CHAPTER 3
JURISPRUDENTIAL ASPECTS OF LAW OF CONTRACT

3.1. INTRODUCTORY

There is widespread understanding about e-commerce that it is growing rapidly worldwide. Specifically there is an increase in online transactions in India. Instead of visiting to local market, people are favoring to purchase goods and services online. This is not the case with India alone, this situation prevail almost every corner of this earth. As everybody aware that jurisprudence is referred as ‘mother of all laws’. Almost all laws originate from the womb of jurisprudence.\(^1\) In broader sense jurisprudence means study of knowledge of law. Here we are not arguing about what is jurisprudence and what are its functions? Our concern is to find out how law of contract is considered concept of jurisprudence. Before going to the crux of our discussion first let us have look at definition of jurisprudence.

As such there is no particular definition of jurisprudence. Each philosopher expresses his view differently. Most part of the jurisprudence is developed during theological period, wherein the Pope was exercising powers of the State. Almost all definitions have theological background. For some philosophers jurisprudence is philosophy of positive law,\(^2\) for some it may science of first principles of the civil law\(^3\). Further question

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\(^1\) Jurisprudence is a combination of two Latin words *juris* and *prudential*, literally means knowledge of law. One of the oldest definitions of jurisprudence given by Ulpian describes jurisprudence as the, ‘knowledge of things human and divine, the science of the just and unjust.

\(^2\) John Austin, Esq., *The Province of Jurisprudence Determined*, John Murray, London, 1832, p.1

arises before us that, what exactly jurisprudence is about, social or scientific? We must be clear here that we are not bothered scientific aspect of jurisprudence.

Sir Thomas Erksine Holland defines Jurisprudence as the ‘formal science of Positive Law’. Further he says, ‘jurisprudence deals with the human relations which are governed by rules of law rather than with the material rules themselves’.\(^4\) This definition was doubted by Prof. John Chipman Gray in his work *The Nature and the Sources of the Law* but the objection had no strength at all, so we can accept jurisprudence as formal science, as it is called by Holland.

Now the next question before us is about the subject-matter of jurisprudence. Jurisprudence doesn’t deal about set of rules derived from some authority. According to Salmond, jurisprudence is the name given to a certain type of investigation into law, an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems.\(^5\) The subject matter of jurisprudence is divided into three branches, first, it deals with the various legal theories; second, it deals with the sources of law; and last, deals with the elements of law.

The first branch of jurisprudence focuses on meaning of law and views of jurists on law. In second branch of jurisprudence we consider pros and cons of codification, the value of a strict system of judicial precedent and the methods of judicial reasoning. And in last branch we analyze legal

\(^5\) *Supra* Ref. 3
\(^6\) This branch of jurisprudence deals into meaning of law, enumerates various schools of law. Following is the list of schools, Natural Law School, Analytical School, Historical School, Sociological School, Realist School and Philosophical School.
concepts. However there are nine elements of law, but our concern is confine to only three in number. Those are:

- Rights and Duties
- Titles and
- Obligations

Before discussing above elements of law we must know the definition of contract first.

### 3.2. DEFINITION

Oxford dictionary defines contract as, a written or spoken agreement, especially one concerning employment, sales, or tenancy that is intended to be enforceable by law.\(^7\) It is the view of William Markby that Contract belongs to that class of acts which give rise to legal rights and duties upon occasions when the parties themselves have agreed so to declare.\(^8\) In his book entitled *Elements of Law*, Markby quoted Savigny’s definition of contract. Savigny defines contract as,

> A contract is the concurrence of several persons in a declaration of intention whereby their legal relations are determined.

From the above definition of Savigny, it can be observed that the contract includes not only those agreements which are a promise to do or to forbear from, some future act, but also which are carried out simultaneously with the intention of parties being declared.

