

CONTRACT-I

Synopsis

Objectives: contracts are at the basis of majority of transactions especially transactions dealing with the property. The general principles governing the contracts remain the same whether the transaction is in the ordinary course of life or in the electronic world. Thus it is very necessary to introduce students to the basic principles governing contracts and lay a powerful foundation for their study.

Unit I

Chapter 1

History of contract

A contract is a source of obligation or promise. It developed in 12th century through the concept of *Lex Mercatoria*, which was originally a body of rules and principles laid down by merchants themselves to regulate their dealings. It consisted of usages and customs common to merchants and traders in Europe, with slightly local differences. International commercial law today owes some of its fundamental principles to the *lex mercatoria* as it was developed in the medieval ages. It is believed that goods and services flowed freely during the medieval period, thus generating more trade and wealth. The Law of Merchant was also a means for local communities to protect their own markets. By holding merchants to local rules the Merchant Law required a distinct local character. Nation states were non-existing at the early stages of the Merchant Law, but local kings or authorities saw to the task just as well. The effort to create a single market did not fail, but lack of a higher authority to unify rules and customs certainly gave room for local variations within the market.

Since *lex mercatoria* was the product of customs and practices among traders, it could be enforced through the local courts. It provided quick and effective justice. This was possible through informal proceedings, with liberal procedural rules. The Law of Merchant rendered proportionate judgments over the merchants' disputes, in the light of "fair price", good commerce, and equity.

The medieval Law Merchant originated the "writing obligatory". By this, creditors could freely transfer the debts owed to them. The "writing obligatory" displaced the need for more complex forms of proof, as it was valid as a proof of debt, without further proof of; transfer of the debt; power of attorney or a formal bargain for sale. The Law Merchant also strengthened the concept of party autonomy: whatever the rules of the Law Merchant were, the parties were always free to choose whether to take a case to court, what evidence to submit and which law to apply.

The period of Industrial Revolution (18th to 19th Century) brought major changes in agriculture, manufacturing, mining, transportation, and technology, which in turn have a profound effect on the socioeconomic and cultural conditions of the times. It began in the UK, and then subsequently spread throughout Europe, North America, and eventually the world. The Industrial Revolution marks a major turning point in human history; almost every aspect of daily life was influenced in some way. Most important, it influenced the commercial world in major aspects.

Contract law is codified and used in all areas of society for the transfer of goods, letters of loan, payments, employment etc. thus it could be summarized in the expression - "the one fact of human existence is contracts".

In India, the Indian Contract Act was enacted in the year 1872, which is mostly based on English Law of Contracts.

Nature of Contractual Obligation

The purpose of a contract is to establish the agreement that the parties have made and to fix their rights and duties in accordance with that agreement. The courts must enforce a valid contract as it is made, unless there are grounds that bar its enforcement. Statutes prescribe and restrict the terms of a contract where the general public is affected. It is the policy of the law to encourage the formation of contracts between competent parties for lawful objectives. As a general rule, contracts by competent persons, equitably made, are valid and enforceable. Parties to a contract are bound by the terms to which they have agreed, usually even if the contract appears to be improvident or a bad bargain, as long as it did not result from Fraud, duress, or Undue Influence.

The binding force of a contract is based on the fact that it evinces a meeting of minds of two parties in good faith. A contract, once formed, does not contemplate a right of a party to reject it. Contracts that were mutually entered into between parties with the capacity to contract are binding obligations and may not be set aside due to the caprice of one party or the other unless a statute provides to the contrary.

The Indian contract Act was enacted principally to ensure reasonable fulfillment of expectations created by the promises of the parties and also obligations prescribed by an agreement between the parties. Besides, it aims at making principles relating to business transactions uniform through out the nation except the state of Jammu and Kashmir. It deals with common principles covering contracts. It is applicable not only to business dealings but also others. "The law of contract is neither the whole law of obligation nor the whole law of agreements."

Chapter 2

Definition of Contract and Agreement

Section 2(h) of the Indian Contract Act, 1872 defines a contract as an agreement enforceable by law.

Section 2(e) defines agreement as "every promise and every set of promises forming consideration to each other is called as agreement"

Section 2(b) defines promise in these words: "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise."

From the above definition of promise, it is obvious that an agreement is an accepted proposal.

Elements of Agreement and Contract

The two elements of an agreement are:

- (i) Offer or a proposal; and
- (ii) An acceptance of that offer or proposal.

All agreements are not studied under the Indian Contract Act, as some of them are not contracts. Only those agreements, which are enforceable at law, are contracts. The Contract Act is the law

of those agreements, which create obligations, and in case of a breach of a promise by one party to the agreement, the other has a legal remedy.

Thus, a contract consists of two elements:

- (i) An agreement; and
- (ii) Legal obligation, i.e., it should be enforceable at law.

However, there are some agreements, which are not enforceable in a law court. Such agreements do not give rise to contractual obligations and are not contracts.

In a Contract there must be an intention to create legal relationship:

Ex: Jones V Padavatton;
Meritt V Meritt;
Balfour V Balfour

Section 10 of the Contract Act provides for some more elements, which are essential in order to constitute a valid contract. It reads as follows:

“All agreements are contracts if they are made by 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.” Thus the essential elements of contract can be summed up as follows-

- 1) An Agreement between the two parties
- 2) Agreement should be between the parties who are competent to contract
- 3) There should be a lawful consideration and lawful object in respect of that agreement.
- 4) There should be free consent of the parties when they enter into the agreement.
- 5) The agreement must not be one, which has been expressly declared to be void

Kinds of Contract

A contract may be oral or in writing. If, however, the law requires for a particular contract, it should comply with all the legal formalities as to writing, registration and attestation.

On the basis of validity a contract may be of

- 1) Valid contract
- 2) Void contract or agreement
- 3) Voidable contract
- 4) Illegal agreement

- **Valid contract-** An agreement which has all the essential elements of a contract is called a valid contract. Law can enforce a valid contract.
- **Void Contract or Agreement (Section 2(j)) -** A void contract is a contract which ceases to be enforceable by law.
- **Voidable contract (Section 2(i))-** a voidable contract is one, which may be repudiated at the will of one of the parties, but until it is so repudiated it remains valid and binding. It is affected by a flaw like undue influence or fraud, and the presence of anyone of these defects enables the party aggrieved to take steps to repudiate the contract.

- **Illegal agreement-** An *illegal agreement* is one the consideration or object of which (1) is forbidden by law; or (2) defeats the provisions of any law; or (3) is fraudulent; or (4) involves or implies injury to the person or property of another; or (5) the court regards it as immoral, or opposed to public policy. These agreements are punishable by law and are void -ab- initio.

Chapter 3

Offer/Proposal-

Section 2(a)-A proposal is defined as “*when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.*”

An offer is synonymous with proposal. The offeror or proposer expresses his willingness “to do” or “not to do” (i.e., abstain from doing) something with a view to obtain acceptance of the other party to such act or abstinence. Thus, there may be “positive” or “negative” acts which the proposer is willing to do.

For Examples- (1) **A** offers to sell his book to **B**. **A** is making an offer to do something, i.e., to sell his book. It is a positive act on the part of the proposer.

(2) **A** offers not to file a suit against **B**, if he pays **A** the amount of Rs. 200 outstanding. Here the act of **A** is a negative one, i.e., he is offering to abstain from filing a suit.

How an offer is made?

An offer can be made either by words (spoken or written) where the written offer can be made by letters, telegrams, telex messages, advertisements, etc. The oral offer can be made either in person or over telephone. It can also be made by conduct i.e. by positive acts or signs so that the person acting or making signs mean to say or convey

Various forms of offer-

An offer can be either **specific offer**, which is made to a definite person or a group of persons, or it can be a **general offer** made to the public at large. In case of the specific offer, it may be accepted by that person or group of persons to whom the same has been made. The general offer may be accepted by any one by complying with the terms of the offer.

For Example- In Carbolic Smoke Ball Co. 's case, the patent-medicine company advertised that it would give a reward of £100 to anyone who contracted influenza after using the smoke balls of the company for a certain period according to the printed directions. Mrs. Carlill purchased the advertised smoke ball and contracted influenza in spite of using the smoke ball according to the printed instructions. She claimed the reward of £100. The claim was resisted by the company on the ground that offer was not made to her and that in any case she had not communicated her acceptance of the offer. She filed a suit for the recovery of the reward.

Held: She could recover the reward as she had accepted the offer by complying with the terms of the offer.

Thus the general offer creates for the offeror liability in favour of any person who happens to fulfill the conditions of the offer. It is not at all necessary for the offeree to be known to the offeror at the time when the offer is made. He may be a stranger, but by complying with the conditions of the offer, he is deemed to have accepted the offer.

