KLE LAW ACADEMY BELAGAVI

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STUDY MATERIAL

for

CONTRACT I

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SYNOPSIS

UNIT-I

UNIT I

Introduction

The Law of Contract constitutes the most important branch of mercantile or commercial law. It affects everybody, more so, trade, commerce and industry. It may be said that the contract is the foundation of the civilized world. The law relating to contract is governed by the Indian Contract Act, 1872 .The preamble to the Act says that it is an Act "to define and amend certain parts of the law relating to contract". It extends to the whole of India except the State of Jammu and Kashmir.

Definition and Essentials of CONTRACT

A Contract is an agreement enforceable by law. An agreement is enforceable by law, if it is made by the free consent of the parties who are competent to contract and the agreement is made with a lawful object and is for a lawful consideration, and is not hereby expressly declared to be void. The agreement which is not enforceable by law is not called contract. Eg. An agreement to sell a radio set may be a contract, but an agreement to go to see a movie may be a mere agreement not enforceable by law.

Agreement + Enforceability at law = Contract

“All agreements are not contracts but all contracts are agreements”

Definition of AGREEMENT

According to S. 2 (e) “Every promise and every set of promises, forming the consideration for each other, is an agreement”. In an agreement there is a promise from both sides. Eg. A promises to deliver his watch to B and in return B Promises to pay a sum of Rs. 2,000 to A. There is said to be an agreement between A and B. A promise is the result of an offer by one person and its acceptance by the other. Section 2(b) of the Act, defines “promise” as “When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.”

S.10 What agreements are contracts?

All agreements are contracts if they are made

- Between Two persons

- Free consent of parties

  Two or more persons are said to consent when they agree upon the same thing in the same sense. Consent is free when it is not caused by mistake, misrepresentation, undue influence, fraud or coercion. When consent is caused by any of above said elements, the contract is voidable at the option of the party whose consent was so caused.

- Competent to contract

  Competent to contract means the legal ability of a person to enter into a valid contract. Every person is competent to contract who (a) is of the age of majority according to the law to which he is subject and (b) is of sound mind and (c) is not otherwise disqualified from contracting by any law to which he is subject.

- Lawful consideration and lawful object

  An agreement where the object or the consideration is unlawful is void. Object or consideration is unlawful if it is forbidden by law, it defeats the provisions of law; or is fraudulent, or involves injury to the person or property of another; or is immoral; or is opposed to public policy. Besides the above said agreements, certain agreements have been expressly declared to be void by the Contract Act such as – wagering agreements, agreement with uncertain meaning, agreements where consideration is unlawful in part etc.

- Are not hereby expressly declared to be void.

  The agreement entered into must not be which the law declares to be either illegal or void. An illegal agreement is an agreement expressly or impliedly prohibited by law. A void agreement is one without any legal effects.

Different types of agreements

Void Agreements

An agreement not enforceable by law is said to be void. For eg. an agreement by a minor has been held to be void. Section 24 to 30 of the Indian Contract Act, 1872, makes specific mention of agreements which are void. Those agreements include an agreement

without consideration, an agreement, in restraint of marriage, and an agreement in restraint of trade.

Voidable Contracts

An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other, is a voidable contract. Thus, a voidable contract is one which could be avoided by one of the parties to the contract at his option. For eg, when the consent of the party to a contract has been obtained by coercion, undue influence, fraud and misrepresentation, the contract is voidable at the option of the party whose consent has been so obtained.

Difference between Void Agreement and Voidable Contract

1. A voidable contract is voidable at the option of one of the parties thereto. But a void agreement cannot be enforced by any one of the parties thereto.

2. The defect in the case of voidable contract is curable and may be condoned, whereas a void agreement is void ab initio, and its defects are not curable.

3. A voidable contract does not become void unless the party at whose option it is voidable repudiates it. But a void agreement is void ab initio.

4. A voidable contract implies a contract, in which the consent of one of the parties to contract is not free, whereas a void agreement denotes an agreement, which does not fulfill the essentials of a valid contract.

5. In case of a voidable contract, a person is entitled to compensation for loss or damages suffered by him on account of the non-performance of contract. But in a void agreement, as it is unenforceable at law there does not arise any question of compensation due to the non-performance of the agreement.

Unlawful Agreements

There are certain agreements which are “unlawful” in the sense that the law forbid the very act, the doing of which is contemplated by the agreement. For eg, an agreement to commit a crime or a tort. To distinguish an unlawful agreement from other void agreement, it is stated that while in case of void agreement a collateral transaction may not also be avoid, but in case of

an unlawful agreement, the collateral transaction is held to be void. For eg, A gives money to B to enable him to pay his wagering debt. The wager is the main transaction which is void, but loan given by A is subsidiary to it, which is not void and A can recover his money from B. On the other hand, where A gives loan to B to smuggle goods. Smuggling is the main transaction and loan is subsidiary to it. But, loan transaction is also said to be tainted with the same illegality and A will not be able to recover his money.

Proposal or Offer

The term "proposal" has been defined in Section 2(a) of the act, as "when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal". For eg. A's willingness to sell his radio set to B for Rs. 500 with intention to consent of B. But if a statement is made without any intention to obtain the assent of the other party thereto, that cannot be termed as proposal.

Elements of proposal

•Expression of willingness to do or abstain from doing something

•Made with the object of obtaining assent of the other

Thus the person making the proposal is called the 'proposer', or 'offeror' or 'promisor' and the person to whom the proposal is made is called as the 'proposee', or 'offeree', or 'promisee'.

Offers must be communicated

Section 2(a) of the Act explains that a person is said to make a proposal "when he signifies to another person his willingness to do or to abstain from doing something". The emphasis, here, is upon the requirement that the willingness to make a proposal should be "signified". The terms signify means to or communicate to make known. It thus requires that the offer must be communicated to the other person.

Express or Implied offer

Offer is either express or implied. When the offer is made by express communication then the offer is said to be an express offer. The express offer can be either in words or in written format. Whereas when the offer is not communicated expressly but communicated by conduct or by the circumstances of the case, the offer is called an implied offer. For eg. A says to B that he will sell his bike to B for Rs.30, 000, it is an express offer. For eg, a bid at an auction is an implied offer.

Completion of Communication

S. 4 The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. An offer cannot be accepted unless and until it has been brought to the knowledge of the person to whom it is made. For eg. A cannot be said to make an offer to B unless A brings the offer to the knowledge of B. Thus, acting in ignorance of an offer does not amount to acceptance of the offer. In ***Lalman Shukla v. Gauri Dutt,*** The plaintiff was in defendants service as a servant. The defendant's nephew absconded and the plaintiff went to find the missing boy. In the plaintiff's absence, the defendant issued handbills, offering a reward of Rs 501 to anyone who might find the boy. The plaintiff traced him and claimed the reward. The plaintiff did not know of the handbills when he found the boy. The court held that the plaintiff was not entitled to a reward. If the person has the knowledge of the offer, his acting in accordance with the terms thereof amounts to the acceptance of the same. In such a case, it is immaterial that at the time of accepting the offer, the acceptor does not intend to claim the reward mentioned in the offer.

Intention to Contract

In order that an offer, after acceptance, can result in valid contract, it is necessary that the offer should be made with an intention to create legal relationship. Promise in case of social engagements is generally without an intention to create legal relationships. Such an agreement, therefore, cannot be considered to be a contract. For eg. An agreement to go for movies, for a walk, to play some game, cannot be enforced in a court of law. The test to know the intention of the parties is objective and subjective, merely because the promisor contends that there was no intention to crate legal obligation would not exempt him from the liability. In ***Balfour v Balfour,*** Mr. Balflour who was employed on a government job in Ceylon, went to England with his wife

on leave. For health reasons the wife was unable to accompany the husband again to Ceylon. The husband promised to pay 30 euros per month to his wife until she rejoined him in Ceylon. The husband failed to pay her the said amount hence the wife sued him for the amount. The court held that the husband was not liable as there was no intention to create a legal relationship. Intention of the parties to be gathered from the terms of the contract and surrounding circumstances. Generally in all social matters it is presumed there is no intention to create legal relation. But in business matters it is presumed to intend such relation. In ***Jones v. Padavatton,*** A divorced daughter lived in Washington with her son who employed on attractive terms and her mother living in Trinidad, who wished to live near the lady as she was attached to grandson so she persuaded the daughter much against her will to leave the job, take legal education in England & finally come back to Trinidad as practicing lawyer and mother agreed to pay all expenses, purchased a house in England, part of it was rented out & a part was allowed to her daughter and for 5 long years daughter could not complete law, in the meantime she got remarried and differences arose between mother & daughter and mother stopped payments &also commenced eviction proceedings. It was held that there was no intention to create a legal relationship and gave possession to the mother.

Offer may be general or specific

When the offer is made to a specific or ascertained person, it is known as specific offer. It can be only accepted by the person to whom the offer is made or to the person duly authorized by him. When the same is made to any particular person but to the public at large, it is known as general offer. A general offer can be accepted by any person. Illustration 'A' advertises in the newspaper that whosoever finds his missing son would be rewarded with 2 lakh. 'B' reads it and after finding the boy, he calls 'A' to inform about his missing son. Now 'A' is entitled to pay 2 lakh to 'B' for his reward. In ***Carlill v. Carbolic Smoke ball Co.,*** The smoke ball company offered by advertisement a reward of $100 as reward to anyone who contacted influenza after having used the Smoke Ball with the printed directions. Mrs.Carlill (plaintiff) relying on the advertisement purchased a smoke ball from a chemist, used the same in accordance with the directions of the defendants, but still caught influenza. She sued the defendant to claim the reward of $100 advertised by them. There may be general offer

and acceptance of the general offer may not be communicated. By fulfilling the conditions of such offer the offeree is said to accept the offer.

Offer and Invitation to offer (treat)

A proposal or an offer has to be distinguished from an invitation to offer or treat. A person may not offer to sell his goods, but makes some statement or give some information with a view to inviting others to make offers on that basis. For eg. Displaying goods or dress or books in window of the shop. This is an invitation to offer. It is on the discretion of the shopkeeper if he wants to sell his article or not. An invitation to offer is not the final willingness but the interest of the party to invite the public to offer him. In ***Harris v. Nickerson,*** The defendant advertised a sale by auction. The plaintiff travelled to the advertised place of auction to find that the defendant had cancelled the auction sale. He brought an action against the defendant to recover the expenses of his travel. It was held that he was not entitled to the same as there was as yet no contract between the two parties, which could make the defendant liable.

DEFINITION OF 'ACCEPTANCE'

S. 2(b) When the person to whom the proposal is made signifies his assent thereto, the offer is said to be accepted. Thus the proposal when accepted becomes a promise." An offer can be revoked before it is accepted. As specified in the definition, if the offer is accepted unconditionally by the offeree to whom the request is made, it will amount to acceptance.

Acceptance may be express or implied

where acceptance is made with words spoken or written, it is an express acceptance, and if acceptance is made otherwise than in words, it is implied. What is necessary is that there should be some external manifestation of acceptance.

Who Can Accept?

Offers can either be made out to people in General or to a Specific counter-party If it is a *General Offer* it can be accepted by anybody. Who performs according to general offers is said to be accepted the offer and contract is created. If it is a *Specific Offer* it can ONLY be accepted by that Specific Counter-party to whom the offer is made.

Effect of Acceptance

A contract is created only after an offer is accepted. Before the acceptance is made neither party is bound thereby. At that stage offerror is free to revoke or withdraw his offer, and the offeree is free not to accept the offer or to reject the same. After the offer has been accepted it become a promise which, if other conditions of a valid contract are satisfied, bind both the parties to promise. After acceptance, each party becomes legally bound by the promise made by him through the medium of offer and acceptance of it.

Essential of valid acceptance

1. Acceptance should be communicated by the offeree to the offeror.
2. Acceptance should be absolute and unqualified.
3. Acceptance should be made in some usual and reasonable manner, unless the proposal prescribes the manner of acceptance.
4. Acceptance should be made while the offer is still subsisting.

Acceptance should be communicated

The offeree must communicate the acceptance. The communication may be express or implied. Sometimes the conduct of a person might indicate his assent. For eg. when a passenger boards a bus and travels thereby, he impliedly assents to pay the necessary fare. In order to create a contract, acceptance of the offer and intimation of acceptance by some external manifestation, which the law regards as sufficient is necessary. For a valid contract the acceptance must be communicated and moreover, such communication should be made to the offeror. In ***Felthouse v. Bindley,*** Felthouse wrote a letter to his nephew offering to buy his horse for Rs. 10,000. In the letter containing the offer it was also mentioned "If I hear no more about the horse, I consider the horse mine at Rs. 10,000." The nephew did not reply this letter. He, however, told his auctioneer, Bindely, that he wanted to reserve this horse for his uncle and, therefore, desired that the horse be not sold by the auctioneer. The auctioneer disposed of the horse by mistake. Felthouse sued Bindely for the tort of conversion on the plea that Felthouse had become the owner of the horse which Bindely had disposed of. HELD: It was clear that the nephew intended to sell the horse to his uncle but it was not communicated to his uncle, hence it was not a valid acceptance.

Principles:

1. Acceptance of the offer shall be communicated to the offeror himself.
2. communication to a stranger is no acceptance
3. Offeror cannot impose the burden of refusal.

Acceptance shall be communicated to the offeror himself.

- ***Powell v. Lee ,*** Powell was one of the candidates for the post of headmaster of a school. The Board of Managers passed a resolution selecting him for the post. No communication about this decision was made to Powell by the Board. One of the member of the board who had not been authorized to communicate this decision, acting in his individual capacity, informed Powell about his selection for the post. The board of managers met again and decided to cancel the appointment of Powell and appoint another candidate. Powell sued for the breach of contract. It was held that communication of acceptance was not valid. It was almost like overhearing. Communication shall be made by offeree/acceptor himself.

Mode of Communication

Mode of communication

S. 7. Acceptance must be absolute. In order to convert a proposal into a promise, the acceptance must-

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

If the proposal prescribes a manner in which it is to be accepted, and the acceptance should be made in such manner, otherwise it is not valid acceptance.

Completion of Communication

S.4 Communication when complete. –

The communication of an acceptance is complete, -

- As against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;
- As against the acceptor, when it comes to the, knowledge, of the proposer.

Eg. When B accepts A's proposal sent by post, acceptance is complete-

- As against A, when the letter is posted
- As against B, when the letter is received by A (there is presumption that letter reaches)

Absolute and Unqualified Acceptance

Acceptance must be unconditional and absolute. There cannot be conditional acceptance that would amount to a counteroffer which nullifies the original offer. For eg. A offers to sell his cycle to B for 2000/-. B says he accepts if A will sell it for 1500/-. This does not amount to the offer being accepted, it will count as a counteroffer. Also, it must be expressed in a prescribed manner. If no such prescribed manner is described then it must be expressed in the normal and reasonable manner, i.e. as it would be in the normal course of business. Implied acceptance can also be given through some conduct, act, etc. However, the law does not allow silence to be a form of acceptance. So the offeror cannot say if no answer is received the offer will be deemed as accepted. In ***Hyde v. Wrench,*** There was an offer made by A and B for the sale of a Farm for 1000 pounds. B rejected this offer and said that he will pay only 950 pounds to which A did not agree. Thereupon B said that he was willing to pay 1,000 pounds to which also A did not agree. B sued A and contended that there was a contract by which by which A was bound. It was held that B had once rejected A's offer by his counter offer to pay 950 pounds and this made the original offer to lapse, and therefore, no contract had resulted in this case.

Acceptance should be expressed in usual/ prescribed manner

According to S.7 (2), the acceptance must be "expressed in some usual or reasonable manner, unless the proposal prescribed the manner in which it is to be accepted." It means that if the manner of acceptance has been prescribed by the proposal, the acceptance has to be made in that prescribed manner; otherwise the same may be made in some usual or reasonable manner.

Usual or Reasonable manner

Usual or Reasonable manner of acceptance means the manner which is usually adopted in a particular kind of transaction according to the usage or custom of trade. Acceptance by post, telegram, telephone, or through personal messenger may be considered to be usual manner of acceptance.

Prescribed manner

If the proposal prescribes any particular manner of acceptance, the acceptance must be made in that manner. The manner of acceptance may include the requirement of fulfillment of certain conditions, such as the payment of an advance. If such conditions are not fulfilled, there does not arise a valid contract.

Acceptance should be made while the offer is still subsisting

Already it has been noted that the offeror is free to withdraw the offer, or the offer is revoked under various circumstances mentioned in S.6. After the offer has been withdrawn or has lapsed, there is nothing which can be accepted. It is, therefore, necessary that the acceptance should be made while the offer is still alive and subsisting. Acceptance after the lapse of the offer cannot give rise to a contract. Similarly, the offer is deemed to have ended by rejection of the original offer or a counter offer.

Revocation of Offer and Acceptance

Revocation of Offer

It is only after the acceptance of an offer that there arises a contract and then both the parties become bound by their respective promises. Before the offer has been accepted, it can be revoked. After the offer has been accepted it ripens into a contract and then it cannot be revoked.

Modes of revocation of offer

S.6 mentions various modes of revocation of offer

- Notice of Revocation
- Lapse of time,

- Failure to accept condition precedent
- Death or insanity of offeror

Revocation by Notice

It may be revoked at any time before it is accepted. The proposal may be revoked by the communication of notice of revocation which has to be communicated by the proposer or his agent and not by anybody else. In India, the notice of revocation has to be communicated by the proposer only, whereas in England the offer stands revoked even though the offeree comes to know about the revocation of the offer through some other source and not by a notice by the offeror himself.

By lapse of time

A proposal is revoked by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is prescribed, by the lapse of a reasonable time. Sometimes the party may expressly fix the time up to which the offer will remain open. An offeror, who has mentioned that his offer is open until a particular time, is not debarred from revoking the offer earlier than that time, if he so likes. For eg. if A has made an offer to sell his property to B for certain price, also stating that the offer is open till 12th June, 9:00 a.m. the offer would be revoked on 11th June if on that date A disposes of the property to somebody else with notice to B. An attempt on part of B to accept this offer on 12th June (before 9:00 a.m.) will be of no avail as the offer has already been revoked. Similarly, expressly rejecting an offer even before the lapse of a fixed or reasonable time makes the offer to lapse.

By failure to fulfill a condition precedent

When the offer is subject to some conditions precedent, such a condition has got to be fulfilled by the acceptor before making the acceptance. If the acceptor fails to fulfill the condition precedent to acceptance, the offer stands revoked. For example, if the offer requires the deposit of some earnest money, or the execution of some document, etc, this condition must be fulfilled. In ***State of M.P. v. Goberdhan Nath,*** Tenders for the sale of certain goods were invited subject to the condition that 25% amount was to be paid when the tender was accepted. A's tender was the highest and the same was accepted, but he failed to fulfill this condition. It was

held that no contract had arisen merely because A's tender was accepted. Therefore, if A failed to take the goods and pay for them, he could not be made liable for the breach of contract.

By death or insanity of the offeror

An offer is revoked by the death or insanity of the offeror, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance. In India, the death or insanity of the offeror does not automatically make the offer to lapse. The offer stands revoked if the fact of death or insanity comes to the knowledge of the acceptor before acceptance. It means if the fact of death or insanity has not come to the knowledge of the offeree while he accepts the offer, it is valid acceptance giving rise to a contractual obligation. Under English Law, death of the offeror revokes an offer even if acceptance is made in ignorance of the death.

Revocation of Acceptance

S.5 "An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards". It has already been noted above that when the contract is created through post, according to S.4, by the posting of the letter of acceptance:

- the proposer becomes bound when the letter of acceptance is posted to him,
- but the acceptor becomes bound when the letter of acceptance reaches the proposer.

Since the acceptor does not become bound immediately on posting his letter of acceptance, he is free to revoke the acceptance by adopting speedier mode of communication, whereby his communication of revocation of acceptance may reach earlier than his letter of acceptance.

Consideration

Introduction

Section 25 an agreement made without consideration is void subject to certain exceptions. Consideration means something in return for the promise. It may be either some benefit conferred on one party or some detriment suffered by the other. It is the price of the promise for each party

Definition of Consideration

Section 2(d) of Indian Contract Act, 1872 defines consideration as "when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise". The definition requires the following essentials to be satisfied in order there is valid consideration-

1. Consideration to be given 'at the desire of the promisor'.
2. Consideration to be given 'by the promisee or any other person'.
3. Consideration may be past, present, future, in so far as the definition says that the promise:
   (i) Has done or abstained from doing, or
   (ii) Does or abstains from doing, or
   (iii) Promises to do or to abstain from doing, something.
4. There should be some act, abstinence or promise by the promise, which constitutes consideration for the promise.

- **Blackstone** – "consideration is the recompense given by the party contracting to the other"
- **Cheshire and Fifoot** – "a price for the promise"
- **Sir Frederick Pollock**- "consideration is the price for which the promise of the other is bought and the promise is thus given for value is enforceable".
- **Patterson** – "consideration means something which is of some value in the eye of law. It may be some benefit to the plaintiff and some detriment to the defendant."

Consideration at the desire of the promisor

Consideration must have been given at the desire of the promisor, rather than voluntarily or at the instance of some third party. Example: A saves B's goods from a fire without being asked to do so. A cannot demand payment for his service. In **Durga Prasad vs. Baldeo,** Plaintiff constructed few shops in a market at the instance of the collector of that place. Defendant occupied one of the shops in the market. Money for the construction of the market was spent by the plaintiff, the defendants, in consideration thereof, made a promise to pay to the plaintiff

commission on the articles sold in that market. Defendant failed to pay the promised commission. Held: Consideration for promise to pay the commission for construction of the market was not at the desire of the defendant but on the order of collector. Therefore, held that since the consideration did not move at the desire of the defendant they were not liable in respect of the promise made by them.

Subscription for a charitable purpose

A promise to contribute an amount for a charitable purpose may not be enforceable because against this promise there may be no consideration. But a promise to pay subscription becomes enforceable when definite steps have been taken on the faith of the promised subscription. In ***Kedarnath v. Gorie Mohammed***, There was a proposal to construct a Town Hall at Howrah provided sufficient funds would be available by way of subscription. The defendant was one of the subscribers, having promised to pay Rs.100 by signing his name in the subscription book for the purpose. On the faith of the promised subscriptions, the plaintiff engaged a contractor for the purpose of the construction and started a construction work. The defendant refused to pay his subscription on the ground that he was not legally bound by his promise because there was no consideration for the same. Held: That engaging a contractor and starting the construction on the faith of the promise was sufficient consideration to enforce the promise and, therefore, the defendant was bound to pay the amount promised by him.

Consideration by promisee or any other person

According to Indian law consideration may be given by the promisee or any other person. In India there is a possibility that the consideration for the promise may move not from the promisee but a third person, who is not a party to the contract. Thus, as long as there is a consideration for a promise, it is immaterial who has furnished it. It may move from the promisee or from any other person. In English law, consideration should move from promisee only. In ***Chinnaya vs. Ramaya,*** A, an old lady, granted an estate to her daughter (defendant) with a direction that the daughter should pay an annuity of Rs. 653/- to A's brother (plaintiff). On the same day the defendant made a promise to the plaintiff that she would pay the annuity as directed by A. The defendant failed to pay the stipulated sum. In an action against her by the plaintiff she contended that since the plaintiff himself had furnished no consideration, The Madras High Court held that in this agreement between the defendant

and plaintiff, the consideration has been furnished by the defendant mother and that is enough consideration to enforce the promise between the plaintiff and the defendant.

Privity of Contract

The doctrine of privity of contract means that only those persons who are parties to the contract can enforce the same; a stranger to the contract cannot enforce a contract even though the contract may have been entered into for his benefit. Example: If in a contract between A and B some benefit has been conferred upon X, X cannot file a suit to enforce the contract because A and B are the only parties to the contract whereas X is only a stranger to the contract. In India a person may not have himself given any consideration but he can enforce the contract if he is a party to the contract, because according to the Indian Law consideration may be given either by the promisee or even a third party. That does not affect the rule of privity of contract.

English Law

- ***Dutton Vs. Poole,*** A intended to sell his wood to make a provision for the marriage expenses of his daughter. The defendant, A's son requested A not to sell the wood and in return made a promise to his father that he would pay 1,000 pounds to A's daughter, The father forebore to sell the wood but the defendant did not pay the promised amount to the plaintiff. Held: It is true that the defendant, promised to father and father furnished consideration for the promise. The plaintiff, was neither privy to the contract nor to the consideration. But it was equally clear that the whole object of the agreement was to provide a portion to the plaintiff. It would have been highly inequitable to allow the son to keep the wood and yet to deprive his sister of her portion. He was accordingly liable. A person, who is not a party to the contract but is intended to be the beneficiary under the contract and is nearly related to the promisee, has a right of action.
- ***Tweddle Vs. Atkinson,*** After the marriage of the plaintiff, there was a contract in writing between the plaintiff's father and the girl's father that each would pay a certain sum of money to the plaintiff and the plaintiff would have a right to sue for such sums. Plaintiff brought an action against girl's father to recover the promised amount. Held: Plaintiff could not sue for the same. As the plaintiff was both a stranger to the contract as well as stranger to consideration and he could not enforce the claim. It laid foundation for

doctrine of "privity of contract" which means that a contract is a contract between the parties only and no third person can sue upon it even if it is made for his benefit.

Two fundamental principles

- Consideration must move from promisee and promisee only. If consideration moved from any person other than promisee then promisee becomes stranger to the contract as such he cannot enforce the contract
- A contract cannot be enforced by a person who is not a party to contract even though it is made for his benefit. He is a stranger to contract and hence can claim no rights under it.

Indian law – Privity of Contract

The rule that "privity of contract" is needed and a stranger to contract cannot bring an action is equally applicable in India as in England. Even though under the Indian Contract Act the definition of consideration is wider than in English Law, yet the common law principle is generally applicable in India, with the effect, that only a party to the contract is entitled to enforce the same. In ***Jamnadas vs. Ramavtar ,*** A had mortgaged some property to X. A sold this property to B. B having agreed with A to pay off the mortgage debt. X brought an action against B to recover the mortgage money. It was held by the Privy Council that since there was no contract between X and B, X could not enforce the contract to recover the amount from B.

Exceptions to Privity of Contract

Trust or Charge

While only a party to a contract who can sue on it and no such right is conferred on a third party, it was also stated that "such a right may be conferred by way of property, as, for example, under a trust." The basis of an action by the third party is actually not enforcing the contract but the right conferred by a particular contract in favour of a third party in the form of trust etc. For example, in a contract between A and B, beneficial right in respect of some property may be created in favour of C. In such a case C can enforce his claim on the basis of the right conferred upon him. In ***Khwaja Muhammad Khan vs. Husaini Begum,*** An agreement between the fathers of a boy and a girl that if the girl married a particular boy, the boy's father would pay certain

personal allowance known as Kharch-i-pandan (betel-box expense) or pin money to the plaintiff. It was also mentioned that a certain property had been set aside by the defendant and this allowance would be paid out of the income of that property. The plaintiff married the defendant son but the defendant failed to pay the allowance agreed to by him. Plaintiff brought an action against the defendant. Held: The basis of the plaintiff's claim being a specific charge on the immovable property in her favour she is entitled to claim the same as a beneficiary, and as such, the common law rule of privity is not applicable.

Conduct, acknowledgement, or admission

If a party by conduct, acknowledgement, or admission recognizes the right of other to sue him, he may be liable on the basis estoppel. In ***Narayani Devi vs. Tagore Commercial Corporation Ltd.,*** in a contract between the plaintiff husband, and defendant, defendant agreed

- to pay certain amounts to the pt.'s husband during his lifetime&
- thereafter to pay the same to plantiff. for her life.
- On death of plaintiff husband, defendant -
  - made certain payments to the pt., in pursuance of the agreement,
  - had asked for the extension of time to pay, and
  - called the plaintiff, to execute certain documents in this connection.
- On suit for recovery of the same defendant take the plea of privity of contract!

Held: Defendant have created such privity with the plaintiff, by their conduct, by acknowledgement and by admission, that the plaintiff is entitled to her action even though there was no privity of contract between the plaintiff, and the defendant,

Marriage settlement, partition or family arrangement

Where, under a family arrangement, the contract is intended to secure a benefit to a third party he may sue in his own right as a beneficiary. Eg., on the partition of joint family property between the male members, a provision is made for the maintenance of the female members of the family. Eg., agreement of marriage by father of a girl, Two brothers agreeing to invest a sum for the benefit of mother, a daughter and her husband agreeing with her father to provide maintenance to mother on receipt of property, promise by a husband to his wife's father to treat

her well and to provide separate dwelling house in case of default.

Covenants running with the land

Rule of privity is modified by the principles relating to transfer of immovable property A person purchasing a land with the notice that the owner of the land is bound by certain duties created by an agreement affecting the land shall be bound by them, although he was not a party to it. In ***Smith & Snips Hall Farm ltd., v. River Douglas Catchment Board,*** Defendant agreed with certain land owners adjoining a stream to improve the banks of the stream and to maintain them in good condition and landlords paid costs and subsequently one of the landlords sold it to plaintiff and board negligently maintained banks, which burst and flooded plaintiff land. Held: Board was liable. Whole arrangement was to benefit the lands whoever be the owners.

