

NOTES ON

LAW OF CONTRACTS - I

SFI Study Circle

by

Anil K. NairAdvocate
High Court of KeralaAVAILABLE
AT*Akash Books*RADHA KRISHNA BUILDINGS
GAÑDHARIAMMAN COIL ROAD, STATUE
THIRUVANANTHAPURAM - 1
PHONE : 0471 - 2327390
Mob: 9446580443

Rs. 130/-

PUBLISHED
BY
APARNA PUBLICATIONS
AJITHABHAVAN, KULASEKHARAM,
THIRUVANANTHAPURAM - 13, PHONE: 9446580443

CONTENTS**The Indian Contract Act, 1872**

1.	Introduction	1
2.	Definition of Contract	2
3.	Definition of Offer or Proposal	8
4.	Offer and Invitation to Make Offers	13
5.	Lapse of Offer	16
6.	Acceptance	18
7.	Communication of Offer, Acceptance and Revocation	23
8.	Definition of Consideration	26
9.	Capacity to Contract	33
10.	Free Consent	38
11.	Unlawful Agreements	54
12.	Agreements Opposed to Public Policy	56
13.	Unlawful Agreements and Illegal agreements	59
14.	Consequence of Illegality	61
15.	Void Agreements	62
16.	Wagering Agreements	64
17.	Doctrine of Blue Pencil	65
18.	Contingent Contracts	67
19.	Quasi Contracts	70
20.	Doctrine of Privity of Contract	75
21.	Discharge of Contract	78
22.	Remedies for Breach of Contract	92

The Specific Relief Act, 1963

1.	Introduction	100
2.	Recovery of Possession of Property	100
3.	Specific Performance of Contracts	104
4.	Rectification of Instruments	115
5.	Rescission of Contracts	116
6.	Cancellation of Instruments	120
7.	Declaratory Decrees	121
8.	Preventive Relief by way of Injunction	122

Model Problems 130-139

LAW OF CONTRACTS - I

Prepared By-

Anil K. Nair

Advocate

High Court of Kerala

Phone :2327390, 2378489(0471)

2347135(0484)

9447500443

Topic -I Introduction

In India, the law relating to contracts is contained in the Indian Contract Act, 1872. It came into force on the first day of September, 1872. It extends to the whole of India except the State of Jammu and Kashmir.

The Indian Contract Act is one of the early enactments which is applicable in India even today. The Act is based on the New York Draft Code.

The Indian Contract Act, 1872 deals with the general principles of law of contract and some special contracts. The first six chapters of the Act deal with general principles of contracts. These chapters deal with the different stages in the formation of a contract, its essential elements, its performance or breach and remedies for breach of contract. The remaining chapters deal with some special contracts, viz., indemnity and guarantee, bailment and pledge, and agency.

The Indian Contract Act, 1872 is not an exhaustive enactment. It deals only with the general principles of the law of contract and some special contracts. The preamble itself shows that it is to define and to amend certain parts of the law relating to contracts. The contracts relating to partnership,

sale of goods, negotiable instruments etc., are not dealt with by the Indian Contract Act, 1872. There are separate enactments to deal with them.

Topic-II

Definition of Contract

What are the Essentials of a Valid Contract ?

Or

"All Contracts are Agreements but all Agreements are not Contracts"

- Comment

The word "contract" has been derived from the Latin term *contractum* which means "drawn together."

Section 2 (h) of the Indian Contract Act, 1872 defines the term 'contract' in the following words:

"A contract is an agreement enforceable by law".

Pollock defines the term Contract as follows:

"Every agreement and promise enforceable at law is a contract".

In Halsbury's Laws of England, the following definition is given.

"A contract is an agreement made between two or more persons which is intended to be enforceable at law, and is constituted by the acceptance by one party of an offer made to him by the other party to do or to abstain from doing some act."

The analysis of the above stated definitions bring to light the following points.

- (1) A contract is an agreement made between two or more persons.

(2) The agreement should be one enforceable through court of law.

Thus there are two elements in a contract. They are :

- (1) an agreement, and
- (2) enforceability by law.

Thus a Contract = An Agreement + Enforceability by law.

Agreement

When an 'offer or proposal' made by one person is 'accepted' by another, it becomes an agreement. Thus there are two elements in an agreement. They are:

- (1) offer or proposal, and
- (2) acceptance.

An Agreement = Offer + Acceptance.

When a person signifies (communicates) to another his willingness (readiness) to do or to abstain from doing anything with a view to obtaining the assent (consent) of that other, he is said to have made a proposal or offer.

The person making the offer is known as the offerer or proposer. The person to whom the offer is made is called offeree.

Acceptance is an expression by the offeree of his willingness to be bound by the terms of offer. When the person to whom the offer is made signifies his assent thereto, the offer is said to be accepted. When an offer or proposal is accepted, it becomes an agreement.

Enforceability by law

If the agreement is enforceable through court of law, the agreement is

a contract. Only an enforceable agreement becomes contract. Section 10 of the Indian Contract Act, 1872 prescribes the essential conditions of enforceability of an agreement.

Section 10 reads as follows :

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

In order to be an enforceable agreement, by virtue of section 10 of the Act, the following are the essential conditions.

- (1) The agreement should not be a mere *social agreement or domestic agreement*.

It is an established principle that a *social agreement* or a *domestic agreement* does not give rise to a contractual obligation, and thus such agreements are not enforceable through a court of law.

Examples

(i) A invited his friend B to come and stay with him for a week. B accepted the invitation, but he could not go to A's place as agreed. A cannot enforce the agreement because the agreement is only a social agreement.

(ii) A's father promised him to pay a sum of Rs. 100/- on every month as pocket money. Later the father refused to pay. The son cannot recover the money. Because it is only a domestic arrangement.

Balfour v. Balfour (1919) 2 KB 571

A husband and wife were residents in Ceylon where the husband was employed. They went to England on nine months' leave. At the end of that time, the husband had to return alone as the wife was advised to remain in England because of illness. The husband promised to send her a

maintenance allowance of 40 pounds a month until she return to Ceylon. The husband failed to perform his promise. The wife filed a suit to enforce the promise. It was held that there was no binding contract but only a mere domestic agreement. The court dismissed the suit filed by the wife.

Spellman v. Spellman (1961) 1 WLR 921

The husband had given a promise to his wife and thereby agreed to buy a car for her in an effort to improve their strained matrimonial relationship. The husband failed to perform his promise and the wife filed a suit for enforcement of the agreement. The court held that the promise to the wife was only a domestic arrangement and it would not result in any contractual relationship. The suit filed by the wife was dismissed by the court.

Jones v. Padavattom (1969) 2 All ER 616

A divorced woman was living in Washington with her son. She was employed there as an assistant accountant in the Indian Embassy on attractive terms. Her mother was at Trinidad. The mother, who had great love and affection to the grandson, wished her daughter to be near her. The mother persuaded her daughter to leave service to take legal education in England and finally to come back to Trinidad as a practising lawyer. The mother undertook to bear the expenses of education. The daughter left the service. The mother bought a house in England and a part of which was given to her daughter for her accommodation, and the other part was let out to tenants. The daughter could not complete her education within the long period of five years. In the meantime she remarried. Later differences of opinion arose between the mother and the daughter, and the mother stopped payments and also commenced proceedings to evict the daughter from the building. The daughter resisted the suit on the ground that the mother had agreed to meet the expenses of her education and thus she is entitled to be maintained by her mother till the completion of her education and till then she was not liable to be evicted from the building. The court rejected the contention of the daughter and held that the promise of the mother was only a family arrangement and thus it was not intended to be rigid binding agreement. It was further held that she could not expect support from her mother for herself,

her son and her husband in perpetuity.

(2) There should have been *Intention to create legal obligation*.

The agreement should have been entered into by the parties with intention to create a legal obligation. If the agreement gives rise only to a social obligation, there is no contract. The agreement must give rise to a legal obligation in order to be a contract.

Example

'A' made a proposal or offer to sell his car to 'B' for Rs. 10,000/- 'B' accepted the proposal and paid Rs. 5000/- as advance. Here, when 'A' made the proposal and 'B' accepted it, there was intention to create legal obligation on the part of both 'A' and 'B'. This is an enforceable agreement and thus a contract.

Balfour v. Balfour (1919) 2 KB 571

In this case, the court held that when the parties have not intended to make a bargain which could be enforceable by law, there is no contract.

(3) There must be *consensus ad idem*.

Consensus ad idem means identity of minds. The parties to a contract must have agreed about the subject matter of the contract in the same sense, at the same time. Unless there is *consensus ad idem* (identity of minds), there is no enforceable contract.

Example

'A' has two cars, one is Ambassador and the other is Fiat. A offered to 'B', a car for sale. B accepted the offer believing that the car which 'A' offered is Fiat. But A actually offered the Ambassador Car. There is no *consensus ad idem* and consequently no enforceable contract.

- (4) The consent of the parties to the agreement must be free and genuine.

If the consent of the parties is not free, the agreement is not enforceable through court of law. There is absence of free consent, if the agreement is induced by coercion, undue influence, fraud, misrepresentation or mistake.

- (5) There should be lawful consideration

The agreement to be enforceable by law, it must be supported by lawful consideration. Consideration means 'something in return'. The agreement is legally enforceable only when both the parties give something and get something in return. The consideration need not necessarily be in cash or in kind. It may be a service or a return promise. But it must be real and lawful.

- (6) The parties to the agreement should have capacity to contract

Every person is competent to contract, if he -

- (a) has attained the age of majority, and
- (b) is of sound mind.

- (7) The object of the agreement must be lawful.

The agreement must not be illegal, immoral or opposed to public policy.

- (8) The agreement must not have been expressly declared void by any law in force in the country.

- (9) The agreement may be oral or in writing. If the law says that the agreement should be in writing and it should be registered and attested, then these formalities should be satisfied.

Thus we can say that an agreement which satisfies all the above said

conditions can only be enforced through a court of law, and becomes a contract. "All contracts are agreements but all agreements are not contracts". It means that an agreement which is not enforceable through court of law is not a contract. But a contract is an agreement enforceable by law.

Topic -III

Define Offer or Proposal

What are the Essentials of a Valid Offer?

Offer is the word used in English law of contract. In India, the equivalent word is proposal.

When an offer or proposal is accepted, it becomes an agreement. Section 2(a) of the Indian Contract Act, 1872 defines proposal as follows:

When one person signifies (communicates) to another his willingness (readiness) to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

The analysis of the definition bring to light the following points:

1. In order to constitute a proposal, a person should have made a communication to another person.
2. The person who has made the communication should have expressed his willingness or readiness to do or to abstain from doing something.
3. The communication should be made with a view to obtaining the assent (or consent) of that other to such act or abstinence.

The person making the proposal (offer) is known as "promisor" ('offeror' or 'proposer'). The person to whom the proposal (offer) is made is called "promisee" (offeree).

Example: "A" says to 'B', " I am ready to sell my house at

Thiruvananthapuram to you. Will you purchase the house for Rs. 1,00,000". This is an offer or a proposal. A is the promisor (offerer) and B is the promisee (offeree).

Express Offer and Implied Offer

An offer is to be signified to the offeree. Based on the mode of expression, the offer can be classified into (i) express offer, and (ii) implied offer.

When an offer is made in words, spoken or written, it is known as express offer.

Example : "A" says to B, "will you purchase my house at Thiruvananthapuram for Rs. 1,00,000". This is an express offer.

An offer which is expressed by conduct is called implied offer. An implied offer can be ascertained or inferred from the conduct of proposer.

Example ; A person enters into a shop where goods are sold on self-service system and selects some goods for him. The act of selecting goods for purchasing them is an implied offer to purchase those goods.

Specific Offer and General Offer

When an offer is made to a definite ascertained person, it is called a specific offer. Such an offer can be accepted only by the person to whom it is made.

When an offer is made to public at large or to an unascertained individual, it is called general offer. Such an offer may be accepted by any one who is aware of it.

Carlll v. Carbolic Smoke Ball Co. (1893) 1 QB 256

A company advertised in several newspapers that a reward of 100 pounds would be given to anyone who is contracted epidemic influenza

after having used the "smoke balls" of the company according to the printed directions. The advertisement further stated that the company had deposited 1000 pounds in a Bank to give reward. One Mrs. Carlill used the smoke balls according the directions of the company, but she was afflicted by influenza. She filed a case claiming reward of 100 pounds. The company resisted the suit and contended that the advertisement was only a mere puff and not an offer. The court held that the advertisement in the newspaper was a general offer and by using the smoke balls she had accepted the offer. The deposit of money in the bank showed that it was seriously intended. She could recover the amount as compensation.

Bhajan Lal v. Charan Lal (AIR 1925 All. 539)

A young boy ran away from his father's house. The father issued a pamphlet offering to pay Rs. 500 to any one who brings to him his missing son. The plaintiff, who came to know of the pamphlet, traced the boy at a Railway station took him to the Railway police station and sent a telegram to the boy's father that he had found his son. Though the plaintiff traced the boy, the father refused to make payment of the reward declared by him. The court held that the pamphlet was an offer open to the whole world and capable of acceptance by any person who fulfilled the condition. The plaintiff substantially performed the condition and was entitled to get the amount offered.

Cross Offer and Counter Offer

Cross Offer

When two parties make identical offers to each other, in ignorance of each other's offer, the offers are called 'cross offers'. In such a case there is no concluded contract.

Example

On 25.6.2008 'A' wrote a letter to B offering his house for sale for Rs. 25,000/- . B without the knowledge of this letter, on the same day, wrote a letter to A offering to purchase of A's house for Rs. 25,000/- . Both

of them were not aware of the offer of the other. In this case, the offers will only be treated as cross offers. There is no acceptance and hence no contract.

Tinn v. Hoffmann & Co. (1873) 29 LT 271

On 28th November 1871, the defendant wrote to the plaintiff offering to sell a certain quantity of iron at a particular price. On the very same day, the plaintiff wrote to the defendant offering to buy the same quantity of iron at the same price. Unknown to each other, the letters crossed in post. The plaintiff claimed that there was a contract. It was held that mere cross-offers made in ignorance of each other, would not create a contract.

Counter Offer

When the person to whom an offer is made accepts it with a condition, the acceptance is only a counter offer and not amounting to valid acceptance.

Example

X offered to 'B' his car for sale for Rs. 25,000/-, B in a reply letter wrote to X that he is ready to purchase it for Rs. 20,000/-. The letter of B is only a counter offer and not an acceptance. There is no enforceable agreement.

Hyde Vs. Wrench (1840) 49 ER 132

The defendant offered to sell an estate to the plaintiff for 1000 pounds. The plaintiff replied offering 950 pounds. It was refused. Later the plaintiff wrote informing that he was prepared to purchase at 1000 pounds. The letter offering to purchase at 950 pounds was held to be a counter offer. The effect of a counter offer was to terminate the original offer. It could not then be revived.

Legal Rules as to Offer

(Essentials of a Valid Offer)

(1) An offer must be made with intention to create legal relationship. It must be one capable of being accepted.

(2) The terms of offer must be definite, unambiguous and certain. It should not be loose and vague. If the terms of an offer are indefinite or ambiguous, its acceptance cannot create any contractual relationship.

(3) An offer must be communicated to the person to whom it is made. Unless an offer is communicated, there can be no acceptance of it. An acceptance of the offer, in ignorance of the offer, is no acceptance and does not confer any right on the acceptor.

Fitch Vs. Snedaker (1868) 30 NY 248 (American Case)

'S' offered a reward of \$ 100 to any one who returns his lost dog. F, a servant of S, brought the dog to S. The offer of reward was declared when F was searching for the dog in the forest. F was not aware of the offer until he returned the dog. He claimed the reward. The court held that there was no acceptance from the part of F since he had accepted the offer without knowledge of the offer. Thus there was no binding contract.

Lalman Vs. Gauri Dutt (1913) 11 All LJ 489

M sent his servant 'S' to trace his missing nephew. He thereafter pronounced that anybody who traced his nephew would be entitled to a reward of Rs. 100= . S traced the boy in ignorance of this announcement. Subsequently, when he came to know of the reward, he claimed it. The court held that S was not entitled to get the reward.

(4) Offer must be made with a view to obtaining the assent of the offeree.

(5) Offer should not contain a term the non-compliance of which may be assumed to amount to acceptance. Thus a man cannot say that if acceptance is not communicated up to next Sunday, the offer would be considered as accepted.

Example

A writes to B, "I shall sell you my horse for Rs. 100/- If you do not reply before 10th of next month, I shall assume, you have accepted the offer". There is no contract if B does not reply. Silence of the offeree does not amount to acceptance.

Topic -IV Offer and Invitation to make Offer (Offer to Chaffer)

When a person signifies his willingness to do or abstain from doing something, he is said to have made an offer. When the person to whom the offer is made signifies his readiness to act as per the terms of offer, the offer is said to have accepted, and it gives rise to a binding contract. But under certain circumstances, a person may disclose his readiness to negotiate and invite offers. Such invitation to make offers will not become a contract when a person makes an offer in response to the invitation.

If a shopkeeper displays in his window certain goods with prices marked on them, there is no offer to sell that goods to anyone who is ready to purchase it. The display of goods with marked price is only an '*invitation to make an offer*' or '*offer to chaffer*' or '*offer to receive offers*' or '*offer to negotiate*'. When a person makes an offer to purchase that goods at the marked price, the shopkeeper can either accept the offer or reject it.

When a person advertises his house to let or property to sell, it is not an offer but it is only an offer inviting offers. Such advertisements are offers to make offers. The person advertised is only expressing his willingness to negotiate and the advertisement does not amount to offer. So also an advertisement by an auctioneer to sell goods by auction is only an invitation

to make offers. A bid at an auction is treated as offer. An auctioneer is not bound to accept even the highest bid (offer). An auctioneer is free to cancel an auction sale announced by him.

Harris v. Nickerson(1873) LR 8 Q.B 286,

The defendant advertised a sale by auction. The plaintiff travelled to the advertised place of action to participate in the auction sale. But the defendant cancelled the auction sale. The plaintiff filed a suit for expenses of his travel. It was held that the plaintiff cannot succeed as there was no contract between the two parties. The advertisement of auction sale was only an offer to make offers.

U.P. Avas Eevam Vikas Parishad v. Om Prakash Sharma (2013) 5 SCC 182

The Supreme Court held that if there is sale of property by auction, the highest bidder did not acquire no vested right in relation to auctioned property until his bid is accepted. It is because no contract comes into existence merely by submission of highest bid, until it is accepted. Communication of acceptance of highest bid is necessary for concluding the contract.

When a person advertises circular calling for tenders from intending purchasers of certain goods, the person who has made the highest tender cannot claim that there is binding contract. The person who invited tenders can either reject or accept the tender. Making the tender is only an offer. Advertisement inviting tenders is only an offer to make offers.

Spencer v. Harding (1870) LR 5 CP 561

The defendant sent out a circular calling for tenders from intending purchasers of certain stock-in-trade. The plaintiff's tender was the highest, but the defendant refused to sell the stock to him. The court held that the circular was only an invitation to offer and that the tender was the real offer. The person who invited tenders can either accept or reject the tender. In this case, the tender of the plaintiff was rejected and thus there was no concluded contract.

Harvey V. Facey (1893) AC 552

In this case, three telegrams were exchanged between Harvey and Facey.

(1) "Will you sell us Bumper Hall Pen.? Telegraph lowest cash price - answer paid"

(H to F)

(2) "Lowest price for Bumper Hall Pen is 900 pounds" (F to H)

(3) "We agree to buy Bumper Hall pen for the sum of 900 pounds asked by you (H to F)

Facey did not give any reply to the last telegram. Harvey filed a suit for specific performance and demanded the Bumper Hall Pen for 900 pounds.

The question before the court was whether there is a binding agreement between H and F.

The first telegram asked two questions

- (i) The willingness of F to sell, and
- (ii) The lowest price.

F replied only to the second question and gave his lowest price. F had not stated his willingness to sell the Bumper Hall Pen. *A quotation of lowest price is not an offer. It is only an offer to make offer.* Harvey's final telegram contains an offer to purchase the Bumper Hall Pen at the quoted price. Since Facey did not accept that telegram, it was held that there was no binding contract.

Pharmaceutical Society of Great Britain Vs. Boots Cash Chemists (1953) 1 QB 401

Goods are sold in a shop under the "self service" system. Customers select goods in the shop and take them to the cashier for payment of the price. X entered the shop and selected certain articles and brought to the cashier. The cashier rejected the cash and not gave the goods to X. X filed a case against the shop owners. The court held that the contract, in this case, is made not when the customer selects the goods, but when the cashier accepts the offer to buy and receives the price. Thus there was no contract.

