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NATURE OF CONTRACT

Object of the law of contract: it is that branch of law which determines the circumstances under which promises made by the parties to a contract shall be legally binding upon them.

INDIAN CONTRACT ACT OF 1872:

Nature:

The law of contract differs from the other branches of law. The law of contract is not the whole law of agreements nor the whole law of obligations.

There are several agreements which do not give rise to legal obligations. Similarly, there are certain obligations which do not arise from an agreement.

The law of contract creates Jus in Rem (i.e., rights against a thing) and Jus in personum (i.e., right against a person).

Example:
1. ‘A’ owes money to ‘B’, ‘B’ can recover it from ‘A’. This is Jus in personum.
2. ‘X’ is the owner of a plot of land. He can have a quiet possession/enjoyment of the land against every member of the public. This is Jus in Rem.

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Definition:

[Sec 2(H)], “A contract is an agreement enforceable by law”

Pollock: “Every agreement and promise enforceable at law is a contract,”

Salmond: “It is an agreement creating and defining obligations between parties,” thus a contract consists of two elements i.e., Agreement and enforceability.

An agreement is defined as “Every promise and set of promises forming consideration for each other.”

[Sec 2(E)] A promise is defined thus,

“when the person to whom a proposal is made signifies his ascent there to the proposal is said to be accepted.” A proposal when accepted becomes a promise. Thus agreement is equal to offer plus acceptance.

Consensus/ad Idem:

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It means parties to an agreement must have agreed upon the subject matter of the agreement in the same sense at the same time.

Example: Mr. ‘X’ owns two horses, ’A’ and ‘B’, and ‘X’ wants to sell horse ‘A’ to Mr. ’Y’. But Mr. ’Y’ thinks he has sold horse ’B’ there is no consensus ad idem.

An agreement may be a social agreement or a legal agreement.

Example: ’A’ invites ‘B’ to a dinner party ‘B’ accepts it. it is a social agreement.

A social agreement is not give rise to legal or contractual obligation and cannot be enforced by law. this contract is equal to agreement plus enforceability by law.

Essential element of a valid contract:

As per sec 10 of the Indian contract act of 1872, all agreement are contracts if they are made by free consent of parties competent to contract for a loss and consideration and with a law full object and it not is expressly declared to be void

The essential elements of a valid contract or as follows:

1. Offer and acceptance:
There must be two parties an agreement. One party that makes the offer to the other party that accept it. The terms of the offer must be absolute and the unlawful full conditional. the offer must be in some mode and must be communicated.

2. Legal relationship:
The intension of the party must be create a legal relationship social or domestic agreements do not create a legal relationship

Example: Balfour Vs Balfour Case.
A husband promises to pay his wife a house found allowance of 30 pounds/month.
Later the party separated on the husband fail to pay the amount. The wife sued for the allowance held that the agreement of this sort were out of the realm of the contract.

3. Law full consideration:
An agreement to be enforced law must be supported by law full consideration. Consideration is the advantage or the benefit moving from one party to another. It means something in return for something. The agreement is legally enforceable.
enforceable only when both the parties to a contract give something in order to get something in return.

4. Capacity of parties:
This is another requirement of a valid contract. Every person is competent to contract if he is-
a) Of the age of majority.
b) Of sound mind
c) Not disqualified for contracting by any law to which he is subject to.
Persons who are lunatic, drunk, minor are not competent to enter into any contract.

5. Free and Genuine consent:
The consent of the parties are said to be free when they agree upon a subject matter in the same time in the same sense and is not induced by coercion and, undue influence, fraud, mis-representation and mistake.

6. Law full object:
This is another element of a valid contract where in the object of the contract must not be immoral, illegal or oppose public policy.

7. Agreements not declared voidibly any law enforce in the country.

8. Certainly and possibility of performance i.e, agreement must be clear and definite and must be capable of being performed.
Example: A Doctor promising to put life into his dead patient, is a void contract.

9. Legal Formalities:
A contract may be made by words, spoken or written. Such as document of contracts, may be stamped registered etc., so that the agreement is legally enforceable.

Classification of contract:

1. According to validity:
An agreement becomes a contract only when all elements of a valid contract are present.
A voidable contract is one where on agreement which is enforceable by law is at the option of one or more of the parties there to but not the option other or others.
Example: In the absence of free consent.
‘X’ promises to sell his scooter ‘Y’ for Rs. 10000/- his consent is obtained by force.
It is voidable contract.

Void agreements and void contract:
An agreement not enforceable by law is a void contract.
Example: import of goods from a foreign country becomes void when a war breaks out between the countries.
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Illegal Agreements:
They are agreements which are immoral, opposed to public policy and are criminal in nature.

2. According to Formation:
Contract may be verbal or written on the basis of the mode of their formation they may be classified into:

a) Expressed contract: Either written or verbal expression at the time of formation of the contract.

b) Implied contract: it is a contract which is implied by its conduct or act between the parties in the course of their dealings.

c) Quasi contract: this is not a contract at all. This contract is created by law in the absence of an agreement. It resembles a contract in which legal obligations is imposed on a party which is required to perform it.

3. According to performance:

a) Executed contract: there are those contracts that are performed.
Example: ‘A’ agrees to stich a garment for ‘B’ when the work is over the price is paid by ‘B’ and the contract said to be executed.

b) Executory contract: it means that which remains to be carried into effect this contract may be some time partly executed and partly not executed.
Example: ‘X’ arranges to engage a servant for his wife from te next month.

c) Unilateral contract: it is a one-sided contract where in only one party as to fulfil the obligation at the time of information of the contract.

d) Bi-lateral contract: it is one in which the obligation, on te party of both the parties to a contract or out-standing at the time of formation of a contract.

Classification of contract as per ENGLISH LAW:

1. Formal contract:
They comprise of a contracts of a record and contracts under seal.

a) Contract of record: it is either the judgement of a code or a recognizance, a judgement is an obligation imposed by a court upon one or more person in favour of another or others, a recognizance is a written acknowledgement of a debt due to the crown. It is meant in connection with te criminal proceedings.

b) Contract under seal: it is one in which it delivers it binding force from its form alone. It is in writing, signed, sealed as delivered by the parties it is called a deed or a speciality contract.

2. Simple contract:
They may be in writing or may be in verbal or in the verbal form and is supported by adequate consideration.
OFFER

An offer is a proposal by one party to another enter into a legally binding agreement with him. A person is said to have a made proposal when he signifies to another his willingness to do or to abstain from doing anything with a view to obtaining assent of that other to such an actor abstinence.

Example: ‘A’ asks ‘B’ to purchases bi-cycle. ’A’ is the offer or and ‘A’ has to receive ‘B’ assent. An offer may be made in writing or it may be verbal one. Tis is known as an express offer.

An offer may be implied by the conduct of parties. Example: A Telephone facility at an STD booth or a weighing machine at the Railway Station.

When an offer is made to a definite person. It is called a specific offer and wen it is made to the world at large it is called a General offer.

Example: Carlill Vs Carbollic Smoke ball co. 1893

A company advertised in the leading Newspapers that a reward off 100 pound would be given to anybody contracting influenza after using the smoke ball of the company.

1. Mrs. Carlill contracted influenza on using the smoke ball of the co. and could recover the amount from the company as per the offer.

Thus offer must constitute:

1. It must show an obvious intention on the part of the offer or to be bound by it.
   Example: A joke of offer and acceptance does not constitute offer.
2. The offeror must make the offer with a view to obtaining the assent of the offeree to such an act or abstinence.
3. The offer must be definite.
4. The offer must be communicated to the offeree.

Legal rules as to offer:

1. Offer must be capable of being accepted and must give rise to legal relationship. A social agreement does not give rise to legal relationship.
2. The terms of the offer must be definite unambiguous and certain and must not be vague
   Example: Taylor Vs Portington case 1855:
   An offer to take a house on lease for 3 years at to 85 pounds provided the house was thoroughly repaired and the rooms decorated according to the
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present style. Here the condition of an offer were vague and not clear and thus could not be carried out.

3. An offer must be distinguish from.
   a) A declaration of intention and an announcement.
   b) An invitation to make an offer or to do business.
Example: Quotations, Catalogues etc.
Example: Pharmaceutical society of Great Britain Vs Boots cash chemist.1953: Goods are sold in a shop under the self-service system the customer selects the goods in the shop and takes them to the casual for payment contract is entered into only on payment and receipt of the goods.

4. An offer must be communicated:
   It must be complete and communicated to whom it is made.
Example: Lalman Vs GauriDutt
   ‘S’ sent his servant ‘L’ to trace his missing nephew. He then announced a cash reward for the person who traced his missing nephew. ‘L’ traced ‘S’ s missing nephew in ignorance of the announcement and then tiered to claim the reward held he was not entitled to the reward as it was communicated to him.

5. Offer must be made with a view to obtaining the assent of the other.

6. Offer should not contain a term, the non-compliance of which may be assume to amount to acceptance.
   Example: ‘A’ wants to sell his house to be for Rs. 100000 but if there is no communication from ‘B’ it does not amount to acceptance and held there is no contract.

7. A statement of price is not an offer.

Tenders:
1. A tender is an offer and may be a definite offered to supply specified goods or services.
2. Tender as a standing offer where goods or services are required over a certain period a tender may invite tenders as a standing offer.
3. ‘A’ invites tender for a supply of 100000 bricks. X Y and Z submits the tender ‘A’ accepts ‘X’s tenders there is a binding contact between ‘A’ and ‘X’

Special terms in a contract:

   If a special term is to be included in a contract. It must be duly brought to the notice of the offeree. At the time when the proposal is made, if it is not done and if the contract is subsequently enter into the offeree will not be bound by them and these terms should be presented in such a
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manner that a reasonable man can become aware of them before he enters into a contract.

Example: Parker Vs South East Rail co 1877

‘P’ deposited a bag in the cloak room of the railway station. On the face of ticket was mentioned “Refer back” one of the printed conditions limited the liability of the company for the loss of package to 10 pounds the bag was lost and ‘P’ claimed 24.5 pounds as its value held. ‘P’ was bound by the conditions specified behind the ticket. even though he had not read it.

If conditions are printed on the back of the ticket but there are no words at all on the face of it to draw the attention of the person concerned to those attentions he is not bound by them. However, if the conditions are contained in the voucher for payment of money, which is not generally supposed to contain the conditions of the contract. They do not bind the person receiving the receipt.

Ordinarily the acceptance of a document containing the contract implies acceptance of all terms contained in the document exceptions are however made in the following cases:

1. Where there is Mis-representation or fraud.
2. When a notice of the terms in insufficient
   Example: Henderson Vs Stephenson Case 1875.
   ‘A’ Purchased a tickets from Dublin to white heaven behind the ticket there was a term that the carrying company was not liable for the loss of any kind. But there was no indication on the face of the ticket. To draw ‘A’ s attention to their terms and conditions behind the ticket. Held ‘A’ was not bound by tis conditions, and there was nothing to lead the purchaser of the ticket to tis additional term and conditions

Cross offer:
When two parties make identical offer to each other in ignorance of each other’s offer there are called cross offers.

Counter offer:
Rejection of the original offer by the offeree and acceptance of the new offer amounts to counter offer.
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ACCEPTANCE

A contract arises from the acceptance of the offer. It is the willingness given by the offeree to the offer. “it is an offer as to what a lighted match is to a train of a gun powder”. An offer when accepted becomes a promise.

An acceptance may be expressed or implied.

Example: At an auction sales “S” is the highest bidder. The Auctioneer accept the offer by striking the hammer on the table this is an implied acceptance.

Example: **Boulton Vs Jones Case 1857.** Boulton bought a hose pipe (water pipe) business from Brocklehurst, Brocklehurst owed some debt to Jones. Jones placed an order with Brocklehurst for which Boulton supplied the goods. Even though he did not receive the order for goods held as the offer was made to Brocklehurst, it was not in the powder of Boulton to step in and accept and therefore there was no contract.

**Legal rules as to acceptance:**

1. It must be absolute and un-qualified and must confirm with the offer. These may be no contract in case of cross and counter offers.
2. It must be communicated with the offeror.

Example: **Felthouse Vs Bindley Case 1862.** “F” offered to buy his nephew’s horse for 30 pounds saying “if I hear no more from you I shall consider the horse for 30 pounds”. The nephew did not write to “F” at all but e told his auctioneer not to tell that horse to any one as it was already sold to his uncle. The auctioneer unknowingly sold the horse, held “F” had no right of action against the auctioneer as there was no proper communication of acceptance.

3. It must be according to the mode present or usual and reasonable mode. This must also be properly communicated to the offeree, otherwise the offeror is deemed to have accepted the acceptance.
4. Acceptance must be given within a reasonable time: in case any specified time limit is given or within a reasonable time.
5. Acceptance cannot precede an offer: it than does not amount to valid acceptance and does not create a contract.
6. It must show and intention on the part of the acceptor to fulfil the terms of the promise. Otherwise it cannot be considered as a valid one.
7. It must be given by the party or parties to whom an offer is made.
8. It must be given before the offer lapses or before the offer is withdrawn.
9. It cannot be implied from silence:

Example: ‘A’ wrote to ‘B’ “I offer you my car for Rs. 50000. If I don’t here from you within a week I shall assume you have accepted. ‘B’ does not reply at all. There is no contract.

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When an offeree accepts an offer “subject to contract or Formal contract the
matter remains in the negotiation stage and the parties do not intend to be
bound until a formal contract is prepared and signed them”.

Acceptance to agree in future:
There is no contract if the parties have not agreed upon the terms of
the contract but have made an agreement to agree in future.
Example: Loftus Vs Roberts 1902
An actress was engaged by theatre company for a certain period.
One of the terms of the agreement was that if the play was sown in London.
She would be engaged at a salary to be mutually agreed upon held that there
was no contract.

Communication of offer, Acceptance, and Revocation:
An offer is Acceptances and their Revocation or withdrawal is complete
through communication.

Modes of communication:
The Acceptance or Revocation may be made either through spoken words or
in writing or through the conduct of parties.
Example: Installation of a weighing Machine at a public place is an offer,
putting a coin in the slot of the machine is acceptance of the offer and
switching off the machine refer to revocation of the offer.
Communication of offer is complete when it comes to the knowledge of the
person to whom it is made.
Example: ’A’ proposes to sell his house to ‘B’ at a certain price and letter is
posted on 10th July. It reaches ‘B’ on 12th July therefore the offer is complete
on 12th July ‘B’ gives his acceptances that reaches on ’A’ on 15th July on which
the date acceptance is complete supposing ’A’ withdraws his offer by sending
a communication earlier than the offer reaches ‘B’ it amounts to Revocation of
the offer or withdrawal of the offer being complete.

A Proposal may be revoked at any time before the communication of its
acceptance is complete as against the proposer, but not afterwards.
Acceptance may be revoked at any time before the communication of its
is complete as against the acceptor, but not afterwards.

An acceptance is complete as against the offeror as soon as the letter of
acceptance is posted. The contract is complete even if the letter of acceptance
is lost. But it is essential that the letter of acceptance is correctly addressed
stamped and posted, otherwise it is not complete. However these things are
done properly and still the letter does not reach the offeror the acceptor may
not be held responsible.

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An Offer comes to an end:

By Revocation or lapse or rejection of the offeror i.e,

1. By communication of notice of Revocation: By the offeror at any time before its acceptance is complete as against it.
2. By lapse of time: if the acceptance is not made within the prescribed time.
3. By non-fulfilment of certain conditions, precedent to acceptance.
   Example: ‘X’ agrees to sell certain goods subject to conditions that why the buyer pays the agreed price before a certain date.
   If ‘Y’ fails to pay the price by that date than the Offer stands revoked.
4. By death or insanity of the offeror: Provided the offeree comes to know of it before acceptance.
5. If a counter offer is made.
6. If the offer is not according to the prescribed or usual mode.
7. If the law is changed in case of contract that are illegal in capable of being performed.
8. An offer can be however revoked under the following rules:
   a) Before the acceptance is complete.
   b) Revocation must be communicated to the offeree
   c) On lapse of a certain reasonable period for offer
   d) If there is no consideration for keeping the offer open.