Offer can also be **Standing, open or continuing offer**: Ex: **Bengal Coal co B Homee wadia &co; Rajendra Kumar Verma V state of MP**

Essential elements of offer

An offer must have certain essentials elements. These are:

1. The offer must be made with a view to obtain acceptance [Section 2(a)].
2. The offer must be made with the intention of creating legal relations.
3. The terms of offer must be definite, unambiguous and certain or capable of being made certain (**Section 29**). The terms of the offer must not be loose, vague or ambiguous.
4. It is different from mere declaration of intention and intention to offer. A person may make a statement without any intention of creating a binding obligation. It may amount to a mere declaration of intention and not to a proposal. A prospectus issued by a college for admission to various courses is not an offer. It is only an invitation to offer. A display of goods with a price on them in a shop window is construed an invitation to offer and not an offer to sell.
5. The offer must be communicated to offeree
6. The offer must not contain a term the non-compliance of which may be assumed to amount to acceptance. Thus, the offeror cannot say that if the offeree does not accept the offer within two days, the offer would be deemed to have been accepted.
7. A **tender** is an offer as it is in response to an invitation to offer. Tenders commonly arise where, for example, a hospital invites offers to supply eatables or medicines. The persons filling up the tenders are giving offers. However, a tender may be either: (a) specific or definite; where the offer is to supply a definite quantity of goods, or (b) standing; where the offer is to supply goods periodically or in accordance with the requirements of the offeree. In the case of a definite tender, the suppliers submit their offers for the supply of specified goods and services. The offeree may accept any tender (generally the lowest one). This will result in a contract. In the case of standing offers, the offeror gives an open offer whereby he offers to supply goods or services as required by the offeree. A separate acceptance is made each time an order is placed. Thus, there are as many contracts as are the acts of acceptance.

Ex: HarrisV Nickerson;

**Pharmaceutical Society of Great Britain B Boots Cash Chemist Ltd;
Harvey v Facey;**

8. The offer must not contain counter offers where two parties make identical offers to each other, in ignorance of each other's offer, the offers are known as cross-offers and neither of the two can be called an acceptance of the other and, therefore, there is no contract.

2) **Acceptance-**

Section 2(b) of Indian contract act 1872 defines Acceptance as- "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted". Thus, acceptance is the act of giving consent to the proposal. A proposal when accepted becomes a contract.

Acceptance how made?

The assent may be express or implied. It is express when the acceptance has been signified either in writing, or by word of mouth, or by performance of some required act and it is implied when it is to be gathered from the surrounding circumstances or the conduct of the parties.

Who can accept?

In the case of a specific offer, it can be accepted only by that person to whom it is made. In the case of a general offer, it can be accepted by anyone by complying with the terms of the offer.

Essentials of a valid acceptance-

There are some legal rules, which make the acceptance effective so as to give rise to a valid contract. These are:

1. Acceptance must be absolute and unqualified.
2. It must be communicated and may be express or implied. **Ex: Felthouse v Bindley; Powell V Lee**
3. It must be according to the mode prescribed by the offeror
4. It must be given within the time specified or within reasonable time.
5. It must be made before the offer lapses.
6. It must be given by the person to whom the offer is made

3) Communication and revocation of offer and acceptance

According to **Section 4**, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The completion of communication of acceptance has two aspects, viz:

- (i) as against the proposer, and
- (ii) as against the acceptor.

The communication of acceptance is complete:

- (i) *as against the proposer*, when it is put into a course of transmission to him, so as to be out of the power of the acceptor;
- (ii) *as against the acceptor*, when it comes to the knowledge of the proposer.

Examples: Lalman Shukla V Gauri Dutt; Tinn V Hoffmann

Acceptance by Post/Telegram: Ex: Dunlop V Higgins; Household fire and carriage accident insurance co v Grant

Acceptance by Telephone: Ex: Bhagwandas V Giridhar Lal & Co

Revocation of offer and Acceptance

The communication of a revocation (of an offer or an acceptance) is complete:

- (1) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it.
- (2) As against the person to whom it is made when it comes to his knowledge.

Section 5 provides that: “a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. Also an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.”

**Ex: Managing Committee SGA High Scholl V State of Bihar and others;
JK enterprise V State of MP**

Modes of Revocation of Offer

Section 6: A Proposal is revoked-

- a) By notice of revocation. **Ex: Dickinson V Dodds**
- b) By lapse of time
- c) By failure to fulfill a condition precedent.
- d) By death or insanity of the offeror

The English law differs from Indian Law in case of revocation of acceptance. An offer once accepted cannot be revoked under English law where as it can be revoked under Indian Law. In

this context Sir William Anson observes that “*Acceptance to an offer is what a lighted match is to a train of gun-powder. It produces something which cannot be recalled or undone.*”

Chapter 4

Consideration

Consideration is what a promisor demands as the price for his promise. ‘Consideration’ may be used in the sense of ‘*quid-pro-quo*’, which means ‘something in return.’ This ‘something’ may be some benefit, right, interest or profit or it may also be some forbearance, detriment, loss or responsibility upon the other party.

Section 2 (d): It reads: “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 promises to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.”

For Example-

(1) **A** agrees to sell his house to **B** for Rs. 10,000. Here **B**’s promise to pay the sum of Rs. 10,000 is consideration for **A**’s promise to sell the house; and **A**’s promise to sell the house is the consideration for **B**’s promise to pay Rs. 10,000.

Kinds of Consideration

A consideration may be:

- 1. Executed or Present.** Consideration, which moves simultaneously with the promise, is called present consideration. ‘Cash Sales’ provide an excellent example of the present consideration.
- 2. Executory or Future.** When the consideration is to move at a future date, it is called future or executory consideration. It takes the form of a promise to be performed in the future.
- 3. Past.** A past consideration is something wholly done, forborne, or suffered before the making of the agreement.

English Law on past consideration: Past consideration is no consideration. Ex Re Mc Ardle case; Lampleigh V Brathwait

Essential elements of a Consideration:

1. Consideration must move at the desire of the promisor and an act done at the desire of promissory is not a consideration. **Ex: Durga Prasad V Baldeo**
2. Consideration may move from the promisee or any other person, i.e., a stranger to consideration may maintain a suit. **Ex: Chinnaya V Ramaya**
3. Consideration need not be adequate. Section 25 Explanation 2.
4. Consideration must be real. **Ex: White V Bluett**
5. Consideration must be legal.

Performance of existing legal duty is no consideration: Ex: **Collins V Godefroy; Ward V Byham; Shadwell V Shadwell**

Promise to pay less amount than due: Pinnel’s case Rule: English Law: An agreement to pay smaller sum in lieu of larger sum is not binding, as the agreement is without consideration.

Exception to the rule:

- a) Payment in Kind
- b) Payment before due date
- c) Part Payment by a Third Party
- d) Composition with the creditors

- e) **Doctrine of Promissory Estoppel:** the Person making the representation or promise becomes bound by the same if another person has acted on the faith of such promise or representation

Indian Law: the promisee may accept in satisfaction of the whole of the debt an amount smaller than that. (Section 63)

Privity of Contract: only those persons who are parties to the contract can enforce the same. A Stranger to the contract cannot enforce a contract even though the contract may have been entered into for his benefit

English Law: Tweddle V Atkinson; Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd

Indian Law: Jamna Das V Ram Avatar

Exceptions to Privity

- a) Trust of contractual rights or beneficiary under a contract. Ex Khwaja Muhammad Khan V Husaini Begum; Klaus Mittelbachert V East India Hotels Ltd
- b) Conduct, acknowledgement or admission. Ex: Narayani Devi V Tagore Commercial Corporation Ltd.
- c) Provision for marriage expenses or maintenance under family arrangement. Ex: Sudaraj Iyengar V Lakshmiammal.

Exceptions to agreements without consideration (*nudum pactum*)

A promise without consideration is called *nudum pactum*, which means naked or nude contract. Such contracts are not clothed with the consideration required by law, in order to give an action. Such contracts may be purely gratuitous and, however sacred and binding in honour it may be, cannot create a legal obligation. The general rule of law is that an agreement without consideration is void. **Section 25** however, mentions the following three exceptions to the general rule where even though a contract is made without consideration it is enforceable.

An agreement made without consideration is valid if—

- a) It is expressed in writing, and it is registered (under the law for the time being in force for registration of documents), and
- b) It is made on account of natural love and affection;
- c) Compensation to past voluntary services
- d) Promise to pay a time barred debt

Unit II

Chapter 1

Capacity to Contract

According to Section 11 of Indian Contract Act of 1872, “Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

Thus, incapacity to contract may arise from: (i) minority, (ii) mental incompetence, and (iii) status

Who is a Minor?

