CHAPTER 5
FUNDAMENTALS OF INDIAN CONTRACT LAW

5.1. INTRODUCTORY

After examining history of contract law, now it’s time to discuss Indian Contract Act, 1872 (hereinafter it will be referred to as ‘Act’). Before moving on to provisions of the Act we must look into the background of drafting of bill and also about societal situation prevailed at that time. In previous chapter we have seen position of contract law in India. It was a mixed bag, it was consisted of partly Hindu law, Muslim law and after advent of British rule partly English law. During eighteenth and nineteenth centuries there was much confusion as to application of law by the courts. As there was no uniformity available, the courts were facing problems for its application of it. In the Presidency Towns, the Supreme Courts\(^1\) were required to administer Hindu, Mohammedan and English laws of contract. The application of law was different in the mofussil and Presidency areas. The law was applied according to their convenience, it was never applied uniformly. The law in the Presidency Towns was archaic, there pre-1726 English law applied and no post-1726. The law lay was deeply buried in precedents and case-law and, thus, it became difficult even for a lawyer to ascertain the law. The law of contracts was thus very inarticulate, and it adversely affected proper development of trade and commerce in the country. Codification of law in this area was a great desideratum.\(^2\)

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\(^1\) Supreme Court established under Regulating Act of 1773
Sir George Claus Rankin in his book *Background of Indian Law* mentions that in 1855 the Second Law Commission in its Second Report recommended the enactment of a uniform body of the law of contracts which would be applicable to all. In pursuance of this recommendation, the Third Law Commission sitting in England prepared a draft bill with dealing the general principles of contract. The draft contained rules for sale of movable property, indemnity and guarantee, bailment, agency and partnership. The draft bill consisted of English law of contract which simplified and altered in some particulars so as to accommodate it to the circumstances of India.³

The bill was sent to India by the Secretary of State and was published with its statement of objects and reasons in 1867. The bill was introduced in the Legislative Council in 1867 and was referred to a Select Committee for further recommendations. Later the bill was forwarded to the Local Governments for their opinions. The bill was left pending for longer time in Assembly. When Sir James Fitzjames Stephen came to India as the Law Member, he found that the bill was still pending before the Select Committee. After significant changes made by the Select Committee, further the bill was reconsidered in England. The bill received permission of Secretary of State for enactment. The draft after revision by Law Member Sir James Fitzjames Stephen, became law in 1872.⁴

Originally, the Act dealt specifically about various classes of contracts like, Sale of Goods (Ss. 76-108), Indemnity and Guarantee (Ss. 124-147) including Pledge (Ss. 148-181), Bailment and Warranty (Ss. 109-118), Agency (Ss. 182-238) and Partnership (Ss. 239-266). Later provisions

⁴Supra Ref. 2 p. 475
relating to Sale of Goods and Partnership were repealed and enacted these into new laws.

For the purpose of discussion of regulations of e-contract in India, it is essential for us to deal with provisions of Indian Contract Act, because the concept of e-contract stands on provisions of the Act. The 1872 Act originally comprised of 266 sections divided into XI chapters. In this segment we aren’t going to deal this Act in detail, here we would be trying to highlight vital concepts of the Act. The scheme of this chapter is built in following manner:

- Formation of Contract
- Discharge of Contract
- Breach of Contract and
- Remedies for Breach of Contract

5.2. FORMATION OF CONTRACT

The term contract means, an agreement enforceable by law. Here ‘agreement’ means ‘every promise and every set of promises forming the consideration for each other.’ And a promise is defined as, a proposal, when accepted, becomes a promise. This is another way of saying that an agreement is an accepted proposal. The process of definitions comes down to this: a contract is an agreement; an agreement is a promise and a promise and a promise is an accepted proposal. Thus, every agreement, in its ultimate analysis, is the result of a proposal from one side and its acceptance by other.

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5 Section 2(h) of The Indian Contract Act, 1872, No. 9 of 1872
6 Section 2(e) of The Indian Contract Act, 1872, No. 9 of 1872
7 Section 2(b) of The Indian Contract Act, 1872, No. 9 of 1872
A question arises in our mind, what agreements are contract? The answer to this would be agreements which are enforceable by law are qualified to become contracts. Further, we can say that all agreements are contract if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. ⁸

From above para we can conclude that, to form a contract we require some essentials ingredients. An agreement becomes a contract when the following conditions are satisfied:

- Agreement (Offer and Acceptance)
- Capacity
- Free Consent
- Consideration and
- Lawful Object

5.2.1. AGREEMENT

An agreement is something which is consisting of offer, acceptance and consideration. For example, A promises to deliver his watch to B and in return B promises to pay a sum of Rs. 5000/- to A. There is said to be an agreement between A and B. Agreement are of four kinds,

- Valid (Contract) — It is an agreement or set of promises giving rise to obligations which can be enforce or are recognised by law.
- Voidable — 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.

⁸ Section 10 of The Indian Contract Act, 1872, No. 9 of 1872
• Void—An agreement not enforceable by law  
• Illegal—Agreements which are illegal in the sense that the law forbids the very act.

To understand the crux of contract we must first discuss offer and acceptance.

5.2.1.1. OFFER

The term ‘offer’ or ‘proposal’ is defined under Section 2(a) of the Act, as follows:

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.

The word ‘proposal’ used in the above section is similar to that of ‘offer’ used in English law. Anson defines offer as: 9

…an intimation, by words or conduct, of a willingness to enter into a legal binding contract, and which in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance, or return promise on the part of the person to whom it is addressed.

Further Chitty defines ‘proposal’ as: 10

The offer is an expression of willingness to contract made with an intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed.

10 Chitty on Contracts, 26th Ed., Sweet and Maxwell, London, 1989, p.34
The definition of offer can be understood through an example. If A’s willingness to sell his radio set to B for Rs. 1000/- if B accepts to purchase the same, amounts to proposal by a for the sale of radio set. Suppose if the proposal is not made with an intention to enter into contract such proposal may be concluded as invalid proposal.\textsuperscript{11}

**Offer and Invitation to Treat**

It is said that a proposal must be distinguished from mere statement of intention which is not intended to require acceptance. The latter may be merely a statement of intention, or an invitation to make offers, or to do business. Such a statement not intended to be binding is an ‘invitation to treat’.\textsuperscript{12}

In *Harvey v. Facey*\textsuperscript{13} the plaintiffs telegraphed to the defendants, ‘Will you sell us Bumper Hall Pen? Telegraph lowest cash price.’ The defendants replied, ‘Lowest cash price for the Bumper Hall Pen £900.’ The plaintiffs then telegraphed, ‘We agree to buy Bumper Hall Pen for £900 asked for by you.’ The Privy Council held that the defendants’ telegraph was not an offer but merely a statement as to price; the plaintiff’s second telegram was in fact an offer to buy, but as this had never been accepted by defendants, there was no contract.

A general rule is that a display of goods at a fixed price in a shop window or on a shelf in a self-service store is an invitation to offer and not an offer; an offer may be made by a prospective buyer and this the shopkeeper may

\begin{footnotesize}
\textsuperscript{11}Ibid
\textsuperscript{12}Pollock and Mulla, *Indian Contract and Specific Relief Acts*, Vo.1, 14\textsuperscript{th} Ed., LexisNexis Butterworth Wadhwa Nagpur, Gurgaon, 2012, p.39
\textsuperscript{13}[1893] AC 552
\end{footnotesize}
accept or reject.\textsuperscript{14} Auction sale, advertisement of goods, timetables and passenger tickets and tenders, are few other examples of invitation to offer.

