

legally compelled to do. In order that a promise to pay for past voluntary services is binding, the following essential conditions must exist : (i) The services should have been rendered voluntarily. (ii) The services must have been rendered for the promisor, and not anybody else. If the services are rendered involuntarily but at the desire of the promisor, then it is covered under 'past consideration' and not under this exception. (iv) The promisor must have intended to compensate the promisee. (v) The promisor should be competent to contract at the time when the act was done. (vi) It is to be noted that there is no need of having any written contract for this purpose. [Sec. 25(2)].

(C) **Promise to pay time-barred debt** : A promise in writing signed by the person to be charged therewith or by his agent, to pay a debt barred by the law of limitation would constitute a valid contract, even though it is not supported by any consideration [Section 25(3)]. The following essential conditions should be noted in connection with this exception : (i) The debt must be an ascertained and specific sum of money. (ii) The promise to pay time-barred debt must be made in writing and signed by the promisor or his agent authorised on that behalf. (iii) The promise must not be an acknowledgment of the debt. (iv) The promise may be absolute or conditional. If it is conditional, it can be fulfilled only after the conditions have been performed. (v) The promise may be to pay the whole or any part of the debt. (vi) The debts must be such that the only bar to recovery is limitation, but otherwise the debt should be perfectly lawful and binding on the debtor.

(D) **Completed gift** : In the case of a gift actually made, not being an agreement to make a gift, *no consideration is necessary although the donor and the donees* may not be standing in near relation to each other, and even if they do, there may not be any natural love and affection between them.

(E) **Agency** : Besides the above exceptions mentioned in section 25 of the Act, there are also other types of agreements which are enforceable by law even without consideration. For instance, Section 185 of the Act Contract specifically says that, "*No, consideration is necessary to create an agency*".

(F) **Remission** : Under section 63 of the Contract Act, no consideration is necessary for an agreement to receive less than what is due, known as *remission in India* and *accord and satisfaction in England*.

(G) **Bailment** : A gratuitous bailment means giving an article to a person for a certain purpose and it is to be returned after the purpose is fulfilled; but no remuneration is charged for the favour. *Gratuitous bailment is, in essence, without consideration.*

(H) **Guarantee** : *A contract of guarantee is made without consideration* (Section 127 of the Contract Act 127).

*Note : There is no consideration in an accommodation bill under the Negotiable Instruments Act, 1881.*

### NO CONSIDERATION NO CONTRACT EXCEPTIONS

1. Natural love and affection
2. Compensation for past voluntary service.
3. Promise to pay a time barred debt.
4. Completed gift.
5. Contract of Agency
6. Remission in India / Accord and Satisfaction in England.
7. Gratuitous Bailment
8. Contract of Guarantee

### STRANGER TO CONSIDERATION AND STRANGER TO CONTRACT

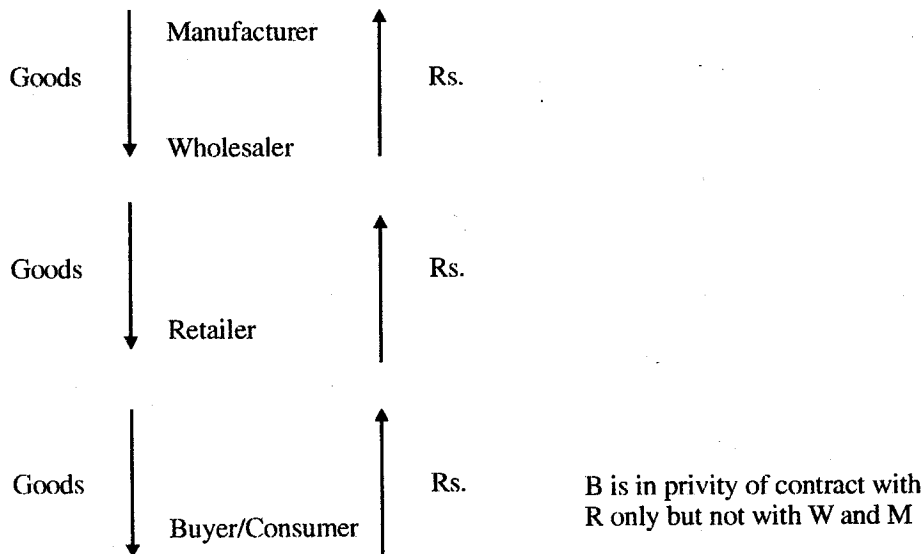
It is necessary, in this context, to distinguish between a stranger to a consideration and stranger to a contract. If consideration is furnished not by the promisee but a third person, the promisee becomes a '*stranger to the consideration*', and as such, he cannot enforce the promise. However, it should be noted that a '*stranger to consideration*' can sue the contract provided he is a party to the contract and the consideration must flow from him at the desire of the promisor. Similarly, a person who is not a party to a contract, cannot claim any rights under the contract even though the contract may be for his benefit, and such a person is known as '*stranger to the contract*'.