Rejection of offer:
It may be either expressed or implied. Expressed rejection is effective only when the notice of rejection reaches the offeror. Implied rejection may happen in case of counter offer or conditional acceptance.

CONSIDERATION

This is the next important element of a contract. An agreement without consideration is void. When a party to an agreement promises to do something, he must get something in return and this is known as consideration.
In the words of ‘Pollock’ “consideration is the price for which the promise of the other is bought” in the English case of Curie Vs Misa, “A valuable consideration in the sense of law may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, laws or responsibility given, suffered or undertaken by the other”.
In case of Abdul Vs Masum Ali Case 1914: The secretary of a mosque filed a suit to enforce a promise which the promisor had made to subscribe Rs.500/-
for re-building the mosque held the promise was unenforceable because there was no consideration in the sense of the benefit.

In Kedar Nath Vs Gauri Mohamed Case 1886 the fact of this case were almost similar to those of the previous case. But the secretary in turn suffered a liability on the strength of the promise held the promise could be enforced to the extent of the liability suffered even though there was no consideration. As per sec 2(d) of the Indian contract act of 1872 consideration is defined as “when at the desire of the promisor, the promisee or any other person has done or abstained from doing, does or abstains from doing promises to do or to abstains from doing something such act or abstinence or promise is called consideration for the promise”.

Example: ‘A’ Promises to pay the price to ‘B’ sells the goods on credit to ‘C’ thus sale of goods to ‘C’ is the consideration of ‘A’ s promise.

Example: ‘D’ Promises ‘E’ not to file a suit against him, if he pays him Rs.500. thus the abstinence is sufficient consideration of ‘E’ against ‘B’ promise.

**Legal rules as to consideration:**

1. **Consideration must move at the desire of promisor**
   
   Example: Durga Prasad Vs Baldeo case 1880, ‘B’ spent some money on the improvement of a market at the desire of the collector of the district. In consideration of this ‘D’ who was using the market, promises to pay some money to ‘B’ held the agreement was void being without consideration.

2. **It may move from the promise or any other person:** under the English law, stranger to a contract cannot sue if he is not a party to the contract.
   
   Example: Chinnayya Vs Ramayya Case 1882: An old lady by a deed of gift made over a property to her daughter ‘D’ under the direction that she should pay her aunt ‘P’ a certain sum of money annually the same day ‘D’ entered into an agreement with ‘P’ to pay her the agreed amount. Later ‘D’ refused to pay the amount on the plea that no consideration had moved from ‘P’ to ‘D’ held ‘P’ was entitled to maintain her suit as consideration had moved from the old lady in favour of her sister to ‘D’

3. **It may be an act abstinence or forbearance or a written promise:**

   a) **Forbearance to sue:** if a person who could sue another for an enforcement of right agree not to pursue his claims. It constitutes a good consideration for a promise by the other person. It result in a benefit of the person who is not sued and a loss to the person who could sue.

   Example: ‘Debi Radha Rani Vs Ramdoss case 1941: ‘D’ is ready to sue her husband for maintenance allowances when her husband agrees for it. She forbears to sue against her husband consideration.
b) Compromised of a disputed claim: this is also a kind of forbearance and the claim must be a bonafied claim and no a frivolous claim.
c) Composition with the creditors: a debtor who is financially embarrassed may called for a meeting of his creditors and request them to accept a lesser amount in satisfaction of their debt.

4. It may be past, present or future consideration:
   a) When consideration by a party for a present promise was given in the past.
      Example: ’A’ renders some service to ‘B’ for which ‘B’ promises to compensate ‘A’s service rendered to him in future. ’A’ can recover the promised amount.
   b) Present or executed consideration: when consideration is given with a simultaneous promise.
      Example: ’A’ sold goods worth Rs. 500/- to ‘B’ for which ‘B’ pays the amount and receives the delivery of goods.
   c) Future or executory consideration:
      Example: ‘D’ promises to deliver certain goods to ‘E’ after a week and ‘E’ promises to pay the amount after a fortnight consideration here is future or executory.

5. Consideration need not be adequate: that means it need not to be equal to the worth of something received.
   Example: ‘A’ sells his car worth Rs. 100000 for Rs. 10000. ‘A’ s consent to the agreement is freely given. The agreement will be a contract notwithstanding ‘A’s inadequacy of consideration.

6. Consideration must be real and must not be illusory: it must be competent and must have some value in the eyes of law
   a) There must be physical possibility of performing a promise.
      Example: ‘A’ promises to put life into ‘B’s dead wife
   b) It must be certain and legal.
      Example: ‘X’ engages ‘Y’ to do some work for certain sum of money. Here the consideration is not clear and is vague.

7. It must be something which the promisor is not already bound to do:
   supposing he is required to do it under the contract already promised. It does not form sufficient consideration.

8. Consideration must not be immoral or oppose to public policy.

**Stranger to a contract:**
In the general rule of a law it is that only parties to a contract may sue and he sued on that contract. The rule is based on the principal of Doctrine of Privity of contract which means relationship subsisting between parties who have entered into contractual agreements.

The two consequences under Doctrine of Privity of contract are:
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a) A Person not a party to a contract cannot sue upon it, even though the contract is for his benefit and he provided consideration.
b) A contract cannot confer rights or impose obligations arising under it on any person other than the parties to it.
Example: Dunlop pneumatic tyre co. ltd. Vs Selfridge and co. ltd 1915: ‘S’ bought tyre from Dunlop Rubber co. and sold them to ‘D’ a sub dealer who agreed to with ‘S’ not to sell below Dunlop’s list price and to pay Dunlop’s co. 5 pounds as damages on every tyre ‘D’ under sold. ‘D’ sold two tyre less than the list price of Dunlop co. and Dunlop co. sued ‘D’ for the breach held Dunlop co. could not maintain the suit as he was a stranger to the contract.

Exceptions to the rule:
1. A trust or charge: a person who is beneficiary and in whose favour a trust or other interest in some specific property has been created and enforced at even though he is not a party to the contract.
Ex: a) ‘J’ agrees to transfer certain property to be held by ‘K’ in trust for the benefit of ‘P’, ‘P’ can enforce the agreement even though he is not a party to the contract.
b) Gandy Vs Gandy case: a husband who was separated from his wife executed a separation deed by which he promised to pay the trustees all expenses for the maintenance of his wife held the agreement created a trust in favour of his wife and could be enforced by her in the court of law.

2. Marriage settlement, partition or other family arrangement: under this situation a provision is made for the benefit of a person he may sue all though he is not a party to the agreement.
Ex: In Darapathy Vs Jaspath rai case: ‘J’ s wife deserted him because of his ill treatment than ‘J’ entered into an agreement with is father in law that he would treat her properly and pay her a monthly maintenance subsequently, she was ill-treated and driven out held she was entitled to enforce the promise made by ‘J’ to her father.

3. Acknowledgement or estoppel: where the promise by his contract acknowledgement or otherwise constituted himself as an agent of the third party a binding obligation is there by created by him towards the third party.
Ex: if ‘P’ receives some amount to be paid to ‘Q’ from ‘R’ then ‘P’ has a binding agreement towards ‘Q’ & ‘Q’ can recover the amount from ‘P’.

4. Assignment of a contract: the assignment of rights and benefits under a contract not involving personal skill can enforce the contract subject to equities between the parties. Thus the holder in due course of negotiable instrument can realise the amount on it.
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Even though there is no contract between him and the person liable to pay.

5. Contracts through an agent: the principle can enforce the contract entered into by his agent provided the agent acts within the scope of the authority and in the name of the principle.

6. Convenants running with the land: in case of transfer of immoveable property the purchaser of the land with the notice f the land owner is bound by certain conditions or convenants created by an agreement affecting the land and shall be bound by them even tough he was not a party to the original agreement.

A contract without consideration is void exception to it:

The general rule is that an agreement without consideration is a nude contract and is considered as void. But there are certain exception to the rule.

1. Natural love and affection: as per sec 25 (1) of the Indian contract act, an agreement without consideration is void unless it is expressed in writing and is registered under the law for the time being in force for the registration of the document and is made on account of natural love and affection between parties standing in relation to each other.
Ex: Raj lukhy Vs Bhoot Nath Case: an agreement entered into by a husband with his wife during quarrels and dis agreement where by the husband promised to give some property to his wife. This agreement is void because of the absence of natural love and affection between the parties.

2. Compensation for voluntary service: A promise to compensate wholly or in part a person who has already voluntarily done something for the promisor is enforceable even though without consideration. In simple words a promise to pay for the past voluntary service in binding.
Ex: ‘X’ finds ‘Y’ s missing son and gets him to ‘Y’. ‘Y’ promises to pay ‘X’ a sum of Rs. 10000
a) Therefore it must be something done for the promisor
b) Promisor must be competent to the contract
c) Promises must be in existence when the act was done.

3. Promise to pay a time barred debt: A promise by a debtor to pay a time barred debt is enforceable provided it is in writing and his signed by the debtor or by his agent. Generally or specifically authorised in that behalf. The promise may be to pay the whole or any part of the debt. The debt must be such of which the creditor might have enforced payment. But for the law of limitations of suits. A debt is barred by limitation if it remains
unpaid or unclaimed for a period of 3 years. Such a debt becomes legally irrecoverable.

4. Completed gifts: it does not require consideration
5. Agreement to great agency does not require consideration
6. Charitable subscription: where the promise on the strength of the promise on makes commitment that changes the position of his detriment.

CAPACITY TO CONTRACT

It means competency of parties to enter into a valid agreement. As per sec 10 of the Indian contract act and agreement becomes a contract if it is entered into between the parties who are competent to contract as per sec 11 every person is competent to contract if he is of:

a) Sound mind
b) Has attained the age of majority
c) Is not disqualified from contracting by any law to which he is subject to.
   Thus incompetent persons under the contract are:
   a) Minor
   b) Person of unsound mind
   c) Persons disqualified by any law to which they are subject to.

MINORS:

As per sec 3 of the Indian Majority Act of 1875, “A Minor is one who has not completed 18 years of age .” but in case where the guardian of the minor person or property is appointed or where the minor’s property is taken over by the court of words the minority continue up to the completion of 21 years of his age. Thus a minor is not competent to contract and contract entered into with him is absolutely void. Thus the law protects the minor, preserves their rights and estates, excuses their negligence and mistakes and assist them in their pleadings.
The judges are their councillors, the jury their servants and the law is their guardian.

Legal Rules relating to minor’s contract:
1. Contract with a minor is absolutely void Ab initio: A minor is neither liable to perform what he has promise to do under an agreement nor he is liable to repay the money that he has received under it. The principle behind it is a minor is in capable of judging what is good or bad for him.
Example: Mohini Bibi Vs Dharmadas Ghose case: A minor executed a mortgage for a sum of Rs. 20000 out of which he has received Rs. 8000. The minor filed a suit subsequently for setting aside the mortgage. The money
lender claimed a refund of Rs. 8000 from the minor. It was held that Contract with the minor is void and therefore the money lender could not recover the amount from the minor.

2. A minor can be a promise or a beneficiary: These Contract may be enforced at the option of the minor and not at the option of the other party.

Example: ‘A’ aged 16 years agreed to purchase a second hand scooter for Rs.1000 from ‘B’. he paid Rs.500 as advanced and agreed to pay the balance the next day and collect the scooter, he told him that he had changed is mind the next day and offered to return the advance. ’B’ cannot avoid the contract though ‘A’ may if he wants.

3. His agreement cannot be ratified by him on attaining the majority consideration which was passed under the earlier contract cannot be implied into the Contract which the minor enters on attaining majority.

Example: ‘j’ a minor borrows Rs.20000 from ‘K’ and executes a promissory note in favour of ‘K’ after attaining majority he executes another promissory notes in settlement of the first note. The second promissory note is void for want of consideration.

Example: Smith Vs King case: K an infant speculated on a stock exchange and became liable to the stock brokers for 547 pounds. Subsequent to his attaining the age of majority. He gave to bills for 50 pounds each in satisfaction of the original debt. held ‘K’ was not liable on the bills.

4. If a minor has received any benefit under a void agreement, he cannot be asked to compensate for it.

Example: ‘C’ a minor obtains loans by mortgaging his property. he is not liable to refund the loan nor his debt can be claimed from his mortgaged property.

5. A minor can always plead minority: Even if he has, by mis-representing his age induced the other party to contract with him he cannot be sued either in contract or for fraud as agreement with him is itself void.

6. There can be no specific performance of the agreement entered into with him as they are void Ab initio: A contract entered into on his behalf by his parents, guardian or manager of his estate can be specifically enforced by or against the minor provided the contract is:

a) With in the scope of the authority of the parent guardian or manager and

b) Is for the benefit of the minor

7. A minor cannot enter into a partnership: But he may be admitted to the benefits of an already existing partnership with the consent of the other partners.

8. A minor cannot be a ad judge insolvent- as he his incapable of entering into a contract.
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9. He is liable for the ‘necessaries’ supplied to him or any one whom he is legally bound to support.
10. A minor can be an agent: he may bind the principal with the third party by his act. And without incurring any personal liability.
11. His parents or a guardian are not liable for the contract entered into with him even though the contract is for the supply of necessaries to the minor.
12. A minor is not liable torts or civil mistake committed by him: the term ‘necessaries’ is not defined in the Indian Contract Act but the English Sale of Goods Act 1893 defines it under sec 2 as good suitable to the conditions in life of such infant or other person and to is actual requirement at the time of sale and delivery.

Necessary Goods provided to a minor are a goods that are required for mere existence such as food clothing and shelter, even services renders to a minor such as education training for a trade, medical expenses, legal advice, provision of a funeral for a deceased husband of a minor widow. A house given to a minor on rent for the purpose of living and continuing the studies may also be regarded as necessaries for which the minor will be liable to pay out of his private estate. Though they are beneficial to him. A loan obtained by a minor to take necessaries also binds him and it is recoverable by the lender. though the minor is not personally liable for it. He may pay out of his private estate.

PERSONS OF UNSOUND MIND:
Sec 12 of the Act defines a person who is of sound mind as a person who has a sound mind for the purpose of making a contract if at the time he makes it, is capable of understanding it and forming a rational judgement as to it effect upon his interest. The person who is usually of unsound mind but occasionally of sound mind may make a contract when he is of sound mind. Thus a contract by a lunatic or an insane person is void, as he is not a competent authority to contract.

A person who is usually of sound mind but occasionally of unsound mind may make a contract when he is of sound mind. Thus a contract by a lunatic or an insane person is void, as he is not a competent authority to contract.

An idiot is a person who has completely lost his mental powers and is not in a position to understand even a simple subject matter. Thus an agreement with him is also void.

Contract enter into with a drunkard is absolutely void as he is not able to form a rational judgement which he is intoxicated.

CONTRACT WITH OTHER PERSONS SUCH AS:
1. Alien: he is a person who is not a subject to the republic of India. An alien may be a friend or an enemy contract with an alien friend is a valid contract
subject to certain restrictions. Contract with an alien enemy may be studied under two heads namely contracts during the war and contract before the war. Contract during the war is void provided he receives a licence from the government contract before the war may be suspended in the course when the war breaks out.

Foreign sovereign or foreign diplomat and representatives enjoy special privileges and generally cannot be sued unless they have their own submit to the jurisdiction of our law courts and the central government has to grant permission for it.

2. Corporation: it is an artificial person created by law under the company Act 1956 having legal existence apart from it members it can sue and be sued independently and is registered under the companies Act of 1956.

3. Contracts with pardah nasheen women: she is one who by the custom of the country to which she belongs to has to observe complete seclusion (separation) to make the agreement legally binding and valid one, it is necessary that she is made of the agreement.

4. Contract by married woman: A married woman or a single woman can enter into a contract on attaining majority. A married woman need not even obtain her husband’s consent to enter into a valid contract even bind her husband’s property for obtaining necessaries. But the property acquired by a married woman. through her own skill is deemed to be a separate property and she can sue and be sued in her won name with respect to her separate property.

5. Insolvent: when a debtor is adjudged insolvent his property vests in the hands of the official receiver or assigned. The insolvent is deprived of his power to deal in that property it is only the official receiver or the assign who can enter into contract relating to his property sued on behalf of the insolvent.

