INTRODUCTION

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DEFINITION OF LAW

Law, as it is, is the command of the Sovereign. It means, (1) law has its source in sovereign authority, (2) law is accompanied by sanctions, and (3) the command to be a law should compel a course of conduct. Being a command the law must flow from a determinate person or group of persons with the threat of displeasure if it is not obeyed. Sovereignty is, however, only a part of the state. So, in ultimate sense, law emanates from the state. Thus the term Law is used to denote rules of conduct emanated from and enforced by the state. People living in an organised society have to follow certain common rules, otherwise peaceful living is impossible. It is the function of the State to enforce these rules.

Holland

According to Holland[1], Law is, "a rule of external human action enforced by the sovereign political authority". From this definition it follows that there are three essential characteristics of law.

1. Law is a rule relating to the *actions* of human beings.
2. Law attempts to regulate the *external actions* of human beings.
3. Law is enforced by the State.

Salmond

"Law is the body of principles recognised and applied by the State in the administration of justice."[2]

Woodrow Wilson

Woodrow Wilson[3] defines Law as follows : "Law is that portion of the established habit and thought of mankind which has gained distinct and formal recognition in the shape of uniform

[1] Holland, *Jurisprudence*.
[2] Salmond, *Jurisprudence*.
[3] Woodrow Wilson, *The State*

rules backed by the authority and power of the government." This definition is practically the same as that of Holland.

Anson

Rules regarding human conduct are necessary for peaceful living as well as for progress and development. Anson[1] observes as follows : "The object of Law is Order, and the result of Order is that men are enabled to look ahead with some sort of security as to the future. Although human action cannot be reduced to the uniformities of nature, men have yet endeavoured to reproduce by Law something approaching to this uniformity".

SOCIETY AND LAW

The term 'society' is used to mean a community or a group of persons, living in any region, who are united together by some common bond.

A 'common bond' is formed when some uniformity of factors like nearness, nature of the people, habit, custom, inhibition, beliefs, culture, tradition etc. appears. The 'common bond' lead to forming social rules or rules of social behaviour. The rules are made by members of the society. Disobedience of the rules is followed by punishment in the form of social disapproval. There is no positive penalty associated with the violation of social rules except excommunication or ostracism.

But 'law' unlike social rules, is enforced by the State. Law, according to Holland is "a rule of external human action enforced by the sovereign political authority". The objective of law is to bring order in the society with a view to enable its members to progress and develop with some sort of security regarding the future. (See below)

From the above discussion it follows that although custom, usages and traditions indicate a particular social conduct, law or definitive rules are made to ensure the peace and progress of a society.

The State makes laws. Disobedience of State laws involves a penalty which is enforced by the government through the sovereign power of the State. Whatever is not enforceable is not Law. Laws of the State are applicable to all without exception in identical circumstances.

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[1] Anson, *Law of Contract.*

Law and Social Objectives

Many jurists and social scientists in 19th century interpret the nature of Law with social perspectives. 'Ancient Law' by Henry Maine, is the pioneering work in this respect. According to him, with social advance, law must be framed and changed on the basis social needs. Social scientists like Emile Durkheim, L. T. Hobhouse, Max Weber, etc., observed that moral values rather than the settlement of disputes of interests should be the objective of Law. According to Rosco Pound, Law is profoundly related to the following three elements : (a) the legal structure of the society (b) constitutional ideals and principles and (c) legal procedure. The nature and the principle of Law of a democratic society must be different from that of an autocratic system. It has been accepted on all hands that Law is today one of the imperative tools for performing social purposes.

Change of Law and Change of Social Rules

The legal system of a country reflects the rules of society. If there is a change of social rules usually there occurs a change of law. For example, in the Middle Ages in Europe, the landlord and the feudal system prevailed. At that time the rights of the peasant was very restricted. In modern times when the feudal system was abolished the rights of the peasant and the citizens were enlarged. Therefore change of social rules leads to change of law.

The converse of the above also applies, i.e., change of law leads to change of the rules of society. Legislation has enlarged the rights of Hindu women regarding inheritance, property rights and marital rights. In these cases the change of law has been accepted by the society. We can conclude that there is a dependence between law and social rules and *vice versa.*

RULE OF LAW

The Concept

In earlier times (and in a few countries now) certain classes and individuals possessed special privileges and were judged by special law. The modern view is to apply the same law over all persons in the State and to give all persons equal rights and privileges for the protection of their human liberties. Democracy can remain only in a society of equals.

Three Rules

The concept of equality of all persons before law is the basis of what is called the Rule of Law. The Rule was summarised by Dicey[1] as follows :

1. The Rule of Law states that, "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts." (Dicey). In other words, (a) there must be supremacy of law, (b) no one shall be punished except for definite breach of law and (c) the breach of law must be proved in a duly constituted court of law. No citizen can be arrested or imprisoned, unless he violates specifically any law of the country in force and is accused of a charge by the court. Thus the rule of law implies equal protection of law.

2. In the second place, Rule of law means that, "no man is above law". Every man whatever his rank or condition, is subject to the ordinary law of the State and amenable to the jurisdiction of ordinary tribunals. "What is law—legal right and legal obligation for me—must hold equally as such for all citizens." (Dicey). In other words, Rule of Law means (a) equality before the law, (b) every citizen is subject to the ordinary law of the land and (c) the citizen has to face trial in the same law courts, irrespective of his status or position in the society.

3. In the third place, the Rule of Law is the result of statutes and judicial decisions determining the rights of private persons. Thus the constitutional law of the country follows from the ordinary law of the land.

Comments

The Rule of Law is therefore, no respecter of persons. It is applicable to everybody (from Prime Minister to the convict, and from the millionaire to a beggar). The judiciary must be independent and impartial if the Rule of Law can mean anything real.

Unlike the Indian Constitution, the British Constitution has developed through historical evolution on the basis of common law. The rights of citizens of England are not written in a special document (like Fundamental Rights or a Bill of Rights). They are specified in common law. If an ordinary citizen, or the sovereign power interferes with the legal right of a citizen, the

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[1] A. V. Dicey, *Law of the Constitution.*

remedy is to be sought with the help of common law. Therefore, Dicey observes that the rights of the citizens have been protected by the ordinary law of the country and the Rule of Law. In India, however, there is a written constitution specifying the Fundamental Rights of a citizen.

Criticism

The three principles, which Dicey described in relation to the Rule of Law, have been criticised by many jurists, including I. Jennings, H. Laski and W. A. Robson. The main criticisms are summarised below :

1. *The emergence of Administrative Law* : With the increase of constitutional complexities, the government departments have made many rules framed under various acts. This is known as Administrative Law. There are also special tribunals for the settlement of professional disputes. At the time of Dicey (19th century Great Britain) there existed separate military courts and courts for churchmen. The executive department often uses the arbitrary and prerogative powers in day-to-day's work and for the purpose of performing the administrative work applies the discretionary power in most cases. Therefore, it is apparent that the Rule of Law is breached and the power of the government is far-reaching.

2. *Economic Inequalities* : In order to ensure legal equality Prof. Laski emphasises the need of economic equality. Punishment for the same offence varies because police enforcement is frequently partial. Therefore, from the standpoint of law, the word 'equality' is meaningless, unless there is economic equality followed by Social and constitutional equality.

3. *The supremacy of the Legislature* : The third principle of the Rule of Law is the supremacy of common law. But, in fact, the principal basis of the constitution of England is the supremacy of Parliament. The sovereignty of Parliament in Britain has not been established by the Court. Although the Fundamental Rights of a citizen are established upon the basis of conventional rules and the Court is the protector of those rights, yet Parliament of Britain is the sole authority to bring any change over or to nullify the existing rules. Therefore, it is understood that Parliament is the fundamental basis of the Constitution of England and judging from the standpoint of modern age, the concept of the Rule of Law is only a theoretical

idea. This, however, does not apply to India because the constitution of India is written and there is a provision of fundamental rights in the constitution.

Conclusion

The principle of Rule of Law has been criticised from three viewpoints, *viz.*,(i) the extensive power of Administrative Law, (ii) inequality of income/wealth and (iii) supremacy of the legislature. In spite of these defects, a civilised state must secure the Rule of Law. Otherwise, despotism, authoritarianism and corruption will hold sway on the state. Democracy can be attained only under the Rule of Law. Conversely Rule of Law can be attained only in democracy.

The Rule of Law has many benefits. It protects the liberty and rights of citizens. The Rule of Law creates an atmosphere of peaceful living. This principle, with true education enhances the calibre of citizens, legislators, and voters, thus enabling them to maintain Rule of Law free from its defects and designs of self-seeking persons.

COMMERCIAL LAW OR MERCANTILE LAW

Definition

The laws of a country relate to many subjects, e.g., inheritance and transfer of property, relationship between persons, crimes and their punishment, as well as matters relating to industry, trade and commerce. The term Commercial Law or Mercantile Law is used to include only the last of the aforesaid subjects, *viz.*, rules relating to industry, trade, and commerce.

Commercial Suit

A suit between merchants, bankers, and traders, relating to mercantile transactions is a commercial suit. It follows that all laws which must be referred to in order to decide such suits come within the scope of commercial law. Commercial law or mercantile law may therefore be defined as *that part of law which regulates the transactions of the mercantile community.*

Scope

The scope of commercial law is large. It includes the laws relating to contract, partnership, negotiable instruments, sale of goods, companies etc.

It must be noted that there is no fixed line of division between commercial law and other branches of law, nor is there any conflict or contradiction between them. The law of contract, which is a very important part of commercial law, is applicable not only to merchants and bankers but also to other persons. When a merchant files a suit in a court of law the procedure is not materially different from that of other suits. When a trader commits an offence he is punishable under the criminal law exactly in the same way as any other person. The subjects studied under the heading of commercial law do not form a comprehensive code dealing with all aspects of mercantile activity. Commercial law deals with only those parts of law which are of special importance to the mercantile community. The same laws are applicable to other citizens under appropriate circumstances.

SOURCES OF INDIAN COMMERCIAL LAW

The commercial law of India is based upon statutes of the Indian legislature, English mercantile law and Indian mercantile usages, modified and adapted by judicial decisions.

We are stating below the sources from which the rules of Commercial Law of India have been derived.

1. Statutes of the Indian Legislatures

The legislature is the main source of law in modern times. In India, the Central and the State legislatures possess law making powers and have exercised their powers extensively. The greater part of Indian commercial law is statutory.

2. English Mercantile Law

Many rules of English Mercantile Law have been incorporated into Indian Law through statutes and judicial decisions. English Mercantile Law is a mixture of diverse elements. It contains rules originating from the following sources :

(*i*) Maritime usages which developed during the 14th and the 15th centuries among merchants trading in the European ports. These usages are known as *Lex Mercantoria.*

(*ii*) Rules which developed by custom in England and which constitute what is called the English Common Law.

(*iii*) Rules of Roman Law.

(*iv*) Rules of Equity, *i.e.*, rules which were applied by English Courts of Equity in cases where the common law rules were considered harsh and oppressive.

(*v*) Statutes of the British Parliament.

3. Judicial Decisions or Precedents

Judges interpret and explain statutes. Rules of equity and good conscience are incorporated into law through judicial decisions. Whenever the law is silent on a point, the judge has to decide the case according to his idea of what is equitable. Prior to 1947, the Judicial Committee of the Privy Council of Great Britain was the final court of appeal for Indian cases and its decisions were binding on Indian courts. After, independence, the Supreme Court of India is the final court of appeal. But decisions of the superior English courts like the Courts of Appeal, Privy Council, and the House of Lords, are frequently referred to as precedents which might be followed in interpreting Indian statutes and as rules of equity and good conscience.

4. Custom and Usage

A customary rule is binding where it is ancient, reasonable, and not opposed to any statutory rule. A custom becomes legally recognised when it is accepted by a court and is incorporated in a judicial decision.

EXERCISES

1. Define 'Law' and discuss the theory of 'Rule of Law'. (Pages 1, 3-5)
2. "Change of Law depends upon the change of society". Discuss. (Pages 2–4)
3. What do you understand by Rule of Law? What are the benefits of Rule of Law? (Pages 3–5)
4. "All are equal in the eyes of law". Discuss. (Pages 3–5)
5. Discuss the relationship between Law and Society. (Pages 1–3)
6. What are the sources of Commercial Law in India? (Page 6)
7. Objective questions. Give short answers.
   (*i*) Summarise the Rule of Law in seven lines. (Pages 3–5)
   (*ii*) What good law does to the society? (Page 1)

BOOK I

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1 THE ESSENTIAL ELEMENTS OF CONTRACT

Object and Scope

The Law of Contract deals with agreements which can be enforced through courts of law.

The Law of Contract is the most important part of commercial law because every commercial transaction starts from an agreement between two or more persons.

According to Salmond[1] a contract is "an agreement creating and defining obligations between the parties." According to Sir William Anson[2], "A contract is an agreement enforceable at law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."

The object of the Law of Contract is to introduce definiteness in commercial and other transactions. How this is done can be illustrated by an example. *X* enters into a contract to deliver 10 tons of coal of *Y* on a certain date. Since such a contract is enforceable by the courts, *Y* can plan his activities on the basis of getting the coal on the fixed date. If the contract is broken, *Y* will get damages from the court and will not suffer any loss.

Sir William Anson observes as follows : "As the law relating to property had its origin in the attempt to ensure that what a man has lawfully acquired he shall retain, so the law of contract is intended to ensure that what a man has been led to expect shall come to pass ; and that what has been promised to him shall be performed."

Application

The Indian Contract Act of 1872 (Act IX of 1872) lays down certain general rules regarding contracts. The Act is not exhaustive. There are other Acts relating to particular types of contracts. *e.g.*, the Negotiable Instruments Act, the Transfer of Property Act, etc.

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[1] Salmond, *Jurisprudence.* [2] Anson, *Law of Contract.*

The Contract Act does not affect any usage or custom of trade, or any incident of any contract not inconsistent with the provisions of the Act.—Sec. 1.

Definition of Contract

Section 2(h) of the Indian Contract Act provides that, "An Agreement enforceable by law is a contract". Therefore in a contract there must be (1) an agreement and (2) the agreement must be enforceable by law.

An *agreement* comes into existence whenever one or more persons promise to one or others, to do or not to do something, "Every promise and every set of promises, forming the consideration for each other, is an agreement–Sec. 2(e). Some agreements cannot be enforced through the courts of law, *e.g.*, an agreement to play cards or go to a cinema. An agreement, which can be enforced through the courts of law, is called a *contract.*

The Essential Elements of a Contract

An agreement becomes enforceable by law when it fulfils certain conditions. These conditions, which may be called the Essential Elements of a Contract, are explained below.

1. *Offer and Acceptance* : There must be a lawful offer by one party and a lawful acceptance of the offer by the other party or parties. The adjective "lawful" implies that the offer and acceptance must conform to the rules laid down in the Indian Contract Act regarding offer and acceptance. (See ch. 2)

2. *Intention to create Legal Relationship* : There must be an intention (among the parties) that the agreement shall result in or create legal relations. An agreement to dine at a friend's house is not an agreement intended to create legal relations and is not a contract. But an agreement to buy and sell goods or an agreement to marry, are agreements intended to create some legal relationship and are therefore contracts, provided the other essential elements are present. (See ch. 3)

3. *Lawful Consideration* : Subject to certain exceptions, an agreement is legally enforceable only when each of the parties to it gives something and gets something. An agreement to do something for nothing is usually not enforceable by law. The something given or obtained is called consideration. (See ch. 4)

The consideration may be an act (doing something) or forbearance (not doing something) or a promise to do or not to do something. Consideration may be past (something already done or not done). It may also be present or future. But only those considerations are valid which are "lawful". (What is meant by "lawful consideration" is discussed in ch. 8)

4. *Capacity of Parties* : The parties to an agreement must be legally capable of entering into an agreement, otherwise it cannot be enforced by a court of law. Want of capacity arises from minority, lunacy, idiocy, drunkenness, and similar other factors. If any of the parties to the agreement suffers from any such disability, the agreement is not enforceable by law, except in some special cases. (See ch. 6)

5. *Free Consent* : In order to be enforceable, an agreement must be based on the free consent of all the parties. There is absence of genuine consent if the agreement is induced by coercion, undue influence, mistake, misrepresentation, and fraud. A person guilty of coercion, undue influence etc. cannot enforce the agreement. The other party (the aggrieved party) can enforce it, subject to rules laid down in the Act. (See ch. 7)

6. *Legality of the Object* : The object for which the agreement has been entered into must not be illegal, or immoral or opposed to public policy. (See ch. 8)

7. *Certainty* : The agreement must not be vague. It must be possible to ascertain the meaning of the agreement, for otherwise it cannot be enforced. (See ch. 8)

8. *Possibility of Performance* : The agreement must be capable of being performed. A promise to do an impossible thing cannot be enforced. (See ch. 8)

9. *Void Agreements* : An agreement so made must not have been expressly declared to be void. Under Indian Contract Act there are five categories of agreements which are expressly declared to be void. They are :

1. Agreement in restraint to marriage. (Sec. 26)
2. Agreement in restraint of trade. (Sec. 27)
3. Agreement in restraint of proceedings. (Sec. 28)
4. Agreements having uncertain meaning. (Sec. 29)
5. Wagering agreement. (Sec. 30)

10. *Writing, Registration and Legal Formalities* : An oral contract is a perfectly good contract, except in those cases where writing and/or registration is required by some statute. In India writing is required in cases of lease, gift, sale and mortgage of immovable property : negotiable instruments ; memorandum and articles of association of a company e'c. Registration is compulsory in cases of documents coming within the purview of Section 17 of the Registration Act, *e.g.*, mortgage deeds covering immovable property. The terms of an oral contract are sometimes difficult to prove. Therefore important agreements are usually entered into in writing even in cases where writing is not compulsory.

Conclusion

The elements mentioned above must *all* be present. If any one of them is absent, the agreement does not become a contract. An agreement which fulfils all the essential elements is enforceable by law and is called a contract. From this it follows that, *every contract is an agreement but all agreements are not contracts.*

Every contract gives rise to certain legal obligations or duties on the part of the contracting parties. The legal obligations are enforced by the courts.

The Indian Contract Act contains rules regarding each of the elements mentioned above. These rules are discussed in the subsequent chapters.

SOME DEFINITIONS

In the Law of Contract certain terms are used indicating their meaning. The terms also show that contracts can be classified into four broad divisions, namely, (1) the method of formation of a contract, (2) the time of its performance, (3) its parties, and (4) its legality or validity.

I. *Method of Formation*

(1) Express Contract

Express Contract is one which is expressed in words spoken or written. When such a contract is formed, there is no difficulty in understanding the rights and obligations of the parties. (See pp. 18-19)

(2) Implied Contract

The conditions of an implied contract is to be understood from the acts, the conduct of the parties and/or the course of dealing between them. (See pp. 18-19)

(3) Quasi Contract

There are certain dealings which are not contracts strictly, though the parties act as if there is a contract. The Contract Act specifies the various situations which come within what is called Quasi Contract. (Sections 68–72 ; see Chapter 12 Book I)

II. *The Time of Performance*

(1) Executed Contract

There are contracts where the parties perform their obligations immediately, *i.e.*, as soon as the contract is formed. (See pages 35-36)

(2) Executory Contract

In this contract the obligations of the parties are to be performed at a later time. (See p. 36)

III. *The Parties of the Contract*

(1) Bilateral Contracts

There must be at least two parties to the contract. Therefore all contracts are bilateral or multilateral. (See p. 15)

(2) Unilateral Contract

In certain contracts one party has to fulfil his obligations whereas the other party has already performed his obligations. Such a contract is called unilateral contract.

IV. *Legality or Validity of the Contract*

Contracts can be classified into the following : (1) valid, (2) void, (3) voidable, (4) illegal and (5) unenforceable. These terms are explained in Chapter 5, Book I.

EXERCISES

1. Explain the essential elements of a contract. (Pages 13–14)
2. Define contract. State the essential elements of contract. (Pages 12-13)
3. "All agreements are not contracts, but all contracts are agreements". Discuss the statement explaining essential elements of a valid contract. (Pages 13–14)

2 OFFER AND ACCEPTANCE

DEFINITIONS

Formation of Contract

All contracts are made by the process of a lawful offer by one party and the lawful acceptance of the offer by the other party. *X* says to *Y*, "Will you buy my house for Rs 50,000 ?" This is an offer. If *Y* says, "Yes", the offer is accepted and a contract is formed.

Proposal

An "offer" involves the making of a "proposal". The term proposal is defined in the Contract 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" —Sec. 2(a).

Offer

A proposal is also called an offer. The promisor or the person making the offer is called the offeror. The person to whom the offer is made is called the offeree.

Promise and Acceptance

"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."—Sec. 2(b).

"The person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee'." —Sec. 2(c).

Examples of offer and acceptance :

(*i*) *Specific Offer* : *X* offers to sell his motor car to *Y* at the price of Rs. 5000. This is a proposal. *X* is the promisor or the offeror. *Y* is the offeree. If *Y* agrees to buy the car at the price stated ; *Y* becomes the promisee or the acceptor. There is a contract.