Fisher Vs. Bell (1961) QB 394

X exhibited a 'flick knife' in the show window of a shop with a marked price. Y demanded the 'flick knife' at the marked price. X refused to sell the flick knife at the marked price. Y filed a suit against X on the ground that there is breach of contract. The court held that there was no agreement. The exhibition of 'flick knife' was only an offer to make an offer and not an offer. The readiness of Y to purchase the flick knife was an offer. X was at liberty to accept the offer of Y or reject it. As X has rejected the offer of Y there was no valid agreement.

Executive Engineer, Sundargarh v. Mohan Prasad Sahu (AIR 1990 Ori.26)

It was held that the advertisement calling for tenders is not a proposal but the submission of tender is in the nature of an offer.

Topic - V Lapse of Offer or Termination of Offer

By virtue of section 6 of the Indian Contract Act, 1872, under the following circumstances an offer lapses or comes to an end.

(1) By communication of notice of termination or revocation of offer

An offer may be revoked at any time before the letter of acceptance is posted by the offeree. If an offer is revoked by notice, the offer lapses and the offeree cannot thereafter accept it. An acceptance of offer after revocation will not give rise to a binding agreement.

(2) By lapse of time

If a time is prescribed in an offer for its acceptance, the offer terminates by lapse of time, if it is not accepted within the stipulated period. If, however, no time is prescribed, it lapses by expiry of a reasonable time.

Example

'S' offered to sell wool to 'B' on Thursday and agreed to give him 3 days time to accept it. 'B' accepted the offer on Monday, but by that time S sold

the wool to another person. The acceptance is not valid and there is no binding contract.

G.M. Co-operative Housing v. Zenith Chemical Works (AIR 1991 Bom. 211)

It was held that if no time is given for acceptance of offer, acceptance has to be communicated within a reasonable time. The offer cannot remain open indefinitely.

(3) By non-fulfilment of a condition precedent

An offer lapses or terminates, if the offeree fails to fulfil a condition precedent. An offer may be subject to a condition precedent and if the condition fails to be satisfied, then the offer will not be capable of acceptance.

Example

'S' offers to sell certain goods to B, subject to the condition that B should pay the price before a certain date. If B fails to pay the price by that date, the offer lapses or terminates.

(4) By death or Insanity.

The death or insanity of the proposer / offeror puts an end to the offer. But if the offeree accepts the proposal / offer in ignorance of the death or insanity of the offeror, the acceptance is valid.

Dickinsons v. Dodds (1876) 2 Ch. D 463

In this case, the English Court held that the death of the proposer puts an end to the offer and an acceptance though in ignorance will not result in a contract.

In India, the law is different and the offer lapses only if the fact of death or insanity is brought to the knowledge of the acceptor before acceptance. If the offeree accepts the offer in ignorance of the death or insanity of the offeror, the acceptance is valid and it binds the estate of deceased.

(5) By counter offer

An offer terminates or lapses, if a counter offer is made to it.

Topic -VI

What is Meant by Acceptance ?

What are the Essentials of a valid Acceptance ?

Acceptance is an expression by the offeree of his willingness to be bound by the terms of offer.

Section 2(b) defines acceptance as follows:

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.

Section 2(e) defines an agreement as follows:

Every promise and every set of promises, forming consideration for each other, is an agreement.

When an offer / a proposal is accepted, it becomes a promise. Every promise is an agreement. Every set of promises, forming consideration for each other, also becomes an agreement. If the agreement is enforceable at law, that is a contract. In connection with acceptance of an offer Sir William Anson observed that an "acceptance is to offer like a lighted match to a train of gun-powder". It produces something which cannot be recalled or undone.

Acceptance may be express or implied. It is express when it is communicated by words, spoken or written. It is implied when it is to be gathered from the conduct of the parties.

Who can accept ?

When an offer / a proposal is made to a particular person, it can be accepted by him alone. If it is accepted by any other person, there is no

valid acceptance.

In the case of general offer, any person with notice of offer may accept the offer, by performing the terms of offer. (*Carilli Vs. Carbolic Smoke Ball Co* (1893)1 QB 256).

Legal Rules as to Acceptance

(1) It must be absolute and unqualified

The offer must be accepted without any variation from the terms of offer. Conditional or qualified acceptance is not an acceptance but a counter offer and there is no contract until this counter-offer is accepted by the original proposer.

Example

'D' says to 'P' "I offer to sell my car to you for Rs. 5000." 'D' replies "I shall purchase it for Rs.4500/-". This is no acceptance. It is only a counter offer. If 'D' accepts this counter offer in toto, there is contract, if not, there is no valid contract.

Hyde Vs. Wrench (1840) 49 ER 132

The defendant offered to sell an estate to the plaintiff for 1000 pounds. The plaintiff replied offering 950 pounds. It was refused. Later the plaintiff wrote informing that he was prepared to purchase at 1000 pounds. The letter offering to purchase at 950 pounds was held to be a counter offer. The effect of a counter offer was to terminate the original offer. It could not then be revived.

In Trimex International FZE Ltd v. Vedanta Aluminium Ltd (2010) 3 SCC 1, the offer was made through e-mail specifying terms and conditions. It was unconditionally accepted and communication of acceptance was made through e-mail. It was held by the Supreme Court that mere absence of a signed formal contract would not affect unconditional acceptance of contract or implementation thereof.

(2) The acceptance must be communicated to the offeror

An acceptance must be communicated to the offeror. A mere mental determination to accept unaccompanied by any external indication will not be sufficient.

Bhagwandas v. Giridharlal (1966)1 SCR 656

The Supreme Court held that an agreement does not result from a mere state of mind. Intention to accept an offer or even mental resolve to accept an offer does not give rise to a contract. There must be some external manifestation (overt act) of that intent by speech, writing or other act.

Acceptance must be communicated to the offeror himself. A communication to any other person is as ineffectual as if no communication has been made.

Felthouse v. Bindley (1863) 7 LT 835

X offered by means of a letter to purchase his nephew's horse. The nephew did not send a reply to his uncle signifying his assent to sell the horse. But he told his auctioneer not to sell the horse as it was already sold to his uncle. The auctioneer, by mistake put up the horse for auction and sold it. X sued the auctioneer on the ground that under the contract between X and his nephew, the horse had become his property and, therefore, defendant's unauthorised sale amounted to conversion. But the action failed. The Court held: "It is clear that the nephew in his own mind intended the uncle to have the horse, but he had not communicated his intention to the uncle before the defendant put up the horse for sale". The result is that at the time of auction sale, there was no concluded contract and hence the defendant is not liable for the wrong of conversion.

In the case of general offer the offeree can accept it by acting as per the terms of offer.

Carilli V. Carbolic smoke Ball co(1893)1 QB 256.

The court held that in the case of general offer, the offeree may accept

the offer by acting according to the directions contained in the offer of the company .

(3) The acceptance must be given according to the mode prescribed by the offeror

If the offeror says that the acceptance must be given by 'Telegram' and the offeree sends it by 'post', the acceptance is not according to the mode prescribed. If the acceptance is not according to the mode prescribed, the offeror may intimate to the offeree within a reasonable time that the acceptance is not according to the mode prescribed, and may insist that the offer must be accepted in the prescribed mode only. If he does not inform the offeree, he is deemed to have accepted the acceptance.

If no mode of acceptance is prescribed, acceptance must be expressed in some usual and reasonable manner. Thus an acceptance by letter is a reasonable mode when the offer is made by letter.

(4) The acceptance must be given within a reasonable time

If any time limit is fixed or specified for acceptance, the acceptance must be given within that period. If no time is stipulated, it must be given within a reasonable time.

(5) An acceptance cannot precede the offer.

The acceptance must be made after the communication of offer. An acceptance of offer before the offer is communicated to the offeree is not valid acceptance and it will not create a binding contract.

(6) Intention to create Legal obligation

The acceptance must show an intention on the part of the offeree to fulfill the term of agreement and create legal relationship.

(7) Acceptance should be by the Offeree

The acceptance must be given by the party to whom the offer is made. In the case of specific offer, the offeree himself should accept it. In the case

of general offer, any one who is aware of, and fulfills the conditions of general offer, can accept it.

(8) Acceptance must be given before the offer lapses or terminates

If an offer is accepted after it is lapsed or terminated, it will not create a binding contract.

Effect of Silence on Acceptance

The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer, unless the offeree has by his previous conduct indicated that his silence means that he accepts.

Example

A wrote to B "I offer to you my car for Rs. 10,000/-". "If I do not hear from you within 7 days, I shall assume that you accept". B did not reply at all. There is no contract.

Harvey V. Facey (1893) AC 552

In this case three telegrams were exchanged between Harvey and Facey.

(1) "Will you sell us Bumper Hall pen? Telegraph lowest cash price - answer paid" (H to F)

(2) " Lowest price for Bumper Hall Pen is 900 pounds" (F to H)

(3) " We agree to buy Bumper Hall pen for the sum of 900 pounds asked by you (H to F)

Facey did not give any reply to the last telegram. Harvey filed a suit for specific performance and demanded the Bumper hall pen for 900 pounds.

The question before the court was whether there is a binding agreement between H and F.

The first telegram asked two questions

- (i) The willingness of F to sell, and
- (ii) The lowest price.

F replied only to the second question and gave his lowest price. F had not stated his willingness to sell the Bumber hall pen. A quotation of lowest price is not an offer. It is only an offer to make offer. Harvey's final telegram contains an offer to purchase the bumber hall pen at the quoted price. Since Facey has not accepted that telegram, there is no binding contract.

Topic -VII Communication of Offer, Acceptance and Revocation

An offer and acceptance must be communicated. Unless an offer is communicated, it cannot be accepted. An acceptance in ignorance of the offer is no acceptance and does not confer any right on the acceptor. Sections 4 and 5 of the Act deal with rules regarding communication of offer, acceptance and revocation.

The following are the rules regarding communication of offer, acceptance and revocation *by post*.

- (1) The communication of an offer is complete when it comes to the knowledge of the person to whom it is made.
- (2) The communication of an acceptance is complete
 - (a) as against the proposer or offeror, when it is put in the course of transmission to him (i.e., when the letter of acceptance is put in the post box).
 - (b) as against the acceptor, when it comes to the knowledge of the offeror.

Examples

(1) A proposes by a letter to sell a house to B for Rs. 1,00,000. The letter was posted on 10th of March 2015. The letter reached B on 12th of March 2015. The communication of the offer was complete when B received the letter i.e., on 12th March 2015.

(2) B accepts A's proposal by a letter sent on 13th of March 2015. The letter reached A on 15th of March 2015. The communication of acceptance is complete; as against A, when the letter was posted i.e., on 13th and as against B when the letter is received by A, ie, on 15th of March 2015.

Revocation of offer and acceptance - It's communication

Revocation means 'taking back'. An offer and acceptance can be revoked.

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

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Example : A proposes by a letter sent by post to sell his house to B. The letter is posted on 1st of March 2015. B accepts the proposal by a letter sent by post on 4th of the month. The letter reaches A on 6th.

A may revoke his offer at any time before B posts his letter of acceptance, i.e., 4th, but not afterwards. B may revoke his acceptance at any time before the letter of acceptance reaches A, ie, 6th, but not afterwards.

The communication of revocation of offer or acceptance is complete as against the person who makes it, when it is put in the letter box. As against the person to whom it is made, when it comes to his knowledge.

Loss of letter of acceptance in Postal Transit

Acceptance is complete as against the offeror as soon as the letter of acceptance is posted. The contract is complete although the letter of acceptance is lost through an accident in the post. But in order to bind the offeror, it is important that the letter of acceptance must be correctly addressed, sufficiently stamped and posted. If it is not correctly addressed, the communication of acceptance is not complete, even if it is put in the letter box.

Communication by Telex and Telephone

The rule that by posting a letter of acceptance, a contract is concluded at the place where the letter is posted cannot be extended to communication by telex and telephone.

Entores V. Miles Far East Corporation (1955) 2 All ER 493

Two companies entered into a contract by means of telex. Each company had in its office a teleprinter. A message typed on one teleprinter would automatically be typed out by the other. The plaintiffs (offeror) were in London and the defendants (acceptor) in Amsterdam. The question arose as to where the contract was concluded.

It was held that the contract was concluded where the acceptance was received, i.e. London.

But in the case of letter or telegram, the contract will be concluded where the acceptance is posted or where the telegram is handed in.

Bhagwandas Goverhandas Kedia V. Giridharlal Purushottamdas and Co. (1966) 1 SCR 656

The plaintiff made an offer, by telephone, from Ahmedabad and the same was accepted by the acceptor, by telephone, from Khamgaon. The Supreme Court held that the contract was concluded at Ahmedabad where the acceptance was received.

Topic- VIII Define Consideration. What are its Essentials?

Or

'Past Consideration is no Consideration' Comment

Or

Doctrine of Privity of Consideration

Or

Nudum Pactum

or

'Ex nudo pacto non oritur actio'

Or

'An Agreement without consideration is void'. State its exceptions

or

State the statutory provisions by which an agreement without consideration is valid.

An agreement enforceable through court of law is a contract. In order to enforce an agreement through court of law, there should be lawful consideration. By virtue of section 10 of the Act, an agreement for a lawful consideration only will become a contract. Thus an agreement without consideration will not become a contract.

Consideration is a technical term used in the sense of *quod pro quo* (i.e., something in return). When a party to an agreement promises to do something, he must get something in return. If he does not get something in return, the promise is not enforceable through court of law. The 'something in return' is the consideration for the promise.

According to Pollock, consideration is the price for which the promise of the other is bought. Thus consideration is the price for the promise. It may be in the nature of an act or a forbearance. It may also be a return promise.

Section 2 (d) of the Indian 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".

An analysis of the above definition brings to light the following points:

- (1) If the promisee or any other person *has done something* at the desire of the promisor, the act would be treated as consideration for the promise.
- (2) If the promisee or any other person *has abstained from doing something* at the desire of the promisor, the abstinence would be treated as consideration for the promise.
- (3). If the promisee or any other person *does something* at the desire of the promisor, the act becomes consideration for the promise.
- (4) If the promisee or any other person *abstains from doing something* at the desire of the promisor, the abstinence becomes consideration for the promise.
- (5) If the promisee or any other person *promises to do or to abstain from doing something* at the desire of the promisor, the promise will be treated as consideration for the promise.
- (6) Consideration must be real and not illusory. Consideration must be of some value in the eyes of the law.

In Chidambara v. P. S. Renga (AIR 1965 SC 193), it was held that consideration shall be something which not only the parties regard but the law can also regard as having some value.

In White v. Bluett (1853) 23 LJ Ex 36, the defendant owed a sum of money under a promissory note to his father. The defendant continuously, day and night, complained to his father that he had not been treated equally with other children in the distribution of his property. Thereupon the father promised to discharge him from all liability in respect of the loan and the promissory note, in consideration of stopping the complaining of unequal treatment. The defendant had stopped complaining of the unequal treatment. Later on the father filed a suit for recovery of the debt amount. The court held that the promise of the father to discharge his son from the liability is not supported by any valuable consideration and the defendant's promise that he would not complain of unequal treatment was only an illusory consideration.

(7) Consideration need not be adequate. A pepper-corn would be treated as sufficient valuable consideration to support a promise to pay Rs. 1000. This is known as the **peppercorn theory of the doctrine of consideration**. Explanation 2 attached to section 25 lays down that an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate.

Example

A agrees to sell a horse worth Rs. 10000 for Rs. 10. A's consent to agreement was freely given. The agreement is a contract notwithstanding the inadequacy of consideration.

(7) Consideration must not be illegal, immoral or opposed to public policy.

Past Consideration

It is an age old principle of English law that consideration should be contemporaneous with the promise. Consideration, being the price for the promise, should be given in response to and as an inducement for the promise. If an act has been done before any promise is made, it is called past consideration. A past consideration is no consideration for the promise and hence the promise is not enforceable through court of law.

Example

A has lost his dog. B furnishes information regarding the dog which led to the discovery of dog. A made a promise to pay a reward to B. The act of B is a past consideration for the promise of A. The promise to pay the reward would be unenforceable.

In re Mc Ardle (1951) 1 All ER 905

X effected some improvements to property without any request from any person. Later on, the ultimate beneficiaries of the property promised to pay him some amount in settlement of the amount spent on such improvements. The beneficiaries did not pay the promised amount. X filed a suit for recovery of the promised amount. The court held that the promise given by beneficiaries was for past consideration (improvements done) and hence the promise was *nudum pactum*, a promise with no consideration to support it. The suit was dismissed.

In India, by virtue of Section 25(2) of the Indian Contract Act, 1872, **past consideration is valid** and the promise given will be enforceable. If a promise is made to compensate a person who has *voluntarily done* something for the promisor, it is binding on the promisor.

Example

A finds the lost purse of B and gives it to him. B promises to give 'A' Rs.50 as reward. This is a contract.

Doctrine of Privity of Consideration

In England, the consideration must move from the promisee. If it is furnished by any other person, the promisee becomes a stranger to the consideration and, therefore, cannot enforce the promise. The promisee seeking to enforce an agreement must show that he himself furnished the consideration for the promise given by the other party. This principle is known as the **doctrine of privity of consideration**.

The doctrine of privity of consideration is not applicable in India and the consideration may be furnished by the promisee or any other person.

Chinnaya V. Ramayya (1882) 4 Mad 137

An old lady, by a deed of gift, transferred certain property to her daughter D, under the direction that she should pay her aunt P (sister of old lady) a certain sum of money annually. On the same day D entered into an agreement with P to pay her the agreed amount. D, later on, refused to pay the amount on the plea that no consideration had moved from P to D. The court held that P was entitled to maintain the suit as consideration had moved from the old lady, sister of P, to the daughter D.

In *Nihal Singh v. State of Punjab (2013) 14 SCC 65*, it was held by the Supreme Court that consideration for a contract need not always necessarily flow from parties to the contract.

"An Agreement without Consideration is Void" - It's Exceptions

The maxim "*Ex nudo pacto non oritur actio*" means no action arises from a nude agreement. In other words, no action arises from an agreement without a consideration. An agreement without consideration (*nudum pactum*) is void and unenforceable. There are certain exceptions to this general rule. Section 25 of the Indian Contract Act gives three exceptions to the general rule that a contract without consideration is void. They are:

(1) Love and Affection

A written and registered agreement based on natural love and affection between near relatives is enforceable, though there is no consideration.

Example

(1) F, for natural love and affection, promises to give his son, S, Rs.1000/- F puts his promise in writing and registers it. This is a contract.

Poonoo Bibi v. Faiez Baksh (1875) 15 Bom. LR 5

A Hindu husband, after referring to quarrels and disagreement between him and his wife, executed a registered document in favour of his wife agreeing to pay her for

maintenance. Subsequently he failed to act as per agreement. The wife claimed before a court of law the agreed amount. The court held that there was no consideration. It was because the agreement was not a result of natural love and affection. Thus neatness of relationship does not necessarily imply natural love and affection.

(2) Compensation for Voluntary Service

A promise to pay for a past voluntary service is binding even though there is no consideration.

Examples

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

(b) A voluntarily rescued B from death. B said "At the risk of your life you saved me from a serious accident. I promise to pay you Rs.1000/-". This is a contract between A and B.

(3) Promise to pay a time barred debt

A promise by a debtor to pay a time barred debt is enforceable. The promise should be in writing and signed by the debtor or his agent authorised in that behalf. The promise may be to pay the whole or any part of the debt.

Example

D owes C Rs. 1000/- but the debt is barred by the Limitation Act. D signs a written agreement to pay C Rs.500 on account of the debt. This is a contract.

Further, as per section 185, "no consideration is necessary to create an agency". Again, according to Explanation I to sec.25, the rule "No consideration, no contract" does not apply to completed gifts.

Charitable Subscriptions

In India, the law of charitable subscriptions has been settled. A promise to pay a subscription (donation) becomes enforceable as soon as any definite steps have been taken by the promisee in furtherance of the object and on

the faith of the promised subscription. In order to enforce a promise to give subscription, the following conditions are to be satisfied.

- (a) The promisee should have taken some positive steps in furtherance of the object of the promised subscription.
- (b) The promisee should have taken some positive steps on the faith of the promised subscription.