6. Convicts: They are the persons who undergo imprisonment penalty. Contract entered into with him is void provided he is under a license and has obtained the ticket of leave or his penalty expires.

FREE CONSENT

Parties to a contract must give their free consent and there must be consensus ad idem. Their consent must be free as per sec 13 of the Act. Two or more person are said to have given their consent when they agree upon the same things in the same senses as to the subject matter of the contract. This is known as consensus ad idem.

Parties consenting to the same things in the same senses is not sufficient. A Free consent is one which is not caused by:

1. Coercion
2. Undue influence
3. Fraud
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4. Misrepresentation
5. Mistake

When there is no free consent there is no contract. The contract becomes voidable at the instance of the party whose consent was not free.
Example: Baladevi Vs Majumdar case: an illiterate women executed a deed of gift in favour of her nephew under the impression that she was executing a deed authorising her nephew to manage her lands. The evidence showed that the women never intended to execute such deed of gift nor was the deed ever read or explained to her held the deed was void and in operative.
Example: ‘X’ was forced to sign a promissory note at a pistol point. The contract at voidable the instance of ‘X’ and their is no consent of Mr. ‘X’

1. COERCION:
Coercion is committing or threatening to commit an Act forbidden by the IPC 1860 or the unlawful detaining or threatening to retain any property to the prejudice of any person whatever with the intention of causing the other persons to enter into an agreement.
Coercion may be caused either by a stranger or by a party to the contract with the intention of making the other person to enter into an agreement.
Coercion cause fear, physical compulsion and menace to goods (damages) consent is said to be caused by coercion when it is obtained by:
a) Committing or threatening to commit an Act forbidden by the IPC 1860:
Example: Ranganayakamma Vs Alwar shetty case 1889, A young girl of 13 years who become a widow was forced to adopt a boy to cremate her deceased husband. Tis consent was not free and was induce by coercion consequently need not hold good and the adaptation of the boy was set aside.
b) unlawful detaining or threatening to detain any property:
Example: Mutaiah Vs Muttu karuppa case1927, an agent refused to and over the books of accounts of the business to the new agent anti the principal released him for all the liabilities, the principle was forced to executed a released deed which was caused by coercion and was voidable at the option of the principal.
c) A threat to commit suicide is coercion:
Example: in Amiraju Vs Sheshamma case, A husband held out a threat of suicide to his wife and son if they refuse to execute a property in his favour of his brother: the wife and the son executed a release in consequence of the treat held the attempt to commit a suicide was coercion and was voidable at the option of the wife and son.

Thus coercion is:

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1. An act forbidden by the IPC 1860 and is punishable under law.
2. Coercion may proceed from any person to or not a party to the contract.
3. Coercion involves physical compulsion and damage to goods and property.
4. The act of coercion must have been done or threatened with an intention of causing the other person to enter into an agreement.
5. It does not matter whether the IPC is not in force in place where the coercion is employed.
6. Coercion also involves unlawful detaining of property of another person.

**Effects of coercion:**
1. It is voidable at the instance of the party whose consent was so caused.
2. A person to whom have been paid or anything delivered under coercion is required to repay or return it.
3. A person whose consent is obtained by coercion he may rescind the contract within a reasonable time under specific relief Act of 1963.
4. Duress: it means coercion under the English case law, it involves actual or threatened violence by one person over the other person with a view to obtain the consent of the other person to the agreement.

2. **UN-DUE INFLUENCE:** Sec 16(1):
   Defines Undue influence as “A contract is said to be induced by Un-due influence where the relationship subsisting between parties are such that one of the parties is in apposition to dominate the will of the other and uses that position to obtain an unfair advantages over the other.
   A person is deemed to be in a position to dominate the will another:
a) Where he holds a real apparent authority over the other. Ex: doctor and patient, master and servant, teacher, student, employment and employee.
b) Where he stands in the fiduciary relationship i.e, the relationship of mutual trust and confidence. Ex: Solicitor and client, promoter and company, father and son etc.
c) Where e makes a contract with a person whose mental capacity is temporarily or permanently affected by reasons of illness, mental or physical distress etc.
   Ex: A spiritual guru induced his devotee to gift to him the whole of his property in return of a promise salvation of the devote. Held the consent of the devotee was given under undue influence.

**Effects:**
When a consent to an agreement is caused by Undue influence the agreement is a contract voidable at the option of the other party who consent was so caused.

The party to the contract under un-due influence may rescind the contract.
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Difference between coercion and undue influence:

1. In case of coercion consent to the agreement is obtained by committing or threatening to commit an act punishable under IPC 1860, where as

   In case of undue influence consent is obtained by dominating the will of the other.
2. Coercion involves physical force while undue influence involves moral pressure.
3. Coercion may proceed from a stranger and may be directed against a stranger but, undue influence must strictly come from a party to a contract.
4. Coercion attract the provisions of IPC 1860, and is a criminal liability, but undue influence is not as such
5. There must be an intention of causing another person to enter into an agreement in case of coercion, where as in case of undue influence the party uses its position to obtain unfair advantage over the other party.

Contract with parda-Nasheen woman:

Any person who enters into a contract with parsda-Nasheen woman has strictly to prove that no undue influence was used and she had free and independent advice and had understood the contents of the contract before entering into it.

A parda-Nasheen woman is one who observes completes seclusion because of a customer to a particular community to which she belongs to.

3. MIS-REPRESENTATION:

A statement of Act that a party makes in the course of negotiations with a view to induce another party to enter into a contract is known as representation. It must relate to some fact i.e, material to the contract and may be either in spoken or in return written words.

A representation when wrongly made either innocently or ignorantly is mis-representation.

When representation is deliberately made with a intension to deceive it is fraud.

Thus mis- representation is fails statement where the person making it honestly believes it to be true. It is a non: disclosure of material fact suppression of facts without an intension to deceive.

Ex: ’A’ while selling his horse to ‘B’ tells that his horse is fit but later on ‘B’ finds the horse to be a mis fit.it is mis- representation of the part of ‘A’.

As per sec 18 of the act ‘Mis- representation is defined as’:

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1. Mis-representation is that which a person positively asserts that a fact is true when his information does not warrant it to be sold though he believes it to be true.
2. When there is a breach of duty by a person which brings an advantage to the person committing it by misleading another to his prejudice.
3. When a party causes however substance of the thing which is the subject matter of the agreement

Elements of Mis-representation:
1. It must be a representation of material fact, mere expression of the opinion does not amount to mis-representation, even if turns out to wrong.
2. It must be made before the conclusion of the contract with a view to induce the other party to enter into a contract.
3. It must actually have been acted upon by the other person under a contract
4. It must be made within the intension that it should be act upon by the person to whom it is addressed.
5. It must be actually wrong but the person making it believes it to be true.
6. It must be made without only intension to deceive other party under the contract.

Effects of Mis-representation:
The aggrieved party in case mis-representation has to:
1. Avoid the contract
2. Rescind (cancel) the contract within a reasonable time under specific relief Act 1963.
3. If default is committed the party making mis-representation is entitled for damages.

4. FRAUD:
   Sec 17 of the act defines fraud as: Fraud means and includes any of the following acts committed by
1. Party to a contract
2. With his connivance or intension to do so.
3. By his agent with the intension to deceive another party there to or his agent or to induced him to enter into a contract. thus fraud is
   a) A suggestion as to a fact of that which is not true by one who does not believe it to be true.
   b) The active concealment of a fact by one having knowledge believes of the fact.
   c) It is a promise made without an intension of performing it.
   d) It is any other act fitted to deceive.
   e) Any search act or omission as the law specially declares to be fradulant.
   f) Mere silence as to facts likely to affect the willingness of person to enter into a contract is not fraud unless the circumstance of the case is deliberate
g) Concealment of facts.

Essential of fraud:
1. There must be an intention to deceive.
2. The Act must be done by a party to the contract or with his connivance or by his agent.
3. There must be false representation of facts
4. There must be an active concealment of fact of which he has the knowledge and duty to disclose.
5. There must be a false promise without an intention of performing it.
6. The party so induced must have acted upon it and must have suffered a loss.

Therefore fraud includes all surprise tricks and any other unfair means where a person is deceived

Example: Reese River Silver mining co. Vs with case: A shareholder wanted to avoid the contract because he had taken shares on the face of the prospectus which provided false information. It was held at the shareholder could avoid the contract as the false information in the prospectus amounted to fraud.

Exception under situation:

Where a contract is not voidable due to fraud

1. Deceit: which does not deceive in no fraud where in the other party is fully aware of the deceit and thus not suffer any damages.
2. Negligence or carelessness is no fraud: Derry Vs. Peck case: the directors of a Trambay co. issued a prospectus stating that through a special act of parliament. The co. had been authorized to use steam power. But steam power could be used with the consent of the government authority. The director honestly believed that the permission for the use of steam power would be granted however the board of trade refused the permission it was held that the board of directors were not liable for fraud since they did it in good faith.
3. Ignorance is no fraud: where a party enters into a contract in ignorance of fraud. The contract is not voidable.
4. Waiver: when a party deceived takes the benefit of the contract or waives the fraud and his consent to the contract becomes valid.
5. Mere silence: as to fact likely to effect the willingness of the person to enter into a contract is no fraud.

Mere silence does not constitute fraud:
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1. Mere silence without any duty to speak is not fraud
2. Mere silence as to facts likely to effect the willingness of the person to enter
   into a contract is not fraud.
3. Silence is fraud where:
   a) Situation of the case is such that it was the duty of the person to speak and
      disclose the fact instead of keeping silent
   b) Where silence is itself equivalent to speech. Ex: in a contract of
      unberrmafeidi i.e, utmost good faith there is duty to speak.
4. Fradulant silence to deceive but not getting deceived is no fraud.

Effects:
1. Contract is voidable at the option of the party whose consent was so caused.
2. The Party who have suffered the damages due to fraud may sue for damage
   and rescind the contract.

Difference between Mis representation and fraud:
1. In case of Mis representation there is no intention to deceive , where in case of
   fraud there is intention to deceive.
2. In case of Mis representation it is a false statement made innocently, where as
   in case of fraud there is a false statement deliberately mode
3. In case of Mis representation the contract can be entread into if the party
   whose consent was so caused could discover the truth with ordinary
   diligence, where as in case of fraud the contract is avoided except in case
   where silence on the part vof the party did not amount to fraud.

MIISTAKE:
An erroneous belief about something is called as a mistake. When an
agreement is entered into under a mistake the consent is not free. Mistake is
of 2 kinds namely
1. Mistake of Fact: there is a common saying as to ignorantia Juris non
   excuse at which means ignorance of law is not an excuse. A party cannot be
   allowed to get any relief on the ground that he had done a particular act in
   ignorance of law.
2. Mistake of Law: this mistake could be of 2 types i.e, bilateral mistake
   and unilateral mistake
   In case of Bilateral mistake both parties to an agreement are under a mistake
   as to the matter of fact essential to the agreement and the agreement is void.
   Bilateral or mutual mistake as to an existing fact essential to an agreement is
   void as both the parties to a contract are at a mistake must relate to a matter of
   fact essential to the agreement.
   An Unilateral mistake is one where in one party to an agreement makes a
   mistake and the contract is not voidable merely because it was caused by one
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of the party to the contract being under a mistake as to the matter of fact essential to an agreement.

Various types of bilateral mistake:
1. Mistake as to Subject Matter of the contract here both the parties to a contract or a mistake to the subject matter of the contract. The other types of mistake which fall under this category are:

a) Mistake as to Existence of Subject Matter: where both the parties to the agreement believe in the existence of the subject matter. But the subject matter is not prevalent at the time of contract there happens to be a mistake. Ex: ‘A’ agrees to buy horse from ‘B’ it turns out that the horse is dead at the time of a contract then neither of the party was aware of the fact. The agreement was void.
b) Mistake as to Identity of Subject Matter: it usually arise where one party intends to deal in one thing and the other party to deal in another. Ex: ‘A’ contracted with ‘B’ to sell 100mts of cotton silk Fabric but B presumed it to be polycot fabric.
c) Mistake as to Quality of Subject Matter: if the Subject Matter is something essentially different from what the parties thought it to be then the agreement is void. Ex: Nicholoson and Veen Vs. Smith Marriott case: Table napkins were sold at an auction by a description with the crest of Charles I, the authentic property of that Monarch, but the napkins were actually Georgian held the agreement was void as there was the mistake in the Quality of Subject Matter
d) Mistake as to Quantity of Subject Matter: if both the parties are working under a mistake as to Quantity of Subject Matter. The agreement is void. Ex: Cox Vs. Prentice case: A silver bar was sold under a mistake as to its weight there was a differences in volume between the weight of the bar and as it was supposed to be held the agreement is void.
e) Mistake as to the title of Subject Matter causes a void agreement. Ex: A seller sells a thing which is not entitled to sell and both the parties to an agreement do not coincide with the price of the Subject Matter then the agreement is void.
f) Mistake as to the possibility of performance of the contract: A contract becomes void, if it becomes physically and legally impossible to perform.

Unilateral Mistake [section 22]:

The term 'unilateral mistake' means where only one party to the agreement is under a mistake. According to section 22, "A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to matter
If only one party is under confusion, it is called Unilateral Mistake. In case of Unilateral Mistake Contract cannot be avoided.

- For example: A wants to sell away his house at a price of $6000. He makes an offer to B and by mistake he quotes a price of $5000 to which B gives his acceptance. Here only A is under mistake. It is unilateral mistake and Contract cannot be avoided.

**Exceptions for Unilateral Mistake:**

The following are the exceptions where contract can be avoided though there is Unilateral Mistake.

**Mistake as to identity of Parties:** If only one party is under confusion with regard to identification of party, Contract can be avoided.

- A case on this point is “Lake Vs Simons. In this case A is a gold merchant and B is a dacoit woman. She convinces A that she is wife of Charles and thus obtains some Ornaments on Credit basis. Here only A is under mistake. There after B sells away those ornaments to C and goes out of which. Afterwards A comes to know that his Ornaments are at C. He Sues C to get them back. Court decides that Contract can be avoided and hence C is under obligation to return these Ornaments to A. Sale of goods Act says that seller cannot pass on a better title that what he himself has.

**Mistake as to Nature of Contract:** If only one party is under confusion with regard to nature of Contract, then also Contract can be avoided.

A case on this point is Faster Vs Machillon. In this case A is a gentleman and he is not good at sight. B is A` s relative. On one day B brings a bond to A and asks him to sign, saying that it is Surety form. But it is actually bill of exchange, believing that it is Surety bond, ‘A’ signs. Here mistake can be seen only from the side of ‘A’ only. Under this exception Court decides that A can avoid payment of the bill.

**Legality of objectives:**

A contract to be enforced must have a legal purpose of or objectives i.e, consideration of an agreement which must be lawful otherwise the agreement becomes void.

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Situation under which the object is unlawful:

1. If it is forbidden by law: if the object of the consideration of an agreement in doing an act is forbidden by law the agreement is void.
   Ex: ‘A’ promises to obtain for ‘B’ an employment in the public service and ‘B’ promises to pay Rs.5000 to ‘A’. the agreement is void and unlawful.

2. If it is of such a nature that if permitted, it would defeat the provisions of any other law then such an act or agreement becomes void.
   Exc leased a flat to “R” at a rent of 7200 pounds p.a with the objectives of deceiving the municipal authority. Agreement were entered into such the one purporting to lease the flat at 450 pounds p.a and for the other service in connection with the flat at 750 pounds p.a. ‘A’ sued ‘R’ was entitled to remains in possession of the flat for the remainder term of the lease.

3. If it is fraudulent: If the object of an agreement is fraudulent, i.e., to cheat people, it is void. Example: A, B & C enter into an agreement to sell bogus plots of land in Delhi. The agreement is void as it is fraudulent and thereby unlawful.

4. If it involves or implies injury to the person or property of another: Law protects property and person of its citizens. It cannot permit any contract which results in an injury to the person or property of any one.

   Examples: (1) ‘A’ promises to pay ₹. 500 to ‘B’ if ‘B’ beats ‘C’. It involves injury to ‘C’, hence it is unlawful and void.

5. If the court considered it as immoral: An agreement is unlawful on the ground of immorality in the following case.

   Where the consideration is the act of sexual immorality or physical immorality such an prostitution, human sacrifice etc.