(*ii*) *Specific Offer* : *P* puts up a notice offering to pay a reward of Rs. 5 to any student who finds out and returns a book lost in the college. *Q* a student, reads the notice and then finds and brings the book to *P*. *P*'s notice is an offer and *Q* is the acceptor. There is a contract.

(*iii*) *General Offer* : A transport company runs tramway cars along the streets. This is an offer by the company to carry passengers at the scheduled fares. The offer is accepted when a passenger gets up on a tram with the intention of becoming a passenger.

EFFECT OF OFFER AND ACCEPTANCE

Offer alone and acceptance alone are "inactive", "inert" or "powerless". When separate they cannot lead to the formation of a contract. But an offer *together with* acceptance leads to a contract which is enforceable by the Court, provided the other essential elements of contract exist.

The formation of a contract can be illustrated by the famous 'gunpowder and lighted match' simile of Anson. The materials in a gunpowder (like sulphur, iron fillings, etc.) by themselves are not enough to cause an explosion. But when a lighted match is applied to the inflammable mixture, an explosion occurs. Similarly, offer and acceptance together can explode leading to the formation of a valid contract. But if there is any disqualification on the part of either offer or acceptance, no contract will be formed just as if a gunpowder lacks sulphur or a lighted match is damp no explosion will occur. The idea being clear, we can recall the original saying. "Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance or be revoked before acceptance. Acceptance converts the offer into a promise and then it is too late to remove it." (Anson)

OFFER

Rules regarding offer

The Contract Act contains various rules regarding offer or proposal. They can be summed up as follows :

1. *An offer may be express or may be implied from the circumstances* : An offer may be made in two ways : (i) by words, spoken or written and (ii) by conduct. When an offer is made by stating so in words or in writing, it is called an **Express offer.** When an offer is implied from the conduct of a person, it is called an **Implied offer.** Examples (*i*) and (*ii*) in the last

page, are cases of express offer. Example (*iii*) is a case of an implied offer. (See p. 18)

"In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied"—Sec. 9.

2. *An offer may be made to a definite person ; to some definite class of persons ; or to the world at large* : An offer made to a definite person or a definite class of person is called a **Specific offer.** An offer sent to all persons (or the world at large) is called a **General offer.** Example (*i*) is an offer to a definite person ; example (*ii*) is an offer to a definite class of persons ; and example (*iii*) is an offer to the world at large. (See pp. 17-18)

3. *Legal relationship is required* : The offer must be one which is capable of creating a legal relationship. A social party or an invitation to play cards is not a legal relationship. Therefore, an offer to such an affair does not lead to a binding contract. (See chapter 3, Part I, p. 33)

4. *The terms of the offer must be certain, definite, unambiguous and not vague* : X says to Y, "I will give *some* money if you marry Z". This is not an offer which can be accepted because the amount of money to be paid is not certain.

5. *A mere statement of intention is not an offer* : A distinction is usually made, between an "offer" and "a statement of intention". Price-lists and catalogues, and enquiries for customers are merely statements of intention. They are not regarded as offers but as *invitation* to others to made offers. An advertisement in a newspaper or elsewhere may be so worded that it amounts to an offer. But ordinarily and advertisement is considered to be an invitation to make offers. Similarly, in an auction sale, articles are displayed with an intention that the bidders present may bid for them i.e. may make an offer. Thus in an auction sale a bid is an offer while the fall of the hammer signifies the acceptance of the auctioner. (*Payre* v. *Cave*)

Examples :

(*i*) *Intention to sell* : A lable on an article in a shopkeeper's showcase stating 'price Rs. 5' is considered to be the expression of an intention to sell the article at Rs 5. It is not an offer to the world at large which can be accepted by anybody. The intending purchaser who wishes to buy the article is the proposer. The shopkeeper may

or may not accept the proposal. The same rule applies to price-list and catalogues. *Fisher* v. *Bell.*[1]

(*ii*) *Quotation of prices* : A quotation of prices is not an offer, but an invitation for offers. *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirazee.*[2] This is true of many common forms of advertisement.

(*iii*) *Advertisements* : A newspaper advertisement inviting applications for a job or inviting tenders for some work is not an offer. It is only an invitation to make offers. The applicants who reply to the advertisement are the proposers or offerors. The advertiser is free to accept any one of the applications.

(*iv*) *Catalogue* : A banker's catalogue of charges is not an offer. *Bank of Travancore* v. *Dhirt Ram.*[3]

(*v*) *Time-table* : A railway time-table is not an offer. Therefore if a train does not work according to the table, the ticket-holder cannot file a case for breach of contract.

(*vi*) *Question and Reply* : *H* telegraphed to *F* asking the latter to inform him whether he would sell Bumper Hall Pen and if so at what price. *F* informed *H* that the lowest price was £900 but did not say that he was willing to sell at that price. *H* telegraphed that he would buy at that price. *F* gave no reply to the telegram. Held, there was no contract because neither the question of *H* nor the reply of *F* constituted an offer. *Harvey* v. *Facey.*[4]

(*vii*) *Auction* : When particular goods are advertised for sale by auction the auctioneer does not contract any one who attends the sale intending to purchase those goods that they shall be actually put up for sale. *Harris* v. *Nickerson.*[5]

6. *An offer must be communicated to the offeree* : A person cannot accept an offer unless he knows of the existence of the offer. *P* offers a reward to anyone who returns his lost dog. *Q* finding the dog brings it to *P* without having heard of the offer. Held, he was not entitled to the reward. *Fitch* v. *Snedaker.*[6] In this case it was argued that a man cannot accept an offer without intending to do so, and he cannot intend to accept an offer of which he was ignorant. In *Lalman* v. *Gauri Dutt,*[7] *G* sent his servant *L* in search of his missing nephew. Subsequently *G* announced a reward for information concerning the boy. *L* brought back the missing boy, without having known of the reward. Held, there was no contract between *L* and *G* and the reward cannot be claimed.

[Communication of Offer and Acceptance.—See p. 26]

[1] (1961) 1 Q B. 394
[2] (1919) 37 Mad. L.J. 712
[3] AIR (1942) Privy Council 6
[4] (1893) A. C. 552
[5] (1873) L. R. 8 Q. B. 286
[6] 30 N. Y. 248
[7] 11 A. L. J. 489

7. *An offer may be conditional* : An offer may be made subject to conditions. In such cases, the conditions must be clearly communicated to the offeree. If a person accepts an offer without knowledge of the conditions, the offeror cannot claim fulfilment of the conditions. But if the conditions are clearly written or expressed and should have been known to the offeree, he cannot plead ignorance of the conditions.

Examples :

(*i*) *Strict enforcement* : *X* agreed to buy goods from *Y* and signed an order form given by *Y* containing a number of clauses in small print, without reading them. Held, clauses were binding on *X*. *L'Estrange* v. *Graucob Ltd.*[1]

(*ii*) *Strict enforcement* : *T*, who could not read, took an excursion ticket on the railway. On the front of the ticket was printed "for conditions see back". One of the conditions was that the railway company would not be liable for personal injuries to passengers. *T* was injured by a railway accident. Held, *T* was bound by the conditions and could not recover any damages. *Thomson* v. *L. M. & S. Rly.*[2]

(*iii*) *No reasonable notice* : *R* booked her passage on a ship and received a ticket folded in such a way that no writing was visible. On the ticket were printed certain conditions in small type, one of which was that the shipowner's liability was limited to £100. *R* knew that there was printing on the ticket but did not know that the printing related to conditions of the contract. Held, *R* was not bound by the conditions as she did not know of their existence, and having regard to the smallness of the type in which they were printed, the absence of calling of attention to them, the shipowner had not given reasonable notice of them. *Richardson* v. *Rawntree.*[3]

(*iv*) *Against public interest* : *M* delivered one new sari to a laundry for washing. On the back of the printed receipt it was stated that the customer would be entitled to recover only 15% of the market-price of the article in case of loss. The sari was lost owing to the negligence of the laundry. In a suit by *M* it was held that the term was unreasonable. Such a term would give a premium on dishonesty and is against the public interest. *Lily White* v. *R. Munnuswami.*[4]

(*v*) *Unreasonable* : In a Karnataka case, a laundry would pay only 8% of the price in case of loss. The court held that the term was unreasonable. *M. Siddalingappa* v. *T. Nataraj.*[5]

Comments : A contract formed on a *conditional offer* is valid. The terms of the contract can be constructed strictly or

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[1] (1934) 2 K. B. 394
[2] (1930) 1. K. B. 41
[3] (1894) A. C. 217
[4] AIR (1966) Mad 13
[5] AIR (1970) Mys 154

leniently. Formerly, all contracts were constructed and enforced strictly. See examples (*i*) and (*ii*), above. In recent times, however, the courts have adopted various protective measures for the aggrieved persons. Conditional offers are invalid under the following circumstances :

(1) Lack of reasonable notice. Example (*iii*)
(2) Unreasonable terms. Example (*iv*) and (*v*)
(3) Breach of fundamental rights.
(4) Tortious action by offeror.

8. *Printed Contracts* : Printed Contracts (or Standard Forms of Contracts) often contain a large number of terms and conditions which exclude liability under the contract. For examples, the Life Insurance Corporation of India, the Railway Administration, Statutory Corporation and big companies issue printed forms of contract. The individual is bound to sign them whether he likes the terms or not. Previously, the offerees of such printed forms were helpless against the massive organisations like those above. These organisations have availed of the opportunity to exploit the weak individual by imposing onerous terms upon them. Therefore, nowadays in order to protect the oppressed individual the courts have evolved various modes of protection. (See last para)

ACCEPTANCE

Who can accept ?

An offer can be accepted only by the person or persons for whom the offer is intended. An offer made to a particular person can only be accepted by him because he is the only person intended to accept. An offer made to a class of persons can be accepted by any member of that class. An offer made to the world at large can be accepted by any person whatsoever. *X* sold his business to *Y* without disclosing the fact to his customers. *Z* sent an order for goods to *X* by name. *Y* received it and sent a letter of acceptance. Held, there was no contract between *Y* and *Z* because *Z* never made any offer to *Y*. *Boulton* v. *Jones*.[1]

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[1] (1857) E. R. 232

Rules regarding acceptance

The acceptance of an offer to be legally effective must satisfy the following requirements :

1. *It must be an absolute and unqualified acceptance of all the terms of the offer.*—Sec 7(1). If there is any variation, even on an unimportant point, between the terms of the offer and the terms of the acceptance, there is no contract.

Examples :

(*i*) *M* offered land to *N* at £280. *N* replied accepting and enclosing, £80, and promising to pay the balance by monthly instalments of £50. Held, there was no contract, as there was no unqualified acceptance. *Neale* v. *Merrett*.[1]

(*ii*) *P* offered to buy *Q*'s mare on *Q* giving a guarantee that the mare was *quite* in harness. *Q* guaranteed that the mare was "*quiet in double harness*". Held, no acceptance. *Jordan* v. *Norton*.[2]

2. *Conditional Acceptance* : In accordance with English law as well as with the terms of the Contract Act, an acceptance with a variation is no acceptance ; it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made. *X* offered to sell his house for Rs. 12,000. *Y* said, "accepted for Rs. 10,000." This is not an acceptance but a *counter offer or counter proposal. Kundan Lal* v. *Secretary of State*[3] ; *Hyde* v. *Wrench*.[4]

But an acceptance is not called 'conditional' if an immaterial term is added or if there occurs any misunderstanding between the parties for the interpretation of collateral terms.

3. *Contracts subject to condition* : There are cases where an "immediate binding contract is formed although some of the parties' rights and obligations may be dependent upon the happening of a particular event. For example, the agreement may contain such a term as 'subject to the purchaser's solicitors approving the title." *Smith* v. *Butler*[5]. (Anson—*Law of contract*, p. 54)

4. *Clarification* : The seeking clarification of offer neither amounts to the acceptance of the offer nor to the making of a counter offer. Cheshire and Fifoots' *Law of Contracts*, 9 Edn.

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[1] (1930) W.N. 189
[2] (1838) 4 M. & W. 155
[3] (1939) 14 Luck, 710
[4] (1840) 3 Bev. 334
[5] (1900) 1 Q. B. 694

p. 34 ; *U. P. State Electricity Board and another* v. *M/s Goel Electric Stores, Chandigarh.*[1]

5. *The acceptance must be expressed in some usual or reasonable manner* :—Sec 7(2). The offeree may express his acceptance by word of mouth, telephone, telegram or by post. These are the usual methods of communicating acceptance to the offeror. [Communication.—See p. 26]

An offer may also be accepted by conduct. If the offeree does what the offeror wants him to do, there is acceptance of the offer by conduct. Section 8 of the Act states that, "Performance of the conditions of a proposal or the acceptance of any consideration for reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

Examples :

(*i*) *Oral or by writing. P* offers to buy *Q*'s bicycle at Rs. 50. *Q* may accept this offer by stating so orally or through telephone or by writing a letter or by sending a telegram to that effect.

(*ii*) *Conduct.* A company offered £100 to anyone who contracted influenza after using their smoke ball 3 times daily for 2 weeks. Mrs. Carlill used the smoke ball but nevertheless got influenza. She claimed the reward. The company objected, that she should have notified them for her acceptance of the offer. Held, the use of the smoke ball by Mr. Carlill constituted acceptance of the offer by conduct, and no formal notice of acceptance was necessary. *Carlill* v. *Carbolic Smoke Ball Company.*[2]

(*iii*) *Conduct.* A widow invited her niece to stay with her in her residence and promised to settle on her a particular immovable property. The niece stayed with her in residence till her death. Held, (by the Privy Council) that the niece was entitled to the property because she had accepted the aunt's offer by going to her residence and staying with her as desired. *V. Rao* v. *A Rao.*[3]

6. *Mental acceptance or uncommunicated assent does not result in a contract* : No contract is formed if the offeree remains silent and does nothing to show that he has accepted the offer. Acceptance must be communicated to the offeror or shown by conduct.

Acceptance cannot be implied from silence of the offeree. See example (iii).

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[1] AIR (1977) All 494 [2] (1893) 1 Q. B. 256
[3] (1916) 39 Mad 509 (Privy Council)

Examples :

(*i*) *F* offered to buy *B's* horse for £30, saying, "If I hear no more about him I shall consider the horse as mine at £30." *B* did not reply. Held, there was no contract because there was no communication of acceptance. Mental acceptance or uncommunicated assent does not result in a contract. *Felthouse* v. *Bindley*.[1]

(*ii*) A person received an offer by letter ; he wrote on the letter "accepted", put the letter in his drawer and forgot all about it. Held there was no contract because the other party was not informed. *Brogden* v. *Metropolitan Rly Co*.[2]

(*iii*) *Insurance proposal* ; Acceptance is complete only when it is communicated to the offeror. Silence or receipt and retention of premium cannot be construed as acceptance. *Life Insurance Corporation of India* v. *Raja Vasireddy Komalavalli Kamba and others*.[3] (See Law of Insurance, ch. 1)

7. *The mode of acceptance* : Where the promisor prescribes a particular mode of acceptance, the offeree must follow the particular mode of acceptance. For example, if the offeror says, "acceptance to be sent by telegram", the offeree must send a telegram. If the offeree fails to follow the prescribed mode of acceptance, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that the proposal be accepted in the prescribed manner and not otherwise. But if the proposer does not insist upon it, he accepts the acceptance as actually communicated.—Sec 7(2). Thus, under the Indian law the proposer has the option of waiving compliance with the prescribed mode of acceptance.

Example :

X offers to buy a certain quantity of coal from *Y* at a certain price and asks *Y* to send a telegram if he accepts, *Y* writes a letter accepting the offer. *X* may insist on a telegram from *Y*; but if *X* does not so insist, the acceptance is good.

8. *Time of Acceptance* : (It the offeror prescribes a time, the acceptance must be done within that time. If no time is prescribed the acceptance must be done within *reasonable time*.) What is 'reasonable' depends on the facts of the case. See the Case of *Ramsgate Victoria Hotel Co.* v. *Montefiore* (Page 29).

9. *When acceptance is complete* : Section 4 of the Contract Act lays down that the communication of an acceptance is

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[1] (1862) 11 C.B.N.S. 869 [2] (1877) A.C. 666

[3] AIR (1984) Supreme Court 1014

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

Examples :

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

(*ii*) *B* accepts *A*'s proposal by a letter sent by post. The communication of the acceptance is complete—as against *A*, when the letter is posted, as against *B*, when the letter is received by *A*.

10. *Before Offer* : Acceptance must be given before the offer. This is the natural sequence. There cannot be acceptance before the offer is given from any person. See the case of *Lalman* v. *Gauri Dutt*. (Page 20)

11. *The acceptance must be made while the offer is in force, i.e.*, before the offer has been revoked or the offer has lapsed. How an offer is revoked is described below. (See page 29).

COMMUNICATION OF OFFER AND ACCEPTANCE

Section 3 of the Contract Act states as follows : The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation or which has the effect of communicating it.

How is an Offer to be Communicated ?

An offer may be communicated to the offeree or offerees by word of mouth, by writing or by conduct. A written offer may be contained in a letter or a telegram. A circular or advertisement or a notice may be written in such a language that it amounts to an offer. A tramway car and a bus going along a street and picking up passengers are examples of offers by conduct.

Section 4 states : "The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made."

How is an acceptance to be Communicated ? (See p. 23)

Offer and Acceptance by Post

An offer may be made by post. An offer may also be accepted by post, if there is no other mode of acceptance specially prescribed by the proposer. When a proposal is made through the post, the post office is by implication the *agent* of the proposer. Therefore a letter of acceptance duly addressed and posted is sufficient acceptance even though the letter does not actually reach the proposer. (Notice to an agent is considered to be notice to the principal). The letter must, however, be correctly addressed. The letter must be actually posted. It is not enough to give it to somebody to post. See example (ii) in para 9, p. 25.

Examples :

(*i*) *G* applied for shares in a company. A letter of allotment was posted but the letter did not reach *G*. Held there was a binding contract and *G* was a shareholder of the company. *Household Fire Insurance Co.* v. *Grant.*[1]

(*ii*) A registered envelope was tendered by the postman to the addressee, who refused to accept it. It is to be presumed that the addressee has the knowledge of the content thereof. *Har Charn Singh* v. *Shiv Rani and Others.*[2]

Offer and Acceptance through Telephone

Offer and acceptance can be communicated through the telephone. But there are certain rules regarding oral communication. It has been held that the offer and acceptance must be *audible, heard and understood.* It these conditions are satisfied and the other essential elements of contract exist, the parties are bound through a telephone conversation. The High Court judgment about this matter is quoted below. "Now, when the parties negotiate a contract orally in the presence of each other or over telephone and one of them makes an oral offer to the other, it is plain that an oral acceptance is expected, and the acceptor must ensure that his acceptance is audible, heard and understood by the offer. The acceptance in such a case must be by such words which have the effect of communicating it." *Kanhaiylal* v. *Dineshwar Chandra.*[3]

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[1] (1877) 4 Ex. D. 216

[2] AIR (1981) Supreme Court 1284

[3] AIR (1959) M P 234

In an English court it was held that a communication, sent through a telex or a teleprinter machine in the office, is valid. A contract made by "telex" was no exception to the general rule that acceptance is not complete until communicated. *Entores Ltd.* v. *Miles Far Eastern Corporation.*[1]

Microphone

There was an auction sale of plots of land. The terms, including certain restrictive conditions, were announced by a microphone. The Supreme Court held, "Microphones have not yet acquired notoriety as carriers of binding representations. Promises held out over loudspeakers are often claptraps of politics." *Banwari Lal* v. *Sukhdarshan Dayal.*[2]

OPTIONS

An option is a conditional contract to do something. Suppose that *P* the owner of a house, agrees in consideration of Rs. 200, to give *Q* an option to buy the house within six months at a certain price. This is a contract binding upon *P* to allow *Q* to purchase the house at the agreed price at any time within six months. A promise to keep an offer open to acceptance for a certain time is not binding on the proposer unless there is a consideration separately given for that promise, as in the example given above.

STANDING CONTRACT AND OPEN PROPOSALS

Contracts for the supply of goods over a period of time are some times so worded that the buyer has an option as regards the quantity to be purchased and the time of purchase. Such contracts are called "Standing Contracts" or "Open Proposals".

Examples :

P signed a tender addressed to the London County Council, agreeing, on acceptance, to supply all the goods specified in the schedule, to the extent ordered. The tender was accepted but the L. C. C. did not order any goods. Held, the L. C. C. was not bound to order any goods, but if it did so, *P* was bound to deliver the goods as and when ordered. *Percival Ltd.* v. *L.C.C.*[3]

In such cases as above, a contract comes into existence when a definite quantity is ordered. *Bengal Coal Co.* v. *Wadia.*[4]

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[1] (1955) 2 Q. B. 327
[2] (1973) ISCC 2941 (Supreme Court)
[3] (1918) 87 L.J.K.B. 677
[4] (1900) 24 Bom 97

REVOCATION

Revocation of an Offer. When does an Offer Lapse ?

An offer comes to an end, and is no longer open to acceptance under the following circumstances.—Sec 6.

