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CHAPTER

LAW OF CONTRACTS

1.1 NATURE OF CONTRACT

[Sections 1–2]

◆ INTRODUCTION

We enter into contracts day after day. Taking a seat in a bus amounts to entering into a contract. When you put a coin in the slot of a weighing machine, you have entered into a contract. You go to a restaurant and take snacks, you have entered into a contract. In such cases, we do not even realise that we are making a contract. In the case of people engaged in trade, commerce and industry, they carry on business by entering into contracts. The law relating to contracts is to be found in the Indian Contract Act, 1872.

The law of contracts differs from other branches of law in a very important respect. It does not lay down so many precise rights and duties which the law will protect and enforce; it contains rather a number of limiting principles, subject to which the parties may create rights and duties for themselves, and the law will uphold those rights and duties. Thus, we can say that the parties to a contract, in a sense make the law for themselves. So long as they do not transgress some legal prohibition, they can frame any rules they like in regard to the subject matter of their contract and the law will give effect to their contract.

◆ WHAT IS A CONTRACT?

Section 2(h) of the Indian Contract Act, 1872 defines a contract as an agreement enforceable by law. Section 2(e) defines agreement as "every promise and every set of promises forming consideration for each other." Section 2(b) defines promise in these words: "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise."

From the above definition of promise, it is obvious that an agreement is an accepted proposal. The two elements of an agreement are:

(*i*) offer or a proposal; and

(*ii*) an acceptance of that offer or proposal.

What agreements are contracts? All agreements are not studied under the Indian Contract Act, as some of them are not contracts. Only those agreements which are enforceable at law are contracts. The Contract Act is the law of those agreements which create obligations, and in case of a breach of a promise by one party to the agreement, the other has a legal remedy. Thus, a contract consists of two elements:

(*i*) an agreement; and

(*ii*) legal obligation, i.e., it should be enforceable at law.

However, there are some agreements which are not enforceable in a law court. Such agreements do not give rise to contractual obligations and are not contracts.

Examples

(1) **A** invites **B** for dinner in a restaurant. **B** accepts the invitation. On the appointed day, **B** goes to the restaurant. To his utter surprise **A** is not there. Or **A** is there

but refuses to entertain **B**. **B** has no remedy against **A**. In case **A** is present in the restaurant but **B** fails to turn-up, then **A** has no remedy against **B**.

(2) **A** gives a promise to his son to give him a pocket allowance of Rupees one hundred every month. In case **A** fails or refuses to give his son the promised amount, his son has no remedy against **A**.

In the above examples promises are not enforceable at law as there was no intention to create legal obligations. Such agreements are social agreements which do not give rise to legal consequences. This shows that an agreement is a broader term than a contract. And, therefore, a contract is an agreement but an agreement is not necessarily a contract.

What obligations are contractual in nature? We have seen above that the law of contracts is not the whole law of agreements. Similarly, all legal obligations are not contractual in nature. A legal obligation having its source in an agreement only will give rise to a contract.

Example

A agrees to sell his motor bicycle to **B** for Rs. 5,000. The agreement gives rise to a legal obligation on the part of **A** to deliver the motor bicycle to **B** and on the part of **B** to pay Rs. 5,000 to **A**. The agreement is a contract. If **A** does not deliver the motor bicycle, then **B** can go to a court of law and file a suit against **A** for non-performance of the promise on the part of **A**.

On the other hand, if **A** has already given the delivery of the motor bicycle and **B** refuses to make the payment of price, **A** can go to the court of law and file a suit against **B** for non-performance of promise.

Similarly, agreements to do an unlawful, immoral or illegal act, for example, smuggling or murdering a person, cannot be enforceable at law. Besides, certain agreements have been specifically declared void or unenforceable under the Indian Contract Act. *For instance,* an agreement to bet (Wagering agreement) (S. 30), an agreement in restraint of trade (S. 27), an agreement to do an impossible act (S. 56).

An obligation which does not have its origin in an agreement does not give rise to a contract. Some of such obligations are

1. Torts or civil wrongs;
2. Quasi-contract;
3. Judgements of courts, i.e., Contracts of Records;
4. Relationship between husband and wife, trustee and beneficiary, i.e., status obligations.

These obligations are not contractual in nature, but are enforceable in a court of law. Thus, Salmond has rightly observed: "The law of Contracts is not the whole law of agreements nor is it the whole law of obligations. It is the law of those agreements which create obligations, and those obligations which have, their source in agreements."

Law of Contracts creates rights in *personam* as distinguished from rights in *rem*. Rights in *rem* are generally in regard to some property as for instance to recover land in an action of ejectment. Such rights are available against the whole world. Rights in *personam* are against or in respect of a specific person and not against the world at large.

Examples

(1) **A** owns a plot of land. He has a right to have quiet possession and enjoyment of the same. In other words every member of the public is under obligation not to

disturb his quiet possession and enjoyment. This right of **A** against the whole world is known as right in *rem*.

(2) **A** is indebted to **B** for Rs. 100. It is the right of **B** to recover the amount from **A**. This right of **B** against **A** is known as right in *personam*. It may be noted that no one else (except **B**) has a right to recover the amount from **A**.

The law of contracts is concerned with rights in *personam* only and not with rights in *rem*.

◆ ESSENTIAL ELEMENTS OF A VALID CONTRACT

We have seen above that the two elements of a contract are: (1) an agreement; (2) legal obligation. Section 10 of the Act provides for some more elements which are essential in order to constitute a valid contract. It reads as follows:

"All agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void."

Thus, *the essential elements of a valid contract* can be summed up as follows

1. Agreement.
2. Intention to create legal relationship.
3. Free and genuine consent.
4. Parties competent to contract.
5. Lawful consideration.
6. Lawful object.
7. Agreements not declared void or illegal.
8. Certainty of meaning.
9. Possibility of performance.
10. Necessary Legal Formalities.

These essential elements are explained briefly.

1. Agreement

As already mentioned, to constitute a contract there must be an agreement. An agreement is composed of two elements—offer and acceptance. The party making the offer is known as the offeror, the party to whom the offer is made is known as the offeree. Thus, there are essentially to be two parties to an agreement. They both must be thinking of the same thing in the same sense. In other words, there must be *consensus-ad-idem*.

Thus, where '**A**' who owns 2 cars *x* and *y* wishes to sell car '*x*' for Rs. 30,000. '**B**', an acquaintance of '**A**' does not know that '**A**' owns car '*x*' also. He thinks that '**A**' owns only car '*y*' and is *offering* to *sell the same for the stated price. He gives his acceptance to buy the same. There is no contract* because the contracting parties have not agreed on the same thing at the same time, '**A**' offering to sell his car '*x*' and '**B**' agreeing to buy car '*y*'. There is no *consensus-ad-idem*.

2. Intention to create legal relationship

As already mentioned there should be an intention on the part of the parties to the

agreement to create a legal relationship. An agreement of a purely social or domestic nature is not a contract.

Example

A husband agreed to pay £30 to his wife every month while he was abroad. As he failed to pay the promised amount, his wife sued him for the recovery of the amount.

Held: She could not recover as it was a social agreement and the parties did not intend to create any legal relations [*Balfour* v. *Balfour* (1919)2 K.B.571].

However, even in the case of agreements of purely social or domestic nature, there may be intention of the parties to create legal obligations. In that case, the social agreement is intended to have legal consequences and, therefore, becomes a contract. Whether or not such an agreement is intended to have legal consequences will be determined with reference to the facts of the case. In commercial and business agreements the law will presume that the parties entering into agreement intend those agreements to have legal consequences. However, this presumption may be negatived by express terms to the contrary. Similarly, in the case of agreements of purely domestic and social nature, the presumption is that they do not give rise to legal consequences. However, this presumption is rebuttable by giving evidence to the contrary, i.e., by showing that the intention of the parties was to create legal obligations.

Examples

(1) There was an agreement between Rose Company and Crompton Company, where of the former were appointed selling agents in North America for the latter. One of the clauses included in the agreement was: "This arrangement is not... a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts".

Held that: This agreement was not a legally binding contract as the parties intended not to have legal consequences *[Rose and Frank Co.* v. *J.R. Crompton and Bros. Ltd.* (1925) A.C. 445].

(2) An agreement contained a clause that it "shall not give rise to any legal relationships, or be legally enforceable, but binding in honour only".

Held: The agreement did not give rise to legal relations and, therefore, was not a contract. [*Jones* v. *Vernon's Pools Ltd.* (1938) 2 All E.R. 626].

(3) An aged couple (**C** and his wife) held out a promise by correspondence to their niece and her husband (Mrs. and Mr. **P**.) that **C** would leave them a portion of his estate in his will, if Mrs. and Mr. **P** would sell their cottage and come to live with the aged couple and to share the household and other expenses. The young couple sold their cottage and started living with the aged couple. But the two couples subsequently quaralled and the aged couple repudiated the agreement by requiring the young couple to stay somewhere else. The young couple filed a suit against the aged couple for the breach of promise.

Held: That there was intention to create legal relations and the young couple could recover damages [*Parker* v. *Clark* (1960) 1 W.L.R. 286].

3. Free and genuine consent

The consent of the parties to the agreement must be free and genuine. The consent of the parties should not be obtained by misrepresentation, fraud, undue influence, coercion or mistake. If the consent is obtained by any of these flaws, then the contract is not valid.

4. Parties competent to contract

The parties to a contract should be competent to enter into a contract. According to Section 11, every person is competent to contract if he (*i*) is of the age of majority, (*ii*) is of sound mind, and (*iii*) is not disqualified from contracting by any law to which he is subject. Thus, there may be a flaw in capacity of parties to the contract. The flaw in capacity may be due to minority, lunacy, idiocy, drunkenness or status. If a party to a contract suffers from any of these flaws, the contract is unenforceable except in certain exceptional circumstances.

5. Lawful consideration

The agreement must be supported by consideration on both sides. Each party to the agreement must give or promise something and receive something or a promise in return. Consideration is the price for which the promise of the other is sought. However, this price need not be in terms of money. In case the promise is not supported by consideration, the promise will be *nudum pactum* (a bare promise) and is not enforceable at law.

Moreover, the consideration must be real and lawful.

6. Lawful object

The object of the agreement must be lawful and not one which the law disapproves.

7. Agreements not declared illegal or void

There are certain agreements which have been expressly declared illegal or void by the law. In such cases, even if the agreement possesses all the elements of a valid agreement, the agreement will not be enforceable at law.

8. Certainty of meaning

The meaning of the agreement must be certain or capable of being made certain otherwise the agreement will not be enforceable at law. *For instance,* **A** agrees to sell 10 metres of cloth. There is nothing whatever to show what type of cloth was intended. The agreement is not enforceable for want of certainty of meaning. If, on the other hand, the special description of the cloth is expressly stated, say Terrycot (80 : 20), the agreement would be enforceable as there is no uncertainly as to its meaning.

However, an agreement to agree is not a concluded contract *[Punit Beriwala* v. *Suva Sanyal* AIR 1998 Cal. 44].

9. Possibility of performance

The terms of the agreement should be capable of performance. An agreement to do an act impossible in itself cannot be enforced. *For instance,* **A** agrees with **B** to discover treasure by magic. The agreement cannot be enforced.

10. Necessary legal formalities

A contract may be oral or in writing. If, however, a particular type of contract is required by law to be in writing, it must comply with the necessary formalities as to writing, registration and attestation, if necessary. If these legal formalities are not carried out, then the contract is not enforceable at law.

1.2 CLASSIFICATION OF CONTRACTS

Contracts may be classified in terms of their (1) validity or enforceability, (2) mode of formation, or (3) performance.

1. Classification according to validity or enforceability

Contracts may be classified according to their validity as (*i*) valid, (*ii*) voidable, (*iii*) void contracts or agreements, (*iv*) illegal, or (*v*) unenforceable.

A contract to constitute a valid contract must have all the essential elements discussed earlier. If one or more of these elements is/are missing, the contract is voidable, void, illegal or unenforceable.

As per Section 2 (*i*) a voidable contract is one which may be repudiated at the will of one of the parties, but until it is so repudiated it remains valid and binding. It is affected by a flaw (e.g., simple misrepresentation, fraud, coercion, undue influence), and the presence of anyone of these defects enables the party aggrieved to take steps to repudiate the contract. It shows that the consent of the party who has the discretion to repudiate it was not free.

Example

> **A**, a man enfeebled by disease or age, is induced by **B**'s influence over him as his medical attendant to agree to pay **B** an unreasonable sum for his professional services. **B** employs undue influence. **A**'s consent is not free; he can take steps to set the contract aside.

An agreement which is not enforceable by either of the parties to it is void [Section 2(*i*)]. Such an agreement is without any legal effect *ab initio* (from the very beginning). Under the law, an agreement with a minor is void (Section 11).*

A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable [Section 2(*i*)].

Examples

(1) **A** and **B** contract to marry each other. Before the lime fixed for the marriage, **A** goes mad. The contract becomes void.

(2) **A** contracts to take indigo for **B** to a foreign port. **A**'s government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

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* Other instances of void agreements are:

(*a*) Agreements entered into through a mutual mistake of fact between the parties (Section 20).
(*b*) Agreements, the object or consideration of which is unlawful (Section 23).
(*c*) Agreements, part of the consideration or object of which is unlawful (Section 21).
(*d*) Agreements made without consideration (Section 25).
(*e*) Agreements in restraint of marriage (Section 26).
(*f*) Agreements in restraint or trade (Section 27).
(*g*) Agreements in restraint of legal proceedings (Section 28).
(*h*) Uncertain agreements (Section 29).
(*i*) Wagering agreements (Section 30).
(*j*) Impossible agreements (Section 56).
(*k*) An agreement to enter into an agreement in the future.

In the above two examples, the contracts were valid at the time of formation. They became void afterwards. In example (1) the contract became void by *subsequent impossibility.* In example (2) the contract became void by *subsequent illegality.**

It is misnomer to use 'a void contract' as originally entered into. In fact, in that case there is no contract at all. It may be called a void agreement. However, a contract originally valid may become void later.

An *illegal agreement is* one the consideration or object of which (1) is forbidden by law; or (2) defeats the provisions of any law; or (3) is fraudulent; or (4) involves or implies injury to the person or property of another; or (5) the court regards it as immoral, or opposed to public policy.

Examples

(1) **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 illegal.

(2) **A** promises to obtain for **B** an employment in the public service, and **B** promises to pay Rs. 1,000 to **A**. The agreement is illegal.

Every agreement of which the object or consideration is unlawful is not only void as between immediate parties but also taints the collateral transactions with illegality. In Bombay, the wagering agreements have been declared unlawful by statute.

Example

A bets with **B** in Bombay and loses; makes a request to **C** for a loan, who pays **B** in settlement of **A**'s losses. C cannot recover from **A** because this is money paid "under" or "in respect of a wagering transaction which is illegal in Bombay.

An *unenforceable contract* is neither void nor voidable, but it cannot be enforced in the court because it *lacks some item of evidence* such as writing, registration or stamping. *For instance,* an agreement which is required to be stamped will be unenforceable if the same is not stamped at all or is under-stamped. In such a case, if the stamp is required merely for revenue purposes, as in the case of a receipt for payment of cash, the required stamp may be affixed on payment of penalty and the defect is then cured and the contract becomes enforceable. If, however, the technical defect cannot be cured the contract remains unenforceable, e.g., in the case of an unstamped bill of exchange or promissory note.

Contracts which must be in writing. The following must be in writing, a requirement laid down by statute in each case:

(*a*) A negotiable instrument, such as a bill of exchange, cheque, promissory note (The Negotiable Instruments Act, 1881).

(*b*) A Memorandum and Articles of Association of a company, an application for shares in a company; an application for transfer of shares in a company (The Companies Act, 1956).

(*c*) A promise to pay a time-barred debt (Section 25 of the Indian Contract Act, 1872).

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* Other examples of contracts becoming void are:

(*a*) A contingent contract to do or not to do anything if an uncertain future event happens becomes void if the event becomes impossible (Section 32).

(*b*) A contract voidable at the option of the promisee, becomes void when the promisee exercises his option by avoiding the contract. (Sections 19; 19A).

(*d*) A lease, gift, sale or mortgage of immovable property (The Transfer of Property Act, 1882).

Some of the contracts and documents evidencing contracts are, in addition to be in writing, required to be registered also. These are:

1. Documents coming within the purview of Section 17 of the Registration Act, 1908.
2. Transfer of immovable property under the Transfer of Property Act, 1882.
3. Contracts without consideration but made on account of natural love and affection between parties standing in a near relation to each other (Section 25, The Indian Contract Act, 1872).
4. Memorandum of Association, and Articles of Association of a Company, Mortgages and Charges (The Companies Act, 1956).

2. Classification according to mode of formation

There are different modes of formation of a contract. The terms of a contract may be stated in words (written or spoken). This is an *express contract.* Also the terms of a contract may be inferred from the conduct of the parties or from the circumstances of the case. This is **an implied contract** (Section 9).

Example

If A enters into a bus for going to his destination and takes a seat, the law will imply a contract from the very nature of the circumstances, and the commuter will be obliged to pay for the journey.

We have seen that the essence of a valid contract is that it is based on agreement of the parties. Sometimes, however, obligations are created by law (regardless of agreement) whereby an obligation is imposed on a party and an action is allowed to be brought by another party. These obligations are known as quasi-contracts. The Indian Contract Act, 1872 (Chapter V Sections 68–72) describes them as "certain relations resembling those created by contract".

Examples

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

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

(3) **A**, a tradesman, leaves goods at **B**'s house by mistake. **B** treats the goods as his own. **B** is bound to pay **A** for them.

In all the above cases, the law implies a contract and a person who has got benefit is under an obligation to reimburse the other.

3. Classification according to performance

Another method of classifying contracts is in terms of the extent to which they have been performed. Accordingly, contracts are: (1) executed, and (2) executory or (1) unilateral, and (2) bilateral.

An *executed contract* is one wholly performed. Nothing remains to be done in terms of the contract.

Example

A contracts to buy a bicycle from **B** for cash. **A** pays cash. **B** delivers the bicycle.

An *executory contract* is one which is wholly unperformed, or in which there remains something further to be done.

Example

On June 1, **A** agrees to buy a bicycle from **B**. The contract is to be performed on June 15.

The executory contract becomes an executed one when completely performed. *For instance*, in the above example, if both **A** and **B** perform their obligations on June 15, the contract becomes executed. However, if in terms of the contract performance of promise by one party is to precede performance by another party then the contract is still executory, though it has been performed by one party.

Example

On June 1, **A** agrees to buy a bicycle from **B**. **B** has to deliver the bicycle on June 15 and **A** has to pay price on July 1. **B** delivers the bicycle on June 15. The contract is executory as something remains to be done in terms of the contract.

A *Unilateral Contract* is one wherein at the time the contract is concluded there is an obligation to perform on the part of one party only.

Example

A makes payment for bus fare for his journey from Bombay to Pune. He has performed his promise. It is now for the transport company to perform the promise.

A *Bilateral Contract is* one wherein there is an obligation on the part of both to do or to refrain from doing a particular thing. In this sense, Bilateral contracts are similar to executory contracts.

An important corollary can be deduced from the distinction between Executed and Executory Contracts and between Unilateral and Bilateral contracts. It is that a contract is a contract from the time it is made and not from the time its performance is due. The performance of the contract can be made at the time when the contract is made or it can be postponed also. See examples above under Executory Contract.

Classification/Types of Contracts

1. **From the point of view of enforceability**
   - (*a*) Valid contracts
   - (*b*) Voidable contracts
   - (*c*) Void contracts or agreements
   - (*d*) Illegal agreements
   - (*e*) Unenforceable Agreements (Certain contracts must be in writing)
2. **According to Mode of Formation**
   - (*a*) Express contract
   - (*b*) Implied contract
   - (*c*) Quasi-contracts
3. **According to Performance**
   - (*a*) Executed
   - (*b*) Executory
   - (*c*) Uni-lateral
   - (*d*) Bi-lateral

Classification of Contracts in the English Law

In English Law, contracts are classified into (*a*) Formal Contracts and (*b*) Simple Contracts.

Formal contracts are those whose validity or legal force is based upon form alone. Formal Contracts can be either (*a*) contracts of record or (*b*) contracts under seal or by (deed or speciality contracts. No consideration is necessary in the case of Formal Contracts. Such contracts do not find any place under Indian Law as consideration is necessary under Section 25 (of course there are some exceptions to the principle that a contract without consideration is void).

Contracts of Record are not contracts in the real sense as the *consensus-ad-idem is* lacking. They are only obligations imposed by the court upon a party to do or refrain from doing something.

A Contract of Record is either (*i*) a judgement of a court or (*ii*) recognizance. An obligation imposed by the judgement of a court and entered upon its records is often called a Contract of Record.

Example

> **A** is indebted to **B** for Rs. 500 under a contract, **A** fails to pay. **B** sues **A** and gets a judgement in his favour. The previous right of **B** to obtain Rs. 500 from **A** is replaced by the judgement in his favour and execution may be levied upon **A** to enforce payment, if need be.

A **Recognizance** is a written acknowledgement to the crown by a criminal that on default by him to appear in the court or to keep peace or to be of good conduct, he is bound to pay to the crown a certain sum of money. This is also an obligation imposed upon him by the court.

A contract with the following characteristics is known as a *contract under seal or by deed or a contract of speciality; (i) It is in writing, (ii) It is signed, (iii) It is sealed, and (iv) It is delivered by the parties to the contract.*

These contracts are used in English Law for various transactions such as conveyances of land, a lease of property for more than three years, contracts made by corporations, contracts made without consideration. Under the Indian Contract Act also, a speciality contract is recognised if the following conditions are satisfied: (1) the contract must be in writing (2) it must be registered according to the law of registration of documents, (3) it must be between parties standing in near relation to each other, and (4) it should proceed out of natural love and affection between the parties (Section 25 of the Indian Contract Act, 1872).

All contracts other than the formal contracts are called simple or parol contracts. They may be made: (*i*) orally, (*ii*) in writing, or (*iii*) implied by conduct.