**Communication of Offer**

An offer is effective only when it is communicated to the offeree. According to Section 4 of the Indian Contract Act, the communication of proposal is complete when it comes to the knowledge of the person to whom it is made. In *Lalman Shukla v. Gauri Dutt*\textsuperscript{15} the defendant sent the plaintiff who was in his service of his missing nephew. Later on the defendant announced a reward for information relating to the boy. Before coming to know about the announcement the plaintiff traced the boy and informed the defendant. In a suit claiming the reward the court observed that there could be no acceptance unless there was knowledge of the offer. It was also held that it was the duty of the servant to search for the boy.

**Kinds of Offer**

An offer is divided into following types:

- Express and Implied Offer
- General\textsuperscript{16} and Specific Offer
- Standing and Continuous Offer
- Cross Offer

\textsuperscript{14} Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd. [1953] 1 QB 410
\textsuperscript{15} (1913) 11 All. L.J. 489
\textsuperscript{16}Carlill v. Carbolic Smoke Ball Co., (1893) 1 QB 256
Revocation of Offer

Sections 5 and 6 of the Act speak about revocation of offer. According to Section 5, a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. And Section 6 provides for various modes of revocation of offer, they are:

- by the communication of notice of revocation by the proposer to the other party;\(^\text{17}\)
- by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
- by the failure of the acceptor to fulfill a condition precedent to acceptance; or
- by the death or insanity of the proposer, if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.

5.2.1.2. ACCEPTANCE

Anson defines ‘acceptance’ as;\(^\text{18}\)

Acceptance of an offer is the expression, by word or conduct, of assent to the terms of the offer in the manner prescribed or indicated by the offeror.

In the same way, Chitty says,\(^\text{19}\)

An acceptance is a final and unqualified expression of assent to the terms of an offer.

\(^{17}\text{Dickinson v. Dodds, (1876) 2 Ch. D. 463}\)
\(^{18}\text{Supra Ref. 9 p. 34}\)
\(^{19}\text{Supra Ref.10 p. 44}\)
And according Section 2(b) of the Act,

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

From the analysis of above definitions of acceptance, we can come across following essentials of acceptance:

- It should be communicated
- It should be absolute and unqualified
- It should be expressed in usual/prescribed manner
- It should be made while the offer is still subsisting

**Communication of Acceptance**

As a general rule it is essential that an acceptance should be communicated to the offeror, and until it is so communicated and actually received by the offeror the contract is incomplete. The reason for this rule is that it might be unjust to offeror to hold him bound if he did not know that his offer had been accepted. On the other hand, no injustice is caused to the offeree by holding that there is no contract.\(^{20}\) Chitty enumerates exceptions to the general rule, they are:

- The offer may expressly or impliedly waive the requirement of communication of acceptance.
- The offeror may be precluded from denying that the acceptance was communicated if it was ‘his own fault that he did not get it’.
- The acceptance may be communicated, not to the offeror personally, but to his agent.

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An acceptance sent by post often takes effect before it is communicated.

**Silence not to be Acceptance**

There is a general rule that, an offeree who does nothing in response to the proposal is not bound by its terms. In *Felthouse v. Bindley*\(^\text{21}\) the plaintiff offered to buy a horse from his nephew for £30 15s., adding ‘If I hear no more about him I shall consider the horse is mine at £30 15s.’ The plaintiff brought an action for conversion against an auctioneer who had sold the horse by mistake after having been informed by the nephew that it had already been sold to the plaintiff. It was held that, as the nephew’s intention to accept the offer had ever been communicated to the plaintiff. There was no contract of sale, and that accordingly the horse did not belong to the plaintiff at the same time of the auction. Where the offeree does not wish to accept the offer, it is generally undesirable to put him to the trouble and expense of refusing the offer.

**The Postal Rule**

When the parties are at distance and are contracting through post or by messengers, the question arises when is the contract concluded? Does the contract arise when the acceptance is posted or when it is received. This question first arose in *Adams v. Lindsell*\(^\text{22}\). The facts are, on September 2, 1817, the defendants sent a letter offering to sell quantity of wool to plaintiffs. The letter added ‘receiving your answer in course of post’. The letter reached the plaintiffs on September 5, 1817. On that evening the plaintiffs wrote a reply agreeing to accept the wool. This was received by the defendants on September 9. The defendants waited for the acceptance

\(^{21}\) (1862) 11 C.B. (NS) 869  
\(^{22}\) (1818) 106 ER 250 Court of King’s Bench
upto September 8 and not having received it, sold the wool to other parties on that date. They were sued for breach of contract. It was contended that till plaintiffs’ answer was actually received there could be no binding contract and, therefore, they were free to sell the wool on September 8. But the Court said:

If that were so, no contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendant had received their answer and assented to it. And so it might go on ad infinitum (endlessly).

The posting rule only applies if it is reasonable to use the post. This will normally be the case if the offer itself is made by post. The posting rule does not apply to acceptances made by some ‘instantaneous’ mode of communication, e.g. by telephone or by telex. The reason why the rule does not apply in such cases is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that he has the opportunity of making a proper communication.23

According to Section 4 of the Indian Contract Act, when a letter of acceptance is posted and is out of the power of the acceptor, the proposer becomes bound. But the acceptor will become bound only when the letter is received by the proposer.24 Later in 1966 the Supreme Court gave broader interpretation to this particular section in Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.25 It was held that the

23 supra Ref.10 p. 55
24 Section 4 of the Indian Contract Act, 1872 says, the communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him so at to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.
25 AIR 1966 SC 543
language of Section 4 is flexible enough even to cover telephonic communication.26

**Revocation of Acceptance**

According to English law an acceptance once made is irrevocable. In the words of Anson, ‘acceptance is to offer what lighted match is to a train of gunpowder. Both do something which cannot be undone.’27 This rule is confined only to postal acceptance. Further to quote Anson, ‘an acceptance can be revoked at any time before acceptance is complete, provided, of course that the revocation itself is communicated before the acceptance arrives.’28

In India acceptance is generally revocable. An acceptor may cancel his acceptance by a speedier mode of communication which will reach earlier that he acceptanc itself.29

5.2.2. CAPACITY

Section 11 of the Indian Contract Act says, 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 sound mind and is not disqualified from contracting by any law to which he is subject.

If we analyze the above provision negatively, we come across list of persons who are incompetent to make contract. Following are the persons who are not having capacity to form contract:

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26 This case shall be dealt elaborate in *infra* chapter.
29 Section 5 of the Indian Contract Act, 1872, says, an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but no afterwards.
• Minors
• Persons of unsound mind and
• Persons disqualified by law to which they are subject.

5.2.2.1. MINORS

The age of majority is eighteen, except when a guardian of minor’s person or property has been appointed by the court, in which case it is twenty one.30 As per Section 10 of the Act the parties to a contract must be competent and Section 11 of the Act declares that a minor is not competent to make contract. Neither of the sections makes it clear that whether the minor’s agreement is void or voidable. It was the Privy Council in Mohori Bibi v. Dharmodas Ghosh31 held minor’s contract is void ab initio. Sir Lord North observed:32

Looking at Section 11 their Lordships are satisfied that the Act makes it essential that a contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of contract within the meaning of the Act, and cannot arise in the case of an infant.