1. By notice

If the offeror gives notice of revocation to the other party, *i.e.*, expressly withdraws the offer, and the offer comes to an end. An offer may be revoked any time before acceptance but not afterwards. Once an offer is accepted there is a binding contract. The acceptance of an offer becomes binding on the offeror as soon as the acceptance is put in course of communication to the offeror so as to be out of the power of the acceptor. But any time before this happens the offer may be revoked. A proposal is sent by *X* to *Y* and is accepted by *Y* by letter. The proposal might have been revoked any time before the letter of acceptance was posted but it cannot be revoked after the letter is posted.

The notice of revocation does not take effect until it comes within the knowledge of the offeree.

2. By lapse of time

When the proposer prescribes a time within which the proposal must be accepted, the proposal lapses as soon as the time expires.

3. After expiry of reasonable time

If no time has been prescribed, the proposal lapses after the expiry of a reasonable time. What is reasonable time will depend on the circumstances of the case.

Example :

On 8th June, *M* offered to take shares in *R* company. He received a letter of allotment on 23rd November. *M* refused to take the shares. Held, *M* was entitled to refuse as the offer had lapsed by the delay in acceptance. *Ramsgate Victoria Hotel Co.* v. *Montefiore*.[1]

4. By failure of a condition precedent

An offer lapses by the failure of the acceptor to fulfil a condition precedent to acceptance, where such a condition has been prescribed.

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[1] (1866) L. R. 1 Ex. 109

Example :

P says to *Q*. "I will sell my house at Delhi to you for Rs. 50,000 if you are married." The offer cannot be accepted until and unless *Q* is married.

5. By death or insanity

An offer lapses by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

6. Counter Offer

When a counter offer is given, the original offer lapse. See the Case of *Hyde* v. *Wrench*. (Page 23)

7. By refusal

A proposal once refused is dead and cannot be revived by its subsequent acceptance.

Example :

A offers to sell his farm to *B* for Rs. 1,000. *B* replies offering to pay Rs. 950. *A* refuses. Subsequently *B* writes accepting the original offer. There is no contract because the original offer has lapsed.

Revocation of Acceptance

Section 5 of the Contract Act provides that an acceptance can be revoked any time before the acceptance comes to the knowledge of the proposer but not afterwards.

Example :

P proposes, by a letter sent by post, to sell his house to *Q*. *Q* accepts the proposal by a letter sent by post. *Q* may revoke his acceptance any time before the letter communicating it reaches *P* but not afterwards.

The English law on this point is different. Under English law an acceptance is irrevocable once it is put in course of communication to the offeror. Thus in the above example *Q* could not have revoked the acceptance once he had posted the letter of acceptance.

Communication of Revocation

According to Section 3 of the Act, the revocation of a proposal or an acceptance is deemed to be made by any act or omission of the party by which he intends to communicate such revocation, or which has the effect of communicating it.

According to Section 4 of the Act, the communication of revocation is complete—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Examples :

(*i*) *P* makes a proposal to *Q*. *Q* sends a letter of acceptance. Subsequently *Q* revokes his acceptance by telegram. *Q*'s revocation is complete, as against *Q* when the telegram is despatched, and as against *P* when it reaches him.

(*ii*) *A* revokes his proposal by telegram. The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it. *B* revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

EXERCISES

1. When is an offer completed ? How and when may an offer be revoked ? (Pages 25-26, 29-31)
2. (a) How may an offer be terminated ? (Pages 26-28)
   (b) *A* offers to sell *B* his horse for Rs. 1000 and tells *B*. 'This offer will remain open one week'. The following day *B* reject the offer. Within the week *B* changes his mind and notifies *A* that he accepts the offer. Is there a contract ? (Para 6, Page 30)
3. "Acceptance is to offer what a lighted match is to a train of gunpowder". Discuss. (Page 18)
4. "An offer is made when, and not until, it is communicated to the offeree". Explain with illustrations. (Para 6, page 20)
5. Define offer and acceptance. When are offer and acceptance deemed to be complete if made through post ? (Pages 17, 27)
6. State how offer is made, revoked and accepted. What are the rules when offer is made through post office and over the telephone. (Pages 17, 22, 27-28)
7. "A mere mental acceptance, not evidenced by words or conduct is in the eye of law no acceptance." Explain. (Para 6, pages 24-25)
8. Define the term 'Acceptance' What are the essential of a valid acceptance ? (Pages 17, 22-26)
9. "Acceptance must be absolute, and must correspond with the terms of the offer.' Discuss with suitable illustration. (Para 1, page 23)

10. (*a*) Explain the meaning of the terms, Offer and Acceptance. (Page 17)

    (*b*) (*i*) *A* offers to sell his goods to *B* by a letter posted on 1st March. *B* receives *A*'s letter on 3rd March. Can *A* revoke his offer? (Page 30)

    (*ii*) *B* posts his letter of acceptance on 4th March. *A* receive *B*'s acceptance on 6th March. Can *B* revoke his acceptance? (Page 30)

11. (*a*) Define a proposal. (*b*) How is an offer communicated? (Pages 17, 18-22)

12. Objective questions. Give short answers :

    (*i*) What is meant by acceptance by conduct ? Give one example. (Page 24)

    (*ii*) "An advertisement to sell a thing by auction is (*a*) an offer (*b*) an invitation (*c*) no offer at all." What is the best alternative? (Page 19)

13. Problems :

    (*a*) *A* proposes, by a letter sent by post, to sell his house to *B*. *B* accepts the proposal by a letter sent by post. When *A* revokes his proposal or *B* his acceptance? (Pages 30-31)

    (*b*) *X* offers to sell a house in Calcutta to *Y* for Rs. 50,000. The offer is communicated to *Y* in Bombay by an express letter. The letter is delayed in the censor's office. Before *X*'s letter reaches *Y*, *Y* receives a telegram from *X* revoking his offer. Advise *Y*. (Pages 30-31)

    (*c*) *A* proposes by a letter sent by post to sell his house to *B*. *B* accepts the proposal by a letter sent by post. When can *B* revoke this acceptance? (Pages 19-20)

    (*d*) *A* offers a reward to whosoever shall do a certain thing. *B* does the thing, not knowing of the advertised reward. Is *A* bound to pay the reward to *B*? (Pages 19-20)

    (*e*) *A* duly posts a letter of acceptance to *B*. But the letter is lost in transit by the negligence of the Post Office. What is the effect? (Page 26)

3 INTENTION TO CREATE LEGAL RELATIONS

An agreement does not become a binding contract unless there is an intention to enter into legal relations. The parties must intend that the transaction should be attended by legal consequences and create legal obligations. The intention of the parties is to be gathered from the terms of the agreement and the surrounding circumstances. In arriving at a conclusion as to what is the interest of the parties the courts usually apply an objective and not subjective test. Any way it is upto the courts to decide whether the parties have intended to enter into legal obligations.

A contract, however, is defined as an agreement enforceable by law. An agreement which does not create any legal obligation will not be enforced by law. Hence such an agreement is not a contract. *X* offers to play cards with *Y* for pleasure and *Y* accepts. In later on *X* refuses to do so, *Y* cannot go to the courts for enforcing the promise. Hence, such an offer does not create a contract. The courts of law are not concerned with enforcing social obligations. They deal with legal obligations. *Balfour* v. *Balfour.*[1]

"Agreeing to agree"—See, Uncertain ; Agreements, ch. 8.

Examples :

(*i*) *D*, agrees to go to a cinema with *B*. This is not a contract enforceable by law because going to a cinema is not a legal matter.

(*ii*) *R* Company made an agreement with *G* Company whereby they were made agents of the latter. One clause in the agreement was as follows : "This arrangement is not entered into as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts". Held, there was no intention to create any legal relation ; hence there was no contract. *Rose and Frank Co.* v. *Crompton Bros. Ltd.*[2]

(*iii*) A company agreed with *V* that on expiration of *V*'s existing contract, they would "favourably consider" the renewal of his contract. Held, no obligation was created to renew the contract. *Montreal Gas Co.* v. *Vasey.*[3]

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[1] (1919) 2 K.B. 571
[2] (1925) A. C. 445
[3] (1900) A. C. 595

EXERCISES

1. Discuss—"The offer must be one which in its natural meaning may be taken to contemplate and which is capable of creating legal relations." (Page 33)
2. Explain : "In order that an offer may be made binding by acceptance, it must be made in contemplation of legal consequences. (Page 33)

4 CONSIDERATION

Definition of Consideration

Consideration is an essential element in a contract. Subject to certain exceptions, an agreement is *not* enforceable unless each party to the agreement gets something. This "something" is called consideration. It is used in the sense of quid pro quo i.e. something in return.

In the English case, *Currie* v. *Misa*,[1] consideration was defined as, "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Section 2(d) of the Contract Act defines consideration as follows : "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."

Examples

(*i*) *P* agrees to sell a house to *Q* for Rs. 80,000. For *P*'s promise, the consideration is Rs. 80,000. For *Q*'s promise, the consideration is the house.

(*ii*) *H* engages *Q* as a clerk in his office for Rs 1000 a month. The monthly wage is the consideration received by *Q*; the services of *Q* constitute the consideration received by *H*.

(*iii*) *X* promises not to file a suit against *Y* if *Y* pays him Rs. 100 by a fixed date. The forbearance of *X* is the consideration for *Y*'s payment.

Types of Consideration

Consideration may be classified into three types, as follows :

1. ***Past consideration*** : When the consideration of one party was given before the date of the promise, it is said to be past. Suppose that *X* does some work for *Y* in the month of January (without expecting any payment). In February *Y* promises to pay him some money. The consideration of *X* is past consideration.

[1] (1875) L.R. 10 Ex 162

Under English law past consideration is no consideration and a contract based on past consideration is void. But under Indian law a past consideration is good consideration because the definition of consideration in Section 2 (d) includes the words "has done or abstained from doing".

2. *Present consideration* : Consideration which moves simultaneously with the promise is called Present Consideration or *Executed Consideration*. *B* buys an article from a shop and pays the price immediately. The consideration moving from *B* is present or executed consideration.

3. *Future consideration* : When the consideration is to move at a future date, it is called Future Consideration or *Executory Consideration*. In a contract the consideration may be executory on both sides. A promise may support a promise. Thus a promise to pay money at a future date for goods to be delivered at a future date is a valid contract.

Rules (or the Essential Factors) of Consideration

The following rules may be laid down regarding consideration :

1. *Desire (or request) of the promisor is essential* : The act done or loss suffered by the promisee must have been done or suffered at the desire of the promisor. An act done without any request is a voluntary act and does not come within the definition of consideration.

Examples :

(*i*) *P* sees *Q*'s house on fire and helps in extinguishing it. *Q* did not ask for his help. *P* cannot demand payment for his services.

(*ii*) The Collector of a district asked *D* to spend some money on the improvement of a market and he did so. *D* cannot demand payment from the shopkeepers using the market for having improved the market. *Durga Prasad* v. *Baldeo*.[1]

(*iii*) *X* promised to pay *Y* some money by a letter. *Y* showed the letter to *Z* who thereupon consented to the marriage of her daughter with *Y*. *Z* cannot force *X* to pay the money to *Y* because there is no connection between the marriage and the promise to pay. *Dashwood* v. *Jermyn*.[2]

2. *The consideration must be real* : The consideration must have some value in the eye of law. It must not be sham or illusory.

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[1] (1880) 3 All. 221 [2] 12 Ch. D. 776

The impossible acts and illusory or non-existing goods cannot support a contract. Therefore, real consideration comes from good consideration. (See p. 39)

A contribution to charity is without consideration. Therefore, it is not real consideration. (See p. 38)

Examples :

(*i*) *Illusory consideration* : *G* promises for no consideration, to give *H* Rs 1,000. This is a void agreement. No consideration, no contract.

(*ii*) *Impossible act* : *X* promises to supply *Y* one *tola* of gold brought from the sun. The consideration is sham and illusory and there is no contract.

(*iii*) *No consideration* : *V* owed £208 to *E* who told *V* that if the money was not paid by 7th July he would file a bankruptcy petition against *V*. Thereupon *V* promised to pay the money before 12 o'clock on 8th July and *E* agreed not to file the petition before that time. Held, there was no consideration for *E*'s promise. *Vanburgen* v. *St. Edmunds Properties Ltd.*[1]

Example (*iii*) above illustrates the rule that a promise to do what one is already bound to do (whether under the law or under an existing contract) confers no additional benefit and is of no value. The consideration is unreal. A promise to pay an existing debt punctually if the creditor gives a discount is without consideration and the discount cannot be enforced.

3. *Public duty* : "Where the promise is already under an existing public duty, an express promise to perform, or performance of, that duty will not amount to consideration. There will be no detriment to the promisee or benefit to the promisor over and above their existing rights and liabilities"[2] *Example* : A contract to pay money to a witness who has received a subpoena to appear at a trial. *Collins* v. *Godefroy*.[3]

4. *Promise to a stranger* : But a *promise made to a stranger* to perform an existing contract, is enforceable because the promisor undertakes a new obligation upon himself which can be enforced by the stranger. *X* wrote to his nephew *B*, promising to pay him an annuity of £150 in consideration of his marrying *C*. *B* was already engaged to marry *C*. Held, the fulfilment of *B*'s contract with *C* was consideration to support *X*'s promise to pay the annuity. *Shadwell* v. *Shadwell*.[4]

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[1] (1933) 2 K. B. 223
[2] Anson, *Law of Contract*, p. 96
[3] (1831) IB & AD. 950
[4] (1860) 9 C.B.N.S. 159

5. *Consideration need not be adequate* : Section 25 (explanation 2) provides that, "An agreement to which the consent of the party is freely given is not void merely because the consideration is inadequate ; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given."

The reason behind this rule is that it is impossible for the court to decide what is adequate consideration. The parties to the contract must decide the quantum of consideration and, if consent was freely given, the court will enforce the agreement.

If the consideration is inadequate, the Court may hold that consent of the promisor was not freely given and the agreement may become void.

"Consideration" means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'Consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. *Sonia Bhatia* v. *State of U. P. and others.*[1]

Examples :

(*i*) *P* agrees to sell a horse worth Rs 1000 for Rs. 10. *P*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(*ii*) *D* promises to *B* to sell land in Calcutta at Rs. 10 per cottah. The agreement is valid provided the consent of *D* was freely given.

(*iii*) *S* files a suit against *B* for Rs. 5,000. Subsequently he agrees to withdraw the suit on payment of Rs. 3,000. The agreement is a contract. The withdrawal of a suit is valuable consideration so as to support the promise to pay money.

6. *The consideration must not be illegal, immoral, or opposed to public policy* : If either the consideration of the object of the agreement is illegal, the agreement cannot be enforced. The same principle applies if the consideration is immoral or opposed to public policy. [See, Section 23 and ch. 8 for examples of such agreements.]

7. *The consideration may be present, past, or future* : This follows from the definition of consideration given in the Act.

[1] AIR (1981) Supreme Court 1274

8. *Consideration may move from the promisee or from any other person* : A person granted some properties to his wife *C* directing her at the same time to pay an annual allowance to his brother *R*. *C* also entered into an agreement with *R* promising to pay the allowance to *R*. This agreement can be enforced by *R* even though no part of the consideration received by *C* moved from *R*. *Chinnaya* v. *Ramaya*.[1] A stranger to the consideration can sue to enforce the contract, though a stranger to the contract cannot. In England, a stranger to the consideration cannot sue on the contract.

9. *What is good consideration* ? : The rules or the necessary factors for consideration can be summed up as follows : (1) There must be desire of the promisor ; (2) it must be real ; (3) reasonable ; (4) not illegal, immoral or opposed to public policy ; (5) present, past or future ; and (6) from the promisee or any person.

Subject to the above essential factors, a good consideration can be any of the following : (1) physical goods ; (2) services ; (3) forbearance (for example not to sue) ; (4) arbitration or the compromise of disputed claims, and (5) settlement or composition with creditors.

DIFFERENCES BETWEEN ENGLISH AND INDIAN LAW REGARDING CONSIDERATION

In England, a distinction is made between Formal Contracts and Simple Contracts. A Formal Contract is one which is (*a*) in writing or printed, (*b*) signed, (*c*) sealed, and (*d*) delivered to the other party. All other contracts are called Simple Contracts. Under English law, Formal Contracts do not require any consideration but Simple Contracts must be supported by some consideration. Formal Contracts are also called Contracts Under Seal and Specialty Contracts. Simple Contracts are also called Parole Contracts.

The differences between the English and the Indian law relating to consideration are enumerated below.

1. The Indian law of contract does not make any distinction between Formal Contracts and Simple Contracts. In India, excepting the few cases mentioned below, all contracts require consideration.

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[1] (1881) 4 Mad. 137

2. Under English law past consideration is no consideration. Under Indian law past consideration is good consideration.

3. Under English law, consideration must move from the promisee. Under Indian law, it may move from the promisee or any other person.

4. The rules regarding "Devolution of Joint Rights and Liabilities" are different. See ch. 10 (Page 102).

PROMISE TO CHARITIES

A promise to make a contribution to charity is not enforceable because it is without consideration.

Example :

A person agreed to pay to a charitable society a percentage of the value of the goods imported by him. He then executed a *hatchitta* for the arrears of contribution to that charity. The Court held this was no more than a repetition of a voluntary promise and is not enforceable, *Jamuna* v. *Ram*.[1]

In *Kedernath* v. *Gorie Mahomed*[2] the defendant promised to pay Rs 1,000 towards the construction of the Howrah Town Hall and the trustees of the Town Hall, on the basis of this and similar other promises, engaged contractors for building the hall. The defendant subsequently refused to pay the money and a suit was filed against him. The Calcutta High Court held that ordinarily subscriptions to charitable objects were not recoverable but if the promisors knew the purposes of the charity and also knew that on the strength of their promises obligations would be undertaken to third parties (the building contractors in this case) the promise is enforceable. This decision is contrary to English decisions on similar facts. In subsequent cases on this point in Indian courts, the Calcutta decision has not been followed.

In an Allahabad case, a person subscribed Rs. 500 to rebuild a mosque. It was held that the promise was without consideration and that the subscriber was not liable. *Abdul Aziz* v. *Masum Ali*.[3]

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[1] 169 I.C. 396 (Privy Council) [2] (1886) 14 Cal 64
[3] (1914) 36 All. 268

"NO CONSIDERATION NO CONTRACT"— EXCEPTIONS TO THE RULE

Explanation

Consideration is essential for the validity of a contract. "A promise without consideration is a gift; one made for a consideration is a bargain".—Salmond and Windfield, *Law of Contracts.*

A promise without consideration is a gratuitous undertaking and cannot create a legal obligation. Under Roman law an agreement without consideration was called a *nudum pactum* and was unenforceable. Under English law simple contracts must be supported by consideration but specially contracts require no consideration. Under Indian law the presence of consideration is, as a rule, essential to the validity of contracts.

Exceptions

There are exceptional cases where a contract is enforceable even though there is no consideration. They are as follows :

1. *Natural love and affection* : An agreement made without consideration is valid if, '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."—Sec 25(1).

An agreement without consideration is valid under Section 25 (1) only if the following requirements are complied with :

(*i*) The agreement is made by a written document.

(*ii*) The document is registered according to the law relating to registration in force at the time.

(*iii*) The agreement is made on account of natural love and affection.

(*iv*) The parties to the agreement stand in a near relation to each other.

Examples :

(*i*) *A* for natural love and affection, promises to give his son *B*. Rs. 1,000. *A* puts his promise to *B* in writing and registers it. This is a contract. [Illustration (b) to Section 25]

(*ii*) An agreement entered into by a husband with his wife, during quarrels and disagreement, whereby the husband promised to give some property to the wife. The agreement is void because, under

the circumstances, there is no natural love and affection between the parties. *Rajlukhy Debee* v. *Bhootnath*.[1]

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

Section 25(2) applies when there is a voluntary act by one party and there is a subsequent promise (by the party benefited) to pay compensation to the former. The term 'voluntarily' signifies that the act was done, "otherwise than at the desire of the promisor".

Examples :

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

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

3. *Time-barred debt* : A promise to pay, wholly or in part, a debt which is barred by the law of limitation can be enforced if the promise is in writing and is signed by the debtor or his authorised agent.—Sec. 25(3). A debt barred by limitation cannot be recovered. Therefore a promise to repay such a debt is, strictly speaking, without any consideration. But nevertheless such a promise can be enforced if the debtor or his authorised agent makes written and signed promise to repay it.

The debt must be a liquidated or ascertained sum of money and there must be a definite promise to pay. A mere acknowledgement of the debt is not enough.

Example :

D woes *B* Rs. 1000 but the debt is barred by the Limitation Act. *D* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

4. *Agency* : No consideration is required to create an agency.—Sec. 185.

5. *Completed gift* : The rule "no consideration, no contract" does not apply to completed gifts. Explanation 1, to Section 25 states that, "Nothing in this section shall affect the validity as between the donor and the donee, of any gift actually made."

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[1] (1900) C.W.N. 488

Thus, if a person gives certain properties to another according to the provisions of the Transfer of Property Act (*i.e.*, by a written and registered document) he cannot subsequently demand the property back on the ground that there was no consideration.

STRANGER TO CONTRACT : CAN A PERSON WHO IS NOT A PARTY TO A CONTRACT SUE UPON IT ?