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\(^7\) Oxford Dictionary

Section 2 (h) of Indian Contract Act, 1872 gives broader definition. It defines, ‘an agreement enforceable by law is a contract’. Markby criticizes definition saying that it restricts the word contract to those agreements which the party making the promise is compelled by law to perform. Further, he states the definition of contract is very vague because there is no guidance with regard to what agreements or what classes of agreements are enforceable by law. Markby is of view that Savigny’s definition is very comfortable to adopt, he also provides reason for the same.\(^9\)

- That the agreement in order to become a contract must be one in which the parties contemplate the creation of a legal relation between themselves.
- That it clearly describes the true relation of the parties and how it arises.

According to Treitel, a contract may be defined as an agreement which is either enforced by law of recognized by law as affecting the legal rights or duties of the parties.\(^10\) This definition is commonly being used by English lawyers. Similar definition is widely used in the American Restatement of Contracts:\(^11\)

A contract is a promise or a set or promises for the breach of which the law gives a remedy, or he performance of which the law in some way recognizes as a duty.

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\(^9\)Ibid. Ref. pp.301-303
Chitty adopts definition given by Pollock that is a contract is a promise or set of promises which the law will enforce. \(^{12}\) More or less the definition of contract is same throughout world. But Atiyah criticizes these definitions that the lawyers constantly talk about contracts being ‘enforced’. According to him courts hardly ever ‘enforce’ contracts themselves, and they rarely even order the parties to perform their promises. Atiyah makes it clear that the law does not actually compel the performance of a contract, it merely gives a remedy, normally damages, for the breach.\(^{13}\)

In furtherance with above paragraph Atiyah adds that, the final clause of the definition from the Restatement is inserted because to take away this problem. He finds another fundamental problem in above definitions that agreements and promises are ‘things’ which exist outside the law, which can be recognized as such. It is better to quote Atiyah’s words:

> Agreements and promises are not promises are not physical objects which can be seen and recognized by the senses. They are themselves abstract concepts, just as much as the concept of contract itself. Of course ‘agreement’ and ‘promise’ are ordinary English words, and do have recognized meanings in ordinary speech so it may be possible to recognize them when one sees them, as if were, without any legal training. No doubt this is true of some agreements and promises, but it is not true of all. There are many difficult questions involved in actually identifying as agreement or a promise. We have, for instance, already touched on the problem of the person who signs a document without reading it. Does his signature show that he ‘agrees’ to the contents of the document, whatever they may be, that he ‘promises’ to do whatever the document says, even though he has not read it? In many cases of this nature it is not possible to say whether there is an agreement or a promise until we have first of all analyzed the issue in legal


\(^{13}\)Supra Ref. 11
terms. In other words, it is the law itself which provides the only precise definitions we have of the concepts of agreement and promise, so definitions of contract which use these concepts are either incomplete, or circular.

Overall we can say that there is no particular definition of contract, which gives exact meaning of it. Now we can enunciate that Markby’s remarks about definition of ‘contract’ given under the Indian Contract Act, 1872 are true, and there is nothing wrong in adopting definition of Savigny.

3.3. RIGHTS AND DUTIES

The idea of rights and duties is central to the functioning of any legal system. People recognize the need for law primarily as a means to protect their rights. When we think of one person’s rights, the idea of duty follows simultaneously. Right and duties are coextensive. There is no value for such right which doesn’t have coextensive duty.

The English word ‘right’ literally has two meanings. In one sense, it means what is correct or just to do. That is the meaning when we say ‘I am right’ or ‘he is right’. However, we use the word in a different sense when we say that ‘I have a right to speak’ or ‘you have right to get admission’. The fact that many languages including English, German and French have the same word to denote right, both in the sense of being right and having a right, shows that the human mind considers these two meanings as the same or at least inter-related. We may, therefore, say that a person has a right only when others consider it right to allow such right. The ‘rightness’ of the right must be accepted by others, by the society, and formally by the state and the legal system.14

A legal right is commonly defined as an interest recognized and protected by law. Individuals will have many interests. It is obvious that law cannot recognize and protect all these interests. It, therefore, becomes necessary to select some interest as worthy of legal protection. On what basis such interests are selected depends on the policies and priorities of each individual legal system.