According to **Section 3** of the Indian Majority Act, 1875, a minor is a person who has not completed 18 years of age. However, in the following two cases, a minor attains majority after 21 years of age:

- a) Where a guardian of minor’s person or property has been appointed under the Guardians and Wards Act, 1890, or
- b) Where the superintendence of minor’s property is assumed by a Court of Wards

2) Minor’s contracts

The position of minor’s contracts can be summed up as follows-

- a) A contract with and by a minor is void ab initio and a minor is not competent to contract. In **Mohri Bibi V Dharmodas Ghose, Dharmodas Ghose**, a minor, entered into a contract for borrowing a sum of Rs. 20,000 out of which the lender paid the minor a sum of Rs. 8,000. The minor executed mortgage of property in favour of the lender. Subsequently, the minor sued for setting aside the mortgage. The Privy Council had to ascertain the validity of the mortgage. Under Section 7 of the Transfer of Property Act, every person competent to contract is competent to mortgage. The Privy Council decided that Sections 10 and 11 of the Indian Contract Act make the minor’s contract void. The mortgagee prayed for refund of Rs. 8,000 by the minor. The Privy Council further held that as a minor’s contract is void, any money advanced to a minor cannot be recovered.
- b) **A minor can be a promisee or beneficiary**- During his minority, a minor cannot bind himself by a contract, but there is nothing in the Contract Act, which prevents him from making the other party to the contract to be bound to the minor. Thus, a minor is incapable of making a mortgage, or a promissory note, but he is not incapable of becoming a mortgagee, a payee or endorsee. He can derive benefit under the contract.
- c) **A minor’s agreement cannot be ratified upon attaining majority**- A minor cannot ratify the agreement on attaining the age of majority as the original agreement is void *ab initio* and, therefore, validity cannot be given to it later on. *For example-* **A**, a minor makes a promissory note in favour of **B**. On attaining majority, he makes out a fresh promissory note in lieu of the old one. Neither the original, nor the fresh promissory note is valid.
- d) **No Estoppel against a minor**- the law of estoppel does not apply against a minor. He is allowed to plead minority as a defence to avoid liability under an agreement even though at the time of making the agreement, he falsely stated that he has attained the age of majority.
- e) **If a minor has received any benefit under a contract he cannot be asked to refund the same**- a minor cannot be asked to compensate what he has received under the contract. The **Doctrine of Restitution** as under English law does not apply.

English Law: Doctrine of Restitution: If a minor has obtained undue benefit in any transaction, he is required to restore back the benefit so received by him under the equitable doctrine of restitution.

Ex Leslie V Sheill

Indian Law: Section 64, 65 and 70

- f) **A minor cannot be a partner in a partnership firm but however with the consent of all the other partners he may be admitted to the benefits of the partnership.**
- g) **A minor's estate is liable to a person who supplies necessaries of life to a minor.** This obligation is cast on the minor not on the basis of any contract but on the basis of an obligation resembling a contract (Section 68). However, there is no personal liability on a minor for the necessaries of life supplied. The term necessaries are not defined under Indian Contract Act of 1872 but English Sale of Goods Act 1979 defines necessaries as "goods suitable to the conditions in life of the minor or other person concerned and to his actual requirement at the time of the sale and delivery".
The minor's estate is liable not only for the necessary goods but also for the necessary services rendered to him. The lending of money to a minor for the purpose of defending a suit on behalf of a minor in which his property is in jeopardy, or for defending him in prosecution, or for saving his property from sale in execution of a decree is deemed to be a service rendered to the minor. Thus necessaries service rendered to a minor include provision of education, medical and legal advice, provision of a house on rent to a minor for the purpose of living and continuing his studies.
- h) **Minor's parents/guardians** are not liable to minor's creditor for the breach of contract by the minor, whether the contract is for necessaries or not. However, the parents are liable when the minor is acting as an agent of the parents or the guardian.
- i) A minor can act as an agent of the principle and bind him through his acts without incurring any liability.

3) **Mental Incompetence**

One of the essential elements of a contract is that parties to a contract must be of sound mind so as to be competent to contract.

Section 12 lays down a test of soundness of mind. It reads as follows:

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

A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."

For example- A patient, in a lunatic asylum, who is at intervals, of sound mind, may contract during those intervals.

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

Thus soundness of mind of a person depends on his capability to understand the terms of the contract, and his ability to form a rational judgment as to its effect upon his interests

If a person is incapable of both, he suffers from unsoundness of mind. The examples for person suffering from unsoundness of mind include-

- 1) **Lunatics-** A lunatic is a person who is mentally deranged due to some, mental strain or other personal experience. However, he has some intervals of sound mind. He is not liable for contracts entered into while he is of unsound mind. However, as regards

contracts entered into during lucid intervals, he is bound. His position in this regard is identical with minor

- 2) **Idiots**- an idiot is a person who is permanently of unsound mind. He does not have lucid intervals. He is incapable of entering into contract and therefore a contract with an idiot is void.
- 3) **Drunken or intoxicated person**- A person who is drunk, intoxicated or delirious from fever so as to be incapable of understanding the nature and effect of an agreement or to form a rational judgment as to its effect on his interests cannot enter into valid contracts till such drunkenness or delirium lasts.

But whether a party to a contract, at the time of entering into the contract, is of sound mind or not is a question of fact to be decided by the court. The burden of proof lies on the person who claims the unsoundness of mind of a person.

The liability for necessities of life supplied to persons of unsound mind is same as for minors.

4) Evaluation of Minor's agreement

A contract with a minor is always void *ab initio*. But there arises a question whether a minor can be asked to pay compensation to the other party under section 65 and 66 of Indian contract Act of 1872?

This question has already been noted under Mohori Bibi V Dharmdos Ghose and privy council has made it clear that **section 65 and 66** applies only where the parties are competent to contract and the provisions of these sections does not apply to the case of minor's agreement. The Law Commission of India also considered the matter and it disagreed with this interpretation put forth by Privy Council. Law commission has recommended that an **Explanation be added to Section 65** to indicate that it is applicable where a minor enters into an agreement on false representation that he is a major. But no amendment has been made so far. With respect to payment of compensation amount by the minor under **Section 33 of Specific Relief Act of 1963**, the Law Commission of India has recommended that in case if it is proved that a minor had committed fraud by falsely representing his age and received any benefits under the contract, monitory or proprietary, he must restore it to the other party. The view expressed by the Law Commission was based on views expressed by C.J, **Sir Shadi Lal of Lahore High Court in Khan Gul V Lakha Singh**. As per the recommendations of the Law Commission the principle of compensation has now been incorporated in Section 33 of Specific Relief Act. This provision now requires the payment of money compensation by a minor irrespective of the fact whether the minor is the plaintiff or the defendant in the case.

Chapter 2

1. Free Consent

Section 13 of Indian Contract Act defines consent as- when two or more persons agree upon the same thing in the same sense, they are said to consent. It is essential to the creation of a contract that both parties agree to the same thing in the same sense.

For Example- **A** agrees to sell his Fiat Car 1983 model for Rs. 80,000. **B** agrees to buy the same. There is a valid contract since **A** and **B** have consented to the same subject matter.

Definition of Free Consent

According to Section 14 of Indian Contract Act of 1872 Consent is said to be free when it is not caused by—

- (a) Coercion.
- (b) Undue influence.
- (c) Fraud.
- (d) Misrepresentation.
- (e) Mistake.

For a contract to be valid it is not only necessary that parties consent but also that they consent freely. When there is no free consent, there is generally a contract voidable at the option of the party whose consent was not free.

2) Coercion and Undue influence

According to Section 15 of Indian Contract Act Coercion is (i) the committing, or threatening to commit any act forbidden by the Indian Penal Code or (ii) 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 kill B if he doesn't transfer his house in A's favour for a very low price. The agreement is voidable for being the result of coercion.

If an outgoing agent refuses to hand over the account books to the new agent until the principal executes release in his favour, it is coercion.

Coercion should be differentiated from duress as used under English Law. Duress has been defined as causing, or threatening to cause, bodily violence or imprisonment, with a view to obtain the consent of the other party to the contract. Duress differs from coercion on the following points:

1. 'Coercion' can be employed against any person, whereas 'duress' can be employed only against the other party to the contract or the members of his family.
2. 'Coercion' may be employed by any person, and not necessarily by the promisee. 'Duress' can be employed only by the party to the contract or his agent.
3. 'Coercion' is wider in its scope and includes unlawful detention of goods also. 'Duress' on the other hand does not include unlawful detention of goods. Only bodily violence or imprisonment is duress.

Examples; Rangabayakamma v Alwar Setti
Chikkan Ammiraju V Chikkam Seshama

Consequence of Coercion

According to Section 19 when consent to an agreement is caused by coercion, the agreement is a contract voidable at the option of the party whose consent was so obtained. In other words, the aggrieved party can have the contract set aside or if he so desires to insist on its performance by the other party.

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

3. Undue Influence

According to **Sec. 16**, a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

For Example- **A** having advanced money to his son **B** during his minority, upon **B** coming of age, obtains, by misuse of parental influence, a bond from **B** for greater amount than the sum due in respect of the advance. **A** employs undue influence.

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

(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

Thus, the following relationships are said to raise a presumption of undue influence:

(i) Parent and child; (ii) guardian and ward; (iii) doctor and patient; (iv) spiritual guru and disciple; Ex: Phillip Lukka V Franciscan Association (v) lawyer and client; (vi) trustee and beneficiary and other similar relationships.

If a party is proved to be in a position to dominate the will of another and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence, lies on the party who was in a position to dominate the will of the other.

Thus the presumption of undue influence *has not been accepted* in the following relationships: Husband and wife, master and servant, creditor and debtor; landlord and tenant. In these relationships undue influence cannot be presumed and the party alleging undue influence must prove that it existed.

Contracts with pardanashin women

Pardanashin woman is one who according to the custom of her community observes complete seclusion. The Courts in India regard such women as being especially open to undue influence. When, therefore, an illiterate pardanashin woman is alleged to have dealt with her properties and to have executed a deed, the burden of proving that there was no undue influence lies on the party setting up the deed. The law demands that the person who deals with a pardanashin lady must show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the lady. Notice that, a lady who claims to be pardanashin must prove complete seclusion; some degree of seclusion is not sufficient to entitle her to get special protection.