### DOCTRINE OF PRIVACY OF CONTRACT

As a contract is entered into by two or more persons thereby creating rights and obligations for them, it is a party to the contract only who can enforce his rights as against the other party (i.e., the promisor). The basic principle underlying law of contracts is that a stranger to a contract cannot maintain a suit for a remedy. The law entitles only those who are parties to the contract to file suits for exercising their rights. This is known as '*privity of contract*'. This rule can be traced to the fact that the law of contracts creates *just in personam* as distinguished from *jus in rem*. Therefore, a stranger to a contract cannot maintain a suit.

Example: A is indebted to B. A sells certain goods to C. C gives a promise to A to pay off A's debt to B. In case C fails to pay, B has no right to sue C, being a stranger to the contract between C and A. In other words C is not in privity with B. However, C is in privity with A.

The concept of privity of contracts is illustrated below figure.



**Exceptions to the rule : A stranger to contract cannot sue on the contract**

It is now a settled law in India that a *stranger to contract cannot sue on the contract*, (third parties to a contract have no rights and no liabilities under it) owing to the absence of privity of contract. However, in the course of its judgement, the Supreme Court itself has referred to certain well recognised exceptions.

- (1) **Beneficiary in a trust or charge** : In the case of trust, the beneficiary though a stranger to the contract between the trustee and the author of the trust, can sue in his own name to enforce the trust.
- (2) **Acknowledgment of payment or Estoppel** : In the case of acknowledgment of liability or where the principle of estoppel begins to operate, a stranger to the contract can sue the party in question.

**Illustration** : Y receives money from X for payment to Z and acknowledges this fact to Z; Z can sue Y to recover the money, though he is a stranger to the contract. Acknowledgment of collection by Y to Z, makes Y the agent to Z.

Where the promisor by his conduct, acknowledges himself as an agent of the third party, a binding obligation is thereby incurred towards him. Thus in *Khirode Behari Dull Vs. Man Govinda Pande* (1933) the landlord was allowed to recover unpaid rent from the sub-tenant whereas under an agreement between a tenant and his sub-tenant the sub-tenant was paying the rent directly to the landlord.

- (3) **Agreement creating a charge on land** : Where a person makes a promise to an individual for the benefit of a third party and creates a charge on specific immovable property

for carrying out that promise, the third party, though a stranger to the contract can enforce it.

**Khawaja Mohammad Khan Vs. Hussaini Begum (1910) P.C.** : In that case, in a agreement executed between fathers of bridegroom and bride, it was agreed that father of the bridegroom will pay Rs. 500 every month in perpetuity as Kharche Pandan (Pin money) to the bride, if she married his son. For this purpose, a charge was created on a specific immovable property in favour of the bride by a document executed by the father of the bridegroom and the father of the bride. On subsequent refusal to pay, the bride sued her father-in-law to recover the amount with arrears for 40 months. It was held by the Privy Council that though she was not a party to the contract, Yet 'she was clearly entitled in equity to enforce her claim'. Hence Privy Council awarded her claim with interest on the arrears of installments.

- (4) **Family settlements** : Family arrangements or compromises made among male members for the benefit of female members of the family can be enforced by the female members, although the female members are not a party to these agreements. Thus, where an agreement is made in connection with marriage, e.g., partition agreement and a provision is made for the benefit of a person, that person may take advantage of that agreement although he or she is no party to it.
- (5) **Assignee of a contract** : Under certain circumstances a party to a contract can transfer his rights under the contract to third parties. For example, the holder of a bill of exchange can transfer it to any person he wishes. In such cases the transferee or the assignee can sue on the contract even though he was not a party to it originally. Assignment may occur through operation of law. For example, when a person becomes insolvent, all his properties and rights vest in the Official Assignee/Official Receiver who can sue upon contracts entered into by him.