6. When the court regards it as opposed to public policy.

   Unlawful and illegal agreement: An illegal agreement is one which is a void agreement and it is not enforceable by law. It is void right from the beginning. An agreement to commit a crime or tort, an agreement to assault is an illegal agreement.

   An illegal agreement’s unlawful, but every unlawful agreement need not to be illegal.

   Illegal acts are those acts which involves the commission of a crime and is opposed to public policy. A criminal act is one which is forbidden by law and
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which effects the sentiments of the society. A crime is a disobedience of law. Ex: A agreement that tries to endanger public safety.

Effect of Illegality: the general rule of law is that no action is allowed on an illegal agreement. Thus an illegal agreement give rise to a void contract and the defendant is always in a better position. The plaintiff may however sue to recover the money paid or property transferred if

a) He was induced to enter into an agreement by fraud, undue influence or coercion.
b) Where he does not have to rely on illegal agreement.
c) Where a substantial part of an illegal agreement has not been carried out an he is truly and genuinely repentant.

Whether illegality is severable: A contract may contain several distinct promise or a promise to do several distinct act of which some are legal and some are illegal. If illegal promise are severable from legal one. Te court will enforce the legal promise and reject the illegal one. If illegal promise cannot be separated from legal one the whole contract becomes legal one and lawful.

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

Ex: A and B agree that A shall sell a house to B for ₹10,000 but that if B uses it as a gambling house, he shall pay A ₹50,000 for it. The first set of promise, i.e., to sell the house and to pay ₹10,000 is a contract. The second set of promise, i.e., B may use the house as a gambling house and pay ₹50,000 is a void agreement.

Alternative promise: In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced. Ex: A agree to indulge in illegal activities for which B agrees to pay sum of Rs. 10000 as salary is a void agreement.

Agreements opposed to public policy: An agreement is said to be opposed to public policy when its harmful to public welfare. A public policy is that principle of law which holds that no subject can lawfully do that which has a mischievous tendency to be injurious to the interest of the public or which is against public welfare or interest. The Doctrine of public policy is only a branch of common law.
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Some of the agreement considered unlawful when oppose to public policy are:

1. **Agreement of Trading with the enemy**: Those contracts which tend either, to benefit an enemy country or to disturb the good relations of a country with a friendly country, are against public policy. Contracts made before the outbreak of hostilities may be performed after the cessation of hostilities unless already cancelled by the parties or the Government.

   A case on this point is Metropolitan Water board Vs Dick Kerr And Company. Metropolitan Water board wants to construct a dam and enters into a contract with people who are aliens (other nation engineers). The contract is breached followed by a war in between the two nations. Metropolitan Water board files a case up on breach of contract. But, the case loses its validity since a war broke out in between the two nations.

2. **Agreement to Commit a Crime**: In case where objective of the agreement is to conduct a Crime like murder etc, it becomes opposed to public policy.

3. **Agreements which interfere with the administration of justice**: an agreement the object of which is to interfere with the administration of justice is unlawful being opposed to public policy. It may take any of the following forms:

   (i) **Agreements to interfere with course of justice**: An agreement for the purpose or to the effect of using improper influence of any kind with judges or offices of justice is void. Thus, an agreement whereby one person agreed to assist another in carrying out litigation for the purpose of delaying execution of a decree as held to be unenforceable.

   (ii) **Siffling Prosecution**: Agreements for shifting prosecution are a well-known class of those contracts which the courts refuse to enforce on this ground. The principle is “that you shall not make a trade of a felony”. If a person has committed an offence he should be punished and, therefore, “no court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the judges and put it in the hands of private individuals.” Thus, a criminal offence cannot be arbitration. but an agreement to refer a civil dispute to arbitration is perfectly valid.

**Example:**

A promises B to drop a court case which he has instituted against B for robbery and promises to restore the value of the things taken. The agreement is void, as its objects is to stifle prosecution.
(iii) **Agreements for improper promotion of litigation**: In this connection there are two types of agreements (i) Maintenance and (ii) champerty.

**Maintenance**: When a stranger agrees to render assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence, it is called maintenance.

**Champery**: Champerity is a species of maintenance. It is a bargain whereby one person promises to assist another in recovering property in consideration of the latter giving the former a share in the property so recovered.

According to English Law, all Maintenance and Chamerty agreements are illegal and unenforceable. But in India, they are perfectly valid if they are made with the bonafide object of assisting a claim believed to be just and the amount of compensation is reasonable. In Bhagwat Dayal Sing V. Debi Dayal Sahu, it was held that “An agreement champertuous according to English Law is not necessarily void in India, it must be against public polciy to render it void here.”

Thus, a fair agreement to supply funds to carry on a suit in consideration of having a share of the property it recovered ought not to be regarded as being per se opposed to public policy. But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable so as to be inequitable against the party, or to be made, not with the bonafide object of assisting claim, but for improper objects, as for the purpose of gambling in litigation so as to be contrary to public policy. The quantum of the share which the financier would get under the agreement is an important matter to be taken into consideration in judging the fairness or otherwise of the agreement.

**Examples**:

(a) A claim was of a simple nature and in fact no suit was necessary to settle it, an agreement to pay Rs. 30,000 to the plaintiff for assisting in recovering the claim was held to be extortionate and inequitable (*Harilal Nath V. Bhailal Pranlal*, 1940).

(b) R agreed to file an appeal in the name of A with the terms that in case of success A would pay half the costs to R and half the purchase price. Held that an agreement to share the property half and half is champertuous and opposed to public policy and, therefore, void.

4. **Agreement in restraint of legal proceedings**: it is treated as a void agreement in cases like:

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• Agreement restricting enforcement of rights: an agreement which wholly or partially prohibits any party from enforcing his rights in respect of any contract is void to that extent.

• Agreements to vary the period of limitation: Agreements the object of which is to curtail or extend the period of limitation prescribed by the Law of Limitation, are void. Agreements cannot be allowed to defeat the provisions of Law unless otherwise so provided in the law itself.

5. Marriage brokerage contracts: An agreement to procure marriage for reward is void. Of course validity of marriage will not be affected but money actually paid cannot be recovered or, if not paid, suit for the recovery of the promised award cannot be maintained.

Example:

(a) A promises to a purohit to pay Rs. 20 in consideration for procuring a second wife for A.

The promise is illegal.

(b) An agreement to pay money to parents or the guardians in consideration of his giving his daughter in marriage is void.

6. Agreements with regard to sale of Public Offices and Titles: Titles and positions in Government will be given basing on personal talent. That person who has obtained them cannot transfer them to some other person by means of an agreement.

Traffic by way of sale of public offices and appointment obviously tends to the prejudice of public service. Such agreements are void. An agreement to pay money to public servant to induce him to retire, and thus, make way for the appointment of the promisor is virtually a trafficking with reference to an office, and is void. Similarly a promise to make an annual payment to a person on condition that he withdraws his candidature for a public office in favour of the promisor is unenforceable. Where money is paid under such an agreement, it cannot be recovered back from defendant, though he has failed to procure employment for the plaintiff in public service.

A case on this point is Swamynathan Vs Muthu Swamy. In this case a Contract gets formed between A and B according to which A has to transfer his position in govt. to B for certain consideration. It is opposed to Public Policy and hence held to be Void.
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7. Contracts in restraint of marriage and marriage agreements against public policy: A contract in general restraint of marriage is unenforceable on the ground of public policy. Such agreements may relate to not to marry at all or not to marry any particular person or class of persons. An agreement to marry is illegal as against public policy if one of the parties at that time is married. But the contract is enforceable if at the time the contract was made one of the parties was unaware of the fact. Money paid by a person to obtain a divorce by another is money paid for an illegal or immoral purpose.

A case on this point is Lowe Vs Peerless. In this case an agreement gets formed between A and B according to which A should marry B only and B should marry A only. If only one of them breaches the agreement a compensation of $ 2000/- is to be paid. Court decides that the language used in the agreement is creating restriction on marriage and hence void.

8. Agreements in restraint of parental rights: father is the natural guardian of his minor child and in the absence of father, mother has this authority. This right of guardianship is in the nature of sacred trust and, therefore, cannot be bartered away by any agreement. He may, in his discretion, as guardian entrust the custody and education of his children to another. But this agreement is essentially a revocable one, in the welfare and interest of the child. Hence, The agreements which restrict rights of Parents on their Children are called agreements in restraint of Parental Rights. By Virtue of an agreement, Parents cannot waive up their rights. Such agreements are harmful to Children.

- A case on this point is Maharaja of Vijayanagar Vs Secretary of State for India. In this case the king entrusts his children to Court of Wards. On that occasion a deed is executed by king according to which he is giving absolute Power on his Children to court of Wards. After Sometimes Court of Wards decides to send those Children to England for higher Studies. Then the king Sues for injunction order restricting Court of Wards from Sending the Children to England. Court issues. Such injunction order Saying that by means of an agreements Parental rights cannot be restricted and Court of Wards Cannot gets powers on kings Children.

9. Agreements tending to create interest against duty: An agreement with public servant which might cast upon the public servant obligations inconsistent with his public duty is void. An agent must not deal in the subject matter of the contract of agency on his own account, as it is against his duty. A person should not place himself in such position where his duty will come in clash with his interest.
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10. **Agreements to form Monopoly:** Monopoly is suitable to several unfair trade practices and to exploit public. So an agreement to create monopoly is harmful to society.

11. **Agreements, the consideration of which is unlawful in part**

   (i) *If the legal part of the agreement cannot be separated from the illegal part then.*

   (a) If there are several objects but several considerations, the agreement is void if any one of the consideration is unlawful. (Sec. 24)

   (ii) Where there is reciprocal promise to do things legal and also other things illegal the legal part which can be separated from the illegal part can constitute a valid contract and the illegal part shall be void (Sec. 57).

   ‘A’ agrees that he will sell to ‘B’ a house for ₹. 10,000, but if ‘B’ uses the house for gambling purposes, he shall pay ₹. 50,000, to ‘A’. The first part of the agreement shall be valid and binding. But the second part shall be void and unenforceable.

   (iii) In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

   **Example:**

   A and B agree that A shall pay B ₹. 10,000 for which B shall afterwards deliver to A, either car or smuggled opium. There is a valid contract to deliver car and void contract as to opium.

12. **Agreements in Restraint of Personal Freedom:** The agreements which restrict personal freedom are opposed to public policy. For example: An agreement to do slavery falls under this group.

   • Related case is Ramasastry Vs Ambela Karen. In this case a contract of loan gets formed between A and B and their contract specifies that B has to join as slave at A’s house till settlement of debt. Court decides that the contract is void.

13. **Agreements with regard to Compromise of Offence:** The agreements which are outcomes of compromise with regard to an offence are opposed to public policy.

   • A Case on this point is Venkata Subba Rao Vs Chandanmal. In this A is an Ayurveda doctor and B is a money lender. A contract of loan gets formed
between them according to which A has to pledge his medical instruments with B as Security. But A fills-up a wooden box with bricks etc and pledges the box. It comes under public cheating in accordance with Sec. 420 of IPC. After coming to know about the fraud B wants to file criminal prosecution against A. In the mean while A`s Son-in-law namely C makes a Compromise and executes a deed in support of debt taken by A. There after B sues C for recovery Court decides that the Contract which has got formed between B and C is agreement with regard to Compromise of offence and hence void.

14. **Agreements based on Bribes:** Whenever there is involvement of Crime or Corruption, Such agreement is said to be opposed to public policy.

- Related case is Pandyan Vs Roy. In this case there is an agreement between A and B according to which B has to pay Rs.15000 to A and for that A has to arrange for admission of A`s Son to a Medical College. Court decides that their agreement is opposed to Public Policy.

15. **Agreements to Defraud Creditors:** If debtors form an agreement to defraud their Creditors, Such agreement is opposed to public policy.

16. **Agreements to Defraud Government:** Agreements to evade taxes etc create loss to government they are opposed to public policy.

17. **Agreements in Restraint of Trade:** The agreements which restrict trade business or Profession are called agreements in restraint of trade. One citizen cannot restrict lawful business of the other.

- A case on this point is Madhav Vs Raj kumar. A and B enters into a contract according to which B has to close down his business for which he would be paid amount by A. B closes his business but, A fails to pay B the agreed amount. B sues A for recovery and court decides that it is an agreement in restraint of trade and hence void.

**Exceptions for Restraint of Trade**

The following are some occasions on which agreement in restraint of trade attains Validity.

- **Sale of Goodwill:** In case where sale of Goodwill takes place, the person who has paid for Goodwill can restrict the other on reasonable base from doing the business concern.
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- **With retiring Partner:** At the time of retirement of the partner, the existent partners can restrict the retiring partners from carrying on the same business.

- **Among Partners:** Partners of a firm may enter into an agreement in restraint of trade according to which no one of them should carry on the same business individually. It is Valid.

- **At the time of dissolution:** Partners of a firm can make an agreement in restraint of trade at time of dissolution of firm according to which no one of them should do the same business without prior permission from others.

- **Elimination of Competition:** An agreement in restraint of trade can be made to eliminate competition on reasonable basis. In Madav Vs Rajkumar the objective of their agreement is elimination of competition but it is not on reasonable basis. Hence it is held to be Void.

- **Service contracts:** sometimes an employee through terms of his service agreements is prevented from accepting
  
  o Any other engagement during his employment: this is not a void contract.
    Ex: A doctor of a hospital may be restrained from doing private practices because the employee is contractually bound to serve his employer.

  o An employee by terms of his service agreement is prevented from accepting a similar engagement. But after the termination of his service this agreement is in restraint of trade and is void. However, certain acts like an employee copied the names and address of his employers and customers for use after he left his employment held he could be restrained from using this list.

- **Trade Unions/trade combinations:** A trade Union may restrict an entrepreneur or an enterprise from doing certain business for the purpose of labour welfare. It is Valid but it should be a registered trade union. So when, the Traders and manufacturers in the same line of business form associations to regulate the business or to fix prices or regulate as to the opening and closing of business in a market licensing of traders, supervision and control of dealers and mode of dealing these regulations are not unlawful even though they are in restraint of trade.
  
  i. Ex: a combination to regulate supply and maintain price is not necessarily disadvantageous to public and as such is not opposed to public policy.

  ii. An agreement among members of a society to sell a product at a certain stated price and divide the profits among members is valid.
VOID AGREEMENT

A void agreement is one which is not enforceable by law as they do not give rise to legal consequent.

The following agreements are expressly declared by void by the contract act:

1. Agreement by incompetent parties.
2. Agreement with unlawful consideration
3. Agreement under a mutual mistake of fact.
4. Agreement made without any consideration
5. Agreement in restraint of trade
6. Agreement in restraint of marriage
7. Agreement in restraint of legal proceedings
8. Agreement in the meaning of which is uncertain
9. Agreement by way of wager
10. Agreement contingent upon impossible events
11. Agreement to do impossible acts
12. In case of reciprocal agreement to do certain acts tare legal and certain acts that are illegal.

Agreement the meaning of which is uncertain:

Agreement the meaning of which is not certain or is capable of being quantity, quality, price, title to and the subject matter.
Ex: ‘A’ agrees to sell to ‘B’ 100 tons of oil. The agreement is not clear as to the type of oil to be supplied hence it is a void agreement.
Ex: ‘J’ agrees to sell 100 kgs of wheat to ‘K’ and the price to be fixed by ‘J’ as the price of the wheat is uncertain the agreement becomes void.

WAGERING AGREEMENT OR WAGES:

A wages is an agreement between two parties by which one promise to pay money or money’s worth on the happening of some uncertain event in consideration of the other parties promise if the event does not happen.
Ex: ‘A’ will pay Rs. 5000 to ‘B’. if India loses to Pakistan in the cricket match to take place in future and ‘B’ will pay Rs. 5000 to ‘A’ if Pakistan loses to India in the match. There is a mutual chance to win and lose.