Further a minor cannot ratify his contract on attaining age of majority. Whatever contract made during infancy such contract shall be deemed as void ab initio. The only contracts which are absolutely binding on a minor

30 Section 3 of the Indian Majority Act, 1875
31 (1903) 30 IA 114
32 In this case the plaintiff Dharmodas Ghose, while he was a minor, mortgaged his property in favour of the defendant, Brahm Dutt, who was a money-lender to secure a loan. At the time of the transaction the attorney, who acted on behalf of the money-lender, had knowledge that the plaintiff was a minor. The minor brought an action against the money-lender stating that he was minor when the mortgage was executed by him, and therefore, the mortgage was void and inoperative and same should be cancelled.
are contracts for necessaries. Apart from contracts for necessaries and contracts of apprenticeship, education and service, the general rule at common law is that a minor’s contracts are voidable at his option, i.e. not binding on the minor but binding on the other party.\(^{33}\)

A minor’s agreement being void, original it should be wholly devoid of all effects. The law of estoppel is not applicable to minor’s contract. The infant is not estopped from setting up the defence of infancy. The reason is very simple. There can be no estoppel against the statute. Even there is no liability of minor in tort arising out of contract. It was held in Johnson v. Pyre\(^ {34}\) that a minor cannot be held responsible for anything which would be an indirect way of enforcing his agreement.

**Doctrine of Restitution**

If an infant obtains 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. This is known as the equitable doctrine of restitution. The well-known authority is Leslie (R) Ltd v. Sheill.\(^ {35}\) In that case an infant succeeded in deceiving some money-lenders by telling them a lie about his age, and so got them to lend him £400 on the faith of his being an adult. Lord Sumner observed:

> When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant,

\(^{33}\)Supra Ref. 10 p.371  
\(^{34}\) (1665) 1 Sid 258  
\(^{35}\) (1914) 3 KB 607
even by means of a fraud.... Restitution stopped where repayment began.

The same principle was followed by the Lahore High Court in *Khan Gul v. Lakha Singh*.

5.2.2.2. UNSOUND MIND

According to Section 12, a person is said to be sound mind for the purpose of making 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 interest. However, a person who is usually of unsound mind may make contract when he is of sound mind. But a person who is usually of sound mind may not make a contract when he is of sound mind. Any such contract made by unsound person is void.

Drunken person is considered as unsound person. It can be understood through illustration appended to Section 12, a sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkeness lasts.

5.2.2.3. DISQUALIFIED BY LAW

Certain classes of persons may be disqualified under certain enactments from entering into contracts in respect of matters specified in those enactments.

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36 AIR 1928 Lah. 609  
37 Section 12 of the Indian Contract Act, 1872—A person is said to be of sound mind for the propose 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 interest. A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.
**Deity:** A deity is not a perpetual minor and contract for sale of immovable property belonging to a private deity entered into by a ‘marfatdar’ (trustee) is especially enforceable against the deity when it is for legal necessity. The analogy of minor cannot be applied to deities.\(^{38}\)

**Alien Enemy:** The disability of alien enemies to sue in courts without license is a matter of general public policy and not under this head.

**Insolvency:** There is no prohibition against a contract by an insolvent after the insolvency proceedings have commenced but before adjudication. Insolvency does not determine a contract nor operate per se recession thereof.

**Married Women:** The capacity of a woman to contract is not affected by her marriage either under the Hindu or Muslim law.\(^{39}\)

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### 5.2.3. FREE CONSENT

It is need of Section 10 of the Indian Contract Act, that, the free consent to be an essential requirement of a contract. Section 14 of the Act defines ‘free consent’, as ‘consent is said to be free when it is not caused by:

- coercion, as defined in section 15, or
- undue influence, as defined in section 16, or
- fraud, as defined in section 17, or
- misrepresentation, as defined in section 18, or
- mistake, subject to the provisions of section 20, 21, and 22.

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\(^{38}\)Sri Durga Thakurani Bije Nijigarih v. Chinatamoni Swami AIR 1982 Ori 158

\(^{39}\)Supra Ref. 12 p. 299
Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. Further where consent is induced by mistake, the agreement is void.

5.2.3.1. COERCION

According to Section 15, ‘coercion’ is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

The above meaning of coercion can be understood through an illustration: A threatens to shoot B, if B does not agree to sell his property to A at a stated price; B’s consent in this case has been obtained by coercion.

Consent is said to be caused by coercion when it is obtained by pressure exerted by either of the following techniques:

- Committing or threatening to commit any act forbidden by the Indian Penal Code; or
- Unlawfully detaining or threatening to detain any property.

What the Indian law calls ‘coercion’ is called in English law ‘duress or menace’.
5.2.3.2. UNDUE INFLUENCE

If the consent has been induced by undue influence, the contract is voidable at the option of the party whose consent has been obtained. Section 16 of defines undue influence as under:

1) A contract is said to be induced by ‘under influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

2) In particular and without prejudice to the generally of the foregoing principle, a person is deemed to be in a position to dominate the will of another—
   a) where he hold a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
   b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

In order to constitute undue influence, it is necessary to prove that:
• The relation subsisting between the parties are such that one of the parties is in a position to dominate the will of other; and
• Such a person uses his dominant position to obtain an unfair advantage over other.

In *Lakshmi Amma v. Narayan*\(^40\) the plaintiff executed a settlement by which his entire property was given to one of his grandsons. At the time of the execution the plaintiff an old senile was under treatment in a nursing home fixed by that grandson. Held, there was a prima facie case of undue influence and the respondent failed to rebut this.

**Doctrine of Inequality of Bargain Power**

There are cases under the English law, where equity intervened not because the terms were harsh or oppressive, but because it refused one party to take advantage of the other’s weakness or need. The pressure in these cases was not of undue influence or personal pressure, but arose because the other party took advantage of its economic power and necessity of the vendor or the borrower which has been termed as pressure resulting from an inequality of bargaining position.\(^41\)

5.2.3.3. FRAUD

In *Derry v. Peek*\(^42\) Henman, J. observed, ‘I take the law to be that if a man takes himself to assert a thing to be true which he does not know to be true and has no reasonable ground to believe to be true, I order to induce another to act upon assertion, who does so act and is thereby damnedified is entitled to maintain an action for deceit’. Lord Herschelle in the same case

\(^40\) AIR 1970 SC 1367  
\(^41\) Lloyds Bank Ltd v. Bundy [1975] QB 326  
\(^42\) (1889) 14 AC 337
defined fraud as a false statement made knowingly, or without belief in its truth or recklessly careless whether it be true or false. In short, a fraudulent misrepresentation is a false statement which, when made, the representator did not honestly believe to be true.

Section 17 of the Contract Act defines fraud as consisting of certain kinds of acts committed by a party to a contract, or his agent, or by his connivance, or by his agents, with intent to deceive another party thereto his agent, or to induce him to enter into the contract. The acts contemplated are –

1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true;
2) the active concealment of a fact by one having knowledge or belief of the fact;
3) a promise made without any intention of performing it;
4) any other act fitted to deceive;
5) any such act or omission as the law specially declares to be fraudulent.

By way of explanation it is also added the ‘mere silence as regards matters which may affect a party’s willingness to enter into contract is not fraud unless there is duty to speak under the circumstances, or unless the silence is equivalent to speech.’

According to Section 17 following are the essentials of fraud:

- False statement of Facts; and
- Wrongful Intention

As it is given under explanation of Section 17, that mere silence is not fraud. It can be understood by an illustration, if A sells, by auction, to B, a
horse which A knows to be unsound and A says nothing to B about the horse’s unsoundness. This is not fraud by A. The principle - silence is no fraud - will not apply in following circumstances, in other words we can say that they act as exceptions:

- Where there is duty to speak, keeping silence is fraud; and
- Where silence is, in itself equivalent to speech.