Salmond defines a legal right as an interest recognized and protected by rule of justice. The word ‘interest’ implies any interest, respect for which is a duty and disregard of which is a wrong. This definition contains two essential elements, viz. legal recognition and legal protection. Both these elements should simultaneously and concurrently be present in an interest for its transformation as a legal right. A legal recognition of an interest without legal protection does not make it enforceable in a court of law, as e.g. time barred debts. So also legal protection, of an interest without its legal recognition cannot make it a legal right. When law prescribes punishment for cruelty animals, it protects the interests of animals; it protects the interests of animals. However, the interest recognized by the law is that of the society at large which desires the welfare of its animals. Salmond maintains that animals have no rights of their own.

The second part of Salmond’s definition that a legal right is any interest, respect of which is a duty and disregard of which is a wrong, needs some elaboration. Whether a person’s interest amounts to a right or not depends on whether there exist with respect of to it a corresponding duty imposed upon any other person. Further, the right is an interest, the violation of which would be wrong. Rights like wrongs and duties are either moral or

\[15\text{Supra Ref.3}\]
\[16\text{Ibid}\]
\[17\text{Ibid}\]
legal. A moral or natural right is an interest recognized and protected by moral or natural justice, violation of which would be moral or natural wrong and respect for which is a moral duty. A legal right on the other hand is an interest recognized and protected by a rule of legal justice. It is an interest, a violation of which would be a legal wrong and respect for which is a legal duty.\(^\text{18}\)

Gray defines a legal right as that power which a man has to make a person or persons to do or refrain from doing a certain act or acts, so far as the power arises from society imposing a legal duty upon a person or persons.\(^\text{19}\)

According to Holland, a right is ‘a capacity residing in one man of controlling, with the assent and the assistance of the State, the actions of other’.\(^\text{20}\) The definition of ‘legal right’ adopted by Holland involves the following things:

- Right distinguished from Might;
- Imperfect Rights;
- Right enforceable by its Owner; and
- Right and Duty correlative.

Salmond states that rights and duties are correlatives. He also states that, ‘there can be no right without a corresponding duty, and duty without a corresponding right any more than there can be a husband without a wife and parents without a child. For every duty must be duty towards some person or persons in whom correlative right is vested and conversely

\(^{18}\)Ibid
\(^{19}\)John Chipman Gray, The Nature and the Sources of the Law, 2\textsuperscript{nd} Ed., The Macmillan & Co., New York, 1921, p. 18
\(^{20}\)Supra Ref. 4 p.83
every right must be right against some person or persons upon whom a correlative duty is imposed. Thus, every right or duty involves a *vinculam juris*, a bond of legal obligations by which two or more persons are bound together.\(^{21}\)

Our concern is not about the technicalities of right and duty. The above discussion is adequate for concern. Our point of discussion is confined to how concept of right and duty is relevant to law of contract?

Law of contract is a part of right called ‘right in personam’ conversely to this we have ‘right in rem’. First we will discuss right in rem. This term is derived from the Roman term ‘actio in rem’, it was an action for the recovery of dominium. Later this term came to be called as *jus in rem*.\(^{22}\) A right in rem is also called a real right for it is a right over a *res* or thing which thus becomes real. A real right corresponds to a duty imposed upon persons in general. A real right or a right in rem is available against the world at large or persons generally. Right in rem is always a negative right. E.g. my right of possession and ownership is protected by law against all those who may interfere with the same.

As it is in case of right in rem same way in case of right in personam the term derived from the Roman terminology ‘actio in personam’. Later it came to be known as ‘jus in personam’.\(^{23}\) Right in personam is also called as personal right. This right is available against a person or determinate class of persons. A right in personam corresponds to a duty imposed upon determinate persons. Right under a contract is right in personam as the


\(^{23}\) Ibid.
parties to the contract alone are bound by it. The right of a creditor against a debtor is a right in personam. Rights in personam are usually positive, and are negative only in exceptional cases. This is so in the case of sale of goodwill when the seller promises not to set up a rival business within a particular locality and for a specific period. The right of the purchaser is both negative and in personam. He acquires the right of exemption from competition from the seller.