1.3 OFFER AND ACCEPTANCE

[Sections 3–9 of the Indian Contract Act, 1872]

◆ OFFER/PROPOSAL

A proposal is defined as "when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or

abstinence, he is said to make a proposal." [Section 2 (a)]. An offer is synonymous with proposal. The offeror or proposer expresses his willingness "to do" or "not to do" (i.e., abstain from doing) something with a view to obtain acceptance of the other party to such act or abstinence. Thus, there may be "positive" or "negative" acts which the proposer is willing to do.

Examples

(1) **A** offers to sell his book to **B**. **A** is making an offer to do something, i.e., to sell his book. It is a positive act on the part of the proposer.

(2) **A** offers not to file a suit against **B**, if the latter pays **A** the amount of Rs. 200 outstanding. Here the act of **A** is a negative one, i.e., he is offering to abstain from filing a suit.

◆ HOW AN OFFER IS MADE?

An offer can be made by (*a*) any act or (*b*) omission of the party proposing by which he intends to communicate such proposal or which has the effect of communicating it to the other (Section 3). An offer can be made *by an act* in the following ways:

(*a*) *by words* (whether written or oral). The written offer can be made by letters, telegrams, telex messages, advertisements, etc. The oral offer can be made either in person or over telephone.

(*b*) *by conduct*. The offer may be made by positive acts or signs so that the person acting or making signs means to say or convey. However silence of a party can in no case amount to offer by conduct.

An offer can also be made by a party *by omission* (to do something). This includes such conduct or forbearance on one's part that the other person takes it as his willingness or assent.

An offer implied from the conduct of the parties or from the circumstances of the case is known as **implied offer.**

Examples

(1) **A** proposes, by letter, to sell a house to **B** at a certain price. This is an offer by an act by written words (i.e., letter). This is also an express offer.

(2) **A** proposes, over telephone, to sell a house to **B** at a certain price. This is an offer by act (by oral words). This is an express offer.

(3) **A** owns a motor boat for taking people from Bombay to Goa. The boat is in the waters at the Gateway of India. This is an offer by conduct to take passengers from Bombay to Goa. He need not speak or call the passengers. The very fact that his motor boat is in the waters near Gateway of India signifies his willingness to do an act with a view to obtaining the assent of the other. This is an example of an implied offer.

(4) **A** offers not to file a suit against **B**, if the latter pays **A** the amount of Rs. 200 outstanding. This is an offer by abstinence or omission to do something.

Specific and General Offer

An offer can be made either:

1. to a definite person or a group of persons, or
2. to the public at large.

The first mode of making offer is known as specific offer and the second is known as a general offer. In case of the specific offer, it may be accepted by that person or group of persons to whom the same has been made. The general offer may be accepted by any one by complying with the terms of the offer.

The celebrated case of Carlill v. *Carbolic Smoke Ball Co.,* (1813) 1 Q.B. 256 is an excellent example of a general offer and is explained below.

Examples

(1) **A** offers to sell his house to **B** at a certain price. The offer has been made to a definite person, i.e., **B**. It is only **B** who can accept it [*Boulton* v. *Jones* (1857) 2H. and N. 564].*

(2) *In Carbolic Smoke Ball Co.'s case (supra),* the patent-medicine company advertised that it would give a reward of £100 to anyone who contracted influenza after using the smoke balls of the company for a certain period according to the printed directions. Mrs. Carlill purchased the advertised smoke ball and contracted influenza in spite of using the smoke ball according to the printed instructions. She claimed the reward of £100. The claim was resisted by the company on the ground that offer was not made to her and that in any case she had not communicated her acceptance of the offer. She filed a suit for the recovery of the reward.

Held: She could recover the reward as she had accepted the offer by complying with the terms of the offer.

The general offer creates for the offeror liability in favour of any person who happens to fulfil the conditions of the offer. It is not at all necessary for the offeree to be known to the offeror at the time when the offer is made. He may be a stranger, but by complying with the conditions of the offer, he is deemed to have accepted the offer.

Essential requirements of a valid offer

An offer must have certain essentials in order to constitute it a valid offer. These are:

1. The offer must be made with a view to obtain acceptance [Section 2(a)].
2. The offer must be made with the intention of creating legal relations. *[Balfour* v. *Balfour* (1919) 2 K.B. 571.]**
3. The terms of offer must be definite, unambiguous and certain or capable of being made certain (Section 29). The terms of the offer must not be loose, vague or ambiguous.

Examples

(1) **A** offers to sell to **B** "a hundred 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.

(2) **A** who is a dealer in coconut oil only, offers to sell to **B** "one hundred quintals of oil". The nature of **A**'s trade affords an indication of the meaning of the words, and there is a valid offer.

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* For facts or this case, please refer to page 21.

** See page 5.

4. An offer must be distinguished from (*a*) a mere declaration of intention or (*b*) an invitation to offer or to treat.

Offer vis-a-vis declaration of intention to offer

A person may make a statement without any intention of creating a binding obligation. It may amount to a mere declaration of intention and not to a proposal.

Examples

(1) An auctioneer, **N** advertised that a sale of office furniture would take place at a particular place. **H** travelled down about 100 Km to attend the sale but found the furniture was withdrawn from the sale. **H** sued the auctioneer for his loss of time and expenses.

Held: **N** was not liable [*Harris* v. *Lickerson*. (1875) L.R.S. Q.B. 286.].

(2) A father wrote to his would-be son-in-law that his daughter would have a share of what he would leave at the time of his death. At the time of death, the son-in-law staked his claim in the property left by the deceased.

Held: The son-in-law's claim must fail as there was no offer from his father-in-law creating a binding obligation. It was just a declaration of intention and nothing more [*Re Ficus* (1900) 1. Ch. 331.].

Offer vis-a-vis invitation to offer

An offer must be distinguished from invitation to offer. A prospectus issued by a college for admission to various courses is not an offer. It is only an invitation to offer. A prospective student by filling up an application form attached to the prospectus is making the offer.

An auctioneer, at the time of auction, invites offers from the would-be-bidders. He is not making a proposal.

A display of goods with a price on them in a shop window is construed an invitation to offer and not an offer to sell.

Example

In a departmental store, there is a self-service. The customers picking up articles and take them to the cashier's desk to pay. The customers action in picking up particular goods is an offer to buy. As soon as the cashier accepts the payment a contract is entered into [*Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd. (*1953) 1 Q.B. 401].

Likewise, prospectus issued by a company for subscription of its shares by the members of the public, the price lists, catalogues and quotations are mere invitations to offer.

On the basis of the above, we may say that an offer is the final expression of willingness by the offeror to be bound by his offer should the other party choose 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, he only invites the other party to make an offer on those terms. This is perhaps the basic distinction between an offer and an invitation to offer.

In *Harvey* v. *Facie,* the plaintiffs (Harvey) telegraphed to the defendants (Facie), writing: "Will you sell us Bumper Hall Pen?* Telegraph lowest cash price." The defendants replied also

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* Bumper Hall Pen' was the name of the real estate.

by a telegram, "Lowest price for Bumper Hall Pen £900". The plaintiffs immediately sent their last telegram stating: "We agree to buy Bumper Hall Pen for £900 asked by you". The defendants refused to sell the plot of land (Bumper Hall Pen) at that price. The plaintiffs contention that by quoting their minimum price in response to the inquiry, the defendants had made an offer to sell at that price, was turned down by the Judicial Committee. Their Lordship pointed out that in their first telegram, the plaintiffs had asked two questions, *first* as to the willingness to sell and *second*, as to the lowest price. They reserved their answer as to the willingness to sell. Thus, they had made no offer. The last telegram of the plaintiffs was an offer to buy, but that was never accepted by the defendants.

5. The **offer must be communicated** to the offeree. An offer must be communicated to the offeree before it can be accepted. This is true of specific as well as general offer.

Example

G sent **S**, his servant, to trace his missing nephew. Subsequently, **G** announced a reward for information relating to the boy. **S**, traced the boy in ignorance of the announcement regarding reward and informed **G**. Later, when **S** came to know of the reward, he claimed it. Held, he was not entitled to the reward on the ground that he could not accept the offer unless he had knowledge of it [*Lalman Shukla* v. *Gauri Dutt*, II, A.L.J. 489].

6. The offer must not contain a term the non-compliance of which may be assumed to amount to acceptance. Thus, the offeror cannot say that if the offeree does not accept the offer within two days, the offer would be deemed to have been accepted.

Example

A tells **B** 'I offer to sell my dog to you for Rs. 45. If you do not send in your reply, I shall assume that you have accepted my offer'. The offer is not a valid one.

7. A **tender** is an offer as it is in response to an invitation to offer. Tenders commonly arise where, for example, a hospital invites offers to supply eatables or medicines. The persons filling up the tenders are giving offers. However, a tender may be either:
   (*a*) specific or definite; where the offer is to supply a definite quantity of goods, or
   (*b*) standing; where the offer is to supply goods periodically or in accordance with the requirements of the offeree.

In the case of a definite tender, the suppliers submit their offers for the supply of specified goods and services. The offeree may accept any tender (generally the lowest one). This will result in a contract.

Example

A invites tenders for the supply of 10 quintals of sugar. **B, C,** and **D** submit their tenders. **B**'s tender is accepted. The contract is formed immediately the tender is accepted.

In the case of standing offers, the offeror gives an open offer whereby he offers to supply goods or services as required by the offeree. A separate acceptance is made each time an order is placed. Thus, there are as many contracts as are the acts of acceptance.

Example

The G.N. Railway Co. invited tenders for the supply of stores. **W** made a tender and the terms of the tender were as follows: "To supply the company for 12 months with such quantities of specified articles as the company may order from time to time. The

company accepted the tender and placed the orders. **W** executed the orders as placed from time to time but later refused to execute a particular order.

Held: **W** was bound to supply goods within the terms of the tender [Great *Northern Railway* v. *Witham* (1873) L.R. 9 C.P. 16].

The Supreme Court of India in this regard has observed: As soon as an order was placed a contract arose and until then there was no contract. Also each separate order and acceptance constituted a different and distinct contract *[Chatturbhuj Vithaldas* v. *Moreshover Parashram* AIR 1954 SC 326].

It is to be noted that if the offeree gives no order or fails to order the full quantity of goods set out in a tender there is no breach of contract.

Revocation or Withdrawal of a tender. A tenderer can withdraw his tender before its final acceptance by a work or supply order. This right of withdrawal shall not be affected even if there is a clause in the tender restricting his right to withdraw. A tender will, however, be irrevocable where the tenderer has, on some consideration, promised not to withdraw it or where there is a statutory prohibition against withdrawal [*The Secretary of State for India* v. *Bhaskar Krishnaji Samani* AIR 1925 Bom 485].

Special terms in a contract. The *special terms,* forming part of the offer, must be duly brought to the notice of the offeree at the time the offer is made. If it is not done, then there is no valid offer and if offer is accepted, and the contract is formed, the offeree is not bound by the special terms which were not brought to his notice. The terms may be brought to his notice either:

(*a*) by drawing his attention to them specifically, or

(*b*) by inferring that a man of ordinary prudence could find them by exercising ordinary intelligence.

(*a*) the examples of the first case are where certain conditions are written on the back of a ticket for a journey or deposit of luggage in a cloak room and the words. "For conditions see back" are printed on the face of it. In such a case, the person buying the ticket is bound by whatever conditions are written on the back of the ticket *whether he has read them or not.*

Examples

(1) **P**, a passenger deposited a bag in the cloakroom at a Railway Station. The acknowledgement receipt given to him bore, on the face of it, the words "See back". One of the conditions printed on the back limited the liability of the Railways for any package to £10. The bag was lost, and **P** claimed £24. 10s, its value, pleading that he had not read the conditions on the back of the receipt.

Held : **P** was bound by the conditions printed on the back as the company gave reasonable notice on the face of the receipt as to the conditions at the back of the document [*Parker* v. *South Eastern Rly. Co.* (1877) 2 C.P.D. 416].

(2) A lady, **L**, the owner of a cafe, agreed to purchase a machine and signed the agreement without reading its terms. There was an exemption clause excluding liability of the seller under certain circumstances. The machine proved faulty and she purported to terminate the contract.

Held : That she could not do so, as the exemption clause protected the seller from the liability [*L'Estrange* v. *Grancob Ltd.* (1934) 2 R.B. 394].

(3) **T** purchased a railway ticket, on the face of which the words: "For conditions see back" were written. One of the conditions excluded liability for injury, however caused. **T** was illiterate and could not read. She was injured and sued for damages.

Held : That the railway company had properly communicated the conditions to her who had constructive notice of the conditions whether she read them or not. The company was not bound to pay any damages [*Thompson* v. *LM. and L. Rly.* (1930) 1 KB. 417].

(*b*) The same rule holds good even where the conditions forming part of the offer are printed in a language not understood by the acceptor provided his attention has been drawn to them in a reasonable manner. In such a situation, it is his duty to ask for the translation, of the conditions and if he does not do so, *he will be presumed to have a constructive notice of the terms of the conditions* [*Mackillingan* v. *Campagine de Massangeres Maritimes* (1897) 6 Cal. 227 **J**].

If conditions limiting or defining the rights of the acceptor are not brought to his notice, then they will not become part of the offer and he is not bound by them.

Example

A passenger was travelling with luggage from Dublin to Whitehaven on a ticket, on the back of which there was a term which exempted the shipping company from liability for the loss of luggage. He never looked at the back of the ticket and there was nothing on the face of it to draw his attention to the terms on its back. He lost his luggage and sued for damages.

Held : He was entitled to damages as he was not bound by something which was not communicated to him [*Henderson* v. *Stevenson* (1875) 2 H.L.S.C. 470].

Also, if the conditions are contained in a document which is delivered after the contract is complete, then the offeree is not bound by them. Such a document is considered a non-contractual document as it is not supposed to contain the conditions of the contract. *For instance,* if a tourist driving into Mussoorie, receives a ticket upon paying toll-tax, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other toll-tax barrier, and might put in his pocket without reading the same. The ticket is just a receipt or a voucher.

Example

C hired a chair from the Municipal Council in order to sit on the beach. He paid the rent and received a ticket from an attendant. On the back of the ticket, there was a clause exempting the Council "for any accident or damage arising from hire of chairs." **C** sustained personal injuries as the chair broke down while he was sitting therein. He sued for damages.

Held : That the Council was liable [*Chapleton* v. *Barry* U.D.C. (1940) 1 K.B. 532].

From the illustrations given it may be concluded that whether the offeree will be bound by the special conditions or not will depend on whether or not he had or could have had notice by exercising ordinary diligence.

Detailed observations with respect to printed conditions on a receipt were made by the Bombay High Court in *R.S. Deboo* v. *M. V. Hindlekar,* AIR 1995 Bom. 68. These observations are:

1. Terms and conditions printed on the reverse of a receipt issued by the owner of the laundry or any other bailee do not necessarily form part of the contract of

bailment in the absence of the signature of the bailor (customer) on the document relied upon. The onus is on the bailee to prove that the attention of the bailor was drawn to the special conditions before contract was concluded and the bailor had consented to them as contractual terms.

2. It cannot be just assumed that the printed conditions appearing on the reverse of the receipt automatically become contractual terms or part of the contract of bailment.
3. In certain situations, the receipt cannot be considered as a contractual document as such, it is a mere acknowledgement of entrustment of certain articles.

Cross Offers

Where two parties make identical offers to each other, in ignorance of each other's offer, the offers are known as cross-offers and neither of the two can be called an acceptance of the other and, therefore, there is no contract.

Example

H wrote to **T** offering to sell him 800 tons of iron at 69s. per ton. On the same day **T** wrote to **H** offering to buy 800 tons at 69s. Their letters crossed in the post. **T** contended that there was a good contract.

Held: that there was no contract. [*Tinn* v. *Hoffman & Co.* (1873) 29 L.T. Exa. 271.].

Termination or Lapse of an Offer

An offer is made with a view to obtain assent thereto. As soon as the offer is accepted it becomes a contract. But before it is accepted, it may lapse, or may be revoked. Also, the offeree may reject the offer. In these cases, the offer will come to an end.

Essential Requirements of a Valid Offer

1. Must be made with a view to obtain acceptance.
2. Must be made with the intention of creating legal relations.
3. Terms of offer must be definite, unambigous and certain or capable of being made certain.
4. It must be distinguished from mere declaration of intention or an invitation to offer.
5. It must be communicated to the offeree.
6. The offer must not contain a term the non-compliance of which may be assumed to amount to acceptance.
7. A tender is an offer as it is in response to an invitation to offer.
8. The **Special terms**, forming part of the offer, must be duly brought to the notice of the offeree at the time the offer is made.
9. Two identical cross-offers do not make a contract.

(1) **The offer lapses after stipulated or reasonable time.** [Section 6(2)] The offer must be accepted by the offeree within the time mentioned in the offer and if no time is mentioned, then within a reasonable time. The offer lapses after the time

stipulated in the offer expires if by that time offer has not been accepted. If no time is specified, then the offer lapses within a reasonable time. What is a reasonable time is a question of fact and would depend upon the circumstances of each case.

Example

M offered to purchase shares in a company by writing a letter on June 8. The company allotted the shares on 23rd November. **M** refused the shares.

Held : That the offer lapsed as it was not accepted within a reasonable time [*Ramsgate Victoria Hotel Co.* v. *Montefiore* (1860) L.R.I. Ex. 109].

2. **An offer lapses by the death or insanity of the offerer or the offeree before acceptance.** Section 6(4) provides that a proposal is revoked by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance. Therefore, if the acceptance is made in ignorance of the death, or insanity of offerer, there would be a valid contract. Similarly, in the case of the death of offeree before acceptance, the offer is terminated.
3. An offer terminates when rejected by the offeree.
4. An offer terminates when revoked by the offerer before acceptance.
5. An offer terminates by not being accepted in the mode prescribed, or if no mode is prescribed, in some usual and reasonable manner.
6. A conditional offer terminates when the condition is not accepted by the offeree.

Example

A proposes to **B** "I can sell my house to you for Rs. 12,000 provided you lease out your land to me." If **B** refuses to lease out the land, the offer would be terminated.

7. **Counter offer.** An offer terminates by counter-offer by the offeree.

When in place of accepting the terms of an offer as they are, the offeree accepts the same subject to certain condition or qualification, he is said to make a counter-offer. The following have been held to be counter-offers:

(*i*) Where an offer to purchase a house with a condition that possession shall be given on a particular day was accepted varying the date for possession [*Routledge* v. *Grant* (1828) 130 E.R. 920].

(*ii*) An offer to buy a property was accepted upon a condition that the buyer signed an agreement which contained special terms as to payment of deposit, making out title completion date, the agreement having been returned unsigned by the buyer [*Jones* v. *Daniel* (1894) 2 Ch. 332].

(*iii*) An offer to sell rice was accepted with an endorsement on the sold and bought note that yellow and wet grain will not be accepted [*All Shain* v. *Moothia Chetty*, 2 Bom L.R. 556].

(*iv*) Where an acceptance of a proposal for insurance was accepted in all its terms subject to the condition that there shall be no assurance till the first premium was paid [*Sir Mohamed Yusuf* v. *S. of S. for India* 22 Bom. L.R. 872].

Termination of an Offer

1. An offer lapses after stipulated or reasonable time.
2. An offer lapses by the death or insanity of the offerer or the offeree before acceptance.
3. An offer lapses on rejection.
4. An offer terminates when revoked.
5. It terminates by counter-offer.
6. It terminates by not being accepted in the mode prescribed or in usual and reasonable manner.
7. A conditional offer terminates when condition is not accepted.

◆ ACCEPTANCE

The Indian Contract Act, 1872 defines an acceptance as follows:

"When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted" [Section 2 (b)].

Thus, acceptance is the act of giving consent to the proposal. A proposal when accepted becomes a contract.

Acceptance How Made?

As mentioned above, the offeree is deemed to have given his acceptance when he gives his assent to the proposal. The assent may be express or implied. It is express when the acceptance has been signified either in writing, or by word of mouth, or by performance of some required act. The first two kinds of acceptance are self-explanatory. Acceptance by performing the required act is exemplified in the case of *Carlill* v. *Carbolic Smoke Ball Co.**

Examples

(1) A trader receives an order from a customer and executes the order by sending the goods. The customer's order for goods constitutes the offer which was accepted by the trader by sending the goods. It is a case of acceptance by conduct. Here *the trader* is *accepting the offer* by *the performance of the act.*

(2) **A** loses his dog and announces a reward of Rs. 50 to anyone who brings his dog to him. **B** need not convey his acceptance of the general offer. If he finds the dog and gives it to **A**, he is entitled to the reward as he accepted the offer by doing the required act.

Acceptance is implied when it is to be gathered from the surrounding circumstances or the conduct of the parties.

Examples

(1) **A** enters into a bus for going to his destination and takes a seat. From the very nature of the circumstance, the law will imply acceptance on the part of **A**.

(2) *Parker* v. *Clark* (1960) 1 W.L.R. 286.**

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* Explained earlier on page 13.

** Explained earlier on page 5.

(3) **A**'s scooter goes out of order and he was stranded on a lonely road. **B**, who was standing nearby, starts correcting the fault. **A** allows **B** to do the same. From the nature of the circumstances, **A** has given his acceptance to the offer by **B**.

Who can Accept?

In the case of a specific offer, it can be accepted only by that person to whom it is made. The rule of law is that if **A** wants to enter into a contract with **B**, then **C** cannot substitute himself for **B** without **A**'s consent.

Example

Boulton v. *Jones*. The facts of this case were as follows: **B**, who was a manager with **X**, purchased his business. **J**, to whom, **X** owed a debt, placed an order with **X** for the supply of certain goods. **B** supplied the goods even though the order was not addressed to him. **J** refused to pay **B** for the goods because he, by entering into contract with **X**, intended to set-off his debt against **X**.

Held : The offer was made to **X** and it was not in the power of **B** to have accepted the same.

In the case of a general offer, it can be accepted by anyone by complying with the terms of the offer.

Example

Carlill v. *Carbolic Smoke Ball Co.**

◆ ESSENTIALS OF A VALID ACCEPTANCE

There are some legal rules which make the acceptance effective so as to give rise to a valid contract. These are:

(1) Acceptance must be absolute and unqualified (Section 7)

An acceptance to be valid must be absolute and unqualified and according to the exact terms of the offer. An acceptance with a variation, however slight, is no acceptance, and may amount to a mere counter offer which the original offeror may or may not accept.