Consideration may be past, executed or executory

Indian Contract Act recognizes three kinds of consideration, viz., Past, Executed and Executory. It says that when at the desire of the promisor, the promise and the other person:

(a) Has done or abstained from doing, (the consideration is past)
(b) Does or abstains from doing, (the consideration is executed or present)
(c) Promises to do or to abstain from doing, (the consideration is Executory or future)

Past Consideration

Past Consideration means that the consideration for any promise was given earlier and the promise is made thereafter. It is, of course, necessary that at the time the act constituting consideration was done, it must have been done at the desire of the promisor. For eg. I request you to find my lost dog. After you have done the same, if I promise to pay you Rs.100 for that, it is a case of past consideration. For my promise to pay you Rs.100 the consideration is your efforts in finding my lost dog and the same had been done before I promised to pay the amount. Here the consideration has been given at my request, because it is only when I request you to find the dog.

Past services voluntarily rendered

Indian Contract Act recognises only such consideration which has been given at the desire of

the promisor, rather than voluntarily. If consideration has been given voluntarily, it is no consideration. For example, if my dog has been lost and without any request from me to find the same, you find that on your own and deliver the dog to me. This is a case of past services rendered voluntarily. I promise to pay Rs. 100 to you after you have rendered these services,- can such an agreement been forced ? Yes it comes in the exception.

Executed or present consideration

When one of the parties to the contract has performed his part of the promise, constituting the consideration for the promise by the other side it is executed consideration. A advertises an offer of reward of Rs. 100/- to anyone who finds out his lost dog and brings the same to him. B finds the lost dog and brings the same to him. When B did his part of the job that amounted to acceptance of the offer, resulting in a binding contract under which A is bound to pay Rs. 100/- to B, and also simultaneously giving consideration for the contract. The contract in this case is said to be "executed". Executed consideration is different from past consideration – executed consideration is the consideration provided simultaneously with the making of the contract. In case of past consideration at the time of providing of the consideration the promise is nonexistent.

Executory or future consideration

When one person makes a promise in exchange for the promise by the other side, the performance of the obligation by each side to be made subsequent to the making of the contract, the consideration is known as Executory. A agrees to supply certain goods to B, and B agrees to pay for them at a future date, this is a case of executory consideration.

Consideration need not be adequate

A contract supported by consideration is valid even though it is inadequate. Explanation II to section 25, "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by Court in determining the question whether the consent of the promisor was freely given." The burden is on the party pleading absence of free consent. Inadequacy of consideration is by itself is not ground for treating the contract as invalid but it may be a factor

which the court may take into consideration to know whether the consent of a party was free.
For eg. A agrees to sell a horse worth Rs.1, 000 for Rs.10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the court should take into account in considering whether or not A's consent was freely given.

Consideration must be real, of some value

Although it is not necessary that consideration should be adequate, it is, however, necessary that it should be real and should not be unsubstantial. In ***White v. Bluett*** A son used to complain to his father that his brothers had been given more property than him. The father promised that he would release the son from a debt if the latter promised stopped complaining. After the father's death an action was brought by the executors to recover the debt. The son contended that the father had made a contract to release him from the debt in consideration for his promise not to bore his father. Held: Promise by son not to bore his father with complaints in future did not constitute good consideration for the father's promise to release him, and, therefore, the son continued to be liable for the debt. Promise not to bore the promisor is not enough to constitute consideration.

Performance of an existing duty is no consideration

Consideration is a promise to do something more than what a person is already bound to do. Doing of something which a person is already legally bound to do is no consideration.

Performance of Legal duty

- **Collins v. Godefroy** Plaintiff received a summons to give evidence in a case. Thereafter the defendant, promised to pay to the plaintiff, some money for the trouble which was to be taken by him in appearing in that case. Plaintiff sued defendant to recover the amount promised by defendant. Held – Plaintiff having received the summons was already under a public duty to give evidence, and therefore, the promise by the defendant to pay did not constitute consideration for the promise.

Performance of Contractual duty

a) Pre-existing contract with the promisor

b) Pre-existing contract with third parties

Performance of existing contractual duty

If the plaintiff is already bound to perform a particular contractual duty owed to the defendant, his promise to pay something additional for the same promise is no consideration.

- ***Stilk v. Myrick,*** Two sailors having deserted in the course of a voyage, the captain of the ship promised to distribute the wages of those two sailors amongst the other members of the crew if they would work the ship home. Held**:** The members of the crew being already duty bound to work the ship home, there was no consideration to pay the additional amount and hence the promise to pay that amount could not been forced.

Performance of an existing duty owed to a third party

- ***Shadwell v. Shadwell,*** The plaintiff had already promised to marry one Ms. Nicholl. The plaintiff's uncle wrote a letter to the plaintiff as under: "I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life or until your annual income derived from your profession of a Chancery barrister shall amount to six thousand guineas. Thereafter the plaintiff married Miss Nicholl. He could not earn 600 guineas from his profession but no annuity was paid by his uncle to him. After his uncle's death he brought an action against his executors to recover the amount promised to be paid by his uncle to him. It was decided by a majority that the promise was enforceable as it was supported by consideration. Consideration in this case being a benefit to the uncle as marriage of a near relative could be of interest to him, and also detriment to the plaintiff as he might have incurred pecuniary liabilities on the faith of the promise.

Promise to pay less amount than due – The rule in Pinnel's case

According to English Law laid down in Pinnel's case, an agreement to pay smaller sum in lieu of a larger sum is not binding, as the agreement is without consideration. It means that in spite of a promise to pay and receive a smaller amount than due, the promisor can claim the whole of the amount due.

Exceptions to the rule in Pinnel's case:

1. Payment in kind

The gift of a horse, hawk or robe, etc. in satisfaction (of a claim for money) is good. For it shall be intended that a horse, hawk or robe, etc. might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.

2. Payment before due date

The payment and acceptance of the smaller sum of money than originally due in satisfaction of the whole, before the payment is due, "for peradventure parcel for it before the day would be more beneficial to him than the whole at the day". It means that the payment on an earlier date constitutes sufficient consideration to discharge a part of the debt.

3. Part payment by a third party

Payment of a part of the sum due, by a third party, has been recognized to be enough to discharge the whole of the debt. If one party has accepted part payment from a third party, he cannot subsequently sue for the balance of the amount.

4. Composition with the creditors

An agreement between a debtor and a single creditor for payment of lesser amount than due will come under the ban in Pinnel's case, but an agreement between a debtor and creditors will come under the exception.

5. Doctrine of promissory estoppel

This is an equitable estoppel preventing a person from denying what he asserted earlier. The person making the representation or promise becomes bound by the same, on the basis of the law of estoppel if another person has acted on the faith of such promise or representation. The promise is enforceable at the instance of the promisee notwithstanding that there is no consideration for the promise.

Indian law

In India, the promisee may accept in satisfaction of the whole debt an amount smaller than that.

No consideration is needed for such a promise.

S.63 “Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.” Illustrations A owe B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

Forbearance to sue is no consideration

Forbearing to sue or abstaining from enforcing a claim is good consideration for a promise to pay, or do some other act. Forbearance to sue constitutes consideration in so far as the delay in the proceedings is a benefit to the person intended to be sued. Promise to forbear may be implied and it may be forbearance only for some unspecified time.

- ***Callisher v Bischoffsheim - Doubtfulness of original claim not relevant***

A person promised not to sue for an agreed time, provided that some bonds were delivered to them. When the bonds were not delivered, the person claimed damages for breach of that agreement. The other person said that, as the money had not been due in the first place, (assumed for the purpose of these proceedings that that was true). They could not enforce the delivery of the bonds. The court took the view that if D's claim were accepted, no agreement to compromise a doubtful claim could be enforced. If a party to an action believes *bona fide* that there is a chance of success, then there is reasonable ground for suing and the forbearance will constitute good consideration. The other party obtains an advantage of being free from the necessity to defend the action. If the validity of the claim is doubtful but the plaintiff believes that he has a good cause of action, forbearance to sue in such a case is good consideration. If a party made a claim which they knew to be unfounded and then an attempt to derive an advantage by compromise would be fraudulent. Essential to understand that there are in fact 2 contracts - the initial contract which is the subject of the dispute, and then the 2nd contract which is intended to settle the dispute arising from the first. The question is whether there is consideration for the 2nd contract, and what effect this has on the obligations arising from the first.

No consideration no contract - Exceptions

Promise due to natural love and affection [S.25(1)]

When the promise is made in favour of a near relation on account of natural love and affection, the same is valid even though there was no consideration for such a promise. The following are requirements:

- The parties to the agreement must be standing in a near relationship to each other.
- The promise should be made by one party out of natural love and affection for the other.
- The promise should be in writing, and
- The agreement is registered.

What is near relation has neither been defined in the Act, nor in any judicial pronouncement. But, from the various decided cases it appears that it will cover blood relations or those related through marriage, but would not include those relations which are not "near", but only remotely entitled to inherit. "Natural love and affection" between the parties so nearly related is also needed. "Near relation" does not necessarily imply natural love and affection. In ***Rajlucky Dabee Vs. Bhootnath Mookerjee*** - after lot of disagreements and quarrels between a Hindu husband and his wife they decided to live apart and husband executed a registered document in favour of wife whereby he agreed to pay for her separate residence and maintenance and agreement also mentioned about quarrels and disagreements between the two. Held that from the recitals in the document it was apparent that the document had been executed not because of natural love and affection between the parties but because of the absence of it, and therefore the wife was not entitled to recover the sums mentioned in the document.

Compensation for past voluntary services [S.25(2)]

When something has been done "at the desire of the promisor", that constitutes a good consideration in respect of a subsequent promise to compensate for what has already been done. The second exception to Section 25 covers "cases where a person without the knowledge of the promisor, or otherwise than at his request does the latter some service, and the promisor undertakes to recompense him for it. The promise to compensate, though without consideration, is binding because of this exception. The exception also covers a situation where the promise is for doing something voluntarily "which the promisor was legally compellable to do." When A

finds B's purse and gives it to him and then B promises to pay A Rs.50, or A supports B's infant son and B promises to pay A's expenses in so doing, there is a valid contract in such cases although A's act was a voluntary one. The exception covers situations where the service is rendered voluntarily and without the promisor's knowledge. It is also necessary that the service must have been rendered to the promisor and nobody else.

Promise to pay a time barred debt

Another situation when an agreement is a valid contract even without any consideration is a promise to pay a time-barred debt. Section 25 (3) requires the following essentials to be satisfied in such a case.

- The promise must be to pay wholly or in part a time barred debt, i.e. a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
- The promise must be in writing and signed by the person to be charged there with, or his duly authorized agent.

It is necessary that the debt must be one of which the creditor might have enforced payment but for the law for limitation of suits. It, therefore, does not cover such debts which are unenforceable for some other reasons. Thus if an insolvent debtor has been discharged from payment under the insolvency law a subsequent promise by him to pay that debt cannot be enforced unless there is a fresh consideration for the same. Similarly, if the payment of the debt cannot be enforced because the debt was contracted by a person during his minority, the same is not now enforceable if, on attaining majority, a promise is made to pay the same, because a minor's agreement which is void is incapable of being validated by ratification.

Agency

According to section 185 of the Indian Contract Act, 1872, no consideration is necessary to create an agency.

Gifts

The rule of no consideration no contract does not apply to gifts. Explanation (1) to Section 25 of the Indian Contract Act, 1872 states that the rule of an agreement without consideration being void does not apply to gifts made by a donor and accepted by a donee.

Unlawful Consideration and its effect

Consideration means something reciprocally it's actually a price which might be in sort of some benefits paid by one party for the promise of another party. For legitimate contract considerations and objects should be lawful. Object means the aim. Consideration means the worth of the promise.

The consideration or object of an agreement is lawful, unless-

-it is forbidden by law; or

-is of such nature that, if permitted, it might defeat the provisions of any law; or

-is fraudulent; or

-involves or implies injury to the person or property of another or;

-the Court regards it as immoral, or against public policy.

Every agreement of which the object or consideration is unlawful is void.

1. **Forbidden by Law**

Where the object or the consideration of an agreement is that the performance of an act which is forbidden by law, the agreement is void. Acts or undertakings forbidden by law are those punishable under any statute also as those prohibited (expressly or implicitly) by special legislation of Parliament and state legislatures. For example, the assembly or sale of excisable articles is prohibited under the Excise Act except upon a Government license. Sale of liquor without a license is prohibited for this reason under the Excise Act and is, therefore, illegal. A contract entered into in contravention of a statutory prohibition is going to be null and void whether such prohibition is express or implied.

2. **Defeat the purpose of Provisions of any Law**

Though the thing or consideration for the agreement, sometimes indirectly forbidden by law, they're still forbidden if nature defeats the aim of the provision of law. Agreement with such an object or consideration is void. Where a legislative enactment provides penalty for an act or promise, the performance of such an act or promise would amount to the defeat of that enactment, because it is implicit that the statute intends to forbid that act.

In ***Rajat Kumar Rath v. Government of India***, the Orissa High Court has explained the distinction in the following words: “A void contract is one which has no legal effect. An illegal contract through resembling the void contract in that it also has no legal effect as between the immediate parties has this further effect that even transactions collateral to it became tainted with illegality and we, therefore, in certain circumstances not enforceable. If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void is not prohibited by law, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to carry out the law actually prohibited cannot countenance a claim on the agreement, it being tainted with the illegality of the object sought to be achieved which is hit by the law. Where a person entering into an illegal contract promises expressly or by implication that the contract is blameless, such a promise amounts to collateral agreement upon the other party if in fact innocent of turpitude may sue for damages".

E Contract

Introduction

The advent of revolutionary technologies has ensured robust e-commerce in the country. However the usage of technology without adequate legal framework will lead to chaos in the society and will prove counterproductive to the business. The Indian Contract Act, 1872, The Information Technology Act, 2000 and The Indian Evidence Act, 1872 are the crucial legislations which determine the validity of an e-contract. E contracts are formed by way of exchange of Emails and through on line agreements viz. browse wrap, shrink wrap and click wrap agreements. All the said forms are valid under Indian law as if they comply with the prerequisites of a valid contract. Major issues which arise pertain to capacity to contract, free consent, decision on the applicable law and decision on the court jurisdiction. Though the Indian legal system adequately addresses the e-contracts, the challenge before the law makers will be to keep abreast of the issues which will arise with evolving technologies and to adequately address them. The electronic contract is generally different from traditional contracts. E-contract is a contract executed and enacted by way of software systems. The internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/windows and physical

shopping. A viewer from any part of the world may want to get into contract to purchase a product as advertised. In this transaction, the issue is raised for its execution and protection of the consumers. Fundamental Principles of contract law continue to prevail in contracts made on the internet. Nevertheless, not all principles will or can apply in the same manner that they apply to traditional paper-based and oral contracts. In India, the recognition of an electronic contract is mainly supported by the Information Technology Act, 2000. This paper is divided into basic research issues in e-contracts, including conceptual analysis of e-contract, standard forms of e contracts, and the ways in which e-contract is concluded, the laws governing to it in India and the consumer's protection in e-contract.

Definition

E-contract is a kind of contracts formed by negotiation of two or more individuals through the use electronic means, such as email, the interaction of an individual with an electronic agent, such as a computer program or the interaction of atleast two electronic agents that are programmed to recognize the existence of a contract. E-contract is one of the divisions of e-commerce or e-business. It holds a similar meaning to traditional business wherein goods and services are switched for a particular amount of consideration. The only extra element it has is that the contract here takes place through a digital mode of communication like the internet. It provides an opportunity for the sellers to reach the end of consumer directly without the involvement of the middlemen.

E-Contracts are contracts attracting principles of Uberrimaefidei in which the contracting parties are not dealing at arm's length but one party is entirely dependent upon the information supplied by the other party on the basis of which alone he expresses his willingness to contract. The doctrine of Uberrimaefidei should be considered the foundation of e-contracts as the chances of misrepresentation or suppression of material facts is most likely to occur in such transactions. Although legal capacity is not explicitly dealt by the Information Technology Act, the law presumes that once an online contract is concluded, both the parties are presumed to be competent to do so. In other words, neither party is allowed to raise an objection at a later stage that the contract is unenforceable for want of competence on the part of the parties.The doctrine of Uberrimaefidei will be strictly adhered to in case of electronic contract and one party acting to his detriment on the representation of the other that he is competent should not be put to any

prejudice.5E-contract is made through electronic mode with the help of internet. According to the mode of its formation, there are different types of electronic contracts.

Types of Electronic Contracts

Broadly, e-contracts may be classified into following three types. While the shrinkwrap transaction has been around for some time and actually exists in a paper environment, the other two types of transactions (click-wrap and browse-wrap) are suitable to electronic commerce:

• Click-wrap Agreements
• Shrink-wrap Agreements
• Browse-wrap/Web-wrap Contracts

Click-Wrap Agreements

In click-wrap agreements, a party after going through the terms and conditions provided in the website or programme has to, normally, indicate his assent to the same, by way of clicking on an 'I Agree' icon or decline the same by clicking 'I Disagree'. This type of acceptance is usually done before receiving the merchandise. These sorts of contracts are extensively used on the internet, whether it be granting of a permission to access a site or downloading of any software or selling something via a website. This may be called the creation of contracts by conduct.
By clicking on any of these choices, he accepts or declines the terms. If he does not agree, the process is terminated. Click-wrap agreements can further be of the following kinds:

Type and Click

In this case, the user must type 'I accept' or other specified words in an on-screen box and then click a 'Submit' or similar button. This demonstrates acceptance of the terms of the contract. A user cannot proceed to download or view the target information without observing these steps.

Icon Clicking

In this case, the user must click on an icon of 'I agree' button on a dialog box or pop-up window. A user may signify rejection by clicking 'Cancel' or closing the window.

Shrink-Wrap Agreements

The sale of software in stores, by mail and over the internet has resulted in quite a few specialized forms of licensing agreements. For instance, software sold in stores is commonly packaged in a box or other container and then wrapped in the clear plastic wrap. Through the clear plastic wrap on the box, the purchaser can see the warning that states the use of the software is subject to the terms of a license agreement contained inside, an agreement that cannot be read before purchase of the software. The license agreement generally explains that if the buyer does not wish to enter into a contract by purchasing the software, he must return the product prior to opening the sealed package containing the CD on which the software resides. If the software is returned with the sealed package unopened, a refund will be obtained.

Browse-wrap/ Web-wrap Contracts

In browse-wrap contracts, the internet users will find the terms or conditions hyperlink somewhere on web pages that proposes to sell goods and services. According to these terms and conditions, using the site for buying the goods or services offered itself constitutes acceptance of the conditions contained therein.

An agreement is considered as a browse wrap agreement which is intended to be binding upon the contracting party by the use of the website. These include the use of the website. These include the User Policies and terms of service of web sites and are in the form of a "terms of use" or "terms of service", which can be used as the links at the corner or bottom of website.

ENFORCEABILITY OF E-CONTRACT

India is transforming into a visual jungle with internet becoming part and parcel of our life. The growing trend of social media, online shopping, e-retailing has created a predicament for the law makers in protecting the users from fraud, misrepresentation, identity theft and other such challenges. The Information Technology Act of 2000 was implemented for the governance and providing legal sanctity to transactions undertaken through electronic means and also provide for authentication of digital signature, jurisdiction, penalties in case of breach, etc. Section 10-A of the said Act has recognized the validity of these e-contracts. It

specifies that if an e- contract fulfils all the essentials as specified in Indian Contract Act of 1872 of a traditional contract i.e. valid offer and acceptance, capacities of the party, free consent, etc., it will be considered valid and is enforceable in the court of the country for any kind of breach when undertaken through any electronic means. As in case of ***Trimex International FZE v. Vedanta AluminiumLtd. India***, the hon'ble Supreme Court recognized that the contract whose terms and conditions are discussed through e-mails between parties, though no formal contract was formed or signed is valid in the eyes of law.

The enforceability of click wrap, browse wrap and shrink wrap contract have been challenged in various US Courts. Like, in case of ***Feldmanv Google, Inc*** the validity of Clickwrap contract was discussed and the hon'ble court observed that Feldman had sufficient notice of terms and conditions of the contract as he went through a proper signing up process including scrolling through whole terms and conditions page before assenting for it. Hence, the court held that the contract entered between Feldman and Google was valid. However, in the case of browse wrap contracts foreign courts are hesitant in enforcing its validity. In such contracts, judicial opinion holds that for constituting a valid contract it is necessary for the party to have constructive or actual notice of the terms and conditions of it. Therefore, where the defendant failed to specify near the download button'that the user will be bound to the license agreement if he downloaded the software from the website; no contract was executed between the parties. In light of these, the websites are now a day's more inclined towards click wrap contracts. Similarly, in case of shrink wrap contracts the court infers the assent of the party from their scrapping of the wrap which has terms and conditions attached with it. In the case of ***ProCD, Inc v. Zeidenburg,***Zeidenburg protected his price discrimination policy of the product through shrink-wrap licensing agreement however, ProCD after purchasing the product uploaded the information on less rate over the internet violating the license agreement. The court, in this case, held that ProCD had the option to reject the terms and conditions of the contract by returning it, but his scrapping the wrap providing terms and conditions was inferred by the court as his consent, thus he is bound by it. Indian judiciary has failed to acknowledge the question of validity of these contracts as there is no precedent till date for providing any type of ground rules over the enforceability of these contracts. Although in the case of ***L.I.C India v. Consumer Education and Research Centre*** the hon'ble court has tried defining such contracts and observed that where the weaker parties do

not have a bargaining power, such type of contracts were referred as dotted contracts. 'Thus, it can be said that the Indian courts have recognized the concepts of these contracts though no guidelines for its regulation have been laid down by it. The reliance can be placed on the foreign judgments based on the facts and circumstances of the case, yet a strong necessity for proper legislative structure for its implementation has aroused has the Indian economy is moving to paperless transactions.

ISSUES FACED BY E-CONTRACT

The concept of virtual world has impacted commerce of various countries including India. The easy access to the internet, fax, computer programs or smart phones has acted as blood in the body of e-commerce industry of our country. The enforcement of Information Technology Act of 2000 has provided a legislative framework and governance to it. However, as nothing is perfect in this whole might world, this statue also has certain shortcomings pertaining to the raising issues in the country in respect of these e-contracts. Following is few issues faced by electronic contracts in our country:

JURISDICTIONAL ISSUE

Paperless transactions like e-contract are borderless, therefore, it gets difficult to determine the jurisdiction i.e. the extent of the limit of the court's authority over any suit or appeal at the time of breach of e- contracts. As per Section 13(3) of the Information Technology Act of 2000:

a) the place of business of the originator will be deemed to be place where the information was dispatched, and

b) place of business of the addressee will be deemed to place where the information was received.

This implies that the location of computer sources through which it was dispatched and received, places no role in determining the jurisdiction of the case. However, this section limits the power provided by Section 20 of Code of Civil Procedure, 1908. As Section 20 clause c 'specifies that the suit can be instituted in the court within whose local jurisdiction the cause of action has aroused. Therefore, it raises the question over the jurisdiction of the courts as cause of action may arise in e-contract at the place where the electronic information was dispatched, irrespective of the fact of principle place of business. In case of ***P.R.***

Transport Agency vs. Union of India & others, the Allahabad Court dealt with the question jurisdiction and held that the acceptance of the contract was sent through Email and received in Chandauli (U.P) and principle place of business of the petitioner was at Vanaras (U.P) thus, the place of jurisdiction on the present case lies in U.P. As electronic transactions have no boundaries, it has become difficult to deal with the jurisdictional issue, especially when both parties belong to different part of the world. The present legislations governing e-contract have failed to answer questions as to jurisdiction lies in which country in case of dispute, Law to be applied to solving the disputes (suppliers or consumers) or how will decision be enforced in both the countries.

PARTIES TO CONTRACT

Transactions in an electronic contract are between parties which are stranger to each other. This poses threat to both the contracting parties. As for validity of the contract under section 11 of the Indian Contract Act of 1872 it is necessary that parties are not minor, lunatic or disqualified by the law however, while executing e-contract the major question arises are over the competencies of the parties. Minors can easily enter into contracts through click wrap or browse wrap contracts with the website. So, the legal liability is on the websites to ensure that the party contracting is competent under Indian Contract Act of 1872 for it. To ensure the competency of the party, the online websites have come up with various methods such as signing up to the site, in which the person enters personal details including birth date ensuring the website that the party has the capacity to enter into the contract. It is sometimes accompanied with a dialogue box containing pictures, and users are required to identify things in them to ensure the lunacy of the party. Despite these methods the enforceability of e-contract is in question due to lack of stringent legislation to deal with such issue in depth.

SIGNATURE AUTHENTICATION

Indian Contract Act of 1872 recognizes both oral and written contracts; therefore, it is not mandatory under this law for the valid contract to be signed by the parties. The signature in traditional contracts signifies the intention of the party to constitute the contract and has more legal value in the eyes of law. However, certain statute provides for the contract to be signed by both parties such as in case of Indian Copyright Act, 1957, etc. E-contract being generated through electronic means cannot be signed traditionally by the parties, so, it is required to be

signed electronically through electronic signature or digital signature as defined under section 3-A or Section 5. But, the major drawback of it is that not e signature is not valid on every document. Documents like:

a) Negotiable instrument except the cheque

b) Powers of attorney

c) Trust Deed

d) Real Estate Documents

These are the documents which are required to be physically signed by the parties and Information Technology Act 2000 has no applicability over it.

LOSS DUE TO TECHNICAL ERROR

E-contracts are documents which are entered into by the parties through electronic transmissions and are stored in the virtual world. But, like paper transactions there is no safety in the information stored in the world. Though, it is believed that anything which enters the digital world always exists and is never lost yet there are no administrative, legal or judicial guidelines over the scenario where the whole information or part of information is lost due the failure of the technology.

Laws Governing E-Contracts in India

Indian Contract Act, 1872

The Indian Contract Act, 1872 governs the manner in which contracts are made and performed in India, so every contract made should necessarily comply with the provisions of the Act to make it legally enforceable. The provisions of the Indian Contract Act are wide enough to cover such transactions. In the context of contract formation unless otherwise agreed with by the parties an offer and acceptance of an offer or either of them, may be expressed by means of data messages or electronic record. Where electronic record is used in the formation of contract that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose. As between the originator and the addressee of the electronic record, a declaration of will or other statements should be valid, effective or enforceable even though it is in the form of database.

Information Technology Act, 2000

The electronic contracts would be considered absolutely valid under the Information Technology Act, 2000. As per Section 4 of the Information Technology Act, 2000 legal recognition of electronic records, where any Information is in writing, typewritten or printed form is made available to a user in the electronic form for subsequent reference shall be deemed to have satisfied the requirement of law. In a layman's language, this means that any document which is in the written or printed version would be treated same and will have the equal validity in the electronic form also. As per the newly introduced Section 10A 15of the Information Technology Amendment Act, 2008" clearly states that the "Validity of contracts through electronic means, that "Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."The Act also lays down the instruments to which the Information Technology Act, 2000 does not apply, it includes negotiable instruments, power of attorney, a trust deed, a will, and contracts for sale or transfer of Immovable Property.

Indian Evidence Act, 1872

It is pertinent to contextualize at this juncture that evidence recorded or stored by availing the electronic gadgets is given the evidentiary status. For instance: the voice recorded with the help of a tape recorder. Now-a-days, the digital voice recorder, digital cameras, digital video cameras, video conferencing are adding a new dimension to the evidentiary regime. The emergence of information and communication witnessed a sea change by elevating the status of the evidence recorded, generated or stored electronically from the secondary to primary evidential status. The evidentiary value of e-contracts can be well understood in the light of the various sections of Indian Evidence Act. Sections 85A, 85B, 88A, 90A and 85C deal with the presumptions as to electronic records, whereas, Section 65B relates to the admissibility of the electronic record.

UNIT II

1. Capacity to contract

Introduction

The rule of law, therefore, which requires the assent of the parties to a contract, assumes "that such assenting parties shall be competent to contract; and accordingly, in order to there being a valid contract, a capacity to contract is absolutely necessary". In India, the law regarding contracts is majorly the Indian Contract Act of 1872. Therein, capacity is dealt with in Section 11 of the Act. Section 11 says:

Who are competent to contract?

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

Under Section 11 of the Indian Contract Act, any person is competent to contract are as follows.

- A person who attained the age of majority and is not a minor.
- A person of sound mind.
- A person who has not been disqualified by law or declared as insolvent/bankrupt

Persons not eligible for contract

If a person falls in any of the following categories, he/she will be declared as an incompetent party to a contract.

- Minors
- Persons of unsound mind
- Persons disqualified by law

2. MINOR'S AGREEMENT

Who is a minor?

A person who has not attained the age of majority is a minor. S.3 of the Indian Majority Act, 1875 provides about the age of majority. It states that a person is deemed to have attained the age of majority when he completes that age of 18 years, except in case of a person of whose person or property a guardian has been appointed by the court, in which case the age of majority is 21 years.

Nature of a minor's agreement

As stated above a minor is not competent to contract. The question that arises in case of an agreement by a minor is, whether the agreement is void or voidable? S. 10 mandate that the agreement shall be between parties competent to contract. Section 11 indicates that the minor is incapable of entering into contract. But neither section provides as to the effect of agreement entered into by a minor. This led to a controversy

Cases

1. ***Mohoribibi v. Dharmadas Ghose***

- Facts: A minor mortgaged his properties in favour of plaintiff, a money lender to secure the loan of Rs. 20,000/-, after some money was advanced plaintiff. came to know about infancy of the that. He filed a suit to repudiate the contract and recover the money advanced
- Held: Minor not liable because Minor's agreement is void *ab initio*.
- Reasons:
  i. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant (minor).

  ii. General presumption that every man is the best judge of his own interests is suspended in the case of minor.