Essential of wagering agreement:

1. Promise to pay money or money’s worth under the wagering agreement
2. Uncertain event: the promise must be unconditional on an event happening or not happening. A wager generally contemplates a future event. It may also relate to a past event.
3. Each part in the agreement must either stand to win or lose
4. No party to an agreement should have contract over the happening of an event.
5. There should be no other interest in the event, i.e., neither of the party should have any interest in the happening or a non happening of an event. Such as a contract of insurance is not wagering agreement.
Ex: ‘A’ tells ‘B’ that wrestler No.1 in the wrestling match and ‘B’ Challenges ‘A’. the bet with each other over the game is a wagering agreement.

The following transaction are not wagers:

1. A price competition in the game of skill are not wagers.
2. Games of skill such as picture puzzle or athletic competition are not wagering agreement
3. A subscription or contribution or an agreement to subscribe or contribute price or sum of money to the value of Rs. 500 or above to the awarded to the winner of a horse race are not wagers.
Share market transaction in which delivery of stocks and shares intended to be given and taken are not wagers.

Contract of insurance and wagering agreements:
1. In case of insurance the assured has an insurable interest in the subject matter in case of wagering agreement there is no such interest.
2. In case of insurance both the parties are interested in the protection of the subject matter.
Under wagering agreement one of the parties is interested in the protection of the subject matter.
3. A contract of insurance except life insurance is a contract to indemnity. In a wagering agreement the amount is fixed.
4. Contract of insurance are beneficial to the public were as Wagering agreement donot serve any useful purpose to the public.
Wagering agreement are considered as void and no suit against it can be enforced in the court of law. In some part of India it is also considered as illegal.

Effects of wagering agreements:

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Wagering agreements are declared void in India. In some states it is also considered illegal no suit can be filled against a wagering agreement. A money deposited with a person to be paid to the party winning upon a wager cannot be recovered by the winner as agreement itself is void and illegal but a loser can recover his deposit from the stake holder. (The person with whom the money is deposited for wagering agreements).

The relationship of principal and agent in case of wagering agreements:
1. An agent cannot recover from the principal any amount paid on a wagering agreements entered into on behalf of his principal as the act done by the agent is not lawful
2. Where the agent fails to carry out his instruction in respect of a wagering agreements transaction the principal cannot sue his agent for breach of his duties as the agreement itself is considered as void.
3. Where the agent receives the amount on winning a bet on behalf of his principal is bound to hand it over to his principal

A contingent contract to do or not to do something on the happening of an event. Becomes void when the event becomes impossible to perform.
Ex: ‘A’ contracts to pay a certain sum of money to ‘B’. if ‘B’ marries ‘C’ ‘C’ dies the contract becomes void due impossibility of performance.
A voidable contract also becomes void when the party whose consent is not free repudiates the contract.

RESTITUTION: when a contract becomes void the party who has received any benefit under it must restore it to the other party or must compensate the other party by the value of the benefit, this is known as restitution or restoration of the benefit. A person has been unjustly enriched at the expense of another is required to make restitution to the other. When a person at whose option a contract is voidable rescinds it. The other party there to need not perform any promise there in contained in which he is a promisor. The party rescinding a voidable contract shall if he has received any benefit there under from another party to such contract restore such benefit so far as may be to the person from whom it was received.

When an agreement becomes void any person who has received any advantage under such agreement is bound to restore it or make compensation for it to the person from whom he received it.

Ex: 1. ‘A’ pays ₹ 1000 in consideration of ‘B’\’s promise to marry ‘C’, ‘A’\’s daughter. ‘C’ is dead at the time of promise. This agreement is void and ‘B ‘ must repay to ‘A’.
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2. ‘X’ contracts to sing for ‘Y’ at the concert for Rs.10000 which is paid in advance. ‘X’ is too sick to sing. ‘X’ is not bound to make compensation to ‘Y’ for the loss or profit which ‘Y’ would have made it if ‘X’ should refund the amount of advance received from ‘Y’.

Contingent Contracts: A contract may be a) absolute Contract  b) Contingent contract. An absolute contract is one which the promisor binds himself to performance in any event without any condition. A contingent contract is a contract to do or not do something if some event collateral to such contract does or does not happen. Ex: a contract to pay RS. 50000. If ‘B’’s house is burnt this is a contingent contract.

There are 3 Essential of contingent contract:
1. Its performance depends upon the happening or not happening of some future event
2. Event must be uncertain
3. The event must be collateral or incidental to the contract.

The common instances of a contingent contract are a) contract of insurance b) indemnity and guarantee.

Rules regarding contingent contract:
1. If the event depends upon the happening of an uncertain event. If the event is impossible such contract becomes void.
   Ex: ‘A’ offers to sell his horse to ‘B’ discover that the horse is dead at the time of contract therefore due to impossibility of performance the contract becomes void.
2. Where a contingent contract is to be performed if a particular event does not happen. Its performance can be enforced when the happening of an event becomes impossible.
   Ex: contract between ‘A’’s country and ‘B’’s country can be enforced if the war does not break out between these countries.
3. If the contract is contingent upon how a person will act at an unspecified time. The event shall be considered to become impossible when such person does any things render it impossible that he should so act within any definite time or otherwise than under further contingencies.
4. contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time becomes void if the event does not happen or its happening becomes impossible before the expiry of that time.
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Ex: ‘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 a year and becomes void if the ship sinks within a year.

5. Agreement contingent upon impossible event: contingent agreement to do or not to do anything if an impossible event happen is void. Where the impossible event is known to the parties of the agreement at the time when it is made.

Ex: ’A’ agrees to pay sum of Rs. 10000 for the horse sold by ‘B’ the horse is dead at the time of a contract.

The difference between Wagering agreements and Contingent contracts:

<table>
<thead>
<tr>
<th>Wagering agreements.</th>
<th>Contingent contracts.</th>
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</thead>
<tbody>
<tr>
<td>1 All wagers are contingent contracts.</td>
<td>All contingent contracts are not wagers</td>
</tr>
<tr>
<td>2 A wagering agreement is void according to section 30 subject to some exceptions.</td>
<td>But the contingent contract is valid except when the event becomes impossible under section 32.</td>
</tr>
<tr>
<td>3 Wagering agreement is a game of chance, the parties have no other interest in the subject matter of the agreement except winning or losing of the amount of wager.</td>
<td>On the other hand, contingent contract is not a game of chance but it is a contract to do or not to do something, if some event collateral to such contract, does not happen.</td>
</tr>
<tr>
<td>4 In the wagering agreement, the future uncertain event is the sole issue. And dependent on the determination of that event.</td>
<td>In the contingent contract, the future event is only collateral to such contract.</td>
</tr>
<tr>
<td>5 Wagering agreement is based on reciprocal promises of the parties. There is mutual agreement of both the parties to give money or money’s worth upon the determination or ascertainment of an uncertain event.</td>
<td>But a contingent contract may not be based on reciprocal promises.</td>
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PERFORMANCE OF THE CONTRACT:

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PERFORMANCE OF A CONTRACT TAKES PLACE WHEN PARTIES TO A CONTRACT FULFIL THEIR OBLIGATION UNDER THE CONTRACT WITHIN THE TIME AND MANNER PRESCRIBED.

A. **OFFER TO PERFORM:** sometimes it so happens that the promisor offers to perform his obligation under the contract at the proper time and place but the promise does not accept the performance. This is known as attempted performance or tender, then the promisor is not responsible for non-performance nor does he lose his rights under the contract. Thus a tender for performance is actual performance. It excuses the promisor for further performance and entitles him to sue the promise for breach of contract.

**Requisites of a valid tender:**

1. It must be unconditional. It becomes conditional when it is not in accordance with the terms of the contract. Ex: ‘B’ a debtor offers to pay ‘C’ his creditor the amount due to him on condition that ‘C’ sells to him certain shares a cost. This is not a valid tender.
2. It must be of the whole quantity contracted for or of the whole obligation. A tender of an instalment when the contract stipulates payment in full is not a valid tender. Ex: ‘D’ a debtor offers to pay ‘C’ his creditor an amount due in instalments and tender in the first instalment. This is not a valid tender because the tender is not for the whole amount due.
3. It must be by a person who is in a position, and is willing, to perform the promise.
4. It must be made at the proper time and place. A tender of goods after the business hours or of goods or money before the due date is not a valid tender.
5. It must be made to proper person, i.e. the promise or his duly authorized agent. It must also be in proper form. A tender of performance made to a stranger or to a third party is not a valid tender.
6. It may be made to one of the several joint promises. In such a case it has the same effect as a tender to all of them. Ex: a payment made to a partner is deemed to be a payment to the partnership firm.
7. In case of tender of goods, it must give a reasonable opportunity to the promise for inspection of goods.
8. In case of tender of money, the debtor must make a valid tender in the legal tender money.

Tender is of 2 types:

- Tender of goods
- Tender of money
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Effect of refusal of correct tender: under sec 38 of the contract act “where a promisor had made an offer of performance to the promise and the offer has not been accepted. The promisor is not responsible for non-performance or does he lose his right under the contract.” In case of a valid tender for goods refusal by the person to whom it is made charges the person by whom it is made from further liability. Where the seller under the contract of sale of goods satisfies all the requirements of the contract as to delivery of goods but the buyer refuses to accept the goods. The seller is discharged by such a tender of performance.

Effect of refusal of tender of money: where the debtor makes a valid tender of money but the creditor refuses to accept it, the debtor is not discharged from making the payment.

Thus the effect of refusal of the tender are:

- Promisor becomes free from his responsibilities under the contract.
- His rights against the promise as per the contract continues but the promisee’s right may cease.

Effect of refusal of a party to perform promise wholly: under sec 39 “when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract. Unless he has signified by words or by conduct his acquaintances in its continuance”

Ex: ‘A’, a singer enters into a contract with ‘B’ the manager of a theatre to sing for 2 nights in every week during the next 2 months and ‘B’ engages to pay her at the rate of Rs. 100 for each night. On 6th night ‘A’ absents herself with the assent of ‘B’. ‘A’ sings on 7th night. ‘B’ has signified his acquaintance of the continuous of the contract and now cannot put an end to it, but is entitled to compensate for the damage sustained by him through ‘A’s failure to sing on the 6th night.

B. BY WHOM CONTRACT MUST BE PERFORMED or WHO CAN DEMAND THE PERFORMANCE:

1. By the promisor himself: In the case of a contract involving personal skill, taste or credit, e.g., a contract to paint a picture, a contract of agency or service; the promisor must himself fulfill the contract. Section 40 states thus, "if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be fulfill by the promisor himself, such promise must be performed by the promisor."

Illustration:
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‘A’ promises to paint a picture for ‘B’. ‘A’ must fulfill this promise personally.

2. By the promisor or his agent: In the case of a contract of impersonal nature; e.g., a contract of sale of goods or a contract to lend a sum of money; the promisor himself or his agent may fulfill the contract [Section 40 Clause (2)].

Illustration:

A promises to pay B a sum of money. A may fulfill this promise, either by personally paying the money to B or by causing it to be paid to B by another [illustration (a) to Section 401.

3. By the legal representatives: In the case of the death of the promisor before performance, the liability of performance falls on his legal representatives, unless a contrary intention appears from the contract [Section 37]. Thus, in the case of contracts involving personal skill, the heir or legal representatives of a deceased promisor are not bound to perform the contract. Such contracts come to an end on the death of the promisor.

The rule of law is: "a personal cause of action comes to an end with the death of the person concerned." In the case of contracts not involving personal considerations, the legal representatives are bound to fulfill the contract. But their liability is limited to the estate of the deceased which has come to their hands, in case of breach of contract. They are not personally liable.

Illustrations:

(a) ‘A’ promises to paint a picture for ‘B’ by a certain day at a certain price. ‘A’ dies before the day. The contract cannot be enforced either by A's representatives or by ‘B’.

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

4. Performance by a third person: Section 41 lays down that if a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. Thus, where a promisee accepted lesser amount from a third party in full satisfaction of his claim, it was held that he cannot enforce the promisee against the promisor. Notice that under this Section performance of the promise by a stranger, once accepted by the promisee,
discharges the promisor, although the latter has neither authorized nor ratified the act of the third party.

5. **Joint promisors:** in case of joint promisors a promise may compel one or more of the joint promisors in the absence of a contract to the contrary.

In many cases, there may be more than one promisor and promisee. If there are more than one promisor, they are called ‘joint promisors’ and in case there are more than one promisee they are called ‘joint promisees.’

Joint promises may take any of the following shapes:

(i) Where several joint promisors make a promise with a single promisee, e.g., A, B, and C jointly promise to pay ₹ 3,000 to D, or

(ii) Where a single promisor makes a promise with several joint promisees, e.g., P promises to pay ₹ 3,000 to Q and R jointly, or

(iii) Where several joint promisors make a promise with several joint promisees e.g., A, B and C jointly promise to pay ₹ 3,000 to P, Q and R jointly.

Section 45 which provides that when a promise is made to several persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests with all the promisees jointly and a single promise cannot demand performance. When any one of the promisees dies, the right to claim performance rests with the legal representatives of such deceased person jointly with the surviving promisees. When all the promisees are dead, the right to claim performance rests with all of them jointly and on the death of any promisee his legal representatives step into his shoes.

**Illustration**

A, in consideration of ₹ 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 the death of C, with the representatives of B and C jointly.

It is worth noting that under the terms of the Section, if a promisor makes, the payment to one of the several joint promisees, it does not operate as a complete discharge of the debt.

**By whom joint promises must be performed?**
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The rules on the subject, as contained in Sections 42 to 44 of the Contract Act, are as follows:

1. All promisors must jointly perform the promise: When two or more persons have made a joint promise (e.g., signed a promissory note jointly), then, unless a contrary intention appears by the contract, all such persons must jointly perform the promise. When any one of the joint promisors dies, his legal representatives must, jointly with the surviving promisors, perform the promise. On the death of all the original promisors, the legal representatives of all of them jointly must perform the promise (Sec. 42).

The above rule is of course subject to the following usual conditions:

(a) Contracts involving personal skill, e.g., to paint a picture, come to an end on the death of any of the joint promisors and the liability of performance does not fall on the legal representatives.

(b) Wherever the legal representatives are made liable to perform the promise, they are not personally liable. Their liability is limited to the assets inherited by them.

2. Any one of joint promisors may be compelled to perform: When two or more persons make a joint promise, the promisee is entitled, in the absence of express agreement to the contrary, to compel any one or more of such joint promisors to perform the whole of the promise (Sec. 43, Para 1). In other words, according to the Section, the liability of joint promisors is “joint and several” as against the promise, unless there is a contract to the contrary. For example, A, B and C jointly promise to pay D ₹ 3,000. D may compel either A or B or C or all or any two of them to pay him ₹ 3,000.

In case-of death of original debtor, if the debt falls upon a number of heirs, promisee must bring the suit against all heirs collectively, because the liability is only joint and not several in case of co-heirs. Co-heirs are not joint promisors.

3. Right of contribution inter-se between joint promisors: If one of several joint promisors is made to perform the whole contract, he may require equal contribution from the other joint promisors, unless a contrary intention appears from the contract (Sec. 43, Para 2). Thus, in our example, if A is compelled to pay the entire amount of Rs. 3,000, he can realize from B and C Rs. 1,000 each.
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Ex: a partner of a firm is a joint promisor with other partners he is entitled to claim contribution from other partners in case he is required to pay the debt of the firm.

4. Sharing of loss by default in contribution: If any one of the joint promisors makes a default in making contribution, if any, the remaining joint promisors must bear the loss arising from such default in equal shares (Sec. 43, Para 3). Thus, in our example, if A is compelled to pay the whole and C is unable to pay anything, A is entitled to receive ₹. 1,500 from B. If C’s estate is able to pay one-half of his share, A is entitled to receive ₹. 500 from C’s estate and ₹. 1,250 from B [Illustrations (b) and (c) to Section 43],

5. Effect of release of one joint promisor: In case of joint promise, if one of the joint promisors is released from his liability, his liability to the promise ceases but this does not discharge the other joint promisors from their liability; neither does it free the joint promisor so released from his liability to contribute to the other joint promisors (Sec. 44).

Joint Rights and Joint Liabilities:

Devolution means passing over from one person to another person

Devolution of joint rights: (Sec.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 as between him and them, with all the joint promises during their joint lives. After the death of any one of them, it rests with the representatives of such deceased person jointly with the survivor or survivors. After the death of the surviving promise it rests with the representatives of all jointly.