Examples

(1) A offers to sell his house to **B** for Rs. 1,000. **B** replies, "I can pay Rs. 800 for it." The offer of **A** is rejected by **B** as the acceptance is not unqualified. However, **B** subsequently changes his mind and is prepared to pay Rs. 1,000. This will also be treated as a counter offer and it is up to **A** whether to accept the same or not [*Union of India* v. *Babulal,* A.I.R. 1968 Bombay 294].

(2) **M** offered to sell land to **N** for £280. **N** replied purporting to accept and enclosed £80, promising to pay the balance of £200 by monthly instalments of £50 each. *Held :* That **N** could not enforce acceptance because his acceptance was not an unqualified one [*Neale* v. *Merrett* (1930) W.N. 189].

(3) **A** offers to sell his house to **B** for Rs. 10,000. **B** replies, "I am prepared to buy your house for Rs. 10,000 provided you purchase my 1980 model Ambassador Car for Rs. 60,000." There is no acceptance on the part of **B**.

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* See page 13.

However, a mere variation in the language which does not involve any difference in substance would not make the acceptance ineffective [*Heyworth* v. *Knight* (1864) 144 E.R. 120, 142 R.R. 855].

Also, if some conditions are implied as a part of the contract, and the offeree accepts the offer subject to those conditions, the acceptance will be treated as valid.

Example

A offers to sell his house to **B**, and **B** agrees to purchase it subject to the title being approved by **B**'s solicitor. The acceptance by **B** is absolute and unqualified as it is presumed that **A** has a title to the property and it was not necessary for **A** to mention anything about the title.

Further, an offeree may accept an offer "subject to contract" or "subject to formal contract" or "subject to contract to be approved by solicitors." The significance of these words is that the parties do not intend to be bound, and are not bound, until a formal contract is prepared and signed by them. The acceptor may agree to all the terms of a proposal and yet decline to be bound until a formal agreement is drawn up.

Examples

(1) **C** accepted **E**'s offer to sell nursery for £4,000, subject to a proper contract to be prepared by the vendor's solicitors. **A** contract was prepared by **C**'s solicitors and approved by **E**'s solicitors, but **E** refused to sign it.

Held : That there was no contract as the agreement was only conditional. [*Chillingworth* v. *Esche* (1924) 1 Ch. 97].

(2) **E** bought a house from **B** "subject to a contract." The terms of the formal contract were agreed, and each party signed his part. **E** posted his part but **B** did not post his part as he changed his mind in the meantime.

Held : That there was no binding contract between the parties [*Eccles* v. *Bryant* (1948) Ch. 93].

In the first example, one of the parties did not sign the contract. In the second example, separate parts duly signed by the parties were not exchanged. In both the cases, there was no binding contract.

(2) Acceptance must be communicated to the offeror

The communication of acceptance may be express or implied. A mere mental acceptance is no acceptance. A mere mental acceptance means that the offeree is assenting to an offer in his mind only and has not communicated it to the offeror.

Example

B, a supplier, sent a draft agreement relating to the supply of Coal and Coke to the manager of a railway company for his acceptance. The manager wrote the word "approved" on the same and put the draft in the drawer of his table intending to send it to the company's solicitors for a formal contract to be drawn up. By an oversight, the draft agreement remained in the drawer.

Held : That there was no contract as the manager had not communicated his acceptance to the proposer.

The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer.

Example

F offered by letter to buy his nephew's horse for £30, saying: "If I hear no more about it, I shall consider the horse is mine at £30." The nephew did not reply at all, but he told an auctioneer who was selling his horses not to sell that particular horse as he had sold it to his uncle. By mistake, the auctioneer sold the horse. **F** sued the auctioneer for conversion. Held, **F** could not succeed as his nephew had not communicated acceptance and there was no contract [*Felthouse* v. *Bindley* (1862) 11 C.B. (N.S.) 869].

However if the offeree has by his previous conduct indicated that his silence means that he accepts, then the acceptance of the offer can be implied from the silence of the offeree.

Further, in the case of a general offer, it is not necessary to communicate the acceptance if it is made by acting upon the terms or the offer [*Carlill* v. *Carbolic Smoke Ball Co.**].

(3) Acceptance must be according to the mode prescribed. *(Section 7)*

Where the offerer prescribes a particular mode of acceptance, then the acceptor should follow that mode. In case no mode of acceptance is prescribed by the proposer, then the acceptance must be according to some usual and reasonable mode. If the proposer prescribed a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Examples

(1) **A** sends an offer to **B** through post in the usual course. **B** should make the acceptance in the "usual and reasonable manner" as no mode of acceptance is prescribed. He may accept the offer by sending a letter, through post, in the ordinary course, within a reasonable time.

(2) **A** sends an offer to **B** through post in the usual course and asks for an acceptance by wire. **B** should accept the order by wire. However, if **B** accepts the offer by a letter, then **A** may insist that the acceptance should be in the prescribed mode. But if the proposer does not insist within a reasonable time then the proposer is bound by the acceptance, though not made in the prescribed mode.

(3) The acceptance must be given within the time specified, if any, otherwise it must be given within a reasonable time. What is a reasonable time is a question of fact and would depend upon the circumstances of each case.

Example

Ramsgate Victoria Hotel Co., v. *Montefiore* (1866) L.R.I. Ex. 109**.

(4) The acceptance must be in response to offer. There can be no acceptance without offer. Acceptance cannot precede offer. For instance, no allotment of shares in a company can be made unless the allottee has applied for them beforehand (Section 41 of the Companies Act, 1956).

(5) The acceptance must be made before the offer lapses or is terminated, revoked or withdrawn. If the offer lapses, then there is nothing to accept.

(6) Acceptance can be given by the person to whom the offer is made. However, in the case of a general offer, acceptance can be given by any member of the public.

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* See page 13.

** See page 19.

Agreement to Agree in Future

Law does not allow making of an agreement to agree in the future. The parties must agree on terms of the agreement. The terms of the agreement must be either definite or capable of being made definite without further agreement of the parties.

Examples

(1) **A**, an actress was engaged for a provincial tour. The agreement provided that if the party went to London, **A** would be engaged at a 'salary to be mutually arranged between us'.

Held : That there was no contract as the terms were not definite and were incapable of being made definite without further agreement of the parties. [*Lofus* v. *Roberts*, (1902) 18 T.L.R. 532].

(2) **F** sold part of his land to a motor company subject to a condition that the company should buy all their petrol from **F** 'at a price to be agreed by the parties in writing and from time to time.' The agreement also provided that dispute, if any, was to be submitted to arbitration. The price was never agreed and the company refused to buy the petrol.

Held : That there was a binding contract. The agreement provided the method by which the price could be ascertained. The terms of the agreement were definite and the parties did not agree to settle the terms in future by their mutual consent [*Foley* v. *Classique Coaches Ltd*. (1934) 2 K.B.I].

Essentials of a Valid Acceptance

1. Acceptance must be absolute and unqualified.
2. It must be communicated.
3. It must be according to the mode prescribed.
4. It must be given within the time specified or within reasonable time.
5. It must be in response to offer.
6. It must be made before the offer lapses.
7. It must be given by the person to whom the offer is made.

◆ COMMUNICATION OF OFFER, ACCEPTANCE AND REVOCATION

As mentioned earlier that in order to be a valid offer and acceptance.

(*i*) the offer must be communicated to the offeree, and

(*ii*) the acceptance must be communicated to the offeror.

Similarly, revocation of offer by the offeror to the offeree and revocation of the acceptance by the offeree to the offeror must be communicated.

According to Section 4, *the communication of a proposal is complete* when it comes to the knowledge of the person to whom it is made.

Example

A proposes by letter, to sell a house to **B** at a certain price. The communication of the proposal is complete when **B** receives the letter.

The completion of communication of acceptance has two aspects, viz:

(*i*) as against the proposer, and

(*ii*) as against the acceptor.

The communication of acceptance is complete:

(*i*) *as against the proposer,* when it is put into a course of transmission to him, so as to be out of the power of the acceptor;

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

Example

A proposes, by letter, to sell a house to **B** at a certain price. **B** accepts **A**'s proposal by a letter sent by post. The communication of acceptance is complete:

(*i*) *as against* **A**, when the letter is posted by **B**;

(*ii*) *as against* **B**, when the letter is received by **A**.

The communication of a revocation (of an offer or an acceptance) is complete:

(1) 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.

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

Example

A proposes by letter, to sell a house to **B** at a certain price. **B** accepts the proposal by a letter sent by post.

A revokes his proposal by telegram. The revocation is complete as against **A**, when the telegram is despatched. It is complete as against **B**, when **B** receives it.

B revokes his acceptance by telegram. **B**'s revocation is complete as against **B**, when the telegram is despatched, and as against **A**, when it reaches him.

Revocation of Proposal and Acceptance

Section 5 provides that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

Also an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Example

A proposes, by a letter sent by post, to sell his house to **B**. **B** accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when **B** posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches **A**, but not afterwards.

The *English Law* on communication of proposal, acceptance and revocation through post office differs in some respects from the Indian Law. In England, post office is the agent of the party making the proposal to take the proposal to the offeror and to bring back the acceptance from the offeree. But in India post office is the agent of both offeror and offeree. Therefore, acceptance cannot be revoked in the English Law. In this context Sir William Anson observes

that *"Acceptance to an offer is what a lighted match is to a train of gun-powder. It produces something which cannot be recalled or undone."*

◆ CONTRACTS OVER TELEPHONE OR TELEX

Persons may enter into contracts either: (1) when they are face to face, or (2) over telephone or telex, or (3) through post office. When persons are face to face, one person making the offer and the other accepting it, the contract comes into existence immediately. Similarly, in the case of conversation over telephone, 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.

1.4 CAPACITY OF CONTRACT

[Sections 10–12]

We have mentioned earlier that one of the essentials of a valid agreement is that the parties to the contract must be competent to contract (Section 10).

◆ WHO ARE COMPETENT TO CONTRACT?

Section 11 provides that "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Thus, incapacity to contract may arise from: (*i*) minority, (*ii*) mental incompetence, and (*iii*) status.

◆ MINORITY

According to Section 3 of the Indian Majority Act, 1875, a minor is a person who has not completed 18 years of age. However, in the following two cases, a minor attains majority after 21 years of age:

1. Where a guardian of minor's person or property has been appointed under the Guardians and Wards Act, 1890, or
2. Where the superintendence of minor's property is assumed by a Court of Wards.

◆ MINORS' CONTRACTS

The position of minors' contracts is summed up as follows:

1. *A contract with or by a minor is void and a minor, therefore, cannot, bind himself by a contract.* A minor is not competent to contract. In *English Law,* a minor's contract, subject to certain exceptions, is only voidable at the option of the minor. In 1903 the Privy Council in the leading case of *Mohiri Bibi* v. *Dharmodas Ghose* (190, 30 Ca. 539).

   Held : That in India minor's contracts are absolutely void and not merely voidable. The facts of the case were:

Example

Dharmodas Ghose, a minor, entered into a contract for borrowing a sum of Rs. 20,000 out of which the lender paid the minor a sum of Rs. 8,000. The minor executed

mortgage of property in favour of the lender. Subsequently, the minor sued for setting aside the mortgage. The Privy Council had to ascertain the validity of the mortgage. Under Section 7 of the Transfer of Property Act, every person competent to contract is competent to mortgage. The Privy Council decided that Sections 10 and 11 of the Indian Contract Act make the minor's contract void. The mortgagee prayed for refund of Rs. 8,000 by the minor. The Privy Council further held that as a minor's contract is void, any money advanced to a minor cannot be recovered.

2. *A minor can be a promisee or a beneficiary. During* his minority, a minor cannot bind himself by a contract, but there is nothing in the Contract Act which prevents him from making the other party to the contract to be bound to the minor. Thus, a minor is incapable of making a mortgage, or a promissory note, but he is not incapable of becoming a mortgagee, a payee or endorsee. He can derive benefit under the contract.
3. *A minor's agreement cannot be ratified by the minor on his attaining majority.* A minor cannot ratify the agreement on attaining the age of majority as the original agreement is void ab-initio and, therefore, validity cannot be given to it later on.

Example

A, a minor makes a promissory note in favour of **B**. On attaining majority, he makes out a fresh promissory note in lieu of the old one. Neither the original, nor the fresh promissory note is valid. [*Indran Ramaswamy* v. *Anthiappa Chettiar* (1906) 16 M.L.J. 422.].

4. *If a minor has received any benefit under a void contract, he cannot be asked to refund the same.* We have mentioned the facts *of Mohiri Bibi's* case. Under that case, the lender could not recover the money paid to the minor. Also the property mortgaged by the minor in favour of the lender could not be sold by the latter for the realization of his loan.
5. *A minor is always allowed to plead minority,* and is not estopped to do so even where he had procured a loan or entered into some other contract by falsely representing, that he was of full age. Thus, a minor who has deceived the other party to the agreement by representing himself as of full age is not prevented, from later asserting that he was a minor at the time he entered into agreement.

Example

S, a minor, borrowed £400 from **L**, a moneylender, by fraudulently misrepresenting that he was of full age. On default by S, L sued for return of £400, and damages for the tort of deceit.

Held : **L** could not recover £400, and his claim for damages also failed. The court did not grant the relief; otherwise, it would have been an indirect way of enforcing a void contract. Even on equitable grounds, the minor could not be asked to refund £400, as the money was not traceable and the minor had already spent the same [*Leslie* v. *Shiell* (1914) 3 K.B. 607].

It is to be noted that if money could be traced then the court would have, on equitable grounds, asked the minor for restitution, as minor does not have a liberty to cheat. In the case of a fraudulent misrepresentation of his age by the minor, inducing the other party to enter into a contract the court may award compensation to that other party under sections 30 and 33 of the Specific Relief Act 1963.

Example

A minor fraudulently mortgaged and sold certain properties. On the cancellation of the agreement at the instance of the minor, the lender and purchaser were awarded compensation. The lender and purchaser did not know about the fact that the seller was a minor. In fact, the minor fraudulently represented that he was of full age.

6. *A minor cannot be a partner in a partnership firm*. However, a minor may, with the consent of all the partners for the time being, be admitted to the benefits of partnership (Section 30, the Indian Partnership Act, 1932).
7. *A minor's estate is liable to a person who supplies necessaries of life to a minor*, or to one whom the minor is legally bound to support according to his station in life. This obligation is cast on the minor not on the basis of any contract but on the basis of an obligation resembling a contract (Section 68). However, there is no personal liability on a minor for the necessaries of life supplied.

The term 'necessaries' is not defined in the Indian Contract Act, 1872. The *English Sale of Goods Act* defines necessaries as "goods suitable to the condition in life of the minor and to his actual requirements at the time of sale and delivery" (Section 2). From the above definition, it is obvious that in order to entitle the supplier to be reimbursed from the minor's estate, the following must be satisfied:

(*i*) the goods are 'necessaries', for that particular minor having regard to his station in life' (or status or standard of living) and thus purchase or hire of a car may be a necessity for a particular minor, and

(*ii*) the minor needs the goods both at the time of sale and delivery. What is necessary to see is the minor's 'actual requirements' at the time of sale and at the time of delivery, where these times are different.

Example

I, a minor, was studying in B.Com., in a college. He ordered 11 fancy coats for about £45 with **N**, the tailor. The tailor sued **I** for the price. **I**'s father proved that his son had already a number of coats and had clothes suitable to his condition in life when the clothes made by the tailor were delivered.

Held : The coats supplied by the tailor were not necessaries and, therefore, the action failed [*Nash* v. *Inman* (1908)].

The minor's estate is liable not only for the necessary goods but also for the necessary services rendered to him. The lending of money to a minor for the purpose of defending a suit on behalf of a minor in which his property is in jeopardy, or for defending him in prosecution, or for saving his property from sale in execution of a decree is deemed to be a service rendered to the minor. Other examples of necessary services rendered to a minor are: provision of education, medical and legal advice, provision of a house on rent to a minor for the purpose of living and continuing his studies.

Example

G, a minor and a professional billiards player, agreed with **R**, a leading professional player, to go on a world tour, competing against each other in matches. **G** was to pay a certain sum of money to **R** for this purpose and also for the purpose of learning the game. **R** made all arrangements for the matches and spent money, but **G** refused to go. **R** sued **G** and claimed damages for breach of his contract.

Held : **G** was liable to pay as the agreement was for *the minor's benefit in that* he *would in effect be receiving instruction* [*Roberts* v. *Gray* (1913) 1 K.B. 520].

8. *Minor's parents/guardians are not liable to a minor's creditor for the breach of contract by the minor,* whether the contract is for necessaries or not. However, the parents are liable where the minor is acting as an agent of the parents or the guardian.
9. *A minor can act as an agent* and bind his principal by his acts without incurring any personal liability.

Minor's Position Under English Law

In England, one who has not attained full age is treated as an infant or a minor. Infancy, under the English law, means the period of life which precedes the completion of the twenty-first year, and persons under that age are regarded as infants. Contracts entered into by an infant are classified into the following categories:

(*i*) Void contracts.

(*ii*) Voidable contracts.

(*iii*) Valid contracts.

(*iv*) Contracts enforceable at the option of the infant but not at the option of the other party.

(*i*) *Void Contracts.* Section 1 of the Infants Relief Act, 1874 provides that the following three types of contracts (whether speciality or simple) are void:

(*a*) Any agreement for the repayment of money lent or to be lent,

(*b*) Any contract for goods supplied or to be supplied, other than 'necessaries',

(*c*) All accounts stated.

Example

Leslie v. *Shiell* discussed on page 27.

(*ii*) *Voidable Contracts.* In this category of contracts, the position is that they are binding upon a minor unless he repudiates them before he reaches the age of majority or within a reasonable time thereafter. However, the contract cannot be enforced against him during infancy. Some such types of contracts are:

(*a*) Contracts of a continuing nature.

(*b*) Contracts under which a minor acquires an interest in property of a permanent kind, e.g., (*i*) leases of property, (*ii*) partnership agreement*, and (*iii*) agreements to take shares (which are not fully paid up).

(*iii*) *Valid Contracts.* An infant is bound by such contracts. These are of two types: (*a*) Contracts for 'necessaries' and (*b*) Contracts for the minor's benefit such as for his education, training, etc.

Example

(1) *Nash* v. *Inman (see* page 28). *Roberts* v. *Gray* (see page 28).

(*iv*) *Contracts enforceable at the option of the infant but not at the option of the other party.* All contracts other than (*i*), (*ii*) and (*iii*) discussed above are enforceable at the option of the infant but not as against him, either during or after infancy.

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* See Chapter III.

Position of Minor's Contracts

1. A contract with a minor is void ab-initio.
2. A minor's agreement cannot be ratified by the minor on attaining majority.
3. A minor cannot be asked to refund any benefit received under a void agreement.
4. A minor is not estopped to plead minority even where he falsely represents himself to be of full age.
5. A minor cannot be a partner in a partnership firm. He may, however, be admitted to the benefits of an already existing partnership.
6. A minor can, however, be a promisee or beneficiary.
7. A minor's estate is liable to a person who supplies necessaries of life to a minor.
8. Minor's parents/guardians are not liable to a minor's creditor for the breach of contract by a minor.
9. A minor can act as agent.

◆ MENTAL INCOMPETENCE

We have seen earlier that one of the essential elements of a valid contract is that the parties to the contract must be competent to contract, and a person must be of sound mind so as to be competent to contract (Section 10–11). Section 12 lays down a test of soundness of mind. It reads as follows:

"A person is said to be of unsound mind for the purpose of making a contract, if at the time when he makes it, he is incapable 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."

Examples

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

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

From the above examples given, it is obvious that *Soundness of mind of a person depends* on two facts:

(*i*) his capacity to understand the terms of the contract, and

(*ii*) his ability to form a rational judgement as to its effect upon his interests.

If a person is incapable of both, he suffers from unsoundness of mind. Idiots, lunatics and drunken persons are examples of those having an unsound mind. But whether a party to a contract, at the time of entering into the contract, is of sound mind or not is a question of fact to be decided by the court. There is presumption that a person is sane but this presumption

is rebuttable. The person interested in proving the unsoundness of a person has to satisfy the court.

The liability for necessaries of life supplied to persons of unsound mind is the same as for minors (Section 68).

The position of contracts by persons of unsound mind is given below.

Lunatics

A lunatic is a person who is mentally deranged due to some, mental strain or other personal experience. However, he has some intervals of sound mind. He is not liable for contracts entered into while he is of unsound mind. However, as regards contracts entered into during lucid intervals, he is bound. His position in this regard is identical with minor, i.e., in general the contract is void but the same exceptions as discussed above (under minor's contracts) are relevant.

Idiots

An idiot is a person who is permanently of unsound mind. He does not have lucid intervals. He is incapable of entering into a contract and, therefore, a contract with an idiot is void. However, like a minor, his properties, if any, shall be liable for recoveries on account of necessaries of life supplied. Also he can be a beneficiary.

Drunken or Intoxicated Persons

A person who is drunk, intoxicated or delirious from fever so as to be incapable of understanding the nature and effect of an agreement or to form a rational judgment as to its effect on his interests cannot enter into valid contracts whilst such drunkenness or delirium lasts.

Under the *English Law*, contracts made by persons of unsound mind are voidable and not void.

◆ INCOMPETENCE THROUGH STATUS

Besides minors and persons of unsound mind, there are some other persons who are incompetent to contract, partially or wholly, so that the contracts of such persons are void. Incompetency to contract may arise from political status, corporate status, legal status, etc.

Alien Enemy (Political Status). An alien is a person who is the citizen of a foreign country. Thus, in the Indian context, an alien is a person, who is not a subject of India. An alien may be (*i*) an alien friend, or (*ii*) an alien enemy.

An alien friend (i.e., a foreigner) whose country is at peace with the Republic of India, has usually the full contractual capacity of a natural born Indian subject. But he cannot acquire property in Indian ship, and also cannot be employed as Master or any other Chief Officer of such a ship.

In the case of contracts with an alien enemy (i.e. an alien whose country is at war with India) the position is studied under two heads: (*i*) contracts during the war; and (*ii*) contracts made before the war. During the subsistence of the war, an alien can neither contract with an Indian subject nor can he sue in an Indian court except by licence from the Central Government.