Position under English Law

The general rule at common law, the contract made by an infant was voidable at his option. The rule was modified by the Infants Relief Act, 1874, which declares the following three types of contracts as absolutely void:

1. Contracts for the repayment of money lent or to be lent.
2. Contracts for the supply of goods.(other than necessaries)
3. Contracts for accounts stated.

Effects of Minor's Agreement

No estoppel against minor

When a minor by misrepresenting his age induces another to contract with him no estoppel is available against him – there cannot be estoppel against statute – policy of law is to protect minor from contractual liability – doctrine of estoppel cannot be applied to defeat the policy - An infant is not estopped from setting up the defense of minority. Estoppel means when person makes statement and any other person acted on such statement. Then such statement can not be denied or contradicted. In case of ***Mohiri Bibee v. Dharmodas Ghose*** when a minor misrepresented his age while taking loan, but the fact that the person taking the loan is a minor was known to the money lender. The Privy Council did not consider it necessary to decide whether law of estoppels was applicable to the case, because the money lender was not misled by the false statement by the minor and he was aware of the age of the borrower and that the law of estoppel does not apply against a minor.

No liability for tort based in contract

An agreement by the minor is void and, therefore, if a minor makes a breach of an agreement, he cannot be made liable for the same. On the other hand, when a minor commits a tort, he is liable for that in the same way and to the same extent as an adult person. Sometimes an act done by minor may be both a breach of contract as well as the commission of a tort. In the case of ***Johnson v. Pye,*** a minor falsely stated that he was of the age of majority and obtained a loan of $300. It was held that the minor cannot be asked to repay the loan by bringing an action for deceit against him. Minor's agreement is devoid of all consequences in law. A contract cannot be converted into a tort to sue an infant .Minor is not liable for tort connected with contract, but he is not absolved from liability for independent tort.

Doctrine of equitable restitution

When an infant obtained property or goods by misrepresenting his age, he can be compelled to restore it, but only so long as the same is traceable in his possession. If the minor has resold those goods he cannot be made to repay the value of goods and it is not applicable when the minor has received money instead of goods. In the case of ***Leslie v. Sheill*** A minor misrepresenting his age obtained loan from the plaintiff, who sued to recover on the grounds that the minor is liable for damages for fraud and the minor shall be compelled in equity to restore the money. The money was paid over in order to be used as defendant's own and he has so used it. There is no question of tracing it, no possibility of restoring the very same thing got by fraud. Compulsion to repay an equivalent sum out of his present and future resources would amount to enforcing a void contract.

- **Indian Law: Compensation by a minor**

The question which has arisen in India is how far a minor can be asked to restore back the benefit wrongly obtained by him under a void agreement? Can a minor be asked to pay compensation to the other party?

The following two kinds of provisions have arisen before the courts:

1. Whether a minor can be asked to pay compensation under S.64 and 65, Indian contract act for the benefit obtained by him under a void agreement?
2. Whether a minor can be asked to pay compensation in view of the provisions contained in S.39 and 41, Specific Relief Act?

In ***Mohori Bibee v. Dharmodas Ghose***, *t*he question whether a minor can be asked to pay compensation to the other party, under S.64 and 65 had arisen in this case. The privy council held that the question of compensation under S.64 and 65, Indian Contract Act, arises where the parties are competent to contract, and these provisions does not apply to the case of a minor's agreement. In this case the minor had applied for the cancellation of the mortgage deed, executed by him, under S.39, Specific Relief Act and the Privy Council considered the question of compensation to be paid by him under S.41 of that act. It was held that since in this case the loan had been advanced to the minor with the full knowledge of his minority, the question of payment of compensation to such a money lender did not arise.

Liability to restore benefits

Where a minor seeks the help of court for the cancellation of his contract, the court may grant the relief subject to the condition that he shall restore all benefits obtained by him under the contract, the court may grant relief subject to the condition that he shall restore all benefits obtained by him under the contract or make suitable compensation to the other party. In the case of ***Khangul v. Lakhasingh,*** the defendant fraudulently concealing his age agreed to sell a plot of land, received Rs.17,500/-, refused to perform his promise and hence the plaintiff sued for possession or refund of consideration. The court held that the agreement was void and hence denied possession of the land but ordered payment of consideration back to the plaintiff. The reasons for the judgment were given by Shadilal CJ as follows: "There is no real difference between restoring the property and refunding money except that property can be identified but cash cannot be traced. It must be remembered that while in India all contracts made by infants are void, there is no such general rule in England. Therefore, there should be a greater scope in India than in England for the application of the doctrine of equitable restitution."

- **Section 33 of Specific Relief Act, 1963**

Where a defendant successfully resists any suit on the ground that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

Beneficial contracts are enforceable by minor

Law laid down in *Moharibibi* has been generally followed and growingly limited to cases where minor is charged with obligations and the other contracting party seeks to enforce those obligations against the minor. The principle "*minor's agreement is void"* means law will not enforce any contractual obligation of a minor, i.e., a minor is allowed to enforce an agreement which is of some benefit to him and under which he is required to bear no obligation. For example, mortgage executed in favour of minor, minor's suit for recovery of possession of property on sale, enforcement of promise by the other after minor performs his promise.

- **Contracts of service**

Contract of service entered into by a minor is void.

Contracts of marriage

In the case of ***Khimji Kuverji v. Lalji Karamsi***, the question that was laid down before the Bombay High Court was, whether the contract of marriage of a minor girl entered into by her mother on her behalf with a major boy could be enforced and she could sue for the breach of contract.

- **Contracts of immovable property by the minor's guardian**

In the case of ***Mir Sarwarjan v. Fakhruddin***, the guardian of a minor entered into a contract on behalf of the minor for the purchase of land. The minor sued for the specific performance of the contract. Even though the contract was to the advantage of the minor, the minor's suit was dismissed.

No Ratification

A person cannot on attaining majority ratify an agreement made by him during his minority. Ratification relates back to the date of making the contract and therefore a contract which was then void cannot be made valid by subsequent ratification. As a minor's agreement is void he cannot validate it by ratification on attaining majority. For instance, a minor borrows money and executes a promissory note. On attaining majority, he executes a fresh promissory note in substitution of the one executed as a minor. The second promissory note is also void being without consideration. In the case of ***Suraj Narain v. Sukhu Aheer***, a minor executed a promissory note in favour of a money lender while he took a loan of Rs. 11,000 from him. After attaining the age of majority, he executed a secondary note in favour of the same person. The question before the court was whether the consideration received by a person during his minority can be good consideration fresh promise by him after attaining majority. It was held that the consideration received by a person during his minority could not be called consideration in its strict term within the meaning of S.2 (d), and there was no question of that consideration being considered valid for a fresh promise. The promisor, therefore, could not be made liable in respect of such a promise.

- **Ratification of acts done on minor's behalf**

A minor's agreement being void *ab initio*, neither he can himself enter into contract nor authorize an agent to do so on his behalf. Since after the ratification of an act done on behalf of a

person, the act gets the validity of a previously authorized act, it is necessary that the act to be ratifsied must be such as could have been legally authorized.

Liability for Necessaries

Section 68 deals with the claim for necessaries supplied to person incapable of contracting, or on his account. It states that if a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another, person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. Illustrations A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property. In the Indian Contract Act, section 68 provides that a minor falls within the class of persons referred to in the section, a statutory claim is created thereby against his property. But though the property of the minor may be liable for the necessaries under section 68 of the Contract Act, the minor himself is not personally liable as in English Law.

There is, however, no definition of the term "necessaries" in the Contract Act. It is, therefore, necessary to turn to judicial decisions to determine its precise import. Now, it was ruled by Baron Parke in ***Peters v. Fleming***, that from the earliest times down to the present, the word 'necessaries' is not confined in its strict sense to such articles as were necessary to support life, but extended to articles fit to maintain the particular person in the state, degree and station in life in which he is; and therefore we must not take the word "necessaries" in its unqualified sense but with qualification as above pointed out. To put the matter concisely, "necessaries" means goods suitable to the condition in life of the defendant and to his actual requirements at the time of the sale and delivery, and whether an article supplied to an infant is necessary or not, depends upon its general character and upon its suitability to the particular infant's means and station in life.

Articles therefore that to one person might be mere conveniences or matters of taste, may in the case of another be considered necessaries, For instance, articles purchased by an infant for his wedding may be deemed necessary, while under ordinary circumstances the same articles might not be so considered. The word "necessaries," therefore, includes money urgently needed for the requirements of a minor and cannot be restricted to what is necessary for the elementary requirements of the minor such as food and clothing. Thus cash lent to him to effect necessary repairs in his house, and payment of Government revenue are necessaries of the minor

proprietor. In the case of a minor Muslim girl, marriage is a "necessity" the person incurring expenditure for marriage is entitled to relief under section 68. Expenses incurred for minor's education, marriage of his sister, expenses incurred in funeral of minor's parents, expenses incurred for necessary litigation etc. have been held to be necessaries. Expenses incurred for minor's marriage have also been held to be 'necessaries'. In the case of *Nash v. Inman*, a minor, who was already having sufficient supply of clothing suitable to his position, was supplied further clothing by a tailor. It was held that the price of the clothes so supplied could not be recovered.

3. AGREEMENTS BY PERSONS OF UNSOUND MIND

Who is a Person of Sound Mind?

A person while making a contract should be of a sound mind otherwise the contract will have no validity in the eyes of law. The definition of a person of sound mind has been amply clarified by Section 12 of the Indian Contract Act which reads a person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. Thus soundness of mind of a person depends on two facts:

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

ii) his ability to form a rational judgment as to its effect upon his interests.

If a person is incapable of both, he suffers from unsoundness of mind. Idiots, lunatics and drunken persons are examples of those having an unsound mind General Law of Contract 1 Section 12 further states that a person who is usually of unsound mind, but occasionally of sound mind, may undertake a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Position of Agreements by Persons of Unsound Mind

Lunatics:

A lunatic is a person who is mentally deranged due to some mental strain or other.persona1 experience. However, he has some intervals of sound mind. He is not liable for contracts

entered into while he is of unsound mind. However, as regards contracts entered into during lucid intervals, he is bound. His position in this regard is identical with that of a minor.

Idiots

An idiot is a person who is permanently of unsound mind. Idiocy is a congenital defect. Such a person has no lucid intervals. He cannot make a valid contract.

Drunken Persons

Drunkenness is on the same footing as lunacy. A contract by drunken person is altogether void.

Exceptions

A contract with a person of unsound mind is subject to the same exceptions as the contract with a minor is. Thus a person of unsound mind

(i) May enforce a contract for his benefit, and

(ii) His properties, if any, shall be attachable for realization of money due against him for supply of necessaries to him or to any of his dependents.

4. Persons disqualified by law

Alien enemies

All persons other than Indian citizens are aliens. When the sovereign or the state of that alien is at peace with India, he is an alien friend. Contrary to it, he will be an alien enemy. In case of outbreak of war between India and the alien country, the following rules apply for the performance of agreements:-

i. No contract can be made with an alien enemy during the subsistence of war, except with the prior approval of the Government of India.

ii. Performance of the contracts made before the outbreak of war will be suspended during the course of war. They can be performed only when the war is over. Even

then, the government can put restrictions on the performance of such contracts, if it considers them necessary for national interest.

Insolvents

In simple words, the insolvent is disqualified from entering into a contract until he is discharged by the court of law.

Conclusion

From the above discussion, it can be concluded that the capacity to contract is the legal competence to contract. A person declared as incompetent to contract is the one who is incapable of entering into a contract, and a contract with such a person is unenforceable by law. Further, such persons are also divided into categories such as minor, unsound mind and persons disqualified by law. Any person if falls in any of these categories will be declared as an incompetent person to contract, making his contract void or voidable in certain circumstances. But the court of law also provides relief to certain people, making them incapable of contracting for only a specific period of time such as convicts and insolvents. Thus, the capacity to contract is an essential element to ful the requirements of a valid contract.

Consent

According to Section 10, free consent is one of the elements of a valid contract. The consent of the parties means that they understand the same thing in the same sense. There must be no misunderstanding between the parties about the subject matter of the contract. Section 13 of the Indian Contract Act defines the term 'Consent' as two or more persons are said to consent when they agree upon the same thing in the same sense. Thus, consent involves identity of minds in respect of the subject matter of the contract. In English Law, this is called *'consensus-ad-idem'*. For example, A has two horses, one is black and another one is red. B made agreement with A to purchase one horse, B thought that A would sell black horse and A thought that B would purchase red horse. This is not consent because both parties have understood in different sense.

Concept of Free Consent

For a contract to be valid it is not enough that the parties have given their consent. The consent should also be free i.e., it has been given by the free will of the parties involving no pressure or use of force. Section 10 of the Contract Act specifically provides that all agreements are contracts if they are made by the free consent of the parties. Section 14 of the Act states that Consent is said to be free when it is not caused by

(i) coercion, or
(ii) undue influence, or
(iii) fraud, or
(iv) misrepresentation, or
(v) mistake.

When the consent of any party is not free, the contract is treated as voidable at the option of the party whose consent was not free. If, however, the consent has been caused by mistake on the part of both the parties, the contract is considered void.

UNDUE INFLUENCE

When one party is in a position to dominate the will of others and actually misuses the power, then it is a case of undue influence, and the contract becomes voidable. When all the following three conditions are fulfilled then only the situation is considered as an undue influence:

i. One person is in a position to dominate the will of others.
ii. He misuses his position.
iii. He obtains an unfair advantage.

The word 'undue' means unnecessary, unwarranted, or more than required. 'Influence' means convincing the mind of another through changing his mind or changing his will, but this influence must be undue i.e it is not required. Undue influence applies to a relationship which may be blood relation or some other kind of relation i.e fiduciary or relation based on trust. It may also arise where the parties are in a relation of confidence or dependence which puts one of them in a position to exercise over the other an influence which may be perfectly natural and

proper in itself, but is capable of being unfairly used.

Ability to dominate the will of other

The dominant position is not defined in the Indian Contract Act but Section 16(2) provides certain conditions when a person is in a position to dominate the will of another. Cases, where a person is in a position to dominate the will of others, are as follows:

There must be a relation between the parties:

a) Real or apparent authority/relation in which one party can be dominated by the other party.

b) Fiduciary relation is the relation which is made upon the belief and trust between the parties.

Example of real or apparent authority:

1. A Father exerts undue influence upon his son to do something on the will of his father. Otherwise, he will part his relation with a son.
2. A factory owner exerts undue influence upon his employee to make a certain agreement with him. If not he (employee) will be drawn from his job.

Example of fiduciary relation: an advocate asks his client to give him extra money to fight the case from his side. Doctor and patient relationship

2. Mental or bodily distress means the mental capacity of a person is affected. It can be either permanently or temporarily affected. The reason behind such health condition can be age, illness, mental or bodily distress. Consent under pressure means when consent is obtained forcefully. In this manner, consent is not lawful, so it had no binding effect.

Relations which involves domination

All cases where there is an active trust and confidence between the parties and both parties are not on equal footing. The principle of undue influence applies to all the cases where influence is acquired and abused. It applies to all relations where domination can be exercised by one party over another. The existence of a dominating position along with its use is mandatory to invoke an action. Merely a dominant position does not lead to undue influence. It arises only when this position is used for gaining an undue advantage. Undue advantage means any kind of advantage which is not warranted by circumstances in which the contract was entered.

Real or Apparent authority

Section 16(2) of the Indian Contract Act states that Undue Influence can arise wherever the

donee stands in a fiduciary relationship to the donor or holds a real or apparent authority. In this type of influence, there is a real authority like a police officer or an employer who uses his dominance for his enrichment. Apparent authority is pretending as a real authority without its existence.

Mental distress

An only mental distress state of mind does not amount to undue influence until the defendant has used this opportunity to take unfair advantage from another party. Similarly, instigating a person to enter into a contract who has just attained majority amounts to undue influence under this category due to a lack of the plaintiff ‘s experience. A case of undue influence is established more easily when there is evidence to establish to show that the person influenced was of feeble mental capacity or in a weak state of health.

Burden of proof

Generally, the party bringing a claim has the burden to prove the truth of the facts on which he or she is relying. The burden of proof is on the claimant to show that undue influence was exerted by a stronger party over the weaker party, and the latter could not exercise free choice when entering the agreement. However, this burden can be shifted to the defendant in an undue influence case if the plaintiff can demonstrate that a confidential relationship existed between the testator and defendant, and that suspicious circumstance surrounded the preparation and execution of the will. When this occurs, the burden shifts totally on the defendant to prove that undue influence did not occur. When a person is found to be in a position by which he can dominate the will of the other or a transaction appears to be affected due to dominance, the burden of proof that no undue influence was exercised in the transaction lies on the party who is in a position to dominate the will of others.

Presumption of undue influence

There are some cases in which the Honourable Courts of India presume the existence of undue influence between the parties:

1. Where one of the parties to a contract is in a position to dominate the will of the other and contract is prima facie unconscionable i.e unfair, the court presumes the existence of undue influence in such cases.

2. Where one of the parties to a contract is a Pardanashin Woman, the contract is presumed to be induced by undue influence. In relation to Pardanashin Woman, Bombay High Court made an opinion that a woman becomes Pardanashin because she is totally exempted from ordinary social intercourse not because she is the seclusion of some degree.

3. COERCION

If a person commits or threatens to commit an act forbidden by the Indian Penal Code with a view to obtaining the consent of the other person to an agreement, the consent in such case is obtained by coercion. In simple words coercion means "making a person to give his consent by force or threat."

Essential Ingredients of Coercion:

a) Committing or threatening to commit any act forbidden by Indian Penal Code or,

b) The unlawful detaining or threatening to detain any property to the prejudice of any person whatever.

c) With the intention of causing any person to enter into an agreement.

Chikkam Ammiraju V. Chickam Seshamma, in this case, the husband by a threat of suicide, induced his wife and son to execute a release deed in favor of his brother in respect of a certain proprieties claimed as their own by the wife and son. Court held that to commit suicide amounted to coercion within the meaning of Section 15 of the Indian Contract Act and therefore release deed was voidable.

Committing or threatening to commit any act forbidden by IPC

Act forbidden by IPC- The word act forbidden by Indian Penal Code make it necessary for the court to decide in a civil action, whether the alleged act of coercion is such as to amount to an offence. A threat of bringing a false charm with the object of making another do a thing amount, to blackmail or coercion. In the case of ***Ranganayakamma v Alwar Setti***, where the widow was obstructed from removing the corpse of her husband until she consented for the adoption. The court held that her consent was not free and it was coerced. It is clear that

coercion is committing or threatening to commit any act which is contrary to law.

Unlawful Detaining of Property:

A consent can be said to be caused by coercion, if it is caused because of unlawful confining or detaining of a property, or a risk to do as such.

Coercion and Duress

Under the English law, actual or threatened violence to the victim's person has long been recognized to amount to duress. Duress is a term applied under English Contract Law & Coercion is a term applied under Indian Contract Law. In coercion even third party can perform the act but in duress only the party to contract should perform the act. In Duress, it is only applied for person and cannot detain property. Also coercion can be seen as the practice of putting someone under duress (i.e almost like stress.) Coercion is the act of forcing, while duress is more the consequence (or stressful feeling} that happens as a result of coercion. In this way the extent of coercion is more extensive than duress.

FRAUD

According to Section 17 of the Indian Contract Act, 1872 "FRAUD" means and includes any of the following acts committed by a party to a contract, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.
- The active concealment of a fact – is known as *suppresio veri* or suppression of a fact.
- A promise made without any intention of performing it
- Any other act fitted to deceive.
- Any such act or omission as the law specially declares to be fraudulent.

Explanation – Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Essentials of Fraud:

- There should be a false statement of fact by a person who himself does not believe the statement to be true.
- The statement should be made with a wrongful intention of deceiving another party thereto and
  - inducing him to enter into the contract on that basis.

False statement of fact

In order to constitute fraud, it is necessary that there should be a statement of fact which is not true. Mere expression of opinion is not enough to constitute fraud. For example – A person, who is aged over 60 years and thus beyond insurable age, deliberately makes a false statement that his age is 48 years in order to take out an insurance policy, it amounts to fraud, and the insurer is entitled to avoid the policy. In ***Edington vs. Fitzmaurice***, a company was in great financial difficulties and needed funds to pay some pressing liabilities. The company raised the amount by the issue of debentures. While raising the loan, the directors stated that the amount was needed by the company for its development, purchasing assets and completing buildings. It was held that the directors had committed a fraud.

Mere silence is no fraud

It has been noted above that to constitute fraud; there should be a representation as to be certain untrue facts. Mere silence is no fraud, unless there is duty to speak, or his silence is, in itself, equivalent to speech. In ***Keates v Lord Cadogan***, A let his house to B which he knew was in ruinous condition. He also knew that the house is going to be occupied by B immediately. A didn't disclose the condition of the house to B. It was held that he had committed no fraud. In ***Shri Krishan v. Kurukshetra University,*** Shri Krishan, a candidate for the L.L.B. exam, who was short of attendance, did not mention that fact himself in the admission form for the examination. Neither the head of the law department nor the university authorities made proper scrutiny to discover the truth. It was held by SC that there was no fraud by the candidate and the university had no power to withdraw the candidate on that account.

Exceptions

- When there is a duty to speak, keeping silence is fraud.
- When silence is, in itself, equivalent to speech, such silence is a fraud.

Duty to speak (Contracts of *uberrimae fide*)

When the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, keeping silence in such a case amounts to fraud. When there is a duty to disclose facts, one should do so rather than to remain silent. There are certain contracts which are contracts of *uberrimae fide* meaning contracts of utmost good faith. In such a type of contract it is supposed that the party in whom good faith is reposed, would make full disclosure of it and not keep silent. One instance of contract of *uberrimae fedi* is contract of insurance. In such a contract, there may be certain facts which are in full knowledge of the insured or policy holder. He must make full disclosure of such facts to the insurer or insurance company. In case of ***Srinivasa Pillai v LIC of India,*** it was held in this case by the Supreme Court that contract of insurance being one of *uberrimae fede*, it is normal to expect in such a contract utmost good faith on the part of the insured. The insured is expected to answer certain questions by the insurer and it is his responsibility to give true and faithful answers. If the insured has knowledge of certain facts which others cannot ordinarily have, then he should not indulge himself in *suggestio falsi* or *suppressio veri*. When in the case of contract of insurance, where there exists a duty to disclose , then non disclosure of facts that are non-material to and having no bearing on the risk undertaken by the insured, it does not render the contract voidable.

Silence being equivalent to speech

Sometimes keeping silent as to certain facts may be capable of creating an impression as to the existence of a certain situation. In such a case, silence amounts to fraud. Means of discovering the truth "If such consent was caused by misrepresentation or by silence fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence" Illustration A says to B "If you do not deny it I shall accrue that the horse is sound". B says nothing. Here B's silence is equal to speech that the horse is sound. Later if the horse turns out to be unsound, B will be guilty of fraud.

Active Concealment [Section 17(2)]

When there is an active concealment of a fact by one having knowledge or belief of the fact, that can also be considered to be equivalent to a statement of fact, that can also be considered to be equivalent to a statement of fact and amount to fraud. By active concealment of certain facts, there is an effort to see that the other party is not able to know the truth and he is made to believe as true which is in fact not so. Active concealment of a fact has also been considered as amounting to fraud because in that case there is a positive effort to conceal the truth from the other party. He is made to believe as true that fact which false. This is what is known as suppresio veri –But if he merely keeps silence it will not constitute fraud subject to certain exceptions. In case of sale of goods, the rule which is applicable is caveat emptor – or the doctrine of let the buyer beware. It means that it is the duty of the buyer to be careful while purchasing the goods as there is no implied condition or warranty as to quality or fitness of goods.

Promise Made Without Any Intention to Perform It [Section 17(3)]

When a person makes a promise, there is deemed to be an undertaking by him to perform it. If there is no such intention when the contract is being made, it amounts to fraud. Thus, if a man takes a loan without any intention to repay, or when he is insolvent, or purchases goods on credit without any intention to pay for them, there is fraud. If, there is no such bad intention at the time of making contract, but the promise doesn't perform the contract, it doesn't amount to fraud.

Any act or omission which any other act fitted to deceive'[Section 17(4)]

Clause (4) provides that 'any other act fitted to deceive' will also amount to fraud. This clause is general and is intended to include such cases of fraud which would otherwise not come within the purview of the earlier three clauses.

Any act or omission which the law declares as fraudulent [Section 17(5)]

According to this Section 17(5), fraud also includes any such act or omission as the law specially declares to be fraudulent. In such cases, the law requires certain duties to be performed, failure to

do which is expressly declared as a fraud. In ***Akhtar Jahan Begam v Hazarilal***, A sold some property to B stating in the sale deed that he won't be liable to B if he suffered any loss owing to A's defective title. A had, earlier to this transaction, sold this property to somebody else, but didn't inform B about it. It was held that A had committed fraud and the contract was voidable at the option of B.

Statement should be meant for the party misled

It is necessary that the misleading statement should be meant for the party who is misled. If a person is purchasing the shares of the company in the open market on the basis of any prospectus then he can't sue the company later on because the prospectus is meant for an original allottee of the shares by the company, not for the person like the present appellant who buys the shares from the original allottee and therefore, the promoters were not liable for fraud.

Damages for Fraud

Where a contract is induced by fraud, the representee is entitled to claim rescission or damages or both. He would have a remedy by way of such suit, even if restutio in integrum is not possible. The defendant is bound to make reparation for all the damage directly flowing from the transaction. In assessing such damage, the plaintiff is entitled to recover by the way of damages the full price paid by him, but he must give credit for any benefit which he has received as a result of the transaction. As a general rule, the benefits received by him include the market value of the property acquired but such general rule is not applicable where to do so would prevent him obtaining for the wrong suffered. In addition, the plaintiff is entitled to recover consequential losses caused by the transaction. The plaintiff must take all reasonable steps to mitigate the loss once he has discovered the fraud.

4. MISREPRESENTATION

The word representation means a statement of fact made by one party to the other, either before or at the time of making the contract, with regard to some matter essential for the contract, with an intention to induce the other party to enter into contract. A representation, when wrongly made, either innocently or intentionally, is called 'misrepresentation'. When the wrong representation is made willfully with the intention to deceive the other party, it is called fraud.

But, when it is made innocently i.e., without any intention to deceive the other party, it is termed as 'misrepresentation'. In such a situation, the party making the wrong representation honestly believes it to be true. For example, A while selling his car to B, informs him that the car runs 18 kilometers per litre of petrol. A himself believes this. Later on, B finds that the car runs only 15 kilometers pr litre. This is a misrepresentation by A. Section 18 of the contract Act classifies acts of misrepresentation into the following three groups:

Positive assertion:

When a person makes a positive statement of material facts honestly believing it to be true though it is false, such act amounts to misrepresentation.

Breach of Duty:

Section 18(2) says that any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him, amounts to misrepresentation. In such a case, there is no intention to deceive, but party representing commits a breach of duty which he owes to the other party. A breach of duty would also exist where a party bound to disclose certain information does not do so. Such non-disclosure would also amount to misrepresentation. For example, in a life policy, the assured does not disclose the fact that he had previously suffered from some serious ailments. The non-disclosure, however, innocent it may be, would entitle the insurer to avoid the contract on the ground of misrepresentation of facts. Such a duty exists between banker and customer, landlord and tenant and all contracts of utmost good faith. Such cases can also be termed as 'constructive fraud'.

Inducing mistake about subject-matter:

The subject matter of every agreement must clearly be understood by the concerned parties. If one of the parties, leads the other, even innocently, to commit a mistake regarding the nature or quality of the subject-matter, it is considered misrepresentation.

Essentials of Misrepresentation

1. The representation should be made innocently, honestly believing it to be true and without the intention of deceiving the other party.

2. Misrepresentation should be of facts material to the contract. A mere expression of one's opinion is not a statement of facts.
3. The representation must be untrue, but the person making it should honestly believe it to be true.
4. The representation must be made with a view to inducing the other party to enter into contract and the other party must have acted on the faith of the! representation. A party cannot complain of misrepresentation if he had the means of discovering the truth with ordinary diligence.
5. The false representation must have been made by one party to the contract to the other who is misled. If it is not addressed to the party who is misled, then it is not misrepresentation..

Effect of Misrepresentation

Section 19 of Contract Act provides that when consent to an agreement is caused by misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. Thus, the aggrieved party has the following two rights:

a) He can rescind the contract. This right is available only in such cases where he was not in a position to discover the truth with ordinary diligence.

b) If the aggrieved party thinks it proper, he may accept the contract and insist upon its performance. He may compel the other party to pay damages.

You have seen that the party whose consent was caused by misrepresentation can avoid or rescind the contract. However, this right is lost in the following cases:

i) If he could discover the truth with ordinary diligence.

ii) If his consent is not induced by misrepresentation.

iii) If he, after coming to know about the misrepresentation, expressly affirms the contract or acts in such a manner which shows that he has accepted it.

iv) If, before the contract is rescinded, the third party acquires some right in the subject-matter in good faith and for some consideration.

v) If the parties cannot be restored to their original position.