Illustration:
A, in consideration of ₹ 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 representatives jointly with C during C’s life, and after the death of C with the representatives of B and C jointly.

All promises during their joint lives are jointly entitled to claim performance. They must jointly sue upon the promise. If anyone refuses to join, he must be added as a defendant.

It was held that where the contract was in favour of more than one person and if some of them do not want to specifically enforce the contract and therefore

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are not willing to join as plaintiffs, the others could file a suit for specific performance of contract impleading those who are not willing as defendants and a person cannot be prevented from filing a suit merely because he is only a joint promisee and the other promises have refused to join him in filling the suit.

Devolution of joint liabilities:

1. Jointly liable: When two or more persons have made a joint promise, then, unless a contrary intention appears from the contract, all such persons, during their joint lives, must fulfill the promise. After the death of any of them, his representatives jointly with the survivor or survivors must fulfill the promise. After the death of the last survivor, the representatives of all jointly, must fulfill the promise (Sec.42). Under English law, the legal representatives of the deceased promisor cannot be made liable either alone or jointly with the survivors. The liability devolves upon the survivors only. The Indian law, however, makes the legal representatives of the deceased promisor liable along with the survivor or survivors as the case may be.

2. Promissee’s right: When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise [Sec.43(1)]. In other words, two or more promisors are jointly and severally liable.

Illustration: A, B and C jointly promise to pay D Rs3000. D may compel either A or B or C to pay him Rs3,000.

3. Equal contribution: Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless contrary intention appears from the contract [Sec.43(2)].

Illustration: A, B and C jointly promise to pay D a sum of Rs3,000. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one half of his debts. C is entitled to receive Rs.500 from A’s estate and Rs.1,250 from B.

Default in contribution: If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. [Sec.43 (3)].

Thus partners of a firm, members of joint Hindu family, co-sharers or mortgages are all joint promises. Unless a contrary appears from the contract a suit to enforce such promise must be instituted by all the joint promises.
C. **TIME AND PLACE OF PERFORMANCE:**

The rules regarding the time and place of performance are given in Section 46 to 50 of the Contract Act are as follows:

1. **Performance of the promise within a reasonable time:** As per the Section 46 of Contract Act, where the time for performance is not specified in the contract and the promissory himself has to perform the promise without being asked for by the promise, the contract must be performed within a reasonable time. The question of reasonable time, in each particular case, is a question of fact.

   **Example:**

   Supply of order for books by a bookseller to the publisher given in July should be performed within 4-5 days, it being the time for the demand of books.

   If such order is given in May, it may take 20-30 days or so, as the season for books will start in July.

2. **Performance of promise where time is specified and no application is to be made:** When a promise is to be performed on a certain day, the promisor may undertake to perform it without application by the promisee. Under Sec 47, it has been provided that “In such a case the promisor may perform the promise at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.”

   **Example:** X promises to deliver 10 scooters at Y’s go down on April 1. On that day X brings the scooters but after 8.00 p.m. The delivery is not taken as the go down was closed. Here it was held that X has not performed his promise.

3. **Performance on a certain day (Sec. 48):**

   It may also happen that the day for the performance of the promise is specified in the contract but the promisor has not undertaken to perform it without application or demand by the promisee. In such cases, the promisee must apply for performance at a proper place and within the usual hours of business.

   Proper time and place will depend upon the circumstances of the case.

4. **Performance of promise where no place is specified and also no application is to be made by promise:**

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Section 49 of the contract act says that when promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place.

Example:

A cycle company X undertakes to deliver 100 cycles to Y on a fixed day X should ask Y to appoint a reasonable place for the delivery of cycles and must deliver the cycles to Y at that place.

5. Performance of promise in the manner and time or sanctioned by promise:

Sometimes the promisee himself prescribes the manner and the time of performance. In such cases, the promise must be performed in the manner and at the time prescribed by the promisee. The promisor shall be discharged from his liability if he performed the promise in the manner and time prescribed by the promisee.

Example:

‘X’ owes ‘Y’ ₹ 10,000. Y accepts X’s car valuing ₹ 6,000 in reduction of the debt. The delivery of car will amount to a part-payment of the debt.

‘A’ owes ‘B’ ₹ 30,000. B desires A to pay the amount to B’s account with C’s banker. A, who also has an account with C, orders the amount to be transferred to B’s credit and this is done by the banker. Afterwards and before A knows of the transfer, the bank fails. There has been a good payment by A and he is discharged from his obligation.

D. RECI PROCAL PROMISES:

When a contract consists of an exchange of promises or

According to Sec. 2(f), “Promises which form the consideration or a part of consideration for each other are called reciprocal promises.”

An agreement may consist of either (a) a promise supported by consideration given, or (b) a promise supported by another promise.
In the latter case, when an agreement is supported by another promise, it will be a reciprocal promise. Thus, in reciprocal promises each party gives a promise for a promise. Reciprocal promises are of the following types:-

1. Mutual and independent reciprocal promise:

When each party performs his promise independently and irrespective of the fact whether the other party has performed, or is willing to perform his promise or not, the promises are mutual and independent. **Example:** X agrees Y to supply milk daily, while Y agrees to pay the price of milk every month. Both these are mutual and independent promises.

2. Conditional and dependent reciprocal promises:

When the performance of a promise by one party depends upon the prior permission of the other party, it will be a conditional and dependent promise.

**Example:** X promises to construct Y’s house, provided that Y supplies cement and bricks. This will be a conditional and dependent promise. Here, X need not perform the promise if Y fails to supply cement and bricks.

3. Mutual and concurrent or simultaneous reciprocal promise:

This is the state when two contracts are to be performed simultaneously.

**Example:** All cash sales are examples of simultaneous or concurrent promises, as delivery of goods and payment of price take place simultaneously.

**Rules regarding Performance of reciprocal promises**

- **Simultaneous performance of reciprocal promises:** 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.

**Illustrations:**

(a) ‘A’ and ‘B’ contract that ‘A’ shall deliver goods to ‘B’ to be paid for by ‘B’ on delivery.

‘A’ need not deliver the goods, unless ‘B’ is ready and willing to pay for the goods on delivery.
B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price 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 the first instalment on delivery.

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

✓ **Order of performance of reciprocal promises:** Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order: and,

where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

**Illustrations:**

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

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A’s promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

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

**Illustration:** A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.
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✓ Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises: When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

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

(b) ‘A’ contacts with ‘B’ to execute certain builder’s work for a fixed price. ‘B’ supplying the scaffolding and timber necessary for the work, ‘B’ refuses to furnish and scaffolding or 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.

(c) ‘A’ contracts with ‘B’ to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and ‘B’ engages to pay for the merchandise within a week from the date of the contract. ‘B’ does not pay within the week. A’s promise to deliver need not be performed, and ‘B’ must make compensation.

(d) ‘A’ promises ‘B’ to sell him one hundred 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.

✓ Effect of failure to perform at fixed time, in contract in which time is essential: 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.

Effect of such failure when time is not essential—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.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor’s failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that 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.

✓ Reciprocal promise to do that are legal and certain things that are illegal: that part of the contract to do legal things are considered as valid and that part of the contract to do illegal things are considered as void.

Ex: ‘A and ‘B’ agree that ‘A’ shall sell a house to ‘B’ for ₹ 10000 but if ‘B’ uses it for gambling purposes. He shall pay ‘A’ ₹ 50000. The first set of promise is a reciprocal valid promise and the subsequent set of promise is a void promise.

✓ Agreement to do impossible act: An agreement to do an act impossible in itself is void.

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

Compensation for loss through non-performance of act known to be impossible or unlawful—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations:

(a) ‘A’ agrees with ‘B’ to discover treasure by magic. The agreement is void.

(b) ‘A’ and ‘B’ contract to marry each other. Before the time fixed for the marriage, ‘A’ goes mad. The contract becomes void.
(c) ‘A’ contracts to marry ‘B’, being already married to ‘C’, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at 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.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

E. TIME AS THE ESSENCE OF CONTRACT:

When time is the essence of contract: if there is failure on the part of the promisor to perform his obligations within the fixed time, the contract becomes **voidable** at the option of the promise. If in such a case the promise accepts performance of the promise after the fixed time he **cannot claim compensation** for any loss due to non-performance of the promise at the agreed time. But if at the time of accepting delayed performance, he gives notice to the promisor of his intention to claim compensation he can do so.

When time is not the essence of contract: here failure on the part of the promisor to perform the obligation within the fixed time does **not make the contract voidable** but the promise is **entitled to compensation** for any loss caused to him by such failure. Time may be made the essence of contract by a subsequent notice specifying the time ought to fix the longest time that would be required in the performance of contract.

F. APPROPRIATION OF PAYMENT:

When a debtor owes several distinct debts to a creditor and makes payment in sufficient to satisfy the whole indebtedness then there arises a question as to which debt the payment must be appropriated to. Thus under this situation the following rules apply:

- **Where the debtor intimates**: if the debtor expressly intimates the creditor to apply the payment to a particular debt the creditor must do so. if there is no express intimation by the debtor. The law will decide the appropriation of payments.
- **Where the debtor does not intimate and the circumstances are not indicative**: the creditor may apply it **at his discretion** to any lawful debt actually due and payable to him from the debtor. He cannot however apply the
payment to a disputed or unlawful debt as it is barred by the law of intimation. In case of past payment of the debt the payment must be appropriated to payment of interest and then the principal.

➢ **Where the debtor does not intimate and the creditor fails to appropriate the payment:** the payment shall be applied in discharge of debts in chronological order of time. As per the rule in **Clayton’s case:** this rule is applicable where the parties have a current account between them in such a case the appropriation impliedly takes **place in the order in which the receipts and payments** takes place and are carried into the account the first item on the debit side is discharged against the first item on the credit side.

G. **ASSIGNMENT OF CONTRACTS:**

It means to transfer contractual liabilities and rights. Under the contract to a third party with or without the concurrence of the party. It may take place by the act of parties.

Ex: contractual obligation involving personal skill or ability cannot be assigned such as contract to sing, to dance, to paint, to marry cannot be assigned to another person.

A promisor cannot assign his obligations or liabilities under a contract other than himself: ‘D’ owes ₹ 5000 and is owed the sum by ‘P’, ‘D’ cannot ask ‘L’ to recover the amount by ‘P’ unless ‘L’ accepts performance by ‘P’.

Limitation to the rule: it is open to a party to have the contract performed through agency of a competent parson provided does not expressly or impliedly contemplate performance only by the promisor.

The promisor may transfer his liability with the consent of the promise and of the transferee.

Assignment of contractual rights:

The rights and benefit under a contract not involving personal skill may be assigned subject to all equities between the original parties.

Ex: ‘X’ owes ₹. 1000 to ‘Y’. ‘Y’ the creditor can transfer his rights to ‘Z’ to recover the amount from ‘X’. if ‘X’ has already paid ₹. 500 to ‘Y’. ‘Z’ will be bound by this payment and shall be entitled to recover only the balance of ₹. 500 from ‘X’.
‘A’ bought certain goods from ‘B’ for ₹ 1000. The goods were defective and ‘A’ therefore promptly offered to return the goods. ‘B’ refused to take back and assigned the debt of Rs.1000 to ‘C’. ‘C’ sued ‘A’ for ₹ 1000. ‘A’ can set up defence against ‘C’ for defective nature of goods supplied to him.

An actionable claim can always be assigned but it must be in writing. An actionable claim under sec 3 of the transfer of property act 1882 is “A claim to any debt (except a secured debt or to any beneficial interest whether such claim or beneficial interest be existing accruing conditional or contingent” thus a money debt, shares in a company, right of action arising out of a contract are all actionable claims.

**Operation of law:**

Under situation like:

✓ Death of a party to a contract his rights and liabilities under the contract are transfer to his next legal representative.
✓ Insolvency: his rights and liabilities to his official receiver or assignee.

**DISCHARGE OF A CONTRACT/TERMINATION OF CONTRACT:**

When rights and obligations arising out of a contract are extinguished the contract is said to be terminated.

Contract creates relation between the parties and binds them over. Termination of such contractual relations is called discharge of contract.

**MODES OF WAYS OF DISCHARGING A CONTRACT:**

The following are different modes of discharge or termination of contract.

1. Discharge by Performance.
2. Discharge by Mutual understanding or by Agreement.
3. Discharge by Impossibility of performance.
4. Discharge by Operation of Law.
5. Discharge by Lapse of Time.

**I. DISCHARGE BY PERFORMANCE OF THE CONTRACT:**

This is the usual mode of discharge of contract. The contract is said to be discharged when the parties to a contract have agreed to do and fulfil their
obligations within the time and mode prescribed it may be actual performance or attempted performance or tender.

II. DISCHARGE OF CONTRACT BY AGREEMENT:

A contract may be discharged by mutual agreement of the concerned parties the rights and obligations created by an agreement can be discharged without their performance by means of another agreement between the parties for the termination of the earlier rights and obligations.

As a contract is created by means of an agreement, it may also be discharged by another agreement the consent may be either expressed or implies.

1. Express consent at the time of formation of a contract.
2. Express consent subsequent to the formation of the contract

The following methods of discharging a contract by a fresh contract:

1. Novation
2. Rescission
3. Alteration
4. Remission
5. Waiver
6. Merger

1. Novation:

Section 62 of the Act provides that "if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed." Novation creates a new contract. It discharges and extinguishes the original contract. The new contract may be between the same parties, or between them and a stranger.

Novation are of 2 types:

- Novation involving change of parties: here the parties to a contract changes, but the contract agreement remains the same. ex: substitution of a new debtor in place of the old debtor with the consent of the creditor. Ex: ‘A’ owes ‘B’ and ‘B’ owes ‘C; through novation, ‘A’ owes ‘C’ and contract with ‘B’ is cancelled.
Novation without the change of parties: sometimes the concerned parties to a contract agree to substitute the existing contract for a new contract. In such a case the original contract is discharged and need not be performed. For example, X borrows ₹ 5,000 and writes a promissory note in favour of Y for 3 months. After 3 months, X goes to Y and expresses his inability to pay the amount. X writes a new promissory note for ₹ 5,000, the old promissory note is discharged by the new one. This novation is between the old parties i.e. X and Y.

RULES FOR NOVATION:
1. Novation must be done before the expiry of the original contract.
2. It is possible only be mutual consent of parties and may not be compulsory.
3. New contract replacing the old one must be capable of legal enforcement
4. It must be substitute the present contract
5. As a result of novation old contract is totally discharged and law does not entertain any action based on the terms of the old contract.

2. Rescission:
Rescission means cancellation of the original contract. A contract may be discharged before the date of performance by agreement between the parties to the effect that it shall no longer bind them. This arrangement amount to rescission or cancellation of the contract. An agreement of rescission releases the parties from their obligations arising out of the contract. A contract can be Rescinded in any of the following ways
Ex: ‘A’ promises to supply certain goods to ‘B’ on a certain day before the actual date of performance ‘A’ and ‘B’ mutually agreed that the contract need not be performed.
The contract is rescinded rescission may take place by:
   a) Mutual consent between the parties before the breach of performance of a contract
   b) By the aggrieved party: when any of the parties have committed a breach of contract without affecting the right to compensation from the breach of the contract
   c) By the party whose consent is not free: in case of voidable contract. The party who consent is not free may rescind the contract if e so desires.
   d) Non Performance for a long time: where none of the parties perform their obligation for a long time and no other party has objected if the contract may be taken as rescinded.

3. Alteration: alteration of a contract may take place were one or more terms of the contract are altered by mutual consent of the parties to the contract in such a case the old contract is discharged.
Ex: A enters into a contract with B for the supply of 100 bales of cotton at his godown by the first of next month. A and B may alter the terms of the contract by mutual consent.

Remission: Remission:

Remission means acceptance of a lesser performance that what was actually due under the contract. According to section 63, a party may dispense with or remit, wholly or in part, the performance of the promise made to him. He can also extend the time of such performance or accept, instead of it, any satisfaction which he deems fit. A promise to do so will be binding even though there is no consideration for it.