Kedarnath v. Gorle Mohammed (1886) ILR 14 Cal 64

The defendant had agreed to subscribe Rs.100 towards the construction of a town hall at Howrah. The Vice-chairman of the Municipality had called for plans, entrusted the work to contractors and had undertaken liability to pay them. The defendant failed to pay the subscription. The plaintiff filed a suit against him. It was held that the promise was enforceable, since the promisee had taken definite steps in furtherance of the object and on the faith of the promised subscription.

Abdul Aziz v. Masum Ali (AIR 1914 All 22)

The defendant promised to pay Rs. 500 to a fund started to rebuild a mosque but nothing had been done to carry out the repairs and reconstruction. The court held that the subscriber was not liable to pay the promised amount.

District Board of Ramnad v. Mohammed Ibrahim (AIR 1933 Mad 524)

The defendant promised to contribute a sum of Rs. 5,000/- for the purpose of constructing a bridge. He was held liable to pay the amount on the completion of the bridge.

Nair Service Society v. Kunjukrishna Pillai (1964) KLT 58

"K" promised to pay Rs. 10,000/- to the society for starting a college. 'K' failed to pay the promised amount. The society has already started construction, and hence it was held that 'K' is liable to pay the agreed amount.

Topic - IX **Capacity to Contract**

According to Section 10 of the Indian Contract Act, 1872, an agreement becomes a contract if it is entered into between parties who are *competent to contract*.

According to Section 11 of the Act, every person is competent to contract, if -

- (a) he has attained the age of majority according to the law to which he is subject;
- (b) he is of sound mind; and
- (c) he is not disqualified from contracting by any law to which he is subject.

The following persons are incompetent to contract.

- (1) Minors
- (2) Persons of unsound mind
- (3) Persons disqualified by law

I. Minors

By virtue of section 3 of the Majority Act, 1875, a minor is a person who has not attained eighteen years of age.

The position of a minor as regards his agreements can be summed up as under;

- (1) An agreement with or by a minor is *ab initio* (from the very beginning) void. In England, a minor's contract is only voidable at his instance.

Mohori Bibi V. Dharmadas Bhose (1903) 30 Cal 539

A minor executed a mortgage for the sum of Rs. 20,000/- in favour of

the defendant and out of which the mortgagee paid the minor Rs. 8000/-. Subsequently the minor sued for setting aside the mortgage. The defendant claimed refund of Rs. 8000/- which he had paid to the minor. The court held that the agreement was void *ab initio* and thus he could not recover the amount.

- (2) A minor can be a promisee or a beneficiary. A minor can be a buyer or mortgagee. A minor cannot be a seller or mortagor.

Example

M aged 17, agreed to purchase a second hand scooter for Rs. 2000/- from S. M paid Rs. 200 as advance and agreed to pay the balance the next day and collect the scooter. When M came with the money the next day, S told him that he had changed his mind and offered to return the advance. S cannot avoid the contract though M may, if he likes.

Padma Villoba v. M. Murtani (1963) 3 SCR 229

The Supreme Court held that a minor can be a transferee of property under a sale or mortgage.

Ranga Raju v. M. Basappa (1913) 24 MLJ 363

The Court held that if a minor happens to lend money on a promissory note, he can recover the amount from the promisor.

Raghavacharlar v. Srinivasa Raghavacharlar, 40 Mad. 308 (FB)

A minor lent money to 'B' on a mortgage. It was held that a minor can be a mortgagee and a mortgage in his favour is enforceable.

- (3) Minor cannot ratify the agreement on attaining majority

An agreement entered into by a minor cannot ratify when he attains majority. It is because minors contracts are void *ab initio*.

Armugham v. Doraisinga (1914) 37 Mad. 38

M, a minor borrowed Rs. 5000/- from L and executed a promissory note in favour of L. After attaining majority, M executed a fresh promissory note in consideration of the same borrowing. The second promissory note is void for *want of consideration*. A minor cannot ratify an act which he did during minority on attaining majority.

(4) A minor can always plead minority

Even if a minor fraudulently representing himself to be of full age and induced another to lend him a loan, he can avoid the liability to pay back by pleading minority. In other words, the doctrine of estoppel is not applicable to minors. Estoppel is a rule of evidence by which a person is not allowed to go back from his previous representation.

Example

S, a minor, by fraudulently representing himself to be of full age, induced L to lend him Rs. 10000/-. He refused to repay it and L sued him for the money. Here, the contract was absolutely void and S was not liable to repay Rs. 10000/-.

Sadik v. Jaikishore (1928)PC 152

The Privy Council held that there can be no estoppel against a minor. Even when a minor misrepresents that he is a major and thereby induces another to enter into a contract, it cannot be enforced against him as he is not estopped from setting up his minority as a defence.

(5) A minor may be directed to restore the property

If some property is obtained by a minor by some fraudulent representation, the court may direct the minor to restore the property to the other party, if the property remains in his possession.

Under English law restitution will not be ordered if the benefit obtained

by the minor is money. If the infant has obtained a loan of money which he has borrowed by fraud and subsequently spent, restitution becomes impossible.

Leslie v. Shell (1914) 3 KB 607

A minor obtained a loan of 400 pounds by a fraudulent misrepresentation of his age. The court held that a minor could not be compelled to restore the amount. It was held that "restitution stops where repayment begins".

Khan Gul v. Lakha Singh ILR(1929) 9 Lah. 701 (FB)

The Lahore High Court directed a minor to restore the money received by him through his fraud.

Ajudhia Prasad v. Chandan Lal ILR 860 (1937) All. 860

The Allahabad High Court held that a mortgagee cannot recover the money lent by him to a minor on the principle of restitution.

By virtue of section 33 of the Specific Relief Act, 1963, the court may direct a minor who has fraudulently received any benefit under the agreement, from the other party to restore the benefit. But it must be shown that the minor or his estate derived benefit therefrom.

(5) A minor cannot enter into a contract of partnership. But he may be admitted to the benefits of the partnership firm with the consent of other partners.

(6) A minor is liable for necessaries supplied to him. He is liable to pay out of his property for necessaries supplied to him. Thus if a medical shop owner supplies some medicines to a minor on credit, he is entitled to realise the money from the minor's property. A minor, is however, not personally liable. Certain services such as education, medical treatment, legal advice etc., rendered to a minor have been held to be necessaries. In England, a contract for necessaries is valid and binding on the minor.

Position of Minor's parents

The parents of the minor are not liable for the contracts entered into by the minor, even though the contract is for the supply of necessaries to the minor. A minor can act as agent of another. If the minor acts as an agent of parents, the parents are liable under the contract.

II. Persons of Unsound Mind

In order to be a valid contract, the parties to the contract must be of sound mind. An agreement by a lunatic or an insane person or a person *non compos mentis* (of unsound mind) is void under Indian Law. In England, the contract of a lunatic is voidable at his instance.

An unsound person is liable for *necessaries* supplied to him. He is liable to pay out of his properties for necessities supplied to him.

By virtue of section 12 of the Act, 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 judgement as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a valid 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. Thus a lunatic may enter into a valid contract during lucid interval.

III Drunken Person

In England, a drunken person's contract is voidable. In India, the contract of a drunken person is void. A sane man who is so drunk, that he cannot understand the terms of a contract or form a rational judgement as to its effect on his interests, cannot contract whilst such drunkenness lasts.

A drunken person is liable for *necessaries* supplied to him. He is

liable to pay out of his properties for *necessaries* supplied to him.

IV. Alien Enemy

In times of war, one cannot enter into a contract with an alien enemy. When war is declared between two countries, the performance of obligations already created will be suspended.

Topic -X

Free Consent

By virtue of section 10 of the Indian Contract Act, 1872, an agreement in order to be enforceable through court of law, there should be free consent of the parties.

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

The consent is said to be *free*, when it is not caused or obtained by-

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

When the consent to an agreement is caused or obtained by coercion, undue influence, fraud or misrepresentation, the agreement is a contract *voidable* at the option of the party whose consent was so obtained.

If the consent of both the parties are caused by mistake (bilateral mistake) the agreement is *void*. But if only one of the parties is under a mistake, it is unilateral mistake and the contract is not *void* or *voidable*.

(I) Coercion (Section 15)

When a person is compelled to enter into a contract by the use of force by the other party or under a threat, the consent is said to be obtained by Coercion.

Section 15 of the Indian Contract Act, 1872 defines "Coercion". The following are coercion.

- (i) The committing or threatening to commit any act forbidden by the Indian Penal Code, 1860.
- (ii) Unlawfully detaining or threatening to detain any property with the intention of obtaining consent to enter into an agreement.

Section 19 says that when consent to an agreement is caused or obtained by coercion, the agreement is a contract voidable at the option of the party whose consent was so obtained.

Chikhan Amraju Vs. Seshamma(1917) ILR 41 Mad. 33

A person held out a threat of committing suicide to his wife and son if they did not execute a release in favour of his brother in respect of certain properties. The wife and son executed the release deed under the threat. Held, the threat of suicide amounted to coercion and the release deed was voidable at the option of the wife and son.

Ranganayakamma V. Alwar Setty (1889) ILR 13 Mad 214

A young lady was forced to adopt a boy to her husband who had just died by the relatives of her husband who prevented the removal of his body for cremation until she consented. Held, her consent was not free but induced by coercion.

Muthayya V. Karuppan AIR (1927) Mad 852

An agent refused to hand over the account books of a business to the new agent unless the principal released him from all liabilities. The principal

had to give a release deed as demanded. Held, the release deed was given under coercion.

(II) Undue Influence (Section 16)

In an agreement there will be two or more parties. One of them may be in a position to dominate the will of another. If the person who is in such a position to dominate the will of another uses that position to obtain an unfair advantage over the other, the consent is said to be induced by "Undue influence".

A person is deemed to be in a position to dominate the will of another-

- (i) If he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other, or
- (ii) If he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

By virtue of section 19A of the Indian Contract Act, 1872, when consent to an agreement is caused or obtained by undue influence, the agreement is a contract voidable at the option of the party whose consent is so caused or obtained. The burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of other.

The following relationships usually raise a presumption of 'Undue Influence'

- (i) Parent and child
- (ii) Guardian and ward
- (iii) Trustee and beneficiary
- (iv) Religious adviser and disciple
- (v) Doctor and patient
- (vi) Advocate and client.

Allicard v. Skinner (1887) 36 Ch. D. 148

The plaintiff joined a sisterhood in 1862. Between 1871 and 1878 the plaintiff gifted a number of properties to mother superior of the sisterhood. In 1879, she left the sisterhood and after six years she filed a suit for setting aside the gifts of the properties on the ground of undue influence. The court held that, in principle, there was undue influence. In the instant case, however, the plaintiff failed for inordinate delay in bringing the suit.

Mannu Singh v. Umadat (1890), 12 All. 523

A spiritual adviser induced the plaintiff, his devotee to gift to him the whole of his property to secure benefits to his soul in the next world. Such a consent was held to be obtained by undue influence.

Wajid Khan V. Eswaz Ali (1891, 18 Cal. 545)

The privy Council set aside a gift deed executed by an old illiterate, lady in favour of her confidential managing agent on the ground of undue influence.

Palanivelu V. Neelavathi (AIR 1937 PC 50)

Two sisters, who were under the protection of the husband of their elder sister, executed a promissory note in his favour soon after attaining majority. It was held that there was undue influence.

Rajamani Ammal v. Bhoora Sami (AIR 1974 Mad. 36)

The defendant obtained a release deed from her sister, the plaintiff, immediately after her attaining majority. The plaintiff was not educated, was unmarried and was under defendant's care, protection and control. The Court held that there was undue influence on the part of defendant since he was in a fiduciary relation to the plaintiff.

Lakshmi Amma v. T. Narayana Bhatta (AIR 1970 SC 1367)

The Plaintiff executed a deed of settlement by which his entire property was given to one of his grandsons. At the time of execution, the plaintiff was seventy years old and undergoing treatment in a hospital fixed up by

the grandson in whose favour the settlement was executed. The plaintiff had wife, two daughters and other grandchildren. All of them were excluded for no ostensible reason.

The Supreme Court set aside the settlement deed on the ground that there was undue influence.

The Supreme Court held that a transaction may be vitiated on account of undue influence where the relation between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other.

In order to avoid a transaction on the ground of undue influence, two conditions should be established.

- (i) The plaintiff has to prove that the other party to the agreement was in a position to dominate his will
- (ii) That the other party had obtained an unfair advantage by using that position.

Vijay Krishna v. Keshav Chandra (AIR 1993 SC 956)

A tribal woman, who was old, illiterate and blind, executed a sale deed in favour of her relative. She was living with him till her death and was dependant on him. No consideration had passed at the time of sale. On these facts, the Supreme Court held that there is *prima facie* undue influence in this transaction.

In Joseph John Peter Sandy v. Veronica Thomas Rajkumar (2013) 2 SCC 801, father executed two registered settlement deeds by way of which he gave House No 22 (730 Sq. ft) to his son (J) and House no 23 (2413 sq. ft) to his daughter (V).

Thereafter 'J' and 'V' executed an agreement to exchange the said houses with each other. At the time of execution of the agreement, 'V' was unmarried and was dependent on her brother 'J' in respect of her marriage

and sustenance.. In fact, 'J' was in a position to dominate the will of 'V'. The Supreme Court held that the said agreement was obtained by undue influence.

Problem

A applies to a banker for a loan at a time when there is 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. Now he seek to avoid high rate of interest on the ground of undue influence. Advice 'A'.

In money lending transactions, if unconscionable and oppressive terms are included, the court may set aside such unconscionable and oppressive terms subject to the repayment to the lender the money actually advanced with reasonable interest.

By virtue of section 19-A of the Indian Contract Act, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused or obtained. Any such contract may be set aside by the court either absolutely or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as the Court may deem just.

Thus if 'A', a money lender has advanced Rs. 100/- to B, an agriculturist, and induced him to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set aside the bond and order B to repay the Rs. 100 with such interest as may deem just.

However, if the transaction is only one in the ordinary course of business, it might not be treated as vitiated by undue influence.

In the given problem 'A' applied to a banker for a loan at a time when there was stringency in the money market. The banker declined to make the loan except at an unusually high rate of interest. A accepted the loan on these terms. A was at liberty either to avail the loan at a high rate or to

refuse it. Here 'A' decided to avail the loan at a high rate of interest. Now he wants to avoid high rate of interest. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

(3) Mis-representation (Section 18)

A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some fact which is one of the causes that induce the contract. A representation may also be inferred from the conduct of the parties. A representation, when wrongly made, either innocently or unintentionally, is an innocent misrepresentation. When a false representation is made intentionally, with an intent to deceive or defraud the other party, the misrepresentation is a fraud.

Misrepresentation is a false statement which the person making it honestly believes it to be true or which he does not know to be false.

If the following conditions are satisfied the representation made by a party to the contract will become innocent misrepresentation

- (1) It must be a representation of fact.
- (2) It must be made before the conclusion of the contract.
- (3) It should be made with a view to induce the other party to enter into contract.
- (4) It must have induced the other party and he must have entered into the contract.
- (5) The representation should be a false one and the person made it honestly believed it to be true.

Derry Vs. Peek (1889, 14 AC 337)

A company's prospectus contained a representation that the company had been authorised to run its trams by steam power. In fact, the company could run the trams by horse-power and the consent of Board of Trade was required to run them by steam power. The directors honestly believed that

the consent of the Board was only a formality and had submitted plans for obtaining such consent. The plaintiff purchased shares in the company on the faith of the representation contained in the prospectus. Ultimately the Board of trade refused to allow the company to run trams by steam power and the company had to be wound up. The plaintiff sued the directors for damages on the ground that the statement in the prospectus was fraudulent. The House of Lords held that there was no fraud on the part of directors but they were guilty of misrepresentation.

Consequence of Mis-representation

By virtue of section 19 of the Indian Contract Act, a contract induced by misrepresentation is voidable at the option of the party whose consent is obtained by such mis-representation.

If the aggrieved party takes a benefit under the contract or affirms the contract even after becoming aware of the misrepresentation, he loses the right to avoid the contract.

(4) Fraud (Section 17)

If consent of a party to the agreement is obtained by fraud, it is voidable at the option of the person whose consent is so obtained. The person who is defrauded can also claim compensation for deceit.

The following are the essential elements of fraud.

- (1) There must be a representation or assertion and it must be false.
- (2) The representation must relate to a fact which is in existence or existed in the past.
- (3) The representation must have been made before the conclusion of the contract.

- (4) The representation must have been made with the intention of inducing other party to act upon it.
- (5) The representation must have been made with the knowledge that it is false or without belief in its truth.
- (6) The other party must have been induced to act upon the representation.
- (7) The other party must have been deceived or must have suffered some loss.

By virtue of Section 17 of the Indian contract Act, any of the following acts committed by a party to a contract with intent to deceive or to induce a person to enter into a contract is a fraud.

- (1) The suggestion that a fact is true when it is not true and the person making the suggestion does not believe it to be true.
- (2) The active concealment of a fact by a person having knowledge or belief of the fact.
- (3) A promise made without any intention of performing it.
- (4) Any other act fitted to deceive.
- (5) Any such act or omission as law specifically declares to be fraudulent.

Illustrations

- (a) A intending to deceive B falsely represents that five hundred cars are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A fraudulently informs B that A's estate is free from encumbrance. B, there upon buys the estate. The estate is subject to mortgage. B may avoid the contract.

(c) 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 under value. The contract is voidable at the option of A.

Peek v. Gurney (1873) LR 6 HL 377

The prospectus of a company did not refer to the existence of a document disclosing liabilities. This gave the impression that the company was prosperous. If the existence of the document had been disclosed, the impression would have been quite different. The court held that the non-disclosure amounted to fraud and any one who purchased the shares on the faith of the prospectus could avoid the contract.

Silence

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud. But under certain circumstances, it may be the duty of the person keeping silence to speak. So also under certain circumstances, silence itself will be equivalent to speech.

Example

(1) A sells, by auction to B, a horse which A knows to be of unsound. A say nothing to B about the horse's unsoundness. This is not fraud in A.

(2) B says to A- "if you do not deny it, I shall assume that the horse sound". A says nothing. Here A's silence is equivalent to speech and there is active concealment of fact. A's act is fraudulent.

When consent to an agreement is caused by fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused or obtained.

Distinction between Fraud and Misrepresentation

(1) In the case of innocent misrepresentation, the person making it honestly believes it to be true or does not know it to be false. In fraud, the representation is made with the knowledge that it is false or without believing its truth.

(2) Fraud, besides being a vitiating element in contract, is also a tort in itself. Innocent misrepresentation is not a tort but may vitiate a contract.

(3) In case of fraud, the aggrieved party can claim compensation. In case of misrepresentation, the aggrieved party can avoid the contract but not entitled to compensation.

(5) Mistake

Sections 20 to 22 of the Indian Contract Act, 1872, deal with effect of mistake in an agreement. Mistake may be defined as an erroneous belief about something. It may be a Mistake of law or Mistake of fact.

(1) Mistake of Law

It is well settled that ignorance of law is not an excuse (*ignorantia juris non excusat*). A party cannot be allowed to get any relief on the ground that he had done a particular act in ignorance of law. A mistake of law is no excuse and the contract cannot be avoided. But mistake of law of a foreign country is treated as mistake of fact, and the agreement in such a case is void.

(2) Mistake of Fact

Mistake of fact may be classified into the following two categories:

- (i) Bilateral Mistake
- (ii) Unilateral Mistake

A Bilateral Mistake

If both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, there is bilateral mistake. An agreement vitiated by bilateral mistake is void.

Bilateral Mistake may again be classified into two. They are:

- (a) Common Mistake
- (b) Mutual Mistake.

(1) Common Mistake

If the promisor and promisee are both mistaken as to the existence of a fact which is so fundamental that it forms the basis of the contract, there is common mistake and the contract is void. In common mistake both parties make the same mistake. Each knows the intention of the other and accepts, but each is mistaken about some underlying and fundamental fact.

Bell v. Lever Brothers Ltd (1932, AC 161)

This is the leading case on the question whether an agreement is void or not on the ground of common mistake. Bell was in the service of Lever Brothers under a contract of service. He was terminated from service before the expiry of period of service contract. Liver Brothers entered into a compensation agreement with Bell and paid 30,000 pounds as compensation for premature termination of service. Subsequently Liver Brothers filed a suit for recovery of 30,000 pounds paid to Bell on the allegation that during the course of his employment he had committed several breaches of duty and he could have been dismissed without paying any compensation. The Court of Appeal held that there was common mistake and thus Liver Brothers could recover the amount paid to Bell.