5. MISTAKE

Mistake may be defined as the erroneous belief concerning something. Whenever an agreement is made under a mistake, there is no consent, and the agreement is not valid. Broadly speaking, Mistake may be of two types-mistake of law and mistake of fact. Mistake of law can be further classified into (a) mistake of Indian law, and (b) mistake of foreign law. Similarly, mistake of fact can be (a) bilateral mistake or (b) unilateral mistake.

Mistake of Law (Section 21)

Mistake of law can be further classified into (a) mistake of Indian law, and (b) mistake of foreign law.

Mistake of Indian Law

The general rule is that mistake of law of the land is no excuse. Section 21 lays down that a contract is not voidable because it was caused by a mistake as to any law in force in India. It is because everyone is supposed to know the law of the country and if a person does not know the law of his country, then he must suffer the consequences,

Mistake of Foreign Law

A person is supposed to know the laws of his country but he cannot be expected to know the laws of other countries. Therefore, the rule that 'ignorance of law is no excuse' cannot be applied to foreign law. A mistake of foreign law is treated as a mistake of fact.

Mistake of Fact (Section 20)

Mistake of fact may be classified into two groups.viz., (a) Bilateral mistake, and (b) Unilateral mistake.

Bilateral Mistake

When both the parties to an agreement are under a mistake of fact essential to the agreement, the mistake is known as bilateral mistake of fact. In such a situation, there is no agreement at all because there is complete absence of consent. Section 20 of the Act provides where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. Thus, for declaring an agreement void under this Section, the following three conditions must be satisfied.

Both the parties must be under a mistake:

The mistake must be mutual. For example, A, having two cars, one Fiat and another Maruti, offers to sell his Fiat car to B and B not knowing that A has two cars, thinks of the Maruti car and - agrees to buy it. In this case, there is no consent whatsoever. Therefore, the agreement shall be void.

Mistake must be of fact and not of law:

a. Mistake must relate to as essential fact: The mistake must relate to a matter of fact which is essential to the agreement. In other words, only such mistake of fact that goes to the root of the agreement, renders the agreement void. For example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void, because the mistake relates to something i.e., the horse, which is essential to the contract.

A bilateral mistake may be
(a) Mistake as to the subject-matter, or
(b) Mistake as to the possibility of performance.

Mistake as to the subject-matter of the contract:

Where both the parties to an agreement are under a mistake relating to the subject-matter of the contract, the agreement is void. A mistake as to the subject-matter may take following forms.

a. Mistake as to an existence of the subject-matter:

When both the parties are under a mistake regarding the existence of the subject-matter, the agreement is void. For example; A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship carrying the cargo had been cast away and the goods lost. Neither the party was aware of these facts. The agreement is void.

b. Mistake as to the identity of subject-matter:

Where the parties to a contract have different subject-matter in their minds i.e., one party had one thing in mind and the other party had another, the agreement is void because there is no consensus-ad-idem. For example, A offers to sell his old Delhi house to B. A

had another house in South Delhi. B thinks he is buying the South Delhi's house. There is no agreement between A and B.

c. Mistake as to the title of the subject-matter:

Sometimes the buyer already owns the property which a person wants to sell to him, but the concerned parties are not aware of this fact. In such a case, the agreement is void as there is a mistake about the title of the subject-matter .

d. Mistake as to the quantity of the subject-matter:

Where both the seller and the buyer make a mistake regarding the quantity of the subject-matter, the agreement is void. In the case of Henked v. Pape, P inquired about the price of rifles from H suggesting that he might buy fifty rifles. On receiving the quotation, P telegraphed "send three rifles". But. because of the mistake of the telegraph authorities, the message transmitted was "send the rifles" H despatched fifty rifles. P accepted three rifles and returned the remaining forty seven rifles. It was held that there was no contract. However, P was liable to pay for three rifles on the basis of an implied contract.

e. Mistake as to the quality of the subject-matter:

If the subject-matter is something essentially different from what the parties thought it to be, the agreement is void. For example, A contracts to sell a particular horse to B. A and B believe it to be ,a race horse. But, it turns to be a cart horse. The agreement is void.

f. Mistake as to the price of the subject-matter:

Where there is a mutual mistake as to the price of the subject-matter, the agreement is void. For example, where a seller of certain goods mientioned in his letter the price as Rs. 1,250 when he really intended to w:ite Rs. 2,250, the agreement is void. An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not treated as a mistake of fact.

Mistake as to tire possibility of performance

If the parties to an agreement believe that the contract is capable of performance, while in fact it is not so, the agreement is treated as void or the ground of impossibility. It may be a physical impossibility or a legal impossibility.

a. Physical impossibility:

A contract for the hiring of a room for witnessing the coronation procession of Edward VII was held to be void because unknown to the parties the procession had already keen cancelled and there is no question of witnessing it. (Grifdth v Esymsr)

b. Legal impossibility: An agreement is void if it provides that something shall be done which cannot legally be done.

Unilateral Mistake

The term 'unilateral mistake' means where only one party to the agreement is under a mistake. Generally, a unilateral mistake does not make the agreement void. According to Section 22, a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. If a man due to his own negligence or lack of reasonable care does not ascertain what he is contracting about, he must bear the consequences. For example, A sold oats to B by sample and thinking that they were old oats, purchased them. In fact, the oats were new. It was held that B was bound by the contract, (***Smith v. Hughes).*** In some cases, however, a unilateral mistake may be fundamental and may affect the character of the contract. In such a situation, the agreement is void. In the following cases, even though the mistake is unilateral, the agreement is void.

Mistake as to the identity of the person contracted with:

Mistake as to the identity of the person violates a contract. For example, where A intends to contract only with B, but enters into a contract with C believing him to be B, the contract is void. It should be noted that a mistake about the identity of the contracting party will render the contract void only if

(a) the identity of the party is of material importance to the agreement, and

(b) the other party knows that he is not intended to be a party to the agreement.

The following cases illustrate this point. In the case of ***Cindy v Lindsay***, one Blenkiron, knowing that Blenkiron & Co., were the reputed customers of Lindsay & Co placed an order with Lindsay & Co. by imitating the signature of Blenkiron. The goods were then sold to Cindy, an innocent buyer. In a suit by Lindsay & Co. against Cindy for recovery of goods, it was held that as Lindsay never intended to contract with Blenkiron, there was no contract between them and as

such even an innocent buyer (Cindy) did not get a good title. Hence, Cindy must return the goods or make payments of price. In the case of ***Lake v. Sirnmons***, a woman by falsely misrepresenting her to be the wife of a well known Baron (a millionaire) obtained two pearl necklaces from a firm of jewelers on the pretext of showing them to her husband before buying. She pledged them with a broker, who in good faith paid her some amount. It was held that there was no contract between the jeweler and the woman and an innocent buyer or a broker did not get a good title. The broker must return the necklaces to the jeweler.

Mistake as to the nature of the contract

A contract is void when one of the party, without any fault of his own, makes a mistake as to the very nature of the contract. Thus, when a person is induced to sign a written document containing a contract fundamentally different in nature from what he thinks he is signing, the contract shall be void. In the case of ***Foster v. Mackinnon***, an old illiterate man was induced to sign a bill of exchange, by means of a false representation that it was a mere guarantee. Held, he is not liable for the bill as he never intended to sign a bill of exchange.

Effect of Mistake

While discussing various types of mistakes, the effect of each type of mistake has been clearly stated. It can now be summarized as follows:

1) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

2) In most cases of unilateral mistake, the contract is not void. But, where unilateral mistake defeats the true consent of the parties, the agreement is treated as void.

3) Any person who has received any advantage under such agreement, he is bound to restore it, or to make compensation for it, to the person from whom he had received it.

4) A person to whom money has been paid or anything delivered by mistake must repay or return it.

1. LEGALITY OF OBJECT

In most of the cases, the words 'Object' and 'Consideration' mean the same thing. But in some cases they may be different. For example, where money is borrowed for the purpose of the marriage of a minor, the consideration for the contract is the loan and the object is the marriage. An agreement will not be enforceable if its object or the consideration is unlawful. According to Section 23 of the Act, the consideration and the object of an agreement are unlawful in following cases:

If it is forbidden by law

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

Illustration

i) A loan granted to the guardian of a minor to enable him to celebrate the minor's marriage in contravention of the Child Marriage Restraint Act is illegal and cannot be recovered back (***Srinivas v. Raja Ram Mohan).***

ii) A promises to drop prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

If it defeats the provisions of any law

If it is of such a nature that if permitted, it would defeat the provisions of any law. In other words if the object or the consideration of an agreement is of such a nature that, though not directly forbidden by law, it would defeat the provisions of the law, the agreement is void. For example, A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon the understanding with A, becomes the purchaser and agrees to convey the estate to A for the price which B has paid. The agreement is void as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

If it is fraudulent

An agreement with a view to defraud others is void. For example, A, B and C enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is void as its object is unlawful.

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

If the object of an agreement is to injure the person or property of another, it is void. For example, A borrowed Rs. 100 from B. A executed a bond promising to work for B without pay for 2 years and in case of default agreed to pay interest at a very 1 exorbitant rate and the principal amount at once. Held, the contract was void (***Ralm Saroop v. Bansi).***

Immoral

An agreement whose object or consideration is immoral is void. What amounts to immorality depends upon the standards of morality prevailing at a particular time and approved by courts. For example, A let a cab on hire to B, a prostitute, knowing that it would be used for immoral purposes. The agreement is void (***Pearce v. Brooks)*** The scope of the word 'immoral' has been explained in ***Gherulal Parakh v Mahadeodas,*** as follows: The case law both in England and India confines operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreement to pay consideration for future illicit cohabitations, promise in regard to marriage for consideration or contracts facilitating divorce are held to be void on the ground that the object is immoral.

Opposed to Public Policy

It is very difficult to define the term 'public policy' with any degree of precision because public policy, by its very nature, is highly uncertain and fluctuating. It keeps on varying with the habits and fashions of the day, with the growth of commerce and usage of trade. In England, Lord Halsbury in case of ***Janson v. Drieftein Consolidated Mines Ltd***, observed "that categories of public policy are closed, and that no court can invent a new head of public policy." Section 23 of the Indian Contract Act, however, leaves it open to court to hold any contract as unlawful on the ground of being opposed to public policy. In simple words, it may be said that an agreement which conflicts with morals of the time and contravenes any established interest of society, it is

void as being against public policy. Thus, an agreement which tends to be injurious to the public or against the public good is void as being opposed to public policy.

Heads of Public Policy

The commonly accepted grounds of public policy include:

Trading with Enemy

All contracts made with an alien (foreigner) enemy, unless made with the permission of the Government, are unlawful on the ground of public policy.

Interference with administration of justice

It may take any of the following forms:

6. Agreements for stifling prosecution:

Contracts for compounding or suppressing of criminal charges for offences of a public nature are unlawful and void. The Law states "you cannot make a trade of your felony (crime), you cannot convert a crime into a source of profit".

Agreements for the sale of public offices and titles

Traffic by way of sale in public offices and appointments obviously tends to the prejudice of the public service by interfering with the selection of the best qualified persons. Such sales are therefore unlawful and void. Illustration A promises to pay B Rs. 5,000 if B secures him an employment in the public service. The agreement is void. 2 Similarly, where A promises to pay a sum to B in order to induce him to retire so as to provide room for A's appointment to the public office held by B, the agreement is void ***(Saminatha v. Muthusarni).***

Marriage brokerage or brokerage contracts

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

Venkatachalam, a sum of money was agreed to be paid to the father in consideration of his giving his daughter in marriage. Held, such a promise amounted to a marriage brokerage contract and was void.

Unfair, unreasonable or unconscionable dealings

Where the parties are not economically on equal footing and there is a wide gap in the bargaining power of the parties, where one of them is in a position to exploit and the other is vulnerable and the contract is made with that other is apparently unfair, it van in circumstances be also regarded as opposed to public policy. In ***Central Inland Water Transport Corporation v Brojo Nath Ganguly,*** that a government corporation imposing upon a needy employee a term that he can be removed just by three months' notice or pay in lieu of notice and without any ground is an exploitation and every ruthless exploitation is against public policy.

2. VOID AGREEMENTS

There are certain agreements which have been expressly declared void under certain provisions of the contract Act or any other law. The following types of agreements have expressly been declared void under various Sections of the Indian Contract Act.

1. Agreement, the consideration or object of which is partly unlawful (Section 24).
2. Agreement made without consideration (Section 25).
3. Agreement in restraint of marriage (Section 26).
4. Agreements in restraint of trade (Section 27).
5. Agreements in restraint of legal proceedings (Section 29).
6. Wagering agreement (Section 30).
7. Impossible agreement (Section 56).

Agreement, the consideration or object of which is partly unlawful/ Partial Illegality

Section 24 of the Indian contract Act provides that if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is

unlawful, the agreement is void. For example, A promises to supervise the business on behalf of B, a licensed manufacturer of some permissible chemicals and some contraband items. B promises to pay A a salary of Rs. 10,000 per month. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful. It is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. In ***Gopalrao v Kallappa***, a license was granted to a person for the sale of opium and ganja with the restriction that he would not partner with anyone in the ganja business without the permission of the collector. He admitted a partner into the whole business by accepting some capital without such permission. The admitted partner filed a suit for dissolution of the firm and refund of his money. But the court held that it is impossible to separate the contract and say how much capital was advanced for the opium and how much for ganja. The whole transaction was held to be void.

Agreement made without consideration

Section 25 declares that an agreement without consideration is void subject to certain exceptions. This has been dealt with under Unit 1.

Agreement in restraint of marriage

According to Section 26 of the Indian Contract Act, every agreement in restraint of the marriage of any person, other than a minor, is void. The restraint may be general or partial. Thus the party may be restrained from marrying at all, or from marrying for a fixed period, or from marrying a particular person or a class of persons. For example, A promised to marry none else except B, and in default pay her a sum of Rs. 2,000. A married someone else and B sued A for recovery of Rs. 2,000. Held, the agreement was in restraint of marriage and as such void in ***Lowe v. Peers***. A penalty upon remarriage may not be construed as a restraint of marriage. Thus, an agreement between two co-widows that if one of them remarried she should forfeit her right to her share in the deceased husband's property has been upheld in ***Rao Rani v. Gulab Rani.*** Similarly, a provision in Nikah Nama (marriage agreement) by which a Muslim husband authorises his wife to divorce herself from him in the event of his remarrying a second wife is not void. Thus, if the wife divorces herself from the husband on his marrying a second wife, the

divorce shall be valid, and she will be entitled to maintenance from him as held in ***Badu v. Badarannessa.***

Agreement in restraint of trade

Freedom of trade and commerce is a fundamental right protected by Article 19(g) of the Constitution of India, Just as the Legislature cannot take away individual freedom of trade, so also the individual cannot barter it away by an agreement. Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of his labour, skill or talent, by any contract that he enters into. Courts, therefore, do not allow any tendency to impose restrictions upon the liberty of an individual to carry on any business, profession or trade. Thus, all agreements in restraint of trade, whether general or partial, qualified or unqualified, are void.

Cases:

a. In Patna city, 29 out of 30 manufacturers of combs agreed with R to supply him combs and not to anyone else. Under the agreement R was free to reject the goods if he found there was no market for them. Held, the agreement amounted to restraint of trade arid was thus void in ***Sheikh Kalu v. Ramasaran Bhugat.***

b. A and B carried on business of braziers in a certain locality in Calcutta. A promised to stop business in that locality if B paid him Rs. 900 which he had paid to his workmen as advance. A stopped his business but B did not pay him the promised money. Held, the agreement was void and, therefore, nothing could be recovered on it. (Madhab v. Raj Coomar).

Exceptions

There are two exceptions to this rule- those created by statutes, and those arising from judicial interpretations of Section 27.

Statutory Exceptions

Sale of Goodwill:

The seller of goodwill of a business may agree with the buyer thereof not to carry on a similar business within specified local limits. Such a restraint shall be valid, if limits are reasonable (Section 27). The reasonableness of restrictions will depend upon many factors, such as the area in which the goodwill is effectively enjoyed, the price paid for it and above all, the nature of the business. For example, a seller of imitation jewellery in England, sold his business to B and promised that for a period of two years he would not deal (a) in imitation jewellery in England (b) in real jewellery in certain foreign countries. The first promise alone was held lawful. The second promise is void and the restraint was unreasonable in point of space and nature of business.

Certain restraints in partnership:

There are four provisions under the Partnership Act which recognise agreements in restraint of trade as valid. Accordingly, partners may agree that:

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

ii. A partner on ceasing to be a partner will not carry on any business similar to that of the firm within a specified period or within specified local limits. The agreement shall be valid only if the restrictions are reasonable [Section 36(2) of the Indian Partnership Act, 1932].

iii. Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits. Such an agreement shall be valid provided the restrictions imposed are reasonable (Section 54 of the Indian Parthership Act, 1932).

iv. A partner may, upon the sale of the goodwill of a firm, make an agreement that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits. Any such agreement shall be valid if the

restrictions imposed are reasonable. [Section 55(3) of the Indian Partnership Act, 1932].

Exceptions under Judicial Interpretations

Following are the exceptions arising under judicial interpretation of Section 27 of Indian Contract Act.

Trade Combinations:

Business combinations with the idea of regulating business and not restraining it have been held to be desirable in public interest. Restraints imposed by such associations are, therefore, not to be declared void on grounds of restraint of trade. In the case of ***Haribhai v. Sharef Ali,*** four ginning factories entered into an agreement fixing uniform rate for ginning cotton and pooling their earnings to be divided between them in certain proportions. The Bombay High Court held the agreement to be valid and enforceable. Bur the Courts would not allow a restraint to be imposed disguised as trade regulations. Thus, an agreement between certain persons to carry on business with the members of their caste would be held void.

Exclusive Dealing Agreements:

Reasonable agreements to deal in the products of a single manufacturer or to sell the whole produce to a single dealer have been upheld to be valid and not in restraint of trade. Thus, the following agreements were upheld as enforceable.

i) An agreement by a manufacturer of dhotis to supply 1,36,000 pairs of certain description to the defendant and not to sell goods of that kind 10 any other person for a fixed period (***Carliles Nephew & Co. v. Ricknauth Bucktemull).***

Where a manufacturer or supplier, after meeting all the requirements of a buyer, has surplus to sell to others, he cannot be restrained from doing so (***Shaikh Kalu v. Ram Saran Bhagat)***. Similarly, exclusive dealing agreements shall not be valid if their terms are unreasonable or they unreasonably check competition (***Esso Petroleum Co. v. Harper's Garage Ltd***.).

Service Agreements:

An agreement of service by which a person binds himself during the term of the agreement not to take service with anyone else or, directly or indirectly, take part in or promote or aid any business in direct competition with that of his employer is valid. For example, A agreed to become assistant for three years to B who was a doctor practising at Zanzibar. It was agreed that during the term of the agreement A was no1 to practise on his own account in Zanzibar. After one year, A started his own practice. Held, the agreement was valid and A could be restrained by an injunction from doing so. These days it is a common practice to appoint trainees. A service bond is normally got signed whereby the trainee agrees to serve the organisation for a stipulated period. Such agreements, if reasonable, do not amount to restraint of trade and hence are enforceable. But an agreement to restrain an employee from competing with his employer after the termination of his employment may not be allowed by the courts.

Agreements in restraint of legal proceedings

Section 28 of the Indian Contract Act regards the following two restraints of legal proceedings as void.

Restriction on Legal Proceedings:

An agreement by which a party is restricted absolutely from enforcing his legal rights under, or in respect of any contract by the usual legal proceedings in the ordinary tribunals is void. For example, a contract contains a stipulation that no action should be brought upon it in case of breach. Such a stipulation would be void because it would restrict both parties from enforcing their rights under the contract in the ordinary tribunals. But, a contract whereby it is provided that all disputes arising between the parties should be referred to the arbitration, whose decision shall be accepted as final and binding on both parties of the contract, is not invalid. The courts have power, in spite of such a stipulation, to set aside the decision of the arbitrator on grounds of misconduct on the part of the arbitrator. A contract may contain a double stipulation that any dispute between the parties should be settled by arbitration, and neither party should enforce his rights under it in a court of law. Such stipulation would be valid as regards its first branch. (i.e., all disputes between the parties should be referred to arbitration, because that stipulation itself

would not have the effect of ousting the jurisdiction of the courts. But the latter branch of the stipulation (i.e, neither party should enforce his rights under it in a court of law) would be void because by that the jurisdiction of the court would be necessarily excluded. Further, it should be noted that the restriction imposed upon the right to sue should be absolute in the sense that the parties are precluded from pursuing their legal remedies in the ordinary tribunals. Thus, where there are two courts, both of which have jurisdiction to try a suit, an agreement between the parties that the suit should be filed in one of those courts alone and not in the other, does not contravene the provisions of Section 28.

Limitation of Time:

Another type of agreement rendered void by Section 28 is where an attempt is made by the parties to restrict the time within which an action may be brought so as to make it shorter than that prescribed by the law of limitation. For example, according to the Indian Limitation Act, an action for breach of contract may be brought within three years from the date of breach. If a clause in an agreement provides that no action should be brought after two years, the clause is void. A clause in a policy of life insurance declaring that "no suit to recover under this policy shall be brought after one year from the death of the assured" was held void. However, cases of the above sort are distinguished from those which provide for surrender or forfeiture of rights if no action is brought within the stipulated time. A clause in a policy of life insurance provided "if a claim be made and rejected and an action or suit be not commenced within three months after such rejection ..., all benefits under the policy shall be forfeited." This clause was held valid.

Uncertain Agreements

An agreement is called an uncertain agreement when the meaning of that agreement is not certain or capable of being made certain. Such agreements are declared void under Section 29. Illustration

i. A agrees to sell to B "one hundred tons of oil". The agreement is void for uncertainty since there is no clarity in the agreement what kind of oil was intended.

ii. A agrees to sell B "my white horse for Rs. 5,000 or Rs. 10,000". There being nothing to show which of the two prices was to be given, the agreement is void.

Wagering Agreement

Agreements entered into between parties under the condition that money is payable by the first party to the second party on the happening of a future uncertain event, and the second party to the first party when the event does not happen, are called Wagering Agreements or Wager. There should be mutual chance of profit and loss in a wagering agreement. Generally wagering agreements are void.

Wager means a bet. It is a game of chance where the probability of winning or losing is uncertain. The chance of either winning or losing is wholly dependent on an uncertain event. Parties involved in a wagering contract mutually agree upon the nature of the agreement that either one will win. Each party stands equally to win or lose the bet. The chance of gain or the risk of loss is not one sided. If either of the parties may win but not lose, or may lose but cannot win, it is a wagering contract. The essence of a wagering contract is that neither of the parties should have any interest in the contract other than the sum, which he will win or lose. Parties to a wagering contract focus mainly on the profit or loss they earn. Illustrations A and B agree with each other that if it rains on Tuesday, A will pay Rs. 100 to B and if it does not rain on Tuesday, B will pay A Rs. 100. Such an agreement is a wagering agreement and hence is void.

Essentials of a Wager

Dependence on Uncertain Event

One of the important essentials of a wagering agreement is that it must depend upon an uncertain event. Event may be past, present or future, but the parties must be unaware of its future or the time of its results or the time of its happening. Example: A football match between team A and team B is to start at Mumbai on 30th June 2016. C and D enter into an agreement that C will pay Rs. 500 to D if team A wins, and if team B wins, D will pay Rs. 500 to C. This is a wagering agreement and is void.

Mutual Chance of Gain or Loss

Another element of wagering agreement is that each party to the agreement should stand to win or lose as per the result of the uncertain event. If there are no such mutual chances of gain or loss, there is no wager. Example: A cricket match is to start at Hyderabad between India and

South Africa. If India wins the match, A agrees to pay B Rs. 500, whereas if South Africa wins the match, B agrees to pay Rs. 500 to A. This is a wagering agreement. In this case. each party has the chances to win or lose. Here the gain of one party will be the loss of the other and vice versa. In the case of ***Babasaheb v Rajaram***, two wrestlers agreed to play a wrestling match on condition that the party failing to appear on the day fixed was to forfeit Rs.500 to the opposite party and the winner was to receive Rs.1125 out of the gate money. The defendant failed to appear in the ring and the plaintiff sued him for Rs.500. It was held that the agreement could not be of wager because neither party to the said contract stood to lose according to the result of the wrestling match. The winning amount was to be given from the gate money and not by the parties.

No Other Interest in the Event

Neither party should have any interest in happening or non-happening of the event other than the sum he will win or lose. If either party has some other interest other than the sum he will win or lose, it will not be a wager. Example: A, a owner of a house, insures his house against fire with GIC. A has to pay an Insurance premium of Rs. 50 per month as per the terms of contract. If the house is destroyed by fire, GIC will pay the actual amount of loss suffered by him. Here A has interest in his house. Further on the happening of the event i.e. fire, A will not gain anything. Hence, it is not a wager.

No Control Over the Event

The parties to the contract should not have any control over the happening of the event one way or the other. If one party has the events in his hands, the transaction will not be a wager. Illustration A and B enter into an agreement that if A resigns his job, B will pay Rs. 500 to A and A will pay Rs. 500 to B if he does not resign his job. Here A has the event under his control. Hence the contract is not a wager.

Promise to Pay Money or Money's Worth

The wagering agreement must contain a promise to pay money or money's worth.

The following transactions are not wagers

Contract of Insurance are not wagers

Insurance contracts are contracts of indemnity. They are entered into, to safeguard the interest of one party to the contract. In this contract, the insured has insurable interest in the property or life Hence it is not a wager.

Distinction between Wagering Agreement and Contract of Insurance

i. In a wagering agreement, there is no insurable interest, whereas contract of insurance has insurable interest

ii. Wagering agreement is a void agreement, whereas contract of insurance is a valid one.

iii. In a wagering agreement, neither party has any interest in the happening or non-happening of an event. But in an insurance agreement, both the parties are interested in the subject-matter.

iv. Wagering agreements are conditional contracts, whereas insurance agreements are contracts of indemnity except life insurance contracts which are contingent contracts.

v. The object of a wagering contract is to speculate for money or money's worth, whereas an insurance contract is to protect an interest.

vi. A wagering agreement is just a gamble, whereas a contract of insurance is based on scientific and actuarial calculation of risks.

Skill Competitions are not wagers

Skill plays a substantial part for the successful solution of certain competitions. For example, crosswords competitions, picture, puzzles etc. Here, the prizes are awarded as per the merits of the solution. Such competitions are not wagers. However, if prizes depend upon a chance, that is a lottery and therefore a wager. Example: A crossword puzzle was given in a newspaper and it was stated in the newspaper that whose solution of the crossword puzzle would correspond with the solution kept with the editor, he would be given the first prize. This is a game of chance and therefore a lottery. And thus, is a wager. Further, as per law, the prize competitions involving

games of skill are not wagers. But if the amount of prize exceeds certain amount, they will be regarded as gambling and void.

Horse Race Competition is not wager

State Governments may authorize the horse race competition, if it is permitted by the local laws. In such cases, any subscription or contribution of the value of Rs.500 or upwards made towards any prize or sum of money which is to be awarded to the winner of any horse race, shall not be unlawful. In other words, agreement to subscribe or contribute towards such prize or sum of money is valid and enforceable. Example: A entered into an agreement with the Race Course Authority who was permitted to conduct the race course competition, to contribute Rs. 600 towards the money which was to be paid to the winner of the horse race to be held on a particular day. This is not a wager.

Share Market Transactions are not wagers

Transactions for the purchase and sale of shares and stocks, with an intention to take and give delivery of shares, is not a wager. However, if the intention is only to settle the price difference, the transaction is a wager and hence void.

Sports Competitions are not wagers

Sports competitions such as Athletics, Wrestling, Indoor games, Boxing, Football, Cricket, Hockey etc. are not games of chance. It is decided by skill. Hence, they are not wagers.

Effects of Wagering Agreements

In India, wagering agreements have been expressly declared to be void. So it cannot be enforced in any Court of law. Sec. 30 of the Act states that agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide by the results of any game or other uncertain event on which any wager is made. As a matter of fact, though a wagering agreement is void and unenforceable, but it is not forbidden by law. That is, the wagering agreements are void but not unlawful. However, in the States of Gujarat and Maharashtra, the wagering agreements have been declared to be unlawful. As far as collateral transactions are concerned, as the wagering agreements are void but not

unlawful, they are not void. Therefore, they are enforceable. For e.g., where a person lends money to another person to enable him to pay a gambling debt, the lender can recover the money so paid.

Agreement to do impossible acts

Agreements to do impossible acts Section 56 of the Indian Contract Act declares that an agreement to do an act impossible in itself is void. Thus, where A agrees with B to discover treasure by magic, the agreement is void. We may say that parties who purport to agree to the doing of something obviously impossible must be deemed not to be serious or not to understand that they are doing. Moreover, law cannot regard a promise to do something obviously impossible as of any value and such a promise is, therefore, no consideration. An agreement to do an act impossible in itself should be contrasted from a contract which becomes impossible of performance. Subsequent impossibility renders a contract void when the act becomes impossible. Details on subsequent impossibility and its effect are discussed in Unit 3.

▪ CONTINGENT CONTRACTS

The word contingent means when an event or situation is contingent, i.e. it depends on some other event or fact. In simple words, contingent contracts are the ones where the promisor perform his obligation only when certain conditions are met. The contracts of insurance, indemnity, and guarantee are some examples of contingent contracts. A contingent contract is a contract to do or not to do something if some event, collateral to such contract, does or does not happen (Section 31). For example, A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

Essential features of a contingent contract

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

For example, where A agrees to deliver 100 bags of wheat and B agrees to pay the price only afterwards, the contract is a conditional contract arid not contingent, because the event on which B's obligation is made to depend is a part of the promise itself and not a collateral event. Similarly, where A promises to pay B Rs. 10,000 if he marries C, it is not a contingent contract.

