

Free Consent

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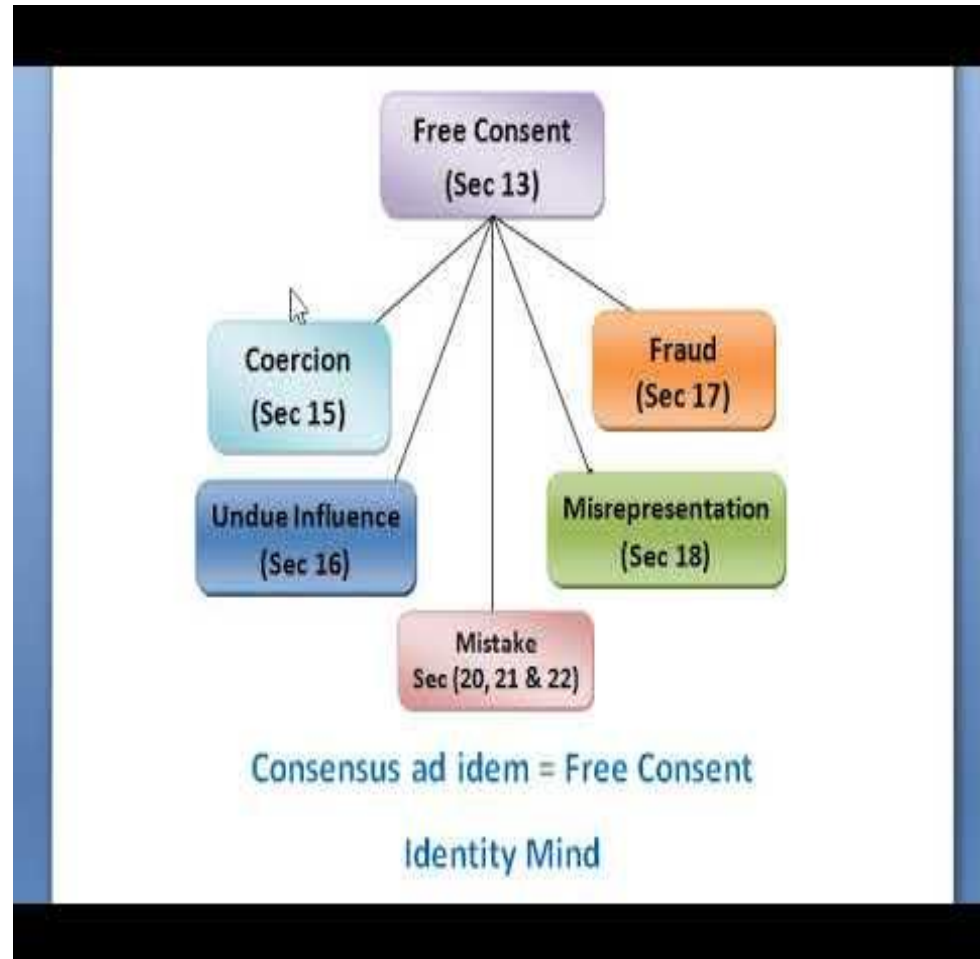
Contract Act, the definition of Consent is given in Section 13, which states that ***“it is when two or more persons agree upon the same thing and in the same sense”***.

So the two people must agree to something in the same sense as well.

Example: A agrees to sell his car to B. A owns three cars and wants to sell the Maruti. B thinks he is buying his Honda. Here A and B have not agreed upon the same thing in the same sense. Hence there is no consent and subsequently no contract.

Meaning of consent:

- According to Section 13 of the Contract Act, 1872 consent means when both parties agree to a thing in the same sense of mind or unison of mind.
- The principle of *consensus-ad-idem*



"Free consent" defined in section 14

Consent is said to be free when it is not caused by-

- (1) **coercion**, as defined in section 15, or
 - (2) **undue influence**, as defined in section 16, or
 - (3) **fraud**, as defined in section 17, or
 - (4) **misrepresentation**, as defined in section 18, or
 - (5) **mistake**, subject to the provisions of sections 20, 21 and 22.
- Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Elements of free consent

Consent is considered to be free consent when the following factors are satisfied:

- It should be free from coercion.
- The contract should not be done under the pressure of undue influence.
- The contract should be done without fraud.
- The contract should not be made through misrepresentation.
- The contract should not be made by mistake.