Bell preferred an appeal to the House of Lords. The House of Lords held that there was no common mistake as to the fundamental fact essential to the present contract (i.e., compensation for release from liability resulting from premature termination of service) and hence the contract for

compensation was valid and consequently Liver Brothers could not recover the compensation already paid to Bell.

Common mistake may be as to (i) the subject matter of the contract or (ii) the possibility of performing the contract.

(i) Common Mistake as to the Subject Matter of the Contract

Common Mistake as to the subject matter covers the following cases.

(a) Common Mistake as to the Existence of the Subject Matter (Res extincta)

If both the parties believe that the subject matter of the contract is in existence, which in fact, at the time of the contract, is non-existent, the contract is void.

Examples

1. A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo has been castaway, and the goods lost. Neither party was aware of these facts. The agreement is void.

2. A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain, though neither party was aware of that fact. The agreement is void.

Couturier V. Hastle(1856)5 HLC 673

A agrees to sell B a specific cargo of goods supposed to be on its way from Salonica to the United Kingdom. Before the day of agreement the goods were sold by the Master of the Ship since they were fermented. Neither party was aware of this fact. The agreement is void.

(b) Common Mistake as to the quality of the subject matter

When there is common mistake as to the quality of subject matter the agreement is void.

Nicholson V. Smith Marritor (1947, 177 L.T. 189)

Table napkins were sold at an auction with a description "made in the days of Charles I". In fact the napkins were "Georgeon". Held, the agreement was void as there is common mistake as to the quality of the subject matter of the contract.

(c) Common Mistake as to the Quantity of the subject matter

If both the parties are under a mistake as to the quantity of the subject matter, the agreement is void.

(d) Common Mistake as to the Title to the subject matter (Res sua)

If a person agrees to sell a thing on the mistaken belief that he has right to sell it though he is not entitled to sell, and another person agrees to buy it on the mistaken belief that the seller has right to sell the thing, there is common mistake and the agreement is void.

(e) Common Mistake as to the Price of the subject matter

If there is a common mistake as to the price of the subject matter, the agreement is void.

(II) Common Mistake as to the possibility of performing the contract

If both the parties believe that the contract is capable of performing when in fact not capable of performing, the agreement is void. The impossibility of performance may be:

- (i) Physical impossibility or (ii) Legal impossibility.

Physical impossibility may arise due to the occurrence of some event before the contract is concluded which made it impossible to perform the contract.

Example

A agrees to let a hall for conducting marriage of B's daughter. Even before the agreement is concluded B's daughter died. This fact was not known to A or B. The contract is void as there is physical impossibility to conduct the marriage.

Legal impossibility arises when the law prohibits a particular act before the conclusion of contract but the parties are unaware of the prohibition.

2. Mutual Mistake

In an agreement there is mutual mistake if the promisor and the promisee misunderstand each other's intentions, though neither realises that his promise had been misunderstood by the other.

When one party intends to sell one thing and the other party intends to purchase another thing, there is mutual mistake as to the identity of subject matter and the agreement is void.

Example

A is owner of an ambassador car manufactured in the year 1968 and another ambassador car manufactured in the year 1987. A offered to sell his ambassador car manufactured in the year 1968 for an amount of Rs.60,000 /-. B accepted the offer under a mistaken belief that the car offered for sale is that which was manufactured in the year 1987. A was unaware of the intention of B. B was unaware of A's intention. The agreement is void since there is mutual mistake.

Raffles V. Wichelhaus(1864) 2 H&C 906

A agreed to buy from B a cargo of cotton to arrive "ex-peerless" from Bombay. There were two ships of that name sailing from Bombay, one sailing in October and the other in December. A meant the former ship and B the latter. It was held that there was a mutual mistake as to the identity of subject matter and there was no contract.

(B) Unilateral Mistake

When in a contract only one of the parties is mistaken about the value or quality of the subject matter the mistake is a unilateral mistake. A unilateral mistake is not allowed as a defence in avoiding a contract unless the case fall within the exceptions.

Example

A offers to B his house for an intended sum of Rs. 44000/- By mistake he makes an offer in writing of Rs.4400/-. A cannot plead mistake as a defence to a suit for specific performance by B.

There are certain exceptions to the rule that the unilateral mistake is not void or voidable. They are-

(i) Mistake as to the person contracted with (Mistaken Identity of person)

If A intends to contract with B but by mistake contract with C. The contract is void, if C is aware of the fact that A intended to enter into contract with B.

Cundy v. Lindsay (1878) 3 AC 459

Blenkaran ordered by letter goods from Lindsay and signed it in such a way that Lindsay believed it came from the well-known firm Blenkrion & Co. The goods were sent as per the order. Blenkaran resold the goods to

Cundy without making payment to Lindsay.

Subsequently Lindsay realised that they dealt with Benkaran and not Blenkrion & Co. They sued Cundy for the recovery of the goods.

The House of Lords held that the plaintiff was entitled to succeed. When there is mistaken identity, though unilateral, the contract is void.

(2) Mistake as to the Nature of Contract (*Non est factum*)

If a person executes a document in ignorance of its character he can avoid the obligation by pleading the doctrine of *non est factum*. Thus if a person enters into a contract under the mistaken belief that he is signing a document of mortgage and if the document is a sale deed, the contract is void for *non est factum*(It means that this is not the deed I intended).

Example

An old illiterate lady signed a document believing that it is a mortgage deed. But really it was a gift deed. She can set aside the gift deed by putting the plea of *non est factum*.

Foster v. Macklinn (1869) 4 CP 704

The court held that if a person has signed a document under a mistake as to its nature and had not been negligent, he would not be liable upon it. In this case the defendant signed a bill of exchange under a mistaken belief that it is a guaranteee. The court held that he was not liable.

Topic - XI Unlawful Agreements

According to section 10 of the Indian Contract Act, 1872 an agreement is enforceable as a contract only if it is made for a lawful consideration and lawful object. An agreement is unlawful if the object or consideration is unlawful. Every agreement of which the object or consideration is unlawful is void.

According to section 23 of the Act, the consideration and object of an agreement is unlawful under the following circumstances.

- (i) If it is forbidden by law.
- (ii) If it would defeat the provisions of any law.
- (iii) If it is fraudulent.
- (iv) If it involves or implies injury to the person or property of another.
- (v) If the court regards it as immoral or opposed to public policy.

By virtue of clause (i) of section 23 of the Act an agreement is unlawful if the object or consideration is *forbidden by law*. Thus an agreement to commit a crime is unlawful and void.

• By virtue of clause (ii) of section 23 of the Act an agreement is unlawful if the object or consideration is of such a nature that, if permitted, it would *defeat the provisions of any law*.

Example

A borrowed an amount of Rs. 10,000/- from B and executed a promissory note in favour of B. A agreed that B may bring a suit for recovery of the loan amount within 6 years. The Limitation Act, 1963 provides a period of only 3 years for a suit on a promissory note. B brings a suit 4 years after the execution of the promissory note. A pleads the bar of limitation. B alleges that A has agreed to bring the suit within 6 years and the suit is within the

agreed period. If the agreement is enforced, the provisions of the Limitation Act, 1963 will be defeated. So the agreement is unlawful and hence void. The suit is liable to be dismissed.

By virtue of clause (iii) of section 23 of the Act an agreement is unlawful if the object or consideration is fraudulent. Thus an agreement for transfer of property entered into by two persons for the purpose of defrauding the creditors of the transferor is an unlawful agreement.

By virtue of clause (iv) of section 23 of the Act an agreement is unlawful if the object or consideration involves or implies injury to the person or property of another.

Example

A promises to give Rs. 10,000/- to B, an editor of a newspaper, if he publishes a defamatory matter concerning C. B published the defamatory matter. B cannot recover the amount from A.

By virtue of clause (v) of section 23 of the Act an agreement is unlawful if the court regards the object or consideration as immoral.

Example

A agrees to let her daughter on hire to B for concubinage. The agreement is void because the object is immoral.

Pearce v. Brooks (1866 LR 1 Ex.213)

The plaintiff had given a coach for hire to the defendant, a prostitute, for using it for her immoral trade. The defendant used the carriage in furtherance of her immoral trade. The purpose was known to the plaintiff. The defendant failed to pay the rent. The plaintiff filed a suit for recovery of the rent. The court held that the plaintiff cannot recover the amount as the object of the agreement was immoral.

By virtue of clause (v) of section 23 of the Act an agreement is unlawful if the court regards the object or consideration as opposed to public policy. (for details please see topic - XII - Page 57).

Topic-XII Agreements Opposed to Public Policy

By virtue of section 23 (v) of the Indian Contract Act, an agreement is unlawful if the court regards the consideration or object of which as *opposed to public policy*. The expression 'public policy' is not defined in the Indian Contract Act. The courts in India are given the freedom to decide what types of agreements are opposed to public policy.

The expression " public policy" cannot be defined precisely. It is an elastic term and it is difficult to define and classify agreements opposed to public policy.

In **Richardson v. Mellish** (1824) 2 Bing 229, Justice Borrough observed as follows:

"Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you".

Lord Truro has defined it as follows:

" Public Policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good which may be termed the policy of the law or public policy in relation to law".

In **Gherulal Parakh v. Mahadeodas Malya and others** (AIR 1959 SC 781), the Supreme Court observed thus :

Public policy or policy of the law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly horse'. etc. The primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contract which forms the basis of society. But, in certain cases, the courts may be relieved from this duty on a rule founded on what is called the public policy.

An agreement which tends to be injurious to the public or against the public good is contrary to public policy. An agreement which is opposed to public policy is unlawful and void.

Muralidhar v. State of U.P (AIR 1974 SC 1924)

The parties to the agreement who were subject to the U.P. (Temporary) Control of Rent and Eviction Act, 1947 had agreed by means of a lease deed that no party would ever claim the benefit of the said Act and that the provisions of the Act would be inapplicable to the lease deed. One of the questions before the court was whether it was open to a tenant or lessee to waive the benefit of the provisions of the Act which was enacted for his benefit. The court held that the Act was based on public policy and could not be waived.

N.V. P. Pandian v. M.M. Roy (AIR 1979 Mad. 42)

A paid Rs.15000/- to B a public servant for securing a seat for her son in a Medical College by using his influence with selection committee. B failed to secure the seat for A's son. A sued B for recovery of the amount. The court held that the object of payment is illegal being opposed to public policy and so the amount cannot be recovered.

The following are considered to be agreements opposed to public policy as they tend to be injurious to the public good.

(i) Trading with Alien Enemy

Agreements with alien enemies would injure the state in relation with other states. It is unlawful to enter into a contract with a foreign enemy, during war or to perform such a contract entered into before the war.

(ii) Stifling Prosecution

If a person has committed a crime he must be prosecuted and punished. Hence an agreement not to prosecute an offender or to withdraw a pending prosecution is an agreement for stifling prosecution and is unlawful.

In **Williams v. Baylely** (1866) 1 HL 200, Lord Westbury observed: "You shall not make a trade of a felony (serious crime)".

In **State of UP v. Kapildeo Shukla** (1972) 3 SCC 504, an agreement not to appear as a witness was held to be against public policy.

(iii) Maintenance and Champerty

Maintenance is an agreement to give assistance, financial or otherwise, to another to enable him to bring or defend legal proceeding when one has got no legal interest of his own in the subject matter.

Champerty is an agreement whereby one party is to assist another to bring an action for recovering money or property, and is to share in the proceeds of the action.

Under English Law 'maintenance agreements' and 'Chambertous agreements' are void.

In India agreements by way of maintenance and champerty are not necessarily void. If the object of a contract is just to assist the other party in making a reasonable claim arising out of a contract and then to have a fair share in the profit, the contract is valid.

An agreement by a client to pay his lawyer according to the result of the case is against public policy.

Kothi Jalram v. Vishvanath (AIR 1925 Bom. 470)

The court held that it is professional misconduct for an advocate to stipulate for or agree with his client to accept as his fee or remuneration a share of the property sued.

(iv) Transfer of public offices and titles

Agreements for the sale or transfer of public offices and titles for monetary consideration are unlawful.

(v) Agreement with voters to procure their votes for monetary consideration is void on the ground of public policy.

Topic - XIII Unlawful Agreements and Illegal Agreements - Distinction

In England, on the basis of the purpose for which they are made, agreements are classified into two heads. They are (i) illegal agreements and (ii) unlawful agreements. The Indian Contract Act does not make any such distinction but uses the word "unlawful".

The following agreements can be treated as **Illegal Agreements**.

An agreement to commit a crime or a tort.

An agreement to defraud the revenue.

An agreement to import liquor into a country where prohibition is in force.

An agreement for illicit cohabitation.

An agreement which tends to endanger the public safety.

The following agreements can be treated as **Unlawful Agreements**.

An agreement in restraint of trade.

An agreement designed to oust the jurisdiction of the courts.

An agreement in restraint of marriage.

An illegal agreement is not only void between the immediate parties but it has the effect that the collateral transactions to it also become void.

Example

A promises to pay B Rs. 500 if he beats T. If B beats T, he cannot recover the amount from A. If A has already paid the amount and B does not beat T, A cannot recover the amount. So also if A has borrowed Rs. 500 from X for this purpose and if X had given with knowledge, X cannot recover the money from A as the agreement between A and B is illegal.

An unlawful agreement is not enforceable by law. It is void *ab initio* as the object of the agreement is unlawful. An unlawful agreement does not affect the public morals. They are not to commit a crime. They are simply disapproved by law on some ground of public policy. In an unlawful agreement the transaction between the immediate parties is void. The collateral transactions are not void.

Topic - XIV *Ex Turpi Causa Non Oritur Actio*

Or

In Pari Delicto Potior Est Condicio Defendantis

Or

Consequences of Illegality

If the consideration or object of an agreement is unlawful or illegal the agreement is void and unenforceable.

An illegal contract is totally unenforceable. The court will not recognise any cause of action founded upon it. In the case of illegal agreements the law gives no assistance to the guilty party. Any money paid or goods supplied under such a contract cannot be recovered. The maxim applicable to an illegal agreement is *Ex turpi causa non oritur actio*. The maxim means out of a bare cause or illegal consideration, an action does not arise. A person who approaches the court should come with clean hands.

Another maxim applicable to an illegal agreement is *in pari delicto potior est condicio defendantis*. The maxim means if both are equally in fault and an action is brought the condition of the defendant is better because the action will definitely be dismissed.

In *Pears v. Brooks* (1866) 1 Ex. 213, the plaintiff had given a coach for hire to the defendant, a prostitute, for using it for her immoral trade. The

defendant used the carriage in furtherance of her immoral trade. The purpose was known to the plaintiff. The defendant failed to pay the rent. The plaintiff filed a suit for recovery of the rent. The court held that the plaintiff cannot recover the amount as the object of the agreement was immoral.

Topic - XV Void Agreements

By virtue of section 10 all agreements are contracts if they are not expressly declared to be void.

Sections 24 to 30 of the Indian Contract Act expressly declare the agreements which are void. An agreement not enforceable by law is said to be void.

The following are Void Agreements.

1. Agreement without Consideration

By virtue of section 25 of the Act an agreement without consideration is void (see Topic -VIII - Page - 26)

2. Agreements in restraint of Marriage

By virtue of section 26 of the Act, agreements in restraint of marriage, other than a minor, is void.

3. Agreements in restraint of Profession, Trade or Business

By virtue of section 27 of the Act, every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is void. But a seller of goodwill of a business may be restrained from carrying on a similar business within specified local limits so long as the buyer carries on the business. The restraint must be reasonable in point of time and space.

Nordenfelt V. Maxim Nordenfelt Guns and Ammunition Co Ltd. (1894)

AC 535

Nordenfelt, a Swedish manufacturer of quick firing guns sold his business to a company and entered into a contract restraining his future activities. He promised that he would not for twenty five years thereafter engage in business of manufacturing guns. After some years Nordenfelt entered into a business with a rival company dealing with guns. The buyer filed a suit for injunction to restrain Nordenfelt. The House of Lords held that the restraint in the circumstances of the case was reasonable as between the parties because Nordenfelt sold his business to the company for a large sum of money.

By virtue of section 11 of the Partnership Act, 1932, there can be an agreement between the partners restraining any one from carrying on any business other than that of the firm. Section 36 of the Act further enables them to restrain an outgoing partner from carrying on a similar business within a specified period or within specified local limits.

4. Agreements in restraint of legal proceedings

By virtue of section 28 of the Act, every agreement, by which any party is restrained absolutely from enforcing his rights under any contract, by the usual legal proceedings in the ordinary tribunals, is void to that extent. So also an agreement which limits the time within which he may enforce his rights is also void to that extent.

5. Uncertain Agreements

By virtue of section 29 of the Act, agreement, the meaning of which is not certain, or capable of being made certain, are void.

Example

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

6. Wagering Agreements.

By virtue of section 30 of the Act, agreement by way of wager are void.

(For Details see Topic - XVI)

Topic-XVI

Wagering Agreements

Wager means a bet. A wagering contract is one in which reciprocal promises are made to give money or something of value upon the result of a future uncertain event with regard to which the parties hold opposite views.

In the words of Cockburn C.J. "it is a contract by A to pay money to B on the happening of a given event in consideration of B's promise to pay money to A on the event not happening."

Wager is a game of chance, ie, the chance of either winning or losing is wholly dependent upon an uncertain event. Each party stands equally to win or lose the bet. One of the essential ingredients of wagering contract is that neither of the parties should have any interest in the contract other than the sum which he will win or lose.

Example

'X' and 'Y' take a bet that if it rains tomorrow 'Y' will pay 'X' Rs.500/- and if it does not rain tomorrow 'X' will pay 'Y' Rs.500/- This is a wagering contract.

By virtue of section 30 of the Indian Contract Act , agreements by way of wager are void. A suit is not maintainable 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 or bet is made. Under section 30 the wagering agreements are not illegal. So collateral contracts are unaffected.

In India, except the Bombay presidency, wagering contracts are void but not illegal. In Bombay, wagering contracts have been declared illegal by the Avoiding of Wagers (Amendment) Act, 1865. So in the Bombay presidency, a wagering contract being illegal is void, but it also traints and renders void a collateral agreement to it.

Example

'X' bets with 'Y' and loses; applies to 'Z' for a loan who pays 'Y' settlement of the loss of 'X'. 'Z' cannot recover the amount from 'X' because this is money paid "under or in respect of" a wagering transaction which is illegal in Bombay. But in the other parts of India such a transaction only being void, Z, can recover the amount from 'X'. But if 'X' refuses to pay 'Y' the amount of the bet that he has lost, 'Y' cannot sue 'X' anywhere.

A lottery is a wagering transaction and hence it is illegal and punishable under Section 294-A of the Indian Penal Code. But the Government may give sanction for conducting lotteries. The only effect of such sanction is that no prosecution can be had under the Penal law. In Civil Law the transaction will be void.

Topic-XVII Doctrine of Blue Pencil

Or

Blue Pencil Test

Or

Blue Pencil Rule

The Doctrine of Blue Pencil was evolved by the English and American Courts.

A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void part may be separated or severed from the contract and the rest of the contract enforced without them. The doctrine of Blue Pencil holds

that if court can sever or separate lawful part of the contract by deleting the unlawful or illegal part by simply running a blue pencil through them or by scratching out the offensive portion of the contract, it can enforce the lawful part after deleting the unlawful or illegal part. This doctrine does not permit the court to change, add or rearrange the words. The court has to sever the lawful and unlawful parts of the contract and then enforce the lawful part. If it is not possible to sever the lawful (legal) and unlawful (illegal) parts of the contract, this doctrine has no application. Under such circumstances the court has to declare the whole contract as void.

Sections 24, 57 and 58 of the Indian Contract Act have given recognition to the doctrine of blue pencil.

By section 24 of the Indian Contract Act, if any part of single consideration for one or more objects, or any one or any part of one of several consideration for a single object, is unlawful, the agreement is void.

By section 57 of the Act, where there is a reciprocal promise, first to do certain things which are legal, and secondly to do under specified circumstances certain other things which are illegal, the first set of promise is a contract but the second is void.

By section 58 of the Act, in the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

In substance section 24 says that if a part of the consideration or the object which is unlawful can be separated from the other part which is lawful, the court will enforce that part which is lawful and set aside that part which is unlawful. If no such severance of the illegal from the legal part is possible, the whole of the agreement is void. So also, by virtue section 57 of the Act, in case of reciprocal promises, one set of promise is legal and the other set is illegal, the promise which is legal can be enforced. By virtue of section 58 of the Act, in the case of alternative promise, one branch of which is legal

and the other illegal, the legal branch alone can be enforced.