Difference between the rights of a stranger to a contract and of a stranger to the consideration : A stranger to a contract, *i.e.*, one who is not a party to it, cannot file a suit to enforce it. A contract between *P* and *Q* cannot be enforced by *R*. Lord Haldane said that, "It was a fundamental principle of English law that only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract."*Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*[1]

But a stranger to the consideration can sue to enforce it provided he is a party to the contract. A contract between *P*, *Q* and *R* whereby *P* pays money to *Q* for delivering goods to *R* can be enforced by *R* although he did not pay any part of the consideration.

Exceptions

There are certain exceptions to the rule that a stranger to the contract cannot sue upon it. They are as follows :

1. *Beneficiaries in the case of trust* : An agreement to create a trust can be enforced by the beneficiary. *D* agrees to transfer certain properties to *T* to be held by *T* in trust for the benefit of *C*. *C* can enforce the agreement though he was not a party to the agreement.

2. *Provision of Marriage Settlement of Minor* : In *Khwaja Muhammad Khan* v. *Husaini Begum*[2], the father of the bride-groom had contracted with the father of the bride to make the daughter an allowance called *Kharchi-i-pandan* if she married the son. After the marriage the daughter sued her father-in-law to recover arrears of the allowance. The Privy Council held that though she was no party to the contract yet, "she was clearly entitled to proceed in equity to enforce her claim."

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[1] (1915) A.C. 847 [2] (1910) 32 All. 410 (Privy Council)

3. *Assignee of a contract* : Under certain circumstances a party to a contract can transfer his rights under the contract to third parties. For example, the holder of a bill of exchange can transfer it to any person he wishes. In such cases the transferee or the assignee can sue on the contract even though he was not a party to it originally. Assignment may occur through operation of law. For example, when a person becomes insolvent, all his properties and rights vest in the Official Assignee who can sue upon contracts entered into by him.

4. *Family Settlement* : When family disputes are settled by mutual agreement and the terms of settlement are written down in a document, it is called a Family Settlement. Such agreements can be enforced by members of the family who were not originally parties to the settlement.

5. *Acknowledgement or Estoppel* : Where the promisor by his conduct, acknowledges himself as an agent of the third party, a binding obligation is thereby incurred towards him. Thus in *Khirode Behari Dull* v. *Man Govinda Pande* case (1933, 61 Cal 841, AIR 1934 Cal 682) the landlord was allowed to recover unpaid rent from the sub-tenant whereas under an agreement between a tenant and his sub-tenant the sub-tenant was paying the rent directly to the landlord.

Rights and Liabilities of a Stranger

With the exception of the above cases, a contract cannot confer rights upon a person who is not a party to it. Also, a contract cannot impose a *liability upon a person who is not a party to it.*

Examples :

(*i*) *X* and *Y* entered into an agreement to pay a certain sum of money to their children *C* and *D* upon their marriage. The marriage took place. *X* died. *C* sued to recover the money from the executors of *X*. Held, he cannot sue. *Tweddle* v. *Atkinson*.[1]

(*ii*) *P* sold to *Q* some rubber with a condition that the goods were not to be resold below a certain price. *Q* sold the goods to *R* who was aware of the condition. *R* resold the goods below the stated price. Held, *P* cannot enforce the condition against *R* because there was no contract between *P* and *R*. *Mc'Gruther* v. *Pitcher*.[2]

(*iii*) The managing director of a theatre gave instructions that no tickets were to be sold to *S*. Knowing this, *S* asked a friend to buy a ticket for

[1] (1861) 1 B & S 393 [2] (1904) 2 Ch. 306

him. With this ticket *S* went to the theatre but was refused admission. He filed a suit for damages for breach of contract. Held, no cause of action because there was no privity of contract between the plaintiff and the defendant. *S. Said* v. *Butt.*[1]

EXERCISES

1. Define consideration. Critically discuss the essential elements of consideration. (Pages 35, 36-39)
2. "Past consideration is no consideration". Comment. (Para 1, page 36)
3. Define consideration and point out the differences between English law and Indian law in this respect. (Pages 35, 39-40)
4. "Insufficiency of consideration is immaterial; but an agreement without consideration is void." Explain. (Para 5, page 38)
5. State the circumstances in which a contract without consideration may be treated as valid. (Pages 41-43)
6. Discuss the rule that a stranger to a contract cannot sue on the contract and the exceptions to that rule. (Pages 43-44)
7. 'A stranger to the consideration may sue on a contract but not a stranger to the contract.' Explain. (Pages 43-44)
8. "A stranger to a contract cannot sue to enforce the contract." Discuss. (Pages 43-44)
9. (*a*) What do you mean by consideration? (Pages 35-36)
   (*b*) Describe with examples the agreements which can be valid without consideration. (Pages 41-43)
10. Under what circumstances can a person who is not a party to contract sue upon it? (Pages 43-44)
11. (*a*) Define 'consideration' and analyse the elements of consideration. (Pages 35-39)
    (*b*) State the case in which an agreement without consideration is valid. (Pages 41-43)
12. "An agreement without consideration is void unless it is in writing and registered." Explain. (Para 1, page 41)
13. (*a*) State the essential factors of consideration.
    (*b*) *A* promises in writing to pay wholly an ascertained amount which is barred by limitation. Is this agreement valid? Justify your answer. {(*a*) Pages 36-39, (*b*) Para 3, page 30}
14. Objective questions. Give short answers. (2 marks)
    (*i*) Give two examples of cases where a contract is enforceable though there is no consideration. (Pages 41-43)
    (*ii*) Give two examples of exceptions of the rule that a stranger to the contract cannot sue upon it. (Pages 43-44)

[1] (1920) 3 K.B. 497

5 VOID AND VOIDABLE AGREEMENTS

An agreement which does not satisfy the essential elements of a contract may be either void or voidable. The definitions of these terms are given below.

1. Void Agreement

"An agreement not enforceable by law is said to be void."—Sec. 2(g). A void agreement has no legal effect. It confers no rights on any person and creates no obligations.

Examples of Void Agreement : An agreement made by a minor; agreements without consideration (except the cases coming under Sec. 25, p. 42); certain agreements against public policy; etc. [A list of such agreements is given in ch. 8]. These agreements are void *ab initio, i.e.*, void from the beginning.

Agreements which become void : An agreement, which was legal and enforceable when it was entered into, may subsequently become void due to impossibility of performance, change of law or other reasons. When it becomes void the agreement ceases to have legal effect. [The rights and obligations of the parties in such cases are discussed in ch. 11]

There are certain agreements which are expressly declared to be void even though they may otherwise satisfy Sec. 10 of the Indian Contract Act. (i.e. would have been otherwise enforceable contracts). They are as follows :

1. Section 26 of the Contract Act provides that every agreement in restraint of the marriage of any person, other than a minor, is void.
2. Section 27 of the Act states that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
3. According to Section 28 of the Act Private individuals cannot by agreement alter or vary their personal law or the Statute law.
4. Section 29 implies that agreements, the meaning of which is not certain, or capable of being made certain, are void.
5. Section 30 of the Contract Act clearly states that agreements by way of wages are void.

6. Section 56(1) provides that agreements to do an act impossible in itself are void.
7. Section 24, 57 and 58 maintain that agreements whose objects or considerations are unlawful are void.

2. Voidable Agreement

A voidable agreement is one which can be avoided, *i.e.*, set aside by some of the parties to it. Until it is avoided, it is a good contract. "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 or others, is a voidable contract."—Sec. 2(i).

Examples of voidable contracts : Contracts brought about by coercion, undue influence, misrepresentation etc.

X coerces *Y* into entering into a contract for the sale of *Y*'s house to *X*. This contract can be avoided by *Y*. *X* cannot enforce the contract. But *Y*, if he so desires, can enforce it against *X*.

Unenforceable Agreement

The term Unenforceable Agreement is used in English law. It means an agreement which cannot be enforced in a court of law, one or both of the parties, because of some technical defect, *e.g.*, want of registration or non-payment of the requisite stamp duty.[1]

Illegal Agreement

An Illegal Agreement is one which is against a law in force in India. *Example* : an agreement to commit murder, robbery or cheating.

Distinction between a Void Agreement and an Illegal Agreement

An illegal agreement is also void. But a void agreement is not necessarily illegal. An agreement may not be contrary to law but may still be void. An agreement, the terms of which are uncertain, is void but such a contract is not illegal.

When an agreement is illegal, other agreements which are incidental or collateral to it are void. The reason underlying this rule is that the courts will not enforce any agreement entered into with the object of assisting or promoting an illegal transaction.

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[1] Anson. *Law of Contract*, p. 8.

If the main agreement is void, (but not illegal) agreements which are incidental or collateral to it may be valid. (See examples of Wagering Agreement in ch. 8)

Examples :

(*i*) *P* engages *B* to kill *C* and borrows Rs. 100 from *D* to pay *B*. Here the agreement with *B* is illegal. The agreement with *D* is collateral to it, if *D* is aware of the purpose of the loan. In this case the loan transaction is void and *D* cannot recover the money. But if *D* is not aware of the purpose of the loan, it may be argued that the loan transaction is not collateral to the other illegal agreement and is valid.

(*ii*) *W* enters into a wagering agreement and borrows Rs. 100 for the purpose. The main agreement is void but the loan transaction being merely collateral to it is valid even though the creditor is aware of the purpose of the loan.

Valid Contract

An agreement which satisfies all the essential elements of a contract, and which is enforceable through the courts is called valid contract.

EXERCISES

1. Distinguish between void agreements and voidable contracts. (Page 46)
2. Explain the difference between a void and illegal transaction with reference to collateral transactions. Give illustrations for each. (Page 47)
3. Distinguish between : Void, voidable and unenforceable contract. What is a 'valid contract' ? (Pages 46-47)
4. Problem : State whether the following agreement is a valid contract : *A* Promises to pay Rs 1,000 to *B* who is an intended witness in a suit against *A* in consideration of *B*'s absconding himself at the trial. (Page 47)
5. Give two examples of each of the following :
   (a) Void agreement (b) Voidable agreement (c) Enforceable agreement. (Page 46)
6. State the void agreements under the Indian Contracts Act. (Page 46)

6 CAPACITY OF PARTIES

Definition of "Capacity"

One of the essential conditions for the validity of an agreement is that *all* the parties to it must have capacity to enter into contracts. Section 11 of the Contract Act states that "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

From Section 11 it follows that a person is incapable of entering into contracts under the following circumstances :

(*i*) if he has not attained the age of majority according to the law to which he is subject ;

(*ii*) if he is not of sound mind (*i.e.*, if he is a lunatic or an idiot or suffering from a similar disability) ; and,

(*iii*) if he is disqualified from contracting by any law to which he is subject.

Cases of Incapacity are discussed below.

MINORITY

Who is a minor ?

According to the Indian Majority Act, 1875, a minor is one who has not completed his or her 18th year of age. So a person becomes a major after the completion of 18th year of life. To this rule there are two exceptions—(i) when a guardian of the minor's person or property is appointed by a court of law and (ii) when a minor's property is taken over by the Court of Wards[1] for management. In either cases minority continues up to the completion of the 21st year.[2]

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[1] Under the Court of Wards Act, estates of incompetent persons like minors or lunatics can be placed under the guardianship of the Court of Wards. The Board of Revenue may act as the Court of Wards.

[2] In England, since the Enforcement of Family Reforms Act of 1969, the age of minority continues up to the completion of 18th year.

Why should minors be protected ?

Minors are very often exploited, ill-treated and their properties stolen. Law provides that it is the duty of the Court to guard against their lack of knowledge and experience. The actions of the older persons aggravate ill-use of minors. In England the Crown is considered to be the guardian of the minors. For the reasons stated above the Court protects the minors in India.

The Law regarding Minor's Agreement

The law regarding agreements by minors may be summarised as follows :

1. Minor's Agreement is Void

An agreement by a minor is (subject to the exceptions noted under 2 and 3 below) absolutely void and inoperative. *Mohori Bibi* v. *Dharmodas Ghose.*[1] In this case a minor executed a mortgage for Rs. 20,000 and received Rs. 8000 from the mortgagee. He sued for setting aside the mortgage. The mortgagee wanted refund of the sum which he had actually paid ; *viz.* Rs. 8,000. The Privy Council held that an agreement by a minor was absolutely void and therefore the question of refunding the money did not arise. Had the agreement been only voidable, the benefit received would have been refundable under Sec. 64 or Sec. 65 of the Act [See end of ch. 11].

The decision of the Privy Council that an agreement by a minor is void, is based upon a strict interpretation of Section 11 of the Act. The reason underlying the rule is that a minor is supported to be incapable of judging what is good for him. His mental faculties are not mature and therefore the law protects him. With certain exceptions, promises made by a minor will not be enforced against him.

2. A minor can be a promisee

An agreement under which a minor has *received a benefit* can be enforced as against the other party. A minor in whose favour a mortgage has been executed can get a decree for the enforcement of the mortgage. *Raghavachariah* v. *Srinivas.*[2] Similarly a promissory note executed in favour of the minor can be enforced. Under English law, agreements for the infant's

[1] (1903) 30 I.A. 114 (Privy Council) [2] 40 Mad. 308

education, service, or apprenticeship, and agreements which enable him to earn his living are binding unless they are detrimental to his interest.

Example :

D, an infant professional boxer, held a licence from the British Boxing Board under which his money was to be stopped if he was disqualified. *D* sued to recover it. Held, the contract was for his benefit and was binding on him. *Doyle* v. *White City Stadium*.[1]

3. Minor's Liability for Necessaries

The minor's property is liable for the payment of a *reasonable price for necessaries supplied* to the minor or to anyone whom the minor is bound to support.

What is a necessary article is to be determined from the status, and the social position of the minor. The price which the trader will get is reasonable price, not the price "agreed to" by the minor. Only the minor's property is liable. The minor is not personally liable.

Examples :

(*i*) A trader supplies a minor with rice needed for his consumption. He can recover the price from the minor's property.

(*ii*) Inman, an infant undergraduate in Cambridge bought eleven fancy waistcoats from Nash. He was at the time adequately provided with clothing. Held, the waistcoats were not necessary and the price could not be recovered. *Nash* v. *Inman*.[2]

(*iii*) When a minor is engaged in trade, contracts entered into by him for trading purposes are not for necessaries and are not binding on him.

(*iv*) It has been held that reasonable expenses incurred for the following purposes are necessaries—marriage of the minor; marriage of his sister; cost of defending a minor in civil and criminal proceedings; funeral ceremonies of the wife, husband or children of the minor; sradh ceremonies of the ancestors of the minor.

The case of necessaries supplied to a minor is covered by Section 68 of the Contract Act which provides as follows: "If a person incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition of life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person." [See ch. 12]

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[1] (1985) 1 K. B. 110 [2] (1908) 2 K.B. 1

So far as necessaries are concerned, the minor's liability does not arise out of contract. Fletcher Moulton J. in *Nash* v. *Inman* observed as follows : "The basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied." See example (*ii*) above.

What are "necessaries' ? What goods and services are 'necessaries' for minors are determined by their status and social position. Necessaries include the following :

(1) *Goods* : Physical goods are necessary not only for bare existence and also for reasonable comforts and luxuries to which the minor concerned is habituated.

(2) *Services rendered* : A minor requires certain services for example a nurse for an infant, a teacher for him, the marriage expenses of a minor etc.

(3) *Loans* : If required the minor can incur loans for his necessaries.

4. Law regarding Compensation or Restitution

A minor cannot be compelled to compensate for or refund any benefit which he has received under a void agreement because Sections 64 and 65 of the Act do not apply to such cases. [See ch. 11]

But it has been held in a number of cases that the court may, on cancelling an instrument at the instance of a minor, require the minor to make compensation to the other party. The court's power, to do so, is given by Section 41 of the Specific Relief Act of 1877 which is as follows : "On adjudging the cancellation of an instrument the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." Section 38 of the Specific Act provides in similar terms for cases where a contract is rescinded.

Example :

A minor sells a house for Rs. 10,000. Later he files a suit to set aside the sale on the ground of minority. He *may* be directed to refund the purchase-money received by him.

5. No Estoppel

A minor who falsely represents himself to be a major, and thereby induces another person to enter into an agreement with

him, can nevertheless *plead minority as a defence* in an action on the agreement. There can be no estoppel against a minor. *Sadik Ali Khan* v. *Jaikishore.*[1] In the English case, *R. Leslie Ltd.* v. *Shell.*[2] the Court of Appeal held that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money. But in India it has been held that the court can direct the minor to pay compensation to the other party in such cases. *Khan Gul* v. *Lakha Singh.*[3]

[*The Principle of Estoppel* : The Principle of estoppel is a rule of evidence. When a man has, by words spoken or written, or by conduct, induced another to believe that a certain state of things exists, he will not be allowed to deny the existence of that state of things. "Estoppel arises when you are precluded from denying the truth of anything which you have represented as a fact, although it is not a fact." (Lord Halsbury)]

6. No Ratification

A minor on attaining majority *cannot ratify* an agreement entered into while he was a minor. The reason is that a void agreement cannot be validated by any subsequent action and a minor's agreement is void *ab initio. Mahendra* v. *Kailash.*[4]

7. No specific performance

An agreement by a minor being void, the court will never direct *specific performance* of such an agreement by him.

8. No insolvency

A minor cannot be declared insolvent even though there are dues payable from the properties of the minor.

9. Partnership by minor

A minor cannot enter into a contract of partnership. But he can be admitted into the benefits of a partnership with the consent of all the partners. [See under Partnership. Book III. ch. 2]

10. A minor can be an agent

A minor can draw, make, indorse, and deliver negotiable instruments so as to bind all parties except himself. *A minor cannot be adjudicated an insolvent.* When a minor and a major

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[1] AIR (1928) P. C. 152 (Privy Council)
[2] (1914) 3. K.B. 607
[3] (1928) 9 Lah. 701
[4] 55 Cal 841

jointly enter into an agreement with another person, the minor has no liability but the contract can be enforced against the major if his liability can be separately ascertained. If an adult stands surety for a minor, the adult is liable on the agreement although the minor is not.

11. Position of minor's guardian

An agreement entered into by the guardian of a minor on his behalf stands on a different footing from an agreement entered into by the minor himself. An agreement by a minor is void but an agreement by his guardian on his behalf is valid provided the obligations undertaken are within the powers of the guardian. The powers of a guardian are determined by the personal law of the minor and by the Guardian and Wards Act. An agreement made by the guardian is binding on the minor if it is for the benefit of the minor or is for legal necessity.

12. A company shares of a minor

A minor cannot apply for and be a member of a company. If a minor has, by mistake, been recorded as a member, the company can rescind the transaction and remove the name from the register. The minor can also repudiate the transaction and get his name removed, from the register. But where a minor was made a member and, after attaining majority, he received and accepted dividends, he will be estopped from denying that he is a member. *Fazalbhoy* v. *The Credit Bank of India.*[1]

PERSONS OF UNSOUND MIND

Definition of "Sound mind"

For a valid agreement it is necessary that each party to it should have a sound mind. What is a "sound mind" for the purpose of contracting, is laid down in Section 12 of the Indian Contract Act.

Section 12 : "A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

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[1] 39 Bom. 331

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 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."

"***Illustrations*** :

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

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

The test of soundness of mind is (i) capacity to understand the business concerned and (ii) ability to form a rational judgment as to its effect on a person's interest.

Unsoundness of mind may arise from—insanity or lunacy ; idiocy ; drunkenness and similar factors. A person under the influence of hypnotism is temporarily of unsound mind. Mental decay brought about by old age or disease also comes within the defintion.

In each case it is a question of fact to be decided by the court whether the party to the contract was of sound mind or not. There being a presumption in favour of sanity, the person who relies on unsoundness of mind must prove it sufficiently to satisfy the court.

Idiocy

The term idiot is applied to a person whose mental powers are completely absent. Idiocy is a congenital defect caused by lack of development of the brain.

Lunacy or Insanity

This is a disease of the brain. A lunatic is one whose mental powers are deranged so that he cannot form a rational judgment on any subject. Lunacy can sometimes be cured. Idiocy is incurable.

Drunkenness

Drunkenness produces temporary incapacity. The mental faculties are clouded for a time, so that no rational judgment can be formed.

Effects of Agreements made by Persons of Unsound Mind

Agreements by persons of unsound mind are void. But an agreement entered into by a lunatic or a person of unsound mind for the supply of necessaries for himself or for persons whom he is bound to support (*e.g.*, his wife or children) is valid as a quasi-contract under Section 68 of the Act. Only the estate of such a person is liable. There is no personal liability. (See ch. 12)

The guardian of a lunatic can bind the estate of the lunatic by contracts entered into on his behalf. The mode of appointment of such a guardian and his powers are laid down in the Lunacy Act.

Examples :

(*i*) A person 'agreed' to sell a property worth about Rs. 25,000 for Rs. 7,000. His mother proved that he was a congenital idiot and she pleaded for cancellation of the contract. The court held the agreement to be null and void. *Inder Singh* v. *Parmeshwardhari Singh.*[1]

(*ii*) If an agreement entered into by a person of unsound mind is for his benefit, it can be enforced. *Jugal Kishore* v. *Cheddu.*[2]

DISQUALIFIED PERSONS.