### **CONTRACTUAL CAPACITY**

One of the essential conditions for the enforceability of an agreement, is that the concerned parties must be competent to enter into an agreement. Section 10 of the Indian Contracts Act specifically requires that the parties must be competent to contract. Thus, an agreement is valid and enforceable only if the parties to it are competent enough to enter into contract.

**Meaning of Contractual Capacity** : The '*capacity to contract*' means the competence (i.e. capability) of the parties to enter into a valid contract. The term '*capacity to contract*' is defined in Section 11 of the Indian Contract Act, which reads as under :

*"Every person is competent to contract who is of the age of the 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".*

In other words, a person who is major, of sound mind, and is not disqualified from contracting by law, is competent to enter into a valid contract.

#### **Persons of Sound and Unsound Mind**

**Meaning of Sound Mind** : A person is said to be of sound mind for making a potential business contract, if at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effects upon his interests (Section 12).

Section 12 further states that (i) a person who is usually of unsound mind, but occasionally of sound mind may make a contract when he is of sound mind, and (ii) a person who is usually of sound mind but occasionally of unsound mind may not make a contract, when he is of unsound mind.

### Explanations

1. A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.
2. 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 judgement as to its effect on his interest, cannot contract whilst such delirium of *drunkenness* lasts.

Even persons who have been *hypnotised*, persons who are delirious from fever and persons who have suffered *mental decay* on account of old age or disease become persons of unsound mind. Thus unsoundness of mind may arise (i) idiocy, (ii) lunacy, (iii) drunkenness, (iv) hypnotism and (v) mental decay.

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

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

### Examples

1. A person 'agreed' to sell a property worth about Rs. 25,000 for Rs. 7,000. His mother proved that he was a congenital idiot and she pleaded for cancellation of the contract. The court held the agreement to be null and void. *Inder Singh Vs. Parmeshwardhari Singh (1957)*.
2. If an agreement entered into by a person of unsound mind is for his benefit, it can be enforced. *Jugal Kishore Vs. Cheddu (1903)*.

**Tests of Soundness of Mind :** The test of soundness of mind are (i) the capacity to understand the contents of the business concerned, and (ii) the ability to form a rational judgement as to its effect on his interests. If a person is incapable of both these elements, he suffers from unsoundness of mind. Unsoundness of mind may arise from insanity, lunacy, idiocy, drunkenness, hypnotism, mental decay brought about by old age or disease and similar other factors. In each case, it is a question of fact to be decided by the Court. There is always a presumption in favour of sanity and if any person relies on the unsoundness of mind, he must prove it sufficiently to the satisfaction of the Court.

### Mental Incompetents

(a) **Idiots :** An idiot is a person who is devoid of any faculties of thinking or of forming rational judgement. Idiocy is a congenital defect caused by lack of development of the brain. The

agreement with an idiot is absolutely *void*. However their properties are liable for necessities supplied to them and to their dependents.

(b) **Lunatics and insane persons** : A lunatic is one, whose mental power has been deranged. Instance persons are those persons who are sometimes sane and sometimes *insane*. Such persons may enter into contract during their lucid intervals i.e., period in which they are in senses. Such persons can always plead lunacy or insanity as a ground for avoiding a contract. It is for the plaintiff to prove that the contract was entered into during the lucid interval of the defendant.

**Differences between lunacy and idiocy** : There are some differences between lunacy and idiocy. They are :

1. Lunacy is temporary, whereas idiocy is permanent.
2. Lunacy is curable. But idiocy is incurable.
3. Lunacy is a disease of the brain, whereas idiocy is the lack of development of brain.
4. Contracts entered into by a lunatic during the period of sanity are valid. On the other hand, contracts entered into by an idiot cannot be valid at any time.