The source of right in personam is usually arises out of a contract. Contract, however, is not the sole source of right in personam. It is possible to have right against a definite individual independently of any agreement with him. For instance one may have the right to receive compensation from a wrongdoer for the breach of duty imposed on him by law and out by contract. Such a right is a personal right arising independently of contract.\(^\text{24}\)

The rights which arise out of status are also rights in personam; but they are not of so definite a character as to be reducible to a money value. The rights and duties which arise out of membership of family, for instance, consist often in lifelong courses of conduct and do not always have an economic significance. In this respect they differ from rights in personam that arise out of contract.

The commonest and the most important kind of jus in personam is that which has been termed by the civilians and canonists’ jus ad rem. Salmond says that, if I have a jus ad rem when I have a right that some other right shall be transferred to me or otherwise vested in me. Jus ad rem is a right to a right. It is clear that such a right to a transferred, however-the subject

matter of the *jus ad rem* – may be either *in rem* or *in personam*, though it is more commonly in rem. An agreement to assign a chattel creates a *jus ad jusin rem*; an agreement to assign a debt or a contract creates a *jus ad jusin personam*.25

It is vital for us to point out something about the distinction between rights *in rem* and *in personam*. These apply not only to rights in the strict sense, but also to liberties, powers and immunities. Thus, freedom of speech is, within its limits, a liberty *in rem*, while a license to walk over land of a particular landowner is a liberty *in personam*. The power to make a contractual offer is a power *in rem*, while the power to accept an offer made, and thus to create a contract, is a power *in personam*, availing only against the person who has made the offer.26 Whatever it applies for contract law in general, same thing applies to e-contract too. There is no much difference between paper contract and e-contract.

### 3.4. TITLES

Every right arises from a title. The term ‘title’ is derived from the term *Titulus* of Roman law and *Titre* of French law.27 According to Salmond, ‘every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner’. A person has right to a thing because he has a title to that thing. According to Justice Holmes ‘every right is a consequence attached by the law to one or more facts which the law defines and wherever the law gives anyone special right, not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true to him’.28 It is these

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25 *Supra* Ref. 3 p. 238  
27 *Supra* Ref.22 p. 357  
facts which constitute the title. Title means any fact which creates a right or duty.

Again quoting Salmond, ‘the title is the de facto antecedent of which the right is the de jure consequent. If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other and these facts are the title of the right’.  

Jurisprudence interprets the term ‘title’ in a broad sense and treats the existence of this statute as the title of the particular rights claimed by trust. In practice, it is impossible for the law to confer every right directly, for law has to operate over a wide field and is bound to generalize in order to achieve economy of thought and time; therefore certain particular situations of fact are specified by the law as giving rise to certain rights and duties.

Bentham criticizes the word ‘title’ because, while it denotes the facts which give rise to the creation of right, it does not denote those which destroy a right. He proposes to call every fact by which a right or duty is created or destroyed a dispositive fact—he further divides those dispositive facts into investitive which create rights and duties, and divestitive which extinguishes them.  

We are not looking into the technicalities of vestitive facts and its division.

Now coming to our point of discussion i.e. how contract is related to concept of ‘title’? What Salmond called ‘acts in the law’ in his book on jurisprudence, Paton used ‘juristic act’ for the same. Salmond is not

29 Supra Ref. 3 p.331
satisfactory on this point as compared to Paton. He makes it clear about are the elements of juristic act.

According to Paton, by juristic acts legal persons create, modify, or destroy rights and duties and thereby affect legal persons. He gives outline of four elements of a juristic act:\(^2\)

- The Will: Here will means free consent of the parties to the contract.
- The Expression of the Will or Declaration of Intention: The will must be expressed or made manifest.
- Power to bring about the Legal Result Desired: A juristic act can be effective only if the party is empowered by the law to act in this way.
- Material Validity: The object which it is desired to achieve must not be prohibited by the law.

Salmond doesn’t describe above elements. Further, he continued the legacy of Bentham about vestitive facts and its classification.