Aliens

An alien means a citizen of a foreign state. Contracts with aliens are valid. An alien living in India is free to enter into contracts with citizens of India. But the state may impose restrictions. Certain types of transactions with aliens may be prohibited. A contract with an alien becomes unenforceable if war breaks out with the country of which the alien concerned is a citizen. (Outbreak of War—see ch. 11)

Foreign sovereigns

Foreign sovereigns or governments cannot be used unless they voluntarily submit to the jurisdiction of the local court. *Mighell* v. *Sultan of Johore.*[3]

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[1] AIR (1957) Pat 491
[2] (1903) All. L. J. 43
[3] (1894) 1 Q. B. 149

Foreign sovereigns and governments can enter into contracts through agents residing in India. In such cases the agent becomes personally responsible for the performance of the contracts. (See under Agency, ch. 15)

Company and Corporation

See, "Contractual powers of Company and Corporation". Ch. 2, Book XI (Company Law).

Professional Persons

In England barristers are prohibited by the etiquette of their profession from suing for their fees. So also are members of the Royal College of Physicians. But they can sue and be sued for all claims other than their professional fees. For example, if a barrister or a member of the Royal College of Physicians engages a contractor of building a house he can sue for the enforcement of the contract.

In India these personal disqualifications do not exist. It has been held in *Nihal Chand* v. *Dilwar Khan*,[1] that a barrister can sue for his fees in India. A barrister, before he can practice in India, must be enrolled as an advocate under the Bar Council's Act of 1927 and the Advocates Act of 1961 and his legal status comes from such enrolment. An Advocate can realize his fees by a suit. *Gosta Behari Roy* v. *P. C. Gosh & Co.*[2] In India there is no restriction upon doctors as regards suing for their fees.

Women

In India there is no difference between men and women as regards contractual capacity. A woman (married or single) can enter into contracts and deal with her properties in any way she likes provided she is a major and does not suffer from any disability like lunacy or idiocy.

A married woman can bind her husband's properties for necessaries supplied to her. She is an agent of her husband for this purpose. (See under Agency, ch. 15)

EXERCISES

1. What do you understand by capacity to contract ? What is the effect of any agreement made by persons not qualified to contract ? (Pages 49-54)

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[1] All. 570 (Full Bench) [2] (1973) 77 C.W.N. 216

2. Who are competent to contract under the Indian Law of Contract? What is the legal effect if one of the parties to the contract is a minor? (Pages 49-54)
3. What is the minor's position in the law of contract? What is the leading case on the point? (Pages 50-54)
4. (*a*) What do you mean by capacity to enter into contract? (Page 49)
   (*b*) *A*, trader, supplies *B*, a minor, with rice needed for his consumption. *B*, refuses to pay the price. Can *A* recover the Price? (Pages 50-51)
5. What is the effect of agreements entered into by persons of unsound mind? (Pages 54-55)
6. Write a note on the contractual capacity of Aliens; Foreign Sovereigns; Women. (Pages 54-56)
7. Objective questions. Give short answers.
   (*i*) Who is a minor? (Page 49)
   (*ii*) What do you understand by 'necessaries' supplied to a minor? (Para 3, pages 50-51)
   (*iii*) Who is a Lunatic? (Page 55)

7 FREE CONSENT

Definition of "Free Consent"

An agreement is valid only when it is the result of the "free consent" of all the parties to it. Section 13 of the Act defines the meaning of the term 'consent' and Section 14 specifies under what circumstances consent is 'free'.

Section 13 : "Two or more persons are said to consent when they agree upon the same thing in the same sense."

Consent involves a union of the wills and an accord in the minds of the parties. When the parties agree upon the same thing in the same sense, they have *consensus ad item.* For a valid contract the parties must be *ad idem.*

Section 14 : This section lays down that consent is *not free* if it is caused by (1) coercion, (2) undue influence, (3) fraud, (4) misrepresentation, or (5) mistake.

The definition of coercion, etc., and their effects on the formation of a contract are explained below.

COERCION

Definition

Coercion is defined by Section 15 of the Act as follows : "Coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or 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.

Explanation—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed."

Features or Requisites

The provisions of Section 15 can be analysed as follows :

1. Coercion means (i) committing or threatening to commit an act forbidden by the Indian Penal Code, or (ii) the unlawful detaining or threatening to detain any property.

2. The act, constituting coercion, must be directed at *any* person and not necessarily at the other party to the agreement.

3. The act, constituting coercion, must have been done or threatened with the intention of causing any person to enter into an agreement.

4. It does not matter whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Examples :

(*i*) *P* threatens to shoot *Q* if he does not let out his house to *P*, and *Q* agrees to do so. The agreement has been brought about by coercion.

(*ii*) *P* threatens to shoot *Q* if *R* does not let out his house to *P* and *R* agrees to do so. The agreement has been brought about by coercion.

(*iii*) An agent appointed by a person refused to hand over the book of account of the principal unless the principal released him from all liabilities concerning past transactions. The principal gave a release as demanded. Held, the release was obtained by coercion and was not binding. *Muthia* v. *Karuppan.*[1]

(*iv*) A girl of 13 was made to agree to adopt a boy by her husband's relative who prevented the removal of the dead body of her husband until she consented to the adoption. Held, the agreement to adopt was not binding. *Ranganayakamma* v. *Alwarsetti.*[2]

(*v*) *A*, on board an English ship on the high seas ; causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. *A* afterwards sues *B* for breach of contract at Calcutta. *A* has employed coercion although his act is not an offence by the law of England and although the Indian Penal Code was not in force at the time when or the place where the act was done.

Consequences of Coercion

A contract brought about by coercion is voidable at the option of the party whose consent was so caused.—Sec. 19. The aggrieved party can have the contract set aside or he can refuse to perform it and take the defence of coercion if the other party sought to enforce it. The aggrieved party may, if he so desires, abide by the contract and insist on its performance by the other party.

Special Cases—

1. Prosecution

A threat to prosecute a man or to file a suit against him does not constitute coercion because it is not forbidden by the

[1] (1927) 50 Mad. 786 [2] (1889) 13 Mad. 214

Indian Penal Code. Compulsion of law is not coercion, undue influence, fraud, misrepresentation or mistake. *Andhra Sugars Ltd.* v. *State of A. P.*[1]

2. High prices and high interest rates

It is not coercion to charge high prices or high interest rates because such acts are not forbidden by the Indian Penal Code.

3. A threat to commit suicide

Consent to an agreement may be obtained by threatening to commit suicide *e.g.*, by a fast to death. The Madras High Court has held that this amounts to coercion. *Amiraju* v. *Seshamma.*[2] It was however, argued by Oldfield J, one of the judges of the Bench which decided this case, that Section 15 must be constructed strictly and that an act which is not punishable under the Indian Penal Code cannot be said to be "forbidden" by it. Suicide is not punishable by the Indian Penal Code ; only the attempt to commit suicide is punishable. Therefore, suicide is not a crime and the threat to commit suicide is not coercion.

Duress

The term duress is used in English law to denote threats over the person or another with a view to obtain the consent of a party to an agreement. The scope of the term coercion is wider because it includes threats over property.

UNDUE INFLUENCE

Definition

A contract is said to be induced by undue influence where (*i*) one of the parties is in a position *to dominate the will of the other* and (*ii*) he uses the position to obtain *an unfair advantage* over the other.—Sec. 16 (1).

Presumptions

Section 16 (2) provides that undue influence *may be presumed to exist* in the following cases :

1. Where one party holds a real or apparent authority over the other or where he stands in a fiduciary relationship to the

[1] AIR (1968) Supreme Court 599 [2] (1917) 41 Mad. 33

other. Fiduciary relationship means a relationship of mutual trust and confidence. Such a relationship is supposed to exist in the following cases—father and son ; guardian and ward ; solicitor and client ; doctor and patient ; preceptor and disciple ; trustee and beneficiary etc.

2. Where a party makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

Examples :

(*i*) *F* having advanced money to his son *B* during his minority, upon *B*'s coming of age obtains by misuse of parental influence, a bond from *B* for a greater amount than the sum advanced. *F* employs undue influence.

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

(*iii*) A Malay woman of great age and wholly illiterate made a gift of almost the whole of her property to her nephew who was managing her estates. The gift was set aside on the ground of undue influence. *Inche Noriah* v. *Shaik Omar*.[1]

Consequences of Undue Influence

An agreement induced by undue influence is voidable at the option of the party whose consent was so caused. Such an agreement may be set aside absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, the court can set it aside upon such terms and conditions as may seem just.—Sec. 19A. The aggrieved party may, if he desires, treat the agreement as binding and enforce it against the other party.

According to the Madras High Court undue influence by a person, *who is not a party to the contract,* may make the contract voidable.

Burden of Proof

If a party is proved to be in a position to dominate the will of another and if it appears that the transaction is an unconscionable one, the burden of proving that the contract was not induced by undue influence, lies on the party who was in a position to dominate the will of the other.—Sec. 16 (3).

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[1] (1929) A.C. 127

The existence of the power to dominate the will of another may be presumed to exist under the circumstances mentioned in Section 16 (2). [See para 2, above]

It has been held by judicial decisions that the existence of a power to dominate the will of another *cannot be presumed* in the case of landlord and tenant, and creditor and debtor. There is no presumption of undue influence between husband and wife. *Mackenzie* v. *Royal Bank of Canada.*[1] In these cases the party alleging undue influence must prove that undue influence existed.

Lack of judgment, want of prudence, lack of knowledge of facts, or absence of foresight are generally not, by themselves, sufficient reasons for setting aside a contract. Undue influence cannot be presumed merely from the existence of any of the aforesaid defects in a party. *Allcard* v. *Skinner.*[2]

Rebuttal

An allegation of undue influence may be answered or rebutted if the following facts were proved : (a) the injured person had independent advice ; (b) all material facts were disclosed ; and (c) the consideration was adequate.

When suspected

Undue influence is *suspected* in the following cases :

(*i*) Inadequacy of consideration.

(*ii*) Fiduciary relationship between the parties.

(*iii*) Inequality between the parties as regards age, intelligence, social status, etc.

(*iv*) Absence of independent advisors for the weaker party.

(*v*) Unconscionable bargains. *Unconscionable bargain* is one which is against the conscience of reasonable persons and what shocks the public. If excessive profit is made it will also be within this term.

High rates of interest

It is usual for moneylenders to charge high rates of interest from needy borrowers. Can the court presume the existence of undue influence in such cases ?

Illustration (d) of Section 16, Contract Act is as follows : "*A* applies to a banker for a loan at a time when there is

[1] (1934) A. C. 468 [2] (1887) 36 Ch. D. 145

stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business and the contract is not induced by undue influence."

So a transaction will not be set aside merely because the rate of interest is high. But if the rate is so high that the court considers it unconscionable, the burden of proving that there was no undue influence lies on the creditor. This is made clear by illustration (c) of Section 16 which is as follows : "*A*, being in debt to *B*, the moneylender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence."

In India, in most of the States, there are Money Lenders Acts which lay down the maximum rates of interest which can be charged. Also, under the Usurious Loans Act of 1918, the court has discretionary power to reduce rates of interest whenever they appear to be unconscionable.

Mental Distress

A poor Hindu widow was badly in need of money for her maintenance. A money-lender availed of the opportunity of her predicament and persuaded her to make an agreement to pay 100% interest. The court reduced the interest. *Raghunath Prasad* v. *Sarju Prasad.*[1]

High Prices

As regards high prices the general opinion is that if a trader puts his prices up during scarcity and a buyer agrees to pay such high prices, it is a transaction in the ordinary course of business and is *not* a case of undue influence. In certain cases high prices may amount to profiteering and blackmarketing. They are criminal offences.

Pardanishin Woman

Women, who observe the custom of Parda, *i.e.*, seclusion from contact with people outside her own family, are peculiarly susceptible to undue influence. Therefore, Indian courts have held that a contract made by or with a pardanishin lady may be set

[1] AIR (1924) Privy Council 60

aside by her unless the other party to the contract satisfies the court that the terms of the contract were fully explained to her and that she understood their implications.

Difference between Undue Influence and Coercion

In both undue influence and coercion, one party is under the influence of another. (1) In coercion the influence arises from committing or threatening to commit an offence punishable under the Indian Penal Code or detaining or threatening to detain property unlawfully. In undue influence, the influence arises from the domination of the will of one person over another. (2) Cases of coercion are mostly cases of the use of physical force while in undue influence there is mental pressure.

MISREPRESENTATION

Representation is a statement or assertion, made by one party to the other, before or at the time of the contract, regarding some fact relating to it. **Misrepresentation** arises when the representation made is inaccurate but the inaccuracy is not due to any desire to defraud the other party. There is no intention to deceive.

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

1. Unwarranted Assertion

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

Example :

A says to *B* who intends to purchase *A*'s land : "My land produces 12 maunds of rice per bigha." *A believes* the statement to be true although he did not have sufficient grounds for the belief. Later on it transpires that the land does not produce 12 maunds of rice. This is misrepresentation.

2. Breach of Duty

"Any breach of duty which, without an intent to deceive, gains an advantage to the persons committing it, or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him." Under this

heading would fall cases where a party is under a duty to disclose certain facts and does not do so and thereby misleads the other party. In English law such cases are known as cases of "constructive fraud."

3. Innocent Mistake

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

Consequences of Misrepresentation

In cases of misrepresentation the aggrieved party can :

(*i*) avoid the agreement, or

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

But if the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence, he has no remedy.—Sec. 19.

"Ordinary diligence" means such diligence as a reasonably prudent man would consider necessary, having regard to the nature of the transaction.

Example :

A, by a misrepresentation leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not avoided by *A*'s misrepresentation.

FRAUD

Definition

The term "fraud" includes all acts committed by a person with a view to deceive another person. "To deceive" means to "induce a man to believe that a thing is true which is false."

Section 17 of the Contract Act states that "Fraud" means and includes any of the following acts :

1. False Statement

"The suggestion as to a fact, of that which is not true by one who does not believe it to be true." A false statement intentionally made is fraud.

2. Active Concealment

"The active concealment of a fact by one having knowledge or belief of the fact." Mere non-disclosure is not fraud where the party is not under any duty to disclose all facts. (See below). But *active* concealment is fraud.

Examples :

(*i*) *B*, having discovered a vein of ore on the estate of *A*, *adopts means to conceal, and does conceal,* the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an undervalue. The contract is voidable at the option of *A*.—(Illustration (b) to Sec 19).

(*ii*) *A* sells by auction to *B* a horse which *A* knows to be unsound, *A* says nothing to *B* about the horse's unsoundness. This is not fraud because *A* is under no duty to disclose the fact to *B*. But if between *B* and *A* there is a fiduciary relationship (for example if *B* is *A*'s daughter) there arises the duty to disclose and non-disclosure amounts to fraud.

3. Intentional non-performance

"A promise made without any intention of performing it." *Example*—purchase of goods without any intention of paying for them.

4. Deception

"Any other act fitted to deceive."

5. Fraudulent act or omission

"Any such act or omission as the law specially declares to be fraudulent." This clause refers to provisions in certain Acts which make it obligatory to disclose relevant facts. Thus, under Section 55 of the Transfer of Property Act, the seller of immovable property is bound to disclose to the buyer all material defects. Failure to do so amounts to fraud.

Comment

To constitute fraud, the act complained of must be brought within any of the five above-mentioned categories.

It is to be noted that mere commendation or praising of one's own goods is not fraud. Traders and manufacturers are inclined to speak optimistically of their products, *e.g.*, "X products are the best in the market" or a soap powder which 'washes whiter than white'. Such statements do not amount to fraud, unless a clear intention to deceive is proved.

Can Silence be Fraudulent ?

"Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself equivalent to speech."—Explanation to Sec. 17.

From the above, the following rules can be deduced :

1. The general rule is that mere silence is not fraud.

Examples :

(*i*) *A* and *B* being traders enter upon a contract. *A* has private information of a change in price which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

(*ii*) *H* sold to *W* some pigs which were to his knowledge suffering from swinefever. The pigs were sold "with all faults" and *H* did not disclose the fever to *W*. Held, there was no fraud. *Ward* v. *Hobbs*.[1]

2. Silence is fraudulent, "if the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak." The duty to speak, *i.e.*, disclose all facts, exists where there is a fiduciary relationship between the parties (father and son ; guardian and ward, etc.). The duty to disclose may also be an obligation imposed by statute. (*Example*—Sec. 55 of the Transfer of Property Act). There is also a duty of making full disclosure in contracts of insurance. Whenever there is a duty to disclose, failure to do so amounts to fraud.

3. Silence is fraudulent where the circumstances are such that, "silence is in itself equivalent to speech".

Example :

B says to *A*, "If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here *A*'s silence is equivalent to speech. If the horse is unsound *A*'s silence is fraudulent.

Consequences of Fraud

A party who has been induced to enter into an agreement by fraud has the following remedies open to him—Sec 19.

1. He can avoid the performance of the contract.

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[1] (1878) 4 A. C. 13

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

Example :

A fraudulently informs *B* that *A*'s estate is free from encumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may avoid the contract or may insist on its being carried out and the mortgage debt repaid by *A*.

3. The aggrieved party can sue for damages. Fraud is a civil wrong or Tort ; hence compensation is payable.

Conditions

Relief for fraud can be obtained only if the following conditions are satisfied.

1. The act must have been committed by a party to a contract or with his connivance or by his agent.

2. The act must have been done with the intention to deceive and must actually deceive. A deceit which does not deceive gives no ground of action.

3. The consent of the party was obtained by the act complained of. A fraudulent act which did not cause the consent to a contract of the party on whom such fraud was practised, does not make the contract voidable.

4. In cases of fraudulent silence, the contract is not voidable if the party whose consent was so caused had the means of discovering the truth ordinary diligence.

5. The remedy of rescinding the agreement is not available in cases of approbation (*i.e.*, acceptance of the agreement) and laches or undue delay in taking action.

DISTINCTION BETWEEN FRAUD AND MISREPRESENTATION

1. *Different Intention* : In misrepresentation there is no intention to deceive. Fraud implies an intention to deceive.

2. *Different Belief* : The difference between misrepresentation and fraud depends on the belief of the person making the statement. If the statement is honest, even though it was wrong, there is only misrepresentation. If the statement is dishonest it is a case of fraud.

3. *Different Rights* : In case of fraud the party aggrieved can rescind the contract (*i.e.*, the contract is voidable at his option). He can also sue for damages. In case of misrepresentation the only remedy is rescission. There can be no suit for damages.

4. *Different Defence* : In case of misrepresentation if the circumstances were such that the aggrieved party might have discovered the truth with ordinary diligence, the contract cannot be avoided. The same is the case where there is fraudulent silence. But in other cases of fraud this is no defence. Even if there were independent sources of discovering the truth which were not availed of, the aggrieved party can rescind the contract and/or file a suit for damages.

CONTRACTS UBERRIMAE FIDEI

Definition

Uberrimae fidei contracts are contracts where law imposes upon the parties the duty of making a full disclosure of all material facts. In such contracts, if one of the parties has any information concerning the subject matter of the transaction which is likely to affect the willingness of the other party to enter into the transaction, he is bound to disclose the information.

Examples

The following contracts come within the class of *uberrimae fidei* contracts.

1. *Contracts of insurance* : The assured must disclose to the insurer all material facts concerning the risk to be undertaken. Upon failure to do so, the contract may be avoided. *London Assurance Co.* v. *Mansel.*[1]

2. *Fiduciary relationship* : Contracts in which parties stand in a fiduciary relation to each other, *e.g.*, contracts between solicitor and client, father and son, etc.

3. *Contracts for the Sale of Immovable Property* : Under Section 55(1) (a) of the Transfer of Property Act, the seller is bound "to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover."

[1] (1879) 11 Ch. D. 363

4. *Allotment of shares of companies* : Persons who issue the prospectus of a company have the duty of disclosing all information regarding the company with strict accuracy. (See under Company Law, ch. 3).

5. *Family Settlements* : When family disputes are settled by mutual agreement, each party is bound to disclose any information possessed by him regarding the value of family properties.

MISTAKE

Definition

Mistake may be defined as an erroneous belief concerning something. Consent cannot be said to be "free" when an agreement is entered into under a mistake. An agreement is valid as a contract only when the parties agree upon the same thing in the same sense.

Classification

Mistakes may be (*i*) mistake of law and (*ii*) mistake of fact. Mistake of law may again be (*a*) mistake as to a law in force in India and (*b*) mistake as to a law not in force in India.

Mistake may be Bilateral or Unilateral. Bilateral mistakes arise when both the parties of the contract make mistakes *e.g.*, regarding the existence of the things or the nature of the transaction. Unilateral mistake arises from one of the parties of the contract. As a rule unilateral mistake does not make one avoid an agreement. But there are cases where such agreement can be avoided. For example in an agreement where there is no consent (see below).

Rules

The Indian Contract Act lays down the following rules regarding mistakes :

1. Mistake of Law

Mistake on a point of Indian law does not affect the contract. Mistake on a point of law in force in a foreign country is to be treated as mistake of fact. *A* and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation. This is a valid contract. The reason is that every man is presumed to know the law of his own country

and if he does not he must suffer the consequences of such lack of knowledge. But if in the above case, the mistake is related to the law of limitation of a foreign country, the agreement could have been avoided.—Sec. 21.