Duty to speak arises where one contracting party reposes trust and confidence in the other. For instance, in *Haji Ahmed Yarkhan v. Abdul Gani Khan*\(^{43}\) the plaintiff spent a sum of money to mark the engagement of his son. He then discovered that the girl suffered from epileptic fits and so broke off the engagement. He sued the other party to recover from them compensation for the loss which had suffered on account of their deliberate suppression of a vital fact which amounted to fraud. The court held that a mere passive non-disclosure of the truth, however deceptive in fact, does not amount to fraud, unless there is duty to speak.

5.2.3.4. MISREPRESENTATION

A misrepresentation is innocent where the representator believes his assertion to be true and consequently has no intention of deceiving the other party. However it may actually induce the other party to enter into contract. By Section 18 of the Contract Act it means and includes:

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

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\(^{43}\) AIR 1937 Nag 270
2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;
3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement.

Under English common law, a misrepresentation without fraud would not entitle the aggrieved party to recover damages to render the contract voidable. But equity has established the rule that where a person in induced to enter into a contract by the misrepresentation of the other party, is entitled to escape from the contract either by bringing an action for recession or by pleading the misrepresentation as a defence to a suit for specific performance.44

5.2.3.5. MISTAKE

Mistake may operate upon a contract in two ways, firstly, defeat the consent altogether that the parties are supposed to have given, that is to say, the consent is unreal. Secondly, the mistake may mislead the parties as to the purpose which they contemplated.

The cases in which the consent is defeated or is rendered unreal fall under Section 13 of the Contract Act. This section explains ‘consent’ as, two or more persons are said to consent when they agree upon the same thing in the same sense. The need of this section is intention of the parties or consensus ad idem.

Where the mistake does not defeat consent, but only misleads the parties, Section 20 shall apply. It says, 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.

Mistake in the law of contract may have several different effects. At common law and Indian law, it is usually said to operate so as to negative, or in some cases to nullify, consent. The contract will then be void *ab initio*.

### 5.2.4. CONSIDERATION

One can say that whole contract law is based on consideration. Section 25 of the Indian Contract Act opens with the declaration the ‘an agreement made without consideration is void….’ In England also ‘promises without consideration are not enforced, because they are gratuitous’. In *Rann v. Hughes* the Lord Chief Baron Skynner observed:

> It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of the country supplies no means, nor affords any remedy, to compel the performance of an agreement without sufficient consideration.

Section 2(d) of the Indian Contract Act 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 to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

Then definition of consideration in Section 2(d) requires, in the first place that the act or abstinence, which is to be consideration for the promise,

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45 House of Lords, (1778) 7 Term Reports 346
should be done at the desire of the promisor; secondly, that it should be
done by promisee or any other person and lastly that the act or abstinence
may have been already executed or is in the process of being done or may
be still executor, that is to say, it is promised to be done.

After analyzing above definition we come across following features of
consideration:

- Consideration only at the desire of the promisor
- Consideration by Promisee or any other person (Privity of
  Consideration)
- Consideration may be Past, Present (Executed) or Future
  (Executory)
- Something, i.e. an Act, Abstinence or Promise

At the desire of the Promisor

The definition of consideration in Section 2(d) emphasizes that act or
abstinence which is to be a consideration for the promise must be done or
promised to be done in accordance with the desire of the promisor. In
other words, an act shall not be a good consideration for the promise
unless it is done at the desire of the promisor.46

Privity of Consideration47

According to Section 2(d), consideration can be given by the promisee or
any other person. There is a possibility that consideration for the promise

46 In Durga Prasad v. Baldeo, (1880) 3 All 221, the consideration for the promise had not
moved at the desire of the promisor but some other person, and it was held that the same
was not sufficient consideration to support the promise.
47 Doctrine of Privity of contract is distinguished from the doctrine of privity of
consideration. According to doctrine of privity of contract, a contract cannot confer any
rights on one who is not a party to the contract even though the very object of the contract
may have been to benefit him.
may move, not from the promisee but a third person. In *Chinnaya v. Ramayya*,\(^{48}\) where a promise by a daughter to pay maintenance to her uncle in consideration of the mother making a gift of certain properties to her, was sought to be enforced by the uncle. The daughter pleaded that no consideration proceeded from the uncle and being a stranger to consideration he could not sue. It was held that in the face of the clear definition given by the Contract Act, consideration might move from any person.

Principle of ‘privity to contract’ had its genesis in the English common law; it was adopted by the Court of King’s Bench in *Dutton v. Poole*.\(^{49}\) Nearly two hundred years later in 1861 in *Tweddle v. Atkinson*\(^{50}\) the Court of Queen’s Bench refused to follow this principle. Whitman J. considered it to be an established principle ‘that no stranger to the consideration can take advantage of a contract, although made for his benefit’. This principle was affirmed by the House of Lords in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*\(^{51}\) The position of India with respect to this rule is as same as in England. The Supreme Court of India has expressed itself in favour of the rule in *Tweddle v. Atkinson*.\(^{52}\)

Following are the exceptions to rule of privity:

- Beneficiaries under Trust or Charge or other Arrangements
- Marriage Settlement, Partition or other Family Arrangements
- Acknowledgement or Estoppel
- Covenants running with Land

\(^{48}\) 1881, 4 Mad. 137
\(^{49}\) Court of King’s Bench, (1677) 2 Levinz 210; 83 ER 523
\(^{50}\) 123 ER 762; 30 LJ QB 218
\(^{51}\) (1915) AC 847
\(^{52}\) *M.C. Chacko v. State Bank of Travancore* (1969) 2 SCC 343
Consideration may be Past, Present (Executed) or Future (Executory)

The classification of consideration with reference to the time at which it is furnished in return for the promise is into executory and executed. If the consideration is quite unconnected with the promise given, it will be called past. A consideration may be executory, a promise given for promise; but it may be executed, an act or forbearance given for a promise; but it must not be past, for in that case it is mere sentiment of gratitude or honour promoting a return for benefits received, in other words, it is no consideration at all.\textsuperscript{53}

In England past consideration is no consideration at all. Any contract made on the basis of past consideration is considered as \textit{nudum pactum}.\textsuperscript{54} But in exceptional cases the general rule is not recognised. In one such case \textit{Lampleigh v. Brathwait}\textsuperscript{55} the court held a mere voluntary courtesy will not have consideration to uphold as \textit{assumpsit}. But if the courtesy were moved by a request of the party that gives the promise, it will bind, for the promise, though it follows, yet it is not naked, but it couples itself with the suit before.

When one of the parties to the contract has performed his part of the promise, which constitutes the consideration for the promise by the other side, it is known as executed consideration. E.g. A, makes an offer of reward of Rs. 100/- to anyone who finds his lost dog and brings the same to him. B finds the lost dog and delivers the same to A. When B does so, that amounts to both the acceptance of the offer, which results in a binding contract under which A is bound to pay Rs. 100/- to B, and simultaneously giving consideration for the contract.

\textsuperscript{53} Supra Ref. 44 p.57  
\textsuperscript{54} In re McArdle, (1951) 1 All ER 905  
\textsuperscript{55} Hob 105; 80 ER 255
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. E.g. A agrees to supply certain goods to B and B agrees to pay for them on a future date, this is a case of executory consideration.

**Something, i.e. an Act, Abstinence or Promise**

Consideration, as defined in the Act, means some act, abstinence or promise on the part of the promisee or any other person which has been done at the desire of the promisor. Therefore, it means that even a worthless act will suffice to make a good consideration if it is only done at the promisor’s desire. For illustration, if A promises to give his new Rolls-Royce car to B, provided B will fetch it from the garage.