Kapur Chand Godha vs. Mr. Nawab Himayatali Khan case. M was to pay a sum of ₹ 27 lakhs to K. Since Hyderabad had been taken over by the Indian Government, a committee was appointed to clear matters. It offered ₹ 20 lakhs to K who accepted in full satisfaction of the claim of ₹ 27 lakhs. Later on, K filed a suit for the recovery of the balance. The Supreme Court held that K could not do so as he had accepted 20 lakhs in full satisfaction.

5. Satisfaction:

These two terms are used in English Law but find no place in Indian Law. According to English Law, a promise to accept less than what is due under an existing contract, is unenforceable because it is not supported by consideration. But where the lesser sum is actually paid or lesser obligation actually performed and accepted by the promise, it discharges the original contract. In other words, where a lesser sum is actually paid, than what is due under the existing contract, the new contract is called 'accord' and actual payment is called 'satisfaction'.

Illustration:

X purchased a house from Y and agreed to pay ₹ 50,000 within 30 days. X failed to pay Y at the end of the period and a new agreement was entered into whereby X was to deliver 10 tons of cotton in full payment of the debt. Y in this case, may recover his debt of ₹ 50,000 under the original contract at any time before the delivery of cotton to him. An accord, unless executed so as to satisfy the contract, shall be of no avail.

6. Discharge by Waiver:
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Waiver means giving up or foregoing certain rights. When a party agrees to give up its rights or forego its rights, the contract is discharged and the other party is thereupon released from his obligations. For example, Y employs Z to paint a picture for him. Later on, Y forbids him from doing so. Z is no longer bound to perform the promise.

7. Discharge by Merger:

When inferior rights of a person under a contract merge with superior rights under a new contract, the contract with the inferior rights will come to an end. For example, X was a tenant of Y's house. X purchased this house. X's tenancy right is merged with his ownership rights i.e. tenancy agreement will come to end when X becomes the owner of the house. Tenancy right is an inferior right as compared to the ownership right which is a superior right.

III. DISCHARGE BY OPERATION OF LAW:

A contract may be discharged independently of the wishes of the parties i.e. by operation of law. This includes discharge.

A contract may be discharged independently of the wishes of the parties i.e. by operation of law. This includes discharge:

(a) By death: contracts involving personal skill or ability is terminated on death of the promisor. But in other contracts the rights and liabilities of a deceased person pass on to the legal representatives of the deceased person.

(b) By merger: the original contract gets discharged if an inferior right under a contract merges with a superior right under the contract.

(c) By rights and liabilities becoming vested in the same person: where the rights and liabilities under a contract vest in the same person, for example, when a bill of exchange gets into the hands of the acceptor, the other parties are discharged.

Example: X has drawn a bill on Y. Here X has right to collect amount on the bill and Y has liability to pay. There after X has endorsed the bill to Z. Where Z has got the right and liability is with Y. Assume that Z has endorsed the bill to Y. Now right as well as liability are with Y. This situation discharges the contract.

(d) By Insolvency: Upon insolvency, the rights and liabilities of the insolvent are transferred to the Official Assignment or Official Receiver, as the case may
be. When a person is adjudged insolvent, he is released from performing his part of the contract by law. The order of discharge gives a new lease of life to the insolvent and he is discharged from all obligations arising from all his earlier contracts.

(e) By lunacy: When one of the parties gets attached by lunacy discharge of contract takes place.

(f) By unauthorised material alteration of the contract: In a written contract, if the promisee or his agent makes any material alteration intentionally and without the consent of the promisor, the contract is discharged. Such alteration entitles the promisor to rescind the contract. Material alteration changes the character of the contract or alters the rights and liabilities of the parties to the contract. 'Any alteration is material which affects the substance of the contract'. It varies the legal effect of the instrument. Examples of material alteration include an alteration in (i) the amount of money to be paid, (ii) the time of payment, (iii) the place of payment (iv) the names of the parties etc. In case of a material alteration, the party making the alteration cannot enforce the agreement either in its original form or in its altered form.

Alterations which are not material and which do not affect the rights and liabilities of the parties or which are made to carry out the common intention of the parties or which are made with the consent of the parties to a contract and do not affect the validity of the contract. For instance, a correction of electrical errors in words and figures or correction of the spelling of a name of a party to the contract etc. have no effect on the validity of the contract.

Illustration:

For example, C and F entered into a contract of carriage by sea whereby C agreed that his ship would sail from Amsterdam on March 15th next to Liverpool and would there load a cargo to be provided by F. After the singing of the written contract (i.e. the charter Party) the broker who acted for C wrote in after "March next" the words (i.e. the charter Party) the broker who acted for C wrote in after "March next" the words "wind and weather permitting". This was held to be a material alteration and C was precluded from relying on the charter party in an action against F on his refusal to supply the cargo.

In the famous case of Ananthrao vs. Kandikanda, it was held that the document, though altered, could be used as proof of the transaction and the creditor might be allowed to claim refund to money actually advanced by him under section 65 of the Contract Act which is based on the Equitable Doctrine of Restitution.
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IV. DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE:

A contract is discharged if its performance becomes impossible. In such a case there is no contract to terminate. The impossibility in this case is inherent in the transaction. The element of impossibility terminates contractual relations. Impossibility is of two types. Namely:

- Pre Contractual impossibility or initial impossibility and
- Post Contractual impossibility or supervening impossibility.

Initial impossibility: It is impossibility which exists at the time of formation of the contract. The law does not recognise something that is impossible and an agreement to do an impossible act is void. This fact of impossibility may be known or unknown to parties. If the initial impossibility is known to the promisor alone, he must pay compensation for any loss suffered by the promise on account of non-performance.

Ex: ‘A’ contracts to marry ‘B’ being already married to ‘C’ and being forbidden by law to practice polygamy. ‘A’ must compensate ‘B’ for the loss suffered by her for non-performance of his promise. Unknown impossibility may be due to perils of sea, government restrictions, etc.

Supervening impossibility: an impossibility which arises subsequent to the formation of contract is known as supervening impossibility. A contract which at the time it was entered into was capable of being performed subsequently become impossible to perform and the contract becomes void.

Ex: ‘A’ contracts to take in cargo for ‘B’ at a foreign port. ‘A’’s government afterwards declares war against the country in which the port is situated and the contract becomes void when the war is declared.

A contract becomes void on account of supervening impossibility when:

- The act becomes imSpossible
- Impossibility is caused by circumstances beyond the control of concerned parties
- The impossibility must not be induces by the self of the promisor or due to his negligence.

A contract is discharged by supervising impossibility in the following cases
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- **Destruction of subject-matter of contract:** When the subject-matter of a contract, subsequent to its formation, is destroyed without any fault of the parties to the contract, the contract is discharged.

  Example: Taylor vs. Caldwell case: ‘C’ let a music hall to ‘T’ for a series of concerts on certain days. The hall was accidentally burnt down before the date of the first concert. Held the contract was void.

- **Failure of precondition or Non-existence or Non-occurrence of a particular state of things:** Sometimes, a contract is entered into between two parties on the basis of a continued existence or occurrence of a particular state of things. If there is any change in the state of things which ought to have occurred does not occur, the contract is discharged.

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

- **Death or Incapacity for personal service:** Where the performance of a contract depends on the personal skill or qualification of a party, contract is discharged on the illness or incapacity or death of that party. The man’s life is an implied condition of the contract.

  Example: An artist undertook to perform at a concert for a certain price. Before she could do so, she was taken seriously ill. Held she was discharged due to illness.

- **Change of law:** When subsequent to the formation of a contract change of law takes place, and the performance of the contract becomes impossible the contract discharged.

  Example: ‘D’ enters into a contract with ‘P’ on 1st March for supply of ‘ABC’ imported goods in the month of September of the same year. In June the Parliament banned the import of such goods. The contract is discharged.

  ‘X’ agreed to sell his land to ‘Y’. After the formation of the contract, the Government issued a notification and acquired.

  ’X’ hired a room from ‘Y’ for viewing the coronation process of King Edward VII. The procession was cancelled because of King’s illness. It was held that X was not liable to pay the room rent because the procession, which formed the basis of the contract, did not occur. (Krell v. Henry)

- **Outbreak of war:** A contract entered into with an after enemies during war is unlawful and therefore impossible for performance. Contracts entered
into before the outbreak of war are suspended during the war and may be revived after the war is over.

Example: X contracts to take in cargo for Y at a foreign port. X’s government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared.

When the Contract is not Discharged on the Ground of Supervening Impossibility:

Impossibility of performance is, as a rule, not an excuse from performance. It means that when a person has promised to do something, he must perform his promise unless the performance becomes absolutely impossible. A contract is not discharged by the supervening impossibility in the following cases:

(a) Difficulty of Performance: A contract is not discharged simply on the ground that its performance has become more difficult, more expensive or less profitable than that agreed at the time of its formation.

Example: ‘X’ agreed to supply coal within a specified time. He failed to supply in time because of government’s restriction on the transport of coal from collieries. Here ‘X’ will not be discharged because the coal was available in the open market from where ‘X’ could have obtained it.

(b) Commercial Impossibility: A contract is not discharged simply on the ground of commercial impossibility, i.e. when the contract becomes commercially unviable or unprofitable.

Example: ‘X’, a furniture manufacturer agreed to supply certain furniture to Y at an agreed rate. Afterwards, there was a sharp increase in the rates of the timber and rates of wages. Since, it was no longer profitable to supply at the agreed rate, ‘X’ did not supply. ‘X‘ will not be discharged on the ground of commercial impossibility.

(c) Default of a Third Party: A contract is not discharged if it could not be performed because of the default of a third party on whose work the promisor relied.

Example: ‘X’ entered into a contract with Y for the sale of goods to be manufactured by Z, a manufacturer of those goods. ‘Z’ did not manufacture those goods. X will not be discharged and will be liable to ‘Y’ for damages.

(d) Strikes, Lockouts and Civil Disturbances: A contract is not discharged on the grounds of strikes, lockouts and civil disturbances unless otherwise agreed by the parties to the contract.
Example: ‘X’ agreed to supply to ‘Y’ certain goods to be imported from Algeria. The goods could not be imported due to riots in that country. It was held that this was no excuse for non-performance of the contract. [Jacobs v. Credit Lyonnais]

(e) Partial Impossibility: A contract is not discharged simply on the ground of impossibility of some of the objects of the contract.

Example: ‘X’ agreed to let a boat to ‘H’ to view the naval review at the coronation of king and to cruise round the fleet. Due to the illness of the king, the naval review was cancelled but the fleet was assembled and the boat could have been used to cruise round the fleet. It was held that the contract was not discharged.

Effects of supervening impossibility:

- When the performance of a contract becomes impossible or unlawful subsequent to its formation the contract becomes void.
- Where one person has promised to do something which he knew or with reasonable diligence might have known and the promise did not know it to be impossible or unlawful. The promisor must make compensation to the promisee for any loss which the promisee suffers on account of non-performance of the promise.
- Where an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it to the person from whom he received.
- Doctrine of frustration: in England Doctrine of Frustration is a parallel concept of supervening impossibility. It comes into effect when the common object of contract can no longer be achieved or when the contract after it is made becomes impossible of performance due to circumstances beyond control, or by contemplation of parties. It is a part of law of discharge of contract by reasons of supervening impossibility or illegality of the act agreed to be done and comes under the purview of section 56 of the Indian contract act.

V. DISCHARGE OF CONTRACT BY LAPSE OF TIME:

Limitation act has specified duration to perform different contracts. The duration thus specified is called limitation period. Soon after expiry of limitation period, the contract gets discharged. A contract is discharged if it is not performed or enforced within a specified period, called period of limitation. The Limitation Act, 1963 has prescribed the different periods for different contracts, e.g. period of limitation for exercising
right to recover a debt is 3 years, and to recover an immovable property is 12 years. The contractual parties cannot exercise their rights after the expiry of period of limitation.

*Example:* There is a contract of loan between A and B. Her limitation period is 3 years. After completion of 3rd year discharge of contract takes place and debtor – creditor relationship comes to an end. Thus it becomes time barred debt which cannot be recovered by means of legal proceedings.

**VI. DISCHARGE BY BREACH OF CONTRACT:**

Failure in performance of contractual obligation is called breach of contract or it means breaking of an obligation which a contract imposes. Discharge of contract takes place by breach of contract also. It discharges the aggrieved party from performing his obligations. Breach of contract is of two types. Namely:

- Actual breach and
- Anticipatory breach.

(a) Anticipatory Breach of Contract Anticipatory breach of contract occurs when party declares his intention of not performing the contract before the performance is due. In other words, when the promisee prior to the due date of performance all together refuses to perform his obligation under the contract or disables himself from doing so there occurs a breach of contract.

The anticipatory breach may take place either by express refusal to perform the contract or by some act of the promise which makes the performance impossible. Ex: ‘A’ agreed to supply certain goods to ‘B’ on 1st Jan but before this date ‘A’ expressly informed ‘B’ that he would not supply the goods to ‘B’. This is anticipatory breach of contract and express refusal to perform it.

A promise makes before the time of performance arise by doing some act makes the performance of the contract impossible it discharges the contract. This is implied impossibility of contract.

(b) Actual Breach of Contract Actual breach of contract occurs in the following two ways:

(i) **On Due Date of Performance:** If any party to a contract refuses or fails to perform his part of the contract at the time fixed for performance, it is called an actual breach of contract on due date of performance.
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Ex: where on the appointed day the seller does not deliver the goods or the buyer refuses to accept the delivery if time was the essence of contract, failure to perform the contract within the specified time results in breach of contract.

(ii) During the Course of Performance: If any party has performed a part of the contract and then refuses or fails to perform the remaining part of the contract, it is called an actual breach of contract during the course of performance. This breach of contract occurs in case of sale of goods delivery by instalments payments, payment by instalments etc.

Hence, In case where contract is breached by party on the date of performance, it is called actual breach. If breach of Contract takes place before data of performance, it is called anticipatory breach.

A promise can choose one of the following rights:

He can treat the contract as rescinded and put an end to it and is entitled to claim for damages against the other party as a breach of the whole agreement.

He is at liberty to keep the contract alive, accept performance of it if made by the other party and claim damages for part of the contract not performed. This is called waiving the breach of contract.

Consequence of anticipatory breach:

If the promise refuses to accept the repudiation of the contract by the promisor and treats the contract as alive, the consequences are as follows:

The promisor may perform his promise when the time for its performance comes and the promise will be bound to accept the performance.

If while the contract is alive, an event (say, a supervening impossibility) happens which discharges the contract legally, the promisor may take advantage of such discharge. In such a case, the promise loses his right to sue for damages.

Measures of damages in anticipatory breach of contract:

If the contract is ended by the promise at once, he can sue the promisor for damages. The amount of damages will be measured by the difference between the price prevailing on the date of breach and the contract price. If the contract is kept alive till the date of performance of the contract, the measure of damages will be the difference between the price prevailing on the date of the performance and the contract price.
REMEDIES FOR BREACH OF CONTRACT:

Parties to a lawful contract are expected to perform their obligation under the contract. When they refused to perform their promise they are said to have committed a breach of contract. In case of breach of contract, the injured party is entitled to claim for damages in certain situation the breach of contract not only gives rise to a cause of action but also discharges the injured party from performance of his part of the agreement under the contract.

In case of breach the aggrieved or the injured party has one or more of the following remedies:

1. Suit for Rescission
2. Suit for damages
3. Suit for quantum meruit
4. Suit for specific performance
5. Suit for injunction

Thus, the aggrieved party (i.e. the party not at fault) is discharged from his obligation and gets rights to proceed against the party at fault. The various remedies available to an aggrieved party are as follows:

I. Sue for damages in Rescission of the Contract:

When there is a breach of contract by one party, the other party may rescind the contract and need not perform his part of the obligations under the contract and may sit quietly at home if he decides not to take any legal action against the guilty party. But in case the aggrieved party intends to sue the guilty party for damages for breach of contract, he has to file a suit for rescission of the contract. When the court grants rescission, the aggrieved party is freed from all his obligations under the contract; and becomes entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract (Sec. 75).

Illustration: ‘A’ contracts to supply 100 kg of tea leaves for ₹ 8,000 to ‘B’ on 15 April. If A does not supply the tea leaves on the appointed day, ‘B’ needs
not pay the price. ‘B’ may treat the contract as rescinded and may sit quietly at home. ‘B’ may also file a suit for rescission and claim damages.