Undue Influence in unconscionable bargains

An unconscionable bargain is one as no sane man not setting under a delusion would make, and no honest man would take advantage of. In such case, it is for the dominant party to rebut the presumption of undue influence. If a party has got exorbitant gain at the cost of the other party, it is for him to prove that this advantage had not been gained by undue influence.

Examples: Niko devi V Kirpa; Lakshmi Amma V Telengala Narayana Bhatta;

4. Fraud

According to **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.

From this definition it follows that for fraud to exist there must be:

- 1) A representation or assertion, and it must be false.
- 2) The representation or assertion must be of a fact. A mere expression of opinion, puffery or flourishing description does not constitute fraud.
- 3) The representation or assertion must have been made with a knowledge of its falsity or without belief in its truth or recklessly.
- 4) The representation must have been made with the intention of inducing the other party to act upon i.e. the intention of misstating the facts must be to cause the other party to enter into an agreement.
- 5) The representation must in fact deceive.
- 6) The party subjected to fraud must have suffered some loss.

Consequences of fraud

The party defrauded has the following remedies:

1. He can avoid the performance of the contract.
2. He can insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.
3. He can sue for damages.

But the contract is not voidable:

- (1) When the party whose consent was caused by misrepresentation or fraud had the means of discovering the truth with ordinary diligence (Exception to Section 19).
- (2) Where a party, after becoming aware of the misrepresentation or fraud, takes a benefit under the contract or in some other way affirms it.

Mere silence is no fraud: Ex: Shri Krishna V Krukshetra University

Exceptions:

- a) Duty to speak
- b) Silence being equivalent to speech

5. Misrepresentation

Section 18 of the Indian Contract Act 1872 defines contract. Misrepresentation means and includes-

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

For Example- X learns from A that Y would be director of a company to be formed. X tells this to B in order to induce him to purchase shares of that company and B does so. This is misrepresentation by X, though he believed in the truthness of the statement and there was no intent to deceive, as the information was derived not from Y but from A and was mere hearsay.

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

For Example- X entered into contract with C for the sale of hops. X told Y that no sulphur had been used in their growth. Y agreed to buy only if no sulphur had been used for their growth. As a matter of fact, sulphur had been used in 5 out of 300 acres which fact was evidently forgotten by X when he represented that no sulphur was used. *Held* : That the representation that no sulphur had been used was in the nature of a primary stipulation and in a sense a condition, without which the contract would not have been proceeded with and, therefore, the contract could be avoided, though the representation was not fraudulent.

- 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.

For Example- A chartered a ship from B which was described in the 'charter party' and was represented to him as being not more than 2,800 registered tonnage. It turned out that the registered tonnage was 3,045 tons. A refused to accept the ship in fulfillment of the charter party, and it was held that he was entitled to avoid the charter party by reason of the erroneous statement as to tonnage.

Examples: Derry V Peek

In cases of misrepresentation the parties aggrieved or wronged can (Article 19)

- (1) Avoid the agreement, or
- (2) Insist that the contract be performed and that he be put in the position in which he would have been if the representation made had been true.

6. Mistake

Mistake may be defined as an erroneous belief concerning something. Mistake is of two kinds:

- (1) Mistake of fact, and
- (2) Mistake of law.

1) Mistake of Fact- may be either a) bilateral or b) unilateral.

a) **Bilateral Mistake-** When both the parties to the agreement are under a mistake of fact essential to the agreement, the mistake is called a bilateral mistake of fact and the agreement is void.

For 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.

Mistake, so as to render the agreement void, must relate to some essential matter. Some typical cases of mistake invalidating the agreement are-

- 1) Mistake as to existence of subject matter.
- 2) Mistake as to identity of subject matter
- 3) Mistake as to title to the subject matter
- 4) Mistake as to quantity of subject matter
- 5) Mistake as to price of subject matter.

Unilateral Mistake

In the case of unilateral mistake, i.e., where only one party to a contract is under a mistake, the contract, generally speaking is not invalid. Section 22 reads, “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.”

Exceptions. To the above rule, however, there are the following exceptions:

- 1) Where unilateral mistake is as to nature of contract
- 2) Mistake as to quality of promise
- 3) Mistake as to identity of person contracted with.

2) **Mistake of Law**-Mistake of law may be (a) Mistake of Law of the Land, and (b) Mistake of Foreign Law.

a) **Mistake of law of the land**- in this regard, the rule is “Ignorantia juris non excusat,” i.e., ignorance of law is no excuse. Following this principle, Section 21 declares that- “A contract is not voidable because it was caused by a mistake as to any law in force in India.”

b) **Mistake of foreign law**- the maxim ‘ignorance of law is no excuse’ applies only to the law of the country and not to foreign law. The mistake of foreign law is to be treated as a mistake of fact. Section 21 reads, “A mistake as to a law not in force in India has the same effect as a mistake of fact.”

Thus Mistake renders a contract void and as such in case of a contract which is yet to be performed the party complaining of the mistake may repudiate it, i.e., need not perform it. If the contract is executed, the party who received any advantage must restore it or make compensation for it, as soon as the contract is discovered to be void.

Chapter 2

Legality of Object and Consideration

An agreement will not be enforceable if its object or the consideration is unlawful.

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

1. If it is forbidden by law

If the object or the consideration of an agreement is the doing of an act forbidden by law, the agreement is void. An act or an undertaking is forbidden by law when it is punishable by the criminal law of the country or when it is prohibited by special legislation derived from the legislature.

2. If it is of such a nature that if permitted, it would defeat the provisions of any law

If the object or the consideration of an agreement is of such a nature that, though not directly forbidden by law, it would defeat the provisions of the law, the agreement is void.

3. If it is fraudulent

An agreement with a view to defraud other is void.

4. If it involves or implies injury to the person or property of another

If the object of an agreement is to injure the person or property of another it is void.

5. If the Court regards it as Immoral or Opposed to Public Policy

An agreement whose object or consideration is immoral or is opposed to the public policy, is void.

Examples: SL Ferbandes V M Fernandes; Abdul Jabbar V Abdul Muthaliff; Narayani v Pyre Mohan

Agreement against Public Policy

1. Agreements for stifling prosecution
2. Contracts in the nature champerty and maintenance
3. Trading with enemy
4. Agreements for the sale of public offices and titles
5. Marriage brokerage contracts

Void Agreements:

1. Agreement of which the consideration or the object is not lawful (section 23 & 24)
2. Agreement without consideration (section 25)
3. Agreement in restraint of marriage (section 26)
4. Agreement in restraint of Trade(Section 27)
5. Agreement in restraint of Legal Proceedings(section 28)
6. Wagering Agreement (section 30):

A wagering agreement “is a promise to give money or money’s worth upon the determination or ascertainment of an uncertain event.”

Exceptions (Transactions Held ‘Not Wagers’)

The following transactions have been held not to be wagers:

1. Transactions for the sale and purchase of stocks and shares, or for the sale and delivery of goods, with a clear intention to give and take delivery of shares or goods, as the case may be. Notice that, where the intention is only to settle in price difference, the transaction is a wager and hence void.
2. Prize competitions which are games of skill, e.g., picture puzzles, athletic competitions. Thus, an agreement to enter into a wrestling contest in which the winner was to be rewarded by the entire sale proceeds of tickets. Was held not to be wagering contract [*Babalaldeb v. Rajaram* (1931) 33 Bom. L.R. 260]. A crossword competition is not a wager since it involves skill. But, in *Coleys v. Odham’s Press* it was held that a crossword puzzle in which prizes depend upon correspondence of the competitor’s solution with a previously prepared solution kept with the editor of a newspaper is a lottery and therefore, a wagering transaction. According to Prize Competition Act, 1955 prize competitions in games of skill are not wagers provided the prize money does not exceed Rs. 1000.
3. An agreement to contribute a plate or prize of the value of above Rs. 500 to be awarded to the winner of a horse race. (Section 30).

7. Agreement to do an impossible act (section 56)

Chapter 3

Contingent Contract

Contingent Contract Defined (*Section 31*)

A contingent contract is a contract to do or not to do something, if some event, collateral to such contract does or does not happen.

Example

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

Essentials of a Contingent Contract

1. The performance of a contingent contract is made dependent upon the happening or non-happening of some event.
2. The event on which the performance is made to depend, is an event collateral to the contract, i.e., it does not form part of the reciprocal promises which constitute the contract.

'Rules Regarding Enforcement of Contingent Contracts (*Sections 32 to 36*)

1. Contracts contingent upon the happening of a future uncertain event cannot be enforced by law unless and until that event has happened. And if, the event becomes impossible such contract become void (Section 32)
2. Contracts contingent upon the non-happening of an uncertain future event can be enforced when the happening of that event becomes impossible, and not before. (Section 33).
3. If a contract is contingent upon as to how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything, which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies. (Section 34).
4. Contracts contingent upon the happening of a specified uncertain event within a fixed time become void if, at the expiration of the time fixed, such event has not happened or if, before the time fixed, such event becomes impossible (Section 35 para 1).
5. Contracts contingent upon the non-happening of a specified event within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed expired, if it becomes certain that such event will not happen (Section 35 para II).
6. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made. (Section 36)

Unit III

Performance of Contract

A contract creates obligations. 'Performance of a Contract' means the carrying out of these obligations. Section 37 requires that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of the Contract Act, or of any other law.