It is not necessary that consideration should be adequate to the promise. The parties are free to make any contract of their choice. If, with their free consent, they strike bargain where the consideration is too high or too low, the courts will not go into the question of the adequacy or inadequacy of consideration. The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced. E.g. A agrees to sell a horse worth Rs. 10000/- to for Rs. 100/-. A’s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

Forbearance to sue is a kind of abstinence, which is so very clearly as good consideration in the definition itself. It means that the plaintiff has a certain right of action against the defendant or any other person and on a promise by the defendant he refrains from bringing the action. In *Alliance*

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56 *Haigh v. Brooks* (1839) 10 A. & E. 309
Bank v. Broom\textsuperscript{57} the defendant was to pay to the bank a sum of £ 20,000. When the bank pressed for payment he promised to give security for the debt and to deliver the documents as soon as they were received. The defendant failed to do so and the bank sued for specific performance of the promise. The defendant contended that the promise was not supposed by consideration. The forbearance to sue for some time was held to be sufficient consideration. The promise to give security stayed the hand of the creditor. It is sufficient if there is forbearance to some extent, though no definite period has been agreed to between the parties.

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. This principle is famously known as Pinnel’s Case\textsuperscript{58} rule and it was adopted by common law in 1602. The Court observed:

Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, hawk or robe, etc., in satisfaction 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 circumstances; or otherwise, the plaintiff would not have accepted of it in satisfaction.

The rule in Pinnel’s Case was not looking logical so the courts in England enunciated exception to this rule, which are as follows:

- Payment in Kind

\textsuperscript{57} (1864) 62 ER 631
\textsuperscript{58} (1602) Co. Rep. 177a
- Payment before due date
- Part Payment by a third party
- Composition with the creditors
- Doctrine of Promissory Estoppel

Luckily in India there are less chances of arising of such situations, which came before English courts after *Pinnel's Case*. Because in Section 63 of the Act clearly provided, every promise 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.

Section 25 of the Act expresses certain exceptions to consideration. They are as follows:\(^5^9\)

- Promise due to natural love and affection
- Compensation for voluntary services
- Promise to pay a time barred debt

### 5.2.5. LAWFUL OBJECT

The fifth and the last requirement for the formation of a valid contract is that parties must contract for a lawful object. An agreement the object of

\(^5^9\) Section 25 of the Indian Contract Act, 1872, an agreement made without consideration is void, unless—

1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless.

2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

3) it is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.
which is opposed to the law of the land may be either unlawful or simply void, depending upon the provision of the law to which it is opposed. Section 23 mentions the circumstances when the consideration or object of an agreement is not lawful. The Section reads as under:

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

i. It is forbidden by law; or

ii. is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; or

iii. involves or implies, injury to the person or property of another; or

iv. the Court regards it as immoral, or

v. opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Forbidden by Law

This is first circumstance in which the object of a contract will be treated as unlawful is when it is forbidden by law. It may be something violating a prohibitory enactment of the legislature or a principle of unwritten law. A statute may not prohibit a contract but it may impose penalties on the parties for entering into it. In each case it would depend upon the construction of the provisions of the statute.

Defeat the Provisions of any Law

Section 23 refers to cases where, there being no express statutory prohibition against a particular type of contract, the nature of the contract is such that it would be against the spirit of a particular law, whether
enacted or otherwise. In a contract to give a son in adoption in consideration of an annual allowance to the natural parents a suit will not lie to recover any allowance on such a contract, though the adoption may have been made.\textsuperscript{60} An agreement between the partners of a firm to conceal income in certain respect so as to evade income tax has been held to be unlawful.\textsuperscript{61}

\textbf{Fraudulent}

If the consideration or object of an agreement is to commit fraud, the agreement is void. E.g. 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. Similarly, e.g. A, being agent for a land proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud, by concealment by A, on his principal.

\textbf{Injury to Person or Property}

An agreement between two persons to injure the person or property of another is unlawful. In the same way, if the object of an agreement is such that it involves or implies injury to the person or property of another, the agreement is unlawful and void. A person borrowed a sum of hundred rupees and executed a bond promising to work for the plaintiff without pay for a period of two years. In case of default, the borrower was to pay exorbitant interest and the principal sum once. The court held that what contained in the bond was indistinguishable from slavery, which involves

\textsuperscript{60}Narayan v. Gopalrao, (1922) 24 Bom LR 414
\textsuperscript{61}Ram Sewak v. Ram Charan, AIR 1962 All 177
injury to the person and was, therefore void.\footnote{Ram Sarup v. Bansi Mandar, (1915) 42 Cal 742} Similarly, a bond to pay an exorbitantly high rate of interest, in case, the borrower left the lender’s service, has been held void. An agreement to commit a crime or a civil wrong, for example, to assault or beat a person or to deceive him or to publish a libel against him, all fall in this category.

**Immoral**

The law does not allow an agreement tainted with immorality to be enforced. Consequently, every agreement the object of or consideration for which is immoral, is unlawful. What is ‘immoral’ depends upon the standards of morality prevailing at a particular time and as approved by the courts. In *Uphill v. Wright*,\footnote{(1911) 1 KB 506} the plaintiff sued for the rent of a flat let to the defendant with the knowledge that she was the mistress of a person who used to visit her there. The Court held that as the flat was let for an immoral purpose the plaintiff could not recover.

In England, contracts in consideration of past illicit cohabitation are made for no consideration but are not illegal. In a Madras case,\footnote{Namperumal v. Veeraperumal, 1930 MLJ 596} it was held that an agreement made in consideration of past cohabitation is valid under Indian law. In *Nagaratnamma v. Ramayya*,\footnote{AIR 1968 SC 253} an attempt was made to equate illicit cohabitation with past mutual service but failed. The past services were held to be not consideration under Section 2(d) of the Act.

**Public Policy**

An agreement is unlawful if the court regards it as opposed to public policy. The term ‘public policy’ in its broadest sense means that sometimes

\[\text{\textsuperscript{62}}\text{Ram Sarup v. Bansi Mandar, (1915) 42 Cal 742}\]
\[\text{\textsuperscript{63}}\text{(1911) 1 KB 506}\]
\[\text{\textsuperscript{64}}\text{Namperumal v. Veeraperumal, 1930 MLJ 596}\]
\[\text{\textsuperscript{65}}\text{AIR 1968 SC 253}\]
the courts will, on considerations of public interest, refuse to enforce a contract. The doctrine of public policy is based on the maxim 'ex turpi causa non oritur actio', which means, an agreement which opposes public policy would be void and no effect.

Contracts which are opposed to public policy may be grouped as follows:

- **Trading with Enemy**—Agreements with alien enemies would injure the State in relation with other States. It is unlawful to enter into contract with a foreign enemy during war or to perform such a contract entered into before the war.

- **Stifling Prosecution**—It is in public interest that criminals should be prosecuted and punished. Hence, an agreement not to prosecute an offender or to withdraw appending prosecution is void if the offence is of public nature. Such agreements are called agreements to stifle prosecution. Justice Gajendragadkar (later Chief Justice of India) observed in *Narasimha Raju v. Gurumurthy Raju*, that the agreement to be opposed to public policy if a person sets that machinery of criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of the coercive criminal process, he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public.

- **Maintenance and Champerty**—‘Maintenance’ is unlawful for a stranger to render officious by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence. ‘Champerty’ in its essence means a bargain whereby one party is to assist the other in

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66 (1963) 3 SCR 687
recovering property, and is to share in the proceeds of the action. Agreements by which a stranger advances money for maintenance of litigation with view to obtaining an unconscionable gain are called chamertous agreement. In India, agreements by way of maintenance and champerty are not necessarily void unless there are elements of moral turpitude, or unconscionable conduct proved in connection with such contracts.