Importance of free consent

- The contract made out of free consent protects the validity and enforceability of an agreement.
- It provides a protecting shield to the parties from coercion, undue influence, misrepresentation, fraud, and mistake
- It provides the parties to withstand their autonomous power to frame their running policy or principle.
- The principle of consensus-ad-idem is followed.

Consensus ad idem in contract law means there has been a meeting of the minds of all parties involved and everyone involved has accepted the offered contractual obligations of each party. Consensus ad idem is a Latin term that means, simply, agreement.

Elements Vitiating Free Consent

Coercion (Section 15): Coercion means using force to compel a person to enter into a contract. So force or threats are used to obtain the consent of the party under coercion, i.e it is not free consent. **Section 15** of the Act describes coercion as ***"Coercion" is the committing, or threatening to commit, any act forbidden by the Penal Code or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."***

For example, A threatens to hurt B if he does not sell his house to A for 5 lakh rupees. Here even if B sells the house to A, it will not be a valid contract since B's consent was obtained by coercion.

- **Now the effect of coercion is that it makes the contract voidable.** This means the contract is voidable at the option of the party whose consent was not free. So the aggrieved party will decide whether to perform the contract or to void the contract. So in the above example, if B still wishes, the contract can go ahead.
- Also, if any monies have been paid or goods delivered under coercion must be repaid or returned once the contract is void.
- And the burden of proof proving coercion will be on the party who wants to avoid the contract. So the aggrieved party will have to prove the coercion, i.e. prove that his consent was not freely given.

Undue Influence (Section 16)

Section 16 of the Act contains the definition of undue influence. It states that when the relations between the two parties are such that one party is in a position to dominate the other party, and uses such influence to obtain an unfair advantage of the other party it will be undue influence.

The section also further describes how the person can abuse his authority in the following two ways,

When a person holds real or even apparent authority over the other person. Or if he is in a fiduciary relationship with the other person

He makes a contract with a person whose mental capacity is affected by age, illness or distress. The unsoundness of mind can be temporary or permanent

Say for example A sold his gold watch for only Rs 500/- to his teacher B after his teacher promised him good grades. Here the consent of A (adult) is not freely given, he was under the influence of his teacher.

Now undue influence to be evident the dominant party must have the objective to take advantage of the other party. If influence is wielded to benefit the other party it will not be undue influence. But if consent is not free due to undue influence, the contract becomes voidable at the option of the aggravated party. And the burden of proof will be on the dominant party to prove the absence of influence.

Fraud (Section 17)

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

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

Example: A bought a horse from B. B claims the horse can be used on the farm. Turns out the horse is lame and A cannot use him on his farm. Here B knowingly deceived A and this will amount to fraud.

One factor to consider is that the aggravated party should suffer from some actual loss due to the fraud. There is no fraud without damages. Also, the false statement must be a fact, not an opinion. In the above example if B had said his horse is better than C's this would be an opinion, not a fact. And it would not amount to fraud.

Misrepresentation (Section 18)

“Misrepresentation” means and includes—

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

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Mistake 20,21,22

Mistake of Law

This mistake may relate to the mistake of the laws, or it can be a mistake of foreign laws. If the mistake is regarding Indian laws, the rule is that the ignorance of the law is not a good enough excuse. This means either party cannot simply claim it was unaware of the law.

Mistake of Fact

Then there is the other type of mistake, a mistake of fact. This is when both the parties misunderstand each other leaving them at a crossroads. Such a mistake can be because of an error in understanding, or ignorance or omission etc. But a mistake is never intentional, it is an innocent overlooking. These mistakes can either be unilateral or bilateral.

Bilateral Mistake

When both parties of a contract are under a mistake of fact essential to the agreement, such a mistake is what we call a bilateral mistake.

Unilateral Mistake

A unilateral mistake is when only one party to the contract is under a mistake. In such a case the contract will not be void. So the Section 22 of the Act states that just because one party was under a mistake of fact the contract will not be void or voidable. So if only one party has made a mistake of fact the contract remains a valid contract.

However, there are some exceptions to this. In certain conditions, even a unilateral mistake of fact can lead to a void or voidable agreement.

Agreement void where both parties are under mistake as to matter of fact 20

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

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

Effect of mistakes as to law 21

A contract is not voidable because it was caused by a mistake as to any law in force in Bangladesh; but a mistake as to a law not in force in Bangladesh has the same effect as a mistake of fact.

Illustration: A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Bangladesh Law of Limitation: the contract is not voidable.

Contract caused by mistake of one party
as to matter of fact 22

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.