3. The contingent event should not be dependent on the will of the promisor. For instance, if A promises to pay B Rs. 1,000 if he so chooses, it is not a contingent contract. However, where the event is within the promisor's will but not merely his will, it may be a contingent contract.

Rules Regarding Enforcement of Contingent Contracts

The rules regarding contingent contracts are summarized hereunder (Sections 32 to 36)

1. Contracts contingent upon the happening of a future uncertain event cannot be enforced by law unless and until that event has happened. And if, the event becomes impossible, such contract becomes void (Section 32). Illustration A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's life-time.
2. Contracts contingent upon the non-happening of a certain future event can be enforced when the happening of that event becomes impossible, and not before (Section 33).

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

3. If a contract is contingent upon as to how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything, which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies. (Section 34). For example, A agrees to pay B a sum of money if B marries C. But C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.
4. Contracts contingent upon the happening of an uncertain specified event within a fixed time become void if, at the expiration of the rime fixed, such event has not happened or if, before the time fixed, such event becomes impossible (Section 35). For example, A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
5. Contracts contingent upon the non-happening of a specified event within a fixed time may be enforced by law when the time fixed .has expired and such event has not happened, or before the time fixed expired, if it becomes certain that such event will not happen (Section 35). For example, A promises to pay B a sum of money if a certain ship doesn't return within a year. The contract may be enforced if the ship does not return-within the year, or is burnt within the year.
6. Contingent agreement to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the .agreement at the time when it is made. Illustration A agrees to pay B Rs.'1,000 if two parallel straight lines should enclose a space. The agreement is void.

Difference between a Contingent Contract and a Wagering Agreement

1. A wagering agreement consists of reciprocal promises while a contingent contract may not consist of reciprocal promises.
2. A wagering agreement is of a contingent nature while a contingent contract may not be of a wagering nature.
3. A wagering agreement is void while a contingent contract is valid.

4. In a wagering agreement parties have no other interest in the subject matter except for winning or losing of wagering amount while it is not so in contingent contracts.
5. In a wagering agreement the future event is the sole determining factor while in a contingent contract future event is only collateral.

UNIT-III

DISCHARGE OF CONTRACTS

Discharge of a contract happens when the parties have not completely performed their contractual obligations or when happenings, behavior of the parties or procedure of law releases the parties from performance. Under Indian Contract Act, 1872 discharge of a contract means; termination of the contractual connection between the parties in a contract. A contract is said to be terminated when it stops to perform, when rights and obligations made by it come to an end. Following are the modes of discharge of contract:

1. By Performance
2. By Frustration or Impossibility to Perform
3. By Agreement
4. By Assignment
5. By Breach

1. DISCHARGE OF CONTRACT BY PERFORMANCE

- Contingent contracts (Section 31-36): Has already been dealt under Unit-2.
- General Contracts (Section. 37-41)
- Joint Promises (Section 42-45)
- Time for Performance (Section 46-50)
- Reciprocal Promises (Section 51-54)

Contingent contracts (Section 31-36)

This topic has already been dealt under Unit-2.

General contracts

Performance means that doing of which is obligatory by the contract. Discharge by performance occurs when the parties to the contract do their duties arising out of the contract within the stipulated/ reasonable time and in the manner prescribed by the contract. However, even if one party performs or completes his obligations, he only is discharged and not the other party. The party so discharged can bring an action against the other, who is guilty of breach. The general rule is that a party to a contract must perform exactly what he undertook to do. In the

Offer of performance (Section 38)

Performance can be either actual or attempted. When each party performs his obligations exactly in the same manner in which it was intended in the contract. This brings the contract to an end. After that, no claim would remain of one party against another; this is known as actual performance. It may happen that the promisor offers performance of his obligation under the contract at the proper time and place; however, the promise refuses to accept the performance. This is known as 'tender' or 'attempted performance'. It is then for the promisee to accept the performance. If he does not accept, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract. Thus, a tender of performance is equivalent to performance. A tender or offer of performance to be valid should satisfy the following conditions:

a) It must be unconditional. For example, a tender of an amount less than what is due under the contract is not an effective tender.

b) It must be created at a proper time and place, and under such circumstances that the person to whom it's created could have a reasonable opportunity of ascertaining that the person by whom it's created is able and willing to try and do the whole of what he's bound by his promise to do.

c) It must be made to the proper person.

d) It must be in relation to whole of the obligations as contained under the contract.

e) If the tender or offer is a proposal to deliver anything to the promisee, the promisee must have a sensible opportunity of sighting that thing offered is the thing that the promisor is bound by his promise to deliver.

Effect of refusal of party to perform promise wholly (Section 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 conduct, his acquiescence in its continuance.

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) On the same facts, on the sixth night A willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

Effect of accepting performance from third person. (Section 41)

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Performance of Joint Promises

According to the English law when one of several promisors die the rights and liabilities devolve upon surviving promisors, in case of last surviving promisor it devolves on legal representatives of last surviving promisor. But according to Section 42 joint promises must, during their joint lives, fulfill the promise and if any of them dies, his representatives must, jointly with the surviving promisors, fulfill the promises and so on. On the death of the last survivor, the representatives of all of them must fulfill the promise. But this is subject to do any private arrangement between the parties either expressly or impliedly.

Section 43 of the Act lays down three rules for joint promisors:

a. When a joint promise is created and there is no specific agreement to the contrary, the promisee could compel any one or more of the joint promisors to perform the complete promise.
b. A joint promisor who has been compelled to perform the full of the promise could need the other joint promisors to create an equal contribution of the performance of the promise, unless a different intention seems from the agreement.
c. If any one of the promisors makes a default in such contribution, the remaining joint promisors must bear the deficiency in equal shares.

Section 44 provides that where two or more persons have made a joint promise, a release of one of such joint promisors i.e the promisee may waive a joint promisors responsibility but this will not discharge the others. Further, the joint promisor who has been released will still be responsible to the other joint promisors for his contribution but not to the promisee since he has been released by the latter. Section 45 deals with joint promises and the devolution of joint

rights. If a promise has been made to more than one person jointly, the right to claim the performance of such promise rests between the joint promisees throughout their lives. On the death of a joint promisee, his legal representative will have the right to claim performance along with the surviving joint promisees. After the death of the last survivor, the representatives of all the joint promises will jointly have the right to claim performance of the promise.

Time and place for performance: Section 46-50

It is for the parties to a contract to decide the time and place for the performance of the contract. The rules regarding the time and place of performance are given in sections 46 to 50 of the Contract Act. These are as follows:

Performance of a promise within a reasonable time

According to Section 46 where the time for performance is not specified in the contract, and the promisor himself has to perform the promise without being asked for by the promisee, the contract must be performed within a reasonable time. The question 'what is a reasonable time' is, in each particular case, a question of fact. Thus, it is clear from this provision that if time for performance is not stated, the contract is not bad for want of certainty.

Performance of promise where time is specified

Sometimes, the time for performance is specified in the contract and the promisor has undertaken to perform it without any application or request by the promisee. In such cases, the promisor must perform his promise on that particular day during the usual hours of business and at a place where the promise ought to be performed (section 47). For example, A promises to deliver goods at B's warehouse on January 1, 1990. On that day A brings the goods to B's warehouse, but after the usual hours of closing and they are not received. A's performance is not valid.

Performance of promise on an application by the promisee

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. (Section 48)

Performance of promise where no place is specified and also no application is to be made by promisee

When a promise is to be- performed without application or demand by the promisee and no place is specified for performance, then it is the duty of the promisor to apply or ask the promisee to fix a reasonable place for the performance of the promise and to perform it at such place

Performance of promise in the manner and time prescribed or sanctioned by promisee

Sometimes the promisee himself prescribes the manner and the time. 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 performs the promise in the manner and time prescribed by the promisee

Time as the Essence of the Contract

The term 'time as the essence of the contract' means that the time is an essential factor and the concerned parties must perform their respective promises within the specified time. The mere fact that time is specified for the performance of a contract is not by itself sufficient to prove that time is the essence of the contract. Time is generally considered to be the essence of the contract in the following cases:

a) Where the parties have expressly agreed to treat it as the essence of the contract.

b) Where the delay operates as an injury to the party and

c) Where the nature and necessity of the contract requires it to be performed within the specified time. In mercantile contracts, unless a different intention appears from the terms of the contract, time fixed for the delivery of the goods is considered to be the essence of the contract but not the time for the payment of the price. This is so because the prices of goods keep on fluctuating so rapidly that if punctuality is not observed it may result in heavy losses. But in case of the sale of an immovable property, the time is presumed to be not the essence of the contract. According to Section 55, where time is the essence of the contract and the party fails to perform their promise

in time the contract becomes voidable at the option of the other party i.e., if the promisee wants he can rescind the contract. But in contracts where time is not the essence of the contract, if a party fails to perform the contract in time, then the other party cannot rescind the contract but it has the right to claim damages for the delay in performance.

Performance of Reciprocal Promises

Section 2(f) of the Contract Act defines a reciprocal promise as promises which form the consideration or of the consideration for each other. In such cases there is an obligation on each party to perform his own promise and to accept performance of the others' promises.

Order of Performances of Reciprocal Promises

Section 52 of Contract Act provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must 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.

Effects of Preventing the Performance of Reciprocal Promises

Sometimes it may so happen that one party to a reciprocal promise prevents the other from performing his promise, In such a situation, the contract becomes voidable at the option of the party so prevented, and he is also entitled to claim compensation from the other party for any loss suffered due to non-performance of' the contract. For example, G and B contracted that B shall execute certain work for A for Rs. 1,000. B was ready and willing to execute the work accordingly. But, G prevents him from doing so. The contract is voidable at the option of B and if he decides to rescind it, he is entitled to recover from A compensation for any loss which he has incurred due to its non-performance.

1. DISCHARGE OF CONTRACT BY IMPOSSIBILITY OF PERFORMANCE/ FRUSTRATION OF CONTRACT

According to the Section 56 of the Indian Contract Act 1872, “an agreement to do an act which is impossible in itself, such agreement is declared void”. This section deals with initial

impossibility and subsequent impossibility. It is as follows:

a. Agreement to do impossible act: An agreement to do an act impossible in itself is void.
b. Contract to do act after turning into impossible or unlawful:
c. Compensation for loss through non-performance of act known to be impossible or unlawful:

The overhead section relies on common law doctrine of Frustration. Some legal systems accept that changes of circumstances could justify modifying a contract wherever to maintain the original contract would produce intolerable results incompatible with justice. Supervening impossibility under section 56(2) means an impossibility which arises subsequent to the formation of the contract shall make the contract void. It is also termed as the doctrine of frustration. A contract become void on account of the subsequent impossibility only if the following conditions are satisfied:

i) The act should have become impossible after the formation of the contract.
ii) The impossibility should have been caused by reason of some event which was beyond the control of the promisor.
iii) The impossibility must not be the result of some act or negligence of the promisor himself.

In ***Paradine v Jane***, the common law courts laid this doctrine. The theme of this doctrine was that when the law casts a duty upon a person and he is unable to perform for no fault of his, he is excused for non-performance. in ***Taylor v Caldwell,*** Blackburn J., giving the judgment of the Queen's Bench, held the contract is not to be construed as a positive contract, but as matter to an implied condition that the parties shall be excused in the case, before breach, performance becomes impossible from the destroying of the thing without default of the contractor. The overhead rule is applicable to both physical destruction of subject-matter and as well as failure in object, this can be understood an illustration. In ***Krell v Henry,*** the defendant agreed to rent from the plaintiff an apartment for 26th and 27th of June, on which days it had been announced that the coronation procession would pass along that place. A part of the hire was paid in advance. However, the procession having been cancelled owing to the King's disease, the defendant refused to pay the balance. Since the object of the contract was to have a view of the coronation and the same had been frustrated by the non-happening of the coronation, the plaintiff

was not entitled to recover the balance.

Grounds of Frustration

Destruction of subject matter:

The doctrine of impossibility applies with full force where the actual and specific subject matter of the contract has ceased to exist. In ***Taylor v. Caldwell*** the promise to let out a music hall was held to have been frustrated on the destruction of the hall. Another example is the case of ***Howell v Coupland,*** where the defendant contracted to sell a specified quantity of potatoes to be grown on his farm, but failed to supply them as the crop was destroyed by a disease, the contract became void applying doctrine of frustration.

Change of Circumstances

If a contract envisages performance by a particular individual, as in a contract to paint a portrait, and no substitute is likely to be satisfactory, then the contract will generally be frustrated by the incapacity of the person concerned. In many cases, of course, the identity of the person who is to perform the contract will not be significant. For instance, a garage agrees to service a car on a specific day, but on that day, as a result of sickness, it is short-staffed and cannot perform the service. This will be concerned as a breach of contract, instead of frustration. The contract is only to do the service, and the car owner is improbable to be worried about the identity of the specific individual who carries outs the contract, as long as he or she is competent.

Non occurrence of Contemplated event

Sometimes, the performance of a contract remains entirely possible, but owing to the non occurrence of an event contemplated by both parties as the reason for the contract, the value of the performance is destroyed. The case of ***Krell v Henry*** that has been discussed above is an example for the same.

Death or Incapacity of parties

A party to a contract is excused from performance if it depends upon the existence of a given

person, if that person dies or becomes too ill to perform. In ***Robinson v Davison,*** there was a contract between the plaintiff and the defendant's wife, to play the piano at a concert to be given by the plaintiff on a specified day but was barred from doing so due to her hazardous illness. The suit by the plaintiff claiming compensation was dismissed as the defendant's wife was incapacitated by performing her promise due to the illness.

Government, Administrative or Legislative Intervention

A contract will be dissolved when legislative or administrative intervention directly operates on the fulfillment of the contract. In ***Metropolitan Water Board v Dick Kerr & Co Ltd***, in which a contract for the construction of a tank was ordered by the government to cease work during World War I was held to have frustrated the contract. But the government intervention need not be just during a war. Any change in law that will render the contract impossible to perform can also frustrate the contract and free the parties of any liabilities to each other.

Intervention of War

Intervention of war or war-like conditions in the performance of contract also amounts to frustration. In the case of ***Tsakiorglou & Co Ltd v Noblee & Thori GMBH***, where the defendants were supposed to ship goods to the plaintiff through Suez Canal but owing to a war the canal was shut down. The defendants could have shipped the goods through the Cape of Good Hope but did not do so. But the court ruled that the doctrine of frustration could not be applied since the war has not made it impossible for the defendants to perform their promise as an alternate route to ship the good existed. Further, if the intervention of war is due to the delay caused by the negligence caused by a party, the doctrine of frustration does not apply.

Effects of frustration

1. Frustration shall not be self induced:

For example, a sale of shares by a company to its employees and also to the employees of its subsidiary where the employees of the subsidiary company were allowed to buy shares though the same is sold in auction. It cannot be frustration.

2. Frustration operates automatically to the extent of frustration:

For example where a in a contract for sale of 250 tons of barley to be grown in a land, the defendant raised only 150 tons due to crop failure and sold to another. The sale is valid, as the frustration operates only to the extent of failure.

3. Adjustment of rights:

When Section 65 is used to doctrine of frustration, then the effect of it will be restoration of benefits. For example; A, is a singer, contracts with B, the manager of a theatre, to perform at his theatre for three nights in every week during the next two months, and B undertakes to pay her five hundred rupees for each night's performance. On the eighth night, A intentionally absents herself from the theatre, and B, as a result, cancels the contract. B must pay A for the seven nights on which she had performed.

DISCHARGE BY ASSIGNMENT

Assignment of contract means transfer of rights and liabilities arising out of a contract to a third party. An assignment to be complete and effective must be effected by an instrument in writing. There are no specific provisions in the Contract Act dealing with assignment. It is a term used in the Transfer of Property Act. Contracts involving personal skill or taste or ability must be performed by the promisor himself. In other words such contracts cannot be assigned. But when the contract is not of a personal nature, it can be assigned subject t o certain conditions. Contracts can be assigned either by the act of parties or by operation of law.

Assignment by act of parties

This means that the parties themselves make assignment. The rules in this regard are as under:

i) The liabilities or obligations under a contract cannot be assigned. It means that the promisor cannot compel the promisee to accept some other person as the promisor in his place. For example, A owes B Rs. 500 and A is also to recover Rs. 500 from P. A cannot compel B to recover the money from P. But, the promisor may transfer his liability to a third person with the consent of the promisee and the transferee. In the example given above, A can transfer his liability to P with the consent of B and P. This is technically known as 'novation'.

ii) If the contract does not expressly or impliedly provide that the contract shall be performed by the promisor only, the parties can decide that the performance be done by

another competent person. But, even then the promisor remains liable to the promisee for proper performance.

iii) The rights and benefits under a contract, which is not of a personal nature, can be assigned. For example, A owes B Rs. 1,000. B may assign his right to C. But in such a situation the assignee takes assignment subject to all equities between the original parties. In the above example if A has already paid a portion of the debt to B, he will be liable to pay to C a correspondingly less amount.

iv) An actionable claim can always be assigned, but this must be done by an instrument in writing. It is also necessary that a notice of assignment has been given to the debtor. An actionable claim is a claim to any debt (except a secured debt) or to any beneficial interest in movable property. Examples of actionable claims are book debts, money debts, right of action arising out of a contract etc.

Assignment by operation of Law

Contracts which are not of a personal nature get assigned due to operation of law. Assignment by operation of law takes place in cases of death or insolvency of any party to the contract. Upon the death of a party to the contract his rights and obligations automatically pass on to his heirs or legal representatives. In case of insolvency, all the rights and obligations pass on to the official Receiver or Assignee.

DISCHARGE BY AGREEMENT

Just as a contract is created by means of an agreement, it can be terminated or discharged by mutual agreement. If the parties to a contract agree to make a fresh contract in place of the original contract, the original contract is discharged. According to Section 62 if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. A contract can be discharged by mutual agreement in any of the following ways.

Novation

The term 'novation' means the substitution of a new contract for the existing one. This arrangement may be either between the same parties or between different parties. The

consideration for the new contract is the discharge of the original contract. Since novation implies a new contract, all the parties to the existing contract must agree to it. For instance, Adam owes money to Brown under a contract. It is agreed between Adam, Brown and Carlos that Brown shall thereafter accept Carlos as his debtor, instead of Adam. The old debt of Adam to Brown is at an end and a new debt from Carlos to Brown has been contracted. When the parties to a contract agree to replace the existing contract with a new contract, it is called Novation. This is novation involving change of parties. When the parties to a contract decide to replace a new contract for it, the original contract is discharged and need not to be performed. The replace of a new contract is impossible after there has been a breach of the original contract.

Rescission

Rescission means cancellation of the contract. If by mutual agreement the contracting parties agree to rescind the contract, the contract is discharged. A contract can be rescinded before the performance becomes due. Non-performance of a contract by both the parties for a long period, without complaint, amounts to implied rescission. Rescission is different from novation in the sense that in case of novation a new contract is substituted for the original contract whereas in rescission the original contract is cancelled and no new contract is made.

Alteration

It means a change in one or more of the terms of a contract with consent of all the parties. Alteration has the effect of terminating the original contract. In an alteration there is a change in the terms of a contract but no change of parties to it. In novation there may be change of parties. If a document or contract in writing is changed by addition or elimination, it is discharged, except as against a party creating or agreeing to the change, for no body shall be allowed to take the chance of pledging a fraud, without running any risk of losing by the event, when it is identified. This principle is subject to the following rules:

i) The change must be created intentionally by the promisee or by one acting with the promisees' consent and even an change by a stranger while the instrument is in the protection of the promisee will have the same effect.

ii) The change must relate to the material part of the contract. What is considered as material or immaterial depends on the facts and circumstances surrounding the contract. In most cases a material change will be a higher liability on the promisor.

Remission

It means the acceptance of a lesser sum than what was contracted for or a lesser fulfillment of the promise made. According to section 63, every promisee may remit or dispense with it, wholly or in part, or extend the time of performance, or accept any other satisfaction instead of performance. Illustration: A owes B Rs. 5,000. A pays to B Rs. 3,000 who accepts it in full satisfaction of the debt. The whole debt is discharged.

Waiver

Waiver means abandonment or intentional relinquishment of a right under the contract. When a party waives his rights under it the other party is released from his obligation. For example, A promises to paint a picture for B. afterwards forbids him to do so. A is no longer bound to perform the promise. In the case of ***M.Sham Singh v. State of Mysore,*** Sham Singh was offered scholarship by the State to study in the US upon the condition that on his return to India, he would serve the State if the State offered him a job within six months of his return failing which he would have to refund the scholarship amount. On his return he requested for an extension of a period of 6 months which was granted by the State. Sham Singh went back to the US and assumed a position to serve the latter. In a suit for claim of refund of scholarship by the State, the court held that it could not be said that the State had waived the liability of Sham Singh and that it was merely an extension of time for performance of his promise.

Accord and Satisfaction

An accord and satisfaction is a legal contract whereby two parties agree to discharge a tort claim, contract, or other liability for an amount based on terms that differ from the original amount of the contract or claim. Accord and satisfaction is also used to settle legal claims prior to bringing them to court. Accepting some other satisfaction instead of actual performance is known as the principal of “accord and satisfaction” under English Law, and this results in the discharge of obligation under the contract.

DISCHARGE BY BREACH

In general sense, breach is a failure to act in a required or promised way. Breach of contract is failing to perform any term of a contract, written or oral, without a legal excuse. This may

include not completing a job, not paying in full or on time, failure to deliver all the goods, substituting inferior or significantly different goods, not providing a bond when required, being late without excuse, or any act which shows the party will not complete the work. Breach of contract is one of the most common causes for filing suits for damages or suit for "specific performance" of the contract in the court. In order to uphold a case of breach of contract the court must satisfy itself of all the following requirements:-

i. The contract must be valid. It must contain all the essential elements of the contract so that it can be heard by a court. If all the essentials are not present, the contract is not considered as a valid contract; hence no suit shall lie in the court.
ii. The plaintiff must show that the defendant has broken the contract.
iii. The plaintiff did everything required for the performance of the contract.
iv. The plaintiff must have given a reasonable notice to the defendant of such breach. If the notice is in writing, this will prove to be better than an oral notification.

Types of breach

Thus, breach is of two kinds' namely anticipatory breach, and actual or present breach.

Anticipatory Breach

It takes place even before the date for performance of contract that is fixed by the parties. The breach may be committed by the party either expressly by making a communication to the promisee about this intention or in an implied manner by disabling himself for the performance of the contract. For example, Sam had promised to sell a machine to Charlie on 20th August. On 10th August, Sam contracts to sell the same machine to Rainer and lets Charlie know about it. Theoretically, Sam may break the contract with Rainer and sell the machine to Charlie on 20th August. But, Charlie is entitled to conclude that there is anticipatory breach on 10th August.
Section 39 of Act, provides for the concept of anticipatory breach as follows: 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 conduct, his acquiescence in its continuance.

In ***Hochster v De la Tour***, is the leading case on anticipatory breach. A appointed B to accompany him on a tour for three months from 1st June at a certain salary. Before 1st June, A told B that B was no more required by him. B sued A, without waiting for 1st June. A argued

that there was no breach because 1st June had not arrived yet. But, the court said that since A had renounced the contract, B was not required to wait till 1st June to initiate any legal action. This shows that a contract becomes a legal entity not from the moment the performance becomes due but from the moment it is made.

Effects on anticipatory breach upon rights of parties:

a. Innocent party is excused from performance or further performance. The obligation under the original contract comes to an end and is replaced by operation of law by another obligation, namely to pay damages. The anticipatory breach would give to the aggrieved party two options:

- He may treat the anticipatory as the actual breach and declare his intention of doing so. Then, he would be entitled to initiate action against the guilty on this assumed actual breach. The damages shall be measured on the basis of the date of anticipatory breach becoming the date of default. The aggrieved party may initiate action immediately or later. In the example of Hochster v De la tour case, given above, the aggrieved party had chosen this option.

In an anticipatory breach in case of contingent contract, immediate actions for damages lie. In ***Frost v. Knight***, the defendant promised to marry the plaintiff on the death of his father. While the father was still alive, the defendant announced his intention to not fulfill the promises to marry and broke of the engagement. The plaintiff without waiting for the death of the defendant's father brought an action for the breach. The court dismissed the contention of the defendant that the breach could only arise on the happening of the contingency and awarded damages to the plaintiff.

- He may ignore the anticipatory breach and choose to wait till the date of actual performance, hoping that the promisor may change his mind. If this option is exercised, then, the contract continues in its ordinary manner and both the parties remain liable to perform their respective obligations. The promisor may perform the promise as per the terms of the contract. If he does not, then, the aggrieved party would become entitled to take action for actual breach of the contract. In the second option, the aggrieved party would incur a risk. If during the waiting time, and before the date of actual performance, an event occurs that renders the

contract impossible to perform, the aggrieved party will have no remedy because the contract becomes void as per Section 56.

In ***Avery v Bowden***, by contract the claimant was to carry cargo for the defendant. The claimant arrived early to collect the cargo and the defendant told them to sale on as they did not have any cargo for them to carry and would not have by the agreed date. The claimant decided to wait around in the hope that the defendant would be able to supply some cargo. However, before the date the cargo was supposed to be shipped the Crimean war broke out which meant the contract became frustrated. The claimant therefore lost their right to sue for breach. Had they brought their action immediately they would have had a valid claim.

b. The party repudiating may choose perform when the time comes and the promise will be bound to accept the same. Hence if the repudiation of the contract is followed by affirmation of the contract, the repudiating party would escape liability.
c. The date of assessment of damages in the case anticipatory breach would be assessed at the time when repudiation takes place. In the case of ***Ramgopal v. Dhanji Jadhavji Bhatia***, the defendants, the owners of a ginning mill, contracted with the plaintiff, a cotton merchant, to use half the mill's working capacity for ginning his cotton. But the defendant repudiated the contract before any cotton was supplied or ginned. The plaintiff was entitled to recover the estimated loss of profits at the time of repudiation.

Extent of breach or repudiation

Every minor irregularity is not repudiation so as to put an end to contract. The effect of the breach upon the contract as a whole be considered. For example, A contracts to deliver 100 bales of cotton in installments to B. The 16th installment of delivery was below the standard. B wanted to repudiate But it was not the intention of A to repudiate the contract as sub standard goods did not amount to breach in entirety and hence B could not repudiate the contract. The party in default must have refused altogether to perform the contract and the refusal must go to the whole of the contract, otherwise the other party would not be justified in putting an end to the contract.

Actual Breach

Actual or present breach means where one party refuses to perform his part of the obligation on the due date or performs incompletely or not according to the terms of the contract.

A party may fail to perform what he has promised, then he is said to make actual breach. Thus Actual breach may take place at the time when the performance is due, or during the performance of the contract. For example, where on the appointed day the seller does not deliver the goods or the buyer refuses to accept the delivery. Refusal of performance maybe express or implied. This type of breach of contract occurs in the case of installment contracts such as, sale of goods, delivery by installments, payment by installments etc.

Difference between Anticipatory Breach and Actual Breach

Basically, breaches of contract fall into one of these two categories. Both anticipatory and actual breaches of contract are bad news for the parties to the contract. They can waste both time and money, and certainly lead to frustration for the parties to the contract. An actual breach occurs when one person refuses to fulfill his or her part of obligation on the due date or performs incompletely and anticipatory breach occurs when one party announces that he intends not to fulfill his or her part of obligation, before the due date for performance. This doesn't mean there aren't remedies in either case. A breach of contract, no matter what form it may take, entitles the innocent party to maintain an action for damages.

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REMEDIES FOR BREACH OF CONTRACT

Introduction

A Breach of Contract occurs when a party thereto renounces his liability under it, or by his own act makes it impossible that he should perform his obligations under it or totally or partially fails to perform such obligations. A breach of contract can be Anticipatory or Present. Breach of Contract leads to the infringement of the rights of the non-breaching party and the breaching party suffers a loss. Hence, his rights are needed to be restored and he must be reimbursed. For this various remedies are available to the aggrieved party. Remedies for breach of contract is based on the Latin maxim '**Ubi jus, ibi remedium'** denotes **'where there is a right, there is a remedy'**.

So, in case of breach of contract, the aggrieved party would have one or more, remedies against the guilty party.

i. Suit for rescission
ii. Suit for damages
iii. Suit for specific performance
iv. Suit for injunction
v. Suit for quantum meruit

MEANING OF REMEDY

The manner in which a right is enforced or satisfied by a court when some harm or injury, recognized by society as a wrongful act, is inflicted upon an individual, it is called remedy. Remedies may be considered in relation to:

1. The enforcement of contracts.
2. The redress of torts or injuries.

The remedies for the enforcement of contracts are generally by action. The form of these remedies depends upon the nature of the contract.

Meaning of "Breach of Contract"

Breach of contract is failing to perform any term of a contract, written or oral, without a legal excuse. According to Black Law Dictionary: - "Breach of contract means failure to live up to the terms of a contract." Therefore, breach of contract is a legal term that denotes a violation of a contract or agreement in which one party fails to fulfil its promises. In order to upheld a case of breach of contract the court must satisfy itself of all the following requirements:-

- The contract must be valid; it means, it must contain all the essential elements of the contract so that it can be heard by a court. If all the essentials are not present, the contract is not considered as a valid contract; hence no suit shall lie in the court.
- The plaintiff must show that the defendant has broken the contract.
- The plaintiff did everything required for the performance of the contract.
- The plaintiff must have given a reasonable notice to the defendant of such breach. If the notice is in writing, this will prove to be better than an oral notification.