- **Interference with Course of Justice**—An agreement for the purpose of using improper influence of any kind with judges or officers of court is void. Bribing a judge to induce him to decide in a party’s favour is also against public policy. Agreements to delay the execution of decree and a promise to give money to induce a person to give false evidence have been held void.

- **Marriage Brokerage Contracts**—Agreements to procure marriages for reward are void on the ground that marriage ought to proceed from the free and voluntary decision of the parties. In *Vaithyanandhan v. Gangaraju*, the plaintiff a purohit was promised Rs. 50/- in consideration of procuring a second wife for the defendant. The promise was held to be unenforceable.

- **Interest against Duty**—A parent cannot by contract transfer to another his or her rights and duties in respect of a child, because the law imposes such duties in respect of the infant and for its benefit. The same rule applies to the dealings of agents and other persons in similar fiduciary position.

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67Nand Kishore v. Kunj Beharilal, AIR 1933 All 303  
68Adhiraj Shetty v. Vitti Bhatta, AIR 1914 Mad 366  
69(1893) 17 Mad. 9  
70*Supra* Ref. 44 p.147
• **Trade Ethics**—*Lily White v. Munuswami*,⁷¹ is the case which throws light upon trade ethics. The plaintiff gave a new saree and blouse to a firm of dry-cleaning. The defendant agreed to dry-clean the clothes and to re-deliver them, on a specified date. The firm failed to re-deliver saree and the plaintiff claimed the market value of saree viz. Rs. 220/-. It may be noted that on the reverse side of the bill for dry cleaning, certain conditions were printed. One of the conditions so printed was to the effect that the customer was entitled to claim only 50% of the market price of value of articles in case of loss. The court held that the condition relating to the restriction of the claim to 50% of the market price is not enforceable on public ground.

5.3. **DISCHARGE OF CONTRACT**

After the discussion of formation of a contract, the next stage is fulfillment of the intention of the parties. When the object is fulfilled, the liability of either party under the contract comes to conclusion. The contract is then said to be discharged. But ‘performance’ is not the only way in which a contract is discharged. A contract can be discharged in following modes:

- By Performance; [Sections 31-67]
- By Impossibility of Performance; [Section 56]
- By Agreement; [Sections 62-67] and
- Of By Breach; [Sections 39 & 73].

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⁷¹ AIR 1966 Mad. 13
5.3.1. PERFORMANCE OF CONTRACT

The general rule is that a party to a contract must perform exactly what he undertook to do. Section 37 of the Act says, the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance in dispensed with or excused under the provision of this Act, or of any other law. Further it states that, promises bind the representative of the promisor in case of the death of such promisors before performance, unless a contrary intention appears from the contract. The parties to contract have a duty to, perform or offer to perform.

The promisor must offer to perform his obligation under the contract to the promisee. This offer is called ‘tender of 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’. In other words, the tender of performance, if rejected by the other party, excuses the promisor from further performance and entitles his to sue the promisee for breach of the contract. Thus, a tender of performance is equivalent to performance. This is the effect of Section 38.72

72 Section 38 of the Indian Contract Act, 1872, where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract. Every such offer must fulfill the following conditions —

1) it must be unconditional;
2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is been made is able and willing there and then to do the whole of what he is bound by his promise to do;
3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.
By whom the Contract must be Performed

Section 40 of the Act says, if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contain in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representative may employ a competent person to perform it.

It means that if the contract is one which is based on personal confidence, or involves the exercise of personal skill, like painting, dancing, singing, marrying or writing a book, etc., it would be apparent that he intention of the parties is that it should be performed by the promisor himself and nobody else. E.g. if A promises to paint a picture for B, A must perform this promise personally. On the other hand, if the contract is not of a above kind stated above, i.e. it does not involve the exercise of personal skill, the promisor or his representatives may employ a competent person to perform the same.

Joint Promises

According to Section 42 joint promisors must, during their joint lives, fulfill the promise. And if any of them dies, his representatives must, jointly with the surviving promisors, fulfill the promise 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 any private arrangement between the parties. They may expressly or impliedly prescribe a different rule.73

73 Section 42 of the Indian Contract Act, 1872, when two or more person have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor the representatives of all jointly, must fulfill the promise.
Section 43 of the Act lays down three rules for joint promisors:

- Firstly, when a joint promise is made, and there is no express agreement to the contrary, the promisee may compel anyone or more of the joint promisors to perform the whole of the promise.
- Secondly, a joint promisor who has been compelled to perform the whole of the promise, may require the other joint promisors to make an equal contribution to the performance of the promise, unless a different intention appears from the agreement.
- Thirdly, if anyone of the promisors makes a default in such contribution, the remaining joint promisors must bear the deficiency in equal shares.

**Time and Place of Performance**

Sections 46-49 provide for some rules regarding the time and place of performance of a contractual obligation. They may be summarized as follows:

- Where no time for performance is specified and the promisor is to perform his promise without application by the promisee, the performance must be done within a reasonable time.
- Where a promise is to be performed on a certain day and the performance is to be done without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.
- If the date of performance is fixed but the promisee is bound to apply for performance he must apply for performance at a proper place and within the usual hours of business.
Where no place of performance is fixed and the promisor is bound to perform without application by the promisee, the promisor is bound to apply to the promisee to fix a reasonable place for performance and to perform it at that place.

**Time, Whether Essence of Contract**

At common law, in the absence of a contrary intention, performance of the contract had to be carried out upon the exact date specified in the contract; a party could treat the contract as repudiated if the other party’s performance was not completed on the fixed date, since time was ‘of essence of the contract’.\(^74\)

Section 55 of the Contract Act deals with the effect of failure to perform a contract at the fixed time. According this section, if the intention of the parties was that time should be the essence of the contract, then a failure to perform at the agreed time renders the contract voidable at the option of the opposite party. Time is generally considered to be the essence of the contract in the following three cases:\(^75\)

i. Where the parties have expressly agreed to treat it as of the essence of the contract;

ii. Where delay operates as an injury;

iii. Where the nature and necessity of the contract requires it to be so construed, for example, where a party asks for extension of time for performance.

\(^{74}\)Supra Ref.10 p.943  
\(^{75}\)Supra Ref.27 p. 309
Appropriation of Payment

The underlying principle of Section 59 is that where there are several debts owing to one person, any payment made by the debtor either with an express intimation or under circumstances from which intimation may be implied, must be applied to the discharge of the debt in the manner intimated or which can be implied from the circumstances.

In England, ‘it has been considered a general rule since Clayton’s Case,\textsuperscript{76} that when a debtor makes a payment he may appropriate it to any debt he pleases, and the creditor must apply it accordingly’. Where several distinct debts are owed by a debtor to his creditor, the debtor has the right when he makes a payment to appropriate the money to any of the debts that he pleases, and the creditor is bound, if he takes the money, to apply it in the manner directed by the debtor. If the debtor does not make any appropriation at the time when he makes the payment, the right to appropriation devolves on the creditor.

As per Section 59 the payment is to be appropriated according to the following rules:

- Appropriation as desired by the Debtor
- Appropriation by the Creditor
- Appropriation towards debts in order of time

\textsuperscript{76}Devaynes v. Noble, (1816) 1 Mer 572
Section 56 of the Act speaks about an agreement to do an act which is impossible in itself, such agreement is declared void. This section deals about initial impossibility and subsequent impossibility. It reads as follows:

**Agreement to do impossible act**—An agreement to do an act impossible in itself is void.

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

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

The above section is based on common law doctrine of Frustration. 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. But he binds himself by contract absolute to do a thing, he cannot escape liability for performance or for damages in case of non-performance by proof that as events turned out performance has unexpectedly futile or even impossible.