As regards contracts entered into before the war breaks out, they are either dissolved or merely suspended. Those contracts, which are against the public policy or are such which

would benefit the enemy, stand dissolved. Other contracts (i.e., not against the public policy) are merely suspended for the duration of the war and revived after the war is over, provided they have not already become time-barred under the law of limitation.

It may be observed that an Indian, who resides voluntarily, or who is carrying on business, in a hostile territory would be treated as an alien enemy.

Foreign Sovereigns and Ambassadors *(Political status)*

Foreign sovereigns and accredited representatives of a foreign State or Ambassadors enjoy some special privileges. They cannot be sued in our courts unless they choose to submit themselves to the jurisdiction of our courts. They can enter into contracts and enforce those contracts in our courts. However, they cannot be proceeded against in Indian courts without the sanction of the Central Government.

Company under the Companies Act or Statutory Corporation by passing Special Act of Parliament *(Corporate status)*

A company cannot enter into a contract which is *ultra vires* its Memorandum of Association. A statutory corporation cannot go beyond the objects mentioned in the Act, passed by the Parliament. Similarly, Municipal Corporations (Local bodies) are disqualified from entering into contracts which are not within their statutory powers.

Married Women *(Marital status)*

A married woman has full contractual capacity and can sue and be sued in her own name. She is not incompetent to contract.

Insolvent Persons *(Legal status)*

Insolvent persons are incompetent to contract until they obtain a certificate of discharge.

1.5 FREE CONSENT

[Sections 10; 13–22]

Consent Defined (Section 13)

It is essential to the creation of a contract that both parties agree to the same thing in the same sense. When two or more persons agree upon the same thing in the same sense, they are said to consent.

Examples

(1) **A** agrees to sell his Fiat Car 1983 model for Rs. 80,000. **B** agrees to buy the same. There is a valid contract since **A** and **B** have consented to the same subject matter.

(2) **A**, who owns three Fiat Cars, offers to sell one, say, 'car x' to **B** for Rs. 80,000. **B** agrees to buy the car for the price thinking that **A** is selling 'car y'. There is no consent and hence no contract. **A** and **B** have agreed not to the same thing but to different things.

(3) In *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704, the defendant had purported to endorse a bill of exchange which he was told was a guarantee. The Court held that his signature, not being intended as an endorsement of a bill of exchange, there

was no consent and consequently no agreement entered into by him, and therefore he was not liable on the Bill.

Free Consent Defined *(Section 14)*

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

(*a*) Coercion.

(*b*) Undue influence.

(*c*) Fraud.

(*d*) Misrepresentation.

(*e*) Mistake.

For a contract to be valid it is not only necessary that parties consent but also that they consent freely. Where there is a consent, but no free consent, there is generally a contract voidable at the option of the party whose consent was not free.

◆ COERCION *(Sections 15, 19 and 72)*

Coercion is (*i*) the committing, or threatening to commit any act forbidden by the Indian Penal Code or (*ii*) 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.

Examples

(1) A Hindu widow is forced to adopt **X** under threat that her husband's corpse (dead body) would not be allowed to be removed unless she adopts **X**. The adoption is voidable as having been induced by coercion *[Ranganayakamma* v. *Alwar Setti*, 13 Mad. 24.].

(2) A threatens to kill B if he doesn't transfer his house in **A**'s favour for a very low price. The agreement is voidable for being the result of coercion.

(3) An agent refused to hand over the books of accounts of the principal unless he (principal) released him from all liabilities concerning past transactions.

Held : The release so given was not binding, being the outcome of coercion [*Muthia* v. *Karuppan* 50 Mad. 780].

Note that, it is not necessary that coercion must have been exercised against the promisor only, it may be directed at any person.

Examples

(1) **A** threatens to kill **B** (**C**'s son) if **C** does not let out his house to **A**. The agreement is caused by coercion.

(2) **X** threatens to kill **A** if he does not sell his house to **B** at a very low price. The agreement is caused by coercion though **X** is stranger to the transaction.

Further, note that, it is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed *(Explanation to Section* 15).

Example

A, on board an English ship on the high seas, causes **B** to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. **A** afterwards

sues **B** for breach of contract at Calcutta. **A** has employed coercion, although his act is not an offence by the law of England, and although the Indian Penal Code was not in force at the time or place where the act was done.

Threat to Commit Suicide—Is it Coercion?

The doubt arises because suicide though forbidden by the Indian Penal Code is for obvious reasons not punishable. A dead person cannot be punished. But, since Section 15 declares that committing or threatening to commit any act forbidden by the Indian Penal Code is coercion, a threat to commit suicide should obviously be so regarded (suicide being forbidden). The same view was held in *Ammiraju* v. *Seshamma* (1917) 41 Mad. 33. In this case, 'A' 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.

◆ DURESS

The English equal of coercion is Duress. Duress has been defined as causing, or threatening to cause, bodily violence or imprisonment, with a view to obtain the consent of the other party to the contract. Duress differs from coercion on the following points:

1. 'Coercion' can be employed against any person, whereas 'duress' can be employed only against the other party to the contract or the members of his family.
2. 'Coercion' may be employed by any person, and not necessarily by the promisee. 'Duress' can be employed only by the party to the contract or his agent.
3. 'Coercion' is wider in its scope and includes unlawful detention of goods also. 'Duress' on the other hand does not include unlawful detention of goods. Only bodily violence or imprisonment is duress.

◆ CONSEQUENCES OF COERCION *(Section 19)*

When consent to an agreement is caused by coercion, the agreement is a contract voidable at the option of the party whose consent was so obtained. In other words, the aggrieved party can have the contract set aside or if he so desires to insist on its performance by the other party.

Liability of Person to Whom Money is Paid or Thing Delivered Under Coercion (Section 12)

A person to whom money has been paid, or anything delivered under coercion must repay or return it.

Example

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

◆ UNDUE INFLUENCE *(Sections 16 and 19-A)*

Undue influence consists in the improper exercise of a power over the mind of one of the contracting parties by the other. According to Sec. 16, 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 uses that position to obtain an unfair advantage over the other.

Examples

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

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

(3) **A**, a spendthrift and a weak-minded just come of age, conveys a share of his family estate to his father-in-law for nominal consideration. Undue influence is presumed to have been exercised [*Ram Krishan* v. *Parmeshwara* (1931) M.W.N. 215].

Undue Influence When Presumed

After reciting the general principle as above, Section 16 lays down rules of presumptions as regards persons in particular relations. It reads:

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

(*a*) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(*b*) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

Thus, the following relationships are said to raise a presumption of undue influence:

(*i*) Parent and child; (*ii*) guardian and ward; (*iii*) doctor and patient; (*iv*) spiritual guru and disciple; (*v*) lawyer and client; (*vi*) trustee and beneficiary and other similar relationships.

Example

A Hindu, well advanced in age, with the object of securing benefits to his soul in the next world, gave away his whole property to his 'guru', or spiritual adviser. Undue influence was presumed.

The presumption of undue influence can be rebutted by showing that the party said to have been influence had independent legal advice of one who had full knowledge of the relevant facts [*Inche Noria* v. *Shaik Allie Bin Omar* (1929) A.C. 127].

Consequences of Undue Influence *(Section 19-A)*

An agreement caused by undue influence is a contract voidable at the option of the party whose consent was obtained by undue influence. However, any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder upon such terms and conditions as the court deems fit.

Example

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

Burden of Proof *[Section 16 (3)]*

If a party is proved to be in a position to dominate the will of another and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence, lies on the party who was in a position to dominate the will of the other.

The power to dominate the will of another is presumed in circumstances mentioned in Section 16 (2) and discussed above.

The presumption of undue influence *has not been accepted* in the following relationships:

Husband and wife [*Howes* v. *Bishop* (1909) 2 KB 390]; master and servant [*Daulat* v. *Gulabrao* (1925) Nag. 369); creditor and debtor; landlord and tenant; *Lakshmi Chand* v. *Pt. Niader Mal*, AIR (1961) All 295].

In these relationships undue influence cannot be presumed and the party alleging undue influence must prove that it existed.

◆ CONTRACTS WITH A PARDANASHIN WOMAN

Pardanashin woman is one who according to the custom of her community observes complete seclusion. The Courts in India regard such women as being especially open to undue influence. When, therefore, an illiterate pardanashin woman is alleged to have dealt with her properties and to have executed a deed, the burden of proving that there was no undue influence lies on the party setting up the deed. The law demands that the person who deals with a pardanashin lady must show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the lady. *Notice that*, a lady who claims to be pardanashin must prove complete seclusion; some degree of seclusion is not sufficient to entitle her to get special protection.

◆ UNDUE INFLUENCE IN MONEY LENDING TRANSACTIONS

The mere fact of the rate of interest being high is not evidence of undue influence. 'A' who is in urgent need of money borrows from a lender who charges him very high rate of interest. The transaction, on the face of it, is not one induced by undue influence.

Example

> **A** applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. **A** accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence [Illustration (*a*) to section 16].

Thus, a transaction will not be set aside merely because the rate of interest is high. The observation of Judicial Committee in Aziz *Khan* v. *Duli Chand* may be noted here with advantage. The transaction, it observed, may undoubtedly be improvident, but in the absence of any evidence to show that the money-lender had actually taken advantage of his position, it is difficult for a Court of justice to give relief on the grounds of simple hardship.

So, to claim relief under Section 16 it must be proved that the lender was in a position to dominate the will of the other but the urgent need of money on the part of the borrower does not by itself place the lender in a position to dominate his will.

However, if the rate of interest is so high that the Court considers it unconscionable, the

burden of proving that there was no undue influence lies on the creditor. *In other words,* undue influence is presumed in such cases. Illustration (*c*) to Section 16 establishes the point as follows:

Example

> **A**, being in debt to **B**, the money-lender of his village, contracts, for 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.

Similarly, where a debtor was an old and illiterate person and was much involved in litigation and had agreed to pay to the creditor compound interest at 25 per cent, the Court held the transaction as unconscionable and allowed only 12 per cent simple interest [*Ruknisa* v. *Mohib Ali Khan* (1931), I.A. 938]. Still in another case, a poor Hindu widow wanted to bring a suit for maintenance and had to borrow Rs. 1,500. The rate of interest payable was 100 per cent per annum. The Court allowed interest at 24 per cent per annum [*Annapurani* v. *Swaminathan,* 1910, 34 Mad. 7].

◆ FRAUD *(Sections 17 and 18)*

'Fraud' means and includes any of the following acts committed by a party to a contract (or with his connivance or by his agent) with intent to deceive 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. From the analysis of the above, it follows that for fraud to exist there must be:

(A) A representation or assertion, and it must be false. To constitute fraud there must be an assertion of something false within the knowledge of the party asserting it. *Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud.*

Examples

(1) **H** sold to **W** certain pigs. The pigs were suffering from some fever and **H** knew it. The pigs were sold "with all faults." **H** did not disclose the fever to **W**.

Held : *There* was no fraud [*Ward* v. *Hobbs* (1878) A.C. 13].

(2) **A** sells by auction to **B**, a horse which **A** knows to be unsound. **A** says nothing to **B** about the horse's unsoundness. This is not fraud by **A**.

However, (*i*) Silence is fraudulent, if the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak.* The duty to speak exists where the parties stand in a fiduciary relationship, e.g., father and son, guardian and ward, etc.; or where the contract is a contract *uberimae fidei* (requiring utmost good faith), e.g., contracts of insurance. The duty to disclose may also be an obligation imposed by statute.

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* Explanation to Section 17.

Example

A sells by auction to **B**, a horse which **A** knows to be unsound. **B** is **A**'s daughter and has just come of age. Here the relation between the parties would make it **A**'s duty to tell **B** if the horse is unsound.

(*ii*) *Silence is fraudulent* where the circumstances are such that, "silence is in itself equivalent to speech" [Explanation to Section 17].

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.

Thus, we may say that to constitute fraud, ordinarily, there must be active misstatement of fact or such a partial and fragmentary statement of fact as that the witholding of that which is not stated makes that which is stated absolutely false. In *Peek* v. *Gurney (*1873) 6 H.L. 377, the prospectus issued by a company did not refer to the existence of a document disclosing liabilities. The impression thereby created was that the company was a prosperous one, which actually was not the case.

Held : The suppression of truth amounted to fraud.

(B) The representation or assertion must be of a fact. The representation or assertion alleged to be false must be of a fact. A mere expression of opinion, puffery or flourishing description does not constitute fraud.

Example

A, a seller of a horse, says that the horse is a 'Beauty' and is worth Rs. 5,000. It is merely A's opinion. But if in fact **A** paid only Rs. 2,000 for it, then he has misstated a fact.

(C) The representation or statement must have been made with a knowledge of its falsity or without belief in its truth or recklessly.

Example

A company issued a prospectus giving false information about the unbounded wealth of Nevada. A share broker who took shares on the faith of such an information wanted to avoid the contract.

Held : He could do so since the false representation in the prospectus amounted to fraud [*Reese River Silver Mining Co.* v. *Smith* (1869) L.R. 4 H.L. 64].

With regard to cases of above kind, there seems to be no difficulty since fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth. However, with regard to reckless misstatement it may appear difficult to say whether it amounts to fraud because the person making such misstatement does not himself definitely know that the statement is false. But, if we carefully look into it, we find that it does amount to fraud because though the person making it is not sure of the truth of the statement, yet he represents to the other party as if he is absolutely certain about its truth. A person shall be liable in fraud where the false statement he has made was (*i*) made knowingly, (*ii*) without belief in its truth, or (*iii*) recklessly, carelessly whether it be true or false. [*Derry* v. *Peek* (1889) 14 A.C. 337]. The facts *of Derry* v. *Peek* were as follows:

The directors of a Tramway Co. issued a prospectus stating that they had the right to run tramcars with steam power instead of with horses as before. In fact, the Act incorporating the company provided that such power might be used with the sanction of the Board of Trade. But, the Board of Trade refused to give permission and the company had to be wound up. **P**, a shareholder sued the directors for damages for fraud. The House of Lords held that the

directors were not liable in fraud because they honestly believed what they said in the prospectus to be true.

(D) The representation must have been made with the intention of inducing the other party to act upon it.

For fraud to exist, the intention of misstating the facts must be to cause the other party to enter into an agreement.

(E) The representation must in fact deceive. It has been said that deceit which does not deceive is not fraud. A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised or to whom such misrepresentation was made does not render a contract voidable.*

Examples

(1) **A** bought a cannon of **B**. **B** knew the cannon had a defect, which rendered it worthless, and so put a metal plug to conceal the defect. **A** accepted the cannon without examining it. The cannon burst, when used.

Held : There was no fraud because **A** would have bought it even if no *deceptive plug had been put.* He was not in fact deceived by it [*Horsefall* v. *Thomas,* (1862) 158 E.R. 813].

(F) The Party subjected to fraud must have suffered some loss. It is a common rule of law that "there is no fraud without damages". As such, fraud without damage does not give rise to an action of deceit.

Requisites of Fraud

1. A representation or assertion, and it must be false.
2. The representation or assertion must be of a fact.
3. The representation or assertion must have been made with a knowledge of its falsity or without belief in its truth or recklessly.
4. The representation must have been made with the intention of inducing the other party to act upon it.
5. The representation must in fact deceive.
6. The party subjected to fraud must have suffered some loss.

Consequences of Fraud *(Section 19)*

The party defrauded has the following remedies:

1. He can avoid the performance of the contract.
2. He can insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.

Example

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

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* Explanation to Section 19.

3. He can sue for damages.

Exceptions, i.e., where the contract is not voidable. In the following cases, the contract is not voidable:

(1) When the party whose consent was caused by misrepresentation or fraud had the means of discovering the truth with ordinary diligence (Exception to Section 19).

(2) Where a party, after becoming aware of the misrepresentation or fraud, takes a benefit under the contract or in some other way affirms it.

◆ MISREPRESENTATION *(Sections 18 and 19)*

Like fraud, misrepresentation is incorrect or false statement but the falsity or inaccuracy is not due to any desire to deceive or defraud the other party. It is innocent. The party making it believes it to be true.

Section 18 of the Contract Act classifies cases of misrepresentation into three groups as follows:

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

Example

X learns from **A** that **Y** would be director of a company to be formed. X tells this to **B** in order to induce him to purchase shares of that company and **B** does so. This is misrepresentation by **X**, though he believed in the truthness of the statement and there was no intent to deceive, as the information was derived not from **Y** but from **A** and was mere hearsay.

(2) Any breach of duty which, without an intent to deceive, gives an advantage to the person committing it (or anyone claiming under him), by misleading another to his prejudice or to the prejudice of anyone claiming under him.

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

Examples

(1) **X** entered into contract with **C** for the sale of hops. **X** told **Y** that no sulphur had been used in their growth. **Y** agreed to buy only if no sulphur had been used for their growth. As a matter of fact, sulphur had been used in 5 out of 300 acres which fact was evidently forgotten by **X** when he represented that no sulphur was used. *Held* : *That* the representation that no sulphur had been used was in the nature of a primary stipulation and in a sense a condition, without which the contract would not have been proceeded with and, therefore, the contract could be avoided, though the representation was not fraudulent [*Bonnerman* v. *White* (1861) 142 E.R. 658.]

(2) **A** chartered a ship from **B** which was described in the 'charter party' and was represented to him as being not more than 2,800 registered tonnage. It turned out that the registered tonnage was 3,045 tons. A refused to accept the ship in fulfilment of the charter party, and it was held that he was entitled to avoid the charter party by reason of the erroneous statement as to tonnage [*Oceanic Steam Navigation Co.* v. *Soonderdas Dhurumsey* (1890) 14 Bom. 241].

Consequences of Misrepresentation (Section 19)

In cases of misrepresentation the party aggrieved or wronged can:

(1) avoid the agreement, or

(2) insist that the contract be performed and that he be put in the position in which he would have been if the representation made had been true.

Example

A informs **B** that his estate is free from encumbrance. B thereupon buys the estate. In fact, the estate is subject to mortgage, though unknown to **A** also. **B** may either avoid the contract or may insist on its being carried out and the mortgage debt redeemed.

Notice that, unlike fraud, misrepresentation by a party does not entitle the other to claim damages. This, however, is subject to certain exceptions, that is, in certain cases (mentioned below), the right to claim damages arises even in case of misrepresentation. These are:

(*a*) **Breach of warranty of authority of an agent.** Where an agent believes that he has the authority to represent his principal while in fact he has no such authority, the agent is liable in damages, even though he is only guilty of innocent misrepresentation. [*Collen* v. *Wright* (1857) E. and B. 647].

(*b*) **Negligent representation** made by one person to another between whom a confidential relationship exists, e.g., solicitor and client.

However, if the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence, he has no remedy.

◆ MISREPRESENTATION AND FRAUD DISTINGUISHED

The following are the points of difference between the two:

1. In case of fraud, the party making a false or untrue representation makes it with the intention to deceive the other party to enter into a contract. Misrepresentation on the other hand, is innocent, i.e., without any intention to deceive or to gain an advantage.
2. Both misrepresentation and fraud make a contract voidable at the option of the party wronged. But in case of fraud, the party defrauded, gets the additional remedy of suing for damages caused by such fraud. In case of misrepresentation, except in certain cases*, the only remedies are rescission and restitution.
3. Although in both the cases, the contract can be avoided; in case of misrepresentation the contract cannot be avoided if the party whose consent was so caused had the means of discovering—the truth with ordinary diligence.

MISTAKE

Mistake may be defined as an erroneous belief concerning something. Mistake is of two kinds:

(1) Mistake of fact, and (2) Mistake of law.

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* These exceptional cases are discussed above under the heading 'consequences of misrepresentation' (see page 40).

◆ MISTAKE OF FACT

A mistake of fact may either be: (*a*) bilateral or (*b*) unilateral.

Bilateral Mistake

When both the parties to the agreement are under a mistake of fact essential to the agreement, the mistake is called a bilateral mistake of fact and the agreement is void.

Examples

(1) **A** agrees to buy from **B** a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(2) **A** agrees to sell to **B** a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

Mistake, so as to render the agreement void, must relate to some essential matter. Some typical cases of mistake invalidating the agreement are given below.

(A) Mistake as to the existence of subject-matter

Examples

(1) **A** being entitled to an estate for the life of **B**, agrees to sell it to **C**. **B** was dead at the time of the agreement but both parties were ignorant of the fact. The agreement is void.

(2) **A** agreed to assign to **B** a policy of assurance upon the life of **X**. **X** had died before the contract was made.

Held : There was no contract [*Scott* v. *Coulson* (1903) 2 Ch. 249].

(3) **A** agrees to buy from **B** a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(4) **A** and **B** entered into a contract for the sale and purchase of Indian corn supposed to be on board a particular ship bound for England. Unknown to both parties the corn was damaged and discharged at an intermediate port, some days prior to the contract.

Held : The contract was void on the ground of mistake [*Courturier* v. *Hastic* (1856) 10 E.R. 1065].

(B) Mistake as to identity of the subject-matter

Where the parties agree upon different things, i.e., one meaning one thing and the other meaning another, the contract is void.

Examples

1. A contract was entered into for the purchase of certain bales of cotton to arrive by a ship called “Peerless” from Bombay. Two ships of the same name (Peerless) were to sail from Bombay. The buyer intended to buy the cargo of one ship but the seller was selling the cargo of the other. The contract was held to be void.
2. **A**, who owns four Fiat cars, offers to sell his ‘car x’ for Rs. 80,000. **B** accepts the offer thinking **A** is selling his ‘car y’. There is a mistake as to the identity of the subject-matter and hence no contract.

(C) Mistake as to title to the subject-matter

Where the parties believe that the seller is the owner of the thing which he purports to sell, but in fact, he has no title to it, the contract is void on the ground of mistake.

Example

A agreed to take a lease of a fishery from **B** though contrary to the belief of both parties at the time **A** was tenant of the fishery and **B** never had any title to it. The contract was void [*Cooper* v. *Phibbs* (1867) 159 E.R. 375].