Both Paton and Salmond enunciate types of juristic acts or acts in law, in two categories, first, unilateral and second, bilateral. There description about both the categories is similar. A unilateral act is one in which there is only one party whose will is operative; as in the case of testamentary disposition, the exercise of a power of appointment, the revocation of a settlement, the avoidance of a voidable contract, or the forfeiture of a lease of breach of covenant. A bilateral act, on the other hand, is one which involves the consenting wills of two or more distinct parties; as, e.g. a contract, a conveyance, a mortgage, or a lease. Bilateral acts in the law are called agreements in the wide and generic sense of the term. There is,

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\(^2\)Ibid. pp. 316-319
indeed, a narrow and specific use, in which agreement is synonymous with contract, that is to say, the creation of rights \textit{in personam} by way of consent.\textsuperscript{32}

Great importance is attached to agreements between the parties. That is partly due to the fact that agreements are evidence of right and justice and the parties adjust their rights and liabilities by their own free consent. Moreover, agreements create rights and liabilities. As legislation is the public declaration of the rights and duties of the parties concerned. Ordinarily, agreements are enforced by the courts. An agreement constitutes the best evidence of justice between the parties and should be enforced. It is proper to fulfill the expectations of the parties based on their mutual consent if the same is not opposed to the idea of natural justice.\textsuperscript{33}

It is worthwhile to mention here that in jurisprudence we deal ‘contracts’ as part of generic term called ‘agreement’. Salmond classifies agreements into three categories. First category creates rights, second transfers them and third extinguishes them. Let us deal them one by one:

- The agreements which create rights are of two kinds; contracts and grants. Contracts create rights and obligations among the parties \textit{in personam}. A contract greats a legal tie of a personal right and that lie binds the parties. According to Salmond, contracts are bilateral bit there are some unilateral contracts as well. Contracts are unilateral when a promise is made by one party and accepted by the other. Grants are agreement by which rights other than contractual rights are created.
- Agreements which transfer rights are called assignments.

\textsuperscript{32}Supra Ref.3 pp.334-335
\textsuperscript{33}Ibid. pp. 336-338; Cf. Supra Ref.22 p.360
• There are agreements which extinguish rights and those are known as release.

Salmond articulates some cases in law in which, although in fact there is no agreement, the law regards an agreement as existing. These cases are particularly prominent in contract law in practice. Thus, if A makes an offer to B, and then writes a letter to B purporting to revoke the offer, and B accepts A’s offer before A’s revocation has come to his knowledge, there is a valid contract, notwithstanding to consensus ad idem at a single point of time. Again, if A leads B to suppose that he is agreeing, when in fact he does not agree, he is estopped from setting up his real intention. These cases have led to the formulation of an ‘objective’ theory of contract, in contrast to the traditional ‘subjective’ one. According to the objective theory, a contract is not an agreement, a subjective meeting of the minds, but is a series of external acts giving the objective semblance of agreement. Anson gives good description about these theories.

3.4.1. THEORIES OF CONTRACT

3.4.1.1. SUBJECTIVE THEORY OF CONTRACT

The fact that most contracts originate in an agreement fortified certain juristic writers, especially those of the nineteenth century, in placing great emphasis upon the subjective nature of contractual obligations. The essence of a contract was said to be the meeting of the wills of the parties; an agreement was the outcome of free and consenting minds. The reasons for this doctrine are twofold.35

34 The ‘subjective theory of contract’ of Anson is similar to ‘the will theory’ of Paton. Cf. Supra Ref. 33 p. 444 & infra Ref.38 p.3
First, great emphasis had been placed in the political philosophy of the eighteenth century upon the concept of human liberty. Everyman, it was said, should be free to pursue his own interest in his own way. It was, therefore, conceived to be the duty of the law to give effect to the wills of the parties as expressed in their agreement, and it was asserted that as few restrictions as possible should be placed upon ‘freedom of contract’.