Thus, applying to the court for ‘rescission of the contract’ is necessary for claiming damages for breach or for availing any other remedy. In practice a ‘suit for rescission’ is accompanied by a ‘suit for damages,’ etc., in the same plaint.

It is worth noting that in certain cases a suit for ‘rescission of the contract’ may be filed even when no damages are to be claimed, for example, in case of pledge of movable goods, say gold ornaments, if the pledger does not pay as per agreement, the pledgee may file a suit for rescission of the contract (of course within the period of limitation which is 30 years in this case), in order to free himself from his obligation to return the ornaments on payment and to become entitled to sell the ornaments in order to realise his debt.

II. **Suit for Damages:**

Damages are monetary compensation allowed to the injured party for the loss suffered by him as a result of the breach of contract. The fundamental principle underlying damages is not punishment but compensation. By awarding damages the court aims to put the injured party into the position in which he would have been had there been performance and not breach, and not to punish the defaulter party. As a general rule, “compensation must be commensurate with the injury or loss sustained, arising naturally from the breach.” “If actual loss is not proved, no damages will be awarded.

**Rules regarding damages are:**

1. **Assessment of remoteness of damages:** The rules in this regard have been laid down by Section 73.

   Every breach of contract upsets many a settled expectations of the injured party. He may feel the consequences for a long time and in a variety of ways. A person for example, agrees to supply to a shop-keeper pure mustard oil, but supplies impure stuff instead. This is a breach. The oil is seized by an inspector and destroyed. The shop-keeper is arrested, prosecuted and convicted. He suffers the loss of oil, the loss of profit, the loss of his personal prestige, and the prestige of his business. Besides of course the loss of time, energy wasted on defence and the mental agony and torture of the prosecution.

   Thus, the consequences of a breach may be endless, but there must be an end to liability. The defendant cannot be held liable for all that follows from his breach. There must be a limit to liability and beyond this the damage is said to be too remote and, therefore not recoverable. The essence is to decide the limit.
Ordinary/General/Compensatory Damages:

When a contract has been broken, the injured party can, as a rule, always recover from the guilty party ordinary or general damages. These are such damages as may fairly and reasonably be considered as arising naturally and directly in the usual course of things from the breach of contract itself. In other words, ordinary damages are restricted to the “direct or proximate consequences” of the breach of contract and remote or indirect losses, which are not the natural and probable consequence of the breach of contract, are generally not regarded. For ex: ’A’ hired ‘B’’s ship for ₹ 20000 for the purpose of carrying the goods from Bombay to Goa. On the due date ‘B’ refused to make his ship available. ‘A’ made an alternative arrangement for transporting his goods by road for ₹ 30000 as no other ship was available on that day. In this case the excess expenses of Rs.10000 incurred by ’A’ are the ordinary damages and directly of the breach of contract.

(b) Special Damages:

Special damages are those which arise on account of the special or unusual circumstances affecting the plaintiff. In other words, they are such remote losses which are not the natural and probable consequences of the breach of contract. Unlike ordinary damages, special damages cannot be claimed as a matter of right. These can be claimed if the special circumstances which would result in a loss in case of breach of contract are brought to the notice of the other party. It is important that such damages must be in contemplation of the parties at the time when the contract is entered into. Subsequent knowledge of the special circumstances will not create any special liability on the guilty party.

Illustration:
‘X’ contracts with ‘Y’ to supply raw materials for Rs.10000. ‘y’ has informed ‘X’ about his special purpose of exporting the finished goods to other country where the product has a high seasonal demand and thereby he can make the profit upto Rs.30000, on the due date ‘X’ fails to supply the raw material and ‘Y’ could not manufacture product which he had planned to export it to earn special profit. So here ‘Y’ can recover ₹ 30000 from ‘X’ provided he had informed him about his special purpose.

Compensation and not penal damages: Damages for breach are given by way of compensation for the loss suffered by the plaintiff and not for the purpose of punishing the defendant for his breach. Punitive damages have no place in contract law and are not recoverable. But in the case of breach of a promise to marry, dishonour of a cheque by a banker wrongfully, and the issue of a cheque by a customer when he has no adequate balance to his credit in the bank the court may award penal damages.
3. **Nominal Damages:** Nominal damages are those which are awarded only for the name sake. These are neither awarded by way of compensation to the aggrieved party nor by way of punishment to the guilty party. These are awarded to establish the right to decree for breach at contract when the injured party has not actually suffered any real damage and consist of a very small sum of money, say, a rupee or two. For example: where in a contract of sale of goods, if the contract price and the market price is almost the same at the date of breach at the contract, then the aggrieved party is entitled only to nominal damages.

4. **Mental pain and suffering:** In the normal circumstances damages for mental pain and suffering are not allowed. But damages are allowed in exceptional cases. For ex: where the breach was wanton or reckless and caused bodily harm and when the defendant had reason to know that the breach would cause mental suffering the courts would not hesitate in awarding damages.

In Diesen vs. Samson, a photographer who had been engaged to cover a wedding failed to turn up resulting in the absence of mementos to the parties and accordingly damages were allowed.

5. **Duty to mitigate:** the injured is expected to make reasonable efforts to avoid the losses resulting from the breach so that his loss is kept to the minimum. For ex: on the buyer’s refusal to take delivery, the seller must resell the goods at the prevailing market rates. He may then recover the difference between the price he realises by the sale and the price he would have got had the contract been performed. If the seller fails to resell the goods and the loss aggravates, he cannot recover the enhanced loss. Similarly, it is expected of a dismissed employee to find an alternative employment. Failure to do so, deny him the right to damages.

6. **Liquidated damages and penalty:** ‘Liquidated dam-ages’ means a sum fixed up in advance, which is a fair and genuine pre-estimate of the probable loss that is likely to result from the breach.

‘Penalty’ means a sum fixed up in advance, which is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed Item the breach. Thus the essence of a penalty is a payment of money stipulated as per the terms of the offending party.

Liquidated damages represent a fair and genuine pre-estimate of the probable loss that might ensure as a result of breach. The penalty is a sum named in the contract and is disproportionate to the damage likely to accrue as a result of the breach. The English law allows liquidated damages but relieves a party against
penalty. In our country no such distinction is made. The injured party is allowed only reasonable compensation.

Illustration:

(a) ‘A’ contracts with B to pay ₹ 1,000 if he fails to pay ‘B’ ₹ 500 on a given day, ‘A’ fails to pay ‘B’ ₹ 500 on that day. ‘B’ is entitled to recover from ‘A’ such compensation, not exceeding ₹ 1,000 as the court considers reasonable.

(b) ‘A’ undertakes to repay ‘B’ a loan of ₹ 1,000 by five equal monthly installments with a stipulation that, in default of payment of any installment, the whole shall become due. This stipulation is not by way of penalty and the contract may be enforced according to its terms.

(c) ‘A’ borrows ₹ 100 from ‘B’, and gives him a bond for ₹ 200 payable by five yearly installments of ₹ 40, with a stipulation that, in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.

7. **Statutory damages:** where damages are payable in terms of a statutory provision, the supreme court has held that the provision applicable would be one that is in force at the time of cause of action and not that was in force when the agreement was made.

In Padma Srinivasan vs. Premier Insurance co.ltd case: the plaintiff’s husband was killed by a goods lorry which was insured with the defendant company. When the policy was taken the amount payable for loss of life, under the Motor Vehicle Act, was ₹ 20,000. By the time the accident took place, the act was amended and the compensation was raised to ₹ 50,000. The court allowed the revised figure.

8. **Difficulty of assessment:** any difficulty in assessing the damages shall not prevent the injured party from recovering them. The court must do its best to determine the amount of damages. For ex: when a person has been selected in employment written test has not been called for next round of interview, it is difficult to assess the damages because there is no any basis how to calculate the damage whether on the basis of basic monthly pay or other terms. Even though he has called for interview there is no guarantee that he would have cleared that round successfully.

9. **Exemplary or Vindictive Damages:** These are such damages which are awarded with a view to punishing the guilty party for the breach and not by way of compensation for the loss suffered by the aggrieved party. As observed earlier,’ the cardinal principle of the taw of damages for a breach of contract is to compensate the injured party for the loss suffered and to punish the guilty party. Hence, obviously exemplary damages have no place in the law of
contract and are not recoverable for a breach of contract. There are, however, two exceptions to this rule.

(a) Breach of a contract to marry. In this case the amount of the damages will depend upon the extent of injury to the party’s feelings. One may be ruined, other may not mind so much.

(b) Dishonour of a cheque by a banker when there are sufficient funds to the credit of the customer. In this case the rule of ascertaining damages is, “the smaller the cheque, the greater the damage.” Of course, the actual amount of damages will differ according to the status of the party.

III. Suit for an Injunction:

‘Injunction’ is an order of a court restraining a person from doing particular act. It is a mode of securing the specific performance” of the negative terms of the contract. To put it differently, where a party is in breach of negative term of the contract (i.e., where he is doing something which he promised not to do), the court may, by issuing an injunction, restrain him from doing, what he promised not to do. Thus ‘-injunction’ is a preventive relief. It is particularly appropriate in cases of anticipatory breach of contract where damages would not be an adequate relief.

Illustration:
(a) A, agreed to sing at B’s theatre for three months from 1st April and to sing for no one else during that period. Subsequently she contracted to-sing at C’s theatre and refused to sing at B’s theatre. On a suit by B, the court refused to order specific performance of her positive engagement to sing at the plaintiff’s theatre, but granted an injunction restraining A from singing elsewhere and awarded damages to B to compensate him for the loss caused by A’s refusal. (Lumley vs Wagner)

(b) G agreed to take the whole of his supply of electricity from a certain company. The agreement was held to import a negative promise that he would take none from elsewhere. He was, therefore, restrained by an injunction from buying electricity from any other company. (Metropolitan Electric Supply Company vs Ginder).

IV. Suit Upon Quantum Meruit (Sections 65 and 70)
one of the remedy for a breach of contract available to an injured party against the guilty party is to file a suit upon quantum meruit. The phrase quantum meruit literally means “as much as is earned” or “in proportion to the work done.” A right to use upon quantum meruit usually arises where after part performance of the contract by one party, there is a breach of contract, or the contract is discovered void or becomes void. This remedy may be availed of either without claiming damages (i.e., claiming reasonable compensation only for the work done) or in addition to claiming damages for breach (i.e., claiming reasonable compensation for part performance and damages for the remaining unperformed part). The aggrieved party may file a suit upon quantum meruit and may claim payment in proportion to work done or goods supplied in the following cases:

1. Where work has been done in pursuance of a contract, which has been discharged by the default of the defendant.

Illustrations:

(a) ‘P’ agreed to write a volume on ancient armour to be published in a magazine owned by ‘C’. For this he was to receive $100 on completion. When he had completed part, but not the whole, of his volume, ‘C’ abandoned the magazine. ‘P’ was held entitled to get damages for breach of contract and payment quantum meruit for the part already completed (Planche vs Colburn).

(b) ‘A’, engages ‘B’, a contractor, to build a three storied house. After a part is constructed A prevents B from working any more. B, the contractor, is entitled to get reasonable compensation for work done under the doctrine of quantum meruit in addition to the damages for breach of contract.

Notice that in both the above cases the contract was wrongfully terminated by the defendant, and both damages as well as payment quantum meruit have been allowed. It is important that in the case of a wrongful breach of contract the injured party can always claim payment quantum meruit, whether the contract is divisible or indivisible.

2. Where work has been done in pursuance of a contract which is discovered void or ‘becomes void,’ provided the contract is divisible.

Illustrations:

(a) C was appointed as managing director of a company by the board of directors under a written contract which provided for his remuneration. The contract was found void because the directors who constituted the ‘Board’ were not qualified to make the appointment. C nevertheless, purporting to act under the agreement, rendered services to the company and sued for the sums
specified in the agreement, or, alternatively, for a reasonable, remuneration on a quantum meruit. Held, C could recover on a quantum meruit. (Craven-Ellis vs Canons Ltd.).

(b) A contracts with B to repair his’ house at a piece rate. After a part of the repairs were carried out, the house is destroyed by lightning. Although the contract becomes void and stands discharged because of destruction of the house, A can claim payment for the work done on ‘quantum meruit’. Note that if under the contract a lump sum is to be paid for the repair job as a whole, then A cannot claim quantum meruit because no money is due till the whole job is done.

3. When a person enjoys benefit of non-gratuitous act although there exists no express agreement between the parties. One of such cases is provided in Section 70. Section 70 lays’ down that when services are rendered or goods are supplied by a person, (i) without any intention of doing so gratuitously, and (ii) the benefit of the same is enjoyed by the other party, the latter must compensate the former or restore the thing so delivered.

Illustrations:

(a) A, a trader, leaves certain goods at B’s house by mistake. B treats the goods as his own. He is bound to pay A for them. [Illustration (a) to Section 70]

(b) Where A ploughed the field of B with a tractor to the satisfaction of B in B’s presence, it was held that A was entitled to payment as the work was ‘not intended to be gratuitous and the other party has enjoyed the benefit of the same. (Ram Krishna vs Rangoobed).

4. A party who is guilty of breach of contract may also sue on a quantum meruit provided both the following conditions are fulfilled:

(a) The contract must be divisible, and

(b) The other party must have enjoyed the benefit of the part which has been performed, although he had an option of declining it.

Illustrations:

(a) Where a common carrier fails to take a complete consignment to the agreed destination, he may recover pro-rata freight. (He will, of course, be liable for breach of the contract.)

(b) S had agreed to erect upon H’s land two houses and stables for $ 565. S did part of the work and then abandoned the contract. H himself completed the buildings using some materials left on his land by S. In an action by S for the
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value of work done and of the materials used by H, it was held that S could recover the value of the materials (for H had the option to accept or to reject these) but he could not recover the value of the work done (for H had no option with regard to the partly erected building, but to accept that). The court observed, “The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land.” (Sumpter vs Hedges).

V. **Suit for Specific Performance:**

Specific performance means the actual carrying out of the contract as agreed. Under certain circumstances an aggrieved party may file a suit for specific performance, i.e., for a decree by the court directing the defendant to actually perform the promise that he has made. Such a suit may be filed either instead of or in addition to a suit for damages.

A decree for specific performance is not granted for contracts of every description. It is only where it is just and equitable so to do, i.e., where the regal remedy is inadequate or defective, that the courts issue a decree for specific performance. It is usually granted in contracts connected with land buildings articles and unique goods having some special value to the party suing because of family association. Notice that in all these contracts monetary compensation is not an adequate relief because the injured party will not be able to get an exact substitute in the market.

Specific performance is not granted, as a rule, in the following cases:

(i) Where monetary compensation is an adequate relief. Thus the courts refuse specific performance of it contract to lend or to borrow money or where the contract is for the sale of goods easily procurable elsewhere.

(ii) Where the court cannot supervise the actual execution of the contract, e.g., a building construction contract. Moreover, in most cases damages afford an adequate remedy.

(iii) Where the contract is for personal services, e.g., a contract to marry or to paint a picture. In such contracts ‘injunction’ (i.e., an order which forbids the defendant to perform a like personal service for other persons) is granted in place of specific performance.

VI. **Stipulation regarding payment of interest.** The Explanation added to Section 74 states, “a stipulation for increased interest from the date of default may be a stipulation by way of penalty.” It implies that such a stipulation
maybe considered a penalty clause and disallowed by the courts, if the enhanced rate is exorbitant.

‘A’ gives ‘B’ a bond for the repayment of ₹ 1,000 with interest at 12% per annum at the end of six months, with a stipulation that in case of default interest shall be payable at the rate of 75% p.a. 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.

The following rules must also be noted in connection with payment of interest:

(a) Unless the parties have made a stipulation for the payment of interest or there is a usage to that effect, interest cannot be recovered legally as damages, generally speaking.

(b) Where a contract provides that the amount should be paid without interest by a particular date and on default it will be payable with interest, such a stipulation may be allowed if the interest is reasonable. If the interest is exorbitant, the courts will give relief.

(c) Payment of compound interest on default is allowed, only if it is not at an enhanced rate.
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