(D) Mistake as to quantity of subject-matter

Example

P wrote to **H** inquiring the price of rifles and suggested that he might buy as many as 50. On receipt of the information, he telegraphed "Send three rifles." But because of the mistake of the telegraph authorities, the message transmitted was "Send the rifles." **H** despatched 50 rifles.

Held : There was no contract between the parties. However, **P** could be held liable to pay for three rifles on the basis of an implied contract [*Henkel* v. *Pape* (1870) 6 Ex. 7].

(E) Mistake as to price of the subject-matter

Where a contract of lease of a house was agreed to at a lease of £230 but in the written agreement, the figure £130 was inserted by mistake, the contract was held to be void.

However, an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact [Explanation to Section 20].

Example

A buys an article thinking it is worth Rs. 10,000 while it is actually worth Rs. 5,000 only. The agreement cannot be avoided on the ground of mistake.

Unilateral Mistake

In the case of unilateral mistake, i.e., where only one party to a contract is under a mistake, the contract, generally speaking is not invalid. Section 22 reads, "A contact 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."

Exceptions. To the above rule, however, there are the following exceptions:

(A) Where the unilateral mistake is as to the nature of the contract

A contract is void when one of the parties to it does not intend to enter into it, but through the fault of another and without any fault of his own, makes a mistake as to the nature of the contract. Thus, in *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704, an old illiterate man was made to sign a bill of exchange, by means of a false representation that it was a *guarantee.*

Held : The contract was void.

It should be noted that the plea of mistake will be available only when it relates to the nature of the contract, and not to the terms of the contract [*Bay* v. *Polla and Morris* (1930) 1 K.B. 628].

(B) Mistake as to quality of the promise

In *Scriven* v. *Hindley* (1913) 3 K.B. 564, **A** held an auction for the sale of some lots of hemp and some lots of tow. '**B**' thinking that hemp was being sold, bid for a lot of tow for

an amount which was out of proportion to it, and was only a fair price for hemp.

Held : The contract could be avoided.

(C) Mistake as to the identity of the person contracted with

Where **A** intends to contract with **B** but by mistake enters into a contract with **C** believing him to be **B**, the contract is void on the ground of mistake. The following cases are important illustrations of the point:

1. *In Cundy* v. *Lindsay & Co.*, (1878) 3 App. Cas. 459., one Blenkarn, knowing that Blenkiron & Co., were the reputed customers of Lindsay & Co., ordered some goods from Lindsay & Co., by imitating the signature of Blenkiron. These goods were then sold to Cundy, an innocent purchaser. In a suit by Lindsay against Cundy for recovery of goods, it *was held* that as Lindsay never intended to contract with Blenkarn, there was no contract between them and as such even an innocent purchaser of the goods from Blenkarn did not get a good title, and must return them or pay their price.
2. Similarly, in *Lake* v. *Simmons* (1927) A.C. 487, a lady **X** induced **Y** to deliver possession of two pearl necklaces falsely representing that she was the wife of baron **Z** and that she wanted them for showing them to her husband for his approval.

   Held : Y intended to contract only with the wife of the baron, and not with **X** herself. Hence, the contract was void and **X** could not convey any title even to bonafide buyers.
3. *Philips* v. *Brooks* (1919) 2 K.B. 243. The facts of this case should, however, be contrasted with *Lake* v. *Simmons*. In this case a man, **N**, called in person at a jeweller's shop and chose some jewels, which the jeweller was prepared to sell him as a casual customer. He tendered in payment a cheque which he signed in the name **G**, a person with credit. Thereupon **N** was allowed to take away the jewels which **N** pledged with B who took them in good faith.

   Held : The pledgee, B, had a good title since the contract between **N** and the jeweller could not be declared void on the ground of mistake but was only voidable on the ground of fraud. Horridge, J. held that although the jeweller believed the person to whom he was handing the jewels was **G**, he in fact contracted to sell and deliver to the person who came into his shop. The contract, therefore, was not void on the ground of mistake but only voidable on the ground of fraud. The Learned Judge cited with approval an American case of *Edmunds* v. *Merchant Despatch Co.*, 135 Mass. 283 in which Moorton, C.J. said,' 'The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and terms of payment, the person selling and the person buying..... The plaintiff could not have supposed that he was selling to another person: his intention was to sell to the person present and identified by sight and hearing, it does not affect the sale because the buyer assumed a false name and practised any other deceit to induce the vendor to sell."

◆ MISTAKE OF LAW *(Section 21)*

Mistake of law may be (*a*) Mistake of Law of the Land, and (*b*) Mistake of Foreign Law.

Mistake of Law of the Land

In this regard, the rule is "Ignorantia juris non excusat," i.e., ignorance of law is no excuse. Following this principle, Section 21 declares that "A contract is not voidable because it was caused by a mistake as to any law in force in India."

Thus, where, 'A' and 'B' make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

Mistake of Foreign Law

The above maxim that 'ignorance of law is no excuse' applies only to the law of the country and not to foreign law. The mistake of foreign law is to be treated as a mistake of fact. Section 21 reads, "A mistake as to a law not in force in India has the same effect as a mistake of fact."

Consequences of Mistake

Mistake renders a contract void and as such in case of a contract which is yet to be performed the party complaining of the mistake may repudiate it, i.e., need not perform it. If the contract is executed, the party who received any advantage must restore it or make compensation for it, as soon as the contract is discovered to be void.

1.6 CONSIDERATION

[Sections 2(d), 10, 23–25, 148, 185]

◆ DEFINITION

In simplest terms, consideration is what a promisor demands as the price for his promise. Sir Frederick Pollock defines consideration as "an act or forbearance of one party or the promise thereof is the price for which the promise of the other is bought and the promise thus given for value is enforceable."

In *Currie* v. *Misa* (1875) L.R. 10 Ex. 162, consideration was termed as "A valuable consideration in the sense of the 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."

From the foregoing definitions it is clearly brought out that the term 'consideration' is used in the sense of '*quid-pro-quo*' which means 'something in return.' This 'something' may be some benefit, right, interest or profit or it may also be some forbearance, detriment, loss or responsibility upon the other party.

In India, the definition of consideration is contained in Section 2 (*d*) of the Indian Contract Act, 1872. It reads: "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 promises to abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

Examples

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

(2) **A** promises to pay **B** Rs. 1,000 at the end of 6 months, if **C**, who owes that sum to **B**, fails to pay it. **B** promises to grant time to **C**, accordingly. Here the promise of each party is the consideration for the promise of the other party.

(3) **A** promises, for a certain sum paid to him by **B** to make good to **B** the value of his ship if it is wrecked on a certain voyage. Here **A**'s promise is the consideration for **B**'s payment and **B**'s payment is the consideration for **A**'s promise.

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

Importance of Consideration

A promise without consideration is purely gratuitous and, however sacred and binding in honour it may be, cannot create a legal obligation. An analysis of any contract will show that it consists of two clearly separable parts: (*i*) the promise and (*ii*) the consideration for the promise. A person who makes a promise to do or abstain from doing something usually does so as a return or equivalent of some loss, damage, or inconvenience that may have been occasioned to the other party in respect of the promise. The benefit so received and the loss, damage or inconvenience so caused is regarded in law as the consideration for the promise. Thus, generally speaking, a contract cannot be thought of without consideration.* "No consideration, no contract" is the rule of the law. The following two cases prove this point:

1. *Abdul Aziz* v. *Mazum Ali* (1914) 36 All. 268.

In this case a person verbally promised the secretary of the Mosque Committee to subscribe Rs. 500 for rebuilding of a mosque. Later, he declined to pay the said *amount.*
Held : There was no consideration and hence the agreement was void.

2. *Kedarnath* v. *Gori Mohamed* (1886) 14 Cal. 64.

In this case the defendant had agreed to subscribe Rs. 100 towards the construction of a Town Hall at Howrah. The Secretary, on the faith of the promise, called for plans and entrusted the work to contractors and undertook liability to pay them.

Held : The agreement was enforceable being one supported by *consideration in the form of a detriment to the secretary who had undertaken a liability to the contractors on the faith of the promise made by the defendant.*

Moreover, since agreement, by very definition as per section 2 (*e*), is a promise/(s) in exchange for a promise/(s), each promise forming consideration for the other. It will therefore be an inconsistency in itself to think of an agreement and consequently contract without consideration.

Thus, in one sentence we may sum up the importance of consideration:

Except in certain cases, a contract without consideration cannot be thought of and if made, it is devoid of any legal obligation.

Rules as to Consideration

Following are the rules as to consideration:

(1) Consideration must move at the desire of the promisor

Accordingly, an act done at the desire of a third party is not a consideration.

Example

D constructed a market at the instance of the Collector of a District. The occupants of the shops in the said market promised to pay **D** a commission on articles sold through their shops.

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* Exceptions, i.e., cases where an agreement even without consideration is valid are discussed on page 50.

Held : There was no consideration because the money was not spent by the plaintiff at the request of the defendants, but voluntarily for a third person and thus the contract was void [*Durga Prasad* v. *Baldeo* (1881) 3 All. 211].

Notice that although the promisee must give consideration at the desire of the promisor, it is not necessary that the promisor himself should benefit by the consideration. The promise would be valid even if the benefit accrued to a third party.

Example

A owed Rs. 20,000 to **B**. He (**A**) persuaded **C** to sign a promissory note in favour of **B**. **C** promised **B** that he would pay the amount. On the faith of promise by **C, B** credited the amount to **A**'s account.

Held : The discharge of **A**'s account was consideration for **C**'s promise [*National Bank of Upper India* v. *Bansidhar* (1930) 5 Luck I].

(2) Consideration may move from the promisee or any other person

Although it is necessary that consideration must move at the desire of the promisor, it may be supplied either by the promisee or any other person. The case of *Chinnayya* v. *Ramayya,* 4 Mad. 137 is a good illustration on the point.

In that case, **A**, a lady, by a deed of gift transferred certain property to her daughter, with a direction that the daughter should pay an annuity to **A**'s brother, as had been done by **A**. On the same day the daughter executed a writing in favour of the brother, agreeing to pay the annuity. Afterwards, she declined to fulfil her promise saying that no consideration had moved from her uncle (**A**'s brother). The Court, however, held that the words 'the promisee or any other person' in Section 2(*d*) clearly show that the consideration need not necessarily move from the promisee, it may move from any other person. Hence, **A**'s brother was entitled to maintain the suit.

Thus, in India, stranger to the consideration may maintain a suit. In England, however, the position is different. A stranger to the consideration, in England, cannot maintain a suit.

Thus, if **A** pays £100 to **B** and in consideration of that payment **B** promises to deliver a necklace to **C** the promise of **B** to **C**, cannot be enforced.

Stranger to the Contract v. *Stranger to Consideration*. A stranger to the consideration must, however, be distinguished from a stranger to a contract. A stranger to a contract cannot sue in England as well as in India.

Examples

(1) **A** who is indebted to **B** sells his property to **C** and **C** promises to pay off the debt to **B**. In case **C** fails to pay, **B** has no right to sue; **C** being stranger to the contract.

(2) Upon **A**'s marriage his father and father-in-law entered into a contract to contribute a certain sum of money to be given to **A** after his marriage. **A**'s father paid his contribution but his father-in-law failed to *pay.*

Held : **A** could not sue his father-in-law since he (**A**) was a stranger to the contract [*Tweddle* v. *Atkinson* (1861) 1 B. & S. 393].

Exceptions

To the above rule that a stranger to a contract cannot sue, there are the following exceptions:

1. In the case of trusts, the beneficiary may enforce the contract.

Thus, where a contract between **X** and **Y** is intended to secure benefit to **Z** as *cestue que trust*. **Z** may sue in his own right to enforce the trust. In *Khwaja Muhammad* v. *Hussaini Begum* (1910) 32 All 410, **H** sued her father-in-law **K** to recover Rs. 15,000 being the arrears of allowance called Kharchi-i-Pan dan–Betel box expense, i.e., 'Pinmoney' payable to her by **K** under an agreement made between **K** and **H**'s father in consideration of **H**'s marriage to **K**'s son **D**. Both **H** and **D** were minors at the date of marriage. The Privy Council held the promise to be enforceable by **H**. Their Lordship observed that in India where marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common Law doctrine of privity of contract was applied.

2. On the *same* principle, the provision *of marriage expenses of female members of a* joint Hindu family on a partition between male members entitles the female member to sue for such expenses [*Rakhmanbai* v. *Govind* (1904), 6B.L.R.421].
3. In the case of *an acknowledgement of liability* or by past performance thereof; e.g. where **X** receives money from **Y** for paying it to **Z** and **X** admits to **Z** the receipt of that amount then **X** becomes the agent of **Z** and will be liable to pay the amount to him.
4. In the case of *a family settlement the terms of the settlement are reduced into writing,* the members of *the family* who originally had *not* been parties to the settlement, may enforce the agreement [*Shuppu* v. *Subramaniam* 33 Mad. 238].
5. In *the* case *of assignment of a contract* when the benefit under a contract has been assigned, the assignee can enforce the contract [*Kishan Lal Sadhu* v. *Prantila Bala Dasi* (1928,) Cal. 1315].

(3) Consideration need not be adequate

Adequacy of consideration is always the lookout of the promisor. Courts do not see whether every person making the promise has recovered full return for the promise. Thus, if 'A' promises to sell a house worth Rs. 80,000 for Rs. 20,000 only, the inadequacy of the price in itself shall not render the transaction void. But where a party pleads coercion, undue influence or fraud, inadequacy of consideration will also be a piece of evidence to be looked into.

Example

A agrees to sell a horse worth Rs. 1,000 for Rs. 100. **A** denies that his consent to the agreement was freely given. The inadequacy of consideration is a fact which the Court should take into account in considering whether or not **A**'s consent was freely given.

Section 25 (Explanation 2) contains the above provisions. It reads,

"An agreement to which the consent of the party is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court determining the question whether the consent of the promisor was freely given."

(4) Consideration must be real and competent

Consideration must be real. If it is illusory, e.g., if a man promises to discover treasure by magic, the transaction is void.

The consideration must also be competent, that is, it must be something to which law attaches some value. Thus, an agreement to do something which the promisor is already under a duty to do, is void being without competent consideration.

Examples

(1) **A** promises to pay an existing debt punctually if, **B**, the creditor, gives him a discount. The agreement is without consideration and the discount cannot be enforced.

(2) In *Collins* v. *Godfrey* (1831) 100 E.R. 1040, it was held that when a witness who has received summons to appear at a trial, a promise to pay him anything beyond his expenses is void for want of consideration, because the witness was bound to appear and give evidence.

But, a promise made to a stranger to perform an existing contract, is enforceable because the promisor undertakes a new obligation upon himself which can be enforced by the stranger.

(5) Consideration must be legal

Illegal consideration renders a contract void. For details see Part 1.7 'Legality of the object' on page 64.

Rules Regarding Consideration

1. Consideration must move at the desire of the promisor.
2. Consideration may move from the promisee or any other person, i.e., a stranger to consideration may maintain a suit.
3. A stranger to the contract cannot maintain a suit.
4. Consideration need not be adequate.
5. Consideration must he real and competent.
6. Consideration must be legal.

Kinds of Consideration

A consideration may be:

1. **Executed or Present.** Consideration which moves simultaneously with the promise is called present consideration. 'Cash Sales' provide an excellent example of the present consideration.
2. **Executory or Future.** When the consideration is to move at a future date, it is called future or executory consideration. It takes the form of a promise to be performed in the future.

Example

A promises **B** to deliver him 100 bags of wheat at the future date. **B** promises to pay for it on delivery.

3. **Past.** A past consideration is something wholly done, forborne, or suffered before the making of the agreement.

Example

A saves **B**'s life. **B** promises to pay **A** Rs. 1,000 out of gratitude. The consideration for **B**'s promise is a past consideration, something done before making of the promise.

In India, past consideration is a good consideration.

The words "has done or abstained from doing" in Section 2 (*d*) are a recognition of the doctrine of past consideration.

Example

'**A**', a minor was given the benefit of certain services by the plaintiff, who rendered those services, not voluntarily but at *the* desire of '**A**' and these services were continued even after majority at the request of '**A**' who subsequently promised to pay an annuity to the plaintiff, it *was held that* the past consideration *was* a good consideration [*Sindha* v. *Abraham* (1895) 20 Bom. 755].

But under English Law past consideration is no consideration. Thus, if the above promise was made in England, it could not have been enforceable.

Exceptions to the Rule "No Consideration No Contract"

The general rule of law is that an agreement without consideration is void. "A bargain without consideration is a contradiction in terms and cannot exist."* But there are a few exceptional cases where a contract, even though without consideration, is enforceable. They are as follows:

1. An agreement made without consideration is valid if—
   (*a*) it is expressed in writing, and
   (*b*) it is registered (under the law for the time being in force for registration of documents), and
   (*c*) it is made on account of natural love and affection, and
   (*d*) made between parties standing in a near relation to each other.

Examples

(1) An elder brother, on account of natural love and affection, promised to pay the debts of his younger brother. The agreement was put to writing and was registered.

Held : The agreement was valid [*Venkatswamy* v. *Rangaswamy* (1903) 13 M.L.J. 428].

(2) A Mohammedan husband, by a registered agreement promised to pay his earnings to his wife.

Held : The agreement, though without consideration, was valid [*Poonoo Bibi* v. *Fyaz Buksh* (1874) Bom. L.R. 57].

Notice that for an agreement to be valid under this clause, the agreement must be the result of natural love and affection and nearness of relation by itself does not necessarily import natural love and affection.

Example

A Hindu husband by a registered document, after referring to quarrels and disagreements between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence, it was held that the promise was unenforceable [*Raihikhy Dohee* v. *Bhootnath* (1900) 4. C.W.N. 488].

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

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* Lord Loughbotough.

Examples

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

(2) **A** supports **B**'s infant son. **B** promises to pay **A**'s expenses in so doing. This is a valid contract.

(3) A promise to pay, wholly or in part a debt which is barred by the law of limitation can be enforced if (*a*) it is in writing, and (*b*) is signed by the debtor or his authorised agent [Section 25 (3)].

A debt barred by limitation* cannot be recovered. Therefore, a promise to pay such a debt is, strictly speaking, without any consideration. But as noted above, if a written promise is made to repay, it is enforceable.

Example

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

Notice that the above section [Section 25(3)] applies only when the promisor was liable himself for the time-barred debt; the sub-section does not apply to the case of a promise to pay a time-barred debt owing by a third party. [*Pestonji* v. *Meherbai,* 30 Bom. L.R. 1407].

Further, Sub-section (3) of Section 25 would not apply unless the promise is to pay an ascertained sum. A promise to pay what is due after taking accounts is not a promise within the meaning of Section 25(3) [*Chowksi* v. *Chowksi,* 8 Bom. 194].

4. Consideration is not necessary to effect bailment (Section 148).

5. No consideration is required to create an agency (Section 185). Notice, however, that if no consideration has passed to the agent, he is only a gratuitous agent and is not bound to do the work entrusted to him, although if he begins the work, he must do it to the satisfaction of his principal.

6. The rule 'no consideration no contract' does not apply to completed gifts [Explanation 1 to Section 25].

1.7 LEGALITY OF OBJECT

[Sections 23, 24]

An agreement will not be enforceable if its object or the consideration is unlawful. According to Section 23 of the Act, the consideration and the object of an agreement are unlawful in the following cases:

1. If it is forbidden by law

If the object or the consideration of an agreement is the doing of an act forbidden by law, the agreement is void. An act or an undertaking is forbidden by law when it is punishable by the criminal law of the country or when it is prohibited by special legislation derived from the legislature.**

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* Limitation Act.

** Pollock and Mulla: Indian Contract Act, p. 138.

Examples

(1) A loan granted to the guardian of a minor to enable him to celebrate the minor's marriage in contravention of the Child Marriage Restraint Act is illegal and cannot be recovered [*Srinivas* v. *Raja Ram Mohan* (1951) 2 M.L.J. 264].

(2) A partnership entered into for the purpose of doing business in arrack on a licence granted only to one of the partners, is void *ab-initio* whether the partnership was entered into before the licence was granted or afterwards as it involved a transfer of licence, which is forbidden and penalised by the Akbari Act and the rules thereunder [*Velu Payaychi* v. *Siva Sooriam*, A.I.R. (1950) Mad. 987].

(3) **A** promises to drop a prosecution which he has 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 [*Illustration (h) to Section 23*].

2. If it is of such a nature that if permitted, it would defeat the provisions of any law

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

Examples

(1) **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 B 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 [*Illustration (i) to Section 23*].

(2) A let a flat to **B** at a rent of £1200 a year. With a view to reduce the municipal tax **A** made two agreements with **B**. One, by which the rent was stated to be £450 only and the other, by which **B** agreed to pay £750 for services in connection with the flat.

Held : **A** could not recover £750 since the agreement was made to defraud the municipal authority and thus void [*Alexander* v. *Rayson* (1936) 1 K.B. 169].

3. If it is fraudulent

An agreement with a view to defraud other is void.

Examples

(1) **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 is unlawful.

(2) **A**, being an agent for a landed proprietor, agrees, for money, without the knowledge of his principal, to obtain for **B** a lease of land belonging to his principal. The agreement between **A** and **B** is void as it implies a fraud by concealment by **A**, on his principal [*Illustration (g) to Section 23*].

4. If it involves or implies injury to the person or property of another

If the object of an agreement is to injure the person or property of another it is void.

Examples

(1) **A** borrowed Rs. 100 from **B**. He (**A**) executed a bond promising to work for **B**

without pay for 2 years and in case of default agreed to pay interest at a very exhorbitant rate and the principal amount at once.

Held : The contract was void [*Ram Saroop* v. *Bansi* 42 Cal. 742].

(2) An agreement between some persons to purchase shares in a company with a view to induce other persons to believe, contrary to the fact, that there is a *bona fide* market for the shares is void [*Gherulal Parekh* v. *Mahadeo.* A.I.R. (1956) S.E. 781].

5. If the Court Regards it as Immoral or Opposed to Public Policy

An agreement whose object or consideration is immoral or is opposed to the public policy, is void.

Examples

(1) **A** let a cab on hire to **B**, a prostitute, knowing that it would be used for immoral purposes. The agreement is void [*Pearce* v. *Brooks* (1886) L.R. 1 Ex. 213].