(c) **Drunkards** : A person under the influence of intoxication of drug stands on the same footing as a lunatic. He also suffers from temporary incapacity to contract. *Contract by a drunken person is absolutely void and cannot be ratified*. But in order to make a contract by a drunkard void, the drunkenness should be effective and absolute, so that rational judgement cannot be formed by the contracting party. The drunken person is usually incapable of understanding the contents of the contract and its legal consequences. A drunken person's property is liable for necessities of life supplied to him or his dependents during the period of his drunkenness. That means, if he does not have property to pay for such necessities, the supplier has to lose the amount.

### MINOR OR INFANT

**Meaning of Minor** : Minor is a person who has not completed the age of 18 years. However, a minor for whom a guardian has been appointed by court or when his property is managed by the court of wards, he becomes a major only on his completing 21 years (Sec. 3 of the Indian Majority Act, 1875).

**Nature of Minor's Contract** : The Contract Act does not expressly specify whether a minor's contracts are void or voidable. In *Mohori Bibi Vs. Dhurmodas Ghose (1903)*, the Privy Council declared categorically that all contracts made by a minor are *null and void ab initio* and they cannot be ratified by him on his attaining majority.

**Facts of the case** : A minor executed a mortgage for a sum of Rs. 20,000 on which he took an advance of Rs. 8,000. Later on, the minor sought to set aside the mortgage on the ground of minority. The mortgagee contended that since a contract with a minor is voidable, the minor should refund the advance taken by him. The Privy Council negated the contention and held that a contract with a minor is void ab-initio. Being a void contract the minor cannot be asked to refund the advance taken by him. Otherwise, the court will be giving effect to a contract which never came into existence.

Thus money paid or lent to minors under contracts (mortgage, promissory notes etc.) cannot be recovered either from them or their estates even under Section 64 and 65 of the Contract Act. Hence *a minor cannot be asked to refund any benefit he received under a contract. However,*

he can enforce the contracts made by him and sue the party involved; only they are void against him. Any money paid by minors under contracts not yet performed, can be recovered by them. But the question whether the money paid by a minor under contract, already performed, could be recovered by him depends on whether complete restitution is possible. If it is possible, that is, if the parties could be placed in the positions they occupied before the contract, the court will order restitution and direct the other party to return the money to the minor. If restitution is not possible, the minor cannot recover the money.

**Contract for the benefit :** A minor can be a promisee. In *Raghva Chariar Vs. Srinivasa*, the Madras High Court held that a mortgage executed in favour of a minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf. Similarly, in case of sale of goods by a minor, he is entitled to recover the price from the buyer.

**Contracts by Guardian :** Contracts entered into by the guardian of a minor or the manager of his estate, can be enforced (under Hindu Law) against or by the minor if (a) the guardian has powers to enter into them on behalf of a minor and (b) they are for the benefit of the minor. The powers of a guardian are determined by the personal law of the minor and by the Guardian and Wards Act.

However a minor's estate will be liable for the debts incurred by him even for necessaries of life. Further, the liability is not personal, but is only that of the minor's estate. Thus, it has a little contractual element.

**No Estoppel against a minor :** A minor can always put forth the plea of minority and will not be estopped, i.e., prevented from doing so, even when he has entered into a contract falsely representing himself to be a major.

A minor who falsely represents himself to be a major, and thereby induces another person to enter into an agreement with him, can nevertheless plead minority as a defence in an action on the agreement. There can be no estoppel against a minor. *Saidk Ali Khan Vs. Jaikishore*. In the English case, *R. Leslie Ltd. Vs. Sheill*, the Court of Appeal held that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money. But in India it has been held that the court can direct the minor to pay compensation to the other party in such cases. (*Khan Gul. v. Lakhs Singh. (1928) Lah.*)

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

**No Ratification :** An agreement made by a minor (during his period of minority) cannot be ratified (confirmed or approved) by him on attaining majority because minor's agreement is void *ab initio* (i.e., void in the very beginning). Even, if a new agreement given by a minor relating to an earlier agreement (during minority) cannot be enforced because the new agreement (during majority) is not supported by any new consideration.