REMEDIES AVAILABLE FOR THE BREACH OF CONTRACT

SUIT FOR RESCISSION

In contract law, the term rescission refers to the undoing, or unmaking of a contract between parties. The breach of contract no doubt discharges the contract, but the aggrieved party may sometimes need to approach the court to grant him a formal rescission, i.e. cancellation, of the contract. This will enable him to be free from his own obligations under the contract.

The basic reasons for rescission can be stated as follows:-

1) Innocent or Fraudulent representation; or

2) Mutual mistake; or

3) Lack of capacity to contract; or

4) An impossibility to perform a contract not contemplated by the parties; or

5) Duress; or

6) Undue influence.

A party can rescind a contract because of a breach by another party, but the breach must be so substantial that it defeats the purpose of the contract. One can also rescind a contract by agreement. If all parties to a contract agree to cancel it, they can do so.

SUIT FOR DAMAGES

Meaning and definition of Damages

The theory of damages is that they are a compensation and satisfaction for the injury sustained, i.e. the sum of money to be given for reparation of the damages suffered should as nearly as possible, be the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is getting damages.

The word "damage" is simply a sum of money given as compensation for loss or harm of any kind. The term "damages" in general sense, is compensation for causing loss or injury through negligence or a deliberate act, or an estimate of court or award of a sum as a fine for breach of a contract or of a statutory duty. It is the amount of money which the law awards or imposes as pecuniary compensation. Damages are a monetary payment awarded for the invasion of a right at common law.

Justice Greenwood defines the term as: "Damages generally refer to money claimed by, or ordered to be paid to, a person as compensation for loss or injury."

Black's law dictionary: "Damages are the sum of money claimed by or ordered to be paid to a person as compensation for loss or injury."

According to **Frank Graham:** "Damages are the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong."

Damages may be defined as the disadvantage which is suffered by person as a result of the act for default of another. "*Injuria*" is damage which gives rise to a legal right to recompense; if the law gives no remedy, there is *absque injuria*, or damage, without the right to recompense. Therefore, the meaning of "damage" in a statute is a matter of great concern. Remedy by way of damages is the most common remedy available to the injured party. This entitles the injured party to recover compensation for the loss suffered by him due to the breach of the contract, from the party who causes the breach. The quantum of damages is determined by the magnitude of loss caused by breach.

Kinds Of Damages

The damages which may be awarded to the injured party may be of the following kinds:

Ordinary damages

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage cause to him thereby, which naturally arose in the usual course of things from such breach, or which the parties know, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reasons of the breach. In ***Hadley vs. Baxendale,*** The crankshaft broke in the Claimant's mill. He engaged the services of the Defendant to deliver the crankshaft to the place where it was to be repaired and to subsequently return it after it had been repaired. Due to neglect of the Defendant, the crankshaft was returned 7 days late. The Claimant was unable to use the mill during this time and claimed for loss of profit. The Defendant argued that he was unaware that the mill would have to be closed during the delay and therefore the loss of profit was too remote. **Held:** The court held that claimant was entitled only to ordinary damages and defendant was not liable for the loss of profits because the only information given by Claimant to Defendant was that the article to be carried was the broken shaft of a mill and it was not made known to them that the delay would result in loss of profits.

Special damages

Special damages would be the compensation for the special losses caused to the aggrieved party by the special circumstances attached to the contract. At the time of making the contract, a part may place before the other party some information about the special circumstances affecting him and tell him that if the contract is not performed properly, he would suffer some particular types of losses because of those special circumstances. If the other party still proceeds to make the contract, it would imply that he has agreed to be responsible for the special losses that may be caused by an improper performance of his obligation. Compensation for such special losses is called special damages. In the case of ***Simpson v. London & North Western Railway Company***, Plaintiff, a manufacturer, used to exhibit his samples of his equipment at agricultural exhibitions. He delivered his samples to Railway Company to be exhibited at New Castle. On the occasion he wrote "must reach at New Castle on Monday certain". On the account of negligence on the part of Railway Company, the samples reached only after the exhibition was over. Plaintiff, claimed damages from Railway Company for his loss of profits from the exhibition. **Held:** The court held that the railway company was liable to pay these damages as it had the

knowledge of special circumstances, and must have contemplated that a delay in delivery might result in such loss. In ***Govind Rao v. Madras Railway Company***, Govind Rao was a tailor and consigned through rail some sewing machines to a place in Tamil Nadu. He planned to take part in a village fair, where he hoped to stitch garments and make profits. However, the train reached the town, after the fair concluded. Hence, Govind Rao could not participate in the fair. He sued the railway company for the loss of profits. It was held that he could not recover, as the special circumstances were not brought to the notice of the Railway company in the beginning itself.

Vindictive or Exemplary damages

At time breach of contract by one party not only results in monetary loss to the injured party but also subjects him to disappointment and mental agony. In such cases monetary compensation alone cannot provide an appropriate remedy to the sufferings of the injured party. Thus there is a need for vindictive damages. These may be taken as an **exception** to the general principle that damages are awarded only for the financial loss caused by breach of contract.

Nominal damages

Nominal damages are awarded where the plaintiff has proved that there has been a breach of contract but he has not in fact suffered any real damage. It is awarded just to establish the right to decree for the breach of contract. The amount may be a rupee or even less.

REMEDIES AND DAMAGES UNDER THE INDIAN CONTRACT ACT, 1872

Section 73

Compensation for loss or damage caused by breach of contract- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Remoteness of Damage

The term 'remoteness of damages' refers to the legal test used for deciding which type of loss caused by the breach of contract may be compensated by an award of damages. It has been distinguished from the term measure of damages or quantification which refers to the method of assessing in money the compensation for a particular consequence or loss which has been held to be not too remote. The rules on the remoteness of damage in the contract are found in the Court of Exchequer's judgment in ***Hadley v Baxendale,*** as interpreted in later cases. In ***Hadley v Baxendale,*** the plaintiff's mill had come to a standstill due to their crankshaft breakage. The defendant carrier failed to deliver the broken crankshaft to the manufacturer within the specified time. There has been a delay in restarting the mill. The plaintiff sued to recover the profits they would have made if the mill was started without delay. The court rejected the claim on the ground that the mill's profits must be stopped by an unreasonable delay in the carrier's delivery of the broken shaft to the third person.

The damages which the other party should be entitled to receive in respect of such breach of contract should either be deemed to have arisen naturally, fairly and reasonably, i.e. according to the usual course of things, from such breach of contract itself, or as might reasonably have been deemed to have arisen in the contemplation of the contract. The rule in Hadley v. Baxendale consists of two parts:

(1) As may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things from such breach; or;

(2) As may reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract.

Damage arising in the usual course of things

Under this branch of the rule, compensation can be claimed for any loss or damage that arose in the usual course of things from the breach of contract. If the loss is one which does not arise in the usual course of things but in special loss arising out of special circumstances, then the situation would be covered by the second branch of the rule.

Usual Course of Things

The first part of this section operates to affix liability on the person who has committed a breach of those matters as may fairly and reasonably be considered as arising naturally from the breach. Such matters would include the normal circumstances prevailing within the type of transaction in question. It is assumed for the purpose that a reasonable businessman must be taken to understand the ordinary business practices and exigencies of the other's trade or business without the need for any special discussion or communication.

Delay in carriage of goods meant for sale

If the carrier causes the delay in delivering the goods at the destination, he can be made liable to pay the difference between the prices prevailing on the agreed date of delivery and that date on which the goods are actually delivered, because the loss arising on account of difference in prices on different dates can be considered to be arising naturally i.e. according to the usual course of things from the breach. In ***Wilson v. Lancashire and Yorkshire Railway,*** The plaintiff, who was a cap manufacturer, gave a consignment of cloth meant for manufacturing caps to the defendants for carriage. The defendants made a delay in the delivery of the cloth at the destination. The plantiff could not execute the orders for caps as the season for the same had passed away. It was held that the plaintiff could claim only the difference between the value of the cloth between the agreed date of delivery and the actual date of delivery of the consignment. The plaintiffs, however, were not entitled to recover compensation for the loss of profits due to the caps not having been prepared or sold.

Compensation of mental anguish

- ***Ghaziabad Development Authority v. Union of India,*** The Ghaziabad development authority has announced through advertisements scheme for allotment of developed plots. There was unreasonable delay by the Authority in completing the scheme for development of plots. It was held that the purchaser could claim the loss of profit which occurred due to delay by the vendor of the plots. It was held that the buyer of plots could not claim any compensation for mental anguish caused by the delay in the performance of the contract.SC held that mental anguish cannot be a head of damages for breach of ordinary commercial damages.

Breach of promise to marry

In a breach for promise to marry, there results injury to feelings and disappointment and for that exemplary damages may be claimed. In ***Laxminarayan v. Sumitra***, After the engagement, the husband continued to promise to marry the girl and had sexual contact with her, as a consequence of which she become pregnant. Then he refused to marry her. It was held that she was entitled to damages on various counts, such as physical pain, agony, indignity, chances of marriage becoming dim and social stigma. In this case Rs. 30,000 awarded by the lower court, was affirmed by the M.P. High Court.

Loss arising from the special circumstances

If the loss on the breach of the contract does not arise naturally i.e. according to the usual course of things but it arises due to some special circumstances, the person making the breach of contract can be made liable for the same provided than those special circumstances were brought to his knowledge at the time of making the contract. If he had no knowledge of the special circumstances which result in the particular loss, he cannot be made liable for the same. Liability stated to be depending upon some knowledge and acceptance by one party of the purpose and intention of the other in entering into the contract. The liability of the defendant increases with the degree of knowledge he possesses.

Measure of Damages

After it has been established that a certain consequence of the breach of contract is proximate and not remote and the plaintiff deserves to be compensated for the same, the next question which arises is: What is the measure of damages, for the same, or in other words, the problem is of the assessment of compensation for the breach of contract. Damages are compensatory in nature. The object of awarding damages to be aggrieved party is to put him in the same position in which he would have been if the contract had been performed. Damages are, therefore, assessed on that basis. In ***State of Kerala v. K.Bhaskaran***, There was a breach of works contract by the government and the contractor brought an action to recover the loss of 10% profit in that contract. It was held that generally 10% profit is taken as an element in the estimation of the contract and the contractor was entitlted to claim compensation on that basis. In a contract for sale of goods, the measure of damages is the difference between the contract price and the

market price on the date of the breach of contract. The damages are ascertained as on the date of breach of contract. Thus,

(i) If the buyer makes a breach of contract, the seller can claim damages as arising on the date of breach of contract, and it is not necessary that the seller should resell the goods on that date;

(ii) If the seller makes a breach of contract, the buyer can claim damages as arising on the date of breach of contract, and it is not necessary that the buyer should re- purchase the goods on that date.

Rules Regarding Award of Damages

(i) **Compensation not penalty:** The fundamental purpose of awarding damages is to compensate the aggrieved party for any loss suffered and not to punish the guilty party for causing breach.

(ii) **Limited damages:** The aim of the courts, in awarding damages, would be to place the aggrieved party, as far as money can do it, in the same position in which he would have been, had the contract been properly performed.

(iii) **Damages for attributable losses:** Damages are awarded for the losses which can be attributed to the breach.

(iv) **Mitigation of losses:** The aggrieved party is expected to make sincere efforts to minimize the losses that are resulting out of breach of contract.

(v) **Damages in case of contracts of sale of goods:** The basic idea in this context is that in case a party breaks a contract for sale of goods, the aggrieved party must take a quick action to protect itself.

(vi) **Stipulation for liquidated damages or penalty:** Sometime, the parties to contract may themselves stipulate an amount in the contract to be payable by the guilty party to the aggrieved party as damages for breach of contract. This stipulation of the amount may be by way of liquidated damages or by way of penalty.

(vii) **Cost of suit:** The breach of contract by a party forces the other to initiate legal action against the guilty party. This necessarily entails expenditure. This cost of suit can be recovered from the guilty party only at the discretion of the court.

Liquidated damages and penalty

Liquidated damages are a kind of actual damages. Mostly, the term "liquidated damages" are found in a contract. In commercial agreements, liquidated damages are a useful contracting tool, but there is a problem that, if they are not considered properly or drafted correctly, they may be construed as a "penalty clause" and therefore becomes unenforceable. In Common Law, a liquidated damages clause will not be enforced if its purpose is to punish the wrong-doer or the party in breach rather than to compensate the injured party.

"Liquidated Damages" means a sum which the parties have assessed by the contract as damages to be paid whatever may be the actual damage. The parties to the contract may agree at the time of entering into the contract that, in the event of a breach, the breaching party shall pay a stipulated sum of money to the non-breaching party, or may agree that in the event of breach by one party any amount paid by him to the other shall be forfeited. It is an actual "pre-estimate of damages" likely to flow from the breach. However, liquidated damage are distinguished from the term "penalty" which is an amount intended to secure the performance of the contract. If the compensation to be paid on the breach of contract is the genuine pre- estimate of the prospective damages, it is known as liquidated damages. If the compensation agreed to be paid in the event of breach of contract is the excessive and highly disproportionate to the likely loss, the amount is fixed in terrorem, with a view to discouraging breach of contract, it is known as penalty. Liquidated damages should be a reasonable estimate of actual damages that might result from a breach. But if specified sum is disapprotionate to the damages, it is called penalty.

Indian Law: Under Indian law, the position is somewhat different. In India, in every case of a stipulation of amount of damages in the contract, the court will work out the amount of loss suffered by the aggrieved party and award that as damages subject to the maximum of the stipulated amount.

Difference between Liquidated Damages and Special Damages

It also needs to be understood that liquidated damages are different from special damages. Special damages are a compensation determined by court for the types of losses stipulated by the parties. In other words, the types of losses likely to result out of breach are pre-determined without their quantification. Under liquidated damages, the amount of damages itself is pre-estimated.

Difference between Liquidated Damages and Penalty

Liquidated damages are real or actual, covenanted pre-estimate of damages as mentioned above. However, A penalty is said to be a sum so stipulated in fear (with the object of threatening the party to perform the contract), and thus an amount can be said to be a penalty if the sum named is excessive and unconscionable. It is a penalty if the breach consists in paying of money and the sum stipulated is greater than the sum which ought to have been paid. Both are to be so judged on the facts and circumstances of each case. The question whether a particular stipulation in a contract is in the nature of the penalty has to be determined by the court keeping in view various relevant factors.

The basic difference between liquidated damages and penalty is as follows:-

- When the amount of damages is fixed by the parties on the basis of a reasonable estimate of the probable actual loss which a party will suffer in case of breach is called liquidated damages. On the other hand, if the amount of damages is not based upon a reasonable calculation of actual loss but is fixed by way of punishment and as threat is called penalty.
- In case of liquidated damages the court allows only the amount stipulated, never more or less even though the actual loss is different from the amount mentioned. In case of penalty the court allows only reasonable compensation by way of damages but not exceeding the amount mentioned.
- In case of penalty, the court has a discretionary power to grant or not to grant the amount mentioned in the contract. But in case of liquidated damage the court has no such option and the court is bound to grant the entire amount to the plaintiff.

Thus, mentioning the liquidated damages in commercial contracts is a very popular way of dealing with the possibility of breach of contract. The essence of liquidated damages is that the party in breach of its obligation under a contract is bound to pay a particular sum by way of compensation for that breach. And the sum, so payable, is fixed in advance and is written into the contract.

Advantages of Liquidated Damages

Liquidated damages are generally recommended in commercial context. The courts have recognised the advantages of liquidated damages for both the parties, as these are related to the general principle of freedom of contract which led to a general view on the part of the courts that

these damages should be upheld, especially, where the parties are seen as free to apportion the risks between them. However, liquidated damages which constitute a penalty will not be enforceable. The advantages of liquidated damages can be concluded as:-

1) The most important advantage of such damages is that the sum so specified is payable, when the breach occurs, without the need to wait for the loss to crystallise. The time and expense of the injured party is spared of a common law action for damages for breach of contract.
2) Another important thing is: the party is not under any obligation to mitigate the losses, as it would be in an ordinary claim.
3) Remoteness of damages has always been an issue in a contractual damages claim. However, where the innocent party rely on liquidated damages, no question of remoteness arises.
4) The basic problem of under-compensation for the injured party may be avoided, especially where significant consequential losses result from the breach.
5) An extra degree of certainty is brought to the parties as they know in advance their potential exposure on a breach.
6) Liquidated damages can be proved to be a very practical and workable method of dealing with minor breach is throughout a long-term contract.
7) Because of liquidated damages, despite an element of past poor performance, the parties often find it possible to continue their commercial relationship going forward.

- ***Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd ,*** The claimant, Dunlop, manufactured tyres and distributed them to retailers for resale. The contract between Dunlop and New Garage contained a clause preventing new garage from selling the tyres below list price. The agreement said that, in the event of such a dispute arising, New Garage would pay 'by way of liquidated damages and not as a penalty', a sum of £5 per tyre. The defendants sold some tyres below the list price and the claimant brought an action for damages based on the amount specified in the contract. The defendant argued that the relevant clause was a penalty clause and thus unenforceable. The £5 sum was held by the judge to be enforceable; however, the Court of Appeal held that it was a penalty. Dunlop appealed this decision. The House of Lords held that Dunlop were entitled to enforce the agreement as it was a "genuine pre-estimate" of their potential loss as opposed to being a penalty. The court **held** that if the sum is not genuine, or of an

unconscionable amount, it may be considered a penalty by the courts and so will be unenforceable.

Entitlement of compensation for breach of contract

S.74 of the Indian Contract Act, 1872 emphasizes that I case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. The emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre- estimate of the loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden of proof lies on the other party to lead evidence for providing that no loss is likely to occur by such breach.

Section 75

Party rightfully rescinding contract entitled to compensation- A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non- fulfillment of the contract. Illustration: A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A willfully absents himself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.

SUIT FOR QUANTUM MERUIT

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).

Claim for quantum meruit

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:

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

For example, in the case of ***Planche v Colburn [1831]***, Planche agreed to write a volume on ancient armour to be published, in a magazine owned by Colburn. For this, he was to receive $100 on completion.The claimant commenced writing and had completed a great deal of it when the defendant cancelled the series. The defendant refused to pay the claimant despite his undertaking and the fact that the claimant was still willing to complete. The claimant brought an action to enforce payment. Held: The claimant was entitled to recover £50 because the defendant had prevented the performance.

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

For example, in case ***Craven-Ellis v Canons Ltd.,*** the company accepted the services rendered by the plaintiff. It was found that if the plaintiff did not perform the services, the company certainly would have hired some agent to perform those services. Hence, the plaintiff, on the basis of quantum meruit, succeeded in claiming the remuneration from the company for the work done regardless of the fact that he failed to obtain his qualification share within two months.

c. When something is done without any intention to do so gratuitously although there exists no express agreement between the parties.

For example, in indian case, ***Ram Krishna vs Rangoobed*** , 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.

d. A party who is guilty of breach of contract may also sue on a quantum meruit provided both the following conditions are fulfilled: The contract must be divisible, and the other party

must have enjoyed the benefit of the part which has been performed, although he had an option of declining it.

SUIT FOR SPECIFIC PERFORMANCE

Specific performance is an equitable remedy which is provided by the court to enforce the duty of doing what the plaintiff agreed by contract to do, against a defendant. This remedy is granted by way of exception. Thus, this remedy is in contrast with the remedy by way of damages for breach of contract, which gives rise to pecuniary compensation for failure to carry out the terms of the contract. Both the remedies, Damages and specific performance, are available upon breach of obligations by a party to the contract. This is an equitable remedy which is granted at the discretion of the court. So, specific performance is a decree granted by the court to compel a party to perform his contractual obligations. This remedy is usually available where damages are not an adequate relief, e.g., where the subject matter of the contract is unique in nature. In ***Nutbrown v Thornton,*** The claimant entered a contract to purchase some machinery from the defendant. The defendant, in breach of contract, refused to deliver the machines. The defendant was the only manufacturer of this type of machinery. The claimant bought an action for breach of contract seeking specific performance of the contract. Held: Specific performance of the contract was granted. Whilst an award of damages would ordinarily be given for non-delivery of goods, damages would be inadequate to compensate the claimant because he would not be able to buy the machines elsewhere. The court has wide discretionary power to award specific performance and in exercising this discretion, the following factors are taken into account:

i. Delay in asking for the order.
ii. Whether the person seeking performance is ready to perform his part of the Contract.
iii. The difference between the benefit (the order would give to one party) and the cost of performance to the other.
iv. Whether the person against whom the order is sought would suffer hardship in performing.
v. Whether any third party rights would be affected. vi. Whether the contract lacks adequate consideration (the rule “equity will not assist a volunteer” applies so that

specific performance will not be ordered if the contract is for nominal consideration even if it is under seal).

SUIT FOR 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 terms 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. In ***Lumley v Wagner,*** The defendant Johanna Wagner, an opera singer, was engaged by the claimant to perform in his theatre for a period of three months. There was a term in the contract preventing her from singing for anyone else for the duration of the contract. She was then approached by the manager of Covent Garden Theatre, Frederick Gye, who offered her more money to sing for him. The claimant sought an injunction preventing her from singing at Covent Garden Theatre. The defendant argued that to allow an injunction would in effect amount to specific performance of the contract in circumstances where specific performance would not be available. Held: The injunction was granted despite it having the effect of forcing the defendant to sing for the claimant.

CONCLUSION

Due to the aggressive growth in the field of technology, the parties entering into commercial transactions are more cautious than ever, thus making the parties deliberate even on the minute details or specifications so as they can best secure their interest. Therefore, contents of a contract have become highly detailed and elaborate. Particularly, as a measure of safeguarding, securing and protecting their respective interests in an event of breach of the terms of the contract, parties generally negotiate and agree upon the various remedies that the injured party can invoke to mitigate and compensate for the losses it may suffer on account of such breach. Therefore, with regard to liquidated damages and penalties, the primary conclusions of the court appear to be that liquidated damages should be regarded as reasonable compensation, while penalties should not. Further, it also appears to have concluded that in case of a penalty, damages will have to be

proved. The courts in India should interpret the above mentioned sections i.e. sec.73 and 74 very carefully, so that the ordinary man can be benefited by these principles. Moreover, the law is made to facilitate the people, not to harass them. So, these principles should be used, not misused.

QUASI CONTRACT

Introduction

The Indian Contract Act, 1872 does not define a quasi-contract, it calls them relation resembling those of contracts. However, a quasi-contract may be defined as, "a transaction in which there is no contract between the parties; the law creates certain rights and obligation between them which are similar to those created by a contract. "An obligation created by law for the sake of justice; specif., an obligation imposed by law on parties because of a relationship between parties or because one of them would otherwise be unjustly enriched. These types of contracts are quasi-contract or restitution that fall in the third category of quasi-contracts or restitution. These are not contracts but these fictional agreements arise to ensure equity as it would be unfair if a party gets an undue advantage at the cost of others. The liability exists in quasi-contracts on the basis of the doctrine of unjust enrichment. Take for an example a person in whose house certain goods have been left incidentally, so that person is bound to restore them.

What is Quasi Contract?

A quasi contract is an agreement between two parties without previous obligations to one another that has been created and legally recognized by the court system. There are many situations in which law as well as justice requires that a certain person be required to confirm an obligation, although he has not broken any contract nor committed any tort. if a person in whose home certain goods have been left by mistake is bound to restore them. This shows that a person cannot entertain unjust benefits at the cost of some other person. Such kinds of obligations are generally described, for the want of better or more appropriate name, as Quasi Contractual Obligations. This would be better to explain it up that Quasi contract consists of the Contractual Obligation which is entered upon not because the parties has consented to it but because law does not allow a person to have unjustified benefit at the cost of other party. The liability exists in quasi contracts on the basis of the doctrine of unjust enrichment. There are cases where the law implies a promise and imposes obligations on one party while conferring rights to the other even when the basic elements of a contract are not present. These promises are not legal contracts, but the Court recognizes them as relations resembling a contract and enforces them like a contract.

Action for unjust enrichment, following essentials have to be proved:

1. The defendant has been " enriched" by the receipt of a " benefit"
2. The enrichment is " at the expense of the plaintiff"
3. The retention of the enrichment is "unjust"

Types of Quasi contracts:

1. Supply of necessities (Sec.68)
2. Payment by an interested person (Sec.69)
3. Obligation to pay for non gratuitous act (Sec.70)
4. Responsibility of finder of goods (Sec.71)
5. Mistake or Coercion (Sec.72)

Claim for necessaries supplied to person incapable of contracting, or on his account (Section 68)

If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another, person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. Illustrations A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property. It has already been noted in the earlier chapter i.e. "capacity to contract" that an agreement by a minor, or any person incompetent to contract is void ab initio. No action under a contract can be brought against a person for the claim for necessaries supplied to such incompetent person or his dependants. The claim cannot be enforced against such incompetent person, but reimbursement can be claimed only from the property of such a person.

Reimbursement of person paying money due by another, in payment of which he is interested (Section 69)

A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. Illustration B holds land in Bengal, on a lease granted by A, the *zamindar*. The revenue payable by A to the Government

being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B.

The essential requirements of section 69 are as follows:

1. The payment made should be bonafide for the protection of one's interest.
2. The payment should be a voluntary one.
3. The payment must be such as the other party was bound by law to pay.

Essentials of Section 69

1. One should have interest in making payment

The person, who makes the payment and then claims its reimbursement, must have an interest in making the payment. The purpose of making the payment should be bona fide protection of his interest by the plaintiff. This provision in India is wider than that in English law. In England, the person making the payment must have been compelled by law to pay the debt or discharge the liability of the other person. In India, it is enough that there is an interest of the plaintiff in making the payment.

2. Another person should be bound by law to pay

It has been noted above that for this section to be applicable, the plaintiff should have an interest in the payment, and the defendant should be bounds by the law to pay the same. The provision is based on the principle that the plaintiff, having discharged the defendant's debt, is entitled to be reimbursed by him. If the plaintiff is not merely interested but he himself is bound to pay an also pays, he cannot have an action against the defendant.

(i)

S.70 Obligation of person enjoying benefit of non- gratuitous act

When a person lawfully does anything for another person or delivers anything to him non-gratuitously, the latter is bound to make compensation or restore the thing so done or delivered. But the thing must be done lawfully and the person for whom the act is done must enjoy the

benefit of it. A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

The following conditions must be satisfied for the recovery of the compensation for non gratuitous acts:

1. The person must lawfully do something for another person or deliver something to him.
2. The person doing some act or delivering something must not intend to act gratuitously.
3. The other person must voluntarily accept the acts or goods and he must have enjoyed the benefits.

1. **Doing of something or delivering anything to another person**

When a person does something for another person or delivers anything to him not intending to do so gratuitously, he is entitled to claim compensation for the same from such other person.

The point may be explained by referring to the decision of the Allahabad High Court in **Indu Mehta V. State of U.P.** In this case, Miss Indu Mehta, an Advocate practicing at the district court, Kanpur, was appointed as Asst. District Government Council (Criminal), in pursuance whereof she rendered her service. The Appointment was, however found to be void. It was held that even though the said appointment was void, the state had enjoyed the benefits of the service rendered by Miss Indu Mehta, the Govt was not entitled to recover back the fees already paid to her for the services.

2. **No intention to do the act gratuitously**

When the person doing the act does not intent to do it gratuitously but expects payment for the same on doing such act, he can ask for compensation under section 70. If a tenant of a property makes improvements and additions in the property and the landlord accepts the same, the presumption is that the tenant did not intend to do so gratuitously and he can recover compensation for the same from the landlord. Similarly, when a person gives some advance in respect of an agreement which is subsequently discovered to be void, he can recover back the amount not only under section 65, which specifically deals with such a situation, but he can also claim back the advance under section 70, because the advance payment was not intended to be gratuitously.

3. **Enjoyment of benefits by the defendant is necessary**

For an action under section 70, one of the essentials which has got to be proved is that the defendant enjoyed the benefits of the work done or the thing delivered to him by the plaintiff. The voluntary acceptance of the benefit of the work done or the thing delivered is the foundation of the claim under section 70. If a person accepts the benefit of the work done, it can raise a presumption that the work was not intended to be done gratuitously.

Unjust benefit to the defendant necessary

Section 70 is founded on the principle that one should not gain unjust enrichment at the cost of the other. If there is no unjust gain obtained in any transaction, section 70 has no application. In ***C.I. Abraham v. K.A. Cheriyan,*** A purchased some property for B, who was residing abroad, and collected the rents on behalf of B to be deposited in B's account but made a delay in the deposit of the rent amount in B's account. Thereafter, A claimed remuneration from B for this service in the form of purchasing property for B and collecting the rents on his behalf. It was held that there was nothing to prove that A rendered the service not intended to do gratuitously. Moreover, the fact that in this case B had gained no advantage at the cost of A, rather A had gained advantage by utilising the amount of the rent collected until the same had deposited in B's account, A was not entitled to claim any amount under section 70.