(2) **A**, who is **B**'s mukhtar, promises to exercise his influence, as such, with **B** in favour of **C** and **C** promises to pay 1,000 rupees to **A**. The agreement is void, because it is immoral.

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

1.8 AGREEMENTS DECLARED VOID

[Sections 26–30]

The Indian Contract Act, 1872 declares certain agreements to be void. These are explained below.

◆ AGREEMENTS AGAINST PUBLIC POLICY

The term 'public policy' is not capable of being defined with any degree of precision because 'public policy', in its nature, is highly uncertain and fluctuating. It keeps on varying with the habits and fashions of the day, with the growth of commerce and usage of trade*. In simple words, it may be said that an agreement which conflicts with morals of the time and contravenes any established interest of society, it is void as being against public policy. Thus, an agreement which tends to be injurious to the public or against the public good is void as being opposed to public. According to F. Pollock, "Agreements may offend against the public policy, or tend to the prejudice of the state in time of war (trading with the enemies, etc.), by tending to the perversion or abuse of municipal justice, (stifling prosecution, champerty, maintenance) or in private life by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage or their liberty to exercise any lawful trading or calling."

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* In England, Lord Halsbury in Janson v. Drieftein Consolidated Mines Ltd. (1902) A.C. 484 observed "that categories of public policy are closed, and that no court can invent a new head of public policy." Section 23 of the Indian Contract Act, however, leaves it open to court to hold any contract as unlawful on the ground of being opposed to public policy.

Some of the commonly accepted grounds of public policy including those contained in Sections 26 to 28 are dealt with in the following paragraphs.

1. Trading with enemy

All contracts made with an alien (foreigner) enemy are illegal unless made with the permission of the Government. An alien enemy is a person who owes allegiance to a Government at war with India. Such agreements are illegal on the ground of public policy because either the further performance of the contract would involve intercourse with the enemy or its continued existence would confer upon the enemy an immediate or future benefit.

2. Agreements for stifling prosecution

Contract for compounding or suppression of criminal charges, for offences of a public nature are illegal and void. The law is "you cannot make a trade of your felony (crime). You cannot convert crime into a source of profit." The underlying principle is 'if the accused is innocent, the law is abused for the purpose of extortion; if guilty, the law is eluded by a corrupt compromise screening the criminal for a bribe.'

Example

> **A**, knowing that **B** has committed a murder, obtains a promise from **B** to pay him (**A**) Rs. 10,000, in consideration of not exposing **B**, there is a case of stifling prosecution and the agreement is illegal and void.

3. Contracts in the nature champerty and maintenance

'Maintenance' means the promotion of litigation in which a person has no interest of his own. In other words, where a person agrees to maintain a suit, in which* he has no interest, the proceeding is known as 'Maintenance.' Thus, 'maintenance' tends to *encourage speculative litigation*. 'Champerty' is a bargain whereby one party is to assist another in recovering property and, in turn, is to share in the proceeds of the action. Under English Law, both of these agreements are declared illegal and void being opposed to public policy. Indian Law is different. In *Raja Venkata Subhadrayamma Guru* v. *Sree Pusapathi Vekatapathi Raju,* 48 Mad. 230 (P.C.), the Privy Council held that champerty and maintenance are not illegal in India, and that Courts will refuse to enforce such agreements only when they are found to be extortionate and unconscionable and not made with the *bonafide* object of assisting the claims of the person unable to carry on litigation himself. In other words, only those agreements which appear to be made for purposes of gambling in litigation, and for injuring or oppressing others, by encouraging unholy litigation, that will not be enforced, but not all agreements of champerty or maintenance. Thus, an agreement to render services for the conduct of litigation in consideration of payment of 50 per cent of the amount recovered through Court would be legally enforceable. But, where it was found that the value of the part of the estate promised to be conveyed amounted to Rs. 64,000 in return for Rs. 12,000 which was to be spent by the financier on the prosecution of an appeal in the Privy Council, it was held that although the agreement was bond fide, it could not be enforced, the reward being extortionate and unconscionable.

4. Agreements for the sale of public offices and titles

Traffic by way of sale in public offices and appointments obviously tends to the prejudice

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* See *Bhagwut Dayal Singh* v. *Debi Dayal Sahu* (1908) 35 l.A. 48: 35 Col. 4.

of the public service by interfering with the selection of the best qualified persons. Such sales, are, therefore, unlawful and void.

Examples

(1) **A** promises to pay **B** Rs. 5,000 if **B** secures him an employment in the public service. The agreement is void.

(2) Similarly, where **A** promises to pay a sum to **B** in order to induce him to retire so as to provide room for **A**'s appointment to the public office held by **B**, the agreement is void [*Saminathan* v. *Muthusami*, 30 Mad. 530].

(3) The secretary of a college promised Col. Parkinson that if he made a large donation to the college, he would secure a knighthood for him.

Held : The agreement was against public policy and thus void [*Parkinson* v. *College of Ambulance Ltd*. (1925) 2 K.B.1].

5. Agreements in restraint of parental rights

According to law the father is the guardian of his minor child; after the father, the right of guardianship vests in the mother. This right cannot be bartered away by any agreement. [*Re Caroll* (1931) 1 K.B. 307.]. Thus, the authority of a father cannot be alienated irrevocably and any agreement purporting to do so is void.

Example

A father having two minor sons agreed to transfer their guardianship in favour of Mrs. Annie Besant and also agreed not to revoke the transfer. Subsequently, he filed a suit for recovery of the boys and a declaration that he was the rightful guardian, the Court held that he had the right to revoke his authority and get back the children [*Giddu Narayanish* v. *Mrs. Annie Besant*. (1915) 38 Mad. P.C].

6. Agreement in restraint of marriage

According to Section 26 of the Contract Act, "Every agreement in restraint of the marriage of any person, other than a minor, is void."

Example

A promised to marry none else except Miss **B**, and in default pay her a sum of Rs. 1,000. **A** married some one else and **B** sued **A** for recovery of the sum.

Held : The contract was in restraint of marriage, and as such void.

Notice that in India any restraint of marriage whether total (absolute) or partial is opposed to public policy and hence void. In English Law, however, only an absolute restraint is void, e.g., an agreement to marry no one but the promisee.

7. Marriage brokerage or brocage contracts

A marriage brokerage contract is one in which, in consideration of marriage, one or the other of the parties to it, or their parents or third parties receive a certain sum of money. Accordingly, dowry is a marriage brokerage and hence unlawful and void.

Examples

(1) In *Venkatakrishna* v. *Venkatachalam* 32, Mad. 185, a sum of money was agreed to be paid to the father in consideration of his giving his daughter in marriage.

Held : Such a promise amounted to a marriage brokerage contract and was void.

(2) Where a purohit was promised a certain sum of money in consideration of procuring a second wife for the defendant, it was held that the promise was opposed to public policy and thus void [*Vaidyanathan* v. *Gangarazu* (1290) 17 Mad. 9].

In the above cases, if marriage had been performed and the money remains unpaid, it cannot be recovered in a Court of Law. But, if the money had been paid and marriage also performed, the money cannot be got back.

8. Agreements in restraint of legal proceedings

Section 28, as amended by *the Indian Contract (Amendment) Act,* 1996 *w.e.f.* 8.1.1997, provides that every agreement—

(*a*) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(*b*) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

However, an agreement to refer disputes to arbitration is valid.

Similarly, the Supreme Court in M/s. *Angile Insulations* v. M/s. *Davy Ash-more India Ltd.* AIR 1995 SC 1766 has held that an express agreement between parties to vest jurisdiction to refer any dispute to a specified court does not amount to contracting against the statute. Thus, the clause in the agreement, viz., "This work order is issued subject to the jurisdiction of the High Court situated in Bangalore, in the State of Karnataka" was held to be valid. Supreme Court said 'Mercantile Law and Practice' permit such agreements.

9. Contracts interfering with course of Justice

Any agreement for the purpose or to the effect of using improper influence of any kind with judges or officers of justice is void.

10. Contracts tending to create monopolies

Such agreements are void being opposed to public interest.

Example

In *District Board of Jhelum* v. *Harichand* 1934 Lah. 474, a local body granted a monopoly to A to sell vegetables in a particular locality.

Held : The agreement was void.

11. Agreements in restraint of trade

Courts do not allow any tendency to impose restrictions upon the liberty of an individual to carry on any business, profession or trade. **In England,** originally, all agreements in restraint of trade were void. But now, the rule is that though total restraint will be bad, reasonable restraint will be enforceable. In *Nordenfelt* v. *Maxim Nordenfelt, etc., Co.* (1893) A.C. 535, the House of Lords held that "the real test for determining the validity of agreements in restraint of trade was, whether the restraint imposed was reasonable, for good consideration, not prejudicial to the interests of the public, and not more onerous than necessary for the protection of the party imposing the restraint".

In India, the law on the subject is contained in Section 27 which reads: "every agreement by which any one is restrained from exercising a lawful profession, trade or business of any

kind, is to that extent void." Thus, in India, all agreements in restraint of trade, whether general or partial, qualified or unqualified, are void. It is, therefore, not open to the Courts in India to enter into any question of reasonableness or otherwise of the restraint [*Khemchand* v. *Dayaldas,* (1942) Sind, 114].

Examples

(1) 29 out of 30 manufacturers of combs in the city of Patna agreed with **R** to supply him with combs and not to any one else. Under the agreement **R** was free to reject the goods if he found there was no market for them.

Held : The agreement amounted to restraint of trade and was thus void [*Shaikh Kalu* v. *Ramsaran Bhagat* (1909) 13 C.W.N. 388].

(2) **J**, an employee of a company, agreed not to employ himself in a similar concern within a distance of 800 miles from Madras after leaving the company's service.

Held : The agreement was void [*Oakes & Co.* v. *Jackson* (1876) 1 Mad. 134].

(3) **A** and **B** carried on business of braziers in a certain locality in Calcutta. **A** promised to stop business in that locality if **B** paid him Rs. 900 which he had paid to his workmen as advances. **A** stopped his business but **B** did not pay him the promised money.

Held : The agreement was void and, therefore, nothing could be recovered on it [*Madhav* v. *Raj Coomar (*1874) 14 B.L.R. 76].

Exceptions *[or Cases in which restraint of trade is valid in India]*

The following are the exceptions to the above rule that a restraint of trade is void:

1. Sale of goodwill

Exception 1 to Section 27 provides that the seller of the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any one deriving title to the goodwill from him carries on a like business, provided that such limits are reasonable.

Example

S, a seller of imitation jewellery, sells his business to **B** and promises not to carry on business in imitation jewellery and real jewellery.

Held : The restraint with regard to imitation jewellery was valid but not regarding real jewellery [*Goldsoll* v. *Goldmand* (1915)1 Ch.D. 292].

2. Partners' agreement

Partners may agree that:

(*a*) a partner shall not carry on any business other than that of the firm while he is a partner. [*Section* 11(2) *of the Indian Partnership Act,* 1932];

(*b*) a partner on ceasing to be a partner will not carry on any business similar to that of the firm within a specified period or within specified local limits. The agreement shall be valid if the restrictions are reasonable [*Section* 32(2) *of the Indian Partnership Act,* 1932]

(*c*) partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that

of the firm within a specified period or within specified local limits and such agreement shall be valid if the restrictions imposed are reasonable [*Section* 54 *of the Indian Partnership Act,* 1932].

(*d*) a partner may, upon the sale of the goodwill of a firm, make an agreement that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits; and such agreement shall be valid if the restrictions imposed are reasonable [*Section 55 of the Indian Partnership,* 1932].

3. Service agreements

An agreement of service by which a person binds himself during the term of the agreement not to take service with anyone else or directly or indirectly take part in or promote or aid any business in direct competition with that of his employer is valid [*Charles* v. *Macdonald (*1899) 23 Bom. 103].

Example

A agreed to become assistant for 3 years to **B** who was a doctor practising at Zanzibar. It was agreed that during the term of the agreement **A** was not to practise on his own account in Zanzibar. After one year, **A** started his own practice.

Held : The agreement was valid and **A** could be restrained by an injunction from doing so.

These days it is a common practice to appoint management trainees. A lot of time, money and energy is spent in training the selected candidates in the management techniques. So, it will be a waste on the part of such organisations if these persons left for other organisations immediately after training. Therefore, a service bond is normally got signed whereby the trainee agrees to serve the organisation for a stipulated period. Such agreements, if reasonable, do not amount, to restraint of trade and hence are enforceable.

Thus, where an employee undertook to serve his employer for a period of 3 years but leaves the service after one year, he may be asked to abide by the agreement *[Deshpande* v. *Arvind Mills,* AIR 1946 Bom. 423].

But, if a restraint imposed on the employee is to operate after the expiry of the period of his service it shall *prima facie* be void [*Krishna Murgai* v. *Superintendence Co. of India,* AIR, 1979 Delhi 232].* Thus, where A bank appoints an officer subject to the condition that after ceasing to be in service he would not join the service of any other bank in India for a period of 5 years, the bank shall not be in a position to enforce such condition.

◆ WAGERING AGREEMENTS

A wagering agreement, says Sir William Anson, "is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event." Cockburn C.J. defined it as 'A contract by 'A' to pay money to 'B' on the happening of a given event in consideration of 'B"s promise to pay money to 'A' on the event not happening." Thus, a wagering agreement is an agreement under which money or money's worth is payable, by one person to another on the happening or non-happening of a future, uncertain event.

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* Also see *Brahamputra Tea Co.* v. *Scurth* (1855) I.L.R. 11 Col. 545 and *Oakes & co.* v. *Jackson* (1876) I.L.R. 1 Mad 134.

The essence of gaming and, wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature-that is to say, if the event turns out one way A will lose but if it turns out the other way, he will win.

Examples

(1) **A** and **B** bet as to whether it would rain on a particular day or not **A** promising to pay Rs. 100 to **B** if it rained, and **B** promising an equal amount to **A**, if it did not. This agreement is wager.

(2) **A** and **B** agree to deal with the differences in prices of a particular commodity. Such an agreement is a wager.

Effects of Wagering Agreements

An agreement by way of wager is void. Section 30 provides "Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made". Thus, in India all agreements by way of wager are void.

Wagering Agreement Void and not Illegal. In India, unless the wager amounts to a lottery, which is a crime according to Section 294-A of the Indian Penal Code, it is not illegal but simply void. Thus, except in case of lotteries, the collateral transactions remain enforceable.

Example

A borrows Rs. 500 from **B** to pay to **C**, to whom **B** has lost a bet. Contract between **A** and **B** is valid.

Lotteries

'Lottery' is an arrangement for the distribution by chance among persons purchasing tickets. The dominant motive of the participants need not be gambling. Where a wagering transaction amounts to a lottery, it is illegal as per Sec. 294-A of the Indian Penal Code. In *Sir Dorabji Tata* v. *Edward F Lance* (1918) I.L.R. 42 Bom. 676, where the Government of India had sanctioned a lottery, the Court held that the permission granted by the Government will not have the effect of overriding Sec. 30 of the Indian Contract Act and making such a lottery legal. Its only effect was that the persons responsible for running the lottery would not be punishable under the Indian Penal Code.

However, in *H. Anraj* v. *Govt. of Tamil Nadu* AIR 1986 SC 63, the Supreme Court upheld lotteries with the prior permission of the Government as legal, thereby conferring upon the winner of a lottery, a right to receive the prize and the sale of lotteries subject to payment of sales-tax. Supreme Court held that a sale of lottery ticket confers on the purchaser thereof two rights (*a*) a right to participate in the draw and (*b*) a right to claim a prize contingent upon his being successful in the draw.

Exceptions (Transactions Held 'Not Wagers')

The following transactions have been held not to be wagers:

1. Transactions for the sale and purchase of stocks and shares, or for the sale and delivery of goods, with a clear intention to give and take delivery of shares or goods, as the case may be. Notice that, where the intention is only to settle in price difference, the transaction is a wager and hence void.
2. Prize competitions which are games of skill, e.g., picture puzzles, athletic competitions. Thus, an agreement to enter into a wrestling contest in which the

winner was to be rewarded by the entire sale proceeds of tickets. Was held not to be wagering contract [*Babalalteb* v. *Rajaram* (1931) 33 Bom. L.R. 260]. A crossword competition is not a wager since it involves skill. But, in *Coleys* v. *Odham's Press** (1936) 1 K. 416 it was held that a crossword puzzle in which prizes depend upon 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. According to Prize Competition Act, 1955 prize competitions in games of skill are not wagers provided the prize money does not exceed Rs. 1000.

3. An agreement to contribute a plate or prize of the value of above Rs. 500 to be awarded to the winner of a horse race. (Section 30).

4. Contracts of insurance

Contracts of insurance are not wagering agreements even though the payment of money by the insurer may depend upon a future uncertain event. Contracts of insurance differ from the wagering agreements in the following respects:

(*a*) It is only person possessing an insurable interest that is permitted to insure life or property, and not any person, as in the case of a wager.

(*b*) In the case of fire and marine insurance, only the actual loss suffered by the party is paid by the company, and not the full amount for which the property is insured. Even in the case of life insurance, the amount payable is fixed only because of the difficulty in estimating the loss caused by the death of the assured in terms of money, but the underlying idea is only indemnification.

(*c*) Contracts of insurance are regarded as beneficial to the public and are, therefore, encouraged. Wagering agreements, on the other hand, are considered to be against public policy.

1.9 CONTINGENT CONTRACTS

[Sections 31–36]

Contingent Contract Defined *(Section 31)*

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

Example

A contracts to pay **B** Rs. 10,000 if **B**'s house is burnt. This is a contingent contract.

Essentials of a Contingent Contract

1. The performance of a contingent contract is made dependent upon the happening or non-happening of some event.
2. The event on which the performance is made to depend, is an event collateral to the contract, i.e., it does not form part of the reciprocal promises which constitute the contract.

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* Also see *J.N. Gupta* v. *State of West Bengal,* (1959) Cal. 141.

Examples

(1) **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 a part of the promise itself and not a collateral event.

(2) **A** promises to pay **B** Rs. 10,000 if he marries **C**, it is not a contingent contract.

3. The contingent event should not be the mere will of the promisor.

Example

A promises to pay **B** Rs. 1,000, if he so chooses, it is not a contingent contract.*

However, where the event is within the promisor's will but not merely his will, it may be a contingent contract.

Example

A promises to pay **B** Rs. 1,000, if **A** left Delhi for Bombay, it is a contingent contract, because going to Bombay is an event no doubt within **A**'s will, but is not merely his will.

Rules Regarding Enforcement of Contingent Contracts *(Sections 32 to 36)*

The rules regarding contingent contracts are summarised hereunder:

1. Contracts contingent upon the happening of a future uncertain event, cannot be enforced by law unless and until that event has happened. And if, the event becomes impossible such contract become void (Section 32).

Examples

(1) **A** makes a contract with **B** to buy **B**'s horse if **A** survives **C**. This contract cannot be enforced by law unless and until **C** dies in **A**'s life-time.

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

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

2. Contracts contingent upon the non-happening of an uncertain future event can be enforced when the happening of that event becomes impossible, and not before. (Section 33).

Example

A agrees to pay **B** a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

3. If a contract is contingent upon as to how a person will act at an unspecified time, the event shall be considered to 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. (Section 34).

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* In fact, it is not a contract at all.

Example

A agrees to pay **B** a sum of money if **B** marries **C**. **C** marries **D**. The marriage of **B** to **C** must now be considered impossible, although it is possible that **D** may die and **C** may afterwards marry **B**.

4. Contracts contingent upon the happening of a specified uncertain event within a fixed time become void if, at the expiration of the time fixed, such event **has not** happened or if, before the time fixed, such event becomes impossible (Section 35 para 1).

Example

A promises to pay **B** a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

5. Contracts contingent upon the non-happening of a specified event 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 expired, if it becomes certain that such event will not happen (Section 35 para II).

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.

6. 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.

Examples

(1) **A** agrees to pay **B** Rs. 1,000 if two parallel straight lines should enclose a space. The agreement is void.

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

1.10 QUASI CONTRACTS
(Certain Relations resembling those created by contracts)

[Sections 68–72]

'Quasi Contracts' are so called because the obligations associated with such transactions could neither be referred as tortious nor contractual, but are still recognised as enforceable, like contracts, in Courts. According to Dr. Jenks, Quasi-contract is "a situation in which law imposes upon one person, on grounds of natural justice, an obligation similar to that which arises from a true contract, although no contract, express or implied, has in fact been entered into by them."

Example

X Supplies goods to his customer **Y** who receives and consumes them. **Y** is bound to pay the price. **Y**'s acceptance of the goods constitutes an implied promise to pay. This kind

of contract is called a tacit contract. In this very illustration, if the goods are delivered by a servant of **X** to **Z**, mistaking **Z** for **Y**, then **Z** will be bound to pay compensation to **X** for their value. This is 'Quasi-Contract.'

The principle underlying a quasi-contract is that no one shall be allowed unjustly to enrich himself at the expense of another, and the claim based on a quasi-contract is generally for money.

Sections 68 to 72 of the Contract Act describe the cases which are to be deemed Quasi-contracts.

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

If a person, incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who furnished such supplies is entitled to be reimbursed from the property of such incapable person (Sec. 68).

Examples

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

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

The above section covers the case of necessaries supplied to a person incapable of contracting (say, a minor, lunatic, etc.) and to persons whom the incapable person is bound to support (e.g., his wife and minor children). However, following points should be carefully noted:

(*a*) the goods supplied must be necessaries. What will constitute necessaries shall vary from person to person depending upon the social status he enjoys.*

(*b*) it is only the property of the incapable person that shall be liable. He cannot be held liable personally. Thus, where he doesn't own any property, nothing shall be payable.

(2) Reimbursement of person paying money due by another in payment of which he is interested

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

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 such sale will be the annulment of **B**'s lease. **B**, to prevent the sale and the consequent annulment of his own lease, pays the Government, the sum due from **A**. **A** is bound to make good to **B** the amount so paid. In order that the Section may apply, it is necessary to prove that:

(*a*) the person making the payment is interested in the payment of money, i.e., the payment was made *bonafide,* for the protection of his own interest.

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* For details see discussion on 'Minors' under 'Capacity to Contract' [Page 26].