Examples

1. A promises to superintend, on behalf of B, legal manufacturer of indigo and an illegal traffic in other articles, and B promises to pay to A salary of Rs.10,000/- for both the jobs. The whole of the agreement is void.

2. A and B agreed that A shall pay B 1000 rupees, 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 the opium.

In **Alice Mary Hill v. William Clarke** (ILR (1905) 27 All. 266), a married woman agreed to live in adultery and also agreed to render certain services as a housekeeper, for a consolidated remuneration of Rs.50 per month. It was held that the lawful and unlawful parts are inseparable and the whole of the agreement is void, and the plaintiff would not be entitled to recover even for the services a housekeeper.

Topic-XVIII **Contingent Contract**

The rules relating to the contingent contract are dealt with in sections 32 to 36 of the Indian Contract Act, 1872.

A contract may be either an absolute contract or a conditional contract.

An absolute contract is one in which the promise is to be performed independently of any condition. X promises to sell his immovable property to Y for an amount of rupees one lakh. It is an example of absolute contract. In the case of a conditional contract, the promise is to be performed only on the happening or non-happening of a future event. X promises to sell his building to Y if he gets a transfer to a distant place. It is an example of conditional contract.

A contingent contract is a conditional contract. In the case of contingent contract the performance of the promise depends on the happening or non-happening of some future uncertain event. 'A' contracts to pay Rs.5,000/- if the house of 'X' is burnt within a year. This is an example of contingent contract.

The essential features of the contingent contract are the following:-

- There must be valid contract.
- The performance of the contract must be conditional.
- The condition must relate to a future event which may or may not happen.
- The event should be collateral to the contract.

If the contingent contract is to do or not to do anything on the happening of an uncertain future event, the contract cannot be enforced by law unless and until that specified event has happened. If the circumstances have rendered the occurrence of that contingent event impossible, the contract becomes void.

Examples

(a) A makes a contract with B to buy B's house if A survives C. This contract cannot be enforced by law unless and until C dies in A's life time.

(b) A contracts to pay B a sum of money when B marries C. C dies before marriage with B. The contract becomes void.

If the contingency is the non-happening of some event, the contract can be enforced when the happening becomes impossible.

If a time is stipulated for the happening of a specified uncertain event and such a stipulation expires without the happening of the specified event, the contract becomes void.

If a time is stipulated for the non-happening of a specified uncertain

event and the specified uncertain event does not happen within the fixed time, the contract can be enforced.

If the events contingent are inherently impossible, the contract is void.

Examples

(a) 'X' promises to pay 'Y' Rs.2,000/- if 'Y' touches the sky with his finger.
The contract is void.

(b) A agrees to pay B Rs. 1000 if two straight lines should enclose a space.
The agreement is void.

Difference between a wager and a contingent contract

a) Under section 30, wagering contracts are void, but contingent contracts are good if they are not declared by law to be bad.

b) In a wagering contract neither of the parties should have any interest in the contract except for the stake. But in contingent contract the parties are interested on the happening or non-happening of the event which is collateral to the contract.

c) In a wagering contract, there must be mutual promises, but in a contingent contract mutual promises are not necessary.

d) In the case of a wagering contract, the parties have no intention to perform the contract itself. But in a contingent contract the parties have an intention to perform their respective obligations.

Topic-XIX Quasi Contracts

Or

Relations Resembling Those Created by Contracts

Or

Rights and Obligations of Finder of Lost Goods

Or

Quantum Meruit

Quasi means 'as if'. In a quasi-contract there is no real contract, arising from the meeting of the minds, but the law attributes to a particular situation rights and liabilities which are similar to those of a contract.

A quasi-contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. The maxim is "*nemo debet Locupletari ex linea justitiae*" - no man must grow rich out of another person's loss.

The Indian Contract Act, 1872 does not define a quasi-contract. But this subject is dealt with in chapter V(sections 68 to 72) under the head "Certain relations resembling those created by contract". In England quasi contract is otherwise known as constructive contract.

Definitions

Dr. Winfield defines quasi-contract as a "liability, not exclusively referable to any other head of law, imposed on a particular person to pay money to another, on the ground of unjust benefit".

Dr. Jenks defines quasi-contract as "a situation in which law imposes upon one person on grounds of natural justice, an obligation similar to that which arises from a true contract, although no contract, express or implied, has in fact been entered into by them".

Instances of Qasi Contract

Sections 68 to 72 deal with the following types of quasi contracts:

- (a) Necessaries supplied (s.68)
- (b) Reimbursement of Money (s.69)
- (c) Obligation of person enjoying benefit of Non -gratuitous act (Quantum Meruit) (s.70)
- (d) Obligation of finder of lost goods (s.71)
- (e) Liability of person to whom money is paid by mistake(s.72)

A) Necessaries Supplied (Section 68)

A person who supplies the necessaries to an incompetent person is entitled to be reimbursed from the property of such incompetent person even if there is no contract between them. So also, if a person supplies the necessaries to a person whom an incompetent person is bound to support, the person who supplies the necessaries is entitled to be reimbursed from the property of such incompetent person.

Examples

(a) 'A' supplied to 'B', a lunatic, the necessaries suitable to his conditions in life. In this case, 'A' is entitled to be reimbursed from the property of 'B'.

(b) 'A' supplied to the wife and children of B, a lunatic, with necessities suitable to their condition in life. A is entitled to be reimbursed from B's property.

The liability under this section is not a personal one. The person who supplied necessities can recover the value of necessities only from the property of the incompetent person.

b) Reimbursement of Money (Section 69)

A person who is *interested in the payment of money*, which another is *bound by law to pay*, and who therefore pays it, is entitled to be reimbursed by the other.

In order to apply this section the following conditions should be satisfied

- 1. The plaintiff should have paid money to a person which defendant is bound by law to pay.
- 2. The plaintiff should have interest in making the payment.

If these two elements are satisfied, the defendant is liable to reimburse the plaintiff.

Example

A is owner of a building. He leases it to B for a period of 10 years. As per the lease agreement and law A is bound to pay land tax. A has not paid the land tax. In order to avoid sale of the land by the Government for recovery of arrears of land tax, B pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

(c) Obligation of person enjoying benefit of non-gratuitous act (Quantum Meruit)

Quantum Meruit means "as much as he deserves". A claim for the recovery of reasonable remuneration may be enforced even if there is no express agreement, provided the services are not intended to be gratuitous.

Example

'A' renders services to B, without intending them to be gratuitous. B has to pay Quantum Meruit.

Though there is no contract as such or the contract is invalid, when a person has enjoyed a benefit as a result of what another has done or delivered non-gratuitously, he should compensate for such benefit. If another has done the act gratuitously he cannot claim compensation.

Section 70 of the Contract Act deals with the liability of a person who has enjoyed the benefit of non-gratuitous act of another. By virtue of this section he who received benefit of non-gratuitous act of another is bound to

compensate the person who has done the act.

State of West Bengal v. B.K Mondal & Sons(A.I.R. 1962 SC 779)

The plaintiff constructed a building for West Bengal Government. The contract was invalid since it did not comply with the Constitutional requirements. The plaintiff claimed the amount on the ground that the defendant has benefited out his act which is non-gratuitous. The Supreme Court held that even the State is bound by the provisions of Sec.70 and if it has accepted and enjoyed the benefit of the work done for it, it has to pay compensation. Section 70 is based on the principle that no one shall unjustly enrich at the expense of another.

(d) **Obligation of finder of lost goods (Sec. 71)**

A person who finds lost goods of another is not under a duty to take them into his custody. If a person takes them into his custody, he is bound to account for the goods to the owner. The liability of a finder of lost goods is that of a bailee. He must not appropriate the goods to his own use. If the owner is traced, he must return the goods to him.

The following are the rights of the finder of goods.

1. He can retain the goods against the owner until he receives compensation for trouble and expenses incurred by him to preserve the goods and to find out the owner. He has no right to sue the owner for compensation for trouble and expense incurred by him to preserve the goods and to find out the owner.
2. If the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain goods until he receives it.
3. The finder can sell the goods in the following cases.
 - (a) Where the thing found is in danger of perishing.
 - (b) Where the owner cannot, with reasonable diligence, be found out.

- (c) Where the owner is found out, but he refuses to pay the lawful charges of the finder; and
- (d) Where the lawful charges of the finder, in respect of the thing found amount to two-thirds of the value of the thing found.

Hollins v. Fowler LR 7 H.L 757

'F' found a diamond on the floor of the shop of 'H' and handed it over to 'H' to keep it till the true owner is found. In spite of the best efforts the true owner could not be traced. After some time 'F' tendered to 'H' the expenses incurred by him for tracing the true owner and requested him to return the diamond to 'F'. Held 'H' must return the diamond to 'F' as he alone was entitled to retain it as against every person except the true owner.

(e) **Liability of person to whom money paid under mistake**

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

Example

'A' pay Rs. 1000/- to 'B' by mistake. It is really due to 'C'. B must refund the money to A. C, however, cannot recover the amount as there is no privity of contract between B and C.

A debtor may recover from a creditor an excess payment made to him by mistake. The mistake may be of fact or law.

Norwich Society Ltd. V. Price (W.H) Ltd.(1934 AC 455)

An insurance company paid the amount on a policy under the mistake that the goods had been destroyed by a peril insured against. The goods, in fact, had been sold. Held, the money could be recovered by the insurance company.

Topic-XX

Doctrine of Privity of Contract

Privity of contract means the relationship subsisting between the parties who have entered into contractual obligations.

Under the English law consideration for a contract must move from the promisee. If the promisee has not paid consideration for the promise he cannot sue the promisor. In other words, a stranger to a consideration cannot sue. This is known as doctrine of privity of consideration. Under the Indian law the consideration may move either from the promisee or from any other person. Thus the promisee can sue the promisor even though he has not paid any consideration. In other words, a stranger to a consideration can sue. Thus the doctrine of privity of consideration is not applicable in India.

Both under the Indian law and English law, a stranger to a contract cannot sue. The parties to the contract only can sue upon a contract. A stranger cannot file a suit for enforcing a contract. This is known as the doctrine of privity of contract. Privity of contract is said to exist between two persons when there is a valid contract which can be enforced between them. A person who cannot show such privity of contract is a stranger to the contract.

The rule that a stranger to a contract cannot sue is laid down by the House of Lords in the leading case *Dunlop Tyre Co. v. Selfridge & Co.* (1915) AC 847

In the above case one Dew & Co., who were the manufacturing agents of the Dunlop Company agreed with Dunlop Company that they would not sell the tubes and tyres below a certain listed price and would obtain similar undertakings from any retailer to whom they sell tyres.

In an agreement between the Dew & Co., and the Selfridge, the retailer, Selfridge agreed with Dew & Co., that they would not sell the

tyres and tubes below the listed price and for every sale below the price he shall pay 5/- to Dunlop & Co. The 'Selfridge & Co.' (defendants) sold 2 tyres below the listed price and committed a breach of contract. The Dunlop Company (Plaintiffs) who were strangers to the contract, sued for an injunction restraining its breach and for recovering 10 pounds as damages.

It was held by the House of Lords that the plaintiffs could not succeed in the action as they were strangers to the contract. It may be noted that the plaintiffs were strangers to the consideration too and would fail on that account also.

Exceptions

The following are the exceptions to the principle that a stranger to a contract cannot sue.

(1) Trusts

In a contract creating a trust, the beneficiary who is a stranger to the contract can enforce the trust.

(2) Acknowledgement or Estoppel

Where a promisor by his conduct, acknowledged or otherwise constitutes himself as an agent of a third party, a binding obligation is thereby incurred towards him.

Example

If 'X' admits to 'Z' that he had received some money from Y for payments to Z, he constitutes himself as the agent of Z; who can successfully recover the amount from X.

(3) Statutory Obligation

Under the Road Traffic Act in England and Motor Vehicles Act in India, the third party who suffers an injury in an accident can enforce the contract of insurance.

(4) Contract through an Agent

A contract entered into by an agent can be enforced by the principal even though he is not a party to the contract.

(5) Charge Created over Property

A person in whose favour a charge over immovable property is created may enforce it even though he is not a party to the contract.

Khaja Muhamad V. Hussaini Begum (1910, 37 IA 152)

'A' a Muhammadan entered into a contract with 'B' on the occasion of the marriage of A's son with B's daughter. Under that contract A agreed to pay Rs. 5,000/- per month to B's daughter as 'Betel box' expenses from the date of her marriage. The amount thus payable was made a charge over certain immovable property. Held, B's daughter could recover the money although she was not a party to the contract.

(6) Family Arrangement

A provision for marriage expenses of a female member of a Hindu Joint Family can be enforced by the female beneficiary when such provision is part of a family arrangement.

Sundaraja Aiyangar V. Lekshmiammal (1915) 38 Mad 788

The partition deed between the male members of joint family made a provision for the marriage expense of the plaintiff, a female member. The female member, though not a party to the partition, sued successfully for marriage expenses provided in a partition deed between the male members.

Topic- XXI Discharge of Contract

A contract creates rights and obligations. A contract is said to be discharged when the rights and liabilities created by it come to an end. A contract may be terminated or discharged by any one of the following ways:

- (1) By performance (Sections 37,38).
- (2) By agreement or consent (Sections 62,63)
- (3) By Impossibility (Sec. 56)
- (4) By lapse of time.
- (5) By operation of law.
- (6) By breach of contract (Section 39).

(I) Discharge by Performance

Performance of contract takes place when the parties to a contract fulfil their respective obligations. Performance may be actual or attempted.

Actual performance occurs when a party has done what he undertook to do.

A contract need not be actually performed. The party who is bound to perform his obligation under the contract may make an offer to the other party to perform his obligation. An offer to perform obligation is called 'attempted performance' or 'tender of performance'.

A party who has entered into a contract to deliver goods or to pay money to another is deemed to have performed it if he has offered the goods or money to the party to whom the delivery or payment was to be made. It falls short of actual performance solely because of the wrongful refusal by the promisee. The effect of the tender is to discharge the promisor from responsibility for non-performance. At the same time it preserve his rights under the contract intact.

In case the promisor dies before the performance of a contract his promises are binding to his representatives, unless a contrary intention appears from the contract. In the case of contracts involving special personal qualification of the promisor, the promisor himself must perform the contract.

Examples

'X' promises to paint a wall for 'Y' on a certain day at a certain price. 'X' dies before the day. The contract cannot be enforced either by the representatives of 'X' or by 'Y'.

Joint Promisors and Joint Promisees

A promise made by two or more persons may be either a joint promise or a joint and several promise. In India all joint promises are joint and several in the absence of a contract to the contrary. But in England every joint promise is not a joint and several promise.

Joint Promises

When two or more individuals are bound to perform the promises together, and one of them is sued alone he has a right to insist that the other should be joined as co-defendants.

Joint and Several Promises

In the case of joint and several promises, each promisor will be bound along with the other promisors and also individually to perform the whole of the promise.

Devolution of Joint Liabilities

When two or more persons have made a joint promise, all such persons should fulfil the promise in the absence of a contract to the contrary. If any one of them dies, his legal representatives along with the survivors must perform the promise. After the death of the last survivor, the legal representatives of all are jointly liable to carry out the promise (Sec. 42).

In the case of joint promises any one of the joint promisors may be

compelled to perform the whole promise in the absence of express agreement to the contrary. In such cases each promisor may compel every other joint promisor to contribute equally to the discharge of the promise, unless otherwise provided. In case any one of the joint promisors makes a default in such contribution, the remaining joint promisors should equally bear the loss arising from such a default (Sec. 43).

Examples

(a) X, Y & Z jointly promise to pay a sum of Rs. 5,000/- to W. W may compel either X, or Y or Z to pay him Rs. 5,000/-

(b) X, Y & Z jointly promises to pay a sum of Rs. 3,000/- to W. Z is compelled to pay the whole. X is insolvent but his assets are sufficient to pay one half of his debt. Z is entitled to receive Rs. 500/- from the estate of X and Rs. 1,250/- from Y.

Devolution of Joint Rights

When a person has made a promise to two or more persons jointly, the right to demand the performance of the promise rests with the joint promisees during their lifetime unless otherwise provided. In the case of death of any one of them, the legal representatives of the deceased along with the survivors have the right to claim the performance. After the death of the last survivor the legal representatives of all jointly have the right to claim performance (Sec. 45).

Example

X and Y jointly lent Rs. 3,000/- to Z who promises X and Y jointly to repay them that sum with interest on a day specified. Y dies. The right to claim performance rests with the representatives of Y jointly with X during the life of X and after the death of X with representatives of X and Y jointly.

Appropriation of Payments (Rule in Clyton's Case)

Where a debtor owes several distinct debts to his creditor and pays

him a sum of money which is insufficient to discharge the entire debt, the debtor has a right to appropriate it either expressly or by implication towards any debt due to his creditor (Sec. 59).

Example

'X' owes Y among other debts a sum of Rs. 367/- Y writes to X and demands the payment of this sum. X sends a sum of Rs. 367/- to Y. This payment is to be applied to the discharge of the debt of which Y had demanded payment.

Where the mode of payment is not expressed or implied from circumstances, the right of appropriation of payment to various debts devolves upon the creditor and it is open to him to apply the payments to any debt lawfully due from the debtor even to the one barred by limitation (Sec. 60).

Example

X owes several debts to Y, one of them of Rs. 6,000/- is time barred X sends Rs. 6,000/- to Y, without indicating to which debt the amount is to be appropriated Y may appropriate Rs. 6,000/- against the time barred debt if he so chooses.

If the creditor or the debtor has not made any appropriation then it has to be applied in the discharge of the debts in order of time. If there are more than one debt on the same day, the payment shall be applied in the discharge of each proportionately (Sec. 61).

Example

X owes two debts of Rs. 4,000/- each, which are time barred and another debt of Rs. 8,000/- to Y. X sends Rs. 4,000/- Neither party makes any appropriation. The sum of Rs. 4,000/- would be appropriated rateably against the two debts of Rs. 2,000/- each which are time barred, i.e., Rs. 2,000/- would be appropriated against each debt.

Devaynes v. Nobles (1816) 1 Mer 572 (Rule in Clyton's Case)

In this case the Court held that the debtor has the right to indicate to which debt the payment should be applied. If the debtor has not given any indication the creditor can apply the amount towards payment of any lawful debt. If the debtor and creditor do not make the appropriation, the first payment made by the debtor should be appropriated towards the first debt, whether they are time barred or not.

(2) Discharge by Agreement or Consent

A contractual obligation is created by agreement and it can be destroyed by consent of the parties. The rule of law in this regard is based on the maxim "*Eodem modo quo quid constitutor, eodem modo destructor*". It means that a thing may be destroyed in the same manner in which it is constituted. The discharge by consent may be express or implied.

Section 62 and 63 deal with provisions of discharge by mutual agreement.

Section 62 provides that "If the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed".

Section 63 embodies that "every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time of such performance, or may accept instead of it any satisfaction which he thinks fit".

The following are the various modes of discharge of a contract by mutual agreement

(a) Novation

If the parties to an existing contract agree to substitute a new contract in the place of an existing contract, the situation is known as novation. Novation is the supersession of one contract by a new contract. The new

contract may be between the same parties or between the existing parties and a third party.

Example

X owes Y Rs. 5,000/- He enters into an agreement with Y and gives Y a mortgage of his (X's) estate for Rs. 2,500/- In place of the debt of Rs. 5,000/- This is a new contract which extinguishes the old one.

Scarf v. Jardine (1882, 7 A.C. 345)

A owed to B Rs 100/- B owed to C Rs.100/-. A, B and C entered into a contract that A shall pay C Rs.100/-. By this new contract B is discharged. It is novation. C can recover the amount from A. Novation may involve change of parties.

Novation should take place before the breach of the contract occurs. If for any reason the new contract proves to be invalid, the old contract which it superseded stands revived.

(B) Rescission

Rescission is the cancellation of the agreement. If the parties to an agreement agree to rescind it, the original agreement need not be performed.

Example

X promised to deliver certain goods to Y on a certain date. Before the date of performance X and Y mutually agree that the contract need not be performed. The contract is said to be rescinded.

(C) Alteration

Alteration of a contract occurs when the terms of the contract are varied by mutual consent of the parties to a contract.

Example

X enters into a contract with Y for the supply of 299 bales of cotton by

the 10th of the next month. X and Y subsequently agreed that 199 bales of cotton is to be supplied on 10th of next-month and the balance on 15th of next-month.