On this point Anson quoted Henry Maine who postulated, in his book *Ancient Law*, that the movement of progressive societies had hitherto been a movement from status to contract. This movement was not only desirable, but inevitable. ‘Imperative law’, Maine said, ‘has abandoned the largest part of the field which it once occupied, and has left men to settle rules of conduct for themselves with liberty never allowed to them till recently. Anson pointed out that writings of Maine were written close to an epoch in which the champions of individualist social philosophy had been attacking legal and social restriction behind which privileges were entrenched which were almost entirely indefensible; freedom of contract was outcome of those attacks as trophy of victory.36

Today the position is seen in very a very different light. Freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of a collectivist society it has ceased to have much idealistic attraction. It is now realized that economic equality often does not exist in any real sense, and that individual interests have to be made to subserve those of the community. Hence, there has been a fundamental change both in our social outlook

36Ibid.
and in the policy of the legislature towards contract, and the law today interferes at numerous points with the freedom of the parties to make what contract they like. The relations between employers and employed, for example, have been regulated by statutes designed to ensure that the employee is properly protected against redundancy and unfair dismissal, and that he knows his terms of services.

In the era of standard form of contract the freedom of contract has become illusion in many consumer transactions, like railway tickets, wherein there is no negotiation of contract.

The second reason for the subjective approach is more philosophical. This deals with nature of defences against the breach of contract. For example, it may be alleged that the contract was induced by the misrepresentation of the plaintiff, that the defendant was suffering from some incapacity such as mental disorder or drunkenness, or that the parties had contracted together under some false and fundamental mistake. The presence of these defences, indicates the subjective nature of contractual obligations. In addition to the external phenomenon of agreement, it must further be shown that each party consented to be bound, and that this consent was ‘true, full and free’. If this condition is not satisfied, no real consensus exists, and the contract will fail.37

The main difficulty about this argument is that it is impracticable to place emphasis solely upon the subjective nature of an agreement, and to insist on true consensus is every case. It would be impossible to hold that a secret mental reservation by one or other parties, or some tacit misunderstanding, should be permitted to destroy the obligation. And even if resort is had to their ‘declared will’ that is their will as declared

37Ibid. p. 6
and announced to the other party, all difficulties will still not yet be surmounted. For reasons of convenience, the law may hold that a contract has been concluded even though the parties are overtly in disagreement. Where, for example, an offer is accepted by post, it is settled law that the contract is effective as soon as the letter of acceptance is posted. But a letter revoking an offer has no effect until it has been brought to the notice of the offeree. If, therefore, before a letter of revocation reaches the offeree, the offeree sends off a letter of acceptance, a contract comes into existence even though the parties are manifestly not *ad idem*. Even if terms of the parties’ declared will, no consensus exists in this case.

3.4.1.2. OBJECTIVE THEORY OF CONTRACT

The difficulties attendant upon a definition of a contract in subjective terms have led to the formulation of an objective theory which places little upon the meeting of wills and much more upon the legal expectations aroused by the conduct of the parties. The supporters of this theory argue that, when the law enforces a promise, it does so in order that the promisee’s reasonable expectations of performance should not be disappointed. It is therefore immaterial whether or not the promise truly represents the intention of the promisor. So, if one party makes to the other a promise which is reasonably understood by the promisee to be intended to affect legal relations, the promisor will be contractually bound by the promise even though he did not intend to contract, or to contract in those terms.

Although this is more satisfactory explanation is adopted by the common law towards the inception and interpretation of contractual obligations, it cannot be accepted as an entirely exhaustive description of the nature of a

38*Ibid.* pp.7-8
contract. The reason for non-adoption of this theory is the draconian requirements of commercial contracts. If this has to be adopted first requirements of commercial convenience have to be reconciled with the moral qualifications introduced by the concept of fair dealing. Common law has admitted that most of the defences are depend upon subjective considerations.

3.5. SOCIAL CONTRACT THEORY

This theory promotes that subjects have either expressly or impliedly agreed for giving up their rights to the sovereign for protection of some of their other rights. This theory was found in Greek Law, Roman Law, and Canon Law. In Indian context, some jurists advocate that King Asoka was votary of social contract.

The theory of Natural law in modern classical era became a theory of natural rights of man and states. Natural law was used for the emancipation of people from political tyranny. Struggles for emancipation rose in different ways in the English Revolution of 1688, the American Declaration of Independence of 1776, and the French Revolution of 1789. The governments claimed unlimited power over people, and the people claimed democratic rights to control the government. Both relied on social contract theories.