(*b*) the payment should not be a voluntary payment. It should be such that there is some legal or other coercive process compelling the payment.

(*c*) the payment must be to another person.

(*d*) the payment must be one which the other party was bound by law to pay.

(3) Obligation of a person enjoying benefits of non-gratuitous 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 make compensation to the former in respect of, or to restore the thing so done or delivered [Section 70].

Examples

(1) **A**, a tradesman, leaves goods at **B**'s house by mistake. **B** treats the goods his own. He is bound to pay for them.

(2) **A** saves **B**'s property from fire. **A** is not entitled to compensation from **B**, if the circumstances show that he intended to act gratuitously.

In order that Section 70 may apply, the following conditions must be satisfied:

(*a*) the thing must be done lawfully;

(*b*) the intention must be to do it non-gratuitously; and

(*c*) the person for whom the act is done must enjoy the benefit of it.

(4) Responsibility of finder of goods

Ordinarily speaking, a person is not bound to take care of goods belonging to another, left on a road or other public place by accident or inadvertence, but if he takes them into his custody, an agreement is implied by law. Although, there is in fact no agreement between the owner and the finder of the goods, the finder is for certain purposes, deemed in law to be a bailee and must take as much care of the goods as a man of ordinary prudence would take of similar goods of his own. This obligation is imposed on the basis of a quasi-contract. Section 71, which deals with this subject, says:

"A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee."*

(5) Liability of person to whom money is paid, or thing delivered 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.

Examples

(1) **A** and **B** jointly owe Rs. 1,000 to **C**. **A** alone pays the amount to **C** and **B** not knowing this fact, pays Rs. 1,000 over again to **C**. **C** is bound to repay the amount to **B**.

(2) A railway company refuses to deliver certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged

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* Details on p. 107.

in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Notice that the term mistake as used in Section 72 includes not only a mistake of fact but also a mistake of law. There is no conflict between the provisions of Section 72 on the one hand, and Sections 21 and 22 on the other, and the true principle is that if one party under mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise, that money must be repaid [*Sales Tax Officer, Benares* v. *Kanhaiyalal Makanlal Saraf,* (1959), S.C.J. 53].

Quantum Meruit

The phrase "quantum meruit" means 'as much as merited' or 'as much as earned'. The general rule of law is that unless a person has performed his obligations in full, he cannot claim performance from the other.* But in certain cases, when a person has done some work under a contract, and the other party repudiated the contract, or some event happens which makes the further performance of the contract impossible, then the party who has performed the work can claim remuneration for the work he has already done. The right to claim quantum meruit does not arise out of the contract as the right to damages does; it is a claim on the quasi-contractual obligation which the law implies in the circumstances [*Patel Engg. Co. Ltd.* v *Indian Oil Corporation Ltd.*, AIR (1975) Pat. 212].

The claim on 'quantum meruit' arises in the following cases:

1. When a contract is discovered to be unenforceable *(Section 65)*

When an agreement is discovered to be void or 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.

Examples

(1) **A** pays **B** Rs. 1,000 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** the 1,000 rupees.

(2) **A** contracts with **B** to deliver to him 250 kilos of rice before the first of May. **A** delivers 130 kilos only before that day and none after. **B** retains the 130 kilos after the first of May. He is bound to pay **A** for them.

(3) **A**, a singer, contracts with **B**, the manager of a theatre, to sing at his theatre for two nights every week during the next two months, and **B** engages to pay her Rs. 100 for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and **B**, in consequence, rescinds the contract. **B** must pay **A** for the five nights on which she had sung.

2. When one party abandons or refuses to perform the contract

Where there is a breach of contract, the aggrieved party is entitled to claim reasonable compensation for what he has done under the contract.

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* *Cutter* v. *Pawell,* (1795) T.T. 320.

Example

C, an owner of a magazine, engaged **P** to write a book to be published by instalments in his magazine. After a few instalments were published, the magazine was abandoned. *Held* : **P** could claim payment on quantum meruit for the part already published [*Planche* v. *Colburn* (1831) 8 Bing. 14].

3. When a Contract is divisible

When a Contract is divisible, and the party not in default, has enjoyed the benefit of the part performance, the party in default may sue on quantum meruit.

4. When an indivisible contract is completely performed but badly

When an indivisible contract for a lump sum is completely performed, but badly, the person who has performed can claim the lump sum less deduction for bad work.

Example

A agreed to decorate **B**'s flat for a lump sum of £750. **A** did the work but **B** complained for faulty workmanship. It cost **B** £204 to remedy the defect.

Held : **A** could recover from **B** £750 less £204 [*Hoening* v. *Isaacs* (1952) AIR 11 E.R. 176].

1.11 PERFORMANCE OF CONTRACTS

[Sections 37–67]

A contract creates obligations. 'Performance of a Contract' means the carrying out of these obligations. Section 37 requires that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of the Contract Act, or of any other law.

◆ OFFER TO PERFORM OR TENDER OF PERFORMANCE

It may happen that the promisor offers performance of his obligation under the contract at the proper time and place but the promisee refuses to accept the performance. This is called as 'Tender' or 'attempted performance'. According to Section 38, if a valid tender is made and is not accepted by the promisee, the promisor shall not be responsible for non-performance nor shall he lose his rights under the contract. A tender or offer of performance to be valid must satisfy the following conditions:

1. It must be unconditional

A conditional offer of performance is not valid and the promisor shall not be relieved thereby. A 'tender' is conditional where **it is not in** accordance with the terms of the contract.

Examples

(1) **X** offers to **Y** the principal amount of the loan. This is not a valid tender since the whole amount of principal and interest is not offered.

(2) **X** a debtor, offers to pay **Y** the debt due by instalments and tenders the first instalment. This is not a valid tender [*Behari Lal* v. *Ram Ghulam,* 24 All. 461].

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

Examples

(1) **X** offers by post to pay **Y** the amount he owes. This is not a valid tender, as **X** is not able 'there and then' to pay.

(2) **X** offers the goods contracted to **Y** at 1 A.M. This is not a valid tender unless it was so agreed.

As to what is proper time and place, depends upon the intention of the parties and the provisions of Section 46 to 50 which are discussed on p. 86.

3. Since the tender is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity to see that the thing offered is the thing contracted for.

Example

A contracts to deliver **B** at his warehouse, on 1st March 1989, 100 bales of cotton of a particular quality. A must bring the cotton to **B**'s warehouse on the appointed day, under such circumstances that **B** may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Notice that an offer to one of several joint promisees has the same Legal effect as an offer to all of them.

◆ WHO MUST PERFORM?

The promise may be performed by promisor himself, or his agent or by his legal representative.

1. Promisor himself *(Section 40)*

If it appears 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.

Example

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

2. Agent

In cases other than the one specified in (1) above, the promisor may employ a competent person to perform it.

Example

A promises to pay to **B** a sum of money. **A** may perform this promise either personally paying the money to **B** or causing it to be paid to **B** by another.

3. Legal representative

In case of death of the promisor, the Legal representative must perform the promise unless a contrary intention appears from the contract.

Example

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

4. Where, however, a contract involves personal skill or is founded on normal considerations, it comes to an end with the death of the promisor.

Example

A promises to paint a picture for **B** by a certain day. **A** dies before that day. The contract cannot be enforced either by **A**'s representatives or by **B**.

◆ CONTRACTS WHICH NEED NOT BE PERFORMED

A contract need not be performed:

1. If the parties mutually agree to substitute the original contract by a new one or to rescind or alter it (Section 62).

Example

A owes money to **B** under a contract. It is agreed between **A**, **B** and **C** that **B** shall henceforth accept **C** as his debtor, instead of **A**. The old debt of **A** to **B** is at an end, and a new debt from **C** to **B** has been contracted.

2. If the promisee dispenses with or remits, wholly or in part the performance of the promise made to him or extends the time for such performance or accepts any satisfaction for it (Section 63).

Examples

(1) **A** promises to paint a picture for **B**. **B** afterwards forbids him to do so. **A** is no longer bound to perform the promise.

(2) **A** owes **B** Rs. 5,000. **C** pays to **B** Rs. 1,000 and **B** accepts them, in satisfaction of his claim on **A**. This payment is a discharge of the whole claim.

3. If the person, at whose option the contract is voidable, rescinds it (Section 64).
4. If the promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise (Section 67).

Example

A contracts with **B** to repair **B's** house. **B** neglects or refuses to point out to **A** the places in which his house requires repair. **A** need not perform.

PERFORMANCE OF JOINT PROMISES

◆ DEVOLUTION OF JOINT LIABILITIES

When two or more persons make a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel any (one or more) of such joint promisors to perform whole of the promise (Section 43).

Example

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

Thus, in India the liability of joint promisors is joint as well as several. *In England,* however, the liability of the joint promisors is only joint and not several and accordingly all the joint promisors must be sued jointly.

In England, therefore, release or discharge of any of the joint promisor shall discharge all the joint promisors.

Right of Contribution

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

Examples

(1) **A**, **B** and **C** are under a joint promise to pay **D** Rs. 3,000. **A** is compelled to pay the whole. **A** can recover Rs. 1,000 each from **B** and **C**.

(2) **A**, **B** and **C** jointly promise to pay **D** the sum of Rs. 3,000. **C** is compelled to pay the whole. **A** is insolvent, but his assets are sufficient to pay 1/2 of his debts. **C** is entitled to receive Rs. 500 from **A**'s estate, and Rs. 1,250 from **B**.

(3) **A**, **B** and **C** are under a joint promise to pay **D** Rs. 3,000. **C** is unable to pay anything, and **A** is compelled to pay the whole. **A** is entitled to receive Rs. 1.500 from **B**.

Release of Joint Promisor *(Section 44)*

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or promisors, neither does it free him from responsibility to the other joint promisor or promisors.

In *Kirtee Chunder* v. *Struthers,* (1878), 4 Cal. 336, the plaintiff sued some of the partners of a firm for damages, but then he settled his claim against one of them and agreed to withdraw his claim and suit against him.

Held : That the suit could be carried on against the rest of the partners. The position in English Law is, however, different. *Under the English Law,* if the promisee discharges one of the several joint promisors, such discharge acts as a discharge of all the joint promisors. Thus, under English Law suit must be brought against all the promisors jointly.

◆ DEVOLUTION OF JOINT RIGHTS *(Section 45)*

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 with all the joint promisees and after the death of any of them with the representatives of such deceased promisee jointly with the survivor or survivors and after the death of the survivors also, with the representatives of all jointly. Thus, unlike the case of joint promisors whose liability is joint as well as several, the right of the joint promisees is only joint and thus any of them cannot enforce performance unless so agreed.

Example

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

◆ TIME, PLACE AND MANNER OF PERFORMANCE *(Sections 46 to 50 and 55)*

The rules laid down regarding the time, place and manner of performance are summed up hereunder:

1. Where the time for performance has been specified and the promisor has undertaken to perform it without application by the promisee, the promisor must perform on the day fixed during the usual business hours and at the place at which the promise ought to be performed.

Example

A promises to deliver goods to **B** at his warehouse on 15th July, 1999. **A** offers the goods at **B**'s warehouse but after the usual hours for closing it. The performance of **A** is not valid.

2. But, where the time of performance is not specified, and the promisor agreed to perform without a demand from the promisee, the performance must be made within a reasonable time. What a reasonable time is, in each particular case, a question of fact.
3. Where a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, the promisee must apply for performance at a proper place and within the usual business hours. What is a proper time and place is, in each particular case, a question of fact.
4. When a promise is to be performed without application by the promisee and no place is fixed for its performance, the promisor must apply to the promisee to appoint a reasonable place for the performance of the promise, and perform it at such place.

Example

A undertakes to deliver 1,000 kilos of Jute to **B** on a fixed day. **A** must apply to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

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

Examples

(1) **B** owes **A** Rs. 2,000. **A** desires **B** to pay the amount to **A**'s account with **C**, a banker. **B** who also banks with **C** orders the amount to be transferred from his account to **A**'s credit and this is done by **C**. Afterwards, and before **A** knows of the transfer, **C** fails. There has been a good payment by **B**.

(2) **A** owes **B** Rs. 2,000. **B** accepts some of **A**'s goods in deduction of the debt. The delivery of the goods operates as a part payment.

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

◆ PERFORMANCE OF RECIPROCAL PROMISES *(Sections 51 to 54 and 57)*

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

1. Mutual and Dependent,
2. Mutual and Independent, and
3. Mutual and Concurrent.

1. Mutual and dependent

In such a case the performance of one party depends upon the prior performance of the other party. Thus, if the promisor who must perform, fails to perform it, he cannot claim the performance of the reciprocal promise. On the other hand, he must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Examples

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

(2) **A** promises **B** to sell him 100 bales of merchandise, to be delivered next day and **B** promises **A** to pay for them within a month. **A** does not deliver according to his promise. **B**'s promise to pay need not be performed, and **A** must make compensation.

2. Mutual and independent

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

Example

X promises **Y** to deliver him goods on 10th July and **Y** in turn promises to pay the price on 6th July. **Y**'s paying the price is independent of **X**'s delivering the goods and even if **Y** does not pay the price on 6th July, **X** must deliver the goods, on 10th July. He can of course, sue **Y** for compensation.

3. Mutual and concurrent

In such cases the promises have to be simultaneously performed. According to Section 51, when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Examples

(1) **A** and **B** contract that **A** shall deliver goods to **B** to be paid by instalments, the first instalment to be paid on delivery. **A** need not deliver, unless **B** is ready and willing to pay for the goods on delivery. And **B** need not pay for the goods unless **A** is ready and willing to deliver them on payment.

(2) **A** and **B** contract that **A** shall deliver goods to **B** at a price to be paid for by **B** on delivery. **A** need not deliver, unless **B** is ready and willing to pay the first instalment

on delivery. And **B** need not pay the first instalment, unless **A** is ready and willing to deliver the goods on payment of the first instalment.

Reciprocal promises to do things legal and also other things illegal *(Section 57)*

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

Example

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

◆ ASSIGNMENT OF CONTRACTS

Assignment means transfer. When a party to a contract transfers his right, title and interest in the contract to another person or other persons, he is said to assign the contract. Assignment of a contract can take place by operation of law or by an act of the parties.

1. Assignment by operation of law

The instances of assignment by operation of law are the assignment of interest by insolvency or death of the party to the contract. In the case of insolvency, the Official Receiver or Assignee acquires the interest in the contract and in the case of death, the legal representative.

2. Assignment by act of parties

In this case, the parties themselves make the assignment.

The **rules regarding assignment of contracts** are summarised below:

1. *The obligations or liabilities under a contract cannot be assigned.* Thus, if **A** owes **B** 1,000 rupees, he cannot transfer his obligation to pay to **C** and compel **B** to collect his money from **C**. But, if the promisee agrees to such assignment, he will be bound by it. In such a case, a new contract is substituted for an old one. This is called 'novation'. Thus, in the above example, if **B** agrees to accept payment from **C**, the assignment will be valid and **A** shall stand discharged of his obligation to pay.
2. *Rights and benefits under a contract may be assigned.* For example, where **A** owes **B** Rs. 1,000, **B** may assign his right to **C**. But, even a right or benefit under a contract cannot be assigned if it involves personal skill, ability, credit or other personal qualifications. *For example,* a contract to marry cannot be assigned.

In *Namasivaya* v. *Kadir Ammal* 1894, 17 Mad. 168, **A**, a salt manufacturer agreed with **B** to manufacture for him for a period of 7 years quantity of salt as **B** required, at a fixed rate. **B** agreed, to execute all repairs (except petty repairs) in the manufacturer's workshop. *Held* : These latter elements in the contract rendered it as one based on 'the character, credit and substance' of the party and, therefore, **B** could not assign it without A's consent.

3. The rights of a party under a contract may amount to 'actionable claim' or chose-in-action. An 'actionable claim' "is a claim to any debt (except a secured debt) or

to any beneficial interest ....whether such claim or beneficial interest be existent, accruing, conditional or contingent"—Section 3 of the Transfer of Property Act. Examples of actionable claims are—a money debt; the interest of a buyer in goods in a contract for forward delivery; etc.

Actionable claims can be assigned by a written document under Section 130 of the Transfer of Property Act. Notice of the assignment must be given to the debtor to make the assignment valid.

APPROPRIATION OF PAYMENT

[Sections 59–61]

When a debtor owes several debts in respect of which the payment must be made (to the same creditor), the question may arise as to which of the debts, the payment is to be appropriated. *In England,* the law on the subject was laid down in Clayton's case.* *In India,* the rules regarding appropriation of payments are contained in Sections 59 to 61 which in fact have adopted with certain modifications the rules laid down in Clayton's case. The provisions of these sections are summarised below:

Rule No. 1. Appropriation by Debtor. Where a debtor owing several distinct debts to one person, makes a payment to him, with express intimation that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied to that debt. (Section 59).

Where, however, no express intimation is given but the payment is made under circumstances implying that it should be appropriated to a particular debt, the payment, if accepted, must be applied to that debt (Section 59).

Examples

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

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

Rule No. 2. Appropriation by Creditor. Where the debtor does not intimate and there are no circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor. *The amount,* in *such a case can be applied even to a debt which has become 'time barred'.* However, it cannot be applied to a disputed debt (Section 60).

Example

A obtains two loans of Rs. 20,000 and Rs. 10,000 respectively. Loan of Rs. 20,000 is guaranteed by **B**. **A** sends the bank Rs. 5,000 but does not intimate as to how it is to be appropriated towards the loans. The bank appropriates the whole of Rs. 5,000 to the loan of Rs. 10,000 (the loan not guaranteed). The appropriation is valid and cannot be questioned either by **A** or **B.**

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* (l816) 1 Mer 572, 610.

Rule No. 3. Where neither party appropriates. Where neither party makes any appropriation the payment is to be applied in discharge of the debts in order of time, including time-barred debts. If the debts are of equal standing, the payment is to be applied proportionately (Section 61).

The above rule is generally applicable in case of running accounts between two parties, money being paid and withdrawn from time to time from the account, without any specific indication as to appropriation of the payment made. In such a case debits and credits in the accounts will be set-up against one another in order of their dates, leaving only final balance to be recovered from the debtor by the creditor.

Rule in re Hallett's Estate case. The rule in Hallett's Estate case is an exception of the above rule (i.e., Rule No. 3). The rule applies where a trustee had mixed up trust funds with his own funds. In such a case, if the trustee misappropriates any money belonging to the trust, the first amount so withdrawn by him would be first debited to his own money and then to the trust funds. Similarly, any deposits made by him would be first credited to trust fund and then to his own fund, whatever be the order of withdrawal and deposit.

Example

A trustee deposits Rs. 10,000 being trust money with a bank and subsequently deposits Rs. 50,000 of his own in the same account. Thereafter, he withdraws Rs. 10,000 from the bank and misappropriates it. The said withdrawal will not be appropriated against the Trust amount of Rs. 10,000 but only against his own deposit, though this was made later than the first deposit, thus leaving the Trust fund intact.

1.12 DISCHARGE OF CONTRACTS

[Sections 73–75]

The cases in which a contract is discharged may be classified as follows:

A. By performance or tender.
B. By mutual consent.
C. By subsequent impossibility.
D. By operation of law.
E. By breach.

◆ A. BY PERFORMANCE

The obvious mode of discharge of a contract is by performance, that is, where the parties have done whatever was contemplated under the contract, the contract comes to an end. Thus where **'A'** contracts to sell his car to **'B'** for Rs. 85,000 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.*

Tender

The offer of performance or tender has the same effect as performance. If a promisor

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* For details see the preceding Part 1.11 "Performance of Contracts."

tenders performance of his promise but the other party refuses to accept, the promisor stands discharged of his obligations.*

◆ B. BY MUTUAL CONSENT *(Section 62)*

If the parties to a contract agree to substitute a new contract for it, or to rescind it or alter it, the original contract is discharged. A contract may terminate by mutual consent in any of the followings ways:

1. Novation

'Novation' means substitution of a new contract for the original one. The new contract may be substituted either between the same parties or between different parties.

Examples

(1) **A** who owes **B** Rs. 20,000 enters into an arrangement with him thereby giving **B** a mortgage of his estate for Rs. 15,000. This arrangement constitutes a new contract and terminates the old.

(2) A owes money to **B** under a contract. It is agreed between **A**, **B** and **C** that **B** shall thenceforth accept **C** as his debtor instead of **A**. The old debt of **A** to **B** is at an end, and a new debt from **C** to **B** has been contracted.

Notice that, the contract which is substituted must be one capable of enforcement in law. Thus, where the subsequent agreement is insufficiently stamped and, therefore, cannot be sued upon, novation does not become effective, that is, the original party shall continue to be liable.

2. Rescission

Rescission means cancellation of all or some of the terms of the contract. Where parties mutually decide to cancel the terms of the contract, the obligations of the parties thereunder terminate.

3. Alteration

If the parties mutually agree to change certain terms of the contract, it has the effect of terminating the original contract. There is, however, no change in the parties.

4. Remission *(Section 63)*

Remission is the acceptance of a lesser sum than what was contracted for or a lesser fulfilment of the promise made.

Examples

(1) **A** owes **B** Rs. 5,000. **A** pays to **B** who accepts in satisfaction of the whole debt Rs. 2,000 paid at the time and place at which the Rs. 5,000 were payable. The whole debt is discharged.

(2) **A** owes **B** Rs. 5,000. **C** pays to **B** Rs. 1,000 and **B** accepts them, in satisfaction of his claim on **A**. This payment is a discharge of the whole claim.

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* Also see p. 66.

Thus, in India promisee may remit or give-up a part of his claim and promise to do so is binding even though there is no consideration for doing so.

Accord and Satisfaction

These two terms are *used in English Law*. In England remission must be supported by a fresh consideration. The 'accord' is the agreement to accept less than what is due under the contract. The 'satisfaction' is the consideration which makes the agreement operative. In other words, satisfaction means the payment or fulfilment of the lesser obligation. An accord is unenforceable, but an accord accompanied by satisfaction is valid and thereby discharges the obligation under the old contract. Thus, in our above example (1) where **B** agrees to accept Rs. 2,000 in full satisfaction, the agreement is an accord and cannot be enforced under English Law but when Rs. 2,000 are actually paid to **B** who accepts them in full satisfaction of his claim of Rs. 5,000 it is a valid discharge, that is the balance of Rs. 3,000 can never be claimed.