(D) Remission

Remission of a contract indicates the acceptance of a lesser sum than the agreed amount and discharging the debtor from further liability.

Example

X owed Rs.4,000/- to Y. X paid rs.3,000/- to Y and Y accepted it in full satisfaction. In this case X is discharged from his liability of Rs.4,000.

(E) Waiver

Waiver is the intentional relinquishment of a claim which a person is entitled to. Neither an agreement nor a consideration is required to constitute a waiver.

Example

X promises to paint a picture for Y. Y later on forbid him to do so. X is no longer bound to perform the promise.

(F) Accord and Satisfaction

Accord and satisfaction is the acceptance of any other satisfaction than the performance originally agreed. In other-words accord is the agreement by which the obligation is discharged and satisfaction is the consideration which makes the agreement operative.

Example

A owes B Rs. 2,000/- B agrees to accept Rs.1,500/- in full satisfaction. The agreement to pay Rs.1,500/- is an accord and the actual payment is the satisfaction.

Pinel's Case(1620)

The defendant owed Pinel 13 pounds. He paid 5 pounds which Pinel

accepted as full satisfaction of the debt. Subsequently 'pinnel' brought an action for recovering the balance of 8 pounds.' It was held that part payment of a debt cannot operate as satisfaction of the liability for the entire debt. The agreement of Pinnel to remit the balance of 8 pounds was unsupported by consideration and was invalid. The suit was accordingly decreed.

The rule in Pinnel's case is not applicable in India.

Kapurchand v. Himayatullah Khan (AIR 1963 SC 250)

The Supreme Court held that the rule in Pinnel's case is not applicable in India because section 63 clearly says that acceptance of a lesser sum by the promesee in satisfaction of his claim against the promisor will discharge the debtor from his entire liability.

(G) Merger

Merger occurs when a superior right and an inferior right concur and meet in one and the same person the inferior right vanishes into the superior right.

Example

'A' holds a property under a lease. He later buys the property. His right as a lessee merges into his right as an owner.

3) Discharge by Impossibility of Performance (Doctrine of Frustration)

Frustration means the discharge of a contractual obligation which is impossible of performance by external causes beyond the contemplation of the parties. The effect of frustration is that the contract becomes void.

Example

X and Y contract to marry each other. Before the time fixed for the marriage, X goes mad. The contract becomes void.

Discharge by impossibility of performance is based on the maxim "*lex non cogit ad impossibilia*", ie, what is impossible does not create an obligation.

Impossibility of the performance of a contract may appear on the face of it, or may exist unknown to the parties at the time of making the contract or may arise after the contract is made. In the first case the contract is ab initio void. In the second case the contract is void and it is known as the doctrine of 'supervening impossibility' or 'supervening illegality'.

The basis of the doctrine of frustration is rested upon an implied term of the contract. In England the doctrine of frustration is the parallel concept of supervening impossibility under section 56 of the Indian Contract Act.

This doctrine is invoked in two types of cases:

- (i) If a supervening event makes the performance of the obligation impossible.
- (ii) If there is a fundamental change in the situation, even though performance may not have become physically impossible.

A contract is discharged by supervening impossibility in the following circumstances:

- (a) Destruction of subject matter of the contract
- (b) Death or disablement of parties.
- (c) Contract becoming subsequently illegal
- (d) Declaration of war.
- (e) Non-existence of a particular state of thing.

(A) Destruction of subject-matter of the Contract

When subject matter of the contract is destroyed without any fault of the parties, the contract is said to be discharged.

Taylor v. Caldwell (1863) 122 ER 309

The defendant agreed to let out a music hall to the plaintiff on specified dates for the purpose of entertainment. The hall was destroyed by fire prior to those dates. The plaintiff sued the defendant for damages for breach of contract. Held, the contract has become void and the defendant was not liable to pay damages.

(B) Death or Disablement of Parties

When the death or illness of a particular person prevents him from fulfilling the promises, he should be absolved from performance. This is because of the fact that the death or disablement is an Act of God over which he has no control.

Robinson V. Davison (1871) 90 LJ Ex 172

A pianist fell ill, and could not play at a concert as promised by him. Held the contract was discharged and the pianist's illness excused him from performance.

(c) Subsequent Illegality

where by subsequent to the formation of contract the law changes and thereby the performance of a contract is forbidden, the parties are exonerated from liability to perform it.

Baily V. De. Crespigny, (1869)

'D' leased some land to 'B' and agreed to erect some ornamental building on the adjoining land. A railway company under statutory powers, acquired this adjoining land and built a railway station on it. Held, 'D' excused from performance of the contract.

(d) Declaration of War

A contract entered into with an alien enemy during the war is void *ab initio*. A contract entered into prior to the outbreak of war is suspended during the war and may be revived after the war.

(e) Non-existence of a particular state of thing or Non occurrence of a particular event

If there is any change in the state of the things which formed the basis of the contract, or if the state of the things which ought to have occurred does not occur, the contract is discharged.

Krell v. Henery (1903, 2 K.B. 740)

The contract was to hire a flat for viewing the coronation procession of the king in 1902. Owing to the king's illness the procession was given up. A suit was filed for the recovery of the rent. Held the hirer need not pay the rent, as the existence of the procession was the basis of the contract, and its cancellation discharged the contract.

In **Mary v. State of Kerala**, 2013 (4) KLT 466 (SC), the appellant, Mary was a successful bidder in an auction for sale of privilege to vend (sell) arrack in Kalady Range for the period 1-4-1994 to 31-3-1995. Her bid was for a sum of Rs. 25,62,000/- . She deposited 30 % of the bid amount i.e., 7,68,600/- as security for due performance of the conditions of licence. Kalady is the holy birth place of Adi Sankaracharya. The residents of those areas objected to the running of any abkari shop. A large number of people collected and offered physical resistance to the opening of the abkari shop and the law and order enforcing agency could not assure smooth conduct of business. The aforesaid circumstances led the appellant to believe that it was impossible for her to run the arrack shop in the locality. The appellant, therefore, informed the authorities that it was not possible for her to open and run the shops. She also requested them to treat the contract rescinded and claimed refund of the security amount. The respondent did not refund the security deposit.

The appellant filed a writ petition before the Hon'ble High Court of Kerala, claiming refund of security deposit. The petition was heard and decided by a Single Judge, and directed the respondent to refund the security deposit. The respondent, State of Kerala, preferred an appeal before the Division Bench. The Division Bench of the Hon'ble High Court held that the

appellant is not entitled to claim refund of security deposit invoking s.56 of the Contract Act and the state is free to foreclose the security deposit for non-compliance with the terms of rules applicable to auction of abkari shops (the Kerala Akbari Shops (Disposal in Auction) Rule 1974).

The appellant preferred a Special Leave Appeal to the Supreme Court. The Supreme Court held that when a contract to do an act becomes impossible to perform, by reason of some event which the promisor could not prevent, is rendered void. The doctrine of frustration excludes, ordinarily, further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible. But in a 'statutory contract' (i.e. terms of contract are governed by a statutory provision) in which a party takes absolute responsibility cannot escape liability, whatever may be the reason. In such a situation, events will not discharge the party from the consequences of non-performance of contractual obligation and cannot take shelter behind s.56 of the Contract Act. Observing so, the appeal was dismissed.

(4) Discharge by lapse of time

The Limitation Act, in some circumstances, affords a good defence to a suit for breach of contract and in fact, terminates the contract by depriving the party of his remedy at law.

Example

Where a debtor has failed to repay the loan on the stipulated date, the creditor must file a suit against him within three years of the default. If he fails to take action before the expiration of three years he will be barred from his remedy and the other party is discharged of his liability to perform.

(5) Discharge by Operation of Law

Discharge by operation of law may take place as follows:-

(a) By merger: When the parties embody the inferior contract in a superior contract.

(b) By insolvency: When a person is adjudged insolvent, he is discharged from all the liabilities incurred before the adjudication.

(c) By the unauthorised alteration of terms of a written document

Where a party to a written agreement makes any material change without the knowledge of the other, the agreement can be avoided by the other party.

(6) Discharge by Breach of Contract

Where the promisor neither performs his contract nor does he tender performance, or where the performance is defective, there is a breach of contract. It may be-

(a) Actual breach of contract

The actual breach may occur either at the time the performance is due, or when actually performing the contract.

(b) Anticipatory breach of contract

It indicates a breach before the performance is due. This may occur either by the promisor doing an act which makes the performance of his promise impossible or by the promisor in some other way showing his intention not to perform it.

If a party to a contract refuses to perform his part of the contract, prior to the date of performance, the promisee has certain rights. He can either-

(i) treat the contract as discharged so that he is exonerated of the performance of his part of the promise, or

(ii) immediately take a legal action for breach of contract or wait till the due date of the performance.

Hochster V. De La Tour (1853) 2 E&B 678

'A' entered into a contract with 'B' for 'B's services for three months on a foreign tour commencing from a particular date. Even before that date A wrote to B dispensing with his service. Held, B was immediately entitled to sue, without waiting till the date of performance.

Where the promisee refuses to accept the repudiation of the promisor and treats the agreement as alive, the consequences are:

(i) The promisor may carry out his promise on the due date and the promisee should be bound to accept the performance.

(ii) If, while the agreement is alive, an event occurs which discharges the agreement legally, the promisor may take the benefit of such a discharge. In such a case, the promisee loses his right to sue for damages.

Avery V. Bowden (1885) 5 E&B 711

'A' hired the ship of 'B' to carry a cargo from Russia. Later B repudiated the contract. A delayed taking action hoping that B would change his mind before the performance date. War broke out between Russia and Britain before the performance date, frustrating the contract. Held, A lost his right to sue B for damages by his delay.

Topic -XXII Remedies for Breach of Contract

The process of enforcing rights is known as the remedies for breach of contract. Where there is a breach of contract, the injured party has one or more of the following rights:

- (1) Rescission of the contract
- (2) Suit for damages,
- (3) Suit upon quantum meruit
- (4) Suit for specific performance of the contract,
- (5) Suit for injunction

(1). Rescission

If one party has broken his contract, the other party may treat the contract as rescinded and refuse further performance. He may also successfully defend an action of non-performance, or an action brought for specific performance.

Section 75 provides that "a person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract".

(2) Damages

The common law remedy for breach of contract is damages. Damages are a monetary compensation adjudged to be paid to the injured party for the loss or injury suffered by him. The principle of awarding damages is to put the injured party in the same financial position as if the contract had been performed.

Damages are various kinds, They are following-

- (a) General, or ordinary or substantial damages
- (b) Special damages .

- (c) Exemplary, or Punitive or Vindictive damages
- (d) Nominal damages

(a) Ordinary Damages

Damages arising from the breach of contract which are necessary to compensate the injured party for the loss sustained by such a breach.

Ordinary or general damages are usually assessed on the basis of the actual loss suffered. In the case of a breach of contract for delivery of goods, the measure of damages is the difference between the contract price and the market price.

(b) Special Damages

Special damages are granted to compensate the plaintiff for the losses resulting from special circumstances which are known to both the parties at the time of making the contract.

Example

X delivered goods to the Railway Administration to be carried to a place where an exhibition was being held and told the goods clerk that if the goods did not reach the destination on the specified date he ('X') would suffer a special loss. The goods reached late. He was entitled to claim the special damages.

(c) Exemplary Damages

Exemplary damages are awarded to the plaintiff not on the basis of the actual loss caused to him but of the injury to the feelings of the aggrieved party in order to deter other similar minded persons from doing similar wrongs.

Generally vindictive damages are not awarded for breach of contracts but are as a rule awarded in actions on tort. But there are two exceptions to this rule. They are-

- (i) Breach of contract to marry.

- (ii) Breach of contract by a banker possessing the funds of the customer to honour his cheque.

(d) Nominal Damages

Nominal damages are awarded in cases of breach of contract when there is only a technical violation of legal right but no substantial loss is incurred. Nominal damages are only nominal in value and it is also known as contemptuous damages.

Example

'A' contracted to buy a Bajaj Scooter from a dealer. But he failed to buy the scooter. However the demand for Bajaj Scooter far exceeded the supply and the scooter dealer could sell the scooter agreed to be bought without loss of profit. The dealer is entitled only to nominal damages.

Measure of Damages (Rule in Hadley v. Baxendale)

Provisions regarding the measure of damages, both in India and England are to be found in the judgement in the leading case of **Hadley v. Baxendale**, (1854) 9 Ex. 341

The facts of the case were like this:

The plaintiff (Hadley), the owner of the mill at Gloucester entrusted a broken crank shaft to the defendant (Baxendale) who was a carrier for conveying it to a manufacturer at Greenwich for repair. There was a delay on the part of the carrier in sending the broken part to the repairer. The defendant was not made known that for want of the crank shaft the whole mill would remain idle.

The suit was brought for damages under two heads:

- (1) for failure to deliver the broken part in the specified time,
- (2) for the loss of profit caused by the mill remaining idle.

The House of Lords allowed damages under the first head but disallowed damages under the second head-as the defendant was not told

of the existence of the special circumstances.

The rules based on the judgement in **Hadley V. Baxendale** are dealt with in Section 73 of the Indian Contract Act, They are:

- a) The object of compensation is to place the injured party in the same position as if the contract had been carried out.
- b) Damages which naturally arise in the usual course of things from such breach can be recovered.
- c) Special damages are not recoverable, unless the special circumstances are brought to the notice of the other party before the contract is made.
- d) Compensation is not to be given for any remote and indirect loss of the breach.
- e) Compensation for breach of quasi contract is the same as for a contract.

Damages and Penalty

Where the contracting parties fix at the time of the contract the amount of the damages that would be payable in case of breach, the sum so payable is known as 'liquidated damages'. The courts in England usually give effect to liquidated damages, but relieve a party against "penalty". If the amount fixed in the agreement as compensation is extravagant, unconscionable and greater than the actual loss, it is penalty.

The liquidated damages are the fair assessment of the amount which will compensate the aggrieved party from the loss suffered due to the breach of contract. Stipulation in the nature of liquidated damages is enforceable. Whereas, the penalty is not the fair assessment of the loss for breach. The sum fixed by way of penalty is unreasonable and is used to compel the

other party to perform the contract. Penalty is not recoverable.

Examples

- (a) 'A' borrowed Rs. 200/- from B, and agreed to repay the same on a specified date. The contract further provided that if A failed to make the payment on the specified date, he would pay Rs. 400/- to B as damages. In this case, the amount fixed as damages is to be considered as penalty and is not recoverable.
- (b) Where a building contractor contracts to build a building and deliver it to a firm to enable it to start a mill, and in the event of his failure to do so, agrees to pay Rs. 50/- for every days default, the stipulation amounts only to liquidated damages and it is recoverable.

In India, there is no such difference between liquidated damages and penalty. According to Section 74 "where the sum is fixed in a contract as the amount to be paid in case of breach, the party suffering from breach is entitled to receive '*reasonable compensation*' up to the stipulated amount where it is by way of liquidated damages or penalty". The Court cannot increase the amount of damages beyond the amount specified in the contract itself. Therefore, under Indian Law, in both cases only reasonable compensation will be awarded. Even if it is liquidated damages the court will not award the entire amount.

Example

X borrows Rs. 1,000/- from Y and promises to pay Rs. 2,000/- in case he fails to repay Rs. 1,000/- on the specified date. On the failure of X to repay on the stipulated date Y is entitled to recover from X such compensation, not exceeding Rs. 2,000/- as the court may consider reasonable.

In **A.S. Motors (P) Ltd. v. Union of India** (2013) 10 SCC 114, the Supreme Court held that under section 74 of the Contract Act an aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused

by the breach and the court has, subject to the outer limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable.

In *Satish Batra v. Sudhir Rawal* (2013) 1 SCC 345, appellant- seller agreed to sell his immovable property to the respondent-buyer for a total consideration of Rs. 70,00,000/- . At the time of execution of agreement to sell the property, the respondent paid to the seller Rs.7,00,000/- as earnest money deposit. There was a clause in the agreement to the effect that in case of failure on the part of the respondent to buy the property, the appellant can forfeit the earnest money. The respondent- buyer could not perform his part of contract and the appellant- seller forfeited the entire sum of Rs.7,00,000/- paid as earnest money deposit. Then the respondent -buyer filed a suit for recovery of Rs.7,00,000/- but it was dismissed by the trial court. In appeal, the High Court observed that the appellant seller was entitled to forfeit only nominal amount out of Rs.7,00,000/- but not the entire amount. Against the decision of the High Court, the appellant preferred appeal to the Supreme Court.

The Supreme Court held: Rs.7,00,000/- was paid by respondent purchaser as earnest money deposit and it was paid as guarantee that the contract would be fulfilled. As per terms of contract, it was permissible to forfeit entire earnest money deposit. Under such a circumstance the appellant seller was justified in forfeiting entire sum of Rs. 7,00,000 paid as earnest money deposit. Hence, High Court erred in reversing decree of trial court. The Supreme Court restored the decree of trial court.

The court further held that if the money is paid as part-payment of purchase price, that cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, *If the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply.*

(3) Quantum Meruit

The term Quantum Meruit indicates "as much as earned or in proportion to the work done". A right to sue on a quantum meruit arises when a party has performed some act non-gratuitously and the other party has benefited out of it. If a party to the contract has done some work as per the contract and the other party has committed a breach, the party who has done the work can claim quantum meruit.

(4) Specific Performance

Specific performance means the actual performance of the contract by the parties to the contract. If a party fails to carry out the contract, the court may at its discretion, direct the defendant to perform his promise as per the terms of the contract. Provisions regarding the granting of the relief are dealt with in the Specific Relief Act, 1963.

Some of the cases in which specific performance of an agreement may be enforced are:-

- Where compensation in money is not an adequate remedy for the breach of a contract.
- When there exists an impossibility for ascertaining actual damages due to non-performance.
- When it is probable that monetary consideration on non-performance of the act cannot be obtained.

Specific performance is not usually ordered under the following circumstances:

- When the compensation in money is an adequate remedy.
- Where the court cannot supervise the execution of the contract, eg, a building contract.
- In case the contract is for personal service.

d) If one of the parties of a contract is a minor.

(5) **Injunction**

An Injunction is a mode of securing the specific performance of a negative term of the contract. Where a party in a contract is in breach of a negative term of a contract (ie, where he is doing something which he promised not to do), the court may in its discretion issue an order to the defendant restraining him from doing what he promised not to do. Such an order of the court is called an injunction.

Lumley V. Wagner, (1842, 1 De. G.M. & M 604)

'W' agreed to sing at the theatre of 'L' and nowhere else. W, in breach of contract with L entered into a contract to sing for Z. Held, W could be restrained by injunction from singing for Z.

Injunctions may be either temporary or perpetual.

Temporary injunction is an order of the court prohibiting the defendant from doing some act for a specified period or until further order of the court. Temporary injunction is provisional in its nature. The provisions regarding granting of temporary injunction is contained in the Code of Civil Procedure, 1908.

Perpetual injunction can be granted by the court only by a decree made after the hearing and upon the merits of the suit. A perpetual injunction permanently restrains the defendant from committing an act which would be contrary to the rights of the plaintiff. Provisions regarding granting of perpetual injunctions is contained in the Specific Relief Act, 1963.

PART - II

THE SPECIFIC RELIEF ACT, 1963

Topic - I
introduction

The law relating to specific relief including specific performance of contracts is contained in the Specified Relief Act, 1963. The Act came into force on the 1st day of March, 1964. It is an Act to define and amend the law relating to certain kinds of specific relief obtainable through civil suits.

The Act provides for specific relief by way of -

- (a) Recovery of Possession of property, movables and immovables (sections 5-8)
- (b) Specific performance of contracts (sections 9-25)
- (c) Rectification of Instruments (section 26)
- (d) Rescission of contracts (sections 27-30)
- (e) Cancellation of instruments (sections 31-33)
- (f) Declaratory Decrees (sections 34-35)
- (g) Preventive Relief by way of injunctions (36-42)

Topic-II
Recovery of Possession of Property

Sections 5 to 8 of the Act deal with recovery of possession of movable and immovable property.

(a) Recovery of Specific Immovable Property (section 5)

By virtue of section 5 of the Act, a person entitled to possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908. Thus section 5 confers a right to a person

entitled to possession of specific immovable property to institute a suit for recovery of possession as per the provisions of the Code of Civil Procedure. The person entitled to possession has to institute a suit and establish his right to possession and after obtaining a decree it is to be executed in accordance with the provisions of Order 21 Rules 35 and 36 of the Code of Civil Procedure. A suit for recovery of possession is to be instituted within the period of limitation prescribed under the Limitation Act, 1963.