2. Mistake of fact

An agreement induced by a mistake of fact is void provided the following conditions are fulfilled.—Sec. 20.

(*i*) Both the parties to the agreement are mistaken.

(*ii*) The mistake is as to a fact essential to the agreement.

Examples :

(*i*) *P* agrees to sell to *Q* a specific cargo supposed to be on its way from England to Bombay. It turns out that before the day of the bargain the ship conveying the cargo has been cast away and the goods lost. Neither party was aware of the fact. The agreement is void.

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

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

(*iv*) *W* offered to purchase certain plots of land belonging to *C* at £2,000, *C* rejected the offer. Later on *C* wrote a letter offering to sell the plots to *W* for "£1,200". His real intention was to make an offer for "£2,100". *W* accepted the offer as made. Held, *W*, was not entitled to enforce the contract, as he knew that the "offer" was made by *C* under mistake. *Webster* v. *Cecil*.[1]

3. Opinion

"An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact."—Explanation to Sec. 20.

Example :

X buys an article thinking that it is worth Rs. 100 while it is actually worth Rs. 50. The agreement cannot be avoided on the ground of mistake.

4. Unilateral Mistake

Section 22 provides that, "A contract is not voidable merely because it was caused by one of the parties to it being under

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[1] (1861) 30 Beav. 62

a mistake as to matter of fact." A mistake by one of the parties (Unilateral Mistake) does not generally affect the validity of a contract.

Example :

H contracted with the *N* Corporation to build a number of houses. In calculating the cost of the houses *H* by mistake deducted a particular sum twice over and submitted his estimates accordingly. The Corporation agreed to the figures which were naturally lower than actual cost. Held, the agreement was binding as it stood when the Corporation affixed its seal to it, even though it was based upon erroneous estimates. *Higgins Ltd.* v. *Northampton Corporation.*[1]

But if the mistake is of such a nature as to prevent the existence of free consent, the agreement is void, even though the mistake is unilateral. (See below)

Mistake and Consent

Section 10 of the Act provides that an agreement is valid if it is the result of the free consent of the parties. Section 13 of the Act lays down that two or more persons are said to consent when they agree upon the same thing in the same sense. A mistake may prevent the formation of a real agreement "upon the same thing in the same sense". When one or more of the parties to an agreement suffer from a fundamental error and the consent (apparently given) is not really there, the agreement is void.

A fundamental error, which precludes consent, is sometimes the result of fraud. But fraud is not the necessary or decisive element. An error may arise without the fault of any of the parties to the agreement. Whenever any fundamental error exists, the agreement is void.

Examples of Mistake

Some typical cases of mistake invalidating an agreement are given below.

(a) Mistakes as to identity of the person contracted with, where such identity is essential to the contract.

Examples :

(*i*) Blenkarn, by limitating the signature of reputable firm called Blenkiron & Co., induced another firm *Y* to supply goods to him

[1] (1927) 1 Ch. D. 128

on credit. The goods were then sold to *X*. Held, there was no contract between Blenkarn and *Y*, because *Y* never intended to supply Blenkarn. Therefore *X* obtained no title to the goods. Because the goods were given no credit the question of identity was essential to the agreement. *Cundy* v. *Lindsay*.[1]

(*ii*) A jeweller was insured with a company against loss by theft, with the exception of jewellery 'entrusted to a customer'. A woman, posing as the wife of a wealthy customer, made a few purchases from the jeweller to inspire confidence, and then was allowed to take away two pearl necklets of high value 'on approval' for her supposed husband. She made away with the necklets. The House of Lords held that the loss was covered by the insurance. *Lake* v. *Simmons*.[2]

The question of identity must be an essential element of the contract. Where the identity of the party contracted with is immaterial, mistakes as to identity will not avoid a contract. Thus if *X* goes to a shop, introduces himself as *Y* and purchases some goods for *cash*, the contract valid unless it can be shown that the shopkeeper would not have sold the goods to *X* had he knew that he was not *Y*.

(*b*) *Mutual mistakes as to the existence of a thing* : All the examples given in the Contract Act under Section 20 come within this category. They have been reproduced above. (Page 71).

(*c*) *Mutual mistake about the identity or quantity of a thing.*

Examples :

(*i*) *X* agreed to buy from *Y* 125 bales of Surat cotton "to arrive ex *Peerless* from Bombay." There were two ships called "*Peerless*" sailing from Bombay, one arriving in October and the other arriving in November. *X* meant the earlier one and *Y* the latter. Held there was no contract. *Raffles* v. *Wichelhaus*[3]. In this case there was no *consensus ad idem* : the parties did not understand the same thing in the same sense.

(*ii*) *X* inspected 50 rifles in a shop. Latter he telegraphed, "send three rifles." The telegraph clerk by mistake transcribed the message as, "send the rifles." The shopkeeper sent 50 rifles and upon *X*'s refusal to accept, filed a suit for damages. Held, there was no contract. Here the *consensus ad idem* did not arise because of the mistake of a third party. *Henkel* v. *Pope*.[4]

(*d*) *Mutual mistake as to the subject-matter of the contract, or the nature of the transaction* : If the contract actually made

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[1] (1878) L. R. 3 A. C. 459
[2] (1927) A. C. 487
[3] (1864) 2 H. & C. 906
[4] (1870) L.R. 6 Ex. 7

is substantially different from the contract the parties intended to make, the contract can be avoided.

Examples :

(*i*) *M* an old man of feeble sight, endorsed a bill of exchange thinking it was a guarantee. There was no negligence on his part. Held, there was no contract. *Foster* v. *Mackinnon*.[1]

(*ii*) *A* and *B* believing themselves married made a separation agreement under which the husband agreed to pay a weekly allowance to the wife. Later on it transpired that they were not married. In an action by the "wife" for arrears of allowance, it was held that the agreement was void because there was a mutual mistake on a point of fact which was material to the existence of the agreement. *Galloway* v. *Galloway*.[2]

(*e*) *Miscellaneous* : Mistakes may occur for the following causes : the title of property ; quality of the subject matter ; quantity of the goods ; and, the price of the subject.

EXERCISES

1. (*a*) State when a consent is not said to be free. (Page 59)
   (*b*) What is the effect to such consent on the formation of a contract? ('consequences'—pages 60, 61, 64-65, 69-70, 71-72)
2. What is meant by undue influence ? Give two examples. (Page 61)
3. When is consent said to be free ? Distinguish between coercion and undue influence. (Pages 59, 65)
4. Define and distinguish 'misrepresentation' and 'fraud'. What remedies are available to the aggrieved party ? (Pages 65-71)
5. "Mere silence as to facts is not fraud." Explain with two illustrations. (Page 68)
6. "A contract caused by mistake is void." Explain. (Page 71)
7. Give answers with reasons whether the following cases are instances of fraud :
   (*a*) *A*, sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* declares nothing to *B* about the horse's unsoundness. (Page 66)
   (*b*) Suppose, *B* is *A*'s daughter and has just come of age. Is *A* then bound to tell *B* that the horse is unsound ? (Pages 66-67)
   (*c*) *B* says to *A*—"If you do not deny it, I shall take that the horse is sound." *A* says nothing. (Page 68)

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[1] (1869) L.R. 4 C.P. 704 [2] (1914) T. L. R. 531

8. Problems :

(*a*) *A* and *B* make a contract on the mistaken belief that a particular debt is barred by the Indian law of limitation. Is the contract void ? Is the contract voidable ? (Pages 71-72)

(*b*) *A* fraudulently informs *B* that *A*'s house is free from encumbrance. *B* thereupon buys the house. The house is subject to a mortgage. What are the rights of *B* ? (Pages 71-72)

(*c*) *A* agrees to sell *B* a specific cargo of goods per S. S. Malwa supposed to be on its way from London to Bombay. It turn out that before the day of the bargain S.S. Malwa had been cast away and the goods were lost. Discuss the respective rights of *A* and *B*. (Example (*i*), page 72)

(*d*) *A* agrees to buy from *B* a certain elephant. It turns out that the elephant was dead at the time of the bargain, though neither party was aware of the fact. Discuss the rights of *A* and *B*. (*Example* (*ii*), page 72)

(*e*) *A* sells a horse to *B* knowing full well that the horse is vicious. *A* does not disclose the nature of the horse to *B*. Is the sale valid ? (Page 66)

(*f*) *A*, a man enfeebled by disease is induced by *B*, his medical attendant, to agree to pay *B* a sum of rupees one lakh for his professional services. Is the agreement valid ? Give reasons for your answer. (Page 61-62)

(*g*) *A* buys a piece of ordinary cloth from *B*. *A* thinks erroneously that the cloth is of high quality. *B* knows that *A* is under a mistake but keeps quiet on this matter. When *A* realises his mistake, he wants to set aside the contract on the ground that *B* had knowingly committed fraud in not pointing out his mistake. Discuss if the contract is voidable. (Page 73)

(*h*) *A* sells *B* his horse for Rs. 500. The horse is blind in one eye, but *B* does not know this until after the sale is completed. Is *A* liable to *B* on the ground of fraud ? (Page 67)

(*i*) *X* sold a mare to *B* which had a cracked hoof. *X* filled up the hoof in order to prevent detention even after diligent examination. What is the right of *B* ? (Para 2, page 67)

9. Objective questions. Give short answers. (2 marks) :

(*i*) Give two examples where undue influence has been exercised in the contract. (Page 61)

(*ii*) Suicide is no crime. True or false ? (Page 61)

(*iii*) Does silence as to fact amount to fraud ? If so, give one example. (Page 68)

8 LEGALITY OF OBJECT AND CONSIDERATION

UNLAWFUL CONSIDERATION AND OBJECT

Definition

An agreement will not be enforced by the court if its object or the consideration is unlawful. By the expression, "object of an agreement" is meant its 'purpose' or 'design'. The object and the consideration must both be lawful, otherwise the agreement is void.

Unlawful Agreements

According to Section 23 of the Act the consideration and the object of an agreement are unlawful in the following cases :

1. *If it is forbidden by law* : An act or an undertaking is forbidden by law when it is punishable by the criminal law of the country or when it is prohibited by special legislation or regulations made by a competent authority under powers derived from the legislature.[1] If the object of an agreement or the consideration is the doing of an act forbidden by law, the agreement is void.

2. *If it is of such a nature that, if permitted, it would defeat the provisions of any law* : If the object or the consideration of an agreement is of such a nature that it would indirectly lead to a violation of the law, the agreement is void.

Examples :

(*i*) *A*'s estate is sold for arrears of revenue under the provisions of an act of the legislature by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(*ii*) The plaintiff entered into a contract of service with the defendant by which it was agreed that he should be paid the sum of £13 a week as salary, and a further £6 per week for 'expenses'. His

[1] Pollock and Mulla. *Indian Contract Act*. p. 138

expenses were very much lower, therefore this provision was merely a device to defraud the Income Tax Authority. The Court of Appeal in England, held that the two provisions of the contract cannot be severed and the whole contract was void. *Napier* v. *National Business Agency Ltd.*[1]

(*iii*) *P* let a flat to *R* at a rent of £1,200 a year. To reduce the Municipal tax he entered into two agreements with *R*. One, by which the rent was stated to be £450 only and the other by which *R* agreed to pay £750 for services in connection with the flat. In a suit filed against *R* to recover £750, it was held that the agreement was made to defraud the municipal authority and was void and *A* cannot recover the money. *Alexander* v. *Rayson.*[2]

3. *If it is fraudulent* : An agreement whose object is to defraud others is void.

Examples :

(*i*) *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.

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

4. *If it involves or implies injury to the person or property of another.* If the object of an agreement is to injure the person or property of another, it is void.

Examples :

(*i*) An agreement by the proprietors of a newspaper to indemnify the printers against claims arising from libels printed in the newspaper is void. *W. H. Smith & Sons* v. *Clinton.*[3]

(*ii*) An agreement by which a debtor promised to do manual labour for the creditor so long as the debt was not repaid in full has been held to be void under this clause. *Ram Sarup* v. *Bansi.*[4]

5. *If the court regards it as immoral.* An agreement whose object is immoral, or where the consideration is immoral, is void.

Examples :

(*i*) *X* who is *B*'s Mukhtear promises to exercise his influence with *B* in favour of *C* and *C* promises to pay Rs. 1,000 to *X*. The agreement is void because it is immoral.

(*ii*) *D* agrees to let her daughter to hire to *B* for concubinage. The agreement is void.

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[1] (1951) 2 All E. R. 264
[2] (1936) 1 K. B. 169
[3] (1908) 26 T. L. R. .34
[4] (1915) 42 Cal 742

(*iii*) *P* let a cab on hire to *B* a prostitute, knowing that it would be used for immoral purposes. The agreement is void and he cannot recover the hire. *Pearce* v. *Brooks*.[1]

(*iv*) A man who knowingly lets out his house for prostitution cannot recover the rent.

6. *If the court regards it as opposed to public policy* : An agreement which is injurious to the public or is against the interests of the society is said to be opposed to public policy. Public policy is not capable of exact definition and therefore courts do not usually go beyond the decided cases on the subject. It has been said in the House of Lords that, "public policy is always an unsafe and treacherous ground for legal decision", per Lord Davey. *Janson* v. *Driefiein Consolidated Mines*.[2] Courts are generally disinclined to create a new item in the list of agreements against public policy. *Gherulal Parakh* v. *Mahadeodas & others*.[3]

The following agreements have been held to be against public policy : trading with the enemy ; traffic in public offices ; interference with the course of justice etc. These agreements are discussed below.

AGREEMENTS AGAINST PUBLIC POLICY

1. Trading with the enemy

It is a well-settled principle of law that an agreement between citizens of two countries at war with each other is void and inoperative. In India such agreements are allowed where specially permitted by the government. ("Alien"—p. 56)

2. Agreements interfering with the course of justice

Agreements for stifling or hushing up prosecutions are bad in law. When an offence has been committed, the guilty party must be prosecuted and any agreement which seeks to prevent the prosecution of such a person is opposed to public policy and is void. But under the Indian criminal law there are certain cases which can be compromised or compounded. These are mostly minor offences like simple hurt. An agreement for the compromise of such a case is valid. In civil cases compromises and

[1] (1866) L. R. 1 Ex. 213 [2] (1902) A. C. 484
[3] (1959) (II) S.C.A. 342 (Supreme Court)

settlements are not only allowed but also are encouraged. An agreement to refer present or future disputes to arbitration is a valid agreement. But an agreement varying the statutory period of limitation is not valid.

Champerty and Maintenance

When a person agrees to help another by money or otherwise in litigation in which he is not himself interested, it is called **Maintenance.** When a person helps another in litigation in exchange of a promise to hand over a portion of the fruits of the litigation, if any, it is called **Champerty.**

Examples :

(*i*) *P* files a suit against *Q* for the recovery of a house. *X* promises to advance Rs. 1,000 to *P* for the costs of the litigation and *P* promises to give to *X* a portions of the house if he is successful in his suit. This is a champertous agreement.

(*ii*) An advocate entered into an agreement with his client by which the latter promises to pay to the former fifty per cent of whatever is recovered from the decree of the court. The agreement is champertous.

According to English law an agreement which amounts to Champerty is void because it is against public policy to promote litigation. But an agreement which amounts to Maintenance only, is good if it can be shown that the motive underlying the help given is purely charitable. It has been held by the Privy Council in the case of *Ramcoomar* v. *Chandrakanta,*[1] that the English doctrines of Champerty and Maintenance are not applicable to India. In India, an agreement to finance litigation in return of a portion of the results of the litigations is valid provided the litigation was instituted with a *bona fide motive. Bhagwat Dayal Singh* v. *Debi Dayal Sahu.*[2] If, however, the litigation was inspired by a malicious motive or is of a gambling character, the agreement is bad.

3. Traffic in public offices

Agreements tending to injure the public services are void as being against public policy.

Examples :

(*i*) An agreement the object of which is to procure public post is void.

(*ii*) An agreement to share the emoluments of a public office is void.

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[1] (1876) 4 I.A 23 (Privy Council) [2] (1908) 35 I. A. 48 (Privy Council)

(*iii*) An agreement to sell a religious office *e.g.*, that of a shebait or a mutawali is void.

(*iv*) The secretary of certain college promised Parkinson that if he donates £3,000 to the college, he would use his influence to secure a knighthood for him. Parkinson made the donation but did not get a knighthood and sued for the recovery of the money. Held, the action failed because the agreement was against public policy. *Parkinson* v. *College of Ambulance Ltd.*[1]

(*v*) *P* promises to obtain for *Q* an employment in the public service and *Q* promise to pay Rs. 1,000 to *P*. The agreement is void.

(*vi*) *A* paid *B*, a public servant, a certain amount inducing to him to retire from service, thus *A* can be appointed in his place. The agreement is void.

4. Agreement creating an interest opposed to duty

It has been held in several cases that if a person enters into an agreement whereunder he will have to follow a course of action which is against his public or professional duty, the agreement is against public policy and is bad.

Example :

An agreement by an agent whereby he would be enabled to make secret profits ; an agreement for the purchase of property by a public officer where such purchase is prohibited by law ; an agreement by a newspaper proprietor not to comment on the conduct of particular person. *Neville* v. *Dominition of Canada News Co.*[2]

5. Agreements restraining personal freedom

Agreements unduly restraining personal liberty have been held to be void as being against public policy.

Examples :

(*i*) An agreement by a debtor to do manual work for the creditor so long as the debt was not paid in full.

(*ii*) An agreement whereby the debtor promised to a moneylender that he will not change his residence or his employment or agree to a reduction of his salary without the consent of the money-lender was held to be void. *Horwood* v. *Millar's Timber Co.*[3]

6. Agreements interfering with parental duties

The authority of father over children and of a guardian over his ward is to be exercised in the interest of the children and the

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[1] (1925) 2 K.B. 1
[2] (1915) 3 K. B. 556
[3] (1917) 1 K. B. 305

wards respectively. The authority of a father cannot be alienated irrevocably and any agreement purporting to do so is void.

Example :

The father of two minor sons agreed to transfer their guardianship to Mrs. Annie Besant, on an irrevocable basis. Subsequently he wanted to rescind the agreement. Held, guardianship cannot be permanently alienated. So he got back their custody. *Giddu Narayanish* v. *Mrs. Annie Besant.*[1]

7. Agreements interfering with marital duties

Agreements which interfere with the performance of marital duties are void as being against public policy.

Examples :

(*i*) An agreement to lend money to a woman in consideration of her getting a divorce and marrying the lender is void. *Roshan* v. *Mohomad.*[2]

(*ii*) An agreement that the husband will always stay at the mother-in-law's house and that the wife would never leave her parental house is void. *Tikyat* v. *Monohar.*[3]

8. Marriage brokerage agreements

According to English law an agreement to pay brokerage to a person for negotiating a marriage, is void because it is against public policy. The principle underlying this rule is that marriages should take place according to the free choice of parties and such choice should not be interfered with by third parties acting as brokers. In India, however, marriages are in most cases negotiated by the parents of the parties and the custom of appointing agents or brokers for finding out a suitable match is well-established. Therefore there is some difference of opinion on the question whether the English rule regarding marriage brokerage contracts should be applied here.

In an old case, the Calcutta High Court held that an agreement to remunerate a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced. *Bakshi Das* v. *Nadu Das.*[1]

An agreement to pay money to the parent of a minor to give the minor in marriage is void and illegal.

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[1] (1915) 38 Mad 80

[2] P. R. 46 of 1887

[3] 28 Cal 751

VOID AGREEMENTS

An agreement can be void because of mistake, lack of consideration, want of capacity etc. A list of void agreements is given below :

(1) Lack of Capacity—Sec. 11 (See p. 49)
(2) Mutual Mistake of Fact—Sec. 20 (See p. 72)
(3) Unlawful Consideration or Object—Sec. 23 (See p. 77)
(4) Consideration or Object partly unlawful—Sec. 24 (See p. 92-93)
(5) Agreements without consideration—Sec. 25 (See p. 41-42)

Void agreements declared by the Indian Contract Act in sections 26, 27, 28, 29, 30 and 56. These agreements are explained below :

(6) Agreements in restraint of trade.—Sec. 27 (See p. 83)
(7) Agreements in restraint of legal proceedings—Sec. 28 (See p. 87-88)
(8) Uncertain Agreement.—Sec. 29 (See p. 88-89)
(9) Agreements by way of wager.—Sec. 30 (See p. 89)
(10) Impossible Acts.—Sec. 56 (See p. 92)
(11) Agreement Contingent on impossible event.—Sec. 36 (See p. 98)
(12) Reciprocal promises where there are void promises.—Sec. 57 (See p. 104-107)

Agreements in restraint of trade

"Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void"—Sec. 27

"Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself of the fruit of his labour, skill or talent, by any contract that he enters into." *Fraser* v. *Bombay Ice Company.*[2]

According to English law as laid down in *Nordenfelt* v. *Maxim Nordenfelt Gun Co.*[3] contracts which impose ***unreasonable*** restraints upon the exercise of a business, trade or profession are void while those which impose ***reasonable*** restraints are valid.