In *Indran Ramaswamy Vs. Anthaoppa*, a person on attaining majority, gave a promissory note in satisfaction of one executed by him for money borrowed when he was a minor. It was held that the claim under the promissory note could not be enforced because there was no

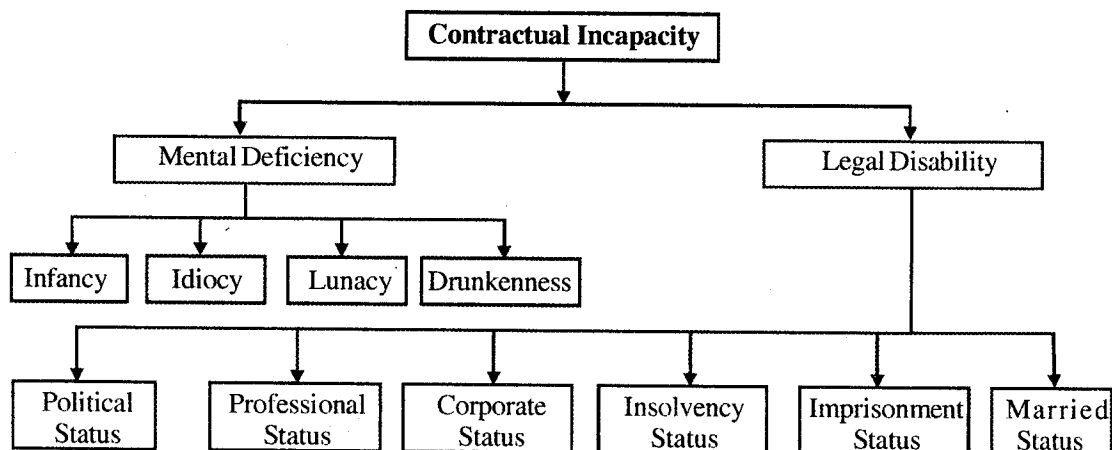
**No specific performance** : An agreement by a minor being void, the court will never direct specific performance of such an agreement by him.

**No insolvency** : A minor cannot be declared insolvent even though there are dues payable from the properties of the minor.

**Partnership by minor** : A minor cannot enter into a contract of partnership. But he can be admitted into the benefits of a partnership with the consent of all the partners.

**A Minor can be an agent** : A minor can draw, make, indorse and deliver negotiable instruments so as to bind all parties except himself. A minor agent cannot be adjudicated an insolvent. Where a minor and a major jointly enter into an agreement with another person, the minor has no liability but the contract can be enforced against the major if his liability can be separately ascertained. If an adult stands surety for a minor, the adult is liable on the agreement although the minor is not.

**Minor as a shareholder of a company**: A minor can become a shareholder or member of a company if (a) the shares are fully paid shares and (b) the articles of association do not prohibit so.



### LEGAL DISABILITY

On the ground of status, some degree of incapacity is imposed by law.

(a) **Foreign Sovereigns, Ambassadors and Envoys (National Status)** : One has to be cautious while entering into contracts with foreign sovereigns and ambassadors, because whereas they can sue others to enforce the contracts entered upon with them, they cannot be used without obtaining the prior sanction of the Central Government. Thus they are in a privileged position and are ordinarily considered incompetent to contract.

(b) **Alien enemy (Political Status)** : Alien enemy is a person (including an Indian citizen) who is domiciled in a country which is at war with India. It is therefore, the place of residence of an individual that decides whether he is an alien enemy or not. An alien enemy cannot enter into contracts with an Indian citizen nor can he file a suit in an Indian Court.



(c) **Professionals (Professional Status)** : In England, barristers, doctors (physicians) are not permitted to enter into contracts pertaining to their profession or to sue for their fees or be sued. So also are members of the Royal College of Physicians. But they can sue and be sued for all claims other than their professional fees. For example, if a barrister or a member of the Royal College of Physicians engages a contractor of building a house he can sue for the enforcement of the contract.

In India these personal disqualification do not exist. It has been held in *Nihal Chand Vs. Dilwar Khan*, that a barrister can sue for his fees in India.

(d) **Corporation (Corporate Status)** : The contractual capacity of corporations, (corporate bodies) is restricted by the statutes governing them. They cannot enter into contracts which are beyond their object and powers (i.e., *ultra vires*); nor can they make contracts which are associated with physical existence like contract to marry, because they are only artificial persons.