(b) Suit by Person Dispossessed of Immovable Property (Section 6)

By virtue of section 6 of the Act, if a person is dispossessed without his consent of immovable property, otherwise than in due course of law, he or any person claiming through him may institute a suit and recover possession of such property notwithstanding any other title that may be set up in such suit.

The plaintiff in a suit under this section need not establish his title or right to possession. What is to be proved by the plaintiff is that he was in possession of the immovable property and he is dispossessed by the defendant.

Section 6 provides for a summary remedy for unlawful dispossessions of immovable property. The suit for recovery of possession of the property is to be instituted within six months of dispossessions. In a suit under section 6 the court cannot go into the question of title of the plaintiff. However the plaintiff should have possession in juridical sense. If 'X' trespasses into my land and on the very same day if I dispossess him by reasonable force, he cannot maintain an action against me under section 6 since he is a mere trespasser and his possession is not a juridical possession. But if I dispossess by force a tenant in my house who has failed to pay me rent, a suit by the tenant is maintainable under this section.

In *Abdul Rahiman V. Nalakath Muhammed Hari* (1996) (2) KLT 185), the Kerala High Court held that a person who is in possession of the property cannot be dispossessed without his consent or in any manner otherwise than in due course of law. Question of title is irrelevant in a suit under section 6. It is the question of possession. Plaintiff must prove his previous possession and dispossession by defendant otherwise than in due course of law within six months prior to the date of the suit.

A suit under section 6 shall not be brought against the Government. No appeal shall lie from any order or decree passed in any suit instituted under section 6. So also no review of any such order or decree is allowed.

The provisions of this section will not bar any person from instituting a suit to establish his title to such property and to recover possession of the property.

In *Philip and Others V. Skarla and others* (1987 (1) KLT 213), it was held that possession by itself is a substantive right recognised by law. Apart from ownership it has got all the legal incidents attached to it. Even before acquiring statutory rights by adverse possession or otherwise he has got well defined rights in the property. Possessory title is heritable, divisible and transferable. Possessory title is distinct from proprietary title. The normal rule is that if a suit is brought under section 6 of the Specific Relief Act within six months of dispossessions on the strength of previous possession, title need not be alleged and proved. But if the suit is brought beyond six months of dispossessions, the plaintiff cannot recover merely on the strength of possession, but he has to prove title also.

(c) Recovery of Specific Movable Property (Section 7)

By virtue of section 7 of the Act, a person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908. Thus section 7 confers a right to a person entitled to possession of specific movable property to institute a suit for recovery of possession as per the provisions of the Code of Civil Procedure. The person

entitled to possession has to institute a suit and establish his right to possession and after obtaining a decree it is to be executed in accordance with the provisions of Order 21 rule 31 of the CPC. A suit for recovery of possession of movable property is to be instituted within the period of limitation prescribed under the Limitation Act, 1963.

(d) Delivery of Movable Property to Person Entitled to Immediate Possession (Section 8)

By virtue of section 8 of the Act, a person having the possession or control of a particular article of movable property, of which he is not owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in the following cases:

- (a) When the thing claimed is held by the defendant as the agent or trustee of the plaintiff.
- (b) When compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed.
- (c) When it would be extremely difficult to ascertain the actual damage caused by its loss.
- (d) When the possession of the thing claimed has been wrongfully transferred from the plaintiff.

By virtue of explanation to section 8, unless and until the contrary is proved, the court shall, in respect of any article of movable property claimed under clause (b) or clause (c) of this section presume -

- (a) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed;
- (b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

Topic - III
Specific Performance of Contracts
or
Contracts Which Can and Cannot be Specifically Enforced

Section 9 to 25 of the Specific Relief Act deal with specific performance of contracts. The "specific performance" of a contract is its actual execution according to its stipulations and terms. A decree for specific performance would direct the defendant to actually perform the promise that he has made. Specific performance is the exceptional rule and the normal remedy for the breach of contract is the recovery of damages. The jurisdiction to decree specific performance is altogether discretionary power of the court and not a matter of right of the parties.

Section 20 of the Act makes it clear that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so. The discretion of the court is not arbitrary. It must be sound and reasonable and guided by judicial principles. It is capable of correction by court of appeal.

In **Sreedharan V. Presanna** (1996 (2) KLT 784), the court observed that section 20 of the Specific Relief Act, 1963 deals with discretion and jurisdiction of the court. It says that the court is not bound to grant such relief merely because it is lawful to do so, but at the same time, it enjoins that the discretion of the court should not be arbitrary but sound and reasonable, guided by judicial principles.

In **Sathy V. Sayed Mohammed** (1998 (1) KLT 141), it was held that one principle that may always guide the court while exercising its discretion is that it shall not act in an inequitable manner. The court would take into

consideration the circumstances in each case, the conduct of the parties and the respective interest in the contract while exercising its jurisdiction. Granting decree for specific performance of a contract of immovable property is not automatic. It is one of the discretion to be exercised on sound principles. When the court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fairness to both the parties. Therefore, when the court exercises its discretionary jurisdiction, the court has to exercise the same on sound judicial principles and not arbitrarily.

By virtue of section 20 (2), under the following cases the court may properly exercise discretion not to decree for specific performance:

- (a) If the terms of the contract or the conduct of the parties at the time of entering into the contract or other circumstances under which the contract was entered into are such that the contract though not voidable gives the plaintiff an unfair advantage over the defendant.
- (b) If the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

By virtue of section 20 (3), the court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

By virtue of section 20 (4), the court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

When the plaintiff institutes a suit for specific performance of the contract the defendant can lead by way of defence any ground which is available to him under any law relating to contracts.

The remedy of specific performance cannot be obtained as a matter of right but rests entirely on the discretion of the Court. As this is an equitable remedy, the plaintiff who claims the relief must show that he himself has performed or is ready and willing to perform his part of the agreement. This rule is based on the maxim, "he who seeks equity must do equity".

By virtue of section 23 of the Act, liquidation of damages shall not be a bar to specific performance. A contract may be specifically enforced, though a sum be stated in it as the amount to be paid in case of its breach and the party in default is willing to pay the sum specified. However the court should be satisfied that the contract is proper to be specifically enforced and the sum was named only for the purpose of securing the performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

In *Jayalakshmi V. Anil Kumar* (1996 (1) KLT 727), the court held that it is only when payment is an alternative to carrying out the other terms of the contract, it would exclude, by the terms of the contract itself, specific performance of the contract to convey a property.

Contracts Which Can Be Specifically Enforced

Section 10 of the Act deals with cases in which specific performance of contract may be enforced by the court. Granting of a decree for specific performance of the contract is in the discretion of the court. The court may enforce specific performance of a contract under the following cases:

(a) No Standard To Ascertain Damages

When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done, specific performance can be enforced.

(b) Compensation In Money Inadequate

When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief, specific performance can be enforced.

Explanation to section 10 provides a rebuttable presumption. Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. On the other hand it can be presumed that the breach of contract to transfer movable property can be relieved by compensation in money. If the movable property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market the presumption would not be applicable.

(c) Contracts Connected with Trusts (Section 11)

When the act agreed to be done is in the performance wholly or partly of a trust the specific performance can be enforced in the discretion of the court. A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Contracts Which Cannot be Specifically Enforced

Section 14 of the Act enumerates contracts which cannot be specifically enforced. The following are the contracts which cannot be specifically enforced.

- (a) Contracts for the performance of which compensation in money is in adequate relief cannot be specifically enforced.

- (b) A contract which runs into such minute or numerous details cannot be specifically enforced.
- (c) A contract which is so dependent on the personal qualifications of the parties cannot be specifically enforced.
- (d) If the nature of the contract prevents it from being specifically enforced, the court cannot specifically enforce such contract.
- (e) If the terms of contract are uncertain.
- (f) A contract by a trustee in excess or breach of his trusts.
- (g) Ultra vires contracts by corporations or public companies or their promoters cannot be specifically enforced.
- (h) A contract involving the performance of a continuous duty which the court cannot supervise.

Who Can Obtain Specific Performance

By virtue of section 15 of the Act the specific performance of a contract may be obtained by the following persons :

- (a) A party to the contract.
- (b) The representative in interest or the principal of any party to the contract. If the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned; his representative in interest or his principal shall not be entitled to specific performance. But it may be permissible if such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party.
- (c) If the contract is a settlement on marriage, on a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder.

- (d) If the contract has been entered into by a tenant for life in due exercise of a power, the remainderman.
- (e) A reversioner in possession, if the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant.
- (f) A reversioner in remainder, if the agreement in such a covenant and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach.
- (g) When the company has entered into a contract and subsequently becomes amalgamated with another company the new company which arises out of the amalgamation.
- (h) When the promoters of a company have before its incorporation entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation of the company. It is essential that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Personal Bars to Relief

or

Persons In whose favour Specific Performance Cannot be enforced

By virtue of section 16 of the Act, specific performance of a contract cannot be enforced in favour of the following persons:

- (a) The person in whose favour specific performance is to be given should, in law, be entitled to recover compensation for the breach. If he is not so entitled the contract cannot be specifically enforced in his favour.
- (b) A contract cannot be specifically enforced in favour of one who has become incapable of performing the contract or has violated any of the

essential terms of the contract. So also it would not be enforced in favour of one who commits any fraud in relation to the contract or wilfully acts at variance with or in subversion of the relation intended to be established by the contract.

- (c) A contract cannot be specifically enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. He will be excused from doing so if the performance of such terms has been prevented or waived by the defendant. If the contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court.

In *Sukhbir Singh v. Birji Pal Singh* (1996 (2) KLT 43) It was held that in a suit for specific performance of agreement for sale of immovable property it is not a condition that the plaintiff should have ready cash with them. The fact that the plaintiff attended the Sub-Registrar's office to have the sale deed executed and waited for the defendant to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the plaintiff to establish that they had the capacity to pay the sale consideration.

In *Karthiyani Amma v. Ganapathi Namboodiri* (ILR 1996 (2) Ker 849), it was held that in a suit for specific performance what is required to be established is the continuous readiness and willingness on the part of the plaintiff to perform the essential terms of the contract for sale and that it does not mean the plaintiff must establish that he had always in his possession the required funds from the date of agreement for sale till the execution of the sale deed or till the date of the decree, if the dispute is pending adjudication in a court of law. The availability of required funds may

be a piece of material to establish the readiness on the part of the plaintiff in certain cases.

In **Jayalakshmi v. Anil Kumar** (1996 (1) KLT 727), it was held that the continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract.

In **Sathy v. Sayed Mohammed** (1998 (1) KLT 141), it was held that the question as to whether plaintiff was ready and willing to perform his part of the contract is a question of fact to be inferred from the facts and circumstances of each case. Readiness and willingness could not be treated as a straitjacket formula. These have to be determined from the entirety of the facts and circumstances, relevant to the intention and conduct of the party concerned. The substance of the matter and the surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness on the part of the plaintiff to perform his part of the contract.

(e) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who has contracted to sell or let the property knowing himself not to have any title to the property.

Against whom Contracts may be Specifically Enforced

By virtue of section 19 the court can grant specific performance of the contract against the following persons.

(a) Either party to the contract.

(b) Any person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

(c) Any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant.

(d) When a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of amalgamation.

(e) When the promoters of a company have before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company; provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Specific Performance of Part of a Contract

Section 12 of the Act deals with specific performance of a part of a contract. The general principle under section 12 is that the court shall not direct the specific performance of a part of a contract. The general rule is subject to the following principles.

1. If a party to a contract is unable to perform the whole of his part and the part which he cannot perform bears only a small portion in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

2. If a party to a contract is unable to perform the whole of his part and the part which he cannot perform forms a considerable part of the whole, though admitting of compensation in money or does not admit of compensation, he is not entitled to obtain a decree for specific performance.

But the court may at the suit of the other party, direct the party in default to perform specially so much of his part of the contract as he can perform. However the plaintiff should pay the consideration for that part which the defendant is directed to perform and relinquish all claims to the performance of remaining part of the contract and all rights to compensation.

If a contract can be split up into parts and a part of the contract stands on a separate and independent footing and that part can be and ought to be specifically performed and the other part cannot be or ought not be specifically performed, the court may direct specific performance of that part which can be performed.

Compensation In addition to specific performance

By virtue of section 21 of the Act, in a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to or in substitution of such performance. No compensation shall be awarded unless the plaintiff has claimed such compensation in his plaint. If the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

If in any such suit the court decides that specific performance ought to be granted, but that is not sufficient to satisfy the justice of the case, and

that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

In determining the amount of compensation to be awarded, the court shall be guided by the principles specified in section 73 of the Indian Contract Act 1872.

Claim of Possession, Partition and Refund of Earnest Money

By virtue of section 22 of the Act, any person suing for the specific performance of a contract for transfer of immovable property may ask for-

- (a) possession, or partition and separate possession, of the property, in addition to such performance; or
- (b) any other relief to which he be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

The above stated reliefs shall not be granted by the court unless it has been specifically claimed in the plaint. If the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such relief.

Bar to suit for compensation for breach

By virtue of section 24 of the Act the dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled by reason of such breach.

Topic -IV

Rectification of Instruments

Section 26 of the Act deals with rectification of instruments. When through fraud or mutual mistake of the parties, a contract or other instrument in writing does not express their real intention, then either party or his representative in interest may institute a suit to have the instrument rectified. A separate suit may be instituted for getting the contract or instrument rectified. Rectification may also be claimed in the course of any suit in which any right arising under the instrument is in issue. Then both the plaintiff and defendant can claim rectification of the document or instrument.

If, any suit in which a contract or other instrument is sought to be rectified, the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as possible, without prejudice to rights acquired by third persons in good faith and for value. Rectification of any instrument shall be granted only if it has been specifically claimed. If a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just, for including such claim.

The Articles of Association of a company to which the Companies Act, 1956 applies cannot be rectified by a court even though they do not conform to the concurrent intention of the signatories. It shall be modified only by a special resolution in the manner prescribed by the Companies Act.

Topic -V

Rescission of Contract

Rescission is a form of specific relief by which the plaintiff claims for the avoidance of a contract as distinguished from specific enforcement.

Section 27 of the Act deals with the circumstances when the court may allow or refuse rescission of a contract.

Any person interested in a contract may sue to have the contract rescinded. He may be a party to it or he may be a beneficiary under it. The rescission may be adjudged by the court in the following cases :

- (a) If the contract is voidable or terminable by the plaintiff.
- (b) If the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

By virtue of section 27 (2) of the Act, the court may refuse to rescind the contract under the following cases :

- (a) If the plaintiff has expressly or impliedly ratified the contract.
- (b) If owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially resorted to the position in which they stood when the contract was made.
- (c) If third parties have, during the substance of the contract, acquired rights in good faith without notice and for value.
- (d) If only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

Rescission of Contract for the Sale or Lease of Immoveable Property after Passing Decree for Specific Performance

By virtue of section 28(1) of the Act, if in any suit a decree for specific performance of a contract for the sale or lease of immoveable property has been made and the purchaser or lessee does not pay the purchase money or other sum which the court has ordered him to pay within the period allowed by the decree or such further period as the court may allow, the vendor or lessor may apply, in the same suit in which the decree is made, to have the contract rescinded. On such application the court may, by order, rescind the contract.

In **Ramankutty Guptan v. Avara** (1992 (2) KLJ 608), it was held that a court executing the decree, should execute the decree as it stands. It cannot go behind the decree. It is only the Court which passed the decree (original side of the court) that can rescind the contract. It is the court, which made the decree in the suit, that can afford the relief. So on a plain reading of section 28(1) of the Act it is clear that the application to rescind the contract should be filed in the court which can rescind the contract. The executing court has no jurisdiction to rescind the contract or annul the decree.

In **Joseph George v. Chacko Thomas** (1992 (1) KLT 6) it was held that a decree for specific performance is a decree in favour of both the plaintiff and the defendant in the suit and the same could be executed as per Order XXI, R 32 CPC. Naturally, therefore, the decree was executable at the hands of the defendants also. In such circumstance it was open to the defendant to move under section 28 of the Act to get the contract rescinded or to take out execution as per Order XXI R. 32 CPC. In the context of section 28 of the Act and also Order XXI R. 32 CPC it is not possible to hold that when already a decree for specific performance is passed mere failure to deposit the

amount should nullify the decree. It is particularly so since as per section 28 of the Act, the court can extend the time for deposit.

In **Anandavally v. Natesan** (1992 (2) KLT 833), it was held that if purchaser does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor can apply, in the suit to have the contract rescinded and the court is given power to rescind the contract subject to the other conditions mentioned in section 28. For the application of section 28 of the Act there must be wilful default.

It was further held that even after passing of a decree for specific performance, court retains control over the subject matter and can pass appropriate orders either extending the time for payment or rescinding the contract, if circumstances exist.

By virtue of section 28 (2) of the Act, if a contract is rescinded under sub-section (1), the court shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor. The court may also direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor. The court may direct the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

By virtue of section 28 (3) of the Act, if the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period, the court may on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases, all or any of the following reliefs, namely-

- (a) the execution of a proper conveyance or lease by the vendor or lessor
- (b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

By virtue of section 28 (4) of the Act, no separate suit in respect of any relief which may be claimed under section 28 shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

The cost of any proceedings under this section shall be in the discretion of the court.

Alternative Prayer for Rescission

By virtue of section 29 a plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled. If the court refuses to enforce the contract, it may direct the contract to be rescinded and delivered up accordingly.

Restoration of Benefit

By virtue of section 30 of the Act, on adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore any benefit which he may have received from the other party and to make any compensation to him which justice may require.

Topic-VI

Cancellation of Instruments

Section 31 to 33 of the Specific Relief Act deal with cancellation of instruments.

By virtue of section 31 (1) of the Act, any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable. When a suit is instituted for the said purpose, the court may, in its discretion, so adjudge it and other the instrument to be delivered up and cancelled.

By virtue of the section 31 (2) of the Act, if the instrument has been registered under the Indian Registration Act, 1908, the Court shall be so registered and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

By virtue of section 32 of the Act, if an instrument evidence of different rights or different obligations, the court may, in proper case cancel it in part and allow it to stand for the residue.

Restoration of Benefit

By virtue of section 33 (1) of the Act, on adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore any benefit which he may have received from the other party and to make any compensation to him which justice may require.

By virtue of section 33 (2) of the Act if a defendant successfully resists any suit on the ground that the instrument sought to be enforced against him in the suit is voidable, the court may, if the defendant has received any benefit under the instrument from the other party, require him to restore such benefit to that party or to make compensation for it.

If a defendant successfully resists any suit on the ground that the instrument sought to be enforced against him in the suit is void by reason of

his not having been competent to contract under section 11 of the Contract Act, 1872, the court may, if the defendant has received any benefit under the extent to which her or his estate has been benefited thereby.

Topic-VII

Declaratory Decrees

Section 34 and 35 of the Specific Relief Act deal with declaratory decrees.

By virtue of section 34 of the Act, any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right to declare his title to such character or right. When such a suit is instituted the court may in its discretion make a declaration that he is so entitled. The plaintiff need not claim any other relief in such suit. However, by virtue of proviso to Section 34, if the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so, the court shall not make any declaration.

In *Antony v. Thersia* (1997 (1) KLT-SN 64 P. 49) it was held that without a prayer for recovery of possession mere suit for declaration was not sufficient in the light of the proviso under section 34 of the Act.

By virtue of section 35 of the Act, a declaration made under section 34 is binding only on the parties to the suit and persons claiming through them respectively.

Topic-VIII

Preventive Relief by way of Injunction

Sections 36 to 46 of the Act deal with preventive relief by way of injunction.

By virtue of section 36 of the Act, preventive relief by way of injunction whether temporary or perpetual is at the discretion of the court.

Granting of Injunction is entirely in the discretion of the court. The discretion is to be sound and reasonably guided by judicial principles.

Injunctions may be either temporary or perpetual.

Temporary Injunction

By section 37(1), temporary injunctions are such as are to continue until a specific time, or until the further order of the court, and they may be granted at any stage of the suit, and are regulated by the Code of Civil Procedure, 1908. Sections 94 (c) Order XXXIX Rules 1 to 5 of the Code of Civil Procedure, 1908 deal with temporary injunction.

In *Laxmikant V. Patel v. Chetanbhai Shah* (AIR 2002 SC 275), it was held that in order to grant temporary or ad interim injunction, the plaintiff must prove a *prima facie* case, balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction.