- **Application of Section 70 against the government**

Section 70 prevents unjust enrichment and it applies as much to individuals are to corporations and government. If the services rendered or goods supplied to the government are under a purported contract, which does not materialize because of non fulfilment of the formalities prescribed in Article 299 of the constitution, the government can still be made liable to compensate for the same under section 70 of the contract Act, if it has enjoyed the benefits of what has been done under the purported contact. In ***State of west Bengal v B.K. Mondal and sons***, the respondents constructed certain structure including a kutcha road, guardroom, office, kitchen and storage sheds at the request of some officers of the appellant, i.e., the state of west Bengal for the use of the civil supplies department of the government. The respondent claimed a sum of Rs.19325 for these works. The appellant, trying to escape the liability, alleged that the request in pursuance of which construction were made were invalid and unauthorized and did not constitute valid contract binding the appellant, under section 175(3) of the government of India

Act, 1935. It was held that the appellant having accepted the benefit of the structure constructed for it, was liable under section 70 to pay for the same.

- **Section 70 cannot be invoked against a minor**

It has already been noted that a minor's agreement is void because he is incompetent to contract. It has also been observed that a minor's agreement being void ab initio, he cannot be made liable under sections 64 and 5 of the contract Act. But if necessaries are supplied to a minor, his estate can be made liable under section 68. It has been held that no action can be brought against a minor to recover compensation from him under section 70.

Responsibility of finder of goods (Section 71)

The finder of the lost goods is a person who finds the goods of another person presumably not knowing the true owner at that time. A person who finds the lost goods does not acquire absolute ownership of the goods. Similarly, the goods when is in someone's possession, he cannot be considered as finder of the goods. The individual who acquires possession of lost goods is the best owner and has superior rights on the goods over anyone except the true owner. In this circumstance, the finder is only the apparent owner. A "finder of goods" is "a person who finds goods belonging to another and takes the goods into his custody". Although as between the finder and the owner of the goods, there is no contract, yet there are certain responsibilities fixed by S.71.A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.

Responsibility of Finder of Goods

A finder of the goods is subject to the same responsibilities and liabilities as those of the bailee's of goods. He has goods found as the bailee has in respect of the goods bailed to him. The person who finds goods belonging to another is entitled to retain the goods against the owner until he gets compensation from him. He has the right of lien against the goods for the expenses which he incurred in preserving the goods in the safe custody, but this does not give him the right to sue the finder for the trouble and expenses incurred by him. He can sue the owner for the reward where a specific reward has been offered. The finder of the goods is entitled to its possession as against everyone except the real owner. If a finder dishonestly appropriates to his own use when he knows the owner or has the means of discovering the true owner, he is guilty of

criminal misappropriation of property. But when he takes the property for the purpose of protecting it, or restoring it to the owner, he is not guilty of any offence. The finder is under an obligation, to take care of the goods as a man of ordinary prudence would take, under similar circumstances, of his own goods. Secondly, he is bound to return the goods to the true owner. These are the quasi contractual obligations of a finder of goods.

Duties of Finder of goods

The duties and obligation of a finder of the goods is treated at par with the bailee. So, the finder's position has been considered along with bailment. Since he is considered as the bailee, the duties of the bailee, under the contract of bailment, are the duties of the finder of goods as follows:

- **Duty to take reasonable care of goods (section 151 & 152)**

According to Section 151, the finder of goods should take such care of the goods as a man of ordinary prudence would take of his own goods. If he fails to act like an ordinary prudent man, he cannot be excused by pleading that he had taken similar care of his own goods also, and his goods have also been lost and damaged along with those of the ordinary prudent man. The foremost duty of a bailee is to take as much care of the goods bailed as a reasonable and prudent man will take of his own goods.

- **Duty not to make unauthorized use of goods (section 153 & 154)**

According to section 154, liability of finder of goods making unauthorized use of goods bailed: **–** If the finder of goods makes any use of the goods found, which is not according to the conditions of the bailment, he is liable to make compensation to the owner of goods for any damage arising to the goods from or during such use of them. It lays down a bailee's liability who makes unauthorized use of the goods bailed.

Duty not to mix goods (section 155 – 157)

According to Section 155, effect of mixture with owner's consent, of this goods with finder of good's: **–** if the finder of goods, with consent of the owner, mixes the goods of the owner with his own goods, the owner and the finder of goods must shall have an interest in proportion to their respective shares, in the mixture thus produced. According to section 156, effect of mixture without owner's consent when the goods can be separated: – when the goods mixed can be separated, the finder and the owner will remain the possessor of their respective shares. But the

finder of goods is bound to bear the expense of separation, and any damage arising from the mixture. According to section 157, effect of mixture, without owner's consent when the goods cannot be separated: – In case, the nature of the goods is such that the owner's cannot be separated from those of the finder's good, it is deemed to be loss of goods and the owner cannot recover compensation for the same from the finder of goods. It is the duty of the bailee that he should not mix up bailor's good with his own goods.

Duty to return goods (section 160 & 161)

According to section 160, return of goods found on expiration of time period: – it is the duty of the finder of the goods to return or deliver the goods found to the true owner as per his directions before the expiration of the time period specified by him. According to section 161, finder of goods responsibility when the goods are not duly returned: – if by the default of the finder of goods, the goods are not returned or delivered at the proper time, he is responsible to the loss or destruction of goods from that time.

Duty to return increase (Section 163)

Section 163 of the Act enacts that, "In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor or according to his directions, any increase or Profit which may have accrued from the Goods bailed." According to S.163, accretions in respect of the goods bailed are part of the balied goods and hence such accretions do not belong to the baliee and, therefore, they have to been handed over to the bailor when the goods bailed are returned. For eg. A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to return the calf as well as the cow to A.

- **Duty not to set up Jus Tertii**

It is the duty of the bailee that he should not set up an adverse title to the goods when demanded by the bailor. Finder of goods is not responsible on re-delivery to owner without title.

Right of the Finder of the Lost Goods:

The following are his right as envisaged by the sections 168 and 169 of the Indian Contract Act.

(i) He has right to retain possession of the goods so long as not claimed by the true owner, since finder of lost goods is the best owner as against rest of the world except the true owner.

(ii) He is entitled to be compensated for the trouble and expenses voluntarily incurred by him in preserving the goods and finding out the owner, but for such expenses he has

no right to sue the owner for compensation (Sec. 168). He has a particular lien upon those goods for payment of these expenses, i. e.; he can refuse to return the goods until he is paid for the expenses and trouble.

(iii) He can sue for any rewards if offered by the owner for the return of the lost goods. The finder of goods may retain the goods against the owner where the owner has offered a specific reward for the return of goods lost, but it must within his contemplation of offering the reward by the owner. The finder may sue for such reward, and may retain the goods until he receives it.

(iv) If the goods found are commonly a subject-matter of sale, and if the owner cannot with reasonable diligence be found, or if he refuses, on demand, pay the lawful charges of the finder, he may sell them when; (a) they are in danger of perishing or of losing the greater part of their value, or (b) when the lawful charges of the finder amount to two-thirds of their value (Sec. 169).

Liability of a person getting benefit under mistake or coercion(Section 72)

Unjust benefit under mistake: Section 72 covers a situation where money has been paid, or anything delivered, by one person to another either by mistake or under coercion. Illustrations A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Money paid or anything delivered under mistake

- ***New India Industries Ltd v. Union of India,*** According to Article 265 of the Constitution, no tax shall be levied or collected except by the authority of law. Law here means only valid law. Payment towards tax or duty, which is without the authority of law, is a payment under mistake within the meaning of section 72 and the same ought to be refunded by the government, because the government cannot be allowed to unjustly enrich itself by retaining the tax so received.

Section 72 does not only apply to a mistake of fact, it equally applies to mistake of law.

- ***Sales Tax officer, Banaras V. Kanhaiya lal,*** The respondent had paid sales-tax on the respondent's forward transactions in silver bullion under the U.P. Sales Tax Act. The levy of sales tax on such transactions was held to be ultra virus by the HC of Allahabad. Respondent claimed the refund of the tax already paid. SC.72 did not make any distinction between mistake of law and mistake of fact and the refund of payment made under mistake of law in this case was allowed.
- **No refund if the plaintiff did not pay from his own pocket**
- ***Roplas (India) Ltd. v. Union of India,*** The petitioners paid excise duty by mistake, but the petitioners had already recovered the whole of the duty paid by them from their customers. It was held that the petitioners were not entitled to refund of the amount paid by mistake, as the money had not gone out of their pocket. Refund in such a case would amount to unjust enrichment of the petitioners.

The plaintiff at fault

In order to invoke S.72, the plaintiff cannot be permitted to make a profit out of his own wrong.

- ***Radha Flour Mills Pvt. Ltd. v. Bihar State Financial Corporation ,***In recovery of loan and interest from the appellant, there was an accounting error on part of the corporation, and as a result Rs. 29000 could not be recovered from the appellant- debtor. On discovery the accounting error after a decade and a half, the corporation claimed the amount along with interest. Patna HC held the demand of interest as improper as it would premium on default being committed by the corporation and hence amounted to unjust enrichment.

Conclusion

Quasi contracts are not contracts but are obligations that the law imposes upon someone to prevent undue advantage to one person at the cost of another. The Indian Contract Act, 1872 covers these types of obligations under the **Chapter V** under the title 'OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT' but the Act does not include the term 'quasi contract'. It could be because of the reasons that the act also wants to tell that these types of obligations are far different from real contracts and they must not be called quasi contracts. It is the law that compels parties who get unduly advantaged to compensate the

other party on the principle of equitable justice. The foundation of quasi contracts is based on the principles of Equity, Justice and Good Conscience, which requires that nobody shall benefit himself unjustly, at the cost of others. This is known as the Principle of Unjust Enrichment. The basis of the quasi contract is that technicality of contract cannot override the requirements of justice. When something has been done for the benefit of another person without the waiting for his formal assent as also for the completion of other formalities, it is expected that the person receiving the benefit must compensate the other party for the trouble and expenses incurred. The contract and quasi contract can be distinguished by focusing on the concept of agreements and obligations by and on the parties respectively. The unjust principle came from the old maxim of Roman law '*Nemo debet locupletari ex aliena jactura' that means no man must grow rich because of one's personal loss*. The doctrine of quasi contracts has been an essential part and aspect of the Indian Contract Act, 1872 in dealing with such obligations which causes loss to one party over undue benefit to the other party.

UNIT-V

SPECIFIC RELIEF ACT, 1963

Introduction

The Specific Relief Act, 1963 is an Act of the Parliament of India which provides remedies for persons whose civil or contractual rights have been violated. It replaced an earlier Act of 1877. Protection of life and property cannot be assured by a simple declaration of rights and duties. The enumeration of rights and duties must be supplemented by legal devices which help the individual to enforce his rights. Social redress must be provided to every person who is injured in the social process. Basically, the mission of the Specific Act is to assure that whenever there is a wrong there must be a remedy. It sets out two main remedies to party whose contract has not been performed. First one, the party may ask court to compel performance of contract (specific performance) and second one being the party may seek monetary compensation instead of performance.

Recovery of Possession of Property

The term possession is not a mere occupation or actual use. There are two eminent components of possession are:

a. Corpus: Actual power and apparent control over the object.
b. Animus: Will to avail oneself of the Corpus. Hence there is a physical possibility of the person dealing with the property as he likes and exclusively. There are two types of property: Immovable and moveable property.

- **Immovable Property**

As the word suggests, it means what cannot be moved. But the legal definition is, unless something repugnant to the context, land, benefits arising out of the land, and things attached to Earth or permanently fastened to anything attached to Earth.

- **Movable Property**

A property except immovable would be movable. Examples would include government

securities, share certificates but not money. It should be capable to be seized or delivered.
There are three types of actions which can be brought in law for the recovery of specific immovable property:

a) A suit based on title by ownership;

b) A suit based on possessory title;

c) A suit based merely on the previous possession of the plaintiff where he has been dispossessed without his consent otherwise than in due course of law.

The last remedy is provided in Section 6 of the Act. The suits of the first two types can be filed under the provisions of CPC. The word entitled to possession means having a legal right to title to possession on the basis of ownership of which the claimant has been dispossessed. Plaintiff must show that he had possession before the alleged trespasser got possession. In *Ismail Ariff v. Mohammed Ghouse*, the Privy Council held, the possession of the plaintiff was sufficient evidence a title of owner against the defendant by section 6 of the Specific Relief Act, 1962, if the plaintiff has been dispossessed otherwise than in due course of law there may be title by contract, and prescription or even by possession and the last will prevail where no preferable title is shown. The essence of this section is 'title', i.e. the person who has better title is a person entitled to the possession. The title may be of **ownership or possession.** Thus, if 'A' enters into peaceful possession of land claiming his own although he might have no title, still he has the right to sue another who has ousted him forcibly from possession because he might have no legal title but at least has a possessory title.

It is a principle of law that a person, who has been in a long continuous possession of the immovable property, can protect the same by seeking an injunction against any person in the world other than the true owner. It is also a settled principle of law that owner of the property can get back his possession only by resorting to due process of law. It states that a suit for possession must be filed having regard to the provision of the Code of Civil Procedure. In ***Dadu v. Dayala Mahasabh***, it was held that since the statute provides for applicability of the Code, there cannot be any doubt whatsoever that all the provisions thereof shall apply.

Recovery of immovable property

Section 6: Suit by person dispossessed of immovable property

1. If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.
2. No suit under this section shall be brought after the expiry of six months from the date of dispossession or against the Government.
3. No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.
4. Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

Possession in the context of **Section 6** means legal possession which may exist with or without actual possession and with or without rightful origin. The plaintiff in a suit under section 6 need not establish title. Long-standing peaceful possession of is enough to prove actual possession. In ***K.K. Verma v Union of India*** it was held that after the expiry of the tenancy agreement, the tenant continues to hold juridical possession and cannot be dispossessed unless the owner gets a decree of eviction against him.

Objective of Section 6

- To discourage people from taking the law into their hands (however good their title may be).
- To provide a cheap and useful remedy to a person dispossessed of immovable property in due course of law.

The object of this section appears to have been to give special remedy to the party illegally dispossessed by depriving the dispossessor of the privilege proving a better title to the land in dispute. Section 6 should be read as part of the Limitation Act and its object to put an additional restraint upon illegal dispossession with a view to prevent the applicant of that dispossession, from getting rid of the operation of the Act by his unlawful conduct. If the suit is brought within the period prescribed by that Section, even the right of the land is precluded from showing his

title. Further, it should be noted that where the grant of possession is purely gratuitous, the owner has the right to reclaim possession even without the knowledge of a person in possession. The only prayer in a suit under section 6 can be a prayer for recovery of possession. Consequently, a claim for damages cannot be combined with that for possession. Section 14 of the Limitation Act, 1963 applies to the proceedings against dispossession. In the case of ***K. Krishna v A.N Paramkusha Bai***, a tenant was dispossessed forcibly by the owner but he himself get forcible repossession. The Court, in this case, held that "tenant could institute suit for repossession immediately when he was forcibly ousted, but as soon as he takes forcible repossession he became trespasser and therefore could not be regarded to be in lawful possession.

Difference between Section 5 and 6

Section 5	**Section 6**
The claim is based on the title.	The claim is based on possession and no proof of title is required and even rightful owner may be precluded from showing his title to the land.
The period of limitation is 12 years.	The period of limitation is only 6 months from the date of dispossession.

Who can seek the relief?

The recovery of possession under the law is mandated to be sought after by the person who has been dispossessed. He or any person claiming through him has been given the power to file a suit in the respective section. Thus the person who should be removed should the one having a juridical possession over the property. It cannot be the father or uncle of the person who would have been removed from the property. Also, it cannot be a servant or the appointee who has been removed. Similarly, a trespasser, who took forcible possession of the land, cannot claim relief under this section. But, if his or her possession has been for a long time and has been peaceful, anterior and accomplished, he or she cannot be ousted or disposed of except with the due recourse of law.

Representative

The section is very clear giving a right to sue even to the representatives of the person removed. The law has recognized the heirs as the representatives and entitled to sue for recovery of immovable possession. The reason is that the possession is a heritable right that is available against all expects the true owner. This character of being the representative is also extended to a Mohammedan widow. It is because when she enters the property of her husband in lieu of dower debt, she gets a heritable right and her heirs can also retain the possession till the debt is paid.
In ***Tilak Chandra Dass v. Fatik Chandra Dass,*** The contours of this section are very limited since the court is empowered only to direct delivery of possession. It has no power to award damages to the plaintiff. The court therefore also cannot direct the defendant to pay to the plaintiff the cost of removing the hut and filling up of excavations.

No Appeal

Neither an appeal nor a review is permissible under the section. But the courts have held that the appeal shall lie if a suit based on the title has wrongly dealt with as a suit based on this section. In the case of ***Narain Das v Het Singh***, Even a letters patent appeal from the decision of a single-judge bench of the High court would be permissible. If a suit is for a mandatory injunction and section 6 would not apply, the appeal would be maintainable.

Establishing Title

The section specifically mandates that the party is not prohibited from establishing his or her title over the property and then claim the recovery. This right exists with the person even if the suit against him under this section has already been decreed. The mention of title under the suit under this section is also irrelevant. The court generally presumes that where possession is doubtful, the court holds that it follows title.(*Dharm Singh v Hur Pershad Singh)*

Recovery of possession of Movable property

Section 7 and 8 of the Specific Relief Act, 1963 contains provisions for recovery of possession of some specific movable property. Section 7 of Act with the head '*recovery of Specific movable property' provides that, "a person entitled to the possession of the specific movable property may recover it in the manner provided by the Code of Criminal Procedure, 1908 (5 of 1908).*

Explanation 1: *A trustee may sue under this section for possession of the movable property to the beneficial interest he is entitled.*

Explanation 2: *A temporary or special right to the present possession is sufficient to support a suit under this section."*

Ingredients of Section 7

a. First, the plaintiff must be entitled to the possession of the movable property. A person may be entitled to the possession of a thing either by ownership or by virtue of a temporary or a special right as provided under explanation 2 of section 7. A special or temporary right to an individual may arise by either act of the owner of goods i.e. bailment, pawn etc. or not by the act of the owner of goods i.e. a person may be the finder of goods and finder of goods enjoys special right to possession except against true owner. Only those persons can maintain a suit under section 7, who has the present possession of the movable property. A person who does not have present possession of the movable property cannot maintain a suit under this section.
b. The property in question must be specific movable property means that property should be ascertained or ascertainable. Specific property means the very property not any property equivalent to it. The disputed specific movable property must be capable of being delivered and seized. Where the goods have been ceased to be recoverable or are not in control of the defendant, the plaintiff is not entitled to a decree for recovery.

Article 91(b) of the Limitation Act, 1963 provides a period of three years for the filing of suit computable from the date when the property is wrongfully taken or when the possession becomes unlawful. ***Chandu Naik and others v Sitaram B. Naik and another***, it was held that when the dispute is between two private parties in respect of possession of premises, the provisions of section 8 of the Act are not attracted and the Civil Court has the jurisdiction to entertain and try the suit of the kind with which we are dealing.

Property of every description except immovable property is movable property.

Example: Government Securities, share certificates are movable property but not money. For

application of the section it must be specific i.e. ascertained and ascertainable capable of being seized and delivered. The remedy of recovery of specific movable property means the property itself and not its equivalent. Section 7 provides for the recovery of movable property in specie i.e. the things itself. The things to be recovered must be specific in the sense they are ascertained and capable of identification. The nature of things must continue without alteration.

Who can sue under Section 7?

To succeed under this section it is sufficient if the plaintiff seeking possession has a right to present or immediate possession or by way of special or temporary right to present possession i.e. of a bailee, Pawnee, finder of lost goods. A trustee can sue under this section possession of movable property to protect the beneficial interest of the beneficiary and it is not necessary to make the beneficiaries, parties to the suit.

Liability of person not in possession/not as owner

Section 8: Liability of person in possession, not as owner, to deliver to persons entitled to immediate possession.—Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

(a) When the thing claimed is held by the defendant as the agent or trustee of the plaintiff;
(b) When compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed;
(c) When it would be extremely difficult to ascertain the actual damage caused by its loss;
(d) When the possession of the thing claimed has been wrongfully transferred from the plaintiff.
Explanation.—Unless and until the contrary is proved, the court shall, in respect of any article of movable property claimed under clause (b) or clause (c) of this section, presume—
(a) That compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be; (b) That it would be extremely difficult to ascertain the actual damage caused by its loss. Section 8 of the act attaches more importance to the title than possession. ***Geetarani Paul v Dibyendra Kundu***, The Supreme Court has held that as long as the

plaintiff is able to substantiate and establish that he is lawful and registered owner of the suit lands and the title vests in him, specific details of his dispossession need not be proved and that a decree on the basis of the title can follow, if the suit is filed within the period of limitation.

Specific situations in which Court will order delivery

a. Defendant is agent or trustee

   Wherever the fiduciary responsibility arises in respect of the possession of the property to the trustee, he is responsible for the return of the property to the rightful owner.

b. Compensation, not an adequate relief

   The court is to presume the existence of this condition. The proper valuation of the movable property is not always possible hence delivery of possession can be ordered like in the case of an idol in dispute.

c. Actual Damage cannot be ascertained

   The court again presumes its existence. This happens in the cases of antiquity, artistic productions, family relics, ornaments, heirlooms. If the article is of such a special character to bear any ascertainable market value, the court may direct the defending party to deliver a particular article to the plaintiff.

d. Possession Wrongfully Transferred

   It can happen when the defendant has obtained the property by means of fraud. Another person can also wrongfully transfer the property. An example can be when the property is transferred to baliee from the plaintiff. It can also happen when the transfer is to a servant without the permission of his employer.

Specific Performance of Contracts

Specific performance is equitable relief, given by the court to enforce against a defendant, the duty of doing what he agreed by contract to do. Thus, the remedy of specific performance is in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract. Damages and specific performance are both, remedies available upon breach of obligations by a party to the contract;

the former is a ‘substitutive’ remedy, and the latter a ‘specific’ remedy. The remedy of specific performance is granted by way of exception. The plaintiff seeking this remedy must first satisfy the court that the normal remedy of damages is inadequate. The presumption being that in cases of contracts for transfer of immovable property damages will not be adequate. Even in these cases specific performance is not always granted, as it is a discretionary remedy. The relief must be specifically claimed. When the plaintiff claims specific performance of a particular agreement, the suit could be decreed for specific performance of only that agreement, and not any other. The prescribed period of limitation for a suit of specific performance is three years from the date fixed for performance, or, if no such date is fixed, when the plaintiff has noticed that performance has been refused.

Defenses

Section 9 of the Specific Relief Act, 1963 provides for the defences against specific performance of contracts. It states that, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts. For enforcement of specific performance of a contract, there must be a valid contract. Consequently, the remedy of specific performance cannot be granted if the contract is void or illegal, e.g. A minor‘s agreement is void as a minor is not competent to contract. Therefore, it can-not be specifically enforced. The defendant may take the defence that the remedy claimed should not be granted on the following grounds:

- Invalidity of contract
- sufficiency of compensation
- discretion of the Court

Delay as ground of defence under law of contract

Where the suit was within the period of limitation, but delay had resulted in third parties acquiring rights in the subject-matter of the suit or had given rise to a plea of waiver it was held that it would provide grounds of defence in a suit for specific performance of contract for sale of immovable property. (Limitation Act, 1963, Article 34).

Where specific performance of contracts are enforceable

Section 10 of the Specific Relief Act, 1963, provides as follows:

Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced:

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation: Unless and until the contrary is proved, the court shall presume-

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff."

There is a clear distinction between the cases giving rise to the filling of a suit for specific performance in the event of breach of recitals of an agreement for due performance of which the parties have covenanted to agree and perform and those which the award of compensation will be adequate relief.

When there exist no standard for ascertaining actual damage

It is the situation in which the plaintiff is unable to determine the amount of loss suffered by him. Where the damage caused by the breach of contract is ascertainable then the remedy of specific performance is not available to the plaintiff. For example, a person enters into a contract for the purchase of a painting of dead painter which is only one in the market and its value is unascertainable then he is entitled to the same.

When compensation of money is not adequate relief

In following cases compensation of money would not provide adequate relief:

1. Where the subject matter of the contract is an immovable property.
2. Where the subject matter of the contract is movable property and,
3. Such property or goods are not an ordinary article of commerce i.e. which could be sold or purchased in the market.
4. The article is of special value or interest to the plaintiff.
5. The article is of such nature that is not easily available in the market.
6. The property or goods held by the defendant as an agent or trustee of the plaintiff.

In the case of ***Ram Karan v Govind Lal*** , an agreement for sale of agricultural land was made & buyer had paid full sale consideration to the seller, but the seller refuses to execute sale deed as per the agreement. The buyer brought an action for the specific performance of contract and it was held by the court that the compensation of money would not afford adequate relief and seller was directed to execute sale deed in favour of buyer.Similarly,

Agreement for reconveyance or repurchase

An agreement to repurchase property which had been sold, popularly known as agreement for reconveyance, has been held to be specifically enforceable.

Delay

K.S. Vidyanandam v. Vairavan, Unreasonable delay by a plaintiff in performing his part of the contract operates as a bar to his obtaining specific performance, provided that-

- Time was originally the essential element of the contract; or
- It was made an essential element by a subsequent notice; or
- The delay has been so unreasonable and long that it amounts to abandonment of the contract.

The word “reasonable” has in law a prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable.

Specific performance of contracts connected with trust enforceable (Section 11)

Section 11 of the Act provides for cases in which specific performance of contracts connected with trust enforceable:

(1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Specific performance of part of contract (Section 12)

Section 12 deals with **s**pecific performance of part of contract and states as follows:

(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a

case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(1) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation: For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance." A court will not, as a general rule, compel specific performance of a contract unless it can execute the whole contract. This section deals with classes of cases in which specific performance may be granted with or subject to special conditions or restrictions. When a part of the contract is not capable of performance is always whether the contract can be executed in substance. This provision can be invoked only where terms of the contract permit segregation of interests and rights of parties in the property, and if the intention is to the contrary, the provision cannot be attracted. Illustrations 'A' contracts to sell 'B' a piece of land measuring 100 acres. It turns out that 98 acres belong to 'A' and 2 acres to a stranger who refused to part with it. 2 acres are not necessary for the use and enjoyment of 98 acres of neither land nor it is so important that the loss of it cannot be made good by damages. 'A' may be directed at the suit of 'B' to convey to 'B' 98 acres of land and to make compensation for not conveying 2 acres of land. At the suit of 'A', 'B' may be compelled to pay purchase money less the sum awarded as the compensation for the deficiency.

Contracts which cannot be specifically enforced

Section 14 provides for contracts not specifically enforceable and states as follows

(1) The following contracts cannot be specifically enforced, namely:--

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable ;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:-

(a) where the suit is for the enforcement of a contract,-

(i) to execute a mortgage or furnish any other security for security for securing the repayment of any loan which the borrower is not willing to repay at once:Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,- (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm,

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:-

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed . According to Section 14 of Specific Relief Act 1963, there are certain contracts which cannot be specifically enforced and these are:

Where compensation in money is an adequate relief:

Here the court will not order specific performance of contract as it is expected that the plaintiff will bank upon the normal remedy for breach of contract i.e. remedy of compensation. For example contract of mortgage of immovable property *(Rambai v. Khimji),* contract of sale of goods ***(Bharat v. Nisarali)*** contract of repair of premises etc.

Where a contract runs into minutes or numerous detail:

These contracts includes contract which depends upon the personal qualification or the violation of the parties or is of such nature that the court cannot enforce specific performance of its material terms. In *Robinson Davison,* it was held by the court that the contract to perform in concert depends upon the personal kill of defendant's wife, and the contract cannot be specifically enforced due to her illness. The other example is construction contract where the detailed terms of contract are not explained.

Contracts of determinable nature:

Determinable contract means a contract which can be determined or revoked or put to an end by a party to the contract. For example in case of partnership at will any partner can retire by giving notice in writing to other partners and can dissolve the firm.

Contracts which involve the performance of continuous duty which court cannot supervise:

Earlier under Specific Relief act, 1877 the continuous duty which court cannot supervise is considered over a period of 3 years which was omitted under Specific Relief Act, 1963 and no time limit restricted for the performance of a continuous duty. These include contract of

appointment of employees for continuous service or contract to execute sale deed every year. In ***Central Bank v. Vyankatesh***, the defendant was required to execute deed every year for the period of 25 years and contract is held to be specifically unenforceable.

Contract of arbitration:

According to Section 14(2)**,** a contract to refer present or future differences to arbitration shall not be specifically enforceable. However, Section 14(3) contains certain exception and the following kinds of contract are specifically enforceable

1. A contract to execute a mortgage or furnish other security for repayment of any loan which the borrower is not willing to repay at once, the court would grant specific performance to execute mortgage or to give any other security.

2. A contract to take up and pay for any debentures of a company.

3. A contract to execute a formal deed of partnership at will when the business has already commenced.

4. A contract for the construction of any building or the execution of any other work on land if;

5. Detailed or the terms of the contract has been sufficiently explained & the court can determine the exact nature of building or work.

6. The plaintiff has a substantial interest in performance of the contract and compensation in money is not an adequate relief.

7. The defendant has in accordance with the contract, obtained possession of whole or part of the land on which the building is to be constructed or other work is to be executed.

Exceptions

Despite the clauses of Section 14(1), the court may enforce specific performance in the circumstances provided under Section 14(3).