A tender or offer of performance to be valid must satisfy the following conditions:

1. It must be unconditional

A conditional offer of performance is not valid and the promisor shall not be relieved thereby. A 'tender' is conditional where **it is not in** accordance with the terms of the contract.

2. It must be made at proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person offering to perform is able and willing there and then to do the whole of what he is bound by his promise to do.

3. Since the tender is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity to see that the thing offered is the thing contracted for.

WHO MUST PERFORM?

The promise may be performed by promisor himself, or his agent or by his legal representative.

1. Promisor himself (*Section 40*)

If it appears that it was the intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor.

Example

A promises to paint a picture for **B**. **A** must perform this promise personally.

2. Agent

In cases other than the one specified in (1) above, the promisor may employ a competent person to perform it.

Example

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

3. Legal representative

In case of death of the promisor, the Legal representative must perform the promise unless a contrary intention appears from the contract.

4. Where, however, a contract involves personal skill or is founded on normal considerations, it comes to an end with the death of the promisor.

Example

A promises to paint a picture for **B** by a certain day. **A** dies before that day. The contract cannot be enforced either by **A**'s representatives or by **B**.

CONTRACTS WHICH NEED NOT BE PERFORMED

A contract need not be performed:

1. If the parties mutually agree to substitute the original contract by a new one or to rescind or alter it (*Section 62*).

Example

A owes money to **B** under a contract. It is agreed between **A**, **B** and **C** that **B** shall henceforth accept **C** as his debtor, instead of **A**. The old debt of **A** to **B** is at an end, and a new debt from **C** to **B** has been contracted.

PERFORMANCE OF JOINT PROMISES

DEVOLUTION OF JOINT LIABILITIES

When two or more persons make a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel any (one or more) of such joint promisors to perform whole of the promise (Section 43).

Example

A, B and C jointly promise to pay **D** Rs. 3,000. **D** may, compel either **A** or **B** or **C** or any two of them to pay him Rs. 3,000.

Right of Contribution

Where a joint promisor has been compelled to perform the whole promise, he may compel every other joint promisor to contribute equally with himself to the performance of the promise (unless a contrary intention appears from the contract). If any one of the joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Examples

(1) **A, B and C** are under a joint promise to pay **D** Rs. 3,000. **A** is compelled to pay the whole. **A** can recover Rs. 1,000 each from **B** and **C**.

Release of Joint Promisor (Section 44)

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or promisors, neither does it free him from responsibility to the other joint promisor or promisors.

DEVOLUTION OF JOINT RIGHTS (Section 45)

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests with all the joint promisees and after the death of any of them with the representatives of such deceased promisee jointly with the survivor or survivors and after the death of the survivors also, with the representatives of all jointly. Thus, unlike the case of joint promisors whose liability is joint as well as several, the right of the joint promisees is only joint and thus any of them cannot enforce performance unless so agreed.

TIME, PLACE AND MANNER OF PERFORMANCE (Sections 46 to 50 and 55)

The rules laid down regarding the time, place and manner of performance are summed up hereunder:

1. Where the time for performance has been specified and the promisor has undertaken to perform it without application by the promisee, the promisor must perform on the day fixed during the usual business hours and at the place at which the promise ought to be performed.

PERFORMANCE OF RECIPROCAL PROMISES (Sections 51 to 54 and 57)

Reciprocal promise means a promise in return for a promise. Thus, where a contract consists of promise by one party (to do or not to do something in future) in consideration of a similar promise by other party, it will be called a case of reciprocal promises. Reciprocal promises maybe divided into three groups:

1. Mutual and Dependent,
2. Mutual and Independent, and
3. Mutual and Concurrent

Reciprocal promises to do things legal and also other things illegal (Section 57)

Where persons reciprocally promise, firstly, to do certain things which are legal and secondly, under specified circumstances, to do certain things which are illegal, the first set of promises is a contract but second is a void agreement.

ASSIGNMENT OF CONTRACTS

Assignment means transfer. When a party to a contract transfers his right, title and interest in the contract to another person or other persons, he is said to assign the contract. Assignment of a contract can take place by operation of law or by an act of the parties.

1. Assignment by operation of law

The instances of assignment by operation of law are the assignment of interest by insolvency or death of the party to the contract. In the case of insolvency, the Official Receiver or Assignee acquires the interest in the contract and in the case of death, the legal representative.

2. Assignment by act of parties

The **rules regarding assignment of contracts** are summarised below:

1. The obligations or liabilities under a contract cannot be assigned.
2. Rights and benefits under a contract may be assigned.
3. The rights of a party under a contract may amount to 'actionable claim' or chose in- action. An 'actionable claim' "is a claim to any debt (except a secured debt) or to any beneficial interestwhether such claim or beneficial interest be existent, accruing, conditional or contingent"—Section 3 of the Transfer of Property Act.

Examples of actionable claims are—a money debt; the interest of a buyer in goods in a contract for forward delivery; etc

APPROPRIATION OF PAYMENT

When a debtor owes several debts in respect of which the payment must be made (to the same creditor), the question may arise as to which of the debts, the payment is to be appropriated. *In England*, the law on the subject was laid down in Clayton's case.* *In India*, the rules regarding appropriation of payments are contained in Sections 59 to 61 which in fact have adopted with certain modifications the rules laid down in Clayton's case. The provisions of these sections are summarised below:

Rule No. 1. Appropriation by Debtor. Where a debtor owing several distinct debts to one person, makes a payment to him, with express intimation that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied to that debt. (Section 59).

Where, however, no express intimation is given but the payment is made under circumstances implying that it should be appropriated to a particular debt, the payment, if accepted, must be applied to that debt (Section 59).

Rule No. 2. Appropriation by Creditor. Where the debtor does not intimate and there are no circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor.

The amount, in such a case can be applied even to a debt which has become 'time barred'. However, it cannot be applied to a disputed debt (Section 60).

Rule No. 3. Where neither party appropriates. Where neither party makes any appropriation the payment is to be applied in discharge of the debts in order of time, including time barred debts. If the debts are of equal standing, the payment is to be applied proportionately (Section 61).

The above rule is generally applicable in case of running accounts between two parties, money being paid and withdrawn from time to time from the account, without any specific indication as to appropriation of the payment made. In such a case debits and credits in the accounts will be

set-up against one another in order of their dates, leaving only final balance to be recovered from the debtor by the creditor.

Unit IV

DISCHARGE OF CONTRACTS

The cases in which a contract is discharged may be classified as follows:

- A. By performance or tender.
- B. By breach OF CONTRACT
- C. By impossibility of contract
- D. Novation

A.BY PERFORMANCE

The obvious mode of discharge of a contract is by performance, that is, where the parties have done whatever was contemplated under the contract, the contract comes to an end. Thus where 'A' contracts to sell his car to 'B' for Rs. 85,000 as soon as the car is delivered to 'B' and 'B' pays the agreed price for it, the contract comes to an end by performance

B. BY BREACH OF CONTRACT

A contract terminates by breach of contract. Breach of contract may arise in two ways:

(a) Anticipatory breach, and (b) Actual breach.

Anticipatory Breach of Contract

Anticipatory breach of contract occurs, when a party repudiates it before the time fixed for performance has arrived or when a party by his own act disables himself from performing the contract.

Examples

(1) A contracts to marry B. Before the agreed date of marriage he married C. B is entitled to sue A for breach of promise.

Consequences of Anticipatory Breach

Where a party to a contract refuses to perform his part of the contract before the actual time arrives the promisee may either: (a) rescind the contract and treat the contract as at an end, and at once sue for damages, or (b) he may elect not to rescind but to treat the contract operative and wait for the time of performance and then hold the other party liable for the consequences of non-performance. In the latter case, the party who has repudiated may still perform if he can.

Actual Breach of Contract

The actual breach may take place (a) at the time when performance is due, or (b) during the performance of the contract.

Actual breach of Contract, at the time when performance is due. If a person does not perform his part of the contract at the stipulated time, he will be liable for its breach.

C.BY IMPOSSIBILITY OF PERFORMANCE

INITIAL IMPOSSIBILITY: SECTION 56: An agreement to do an impossible in itself is void

SUBSEQUENT IMPOSSIBILITY: Section 56(2): A contract to do an act which after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Doctrine of Frustration: When the performance of the contract becomes impossible, the purpose which the parties have in mind is frustrated.

Ex: Robinson V Davison; Krell V Henry; Sushila Devi V Hari Singh

D.DISCHARGE BY AGREEMENT AND NOVATION: SECTION 62

If the parties to a contract agree to substitute a new contract for it, or to rescind it or alter it, the original contract is discharged. A contract may terminate by mutual consent in any of the followings ways:

Novation

‘Novation’ means substitution of a new contract for the original one. The new contract may be substituted either between the same parties or between different parties.

Novation is of two kinds:

- a) Novation by change in terms of contract
- b) Novation by change in the parties to the contract.

Ex: Salima Jabeen v National Insurance Co Lts; Godan Namboodari Pad V Kerala Financial Corptn.