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King’s Bench, (1647) Aleyn 26; 82 ER 897; Facts of the case, there the defendants had taken an estate on lease from the plaintiffs. The defendant was dispossessed of it by alien enemies for some time and, therefore refused to pay the rent for the period dispossession.
The above principle was known as the rule of absolute contracts. Although this rule was peculiar, it continued to be enforced until 1863. In 1863 in *Taylor v. Caldwell*, 78 Blackburn J., giving the judgment of the Queen’s Bench, held the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

The above 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*, 79 the defendant agreed to hire from the plaintiff a flat for June 26 and 27, on which days it had been announced that the coronation procession would pass along that place. A part of the rent was paid in advance. But the procession having been cancelled owing to the King’s illness, the defendant refused to pay the balance. It was held that the real object of the contract, as recognised by both contracting parties, was to have a view of the coronation procession. The taking place of the procession was, therefore, the foundation of the contract. The object of the contract was frustrated by non-happening of the coronation and the plaintiff was not entitled to recover the balance of the rent.

**Specific Grounds of Frustration**

The principle of frustration of contract, or of impossibility of performance is applicable to a great variety of contracts. It is, therefore, not possible to lay down an exhaustive list of situations in which the doctrine is going to be applied so as to excuse performance. The law upon the matter is

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78 *Queen’s Bench* (1863) 3 B&S 826; 122 ER 309
79 (1903) 2 KB 740 CA
undoubtedly in process of evolution. Yet the following grounds of frustration have become well established.

- Destruction of Subject-Matter
- Change of Circumstances
- Non-occurrence of Contemplated Event
- Death or Incapacity of Party
- Government, Administrative or Legislative Intervention
- Intervention of War

**Effect of Frustration**

According to Section 65 of the Act, when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it. When this section is applied to doctrine of frustration then, the effect of it will be restoration of advantages. E.g. 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 a hundred rupees for each night’s performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

**5.3.3. PERFORMANCE BY AGREEMENT**

Section 62 of the Act provides that, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. E.g. A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his
debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

**Doctrine of Novation**

When the parties to a contract agree to substitute the existing contract with a new contract, that is called *novation*. In *Scarf v. Jardine*\(^8^0\) Lord Selborne explained the meaning of novation in following words:

> ...there being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake as between themselves and the retiring partner that they will over the assets; and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand, that they promise to pay him for the consideration.

Novation is of two kinds, viz.:

a. **Change of Parties**—If A is a debtor and the creditor agrees to accept B in his place as the debtor, the original contract between the creditor and A is at an end. A novation of this kind usually takes place when a new partner is admitted into an existing firm or when a partner retires from a firm and the new firm as constituted after admission or retirement accepts the liabilities of the old firm and this is approved by the persons dealing with the firm.

\(^8^0\) (1882) 7 AC 345
b. **Substitution of New Agreement**—When the parties to a contract agree to substitute a new contract for it, the original contract is discharged and need not to be performed. It is necessary for the application of this principle that the original contract must be substituting and unbroken. The substitution of a new contract is not possible after there has been a breach of the original contract.

### 5.3.4. REMISSION OF PERFORMANCE

Section 63 of the Act allows a party to a contract to dispense with the performance of the contract by the other party, or to extend the time for performance or to accept any other satisfaction instead of performance. Section 63 reads as under:

> Every promise 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.

The effect of the is that the party who has the right to demand the performance of a contract may—

- Remit or dispense with it, wholly or part; or
- Extend the time for performance; or
- Accept any other satisfaction instead of performance.

### 5.4. BREACH OF CONTRACT

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. The failure to perform or renunciation may take place when
the time for performance has arrived or even before that. Thus, breach is of
two kinds, viz.:

- Anticipatory Breach &
- Present Breach

**Anticipatory Breach**

An anticipatory repudiation occurs when, prior to the promised date of
performance, the promisor absolutely repudiates the contract. It is an
announcement by the contracting party of his intention not to fulfill the
contract and that he will no longer be bound by it.

According to Section 39 of the Act when a party to the contract (1) has
refused to perform or (2) disabled himself from performing the contract, in
its entirety, the promisee may put an end to the contract, unless he
signified by words or conduct, his acquiescence in its continuance. If these
conditions are satisfied the promisee is given an option. He can choose one
of the following rights:

- He can treat the contract as broken and put to an end to it on that
ground. In such a case he is entitled to claim damages against the
other party as on a breach of the whole agreement.
- He is at liberty to keep the contract alive, accept performance of it if
made by the other side and claim damages for the part not
performed. This is called ‘waiving the breach’ or acquiescing in the
continuance of the contract even after its breach by the other side.

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81 Associated Cinemas of America Inc. v. World Amusement Co. Supreme Court of Minnesota, (1937) 201 Minn. 94; Collected from Supra Ref. 27 p.364
5.5. REMEDIES FOR BREACH OF CONTRACT

The person injured by a breach of contract can claim damages from the other party for compensating the loss suffered. In certain circumstances the injured party may obtain a decree for specific performance of the contract. There are also reliefs by way of recession, rectification cancellation, declaratory decrees and injunctions in connection with contracts. The Contract Act 1872 by Sections 73-75 deals with damages. The other reliefs are dealt within the Specific Relief Act, 1963. Both will be dealt one by one.

5.5.1. DAMAGES

‘Damages’ means compensation in terms of money for the loss suffered by the injured party. Burden lies on the injured party to prove his loss. Every action for damages raises two problems. The first is problem of ‘remoteness of damage’ and second that of ‘measure of damages’.

Rule in Hadley v. Baxendale\(^{82}\) – Remoteness of Damages

In Hadley v. Baxendale, the plaintiffs carried on an extensive business as miller. Their mill was stopped by a breakage of the crankshaft by which the mill worked. The defendants, a firm of carriers, were engaged to carry the shaft to the manufacturers as a pattern for a new one. The plaintiff’s servant told the defendants that the mill was stopped, and that the shaft must be sent immediately. But the defendants delayed the delivery by some neglect, and the consequence was, the plaintiffs did not receive the new shaft for several days after they would have otherwise have done.

\(^{82}\) (1854) 9 EX. 340
The action was brought for the loss of profits which would have been made during the period of the delay.

Sir Edward Hall Alderson laid down the following rule:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

On the basis of this principle the defendants were held not liable for the loss of profits, because in the great multitude of cases of millers sending off broken shafts for repair, it does not follow in the ordinary circumstances that the mill is stopped. Even though it was pointed out that the mill was stopped there could have existed several reasons for the stopping of the mill. The fact that the mill was out if action for want of the shaft was a special circumstance affecting the plaintiff’s mill and the same should have been pointed out to the defendants in clear terms. It should have also been communicated that the plaintiffs would have suffered unreasonable loss by way of delay.

The rule in *Hadley v. Baxendale* has been divided into two parts. Accordingly damages are recoverable in two cases:

i. When they ‘arise naturally’, i.e., according to the usual course of things, from the breach.

ii. When they are ‘such as may reasonably be supposed to have been in the contemplation of both parties, at the time when they made the contract, as the probable result of the breach.’
The above principles are applicable in India also. The Privy Council observed in *Jamal A.K.A.S. v. Moola Dawood Sons & Co.*,\(^\text{83}\) that Section 73 of the Act is declaratory of the common law as to damages. Similarly, Patanjali Sastri J. (later Chief Justice of India) of the Supreme Court observed in *Pannalal Jankidas v. Mohanlal*,\(^\text{84}\) that the party in breach must make compensation in respect of the direct consequences flowing from the breach and not in respect of loss or damage indirectly or remotely caused.