5. Waiver

Waiver means relinquishment or abandonment of a right. Where a party waives his rights under the contract, the other party is released of his obligations.

Example

A promises to paint a picture for **B**. **B** afterwards forbids him to do so. **A** is no longer bound to perform the promise.

6. Merger

A contract is said to have been discharged by way of 'merger' where an inferior right possessed by a person coincides with a superior right of the same person.

Example

A man who is holding certain property under a lease, buys it. His rights as a lessee vanish. They are merged into the rights of ownership which he has now acquired, the rights associated with lease being inferior to the rights associated with the ownership.

◆ C. BY SUBSEQUENT IMPOSSIBILITY *(Section 56)*

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

Examples of Inherent Impossibility

(1) **A** promises to pay **B** Rs. 50,000 if **B** rides on horse to the moon. The agreement is void.

(2) **A** agrees with **B** to discover treasure by magic. The agreement is void.

The impossibility in these cases is inherent in the transaction. Such a contract is void *ab-initio.*

On the other hand, where a contract originates as one capable of performance but later due to change of circumstances its performance becomes impossible, it is known to have become void by subsequent or supervening impossibility. We shall now consider this kind of impossibility in details.

Subsequent Impossibility in England is referred to as 'Doctrine of Frustration'. A contract is deemed to have become impossible of performance and thus void under the following circumstances:

1. Destruction of subject-matter of the contract

Where the subject-matter of a contract is destroyed, for no fault of the promisor, the contract becomes void by impossibility.

A music hall was agreed to be let out on certain dates, but before those dates it was destroyed by fire. Held, that the owner was absolved from liability to let the building as promised [*Taylor* v. *Caldwell* (1863) 122 E.R. 299].

2. By the death or disablement of the parties

Where the performance of the contract must be executed personally by the promisor, his death or physical disability to perform shall render the contract void and thus exonerate him from the obligation.

Examples

(1) **A** and **B** contract to marry each other. Before the time fixed for the marriage, **A** dies. The contract becomes void.

(2) **A**, a singer, agrees with **B** to give his performance at some particular theatre on a specified date. While on his way to the theatre **A** meets an accident and is rendered unconscious. The agreement becomes void.

(3) **A** contracts to act at a theatre for six months in consideration of a sum paid in advance to **B**. On several occasions **A** is too ill to act. The contract to act on those occasions becomes void.

3. Subsequent illegality

Where by subsequent legislation the performance of a contract is forbidden by law, the parties are absolved from liability to perform it.

Example

A contracts to supply **B** 100 bottles of wine. Before the contract is executed, i.e., bottles supplied, dealings in all sorts of liquor are declared forbidden, the contract becomes void.

4. Declaration of war

If war is declared between two countries subsequent to the making of the contract, the parties would be exonerated from its performance.

Example

A contracts to take indigo for **B** to a foreign port. **A**'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

5. Non-existence or non-occurrence of a particular state of things

When certain things necessary for performance cease to exist the contract becomes void on the ground of impossibility.

Examples

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

(2) A contract was to hire a flat for viewing the coronation procession of the king. The procession had to be cancelled on account of king's illness. In a suit for the recovery of the rent, it was held that the contract became impossible of performance and that the hirer need not pay the rent [*Krell* v. *Henry* (1903) 2 K.B. 740].

Exceptions

Apart from the cases mentioned above, impossibility does not discharge contracts. He that agrees to do an act should do it, unless absolutely impossible which may happen in any one of the ways discussed above. Some of the circumstances in which a contract is not discharged on the ground of subsequent impossibility are stated hereunder:

1. Difficulty of performance

The mere fact that performance is more difficult or expensive or less profitable than the parties anticipated does not discharge the duty of performance.

Example

X promised to send certain goods from Bombay to Antwerp in September, In August war broke out and shipping space was not available except at very high rates.

Held : The increase of freight rates did not excuse performance.

2. Commercial impossibility

It means that if the contract is performed, it will result in a loss to the promisor. Commercial impossibility to perform a contract does not discharge the contract.

Example

A contract to lay gas mains is not discharged because the outbreak of war makes it expensive to procure the necessary materials [*M/s. Alopi Pd.* v. *Union of India* (1960) S.C. 589].

However, the Madras High Court in *Easun Engineering Co. Ltd.* v. *The Fertilisers and Chemicals Travancore Ltd. and Another* (AIR 1991 Mad. 158} has held that the abnormal increase in price due to war conditions was an untoward event or change of circumstances which 'totally upset the very foundation upon which parties rested their bargain.' Therefore, in a contract for supply of transformers, an increase of 400 per cent in the price of transformer oil due to war was held to be an impossibility of performance and the supplier not held liable for breach.

3. The promisor is not exonerated from his liability if the third person, on whose work the promisor relied, fails to perform. Thus, a wholesaler's contract to deliver goods is not discharged because a manufacturer has not produced the goods concerned.

4. Strikes, lockouts and civil disturbances

Events like these do not terminate contracts unless there is a clause in the contract to that effect.

Example

A agreed to supply **B** certain goods to be produced in Algeria. The goods could not be produced because of riots and civil disturbances in that country.

Held : There was no excuse for non-performance of the contract [*Jacobs* v. *Credit Lyonnais* (1884) 12 Q.B.D. 589].

5. Failure of one of the objects

If the contract is made for several purposes, the failure of one of them does not terminate the contract.

Example

A agreed to let a boat to **H** to (*i*) view the naval review at the coronation and (*ii*) to cruise round fleet. Owing to the king's illness, the naval review was cancelled, but the fleet was assembled and the boat could have been used to cruise round the fleet.

Held : The contract was not discharged [*Herne Bay Steamboat Co.* v. *Hutton* K.B. 740].

SUBSEQUENT IMPOSSIBILITY
(When does Contract Become Void?)

1. By Destruction of subject matter of the contract.
2. By the death or disablement of the parties.
3. By subsequent illegality.
4. By declaration of war.
5. By non-existence or non occurrence of a particular state of things.
6. Difficulty of performance does not amount to impossibility.
7. Commercial impossibility does not render a contract void.
8. Strikes, lock-outs and civil disturbances do not terminate contracts unless provided for in the contract.
9. Failure of one of the objects does not terminate the contract.
10. Non-performance by the third party does not exonerate the promisor from his liability.

Effects of Supervening Impossibility

1. A contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor couldn't prevent, unlawful, becomes void when the act becomes impossible or unlawful. (Section 56, para 2).
2. According to para 3 of Section 56, where a person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.
3. When a contract becomes void, any person who has received any advantage under such contract is bound to restore it, or to make compensation for it to the person from whom he received it (Section 65).

Examples

(1) **A** contracts to sing for **B** at a concert for Rs. 1,000, which is paid in advance. **A** is too ill to sing. **A** must refund to **B** 1,000 rupees.

(2) A pays **B** 1,000 rupees in consideration of **B**'s promising to marry **C**, **A**'s daughter. **C** dies before marriage. **B** must repay **A** the 1,000 rupees.

◆ D. BY OPERATION OF LAW

Discharge under this head may take place as follows:

1. By death

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

2. By insolvency

The Insolvency Acts provide for discharge of contracts under certain circumstances. So, where an order of discharge is passed by an Insolvency Court, the insolvent stands discharged of liabilities of all debts incurred previous to his adjudication.

3. By merger

When between the same parties, a new contract is entered into, and a security of a higher degree, or a higher kind is taken, the previous contract merges in the higher security, for example, a right of action on an ordinary debt which would be merged in the right of suing on a mortgage for the same debt.

4. By the unauthorised alteration of terms of a written document

Where any of the parties alters any of the terms of the contract without seeking the consent of the other party to it, the contract terminates.

◆ E. BY BREACH OF CONTRACT

A contract terminates by breach of contract. Breach of contract may arise in two ways: (*a*) Anticipatory breach, and (*b*) Actual breach.

Anticipatory Breach of Contract

Anticipatory breach of contract occurs, when a party repudiates it before the time fixed for performance has arrived or when a party by his own act disables himself from performing the contract.

Examples

(1) **A** contracts to marry **B**. Before the agreed date of marriage he married **C**. **B** is entitled to sue **A** for breach of promise.

(2) **A** promised to marry **B** as soon as his (**A**'s) father should die. During the father's life time, **A** absolutely refused to marry **B**. Although the time for performance had not arrived, **B** was held entitled to sue for breach of promise [*Frost* v. *Knight* L.R. 7 Ex. 111].

(3) **A** contracts to supply **B** with certain articles on 1st of August. On 20th July, he informs **B** that he will not be able to supply the goods. **B** is entitled to sue **A** for breach of promise.

Consequences of Anticipatory Breach

Where a party to a contract refuses to perform his part of the contract before the actual time arrives the promisee may either: (*a*) rescind the contract and treat the contract as at an end, and at once sue for damages, or (*b*) he may elect not to rescind but to treat the contract operative and wait for the time of performance and then hold the other party liable for the consequences of non-performance. In the latter case, the party who has repudiated may still perform if he can.

Thus, from the above discussion it follows that 'anticipatory breach' of contract does not

by itself discharge the contract. The contract is discharged only when the aggrieved party accepts the repudiation of the contract, i.e., elects to rescind the contract, *Notice that if the repudiation is not accepted and subsequently an event happens, discharging the contract legally, the aggrieved party shall lose his right to sue for damages.*

Example

A agreed to load a cargo of wheat on **B**'s ship at Odessa by a particular date but when the ship arrived **A** refused to load the cargo. **B** did not accept the refusal and continued to demand the cargo. Before the last date of loading had expired the Crimean War broke out, rendering the performance of the contract illegal.

Held : The contract was discharged and **B** could not sue for damages [*Avery* v. *Bowen* (1856) 6 E. & B. 965].

Actual Breach of Contract

The actual breach may take place (*a*) at the time when performance is due, or (*b*) during the performance of the contract.

Actual breach of Contract, at the time when performance is due. If a person does not perform his part of the contract at the stipulated time, he will be liable for its breach.

Example

A seller offers to execute a deed of sale only on payment by the buyer of a sum higher than is payable under the contract for sale, the vendor shall be liable for the breach *[Jaggo Bai* v. *Hari Har Prasad Singh,* A.I.R. 1947, P.C. 173].

Time as Essence of Contract

But, if the promisor offers to perform his promise subsequently, the question arises whether it should be accepted, or whether the promisee can refuse such acceptance and hold the promisor liable for the breach. The answer depends upon whether time was considered by the parties to be of the essence of the contract or not. Section 55, in this respect, lays down as follows:

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times 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 the essence of the contract."

If it was not the intention of the parties that time should be of the 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. 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 such acceptance he gives notice to the promisor of his intention to do so.

According to the above provisions, if performance beyond the stipulated time is accepted, the promisee must give notice of his intention to claim compensation. If he fails to give such notice, he will be deemed to have waived that right. *In England,* however, no such notice is necessary, and the promisee can, even after accepting the belated performance, claim compensation.

Breach 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 the contract.

Example

A contracted with a Railway Company to supply it certain quantity of railway-chairs at a certain price. The delivery was to be made in instalments. After a few instalments had been supplied, the Railway Company asked **A** to deliver no more.

Held : **A** could sue for breach of contract. [*Cort* v. *Am-bergate, etc. Rly. Co.* (1851) 17 Q.B. 1271.

1.13 REMEDIES FOR BREACH OF CONTRACT

[Sections 73–75]

As soon as either party commits a breach of the contract, the other party becomes entitled to any of the following reliefs:

1. Rescission of the Contract.
2. Damages for the loss sustained or suffered.
3. A decree for specific performance.
4. An injunction.
5. Suit on Quantum Meruit.

1. Rescission of the Contract

When a breach of Contract is committed by one party, the other party may sue to treat the contract as rescinded. In such a case, the aggrieved party is freed from all his obligations under the contract.

Example

A promises **B** to supply 100 bags of rice on a certain date and **B** promises to pay the price on receipt of the goods. **A** does not deliver the goods on the appointed day, **B** need not pay the price.

Party Rightfully Rescinding Contract Entitled to Compensation (*Section 75*)

A person who rightfully rescinds the contract is entitled to compensation for any damage which he has sustained through the 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 Rs. 100 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. Damages

Damages, generally speaking, are of four kinds:

A. Ordinary Damages,

B. Special Damages,

C. Vindictive, or Punitive or Exemplary Damages, and

D. Nominal Damages.

A. Ordinary Damages *(Section 73)*

Ordinary damages are those which naturally arose in the usual course of things from such breach. The measure of ordinary damages is the difference between the contract price and the market price at the date of the breach. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor be liable to have the damages reduced if the market rises.

Examples

(1) **A** contracts to deliver 100 bags of rice at Rs. 100 a bag on a future date. On the due date he refuses to deliver. The price on that day is Rs. 110 per bag. The measure of damages is the difference between the market price on the date of the breach and the contract price, viz., Rs. 1,000.

(2) **A** contracts to buy **B**'s ship for Rs. 60,000 but breaks his promise. **A** must pay to **B**, by way of compensation, the excess, if any, of the contract price over the price which **B** can obtain for the ship at the time of the breach of promise.

Notice that ordinary damages shall be available for any loss or damage which arises naturally in the usual course of things from the breach and as such compensation cannot be claimed for any remote or indirect loss or damage by reason of the breach (Sec. 73).

Example

A railway passenger's wife caught cold and fell ill due to her being asked to get down at a place other than the Railway Station. In a suit by the plaintiff against the railway company, held that damages for the personal inconvenience of the plaintiff alone could be granted, but not for the sickness of the plaintiff's wife, because it was a very remote consequence.

B. Special Damages *(Section 73)*

Special damages are claimed in case of loss of profit, etc. When there are certain special or extraordinary circumstances present and their existence is communicated to the promisor, the non-performance of the promise entitles the promisee to not only claim the ordinary damages but also damages that may result therefrom.

Examples

(1) **A**, a builder, contracts to erect and finish a house by the first of January, in order that **B** may give possession of it at that time to **C**, to whom **B** has contracted to let it. **A** is informed of the contract between **B** and **C**. **A** builds the house so badly that, before the first of January, it falls down and has to be rebuilt by **B**, who, in consequence, loses the rent which he was to have received from **C**, and is obliged to make compensation to **C** for the breach of his contract. **A** must make compensation to **B** for the cost of rebuilding the house, for the rent lost, and for the compensation made to **C**.

(2) **A** delivers to **B**, a common carrier, a machine to be conveyed, without delay, to **A**'s mill, informing **B** that his mill is stopped for want of the machine. **B** unreasonably delays the delivery of the machine, and **A** in consequence, loses a profitable contract with the Government. **A** is entitled to receive from **B**, by way of compensation, the average amount of profit which would have been made by the working of the mill

during the time that delivery of it was delayed. But, however, the loss sustained through the loss of the Government contract cannot he claimed.

Notice that the communication of the special circumstances is a pre-requisite to the claim for special damages.

Examples

(1) In *Hadley* v. *Baxendale,* **X**'s mill was stopped due to the breakdown of a shaft. He delivered the shaft to **Y**, a common carrier, to be taken to a manufacturer to copy it and make a new one. **X** did not make known to **Y** that delay would result in a loss of profits. By some neglect on the part of **Y** the delivery of the shaft was delayed in transit beyond a reasonable time. As a result the mill remained idle for a longer time than otherwise would have been had the shaft been delivered in time.

Held : **Y** *was not liable for loss of profits* during the period of delay as the circumstances communicated to **Y** did not show that a delay in the delivery of shaft would entail loss of profits to the mill.

(2) Where **A** contracts to sell and deliver to **B**, on the first of January, certain cloth which **B** intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time and too late to be used that year in making caps. **B** is entitled to receive from **A** only ordinary damages, i.e., the difference between the contract price of the cloth and its market price at the time of delivery but not the profits which he expected to obtain by making caps, nor the expenses which he has put in making preparation for the manufacture.

C. Vindictive Damages

Vindictive damages are awarded with a view to punish the defendant, and not solely with the idea of awarding compensation to the plaintiff. These have been awarded (*a*) for a breach of promise to marry; (*b*) for wrongful dishonour of a cheque by a banker possessing adequate funds of the customer. The measure of damages in case of (*a*) is dependent upon the severity of the shock to the sentiments of the promisee. In case of (*b*) the rule is smaller the amount of the cheque dishonoured, larger will be the amount of damages awarded.

D. Nominal Damages

Nominal damages are awarded in cases of breach of contract where there is only a technical violation of the legal right, but no substantial loss is caused thereby. The damages granted in such cases are called nominal because they are very small, for example, a rupee or a shilling.

Duty to Mitigate Damages Suffered

It is the duty of the injured party to minimise damages. [*British Westinghouse & Co.* v. *Underground Electric etc. Co.,* (1915) A.C. 673]. He cannot claim to be compensated by the party in default for loss which is really not due to the breach but due to his own neglect to minimise loss after the breach.

◆ LIQUIDATED DAMAGES AND PENALTY

Sometimes parties themselves at the time of **entering** into a contract agree that a particular sum will be payable by a party in case of breach of the contract by him. Such a

sum may either be by way of liquidated damages, or it may be by way of 'penalty'.

Liquidated Damages

The essence of liquidated damages is a genuine covenanted pre-estimate of damages. Thus, the stipulated sum payable in case of breach is to be regarded as liquidated damages, if it be found that parties to the contract conscientiously tried to make a pre-estimate of the loss which might happen to them in case the contract was broken by any of them.

Penalty

The essence of a penalty is a payment of money stipulated as *in* terorem' of the offending party. In other words, if it is found that the parties made no attempt to estimate the loss that might happen to them on breach of the contract but still stipulated a sum to be paid in case of a breach of it with the object of coercing the offending party to perform the contract, it is a case of penalty. Thus, a term in a contract amounts to a penalty where a sum of money, which is out of all proportion to the loss, is stipulated as payable in case of its breach.

English law recognises a distinction between liquidated damages and penalty whereas liquidated damages are enforceable but penalty cannot be claimed. In India, there is no such distinction recognised between penalty and liquidated damages. Section 74 which contains law in this regard states "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled (whether or not actual damage or loss is proved to have been caused thereby), to receive from the party who has broken the contract, *reasonable compensation not exceeding the amount as named* or, as the case may be, the penalty stipulated for." Thus, where the amount payable in case of breach is fixed in advance whether by way of liquidated damages or penalty, the party may claim only a reasonable compensation for the breach, subject to the amount so fixed.

Examples

(1) **A** contracts with **B** to pay **B** Rs. 1,000, if he fails to pay **B** Rs. 500 on a given day. **A** fails to pay **B** Rs. 500 on that day. **B** is entitled to recover from **A** such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(2) **A** contracts with **B** that if **A** practices as a surgeon within Calcutta, he will pay **B** Rs. 5,000. **A** practices as a surgeon in Calcutta. **B** is entitled to such compensation, not exceeding Rs. 5,000 as the Court considers reasonable.

(3) **A** gives **B** a bond for the repayment of Rs. 1,000 with interest at 12% at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and **B** is only entitled to recover from **A** such compensation as the Court considers reasonable.

Payment of Interest

Whether payment of interest at a higher rate amounts to penalty shall depend upon the circumstances of the case. However, the following rules may be helpful in understanding the legal position in this regard.

1. A stipulation for increase from the date of default shall be a stipulation by way of penalty if the rate of interest is abnormally high.

Example

A gives **B** a bond for the repayment of Rs. 1,000 with interest at 12 per cent, at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75% from the date of default. This is a stipulation by way of penalty, and **B** is only entitled to recover from **A** such compensation as the court considers reasonable.

2. Where there is a stipulation to pay increased interest from the date of the bond and not merely from the date of default, it is always to be considered as penalty.
3. **Compound Interest.** Compound interest in itself is not a penalty. But it is allowed only in cases the parties expressly agree to it. However, a stipulation (clause in the agreement) to pay compound interest at a higher rate on default is to be considered a penalty. In *Sunder Koer* v. *Rai Sham Krishan* (1907) 34 Cal. 150, the Privy Council observed that compound interest at a rate exceeding the rate of interest on the principal money being in excess of the ordinary and useful stipulation, may well be regarded as in the nature of a penalty."
4. An agreement to pay a particular rate of interest with a stipulation that a reduced rate will be acceptable if paid punctually is not a stipulation by way of penalty.

Example

Where a bond provides for payment of interest at 12 per cent per annum with a proviso that, if the debtor pays interest punctually at the end of every year, the creditor would accept interest at the rate of 9 per cent per annum. Such a clause is not in the nature of a penalty and hence interest @ 12 per cent shall be payable.

3. Specific Performance

Where damages are not an adequate remedy, the court may direct the party in breach to carry out his promise according to the terms of the contract. This is called 'specific performance' of the contract. Some of the instances where Court may direct specific performance are: a contract for the sale of a particular house or some rate article or any other thing for which monetary compensation is not enough because the injured party will not be able to get an exact substitute in the market.

Specific performance will not be granted where:

(*a*) Monetary compensation is an adequate relief.

(*b*) The contract is of a personal nature, e.g., a contract to marry.

(*c*) Where it is not possible for the Court to supervise the performance of the contract, e.g., a building contract.

(*d*) The contract is made by a company beyond its objects as laid down in its Memorandum of Association.

4. Injunction

Injunction means an order of the Court. Where a party is in breach of a negative term of contract (i.e., where he does something which he promised not to do), the Court may, by issuing an order, prohibit him from doing so.

Examples

(1) **G** agreed to buy the whole of the electric energy required for his house from a certain company. He was therefore, restrained by an injunction from buying electricity from any other person. [*Metropolitan Electric Supply Company* v. *Ginder*].

(2) **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.

5. Quantum Meruit

The phrase 'Quantum Meruit' means as much as is merited' (earned). The normal rule of law is that unless a party has performed his promise in its entirely, it cannot claim performance from the other. To this rule, however, there are certain exceptions on the basis of 'Quantum Meruit'. A right to sue on a 'quantum meruit' arises where a contract, partly performed by one party, has become discharged by the breach of the other party. This has already been discussed under 'Quasi Contracts' (Part 1–10).