QUASI CONTRACT

Sections 68 to 72 of the Contract Act describe the cases which are to be deemed Quasicontracts.

(1) Claim for necessaries supplied to a person incapable of contracting or on his account If a person, incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who furnished such supplies is entitled to be reimbursed from the property of such incapable person (Sec. 68).

Examples

(1) **A** supplies **B**, a lunatic, with necessaries suitable to his condition in life. **A** is entitled to be reimbursed from **B**'s property.

(2) Reimbursement of person paying money due by another in payment of which he is interested

A person who is interested in the payment of money which another is bound by law to **(3) Obligation of a person enjoying benefits of non-gratuitous act**

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered [Section 70].

Examples

(1) **A**, a tradesman, leaves goods at **B**'s house by mistake. **B** treats the goods his own. He is bound to pay for them.

(4) Responsibility of finder of goods

Ordinarily speaking, a person is not bound to take care of goods belonging to another, left on a road or other public place by accident or inadvertence, but if he takes them into his custody, an agreement is implied by law. Although, there is in fact no agreement between the owner and the finder of the goods, the finder is for certain purposes, deemed in law to be a bailee and must take as much care of the goods as a man of ordinary prudence would take of similar goods of his own. This obligation is imposed on the basis of a quasi-contract. Section 71, which deals with this subject, says:

“A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.”

(5) Liability of person to whom money is paid, or thing delivered by mistake or under Coercion (Section 72)

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

Examples

- (1) **A** and **B** jointly owe Rs. 1,000 to **C**. **A** alone pays the amount to **C** and **B** not knowing this fact, pays Rs. 1,000 over again to **C**. **C** is bound to repay the amount to **B**.

REMEDIES FOR BREACH OF CONTRACT

1. DAMAGES
2. QUANTUM MERUIT
3. SPECIFIC PERFORMANCE AND INJUNCTION

DAMAGES

A. Ordinary Damages (*Section 73*)

Ordinary damages are those which naturally arose in the usual course of things from such breach. The measure of ordinary damages is the difference between the contract price and the market price at the date of the breach. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor be liable to have the damages reduced if the market rises.

Examples

- (1) **A** contracts to deliver 100 bags of rice at Rs. 100 a bag on a future date. On the due date he refuses to deliver. The price on that day is Rs. 110 per bag. The measure of damages is the difference between the market price on the date of the breach and the contract price, viz., Rs. 1,000.

B. Special Damages (*Section 73*)

Special damages are claimed in case of loss of profit, etc. When there are certain special or extraordinary circumstances present and their existence is communicated to the promisor, the non-performance of the promise entitles the promisee to not only claim the ordinary damages but also damages that may result therefrom.

Examples

- (1) In *Hadley v. Baxendale*, **X**'s mill was stopped due to the breakdown of a shaft. He delivered the shaft to **Y**, a common carrier, to be taken to a manufacturer to copy it and make a new one. **X** did not make known to **Y** that delay would result in a loss of profits. By some neglect on the part of **Y** the delivery of the shaft was delayed in transit beyond a reasonable time. As a result the mill remained idle for a longer time than otherwise would have been had the shaft been delivered in time.

Held : **Y** was not liable for loss of profits during the period of delay as the circumstances communicated to **Y** did not show that a delay in the delivery of shaft would entail loss of profits to the mill.

Rule1: Damages arising in usual course of things: **Victoria Laundry Lts V Newman Industries Ltd; Wilson V Lancashire and Yorkshire Railway**

Rule 2: Loss arising from the special circumstances: **Simpson V London & North Railway Co; Pilkington V Wood**

Measure of Damages : The object of awarding damages is to put the aggrieved party in to same position in which he would have been if the contract had been performed.

Nominal damages: Nominal damages are awarded in cases of breach of contract where there is only a technical violation of the legal right, but no substantial loss is caused thereby. The damages granted in such cases are called nominal because they are very small, for example, a rupee or a shilling.

Liquidated Damages

The essence of liquidated damages is a genuine covenanted pre-estimate of damages. Thus, the stipulated sum payable in case of breach is to be regarded as liquidated damages, if it be found that parties to the contract conscientiously tried to make a pre-estimate of the loss which might happen to them in case the contract was broken by any of them.

Penalty

The essence of a penalty is a payment of money stipulated as *in terorem* of the offending party. In other words, if it is found that the parties made no attempt to estimate the loss that might happen to them on breach of the contract but still stipulated a sum to be paid in case of a breach of it with the object of coercing the offending party to perform the contract, it is a case of penalty. Thus, a term in a contract amounts to a penalty where a sum of money, which is out of all proportion to the loss, is stipulated as payable in case of its breach.

English law recognises a distinction between liquidated damages and penalty whereas liquidated damages are enforceable but penalty cannot be claimed. In India, there is no such distinction recognised between penalty and liquidated damages. Section 74 which contains law in this regard states “When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled (whether or not actual damage or loss is proved to have been caused thereby), to receive from the party who has broken the contract, *reasonable compensation not exceeding the amount as named* or, as the case may be, the penalty stipulated for.” Thus, where the amount payable in case of breach is fixed in advance whether by way of liquidated damages or penalty, the party may claim only a reasonable compensation for the breach, subject to the amount so fixed.

Examples

- (1) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.
- (2) **Dunlop Pneumatic Tyre Co V New Garage and Motor Co Ltd.**

Quantum Meruit

The phrase “quantum meruit” means ‘as much as merited’ or ‘as much as earned’. The general rule of law is that unless a person has performed his obligations in full, he cannot claim performance from the other.* But in certain cases, when a person has done some work under a contract, and the other party repudiated the contract, or some event happens which makes the further performance of the contract impossible, then the party who has performed the work can claim remuneration for the work he has already done.

1. When a contract is discovered to be unenforceable (Section 65)

When an agreement is discovered to be void or becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Examples

- (1) A pays B Rs. 1,000 in consideration of B’s promising to marry C, A’s daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

2. When one party abandons or refuses to perform the contract

Where there is a breach of contract, the aggrieved party is entitled to claim reasonable compensation for what he has done under the contract

Example

C, an owner of a magazine, engaged P to write a book to be published by installments in his magazine. After a few installments were published, the magazine was abandoned.

3. When a Contract is divisible

When a Contract is divisible, and the party not in default, has enjoyed the benefit of the part performance, the party in default may sue on quantum meruit.

4. When an indivisible contract is completely performed but badly

When an indivisible contract for a lump sum is completely performed, but badly, the person who has performed can claim the lump sum less deduction for bad work.

Example

A agreed to decorate B's flat for a lump sum of £750. A did the work but B complained for faulty workmanship. It cost B £204 to remedy the defect.

Held : A could recover from B £750 less £204

Unit V

Specific relief Act

Specific Relief Act was enacted in 1877. The Act was originally drafted upon the lines of the Draft, New York Civil Code, 1862, and its main provisions embodied the doctrines evolved by the English Equity Courts.

The 9th Law Commission Report, 1958 sought to remove some of the weaknesses of Common Law that had been retained by the 1877 Act, and suggested certain substantive, but mainly linguistic, changes to the legislation. Amongst the former included *inter alia* the categorization of equitable remedies made available by the Act (such as recovery of possession of property, declaratory decrees, injunctions etc.), distinguishing specific performance from specific delivery, specification of the cases wherein specific performance would be enforceable and recognition of rights of affected third-parties to sue in exceptional circumstances. The Specific Relief Act, 1963 was promulgated on the basis of these suggestions.

A bill to repeal the Act of 1877 was introduced in Lok Sabha and was passed by the both the houses of Parliament and on 13th December, 1963 the President assented to the same. The act was amended in the year 2018.

The Specific Relief Act, 1963 extends to the whole of India, except the State of Jammu and Kashmir. The Specific Relief Act deals only with certain kinds of equitable reliefs and these are now:

- i) Recovery of possession of property
- ii) Specific Performance of contracts
- iii) Rectification of Instruments
- iv) Rescission of Contracts
- v) Cancellation of instruments
- vi) Declaratory decrees
- vii) Injunctions

The other forms of Specific relief mentioned in the Code of Civil Procedure and in statutes such as Transfer of Property Act, Trust Act, and Partnership Act are different in origin and nature and are not included in this Act. The cases of Contract are governed by the statutory provisions contained in the Indian Contract Act, 1872 and the provisions of the Specific Relief Act do not apply to such cases.

Lecture 1

- Specific relief means relief of certain species, i.e. an exact or particular, a named, fixed or determined relief. The term is generally understood and providing relief of a specific kind rather than a general relief or damages or compensation.
- It is a remedy which aims at the exact fulfillment of an obligation or specific performance of the contract.
- Specific relief is concerned with the enforcement of civil rights and not penal laws.

Specific relief is granted when there exist no standard for ascertaining actual damage, for instance when the object of sale is picture by a dead painter or where compensation in money will not provide adequate relief to the plaintiff.

Recovery of Specific Immovable property- section 5- a person entitled to the possession of specific immovable property may recover it in the manner provided by the CPC, 1908.