Thomas Hobbes (1588 – 1679) proposed that individuals come together by ceding some of their rights so that others would cede their rights finally resulting in formation of state. John Locke (1632 – 1704) advocated that by individuals in a state were bound morally by the Law of Nature to not to harm each other. They would live in fear if there is no government to

39http://en.wikipedia.org/wiki/Social_contractas last viewed on 08-09-2013
defend them and protect them. He contended that government gets power as citizens give it that authority under self-defense. Jean-Jacques Rousseau (1712 – 1778) published his philosophy in a book called “The Social Contract”. As per Rousseau, liberty was not possible unless people directly rule. He proposed that citizen cannot pursue their interest by being egoistic. They can better serve their interests by being subordinate to law created collectively by citizens.

With this backdrop, there were considerable developments during European Renaissance especially in the legal jurisprudence. ‘Sovereignty’ and ‘liberty’ were more frequently used terms. More clarity was put in thoughts and greater emphasis was laid on individual freedom. With these things in mind, we shall now revert to law of contract from jurisprudential perspective.

3.6. KINDS OF AGREEMENTS

Salmond divides agreements into three kinds. They can be either valid or void or voidable. A valid agreement is one which is fully operative as per the intent of the parties. A void agreement, on the other hand, is one which totally fails to receive legal recognition or sanction. It is unenforceable as the declared will of the parties is wholly destitute of legal efficacy. A voidable agreement stands midway between valid and void agreements. A voidable agreement is not a nullity but its operation is conditional and not absolute. It is liable to be cancelled or disregarded or destroyed at the option of one of the parties to it, but is operative otherwise. Anson adds fourth kind to this list, i.e. unenforceable

40Ibid
41Ibid
42Supra Ref.3 p.341
agreements.⁴³ According to him, an unenforceable agreement is one which is good substance, though, by reason of some technical defect, one or both of the parties cannot be sued on it.⁴⁴ Void and voidable agreements may be classed together as invalid.

### 3.6.1. VALIDITY OF AGREEMENT

All agreements are valid until and unless they are short of any disability. The agreements become invalidity if it is void or voidable. The most important causes of invalidity are six in number viz.:⁴⁵

1. Incapacity
2. Informality
3. Illegality
4. Error
5. Coercion and
6. Want of Consideration

**Incapacity:** Only persons who are competent to enter into a contract can create enforceable obligations. In the eye of law, certain persons are not competent to enter into contracts and consequently contracts by them are invalid.⁴⁶

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⁴³*Supra* Ref. 38 p.8
⁴⁴ The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of enforcement because it is not evidenced by writing as required by statute. But the defect is normally curable; the subsequent execution of a written memorandum may satisfy the requirements of the law render the contract enforceable but it is never at any time in the power of either party to avoid the transaction. *Ibid* p. 8
⁴⁵ This categorization is made by Salmond. *Supra* Ref. 3 p. 342
⁴⁶ Minor, Lunatic, Insolvent, convicts are few persons who are not competent to enter into contract.
**Informality**: There are certain agreements which require certain legal formalities to be fulfilled and if those formalities are not fulfilled, the agreement becomes invalid.47

**Illegality**: Some agreements are declared to be invalid by law. Such agreements are immoral or against public policy, e.g. wagering agreements or agreement in restraint of trade.

**Error or Mistake**: An agreement may become invalid on account of some error or mistake. A mistake may be either essential or unessential. In case of an essential mistake, the parties do not in reality mean the same thing and do not agree to anything. In the case of an unessential mistake, it does not relate to the nature or contents of the agreements, but only to some external circumstances which induced one party to give his consent and which does not make the agreement invalid. It is the duty of the buyer to beware and if he has failed to do so, he cannot be allowed to take advantage of his own mistake.

**Want of Consent**: An agreement also becomes invalid if the consent of any parties is obtained by means of compulsion, undue influence or coercion.

**Want of Consideration**: The last condition is want of consideration. If there is no consideration of agreement, the agreement becomes invalid. In Roman law it is called *nudum pactum*. The consideration involved in a contract should be adequate.