- Where the suit is for the enforcement of a contract to execute a mortgage or secure the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or to take up and pay for any debentures of a company;
- Where the suit is for the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or the purchase of a share of a partner in a firm;
- Where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Certain conditions being maintained, these being:-
    - the building or other work is described in the contract in terms precise enough for the court to determine the exact nature of work;
    - the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and
    - the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

In *Executive Committee, State Warehousing Corporation v. Chandra Kiran Tyagi***,** the Supreme Court held that ordinarily the contracts for personal services cannot be specifically enforced subject to certain exceptions.

Person for or against whom contracts may be specifically enforced

Section 15 talks about who may obtain specific performance:

Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be

assigned, his representative in interest of his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Defenses available in a suit for specific performance

Defendant in a suit for specific performance of a contract may prove that-

1. Compensation in money could be adequate relief to plaintiff. Section 14(a)
2. The contract runs in to such minute details or is dependent on personal qualifications of the parties or is of such a nature that the court cannot enforce performance of its material terms. Section 14 (b)
3. The performance of the contract involves the performance of a continuous duty which the court cannot supervise. Section 14 (d)

4. The contract in its nature is determinable.
5. It is a contract by the plaintiffs in breach of their trust or in excess of their powers. Section 11(2)
6. A contract though not voidable when made gave the plaintiff an unfair advantage over the defendant. Section 20
7. The performance of the contract would involve hardship on the defendant which he did not foresee where as its non-performance would involve non such hardship on the plaintiff. S. 20
8. The conduct of the defendant is such as to disentitle him to relief. Section 16
9. Plaintiff cannot give a title free from reasonable doubt. Section 17
10. Defendant is entitled to get the contract enforced with a variation which he may setup. Section 18.

In ***T.M. Balakrishna Mudaliar v. M. Satyanarayana Rao,*** the expression "representative- in-interest" includes the assignee of a right to purchase the property and, therefore, he would have the title to claim specific performance.

Who cannot claim specific performance of a contract

As per sec 16 specific performance of a contract cannot be enforced in favour of a person or be claimed by a person—

(a) who has obtained substituted performance of contract under section 20;

(b) who has become incapable of performing,

(c) who has violated any essential term of, the contract that on his part remains to be performed

(d) who has acted in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(e) who has failed to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which have been prevented or waived by the defendant. Hence, Specific performance of contract is to be granted on all grounds except when covered by the

aforementioned grounds.

I.T.C Ltd. v. George Joseph Fernandes, the court held that a person who makes himself a party to an illegal contract cannot enforce his rights under this section.

Rakha Singh v. Babu Singh, the court held that where the plaintiff showed that he was ready and willing to pay the purchase price and continued to be so, the failure to plead that he had money in the bank and had not withdrawn it, was immaterial because this was a matter of evidence and had not to be pleaded.

RESCISSION (Section 27-30)

In contract law, rescission has been defined as the unmaking of a contract between parties. Rescission is the unwinding of a transaction. This is done to bring the parties, as far as possible, back to the position in which they were before they entered into a contract (the status quo ante).

When is recession available?

Sections 27 to 30 of specific relief act deals with rescission of contract. The relief of rescission is available to a person who has become the victim of fraud or illegality or something equivalent which makes the contract either void or voidable. Section 27(1) provides for circumstances when a party to a contract may rescind it and are as follows:

i. When the contract is voidable or terminable by the plaintiff.
ii. Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame.

Loss of right of rescission

Section 28(2) provides that the right of rescission is not available in the following cases

i. Affirmation

Where the plaintiff on becoming aware of his right to rescind has expressly or impliedly ratified/affirmed the contract. An express affirmation takes place when the right to rescind is openly waived. An implied a formation takes place when the party having the right to rescind is instead enjoying the benefits of the contract.

ii. Where restitution is not possible

The right of rescission is lost when the position of the parties has been altered to such an extent

that they cannot be put back to their original status. For example, where one party has already resold the goods or consumed them, restoration off the *status quo* becomes impossible.

iii. Intervention of third parties

Where, for example, a person has obtained goods by fraud and, before the seller is able to catch him, he transfers the goods to a bona fide buyer, the deceived seller would not be allowed to get rid of the sale on account of the fraud.

iv. Severance

Rescission is not allowed by the plaintiff is seeking rescission of only a part of the contract and that part is not severable or being separated from the rest of the contract.

Inbuilt remedy of rescission in decree of specific performance (Section 28)

Where a decree of specific performance has been passed in respect of a contract for the sale or lease of immovable property, but the party to whom such relief has been granted does not pay the price within the time prescribed by the court, the seller may ask the court for rescission. The court may:

i. direct the purchaser or lessee, if he has already taken over possession, to restore it to the seller and

ii. to pay him rent for the period during which he enjoyed the benefits of possession.

Limitation

An application for rescission should be filed within 3 years from the date of the decree for specific performance.

Rescission as an alternate prayer is specific performance not granted (Section 29)

A plaintiff instituting a suit for specific performance of contract may pray that if the contract cannot be specifically enforced it may be rescinded and delivered up to be cancelled.

Recession and equity (Section 30)

If the court grants decree of recession, it may require the decree holder to restore any benefit received by him under the contract to the extent to which justice requires.

RECTIFICATION OF INSTRUMENT (Section 26)

Contract or instrument may be rectified-

(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not express their real intention, then-

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

Essentials of rectification

i. A genuine agreement different from the expressed agreement. The parties should have mutually agreed on certain terms to a contract and not the terms expressed in the contract in question.

ii. Fraud by one party or mistake by both parties. Mistake shall be mutual and not unilateral. A unilateral mistake is a ground for rescinding the contract but not to rectify or correct the contract. The mistake may be either of fact or of law although the court of equity will not generally grant relief against a mistake of law, except where the mistake results in an inequitable result.
iii. Fraud or Mistake in the expression of contract and not in its formation. The parties should not have entered into the contract by a mistake or through fraud. It must have been entered into with free consent of both parties. But only the terms expressed in the contract should have been so expressed by mistake or fraud.
iv. Rectification cannot affect the rights of *bona fide* purchasers for value without knowledge of the mistake or fraud.

Illustration A, intending to sell it to B his house and one of the three go-downs adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, all three go-downs are included. This conveyance deed may be rectified as to exclude the two go-downs that were not agreed upon.

CANCELLATION OF INSTRUMENTS (Section 31-33)

Section 31 to 33 of the Specific Relief Act, 1963 provide for the cancellation of instruments. When a document is valid, no question arises of its cancellation. When a document is *void ab initio,* a decree for setting aside the same would not be necessary as the same is *non est* in the eye of the law, as it is a nullity. Section 31 explains the remedy of cancellation as follows: "Any person against whom a written instrument is void or voidable, and who has a reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

It provides for a discretionary relief. The above-mentioned provision encompasses three essential conditions on the fulfillment of which this remedy can be granted by the court-

1. The instrument must be void or voidable.
2. The plaintiff must have a reasonable apprehension of serious injury if the instrument is left outstanding.

3. Under the circumstances of the case, the court exercises its discretion and orders the instrument to be delivered up and cancelled.

Who can seek cancellation?

Any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument of if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable Under this section not only parties to the instrument but also persons affected by such instrument can maintain an action. For example, under Section 53 of Transfer of Property Act, with regard to a fraudulent transfer, one creditor on behalf of other creditors can sue for cancellation of the sale deed executed by the debtor to delay, defraud or defeat the rights of the creditor. In the case of ***Chajulal v. Gokul,*** the neighbor of an owner of the house, while mortgaging his property wrongfully stated in the deed that the wall adjoining the property belonged to him and that he had the right of way over the owner's property. Hence, the court considered the owner eligible to get such terms in the deed cancelled as this specifically work affecting his title and interest.

Partial Cancellation (Section 32)

As per Section 32, to court in its discretion can very well cancel only a part of an instrument. It means, in residue, the instrument can stand in a proper case where there is evidence of different rights or different obligations. This means that rights and obligations identified must be distinct and separable. In ***Ram Chander v. Ganga Saran***, the court held that the plaintiff claimed endorsement on a document to be an act of forgery and thus false, hence, liable to be cancelled. The court answered in affirmative and partially cancelled only the endorsement because it is a document in itself separate and distinct from the rest of the document.

Doing equity for seeking equity (Section 33)

The maxim of 'he who seeks equity must do equity' is inherent in Section 33 of the 1963 Act. It puts an obligation on the party to whom the relief of cancellation is granted, to restore any benefit which he may have received from the other party and to make any compensation to him which justice require. This provision would apply to a case where the plaintiff has not specifically asked for the relief of cancellation and the defendant has successfully resisted the instrument sought to be enforced against him on grounds of the instrument being void or

voidable.

Declaratory Decrees

A declaratory decree is a decree declaring the right of the plaintiff. Declaratory judgment is a judgement which early states that the rights of the parties in an already complicated transaction. The general power vested in the courts in India under the Civil Procedure Code is to entertain all suits of a civil nature, excepting suits of which cognizance is barred by any enactment for the time being in force. However Courts do not have the general power of making declarations except in so far as such power is expressly conferred by statute. The utility and importance of the remedy of declaratory suits are manifest, for its object is 'to prevent future litigation by removing existing cause of controversy.' It is certainly in the interest of the State that this jurisdiction of court should be maintained, and the causes of apprehended litigation respecting immovable property should be removed. However, a declaratory decree confers no new right; it only clears up the mist that has been gathering round the plaintiff's status or title.

Sections 34 and 35 of the Specific Relief Act, 1963

Section 34 of Specific Relief Act reads as:

“Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation:

A trustee of property is a "person interested to deny "a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.” Section 34 provides for "a suit against any person denying or interested to deny the plaintiffs' title to the legal character or right to any property". So it is clear that the plaintiff's task is not over once he proves that he is entitled to the legal character or right to property, it is for him to convince the court that the defendant has denied or interested to deny that legal character or right of the plaintiff. Then only he can succeed in obtaining the declaration sought. The provision is a verbatim reproduction of

Section 42 of the Specific Relief Act, 1877. It ensures a remedy to the aggrieved person not only against all persons who actually claim an adverse interest to his own, but also against those who may do so.

Requisites:

Section 34 of the Specific Relief Act, 1963 contemplates certain conditions which are to be fulfilled by a plaintiff. In the *State of M.P v. Khan Bahadur Bhiwandiwala and c,* the court observed that in order to obtain the relief of declaration the plaintiff must establish that

(1) the plaintiff was at the time of the suit entitled to any legal character or any right to any property

(2) the defendant had denied or was interested in denying the character or the title of the plaintiff

(3) the declaration asked for was a declaration that the plaintiff was entitled to a legal character or to a right to property

(4) the plaintiff was not in a position to claim a further relief than a bare declaration of his title. It is to be submitted that the fourth requisite is not correct as the section only says that if any further relief could be claimed it should have been prayed for. Since declaration is an equitable remedy the court still has discretion to grant or refuse the relief depending on the circumstances of each case.

Thus a person claiming declaratory relief must show that he is entitled

1. to a legal character, or
2. to a right as to property, and that
3. the defendant has denied or is interested to deny his title to such character or right
4. he has sought all reliefs in the suit.

Objective

The object of this Section is obviously to provide a perpetual bulwark against adverse attacks on the title of the plaintiff, where a cloud is cast upon it, and to prevent further litigation by removing existing cause of controversy. The threat to his legal character has to be real and not 4 imaginary. The Section does not lay down any rule, that one who claims any interest in the property, present or future, may ask the Court to give an opinion on his title. It does not warrant

any kind of declaration that the plaintiff is entitled to a legal character or to any right as to any property, and it warrants this kind of remedy only in special circumstances. The plaintiff has to prove that the defendant has denied or is interested in denying to the character or title of the plaintiff. There must be some present danger or determent to his interest. So that a declaration is necessary to safeguard his right and clear the mist. The denial must be communicated to the plaintiff in order to give him cause of action. The declaratory decree is the edict which declares the rights of the plaintiff. It is a binding declaration under which the court declares some existing rights in favour of the plaintiff and declaratory decree exists only when the plaintiff is denied of his right which the plaintiff is entitled to. After that specific relief is obtained by the plaintiff against the defendant who denied the plaintiff from his right. According to Section 34, of the Special Relief Act, 1963, any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. Declaratory decree provisions bring out to merely perpetuate and strengthen the Plaintiff in case of an even adverse attack so that the attack on the Plaintiff cannot weaken his case and it is mentioned in the case of ***Naganna v. Sivanappa***. And by the arguments made in this case, it encourages the plaintiff to come forward to enjoy the rights which they are entitled to and if any Defendant denied the Plaintiff from providing any rights for which the Plaintiff is entitled, then it gives them the power to file the suit and get special relief.

Discretion of court as to declaration of status

As in the Section 34 of Special Relief Act, 1963 the condition mentioned for the declaration of status or right i.e.

(1) the plaintiff at the time of suit was entitled to any legal character or any right to any property

(2) the defendant had denied or was planning or interested in denying the rights of the plaintiff

(3) the declaration asked for should be same as the declaration that the plaintiff was entitled to a right

(4) the plaintiff was not in a position to claim a further relief than a mere declaration of his rights which have been denied by the defendant.

But, it is not compulsory that even after the fulfilment of all the four essential conditions required for declaration, the specific relief will be provided through a declaration to the plaintiff. It is totally on the discretion of the court whether to grant the relief or not to the plaintiff. The relief of Declaration or specific relief cannot be asked as a matter of right; it is a total discretionary power which is in the hands of the court.

In the case of ***Maharaja Benares v. Ramji khan***, it was declared that if the suit is filed and the necessary party is absent then the court will dismiss the suit for the declaration. So, it is necessary that both parties should be available. There is no specific rule to decide whether the discretionary power of the courts should be granted or not, the discretionary power of the court is being exercised according to the case and there are no specific criteria to decide in which cases the court will exercise its discretionary power.

Essentials of a declaratory suit

There are a total of four essential elements considered for a declaratory Suitor for the valid suit for Declaration and all the four elements are mentioned below.

- The plaintiff at the time of suit was entitled to any legal character or any right to any Property.
- The defendant had denied or was planning or interested in denying the rights of the plaintiff.
- The declaration asked for should be the same as the declaration that the plaintiff was entitled to a right.
- The plaintiff was not in a position to claim a further relief than a mere declaration of his rights which have been denied by the defendant.

Legal Character

We have talked about the requisites that a person should be entitled to the legal character. So, what we mean about the Legal Character. Legal character is attached to an individual's legal status which shows the person's capacity. Legal character by names itself denotes character recognized by law. In the case of ***Hiralal v. Gulab,*** it was observed that variety of status among

the natural person, can be referred to the following listed causes i.e. Sex, minority, rank, caste, tribe, profession and many more list.

Person Entitled to a Right to any Property

The second condition which is to be fulfilled by the Plaintiff for the successful relief of Declaration or we can just say that for getting Special relief which should be related to Plaintiff Right to Property. A person seeking special relief has a condition that they must have a right to any property, only then they can go for special relief under Special relief Act, 1963. The Bombay High Court has made a distinction in 'Right to Property' and 'Right in Property' and it has been held that to claim and go for a declaration the Plaintiff need not show the right in Property. The Plaintiff only has to show that he has Right to Property from which he has been denied.

Declaration asked should be the same as the declaration that the plaintiff entitled.

The third condition is to be fulfilled by the Plaintiff for the Declaration and for Special relief. This is considered as essential because it is very necessary to look that the Plaintiff asking for the declaration from the Court should be the same as the declaration to which the Plaintiff is entitled under the right to any Property.

Cloud upon title

A dispute between the parties may relate either to a person's legal character or rights or interest in the property. A cloud upon the title is something which is apparently valid, but which is in fact invalid. It is the semblance of the title, either legal or equitable, or a claim of an interest in property, appearing in some legal form, but which is in fact in founded, or which it would be inequitable to enforce.

Consequential Relief

There may be real dispute as to the plaintiffs legal character or right to property, and the parties to be arrayed, yet the court will refuse to make any declaration in favour of the plaintiff, where able to seek further relief than a mere declaration, he omits to do so. The object of the proviso is to avoid multiplicity of suits. What the legislature aims at is that, if the plaintiff at the date of the suit is entitled to claim, as against the defendant to the cause some relief other than and

consequential upon a bare declaration of right, he must not vex the defendant twice; he is bound to have the matter settled once for all in one suit.

Discretionary relief

Even though if the essential elements are established, yet it is discretion of the court to grant the relief. The relief of declaration cannot be claimed as a matter of right. In cases where the necessary parties are not joined the court can reject the suit for declaration. Under Section 34, the discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well-settled principles. The court has to consider the nature of obligation in respect of which performance is sought. No hard and fast rule can be laid down for determining whether this discretionary relief should be granted or refused. The exercise of the discretion depends upon the chances of each case. A remote chance of succeeding an estate cannot give a right for obtaining a declaration that alienation by a limited owner is void.

Negative Declarations

A suit for a negative declaration may be maintained in a proper case, e.g., where it relates to a relationship. Thus, a suit for a declaration that a person was not, or is not, the plaintiff's wife, and the defendant not her son through him, may be maintainable. Similarly, a suit lies for obtaining a negative declaration that there is no relationship of landlord and tenant between the plaintiff and defendant. But where the rights of the plaintiff are not affected or likely to be affected, suit simpliciter for a negative declaration is not maintainable. Such a suit would be regarding the status of the defendant which, in no way, affects the civil rights of the plaintiff.

When suit for declaration is not maintainable

A suit for the declaration will not be maintainable under some circumstances which are to be mentioned below.

i. In the case of a declaration that the Plaintiff did not infringe the defendant’s trademark.
ii. For a declaration that during the lifetime of the testator, the will is invalid.
iii. No one can ask for a declaration of a non-existent right of succession.
iv. A suit by a student against a university for a declaration that he has passed an examination.

If any person is seeking for a mere injunction without seeking for any declaration of title to

which the Plaintiff is entitled so, then the suit will not be maintainable and will not be laid down within its ambit. In the case of *P. Buchi Reddy and Others vs. Ananthula Sudhakar***,** it was held that the Plaintiff's suit for a mere injunction without seeking a declaration of the title is not maintainable.

'Suit for a bare injunction' is a condition where the suit is not maintainable because in the case of the bare injunction, Plaintiff and Defendant both are claiming the title on which effective possession cannot be proved. And the suit for bare injunction is not maintainable under Section 41(h) of the Specific Relief Act, 1963.

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Effect of Declaration

Section 35 makes it clear that a declaration made under this section does not operate a judgment in rem. Section 35 says: *"A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees".*

Thus a declaratory decree binds-

(a) the parties to the suit;

(b) persons claiming through the parties;

(c) where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees. It is only the parties to the suit and the representatives in interest, but not the strangers who are bound by the decree. By virtue of this Section, a judgment is binding only if it is inter partes, which is not in rem, and does not operate as res-judicata, may be admissible under Section 13 of the Evidence Act.

PREVENTIVE RELIEF

There are cases in which the nature of the contract does not admit of specific performance nor damages are likely to serve any purpose. In such cases the court may have to restrain the party threatening breach to the extent to which it is possible to do so. For example, a person contracts to sing at a particular place and also undertakes not to sing elsewhere during the same period threatens breach. The court cannot force him to sing as the positive side of the bargain is not specifically enforceable. Undertaking not to sing elsewhere can be enforced by restraining him from giving his performances elsewhere. When he is so prevented it may exert some pressure upon him to go ahead with the performance of his contract. This type of remedy is known as preventive relief. Preventive relief is granted by issuing an order known as injunction upon the party concerned directing him not to do a particular act whereas for asking him to perform a particular duty known as a mandatory injunction. Such relief is granted under the provisions of Part III of the Specific Relief Act.

INJUNCTIONS

Burney defined injunction as, "a judicial process, by which one who has invaded or threatening to invade the rights of another is restrained from continuing or commencing such wrongful act".

The most expressive and acceptable definition is the definition of Lord Halsbury. According to him, "An injunction is a judicial process whereby a party in an order to refrain from doing or to do a particular act or thing".

- Injunction acts *in personam*. It does not run with the property. For example, A secures injunction against B forbidding him to erect a wall. A sells the property to C. The sale carries with it the injunction against B.
- Injunction maybe issued against individuals, public bodies or even the State.
- Disobedience of an injunction attracts consequences of attachment/sale of property as per Section 94(c) and Rule 2A of Order 39 of CPC.

Injunction has three characteristic features:

1. It is a judicial process.
2. The relief obtained thereby is a restraint or prevention
3. The act prevented or restrained is wrongful.

Kinds of Injunction

Preventive relief is granted at the discretion of the court by injunction that could be either temporary or perpetual.(Section 36)

Temporary Injunction (Section 37)

Order XXXIX, Rules 1 and 2 of CPC governs the procedure for granting temporary injunction.

When injunction maybe granted

1. For the protection of interest in the property

This category will cover the following cases:
(a) That property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; or
(b) That the defendant threatens to remove or dispose of his property with a view to defraud his creditors; and
(c) That the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit."

2. Injunction to restrain, repetition or continuance of breach

In any suit for restraining the defendant from committing a breach of contract or other injury, of any kind, whether compensation is claimed in the suit or not, the plaintiff may at any time after the commencement of the suit and either after or before judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or an injury complained of, or any breach of contract or injury arising out of same contract.

Injunction is a discretionary relief

The power of the court to grant an injunction is a discretionary one i.e. it is not the right of an individual to get the injunction. Section 36 expressly lays down that, "Preventive relief is granted at the discretion of the court by an injunction, temporary or perpetual".

Conditions to be fulfilled for grant of TI:

1. **The plaintiff must be able to establish a *prima facie* case.**

He is not required to establish a clear title but a substantial question that requires to be investigated and that matter should be preserved in the same status as it is until the injunction is finally disposed of. The court must be satisfied that there is a *bona fide* dispute raised by the applicant. The existence of a prima facie right and infraction of such right is a condition precedent for grant of temporary injunction. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a prima facie case in his favour. In deciding a prima facie case, the court is to be guided by the plaintiff's case as revealed in the plaint, affidavits or other materials produced by him.

2. **An irreparable injury** may be caused to the plaintiff if the injunction is refused and that there is no other remedy open to the applicant by which he could protect himself from the feared injury. The applicant must further satisfy the court about the second condition by showing that he will suffer irreparable injury if the injunction as prayed is not granted, and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. In other words, the court must be satisfied that refusal to grant injunction would result in 'irreparable injury' to the party seeking relief and he needs to be protected from the consequences of apprehended injury. Granting of injunction is an equitable relief and such a power can be exercised when judicial intervention is absolutely necessary to protect rights and interests of the applicant. The expression irreparable injury however does not mean that there should be no possibility of repairing the injury. It only means that the injury must be a material one, i.e., which cannot be adequately compensated by damages. An injury will be regarded as irreparable where there exists no certain pecuniary standard for measuring damages.

3. **The conduct of the plaintiff has not been blameworthy.**

The plaintiff should come before the Court with clean hands. If he suppresses material facts, documents then he is not entitled for the relief of injunction and further points of balance of convenience, irreparable injury even not required to be considered in such case.

4. **The balance of convenience requires that the injunction should be granted and compensation in money would not serve an adequate relief.**

The court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it. It is to be noted that it is a settled principle of law that if in a suit where there is no permanent injunction sought for in the final prayer, ordinarily a temporary injunction cannot be granted. So, the principles that govern the grant of a perpetual injunction would govern the grant of a temporary injunction also.

Perpetual/Permanent Injunction

According t Section 37(2) permanent injunction can be granted only on the merits of the case and it finally decides the rights of the parties whereas temporary injunction is granted on prima facie case.

When is Perpetual Injunction granted?

According to Section 38 perpetual injunction may be granted to

1. To prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. This obligation may arise from either a tort, contract, trust or any legal obligation. Illustration: Ram is a tenant at Shyam's flat. Shyam has specifically asked Ram to not displace the prayer room, as it had a gold statue of a deity. Ram wilfully disobeyed and tried to remove the statue. Here, the court may grant a permanent injunction, in order for Ram to fulfil the request of Shyam.
2. When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II i.e., only in cases where contract is capable of specific performance. Section 41(e) states that no injunction can be granted to prevent breach of a contract that is not capable specific performance. But Section 42 states that where a contract comprises of a positive act coupled with a negative agreement to not do an act, the court can enforce the negative covenant although the positive act is not capable of specific performance. Illustration: A contracts with B to sing for twelve months at B's theatre and not

to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing elsewhere.

3. Where the defendant is a trustee of the property for the plaintiff. Illustration: A, an advocate comes in possession of his client B's documents during employment. A threatens to communicate the contents of the document to a third party/public. B may sue for an injunction to permanently restrain A from doing so. An advocate is under an obligation in the nature of trust not to disclose secrets of his clients.
4. Where there is no standard for ascertaining the actual damage caused, or likely to be caused, to the plaintiff, by invasion of his rights. Illustration: the installation of an electric transformer in front of the plaintiff's land causing nuisance, hindrance and obstruction to free access to the highway was restrained by issuing permanent injunction.
5. Where the invasion of the plaintiff's right is such that compensation in money would not afford adequate relief. Illustration: An injunction may be sought by an author of a book from restraining a publisher from publishing the book without consent.
6. Where injunction is necessary to prevent multiplicity of judicial proceedings. Illustration: Arya has 7 tenants, out of which, 5 tenants have failed to pay the rent for 5 months, consecutively. She files a suit against all of them, with the same cause of action. The court may allow an injunction, in order to prevent multiple proceedings, simultaneously.

Conditions for Section 38 to be applicable

1. There must be a legal right express or implied in favour of the applicant.
2. Such a right must be violated or there should be a threatened invasion.
3. It must be an existing right.
4. The case should be fit for the exercise of court's discretion.
5. It should not fall within the sphere of the restraining provisions contained in or referred to in Section 41 of the SRA, 1963.

Refusal of injunctive relief

As per sec 41 of specific relief act an injunction cannot be granted-

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the

suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings:

Kukkala Balakrishna v. Vijaya Oil Mills, an immovable property was sought to be sold

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter; ***Sangram Singh v State of U.P*** ,No injunction can be issued restraining any person or authority from lodging an FIR. A temporary injunction cannot be issued where permanent is not possible.

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.

Where a wrong can be compounded in money, compensation will be an equally efficacious relief. But in such a case if the defendant is an insolvent or a pauper a decree for damages would be a mere mockery and therefore the court may grant injunction.

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court. The clause incorporated the maxim: 'He who comes to equity must come with clean hands'. For example, in ***Premji Ratansey Shah v. UOI,*** it was held that no injunction can be issued in favour of a trespasser or a person who has gained unlawful possession as against the true owner.

(j) when the plaintiff has no personal interest in the matter.

Mandatory injunction

Section 39: When to prevent breach of an obligation it is necessary to compel the performance of certain acts which the code is capable of enforcing, the court may in its discretion Grant an injunction to prevent the breach complained of and also to compel performance of the requisite act. The injunction which commands the defendant to do something is termed as a mandatory injunction. Salmond defines mandatory injunction as "an order requiring the defendant to do a

positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise, in fulfillment of the legal obligations, for example, and order to pull down a building which he has already erected to the obstruction of the plaintiff's lights". Illustrations A, by new buildings obstructs the light to the axis and use of which B has acquired a right under the Indian Limitation Act, 1963. B may obtain an injunction, not only to restrain A from going on with the buildings, also to pull down so much of them as obstructs B's light. When a mandatory injunction is granted under the section, two elements have to be taken into consideration: (i) the court has to determine what acts are necessary in order to prevent a breach of the obligation; (ii) the requisite acts must be such that the court is capable of enforcing them.

When is Injunction not granted:

Mandatory injunction will not be granted in the following cases:

a. The compensation in terms of money be would be an adequate relief to the plaintiff.
b. Where the balance of convenience is in favour of the defendant.
c. Where the plaintiff is guilty of allowing the obstructions to be completed before coming to the court, i.e. where the plaintiff has shown acquiescence in the acts of the defendant. In the case of ***Daniya Bai v. Jiwan,*** the sister constructed a house adjacent to that of her brother and the brother actively participated in the construction activity and also allowed her to take support of his wall. The court refused to order demolition since the brother never objected for 2 years and later changed his mind claiming demolition of the construction.
d. Where it is desired to create a new state of things. It can only be granted to restore status quo. In ***Sheo Nath v. Ali***, where the defendant constructed a structure which interfered with the privacy of the plaintiff's house, he could not be ordered to erect a wall on the roof, so as to prevent a view of the plaintiff's house from the roof.

Damages in lieu of or in addition to injunction (Section 40)

Section 40 provides that the plaintiff in a suit for injunction under Section 38 or 39, may claim damages either in addition to or in substitution for such injunction. The court may award such damages only if it is included in his plaint. But where is suit in which damages were not claimed, is dismissed, a subsequent separate suit for damages would not lie.

Difference between Temporary/Interim Injunction and Permanent/Perpetual Injunction

Temporary Injunction	Permanent/perpetual Injunction
Order of the court passed during pendency of suit.	Granted by a decree made at the hearing and upon merits of suit.
Continues till specified time or until further order of the court.	Final settlement of mutual rights & directs a party to do or abstain from doing a thing for all time.
Object and effect – preserve the property in dispute in status quo without concluding a right.	Object and effect – give effect to and protect the plaintiff's right.

Difference between Perpetual injunction and Mandatory injunction

Perpetual injunction	Mandatory injunction
Granted to prevent breach of an obligation existing in his favour, express or implied.	Compels the performance of certain acts.
A duty is imposed upon the defendant to abstain from doing something.	Court order to perform a positive duty.

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