The person is entitled to the possession of specific immovable property he can recover the same by filing a suit under CPC

- **Section 6-** if the person without his consent has been dispossessed with specific immovable property he can recover it by filing a suit.
 - The amendment (2018) specifically enumerates the persons who can file a suit for recovery. It says that a suit for recovery can be filed by the person being dispossessed of his property or a person through whom he has been in possession of the property or any person claiming through him. The amendment makes it clear that the term 'other person' includes a person through whom the person being dispossessed of his property has come to have the possession of the property
 - The suit to recover possession under this section is an additional remedy.
 - The suit shall not be brought after the expiry of six months from the date of dispossession.
 - Against the government.
 - No appeal will be allowed from any order or decree passed in any suit instituted under this section.
 - The person can establish his title by filing a suit to recover possession.
- To discourage people from taking the law into their own hands, however good title may be
- To provide a summary cheap and useful remedy to a person dispossessed of immovable property otherwise than in due course of law.
- **Section 6 is applicable only if the plaintiff proves that-**

- He was in juridical possession of the immovable property.
- He has been dispossessed without his consent and otherwise than in due course of law
- That the dispossession took place within 6 months from the date of the suit.
- Ex- the possession of tenant after the termination of the tenancy continues to be a juridical possession. His right to possession remains unless the owner gets a decree of eviction against him
- **Section 7 provides for the recovery of movable property in specific i.e. the things itself.**
- The things to be recovered must be specific in the sense they are ascertained and capable of identification.
- The nature of things must continue without alteration. This section entitles a person to bring a regular suit for the recovery of possession of movable property if he has right to the same at the time of action.
- The person entitled to possession may not be the owner of the goods. If a person is entitled to possess certain goods as an agent, bailee or as a trustee of those goods he may recover the same.
- Suit can be filed under **Order 20, Rule 10 of CPC**
- “Where the Court decrees delivery of such property, the decree shall also state the amount of money to be paid in alternative, if delivery cannot be done.”

Ex- TT Devasthanams V K.M Krishnaiah; Mahabir Prasad Jain V ganga Singh

Section 7 provides for the recovery of movable property in specific i.e. the things itself. The things to be recovered must be specific in the sense they are ascertained and capable of identification. The nature of things must continue without alteration. This section entitles a person to bring a regular suit for the recovery of possession of movable property if he has right to the same at the time of action for detinue. Suit can be filed under Order 20, Rule 10 of CPC and the form of the plaints are laid down in Schedule I and Appendix A of CPC. Where the Court decrees delivery of such property, the decree shall also state the amount of money to be paid in alternative, if delivery cannot be had.

- **Section 8.** -- when a person is in possession or control of certain movable property but he is not the owner thereof, he may be compelled to specifically deliver the same to a person, who is entitled to the immediate possession of such property in the circumstances mentioned in section 8.
 - **Essentials-**
 - The defendant should be in possession or control of a particular property(as a trustee or as the agent)

- Such article should be movable property rather than immovable property.
- When compensation in money would not afford the adequate relief for the loss of the thing claimed.
- When it is extremely difficult to ascertain the actual damage caused by its loss.
- The defendant should not be the owner of such article
- The plaintiff should be entitled to the immediate possession of such article

Provisions of Section 8 are applicable in the following situations only:

- I. When such property is held as agent or trustee of the property.
- II. When compensation is not an adequate relief for the loss to the plaintiff.
- III. When ascertainment of actual damage is not possible.
- IV. When possession of the property is wrongfully transferred from the plaintiff.

In case of situations under I and II burden of proof is on the plaintiff and under III and IV burden is on the defendant.

Kizhakkumpurath V. Thanikkuzhiyil- There was oral and documentary evidence that the plaintiff was the owner of certain scheduled items and the defendants had trespassed into those items. The plaintiff was held entitled to recover those items from the defendants, and also *mesne profits* or compensation as well.

Lecture 2

Section 9-Defenses respecting suits for relief based on contract-

Where any relief is claimed under this chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defense any ground which is available to him under any law relating to contract.

Cases in which specific performance of contract enforceable – section 10-

Specific performance of any contract may be enforced- when there exist no standard for ascertaining actual damages caused by the non-performance of the act agreed to be done.

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

Compensation in money would not provide adequate relief is presumed in the following cases-

When the breach of contract relates to transfer of immovable property.

When it is movable property and the article transacted is not an ordinary article of commerce or is of special value and is goods which are not easily available in the market.

Illustrations- A contracts with B to sell him a house for Rs 1000. B is entitled to a decree directing A to convey the house to him, he paying the purchase money.

A contracts with B to paint a picture for B, who agrees to pay thereof Rs 1000. The picture is painted. B is entitled to have it delivered to him on payment or tender of Rs. 1000

- Specific performance of a contract is not based on the discretion of the courts but it is a valid remedy available to an aggrieved party if his contract has been breached with a few exceptions mentioned under Sections 11(2), 14 and 16 of the Act.
- The amendment Act also permits the aggrieved party to seek compensation for the breach of contract in addition to seeking specific performance of such contract whereas prior to amendment, a claim for compensation was either in addition to or in substitution of seeking specific performance.

Lecture 3

Section 11- cases in which specific performance of contracts connected with trusts enforceable

- Specific performance of a “contract shall” (**repealed contract may, in the discretion of the court**)be enforced when the act agreed to be done is in the performance wholly or partly of a trust
- **A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced. (exception S10)**
- **Ex-A** holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B and B may enforce specific performance of this obligation.
- A is trustee of land with power to lease it for seven years. He enters into a contract with B to grant a lease of the land for 7 yrs, with an agreement to renew the lease at the expiry of the term. The contract cannot be specifically enforced.

Specific performance of part of a contract- section 12-

- The court may direct specific performance of a part of a contract
- Where a party is unable to perform the whole of his part of the contract. i.e a portion of the subject- matter has ceased to exist at the time of its performance.
- The part which is left unperformed bears only a small proportion to the whole in value.
- Admits of compensation in money.

What contracts cannot be specifically enforced?

Section 14-

The following contracts cannot be specifically enforced, namely:—

(a) (Earlier- Where Money is an adequate relief) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;

(b) (Earlier- a contract running with minute details or personal qualification which court cannot supervise) A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;

Cultivating a farm in a particular manner, operating signals by railway etc.

(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms;

For example a contract for personal service cannot be enforced

(d) a contract which is in its nature determinable- Determinable contracts are the contracts that can be terminated at the will of one of the parties or brought to an end under given conditions.

Exception- when contract can be specifically enforced?

- Contract to execute a mortgage or other security for obtaining loan.
- The execution of formal deed of partnership and
- Where the suit is for enforcement of a contract or a contract for the construction of a building or the execution of other work on land.
- **The Amendment inserts a new section in the Act namely section 14A for granting permission to technical experts in suits where the court considers it necessary to get an expert opinion to assist the court on any specific issue involved in the suit.**
- **It will also be left up to the courts to determine the terms of payment of such experts and the payment will be borne by the parties to the suit in whatever proportion and time as decided by the court.**

Lecture 4

Who may obtain specific performance?

Section 15-

- Any party to a contract may obtain specific performance of that contract.
- A representative in interest may also obtain specific performance of a contract. Representative in interest include – assignee, transferee of interest, legal representative.
- A beneficiary under a contract may obtain specific performance- **Ex- Khwaja Mohammed Khan V husainin Begum; Sundaraja Aiyangar V Lakshmiammal**
- Where a contract has been entered into by tenant for life in due course of a power, the remainders can specifically enforce the contract.
- A reversioner in possession may require specific performance, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant.
- A reversioner in remainder may specifically enforce the contract, where the agreement is such a covenant and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach.
- When a company has entered into a contract and subsequently amalgamated to another company. The new company arising out of amalgamation can specifically enforce the contract.
- When promoters of the company have before its incorporation entered into a contract for the purpose of the company, and such contract is warranted by terms of incorporation, the company may specifically enforce the contract.
- **Shyam Singh, v. Daryao Singh**
- Under the provisions of S. 15(b) specific performance of the contract may be obtained by 'any party thereto' or their representative in interest.' This expression clearly includes the transferees and assignees from the contracting party in whose favour the right exists.

Such right of seeking specific performance would, however, be not available in terms of proviso below Cl. (b) where the contract provides that the 'interest shall not be assigned.

Lecture 5

Who cannot claim specific performance?

Section 16-

- 1) A person who could not be entitled to recover compensation for the breach of contract cannot specifically enforce that contract.
- 2) Specific performance cannot be claimed in favour of a person in the following situation-
 - A) who has obtained substituted performance of contract under section 20;
 - B) Who violates any essential term of the contract that remains to be performed by him;
 - C) Who acts in fraud of the contract;
 - D) Who willfully acts in variance with or in subversion of the relation intended to be estimated by the contract.
- 3) A person cannot be granted specific performance if he fails to 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.
- **Ex- Vimal Kumar v Gyanchand** the purchaser paid the entire consideration of the land and was given possession of the same, but the registration had not been done as the land was encumbered.
- The purchaser came to know that seller had executed second sale deed for the same land illegally. Thereupon he gave notice to the seller to register sale deed within 3 days of service of the notice in the name of the purchaser.
- **Held-** purchaser was ready and willing to perform his part of the contract and thus entitled to the specific performance of the contract

Lecture 6

Substituted Performance

- Section 20(4) includes a new concept called Substituted Performance in the Act which means that when a breach of contract occurs then the aggrieved party can arrange for the performance of the contract by a third party or by his own agency and the aggrieved party can recover the costs and expenses incurred.
- However before the appointment of a third party, the aggrieved party has to give a notice in writing of not less than 30 days to the defaulting party to perform the contract within the time specified in the notice and in case of a failure to perform within that time, the aggrieved party may get the same performed by third party or his own agency. This furthermore does not prevent the aggrieved party from claiming compensation from the defaulting party.
- Once the aggrieved party has availed of substituted performance then it automatically nullifies the option of specific performance. It is a logical concept since, once such substituted performance is pursued, the aggrieved party would not be entitled to seek specific performance of the contract from the defaulting party.