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[1] 1 C. L. J. 261
[2] 29 Bom 107
[3] (1894) A. C. 535

But in India restraints are not valid except in the few cases provided by law. (See below)

Examples :

(*i*) *X* and *Y* carried on business as braziers in a certain locality in Calcutta. *X* promised to stop his business in that locality in consideration of *Y* paying to him Rs. 900 which he had disbursed as advances to his workmen. *X* stopped his business but *Y* failed to pay him the promised money. *X* filed a suit to recover Rs. 900. The court held that the agreement was void under Sec. 27 and nothing could be recovered on the basis of that agreement. *Madhav* v. *Rajcoomer*.[2]

(*ii*) *X* garage agreed to deal only with the products of Esso Petroleum Co. and to work according to the company's rules for $4\frac{1}{2}$ years. *Garage Y* with Esso had an agreement containing the same terms but for 21 years. *Y* was also mortgaged to the Esso against a loan. The House of Lords held that the agreement with *Y* was unreasonable and void. But the agreement with *X* was held reasonable and valid. *Esso Petroleum Co.* v. *Harper's Garage (Stouport) Ltd.*[3]

Cases in which restraint of trade is valid in India

An agreement is restraint of trade is valid in the following cases :

I. Statutory Exceptions

(*i*) *Sale of Goodwill* : "One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any one deriving title to the goodwill from him, carries on a like business therein ; provided that such limits appear to the court to be reasonable, regard being had to the nature of the business"—Exception 1, Sec. 27, Contract Act.

The seller of the goodwill of a business can be restrained from carrying on a similar business within specified local limits, provided the restraint is reasonable.

Examples :

(*a*) *X* buys from *Y* the goodwill of the business of plying ferry boats across certain ghats on a river and *Y* promises not to ply his boats at those ghats. The restraint is valid.

(*b*) *C* after selling the goodwill of his business to *D* promises not to carry on similar business "anywhere in the world". The restraint is void.

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[1] (1874) 14 B L R. 76 [2] (1968) A. C. 269

(*c*) *E* a seller of imitation jewellery sells his business to *D* and promises not to carry on business in "imitation jewellery and real jewellery". Held, the restraint was valid as regards imitation jewellery, not as regards real jewellery. *Goldsoll* v. *Goldman*.[1]

(*ii*) ***Partner's competing business*** : A partner of a firm may be restrained from carrying on a similar business, so long as he remains a partner.—Sec. 11 (2) Partnership Act.

(*iii*) ***Rights of outgoing partner*** : A partner may agree with his partners that on ceasing to be a partner he will not carry on a similar business within a specified period or within specified local limits.—Sec. 36 (2), Partnership Act.

(*iv*) ***Partner's similar business on dissolution*** : Partners may, in anticipation of the dissolution of the firm, agree that all or some of them shall not carry on similar business within a specified period or within specified local limits.—Sec. 54, Partnership Act.

(*v*) ***Rights of buyer and seller of goodwill*** : The sellers of the goodwill (i.e., the partners of the firm) or anyone or more of them may carry on a business competing with that of the buyer and may advertise the business. A partner or partners cannot (*a*) use the firm name, (*b*) represent himself as carrying on the business of the firm, or (*c*) solicit the custom of persons who were dealing with the firm before its dissolution (unless there is an agreement with the buyer of goodwill permitting any of these).—Sec. 55 (2)

(*vi*) ***Agreements in restraint of trade*** : The buyer of the goodwill may further protect himself from the competition of the old partners by entering into an agreement with any partner prohibiting such partner from carrying on any business similar to that of the firm within a specified period or within specified local limits. Such an agreement shall be valid if the restrictions imposed are reasonable (not withstanding the fact that the agreement may amount to restraint of trade).—Sec. 55(3)

II. Legal decisions

(*a*) Trade combinations

It has been held in many English cases that an agreement between a group of manufacturers or traders regarding the

[1] (1915) 1 Ch. D 292

conditions of an industry or the price, is binding although it is in restraint of trade, provided the agreement is in the interest of the parties themselves. Thus, pools and cartels whose objects are to promote the welfare of the parties themselves by regulating competition are valid agreements.

Examples :

(*i*) Certain ice manufacturers entered into agreement not to sell ice below a certain minimum price. The agreement was held to be valid. *Fraser & Co.* v. *Bombay Ice Co.*[1]

(*ii*) It was agreed among members of a society of hop growers that each member would deliver all hops grown by him to the society which would market the hops end divide the profits among the members. Held, the agreement was valid. *English Hop Growers* v. *Derring.*[2]

But a trade combination is not valid if it is against the public interest or if it tends to create monopoly. *Attorney General of Australia* v. *Adelaid S. S. Co.*[3] It was observed in Vancouver *Brewing Co.* v. *V. Breweries*[4] that, "Liberty of trade is not an asset which the law will permit a person to barter away except in special circumstances."

(*b*) Negative stipulations in service contracts

A person while in service with another may, by the terms of his service, be prevented from accepting other engagements. For example, a doctor employed in a hospital may be debarred from private practice. Such negative stipulations in service contracts are not considered to be in restraint of trade and are therefore valid.

Sometimes, however, employers seek to restrict former employees from engaging themselves in similar occupations for some period after the termination of their services. In English law such stipulations have been held to be valid if they are for the protection of the employer's interest. Thus in *Fitch* v. *Dewes*[5] the articled clerk of a solicitor stipulated that he would not practice as a solicitor within seven miles of a certain place, after he became qualified as a solicitor and left his previous employment. The agreement was held to be valid.

The Indian law regarding restraint of trade is, however,

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[1] 29 Bom 107
[2] (1928) 2 K. B. 174
[3] (1914) A. C. 461
[4] (1934) A. C. 181
[5] (1921) 2 A.C. 158

stricter. It has been held in, *Brahmaputra Tea Company* v. *Scarth*,[1] that an agreement restraining an employee from taking service or engaging in any similar business for a period of five years from the date of the termination of his service with his previous employers is invalid even though the restrictions only extended to a distance of 40 miles from the previous place of work. In *Cohen* v. *Wilkie*,[2] an actor was brought out from England under a contract containing a stipulation that he would not play at another theatre in India during his tour. The stipulation was held to be void as being in restraint of trade.

A decision of the Supreme Court : A company was manufacturing a special yarn with the collaboration of a foreign undertaking on the condition that the company would maintain secrecy of all technical information and would have secrecy agreements with its employees. One employee was appointed for five years with the condition that during this period he would not take service any where even if he left this service. Shelat, J. of the Supreme Court held that the agreement is valid. *Niranjan Shankar Golikari* v. *Century Spinning & Manufacturing Co. Ltd.*[3]

3. Agreements in restraint of legal proceedings

Private persons cannot by agreement alter their personal law or the statute law. Section 28 of the Act provides that, "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The effect of Section 28 can be summed up as follows : An agreement which prohibits a person from taking judicial proceedings, in respect of any right arising from a contract, is void. Similarly any limitation of the time within which he may enforce his rights is void. Section 28, is subject to two exceptions :

Exception. 1—Future disputes : An agreement by the parties to a contract to refer future disputes to arbitration is valid and binding. An agreement to settle disputes by arbitration prevents the parties from getting the dispute adjudicated by a court of law but nevertheless, such an agreement is binding.

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[1] 11 Cal 545 [2] 16 C. W. N. 534
[3] AIR (1967) Supreme Court 1098

Exception 2—Pending disputes : An agreement in writing to refer a *pending* dispute to arbitration is not rendered illegal by Section 28. The section does not affect the law relating to arbitration.

It is to be noted that Section 28 applies only to rights arising from a contract. It does not apply to cases of civil wrong or torts.

Section 28 dealing with the above question renders void two kinds following agreement as per Amendment Act 1996 :

(1) An agreement which wholly or partially prohibits any party from enforcing his rights under or in respect of any contract is void to that extent.

(2) Agreements which curtail the period of limitation prescribed by the law of limitation are void because their object is to defeat the provision of law.

Similarly an agreement purporting to cast the jurisdiction of courts is contrary to public policy. But an agreement between two or more parties to refer to arbitration any disputes which have arisen or which may arise between them is perfectly valid.

4. Uncertain Agreement

"Agreements the meaning of which is not certain, or capable of being made certain, are void,"—Sec. 29.

An agreement cannot be enforced unless the obligations created by it are clearly understood. (See p. 33)

Examples :

(*i*) *A* agrees to sell to *B* "one hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(*ii*) *A*, who is a dealer in cocoanut oil only, agrees to sell to *B* "one hundred tons of oil". The nature of *A*'s trade affords an indication of the meaning of the words and the agreement is valid.

(*iii*) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(*iv*) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(*v*) *A* agrees to sell to *B* "my white horse for Rs. 500 or Rs. 1,000". There is nothing to show which of the two prices was to be given. The agreement is void for uncertainty.

(*vi*) *L* promises to pay five pounds more after the purchase of a horse if the horse "proved lucky". The promise is too vague to be enforced

for it is not possible for the courts to decide when a horse is lucky *Guthing* v. Lynn.[1]

"Agreeing to Agree" : An agreement to *enter into an agreement in the future* is void for uncertainty unless all the terms of the proposed future agreement are agreed expressly or by implication. "Unless all material terms of the contract are agreed, there is no binding obligation. An agreement to agree in future is not a contract nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it." Lord Maugham in *Foley* v. *Classique Coaches Ltd.*[2] (Anson, *Law of Contract*, ch. II).

Examples :

(*i*) An actress was engaged for a provincial tour. The agreement also provided that if the play was brought to London she would be engaged at a salary "to be mutually agreed upon". Held, there was no contract. *Loftus* v. *Roberts.*[3]

(*ii*) A company agreed with *V* that on expiration of *V*'s existing contract, they would "favourably consider" the renewal of his contract. Held, no obligation was created to renew the contract. *Montreal Gas Co.* v. *Vasey.*[4]

5. Agreements by way of wager

Definition : A wager is an agreement by which money is payable by one person to another on the happening or non-happening of a *future, uncertain event.* "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event ; which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way *A* will lose but if it turns out the other way he will win." *Thacker* v. *Hardy.*[5]

Characteristics of wagering agreements :

1. The consideration for the promise under a wagering agreement is to pay or get money.

2. The money is payable on the happening or the non-happening of an event.

3. The agreement depends on a future and uncertain event.

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[1] (1831) 2 B & Ad. 232
[2] (1934) 2 K. B. 1
[3] (1902) 18 T.L.R. 532
[4] (1900) A. C. 595
[5] (1878) 4 Q.B.D 685

4. The essence of gaming and wagering is that one party is to win and the other lose.

5. In wagering agreement no party has control over the event.

6. Commercial transactions are valid, but to pay price differences in a wagering agreement is void.

Commercial transactions : "In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences." *Sukherdoss* v. *Govindoss.*[1] Commercial transactions are not speculative if there is a clear intention to deliver the goods.

Examples of wagering agreements :

(*i*) *P* agrees with *Q* that if there is rain on a certain day *P* will pay *Q* Rs. 50. If there is no rain *Q* will pay *P* Rs. 50.

(*ii*) A bet on a horse race is wagering transaction, although horse racing is permitted by some local law and although there may be official agencies through which bets may be placed and the winnings collected.

(*iii*) A share market transaction, in which there is no intention to give or take delivery of the shares and where the parties intend to deal only with the differences in prices, is a wagering transaction.

(*iv*) Certain transactions were settled by handing over Delivery Orders and cheques. There is no evidence that actual delivery of goods was ever effected. Held, the transactions are speculative. *Nirmal Trading Co.* v. *The Commissioner of Income-Tax (Central) Calcutta.*[2]

(*v*) *Lotteries*—A lottery is a game of chance. Therefore an agreement to buy a ticket for a lottery is a wagering agreement. A lottery may be authorised by the government. The only effect of such authorisation is to exempt the persons conducting the lottery from criminal prosecutions but it remains a wagering transaction. *Dorabji* v. *Lance.*[3]

(*vi*) *Cross-word Puzzles*—In an English case it has been held that a cross-word puzzle, in which prizes depend upon sameness of the competitor's solution with a previously prepared solution kept with editor of a newspaper, is a lottery and therefore a wagering transaction. *Coles* v. *Odham's Press.*[4]

Exceptions

It has been held that the following transactions are not wagers :

(*i*) *Shares* : Share market transactions in which there is clear intention to give and take delivery shares.

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[1] (1928) 55 I.A. 32 (Privy Council) [2] AIR (1980) Supreme Court 234
[3] (1918) 42 Bom 676 [4] (1936) 1. K. B. 416

(*ii*) *Games of skill* : Prizes and competitions which are games of skill, *e.g.*, *picture* puzzles ; athletic competitions etc. An agreement to enter into a wrestling contest, in which the winner was to be rewarded by the whole of the sale-proceeds of tickets and the party failing to appear on that day would have to forfeit Rs. 500 was held not be a wagering agreement. *Babasaheb* v. *Rajaram.*[1]

(*iii*) *A statutory exception* : An agreement to contribute to the payment of a prize of the value of Rs. 500 or upwards to the winners of a horse race, is valid. This is statutory exception laid down in section 30 of the Contract Act.

(*iv*) *Contract of Insurance* : A contract of insurance is not a wagering agreement. (See 'Law of Insurance', ch. 1)

(*v*) "*Badla*" : "Badla" transactions are exactly similar to the transaction of 'conversion' or 'carrying over' in the terminology of the Stock Exchanges with regard to dealings in securities. Mere agreement to engage in speculation on the rise and fall in prices of goods is not necessarily a wagering contract. But in a case this contract was held void under Section 23 of Contract Act because it prohibited forward contracts by a statute on this subject. *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons etc.*[2]

The effects of a wagering agreement

An agreement by way of wager is void. It will not be enforced by the courts of law. Section 30 provides as follows : "Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made."

In the State of Maharashtra and of Gujarat wagering agreements are, by a local statute, not only void but also illegal.

In the case of void agreements, collateral agreements, *i.e.*, agreements which are subsidiary or incidental to the main agreement, are valid. Therefore, though wagering agreements are void, transactions collateral to such agreements are valid. *Gherulal Parakh* v. *Mahideodas Maiya & ors.*[3]

Examples :

(*i*) Money lent for the purpose of gambling or for paying a gambling debt even if advanced with knowledge of the purpose for which the money is required can be recovered.

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[1] (1931) 33 Bom L.R. 260 [2] AIR (1975) Supreme Court 1223
[3] 1959 (II) S.C.A. 342 (Supreme Court)

(*ii*) Where one of several holders of a Derby Sweep ticket sold half of his share to another, the other could enforce his claim in the prize by suit. *Gough* v. *Leneham*.[1]

(*iii*) *M* lost Rs. 8,500 to *L* on horse races. Subsequently *M* executed a Hundi for same amount in favour of *L* to prevent *M* being posted as a defaulter in his club. *L* filed a suit on the Hundi. *M* pleaded that it was a wagering transaction and that the consideration was unlawful. Held, a wagering agreement is void but does not affect the collateral transaction. *Leicester & Co.* v. *S. P. Mullick*.[2]

6. Impossible Acts

"An agreement to do an act impossible in itself is void.—Sec. 56 (Para 1).

Examples :

(*i*) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(*ii*) *A* contracts to marry *B*, being already married to *C*, and forbidden by the law to which he is subject to practice polygamy. The contract is void. But *A* must make compensation to *B* for the loss caused to her by the non-performance of the promise.

The examples cited above are cases of Pre-contractual Impossibility.

A contract may become impossible to perform by subsequent events. These cases are discussed under "Termination of Contracts" in ch. 11. They can be called Post-contractual Impossibility.

OBJECTS OR CONSIDERATION UNLAWFUL IN PART

If the consideration or object is partially unlawful, the following rules will apply.

1. If there are several objects but a single consideration the agreement is void if any one of the objects is unlawful.—Sec. 24.

2. If there is a single object but several considerations, the agreement is void if any one of the considerations is unlawful.—Sec. 24.

The two above rules with the case where the agreement cannot be divided into two parts—a part which is legal and a part which is illegal.

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[1] 25 I.C. 355 [2] (1923) Cal. 445

Example :

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay *A* a salary of Rs 10,000 a year. The agreement is void. Here a part of the object is legal and a part is illegal but there is a single consideration.

3. Where there is a reciprocal promise to do things legal and also other things illegal, and the legal part can be separated from the illegal part the legal part is a contract and the illegal part is a void agreement.—Sec. 57.

Example :

A and *B* agree that *A* shall sell *B* a house for Rs. 10,000 but if *B* uses it as a gambling house, he shall pay *A* Rs. 50,000 for it. The first part of the agreement is valid, the second part invalid.

4. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.—Sec. 58.

Example :

A and *B* agree that, *A* shall pay Rs. 1,000 for which *B* shall afterwards deliver to *A*, either rice or smuggled opium. This is a valid contract to deliver rice and a void agreement as to opium.

EXERCISES

1. When is an agreement said to be against public policy? Give five examples of agreements which are against public policy. (Pages 79-83)
2. Examine the validity of agreements with consideration and object unlawful in part. (Page 92)
3. State the law in restraint of profession, trade, or business. Give illustrations. (Pages 83-84, 88-89)
4. What are the exceptions to the role that contracts in restraint of trade are void? (Pages 84-87)
5. What are the agreements which have been expressly declared to be void as per the Indian Contract Act., 1872? (Pages 83-93)
6. What are agreements by way of wager? What are the legal consequences that flow from an arrangement by way of wager? (Pages 89-93)
7. Define 'Wagering Contract'. Is there any exception? (Pages 89-93)
8. State with reasons, whether the following agreements are void or valid : (*a*) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*". (Example (*iv*), page 88)

(*b*) *A* grants lease of certain premises in Calcutta to *B* knowing that the premises will be used for the purpose of installing machinery for minting base coin. (Para 1, page 77)

9. ***Problems*** :
   (*a*) *A* enters into a wagering agreement and borrows Rs. 100 for the purpose. Void or valid ? (Page 92)
   (*b*) *A* agrees to sell to *B* "my white horse for Rs. 500 or 1000." Is the agreement valid ? (Page 88)
   (*c*) *X* enters into a contract with *Y* for the sale of goods to be delivered at a future date. Is it a wagering Contract ? (It is a valid Contract, not a Wagering Contract).
10. Objective questions. Give short answers.
   (*i*) An agreement to share the emoluments of a public office is void. True or false ? (Para 3, page 80)
   (*ii*) *X* agrees with *Y* to discover treasure by magic. Is the contract valid ? (Para 6, page 92)

9 CONTINGENT CONTRACTS

Definition

"A contingent contract is a contrac. to do or not to do something, if some event, collateral to suc a contract, does or does not happen."—Sec. 31.

Example :

A contracts to pay *B* Rs 10,000 if *B*'s house is burnt. This is a contingent contract. [Illustration to Sec. 31]

A contingent contract contains a conditional promise. A promise is "absolute" or "unconditional" when the promisor undertakes to perform it in any event. A promise is "conditional" when performance is due only if an event, collateral to the contract, does or does not happen. "Collateral" means, "subordinate but from same source, connected but aside from main line".

Meaning of Collateral Event

According to Pollock and Mulla[1] a collateral event means an event which is, "neither a performance directly promised as part of the contract, not the whole of the consideration for a promise." From this explanation it follows that the following contracts are not contingent contracts :

(*a*) *X* promises to pay Rs. 100 to any person who recovers some property lost by *X*.

(*b*) *X* promises to pay *Y* Rs. 1,000 if he marries *Z*.

In example (*a*) there is no contract until and unless somebody finds the lost property. In example (*b*) there is an offer by *X* which becomes a binding promises when *Y* marries *Z*.

But a contract, whereby *A* promises to pay *B* Rs. 10,000 if *B*'s house is burnt, is a contingent contract because the liability of *A* arises only when *B*'s house in burnt. This is an event collateral to the main contract because the burning of *B*'s house is not the performance required from *B* under the contract nor is it the consideration obtained from *B*. It is an independent event.

[1] Pollock and Mulla, *Indian Contract Act.* p. 235

Characteristic of Contingent Contracts

From the above discussion it follows that there are two essential characteristics of contingent contracts :

(*a*) The performance of such contracts depends on a contingency, i.e., on the happening or non-happening of the future event.

(*b*) In a Contingent Contract, the event must be collateral i.e., incidental to the contract.

(*c*) The contingency is uncertain. If the contingency is bound to happen, the contract is due to be performed in any case and is not therefore a contingent contract.

Contingency dependent on act of party

The performance of a contingent contract depends on the happening or non-happening of a collateral event. The word 'event' includes an 'act'; and the 'act' may be of a party to the contract or of a third party. Thus a promise to buy certain goods if the party's engineer approves of them, is valid. Here the engineer's approval is the act on which the performance of the promise to purchase is contingent. But if the performance of a promise is contingent upon the mere will and pleasure of the promisor, there is no contract.[1]

Examples :

(*i*) Life insurance, indemnity and guarantee are examples of Contingent Contract.

(*ii*) *A* promise to pay, what a third party *X* shall determine, is valid.