The Section 73 provides:

**Compensation of 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, form 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 of damage sustained by reason of the breach.

**Compensation for failure to discharge obligation resembling those created by contract**—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

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\(^\text{83}\) (1916) 43 IA 6
\(^\text{84}\) AIR 1951 SC 144
This section declares that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The section also provides that the same principles will apply where there has been a breach of a quasi-contractual obligation.

The section thus clearly lays down two rules. Compensation is recoverable for any loss or damage—

i. arising naturally in the usual course of things from the breach, or

ii. which the parties knew at the time of the contract as likely to result from the breach.

**Measures of Damages**

Once it is determined whether general or special damages have to be recovered, they have to be evaluated in terms of money. This is the problem of measures of damages and is governed by some fundamental principles.

Damages are compensatory in nature. The object of awarding damages to the 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. If the party takes security deposit from the other for the due performance of the contract, he is entitled to forfeit the deposit on the ground of default when no harm is caused to him on account of such default.

**Liquidated Damages and Penalty**

Where the parties to a contract agree that a specified sum of money shall be payable to the aggrieved party in the event of a breach of contract the sum so agreed represents liquidated damages. A penalty, on the other
hand, is essentially a payment of money stipulated for with the intention of acting as a threat to secure performance and bearing no relation to the actual damage which may be incurred. When a stipulation in the nature of liquidated damages, the plaintiff is entitled to recover that sum, no more and no less.

But if it is a penalty the plaintiff can recover compensation only for the actual damage suffered and if the damages are found greater than the penalty damages is full can be recovered ignoring the penalty.

*Dunlop Pneumatic Tyre Co. v. New Garage* is a leading case on penalties, Lord Dunedin laid down three rules concerning penalty:

- The use of the word ‘penalty’ or liquidated damages’ may prima facie be supposed to mean what they say, yet the expression used is not conclusive.
- The essence of a penalty is a payment of money as in *terrorem* (as warning) of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.
- Whether a sum stipulated is penalty or liquidated damages would be a question of construction of the clause to be decided upon the terms and inherent circumstances of each particular contract, judged as of the time of making the contract, not as at the time of breach.

Indian law is different from English law as to awarding of liquidated damages. The rule for awarding damages is given in Section 74 of the Indian Contract Act. The rule is that where a sum is named in a contract as the amount to be paid in case of breach, regardless whether it is a penalty

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85 [1915] AC 79
or not, the party suffering from breach is entitled to receive reasonable compensation not exceeding the amount so named. The named sum constitutes the maximum limit of liability. The courts cannot order damages beyond that.86

In *Fateh Chand v. Balkishan Dass*,87 the Supreme Court observed as follows: “Section 74 is clearly an attempt to eliminate the somewhat elaborate refinements made under the English Common Law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty…. The Indian Legislature sought to cut across the web of rules and presumptions under the English Common Law by enacting a uniform principle applicable to all stipulations naming the amount to be paid in case of breach and stipulations by way of penalty.”

86 Section 74 of the Indian Contract Act, 1872, Compensation of breach of contract where penalty stipulated for—When a contract has been broken, if a sum is named in the contract as the amount be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss or proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation: A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Explanation: When any person enters into any bail bond, recognisance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation: A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

87 AIR 1963 SC 1405
5.5.2. SPECIFIC RELIEF ACT

Apart from Sections 73-75 of the Act, the Specific Relief Act substantiates few more remedies for breach of contract. In contract law large number of remedial aspects is taken care by the Specific Relief Act, 1963. The network of reliefs allowed by the Specific Relief Act falls under the following outlines:

5.5.2.1. RESCISSION

Rescission is a form of specific relief by which the plaintiff claims for the avoidance of a contract as distinguished from specific enforcement. The contract should be one voidable or terminable at his option. The object of the action is to annul the contract and restore the parties to their original positions in which they stood at the time of the contract. Section 27 gives the circumstances where rescission may be adjudged or refused. Any person interested in a contract may sue to have it rescinded. He may be party to it or he may be a beneficiary under it. The rescission must be adjudged by the court. The essential conditions are:

- The voidable nature of the contract and the party entitled to avoid it elects to do so;
- Contract liable to be determined at the choice of a party and that party chooses to terminate it; and
- The contract being unlawful for which both parties are to blame but for which the defendant is more to blame than the plaintiff.

Where the contract is unlawful for reason apparent on its face the agreement is wholly void.
Specific performance is generally granted by the Court directing the defendant to actually perform the contract according to the terms of the contract. Enforcement of such specific performance happens in circumstances envisaged under Section 10 of the Specific Relief Act.

These could be circumstances where there is no means of ascertaining the actual damage caused by the non-performance of the compensation or money for the non-performance would not adequately compensate the aggrieved party.

However the Specific Relief Act also categorically lays down under Section 14 contracts, which cannot be specifically, enforced being:

- Contracts the non-performance of which would be duly compensated in monetary terms.
- Contracts wherein the details of the contract are so minute that the Court will not be able to enforce specific performance or its material terms.
- Contracts which by nature is determinable.
- Contract the performance of which involved the performance of a continuous duty that the Court cannot supervise.

It is well-settled principle that in a contract of transfer of immovable property time is not the essence of the contract unless it is stipulated so by express terms or by necessary implication. It is equally well-settled that fixation of the period within which the contract has to be performed does not make the stipulation as to time essence of the contract. Specific performance by no means an absolute right, but one which rests entirely on the judicial discretion exercised with reference to facts of each case.
Generally liquidated damages are fixed on the contract more for securing performance.

5.5.2.3. DECLARATORY DECREES

Section 34 of the Specific Relief Act gives the discretion to court as to declaration of status or right. 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. Then the court may in its discretion make a declaration that is so entitled. The plaintiff need not in such suit ask for any further relief. But the court shall not make such a declaration where the plaintiff, being able to seek further relief than a mere declaration of title omits to do so.

A declaration made under this provision 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.

5.5.2.4. PREVENTIVE RELIEFS

One of the methods of giving specific relief is by preventing a party from doing that which he is under an obligation not to do. Obligation is defined as including every duty enforceable by law. Such relief is called preventive relief. Preventive relief is granted at the discretion of the Court by injunction. According to Lord Halsbury, ‘an injunction is a judicial process whereby a party is ordered to refrain from doing or to a particular act or thing’. There are three characteristics of injunction:

- It is a judicial process,
- The relief obtained thereby is a restraint or prevention, and
• The act prevented or restrained is wrongful.

Injunction is generally a remedy that acts in personam and does not run with the subject matter or the property. Such injunction may be:

• Temporary or permanent in nature or
• Preventive or Mandatory in nature,

• Injunctions are generally issued under equitable remedies when damages are not found appropriate to for the loss arising out of breach.

Thus, in this chapter, different provisions of Indian Contract Act, 1872 were discussed. Apart from that, remedies available to aggrieved party for breach of contract was also discussed. It is repeated here that as this study is concerning e-contracts and provisions of Indian Contract Act are applicable to e-contracts, therefore, this discussion was essential.

Having thus discussed about Indian Contract Act and other related aspects regarding breach of contract, we now move to next chapter for application of these basic principles to e-contracts from Indian scenario.