Lecture 7

Section 20A (1) No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.

Section 20 B- The State Government, in consultation with the Chief Justice of the High Court, shall designate, by notification published in the Official Gazette, one or more Civil Courts as Special Courts, within the local limits of the area to exercise jurisdiction and to try a suit under this Act in respect of contracts relating to infrastructure projects.

Section 20 C- Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), a suit filed under the provisions of this Act shall be disposed of by the court within a period of twelve months from the date of service of summons to the defendant:

Provided that the said period may be extended for a further period not exceeding six months in aggregate after recording reasons in writing for such extension by the court

- **Section 21-**
- 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.
- (2) 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.
- (3) If, in any such suit, the court decides that specific performance ought to be granted, but that it 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.
- (4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in **section 73 of the Indian Contract Act, 1872 (9 of 1872).**
- (5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint
- Provided that where 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.

Lecture 8

Section 22 Power to grant relief for possession, partition, refund of earnest money, etc.

- 1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a

contract for the transfer of immovable property may, in an appropriate case, 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 may 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.
- (2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:
 - Provident that where 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.
 - (3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.
- Section 23. Liquidation of damages not a bar to specific performance (1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing 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. (2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

Lecture 9

Rectification of Instrument

When instrument may be rectified? Who may claim rectification?

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Where a contract has been reduced into writing, in pursuance of a previous engagement and the writing, owing to fraud or mutual mistake, fails to express the real intention of the parties, the court will rectify the writing instrument in accordance with their true intent.” Here the fundamental assumption is that there exists in between the parties a complete and perfectly unobjectionable contract but the writing designed to embody it, either from fraud or mutual mistake is incorrect or imperfect and the relief sought is to rectify the writing so as to bring it into conformity with true intent. In such a case to enforce the instrument as it stands must be to injure at least one party to it; to rescind it all together must be to injure both, but rectify it and then enforce it is to injure neither but to carry out the intention of both. In cases of rectification the court does not put it to the other party to submit to the variation alleged but makes the instrument conformable to the intention of the parties without such offer or submission. In **Dagdu V. Bhana** it was observed:

“The Court in administering equitable principles permits mistakes to be proved where they are common; that is where the expression of the contract is contrary to the concurrent intention of the parties. If such mistakes be established, then the court can give relief of rectification, but what is rectified is not the agreement, but the mistaken expression of it.

The following persons may apply:-

- a) Either party or his representative in interest
- b) The plaintiff in any suit
- c) A defendant in such suit

Conditions Necessary

The conditions necessary for obtaining rectification are:-

1. There must have been a complete agreement reached prior to the written instrument which is sought to be rectified. There must be two distinct stages: i) an agreement, verbal or written, which clearly expresses the final intention of the parties, and ii) instrument which purports to embody that intention.
2. Both the parties must have intended, and still intending, that the exact terms of the prior contract should be reduced to writing.
3. Clear evidence of Mistake common to both parties or of fraud.

The principle on which the court acts in correcting instruments is that the parties are to be placed in the position as that in which they would have stood if no error had been committed.

Haji Abdul Rahman Allarakia V. The Bombay and Persia Steam Navigation Company

The plaintiff chartered as steamer from the defendants to sail from Jedda on “10th August, 1892 (15 days after the Haj) in order to convey pilgrims returning to Bombay. The plaintiff believed that “10th August, 1892” corresponded with the fifteenth day after Haj. But the defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July, 1892 and not 10th August, 1892 corresponded with the fifteenth day after the Haj. On finding out the mistake, the plaintiff sued the defendants for rectification of the charter parts. It was held that the agreement was one for the 10th August, 1892 that the mistake was no mutual, but on the plaintiff’s part alone, and therefore, there could be no rectification. The court further expressed its opinion that even if both parties were under the mistake, the court would not rectify but only cancel the instrument as the agreement was one for the 10th August, 1892 and that date was a matter materially inducing the agreement.

Lecture 10

When recession of contract may be granted? Section 27

Recession means termination or annulment of a contract.

It can be granted by the court in following cases namely- where the contract is voidable or terminable by the plaintiff; or

Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

Notice of recession of contract- the party entitled to avoid the contract or rescind it may do so by a serving a notice to the other party.

Ex – Car and Universal Finance Ltd v Caldwell

What are the limits to the right of rescission?

- When the contract has been affirmed or ratified by the plaintiff.
- When the parties cannot be substantially restored to their originally position.
- When third parties have acquired rights.
- Where part of a non-severable contract is sought to be rescinded.

Lecture 11

Cancellation of Instrument

In the matters of voidable contracts in writing, the powers of judicial rescission are co-extensive with those of directing the cancellation and surrender of the instruments.

A forged instrument, so long as the forgery has not been judicially determined, may cause the greatest mischief, and a court of equity will order its cancellation in anticipation. And it does not matter that the Plaintiff is not a party to such a document, it does not embody a contract which binds him personally.

Section 31: Where cancellation may be ordered.

Cases occurs where a written instrument, originally valid, becomes inefficacious by subsequent events, such as, by satisfaction or payment, or other causes; and its existence casts either a cloud upon the title of the other party or subject him to the danger of some future litigation; under such and like circumstances, although the written instruments have become void, courts interpose to prevent injustice or hardship and will decree a delivery and cancellation of the instrument.

Section 32: what instruments may be partially cancelled: the court is not bound to annul the whole of the instrument impugned, but may in its discretion, allow a part of it to stand, if it is evidence of different rights or different obligations.

Section 33: power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.

Lecture 12

A declaratory decree is a mode of relief where there is no specific performance and no award of compensation. There is only a declaration of rights of the parties without any consequential relief which can be enforced by the execution of the decree. In other words, declaratory decrees are those where some right is declared in favour of the plaintiff but nothing is sought to be paid or performed by the defendant. Further, the declaration does not confer any new rights upon the plaintiff; it merely declares what he had before.

Object

The object of such decrees is that where a person's status or legal character has been denied or where a cloud has been cast upon his titles to rights and interests in some property, he may have the cloud removed by having his legal status or rights declared by the court. But it is not a matter of absolute right to obtain a declaratory decree. It is discretion of the Court. The object of Section 34 is to perpetuate and strengthen testimony regarding title and protect it from adverse attacks. The policy of legislature is not only to secure to a wronged party possession of the property taken away from him but also to see that he is allowed to enjoy that property peacefully.

Section 34- Essential requisites for a declaratory action.

1. The plaintiff must be entitled to any legal character or to any right as to any property.
2. The defendant should have denied or be interested in denying the character or title of the plaintiff. It is this denial which gives a cause of action for declaratory relief.
3. The plaintiff is not in a position to claim further relief than mere declaration of his title, or where he is so able to seek further relief, he seeking such relief also
4. **Section 35. Effect of declaration.**-A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.
5. According to this section the declaratory decree is not binding on everybody in the world. It cannot bind strangers and as such a declaration will not operate as a judgment in *rem* and will be binding only between parties to the suit and their representatives. Hence, a declaratory decree is binding between the parties inter se and its effect does not bind persons who are not connected with the suit in question

Lecture 13

Preventive relief or injunctions

An injunction is a specific order of the court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun, or in some cases, when it is called mandatory injunction commanding active restitution of the former state of things. In Barney's Encyclopedia of Laws of England it is defined as "a judicial process by which one, who has invaded or is threatening to invade the rights (legal or equitable) of another, is restrained from

continuing or commencing such wrongful act.” Lord Halsbury is most explicit when he says: “An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing.” In former case it is called restrictive injunction and in the latter case it is called mandatory injunction.

Section 36. Preventive relief how granted.-Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Section 37. Temporary and perpetual injunctions. -

(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908 (5 of 1908).

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby 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.

PERPETUAL INJUNCTIONS

Section 38. Perpetual injunction when granted.-

(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:- (a) where the defendant is trustee of the property for the plaintiff; (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion; (c) where the invasion is such that compensation in money would not afford adequate relief; (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Section 39. 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.

Section 40. Damages in lieu of, or in addition to, injunction.-

(1) The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint: Provided that where 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.

(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.

Section 41. Injunction when refused.-An injunction cannot be granted- (a) 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; (c) to restrain any person from applying to any legislative body; (d) to restrain any person from instituting or prosecuting any proceeding in a 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 it 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; (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court; (j) when the plaintiff has no personal interest in the matter.

Section 42. Injunction to perform negative agreement.- Notwithstanding anything contained in clause (e) of section 41, where 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 circumstance 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 plaintiff has not failed to perform the contract so far as it is binding on him.