(*iii*) The plaintiff entered into a contract for the supply of timber to the Government. One of the terms of the contract was that the timber would be rejected if not approved by the Superintendent of the Gun Carriage Factory for which the timber was required. The timber supplied was rejected. Held, on a suit for breach of contract, that it was not open to the plaintiff to question the Superintendent's decision. *Secretary of State for India* v. *Arathoon.*[2]

(*iv*) In the case of goods to be manufactured to order, it may be a term of the contract that the goods shall be to the customer's approval. In such a case the customer's judgment, acting *bonafide* and not capriciously, is decisive. *Andrews* v. *Belfield.*[3]

(*v*) A promise, to pay for a service whatever the promisor himself thinks right or reasonable, is no promise. *Roberts* v. *Smith.*[4]

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[1] Pollock and Mulla, *op. cit.*, p. 236

[2] (1879) 5 Mad. 173

[3] (1857) 2 C. B. N. S. 779.

[4] (1859) 4 H. & N. 315

Rules regarding Contingent Contracts

Sections 32 to 36 of the Contract Act contain certain rules regarding contingent contract. They are summarised below.

1. *The happening of a future uncertain event* : Contracts contingent upon the happening of a future uncertain event, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.—Sec. 32.

Examples :

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

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

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

2. *The non-happening of an uncertain future event* : Contracts contingent upon the non-happening of an uncertain future event, can be enforced when the happening of that event becomes impossible, and not before—Sec. 33.

Example :

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

3. *When event to be deemed impossible* : If a contract is contingent upon how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.—Sec. 34

Example :

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

4. *The happening of an event within a fixed time* : Contracts contingent upon the happening of an event within a fixed time, become void if, at the expiration of the fixed time, such event has not happened, or if, before the time fixed, such event becomes impossible.

The non-happening of an event within a fixed time : Contracts contingent upon the non-happening of an event within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or before the time fixed has expired, if it becomes certain that such event will not happen.—Sec. 35.

Examples :

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

(*ii*) *A* promise to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

5. *Impossible event* : Contingent agreements to do or not to do anything, if an impossible event happens are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.—Sec. 36.

Examples :

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

(*ii*) *A* agrees to pay *B* Rs. 1000 if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

Difference between Contingent Contract and Wagering agreements

1. A contingent contract is valid, a wagering agreement is void.

2. A contingent contract depends on the happening or non-happening of an event; but the contract is valid, a wagering agreement is void.

3. Contingent contract may not contain reciprocal promises ; a wagering agreement consists of reciprocal promise.

4. In a Contingent contract either party or both may have an interest in the subject matter of the contract ; in a wagering agreement the parties have no interest except getting or paying money.

5. In a Contingent contract the future event is only collateral and valid ; a wagering agreement is void.

EXERCISE

1. Explain the meaning of contingent contracts and their rules.
(Pages 95-98)

10 PERFORMANCE OF CONTRACTS

PERFORMANCE OR TENDER

Definition

A contract creates legal obligations. "Performance of a contract" means the carrying out of these obligations. Each party must perform or offer to perform the promise which he has made. Section 37, para 1, of the Contract Act lays down that, "The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this act, or of any other law."

The Offer to Perform or Tender

The offer to perform the contract is called Tender. Offer to perform or Tender may be called attempted performance. A tender, to be legally valid, must fulfil the following conditions.— Sec. 38 :

1. It must be *unconditional*. A tender coupled with a condition is no tender.

Example :

A passenger on a bus offers a rupee note for the fare which is 10p. only. It is not a valid tender because it imposes condition on the acceptance of the tender *viz.* the return of the balance out of the rupee. A tender of money must be of the exact sum due. *Bireswar* v. *The Emperor*.[1]

2. A tender to pay *conditionally* upon the other party doing somethings such as giving a release or accepting the other amount in full satisfaction of all demands, is not a valid tender. But of course, a receipt may be demanded after a tender has been accepted.

3. A tender money, must be in legal tender money, not by any foreign money, or by promissory note or cheque. *Jagat* v. *Nabagopal*.[2]

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[1] 46 C.W.N. 550 [2] 34 Cal. 305

4. The tender must be made at a *proper time and place.* What is proper time and place, depends upon the intention of the parties and the provisions of Sections 46-50 of the Act. (See pages 109-110).

A tender before the due date or at a time and place other than that agreed upon, is not a valid tender. *Eshaque* v. *Abdul Bari.*[1]

5. The person to whom a tender is made must be given a *reasonable opportunity of ascertaining* that the person by whom it is made is able and willing there and then, to do *the whole of what he is bound by his promise to do.*

6. The reason behind the above rule is that an offer to perform a part of the promise is not a valid tender.

7. 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.

Example :

> *P* contracts to deliver to *B* at his warehouse on the 1st March 1973, 100 bales of cotton of a particular quality. *P* must bring the cotton to *B*'s warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

8. When there are several promisees, an offer to *any one of them* is a valid tender.

Effect of refusal to accept a properly made offer of performance or Tender

Where the promisor has made an offer of performance to the promisee, and the offer has not been accepted, the contract is deemed to be broken by the promisee and he can be sued for breach of contract.

Effect of refusal of party to perform promise wholly

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirely, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.—Sec. 39.

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[1] 31 Cal. 183

Example :

P, a singer, enters into a contract with *B*, manager of a theatre to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *P* wilfully absents herself. With the assent of *B*, P sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract and cannot now put an end to it but is entitled to compensation for the damage sustained by him through *P*'s failure to sing on the sixth night.

BY WHOM IS A CONTRACT TO BE PERFORMED ?

1. Personal Performance

In cases involving personal skill, taste, or credit, the promisor must himself perform the contract. The courts will enforce the intention of the parties, as expressed in the contract, or as may be inferred from the circumstances of the case.

2. Performance by representatives

In all other cases the promisor or his representatives may employ a competent person to perform it.—Sec. 40.

Examples :

(*i*) *Q* promises to paint a picture for *B* ; *Q* must perform this promise personally.

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

3. Effect of Performance from a third person

When a promise accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.—Sec. 41.

4. Death of the Promisor

Contracts involving personal skill or volition, come to an end when the promisor dies. His heirs or legal representatives are not bound to perform such contracts. This rule is expressed in a Latin phrase, *actio personalis moritur cum persona*—a personal cause of action dies with the person concerned.

In cases not involving personal skill or volition, the legal representatives of a deceased promisor are bound to perform the contract. Upon failure to do so, they will be liable for breach

of contract. But the liability of the legal representatives is limited to the assets obtained from the deceased. They are not personally liable.

The legal representatives can enforce performance of the contract upon the other party or parties and their legal representatives.

Examples :

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

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

5. Performance of Joint Promises — See below.

Who can demand performance ?

1. The promisee can demand performance of the promise. A stranger to a contract, i.e., one who is not a party to it, cannot file a suit to enforce it. A contract between *P* and *Q* cannot be enforced by *R*.

2. Under certain cases a stranger to the contract can enforce the contract. Examples, Trust, Assignee...etc. (See p. 44).

3. The legal representatives can enforce performance of the contract upon the other party or parties and their legal representatives.

DEVOLUTION OF JOINT RIGHTS AND LIABILITIES

Joint Performance

Two or more persons may enter into a joint agreement with one or more persons. *Example* : *A* and *B* jointly promise to pay Rs. 500 to *C* and *D*. In such cases, the question arises, who is liable to perform the contract and who can demand performance ? The rules on the subject are stated below—Sections 42-45 :

1. Devolution of Joint liabilities

When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such

persons must jointly fulfil the promise. Upon the death of one of the joint promisors, his liability devolves upon his legal representatives, and the legal representatives become liable to perform the contract jointly with the surviving parties. if all the parties die, the liability devolves upon their legal representatives jointly.—Sec. 42.

The English law on the point is different. In case of joint promises, the liability to perform, devolves in England, upon the surviving promisors. The legal representatives of deceased promisors are not liable.

2. Any one of joint promisor may be compelled to perform

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

Each promisor may compel contribution

"Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract."

Sharing of loss by default in contribution

"If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares."—Sec. 43.

[Sec. 43 does not apply to Sureties. See. ch. 13]

The English law is different. Under it "all joint contractors must be sued jointly for a breach of contract." In India the promisee can choose against whom to proceed.

Examples :

(*i*) *A, B & C* jointly promise to pay *D* Rs. 3,000. *D* may compel either *A* or *B* or *C* to pay him Rs. 3,000.

(*ii*) *A, B & C* are under a joint promise to pay *D* Rs. 3,000. *C* is unable to pay anything and *A* is compelled to pay the whole. *A* is entitled to receive Rs. 1,500 from *B*.

(*iii*) *A, B & C* jointly promise to pay *D* Rs. 3,000. *C* is compelled to pay the whole. *A* is insolvent but his assets are sufficient to pay one-half of his debts. *C* is entitled to received Rs. 500 from *A*'s estate and Rs. 1,250 from *B*.

3. Effect of release of one joint promisor

"Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee not discharge the other joint promisors ; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors."—Sec. 44.

The English law on this point is different. Release of one joint promisor under English law releases all the promisors but not in India.

4. Devolution of joint rights

When a person has made a promise to several persons jointly. then (unless a contrary intention appears from the contract) the right to claim performance rests on all the promisees jointly so long as all of them are alive. When one of the promisees dies the right to claim performance rests with his legal representative jointly with the surviving promisees. When all the promisees are dead. the right to claim performance rests with their legal representatives jointly.—Sec. 45.

Example :

Q in consideration of Rs. 500 lent to him by *B* & *C*. promises *B* & *C* jointly to repay them the sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representative jointly with *C* during *C*'s life and after the death of *C* with the representatives of *B* & *C* jointly.

RECIPROCAL PROMISES

Definition

A Contract consists of reciprocal promises when one party makes a promise (to do or not to do something in the future) in consideration of a similar promise (to do or not to do something in the future) made by the other party. Such a contract is an exchange of promises.

Rules

Sections 51-54 and 57-58 of the Contract Act lay down the rules regarding the performance of reciprocal promises. They are stated below.

1. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform

"When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."—Sec. 51.

Examples :

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

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

2. Order of performance of reciprocal promises

"Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires."—Sec. 52.

Examples :

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

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

3. Liability of party preventing event on which contract is to take effect

"When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."—Sec. 53.

Example :

A & *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly but *A* prevents him from doing so. The contract is voidable at the options of *A* ; and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

4. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises

"When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by non-performance of the contract."—Sec. 54.

Examples :

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

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

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

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

5. Reciprocal promises to do things legal and also other things illegal

"When persons reciprocally promise, firstly to do certain

things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement."—Sec. 57. (See. p. 92)

6. Agreement to do impossible act

An agreement to do an act impossible in itself is void.—Sec. 56. (See p. 92)

CONTRACTS WHICH NEED NOT BE PERFORMED

Sections 62 to 67 of the Contract Act are listed under the heading "Contracts which need not be performed". The relevant provisions are as follows :

1. If by mutual agreement there is Novation, Rescission or Alteration, the original contract need not be performed. (Sec. 62. See Chapter 11)

2. The same rule applies in cases of Remission. (Sec. 63. See Chapter 11)

3. When a voidable contract is rescinded, the other party need not perform his promise. (Sec. 64. See "Restitution", Chapter 11)

4. 'If the promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby." Sec. 67. (See under, "Breach of Contract", Chapter 11)

II. Under the Law of Contract the following agreements need not be performed :

1. Unlawful consideration and object—Sec. 23 (See p. 77-83)

2. Where the performance is unlawful or illegal—Sec. 56 (See p. 92)

ASSIGNMENT OF CONTRACTS

Definition

Assignment means transfer. The rights and liabilities of a party to a contract can be assigned under certain circumstances. Assignment may occur (i) by act of parties or (ii) by operation of law.

Rules

The rules regarding assignment of contracts are summarised below :

1. Contracts involving personal skill, ability, credit, or other personal qualifications, cannot be assigned. *Examples* : a contract to marry ; a contract to paint a picture ; a contract of personal service ; etc.

2. The obligations under a contract, *i.e.*, the burden and the liabilities under the contract cannot be transferred. For example, if *X* owes *Y* Rs. 100 he cannot transfer the liability to *Z*, and force *Y* to collect his money from *Z*.

Exception—In both cases 1 and 2, the parties to a contract may agree to replace the original contract by a new one under which the obligations of one of the parties are shifted to a new party. Thus in the example given above if *Y* agrees to accept *Z* as his debtor in place of *X*, the liability to pay the debt is transferred from *X* to *Z*. Such cases are known as Novation.

3. A contract may be performed through the agency of a competent person, if the contract does not contemplate performance by the promisor personally.—Sec. 40. But in this case the original party remains responsible for the proper performance of the obligations under the contract.

4. The rights and benefits under a contract (not involving personal skill or volition) can be assigned. Thus if *X* is entitled to receive Rs. 500 from *Y*, he can assign his right to *Z* whereupon *Z* will become entitled to receive the money from *Y*. But in this case the assignment is subject to all equalities between the original parties. Thus if *Y* had already paid a portion of the debt to *X*, he will pay to *Z* correspondingly less.

5. The rights of a party under a contract may amount to an "actionable claim" or "a chose-in-action". Section 3 of the Transfer of Property Act defines as actionable claim as "a claim to any debt (except a secured debt) or to any beneficial interest...whether such claim or beneficial interest be existent, accruing, conditional or contingent." *Examples of actionable claims* : a money debt ; book debts ; the interest of a buyer of goods in a contract for forward delivery (*Jaffer Ali* v. *Budge Budge Jute Mills*[1]) ; an option to repurchase property sold ; etc.

[1] 34 Cal. 289

Actionable claims can be assigned but only by a written document. Notice must be given to the debtor.

6. Assignment by operation of law occurs in cases of death or insolvency. Upon the death of a party his rights and liabilities under a contract devolve upon his heirs and legal representatives (except in the case of contracts involving personal qualifications). In case of insolvency, the rights and liabilities of the person concerned pass to the Official Assignee or the Official Receiver.

THE TIME AND PLACE OF PERFORMANCE

General Rules

The time and the place of performance of a contract are matters to be determined by agreement between the parties to the contract. In sections 46 to 50 of the Indian Contract Act certain general rules have been laid down regarding the time and place of performance. They are as follows :

1. Time for performance without application

"Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time."

"*Explanation*—The question what is a reasonable time, is, in each particular case, a question of fact."—Sec. 46.

2. Time and place, where time is specified

"When a promise is to be performed on a certain day, and the promisor has undertaken to perform it 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."—Sec. 47.

Example :

D promises to deliver goods at *B*'s warehouse on the first January. On that day *D* brings the goods to *B*'s warehouse but after the usual hour for closing it and they are not received. *D* has not performed his promise.

3. Application for performance to be at proper time and place

"When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application

by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business."

"*Explanation*—The question 'what is a proper time and place' is, in each particular case, a question of fact."—Sec. 48.

4. To appoint a reasonable place for the performance

"When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place."—Sec. 49.

Example :

D undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *D* must apply to *B* to appoint a reasonable place for the purchase of receiving it, and must deliver it to him at such place.

5. Manner and time prescribed or sanctioned by promisee

"The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions."—Sec. 50.

Examples :

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

(*ii*) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively of the sums which they owed to each other.

(*iii*) *D* owes *B*, 2,000 rupees. *B* accepts some of *C*'s goods in deduction of the debt. The delivery of the goods operates as part payment.

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

PERFORMANCE WITHIN STIPULATED TIME

Rules

Section 55 of the Contract Act lays down certain rules regarding the effects of failure to perform a contract within the stipulated time. They are as follows :

1. In contracts where time is of the essence of the contract, if there is failure to perform within the fixed time, the contract (or so much of it as remains unperformed) becomes voidable at the option of the promisee.

2. In such cases, the promisee may accept performance after the fixed time but if he does so he cannot claim compensation unless he gives notice of his intention to claim compensation at the time of accepting the delayed performance.

3. In contracts where time is not of the essence of the contract, failure to perform within the fixed time does not make the contract voidable, but the promisee is entitled to get compensation for any loss occasioned to him by such failure.

Case Law

When is time the essence of the contract ? The decisions of the Supreme Court, regarding the 'time' of the performance of contracts, are summarised below :

1. The fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. *Gamathinayagam Pillai* v. *Palaniswami Nadar.*[1]

2. The question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. *Hind Constn. Contractors* v. *State of Maharashtra.*[2]

3. Even if a contract expressly lays emphasis on time as the essence of the contract, the condition will be dependent on other provisions of the contract. The inference that the work must be completed by a particular date may not be given the fundamental position because of the presence of such other provisions. If such other clauses provide for extension of time in certain probabilities or for payment of fine or penalty on daily or weekly basis if the work remains unfinished on the expiry of the given period, the express provision as regards the time being of the essence of contract will be rendered ineffective. *Hind Constn. Contractors* v. *State of Maharashtra.* (See above).

4. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence

[1] AIR (1967) Supreme Court 868 [2] AIR (1979) Supreme Court 720

of the contract. *Govind Prasad Chaturvedi* v. *Hari Dutt Shastri and another.*[1]

5. In mercantile contracts, the time of delivery of goods is of the essence of the contract but not the time of the payment of the price. *Mahabir Prasad* v. *Durga Dutta.*[2]

RULES REGARDING APPROPRIATION OF PAYMENTS

When a debtor owes several distinct debts to the same creditor and makes a payment to the creditor, the question may arise against which debt the payment is to be appropriated. In England the law on the subject was laid down in *Clayton's case.*[3] In India the rules regarding appropriation of payments are contained in Sections 59-61 of the Contract Act. The law on the point can be summarised as follows :

1. Express appropriation by Debtor

If the debtor at the time of making the payment expressly intimates that the payment is to be applied to the discharge of some particular debt, the payment if accepted, must be applied accordingly.

2. Implied appropriation by Debtor

If there is no express appropriation, but there are circumstances which imply that the debtor intended appropriation to a particular debt, the debtor's intention must be followed, if the money is accepted.

Examples :

(*i*) *A* owes *B* among other debts, Rs. 1,000 upon a promissory note which falls due on 1st June. He owes no other debt of that amount. On the 1st June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(*ii*) *A* owes to *B* among other debts, the sum of Rs. 567. *B* writes to *A* and demands the payment of this sum. *A* sends to *B* Rs. 567. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

3. Principal and Interest when both due

The general rule is that in absence of any appropriation by

[1] AIR (1977) Supreme Court 1005 [2] AIR (1961) Supreme Court 990
[3] (1816) 1 Mer 572, 610

the debtor at the time of payment, the payment should be attributed in the first instance to interest and then to the principal. *Harishchandra and another* v. *Kailashchandra and another.*[1]

When both principal and interest are due, the debtor can stipulate that a particular payment made by him is to be appropriated to the principal, the interest remaining due. If the creditor accepts the payment he must also accept the debtor's appropriation. If he does not like to do so he must refuse to accept the payment.

4. Appropriation by Creditors

If there is no express or implied appropriation by the debtor, the creditor may apply the money to any lawful debt which is due and payable by the debtor. He may even apply it to a debt which is barred by the law of limitation.

Example :

S was an unregistered dentist who, according to the law in force in England, could not sue for performing a dental operation but could sue for materials supplied. *S* had a bill against *P* for £45 of which £20 was for performing an operation and £25 for materials supplied *P* paid £20 without appropriating it. In an action by *S*, held (1) *S* could appropriate the £20 towards his professional services because it was a lawful debt although irrecoverable and (2) he could make the appropriation for the first time while giving evidence in his suit. *Seymour* v. *Pickett.*[2]

5. Order of appropriation

When neither the debtor nor the creditor makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law of limitation. If the debts are of equal standing (*i.e.*, of the same date) the payment shall be applied in discharge of each proportionately.

6. The rule in re Hallett's estate

Suppose that a man has an account in a bank in which he keeps his own money as well as some moneys of which he is a trustee. He makes a series of deposits and withdrawals, in the course of which some trust funds are misappropriated. In this

[1] AIR (1975) Raj. 15 [2] (1905) 1 K.B. 715

case, the withdrawals are to be debited first to his own moneys and then to the trust funds; and the deposits are to be credited first to the trust fund and next to his own fund, whatever be the order of withdrawals and deposits. *In re Hallett's Estate.*[1]

EXERCISES

1. What do you understand by performance of a contract? Under what circumstances a contract need not be performed? (Pages 99, 107)
2. State the essentials of a valid tender. (Pages 99-100)
3. State the rules regarding appropriation of payments. (Pages 112-114)
4. When is time the essence of the contract? (Page 109)
5. Write notes on : (a) Devolution of joint promises (rights and liabilities); (b) Reciprocal promises; (c) Assignment of contracts. [Pages (*a*) 104-107; (*b*) 107-108; (*c*) 107-109]
6. Objective questions. Give short answers :
   (*i*) *X* tenders a cheque for buying goods from *Y*. Is *Y* bound to accept the cheque? (Page 99)
   (*ii*) *Q* promises to paint a picture for *B* by a certain day on payment of Rs. 1,000. *Q* dies before that day. Can this contract be enforced by *Q*'s representatives or by *B*? (Example (*ii*) page 102)

[1] 18 Ch. D. 696