In *Hindustan Petroleum Corp. Ltd. v. Sriman Narayan* (AIR 2002 SC 2598), it was held that in order to grant relief by way of interlocutory injunction the Court need not deal with matter as if deciding the suit finally. Existence of a *prima facie* case is enough in granting interlocutory injunction. Purpose of granting interim injunction is to lessen the risk of irreparable injury and injustice which cannot be compensated for in money and which would result from violation by defendant of some right of the plaintiff. Therefore, the fact that such risk exists must be established to the court's satisfaction. Also that the risk outweighs the defendant's need for protection

from injury that would result from not being permitted to exercise a legal right of his own.

In **M.P. Housing Board v. Anil Kumar Khiwani** (AIR 2005 SC 1863), it was held that since the relief (interim injunction) is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These conditions will arise not only in respect of the person who seeks an order of injunction under order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.

In **Dorab Cowasji v. Cooml Sorab** (1990 (2) SCC 117), it was held that the relief of **Interlocutory mandatory injunction** is generally granted to preserve or restore the *status quo* of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongly taken from the party complaining. The plaintiff has to make out a strong case for trial. It shall be of a higher standard than a *prima facie* case, that is normally required for a prohibitory injunction.

Perpetual Injunction

By section 37 (2) a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. By a perpetual injunction the defendant is perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

When Perpetual Injunction can be Granted

By virtue of section 38 (1) of the Act, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether express or by implication.

If the obligation arises from a contract the court shall be guided by the rules contained in sections 9-25 of the Act relating to specific performance of a contract.

By virtue of section 38(3), when the defendant invades or threatens to invade the plaintiff's right to do, or enjoyment of property the court may grant a perpetual injunction in the following case :

- (a) If the defendant is a trustee of the property for the plaintiff
- (b) If there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion
- (c) If the invasion is such that compensation in money would not afford adequate relief.
- (d) If the injunction is necessary to prevent a multiplicity of judicial proceedings.

In **Alysumma v. Mrs. Marlyamma** (1994 (1) KLJ 289), it was held that a person in possession is entitled to a decree for injunction against forcible dispossession by the true owner. The rights of the person in possession are valid against the entire world except the true owner. But that is not to say that the true owner can take the law into his hands and dispossess the person in possession, although a trespasser, without recourse to the due process of law or forcibly. Depriving a person in possession of protection in a civil action for injunction will lead to a situation where might is right, with persons taking the law into their hands and forcibly evicting persons in possession without recourse to the due process of law.

In **Padmanabhan v. Thomas** (1989 (1) KLT 268), the plaintiff came to possession by forcefully breaking open the shop and filed a suit for injunction against the person who was in possession. It was held that a suit for injunction is an equitable remedy and the primary requirement for the grant of an equitable remedy is that the person who claims the remedy must come before the court with clean hands. He must show equity and he must show his entitlement under the equity the relief he has sought. Fairness and good faith are the two important things required for obtaining any equitable relief. It cannot be said that a temporary unlawful possession obtained by an unlawful act is sufficient for maintaining a suit for Injunction. If there is an established possession even if it is unlawful the person in unlawful possession can perhaps maintain a suit for Injunction. It is a case where a party has taken law in his hands and thereafter tried to obtain an equitable relief from the court. Such a person is not entitled to the equitable relief of injunction.

Granting of Mandatory Injunctions

Mandatory Injunction is a term used to distinguish it from prohibitory injunction. While a prohibitory injunction forbids the defendant from doing some act, a mandatory injunction compels him to do some act which is enjoined.

Section 39 of the Act deals with granting of mandatory injunctions. When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts.

In **T. Prasad v. T. Punnoose** (1994 (1) KLJ 693), it was held that in a suit for mandatory injunction to restore the boundary wall demolished by defendants for laying a pathway, the plaintiff cannot be denied the relief of mandatory injunction and monetary compensation cannot be the just remedy.

In **Ayissa Umma v. Aml** (1990 (1) KLT 98) it was held that a licensee has no interest in the land and his possession is purely permissive. A licence does not create any estate or interest in the property to which it relates. In the case of licence the control of possession of the property is with the licensor through such licensee. The occupation of the licensee being purely permissive under the licensor the former is under legal obligation to restore the possession of the property to the latter whenever licence is terminated. Licensor can definitely call upon the licensee to vacate the premises. The licensor is legally entitled to the relief by way of mandatory injunction if a suit is filed within reasonable time after the termination or revocation of the licence.

Damages In lieu of, or in addition to, Injunction

By virtue of section 40 of the Act, the plaintiff in a suit for perpetual injunction or mandatory injunction may claim damages either in addition to or in substitution for such injunction, and the court may award such damages.

The relief by way of damages shall not be granted unless the plaintiff has claimed relief in his plaint. If no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

By virtue of section 40 (3) the dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

Refusal of injunction

Section 41 of the Act deal with the cases in which injunction cannot be granted: Under the following cases an injunction cannot be granted :

- To restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is

- sought, unless such restraint is necessary to prevent a multiplicity of proceedings.
- (b) To restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought.
- In **Santha v. Vasu & Others** (1995 (2)KLJ 176) the question mooted in the appeal was whether section 41 (b) of the Specific Relief Act, 1963 would prevent a court from granting an injunction in respect of proceeding pending in the same court. By virtue of section 41 (b) an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. It was held that the interdict contained in section 41 (b) is not applicable when injunction is to be issued in respect of the proceedings pending in the same court. It was further held that proceedings pending in superior courts and courts of equal grade (co-ordinate courts) cannot be regulated or controlled by other courts as a matter of public policy.
- (c) To restrain any person from applying to any legislative body.
- (d) To restrain any person from instituting or prosecuting any proceeding in criminal matter.
- (e) To prevent the breach of a contract the performance of which would not be specifically enforced.
- (f) To prevent, on the ground of nuisance, an act of which is not reasonably clear that it will be a nuisance.
- (g) To prevent a continuing breach in which the plaintiff has acquiesced.
- (h) When equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.

In **Balakrishnan v. Pradeep Kumar** (1996 (1) KLT 562), it is observed that clause (h) of section 41 of the Act states that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust. For this principle to apply, there requisites are required to be fulfilled. They are : (1) there is any other mode of securing relief; (2) the relief obtainable thereby is as efficacious as an injunction; and (3) the plaintiff is certain to secure such relief.

- (i) When the contract of the plaintiff or his agents has been such as to disentitle him to assistance of the court.
- (j) When the plaintiff has no personal interest in the matter.

In **Cotton Corporation of India Ltd. v. United Industrial Bank** (AIR 1983 SC 1272) it was held that the interdict contained in section 41 would apply to all kinds of injunctions, whether temporary or permanent.

Injunction to Perform Negative Agreement

By virtue of 42 if a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting

an injunction to perform the negative agreement, provided that the applicant has not failed to perform the contract so far as it is binding on him. The application of section 42 is invoked "notwithstanding any thing contained in clause (e) of section 41.

The rule contained in section 42 adopts the decision in *Lumely v. Wagner* (1842, 1 De. G.M. & M. 604). In that case, the defendant agreed to sing at the plaintiff's theatre, and during a certain period to sing nowhere else. Afterwards she made a contract with another person to sing at another theatre and refused to perform her contract with the plaintiff. The court refused to order specific performance of her positive engagement to sing at the plaintiff's theatre, but granted an injunction to restrain the breach of her promise not to sing elsewhere.

Model- Problems

1. A filed a complaint against B for the offence of theft. A and B entered into an agreement whereby A would withdraw the case and B would return the stolen goods. Is this agreement valid?

or

X promises to drop prosecution which he has instituted against R for robbery and R promises to restore the value of things taken. Can X enforce this promise? If so give reasons.

An agreement enforceable at law is a contract. Only valid agreements are enforceable through court of law.

According to section 10 of the Indian Contract Act, 1872 an agreement is enforceable as a contract only if it is made for a lawful consideration and lawful object. An agreement is unlawful if the object or consideration is unlawful. Every agreement of which the object or consideration is unlawful is void.

According to section 23 of the Act, the consideration and object of an agreement is unlawful under the following circumstances.

- (i) If it is forbidden by law.
- (ii) If it would defeat the provisions of any law.
- (iii) If it is fraudulent.
- (iv) If it involves or implies injury to the person or property of another.
- (v) If the court regards it as immoral or opposed to public policy.

By virtue of section 23 of the Act an agreement opposed to public policy is void and unenforceable. The expression 'public policy' is not defined in the Indian Contract Act. The courts in India are given the freedom to decide what types of agreements are opposed to public policy.

The expression " public policy" cannot be defined precisely. It is an elastic term and it is difficult to define and classify agreements opposed to public policy.

In **Richardson v. Mellish** (1824) 2 Bing 229, Justice Borrough observed as follows:

"Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you".

Lord Truro has defined it as follows:

" Public Policy Is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good which may

be termed the policy of the law or public policy in relation to law".

In **Gherulal Parakh v. Mahadeodas Malya and others** (AIR 1959 SC 781), the Supreme Court observed thus :

Public policy or policy of the law is an illusive concept; It has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly horse'. etc. The primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contract which forms the basis of society. But, in certain cases, the courts may be relieved from this duty on a rule founded on what is called the public policy.

An agreement which tends to be injurious to the public or against the public good is contrary to public policy. An agreement which is opposed to public policy is unlawful and void.

If a person has committed a crime he must be prosecuted and punished. Hence an agreement not to prosecute an offender or to withdraw a pending prosecution is an agreement for stifling prosecution and is unlawful.

In **Williams v. Baylely** (1866) 1 HL 200, Lord Westbury observed : "You shall not make a trade of a felony (serious crime)".

In the given problem, A filed a complaint against B for the offence of theft. A and B entered into an agreement whereby A would withdraw the case and B would return the stolen goods. The agreement is opposed to public policy and hence unlawful and void.

2. A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. Is B bound to pay for them ?

Sections 68 to 72 of the Indian Contract Act, 1872 deals with certain relations resembling those created by contract. By virtue of sections 68 to 72 of the Act, though there is no valid agreement resulting from offer and acceptance, some rights and obligations are imposed as if there is a contract.

By section 70 of the Indian Contract Act, 1872, a person who has received benefit of a non-gratuitous act is liable to pay compensation to the person has done the act. In order to apply section section 70, the following conditions are to be satisfied:

(1) A person should have lawfully done something for another or delivered something to him.

(2) The person who has made payment or delivered the thing must not have made the payment or delivered the thing gratuitously.

(3) The other person should enjoy the benefit of this payment or the delivery of the thing.

If all the above conditions are satisfied, the person who has received the benefit is bound to pay for it.

In the given problem A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own.

As 'A', the tradesman, left the goods at B's house by mistake and B

treated the goods as his own, B is liable to pay for the same.

3. A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. Is A entitled to recover the value of the necessaries from B.

Sections 68 to 72 of the Indian Contract Act, 1872 deals with certain relations resembling those created by contract. By virtue of sections 68 to 72 of the Act, though there is no valid agreement resulting from offer and acceptance, some rights and obligations are imposed as if there is a contract.

By section 68 of the Indian Contract Act, If a person supplies necessities to a person who is incapable to enter into a contract or to any one whom the incapable person is legally bound to support, the person who has supplied the necessities suited to their conditions in life is entitled to be reimbursed from the property of such incapable person.

In the given problem 'A' supplied the wife and children of B, a lunatic, with necessities suitable to their condition in life. 'A' is entitled to be reimbursed from the property of B the value of necessities. It is to be noted that B is not personally liable for the necessities supplied by A.

4. 'A' held out a threat of committing suicide to his wife and son if they did not execute a release in favour of his brother in respect of certain properties. The wife and son executed the release deed under the threat. The wife and son want to get the release deed set aside. Give your opinion.

By virtue of section 10 of the Indian Contract Act, 1872, an agreement in order to be enforceable through court of law, there should be free consent of the parties.

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

The consent is said to be *free* when it is not caused or obtained by

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

When the consent to an agreement is caused or obtained by coercion, undue influence, fraud or misrepresentation, the agreement is a contract *voidable* at the option of the party whose consent was so obtained. If the consent of both the parties are caused by mistake (bilateral mistake) the agreement is *void*. But if only one of the parties is under a mistake, it is unilateral mistake and the contract is not *void* or *voidable*.

When a person is compelled to enter into a contract by the use of force by the other party or under a threat, the consent is said to be obtained by coercion.

Section 15 of the Indian Contract Act, 1872 defines "Coercion". The following are coercion.

- (i) The committing or threatening to commit any act forbidden by the Indian Penal Code, 1860.
- (ii) Unlawfully detaining or threatening to detain any property with the intention of obtaining consent to enter into an agreement.

Section 19 says that when consent to an agreement is caused or obtained by coercion; the agreement is a contract voidable at the option of the party whose consent was so obtained.

In the given problem A held out a threat of committing suicide to his wife and son if they did not execute a release in favour of his brother in respect of certain properties. The wife and son executed the release deed under the threat. Thus the release deed is voidable at the option of the wife and son.

In Chikhan Amiraju Vs. Seshamma(1917) ILR 41 Mad. 33, A person held out a threat of committing suicide to his wife and son if they did not execute a release in favour of his brother in respect of certain properties. The wife and son executed the release deed under the threat. It was held

that the threat of suicide amounted to coercion and the release deed was voidable at the option of the wife and son.

5. A sent a telegram to B saying that, will you sell your car? Quote lowest price. B replied by telegram saying that lowest price is Rs.25000/- . A sent a second telegram to B, stating that I agree to buy your car for Rs. 25000/- B thereafter refuses to sell. Can A compel B to do so?

When a person signifies his willingness to do or abstain from doing something, he is said to have made an offer. When the person, to whom the offer is made, signifies his readiness to act as per the terms of offer, the offer is said to have accepted, and it gives rise to a binding contract. If a person simply quote the lowest price for his property without signifying his willingness to sell the same would not amount to an offer for sale. No one can compel him to sell the property for the lowest price he quoted.

In Harvey V. Facey (1893) AC 552, three telegrams were exchanged between Harvey and Facey.

(1) "Will you sell us Bumper Hall Pen.? Telegraph lowest cash price - answer paid" (H to F)

(2) "Lowest price for Bumper Hall Pen is 900 pounds" (F to H)

(3) "We agree to buy Bumper Hall pen for the sum of 900 pounds asked by you (H to F)

Facey did not give any reply to the last telegram. Harvey filed a suit for specific performance and demanded the Bumber Hall Pen for 900 pounds.

The question before the court was whether there is a binding agreement between H and F.

The first telegram asked two questions

- (i) The willingness of F to sell, and
- (ii) The lowest price.

F replied only to the second question and gave his lowest price. F had not stated his willingness to sell the Bumber Hall Pen. A quotation of lowest price is not an offer. It is only an offer to make offer. Harvey's final telegram contains an offer to purchase the Bumber Hall Pen at the quoted price. Since Facey did not accept that telegram, it was held that there was no binding contract.

The facts of the given problem and facts of the case Harvey v. Facy are identical, and the decision in Harvey v. Facy can be applied to the given problem. Thus A cannot compel B to sell his car for Rs.25000/-. It is because B has not offered his car for sale. B quoted only the lowest price of his car.

6. A sold some articles from his shop to B on credit; not knowing that B was a minor. The time fixed for payment expired and no payment was made. Sometime later when B attained majority. A sued him for the price, will he succeed?

According to Section 10 of the Indian Contract Act, 1872 an agreement becomes a contract if it is entered into between parties who are competent to contract.

According to Section 11 of the Act, every person is competent to contract if -

- (a) he has attained the age of majority according to the law to which he is subject;
- (b) he is of sound mind; and
- (c) he is not disqualified from contracting by any law to which he is subject.

The following persons are incompetent to contract.

- (1) Minors
- (2) Persons of unsound mind

(3) Persons disqualified by law

By section 3 of the Indian Majority Act, 1875, a minor is a person who has not attained eighteen years of age. If a guardian is appointed by the court for a minor's person or property, he attains majority only on completion of 21 years of age.

An agreement with or by a minor is *ab initio* (from the very beginning) void. In England a minor's contract is only voidable at his instance.

In **Mohori Bibi V. Dharmadas Bhone** (1903) 30 Cal 539, a minor executed a mortgage for the sum of Rs. 20,000/- in favour of the defendant and out of which the mortgagee paid the minor Rs. 8000/-. Subsequently the minor sued for setting aside the mortgage. The defendant claimed refund of Rs. 8000/- which he had paid to the minor. The court held that the agreement was void *ab initio* and thus he could not recover the amount.

In the given problem A sold some articles from his shop to B, a minor, on credit and sued him for price after attaining majority. A minor's contract is *ab initio* void. Thus the suit filed by A is liable to be dismissed.

7. A young widow was forced to adopt a boy under the treat of preventing the body of her husband who had just died from being removed for cremation. Is this adoption valid under law?

By section 10 of the Indian Contract Act, 1872, in order to enforce an agreement through court of law, there should be free consent of the parties.

Two or more persons are said to consent when they agree upon the same thing in the same sense. The consent is said to be *free* when it is not caused or obtained by

- (1) Coercion.
- (2) Undue Influence.
- (3) Misrepresentation.
- (4) Fraud.
- (5) Mistake.

When the consent to an agreement is caused or obtained by *coercion*, *undue influence*, *fraud* or *misrepresentation*, the agreement is a contract *voidable* at the option of the party whose consent was so obtained.

If the consent of both the parties are caused by mistake (bilateral mistake) the agreement is *void*. But if only one of the parties is under a mistake, it is unilateral mistake and the contract is not *void* or *voidable*.

When a person is compelled to enter into a contract by the *use of force* by the other party or under a *threat*, the consent is said to be obtained by *Coercion*.

Section 15 of the Indian Contract Act, 1872 defines "Coercion". The following are coercion.

- (i) The committing or threatening to commit any act forbidden by the Indian Penal Code, 1860.
- (ii) Unlawfully detaining or threatening to detain any property with the intention of obtaining consent to enter into an agreement.

Section 19 says that when consent to an agreement is caused or obtained by coercion, the agreement is a contract voidable at the option of the party whose consent was so obtained.

In **Ranganayakamma V. Alwar Setty** (1889) ILR 13 Mad 214, A young lady was forced to adopt a boy to her husband who had just died by the relatives of her husband who prevented the removal of his body for cremation until she consented. Held, her consent was not free but induced by coercion.

The facts of the given problem and the facts in **Ranganayakamma V. Alwar Setty** (1889) ILR 13 Mad 214 are identical. When we apply the decision in Ranganayakamma's case to the given problem, we find that the adoption is invalid for want of free consent.

8. An auctioneer advertised in a newspaper that a sale of office furniture would be held at Delhi. B, a broker of Mumbai reached Delhi on the appointed date and time. But the auctioneer withdrew all the furniture from the auction sale. The broker sues him for loss of time and expenses. Will he succeed?

When a person signifies his willingness to do or abstain from doing something, he is said to have made an offer. When the person to whom the offer is made signifies his readiness to act as per the terms of offer, the offer is said to have accepted, and it gives rise to a binding contract. But under certain circumstances, a person may disclose his readiness to negotiate and invite offers.

If a shopkeeper displays in his window certain goods with prices marked on them, there is no offer to sell that goods to anyone who is ready to purchase it. The display of goods with marked price is only an '*invitation to make an offer*' or '*offer to chaffer*' or '*offer to receive offers*' or '*offer to negotiate*'. When a person makes an offer to purchase that goods at the marked price, the shopkeeper can either accept the offer or reject it.

When a person advertises his house to let or property to sell, it is not an offer but it is only an offer inviting offers. Such advertisements are offers to make offers. The person advertised is only expressing his willingness to negotiate and the advertisement does not amount to offer. So also an advertisement by an auctioneer to sell goods by auction is only an invitation to make offers. A bid at an auction is treated as offer. An auctioneer is not bound to accept even the highest bid (offer). An auctioneer is free to cancel an auction sale announced by him.

Harris v. Nickerson(1873) LR 8 Q.B 286,

The defendant advertised a sale by auction. The plaintiff travelled to the advertised place of action to participate in the auction sale. But the defendant cancelled the auction sale. The plaintiff filed a suit for expenses of his travel. It was held that the plaintiff cannot succeed as there was no contract between the two parties. The advertisement of auction sale was only an offer to make offers.

In the given problem auctioneer withdrew all furniture from the auction sale. He is free to do so. "B" cannot raise any claim against "A" for loss of time and expenses.