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47 The want of a written agreement, non-registration of an agreement or the omission of the signatures of the parties, may make agreement invalid.
3.7. OBLIGATION

According to Salmond, ‘an obligation may be defined as a proprietary right in personam or a duty which corresponds to such a right’. Obligations are merely one class of duties, namely, those which are the correlatives of rights in personam. An obligation is the *vinculum juris*, or bond of legal necessity, which binds together two or more determinate individuals. It includes the duty to pay a debt, to perform a contract, or pay damages for tort, but not the duty to refrain from interference with the person, property or reputation of others.  

In general sense the term obligation is synonym to duty. We must know one thing about duty that it is only part of the broader term obligation.

H.L.A. Hart observes that obligation exists by virtue of rule. According to him obligations can be moral as well as legal. He identifies the following differences between moral and legal obligations:

- Every moral rule is treated as being important, but this not so with every legal rule.
- Moral rules are not changed by deliberate single acts, while legal rules can be so changed.
- Breach of moral rules requires voluntary and blameworthy conduct, but many legal rules can be broken without fault.
- Moral pressure is applied mainly to appeal to the morality of the conduct, whereas legal rules are applied mainly by coercion.

Dias considers duty as a species of obligation. He differentiates between a duty and an obligation summed asunder:

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48 *Supra* Ref. 3 p. 446
• Obligation is a duty in personam. Duties *in rem*, such as the duty to refrain from interference with the person, property or reputation of others is not considered as an obligation in the legal sense.

• Obligation denotes the legal bond or vinculum juris in its entirety including both the right of one party and the liability of the other in the same transaction. When we look at the transaction from the point of the person entitled, an obligation is a right. From the point of view of the person bound, it is duty. Thus, we may say that the creditor acquires, owns or transfers an obligation. Correspondingly, the debtor has incurred or has been released from an obligation.

According to Holland, ‘an obligation, as its etymology denotes, is a tie whereby one person is bound to perform some act for the benefit of another. In some cases, the two parties agree thus to be bound together; in other cases, they are bound without their consent. In every case, it is the law that ties the knot and its untying, *solutio*, is competent only to the same authority’.51

**Solidary Obligation**

Ordinarily in an obligation, there will be one creditor and one debtor. However, there may be transactions in which there are two or more creditors or two or more debtors. An obligation in which two or more debtors owe the same debt to the same creditor is called a ‘solidary obligation’.52 Solidary obligations may be classified into:

- Several
- Joint and

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51 *supra* Ref. 4 p.245
52 *Supra* Ref. 3 p.448
• Joint and Several

We will not look into the technicalities of solidary obligation. Our point of consideration is contract. But it is necessary to mention here that contract finds its place into the third kind that is, joint and several.\(^\text{53}\) For instance, if A and B owe Rs. 1000/- to C, the common creditor, and A has been compelled to pay the whole debt of Rs. 1000/- to C, then A can sue B for contribution.

Salmond classifies sources of obligations into four main heads:\(^\text{54}\)

- Contractual — *Obligationes ex contractu*
- Delictal — *Obligationes ex delicto*
- Quasi-Contractual — *Obligationes quasi ex contractu*
- Innominate

Our business with respect to sources is confined to contractual obligation. Rest others are not of our concern.

As we have already dealt with contractual obligation in our former section. Now, here we would be dealing some more additions to contract. Contract is one of the most important and foremost sources of obligation. Here we will be just stressing about how contract is source of obligation.

Contract create rights *in personam* between the parties, this we have already dealt discussed above. It can be said that the law of contract is almost wholly embraced within the law of obligations. There may be a few exceptions like promise of marriage, which fall within the law of status and not within that of obligation. Salmond says, neglecting the small class

\(^{53}\) Under Section 43 of the Indian Contract Act, 1872, liability is joint and several unless there is an agreement to the contrary.

\(^{54}\) *Supra* Ref. 3
of personal contract, the general theory of contract is simply a combination of the general theory of agreement with that of obligation.

So far, the discussion was about evolution of contracts from jurisprudential perspective. Now in coming chapter, we will discuss about development of contract law in English system, Ancient Indian system and under Mohammedan Law.