(e) **Bankrupt (Insolvent Status)** : An undischarged insolvent cannot be appointed as a Magistrate, or director in a company or elected to any office of local authority. He is also disqualified from being elected, sitting or voting as member of any local authority. (Section 103 A of the Presidency Towns Insolvency Act, 1909 and Section 73 of the Provincial Insolvency Act, 1920). The law relating to contracts entered into by an insolvent is as follows:

1. An adjudicated insolvent cannot enter into contracts of sale relating to his property. Only the official assignee or official receiver can deal with the property of an adjudicated insolvent. However, he can enter into certain other types of contracts, such as incurring debts, purchasing property, contract of service, etc.
2. Before discharge, an insolvent also suffers from certain other disqualifications. For instance, he cannot be a magistrate or a director of a company or a member of a local body.
3. After obtaining discharge, an insolvent becomes an ordinary citizen. So, he can enter into any valid contracts, and such contracts can be enforced against him and also by him. He also becomes free from other disqualifications.

(e) **Felons and Convicts (Imprisonment Status)** : Persons undergoing sentences of life imprisonment cannot enter into contracts, nor can they sue in Courts, except when they have a licence called *ticket of leave* (i.e., the *parole*). Their capacity to enter into a contract, and to sue is only suspended during the period of sentence and is regained after its expiry. The law of limitation would be held in abeyance during the period of sentence.

(f) **Marriage (Marital Status)** : According to our constitution, the right of a woman to be treated on a footing of equality with man is a fundamental right guaranteed to her. A Hindu woman formerly was under a disability in the enjoyment as an heir of the estate of a deceased male or female relative, in that she could enjoy only what was called a woman's or widow's estate, but the Hindu Succession Act, 1956 enables a Hindu woman to acquire absolute rights even in the property inherited by her from her male or female relations. It may also be noted that under the same Act, for the purpose of succession to the property of a male or female Hindu, a daughter is placed in the same position as a son.



# C H A P T E R - 5

## FREE CONSENT

### CHAPTER OUTLINE

- DEFINITION OF CONSENT
- FREE AND GENUINE CONSENT
- FLAW IN CONSENT
  - COERCION
  - UNDUE INFLUENCE /MORAL COERCION
  - FRAUD
  - GOODFAITH (UBERRIEMAE FIDEI) CONTRACTS
  - MISREPRESENTATION
  - MISTAKE

(viii) **IPC is or is not in force in the place** : It does not matter whether the Indian Penal Code is or is not in force in the place where the coercion is employed. If the suit is filed in India, the above provision (i.e., Sec. 15) will apply.

### GOOD FAITH (*UBERRIMAE FIDEI*) CONTRACTS

**Mere silence is not fraud :** The general rule is that a person need not disclose to the other party material facts which he knows but he must refrain from making active misstatement. This means mere silence is not fraud. Thus, silence does not amount to a representation and cannot amount to fraud. In ordinary contract of sale, for example, the buyer must take care of himself. The seller is under no obligation to disclose material facts.

**Exception to the general rule :** It is fraud for one to conceal material facts which he is under an obligation to disclose when he is entering into a contract with another. This duty to disclose does not arise in cases of all contracts. It arises only in the following cases :

- (i) **Statutory Obligation to disclose :** Certain statutory provisions requires parties to a contract to make disclosure of material facts. Thus Sections 55 of the Transfer of Property Act requires a seller of real estate property to disclose all defects as to his title or property to the buyer. Therefore, if in contravention of this provision the seller conceals any defect in his title and tells the buyer that his property is free from all encumbrances, the buyer may treat the contracts as void even if he buys a property, in case the property turns out to be mortgaged or subject to similar encumbrances.
- (ii) **Duty to disclose in Contracts of *Uberrimae fidei* (Utmost Good Faith):** Where parties to a contract stand in such a relationship that utmost good faith is required of them, they must disclose all material facts, e.g., a contract between father and mother and son just come of age. Nondisclosure in such a case would be treated as fraudulent. The following are a few *instances of contracts uberrimae fidei* :
  - (a) **Insurance Contracts :** An insurer contracts on a condition or understanding the basis that all material facts should be communicated to him. So non-disclosure would vitiate the contract. Thus in a life insurance contract, if the assured declares that he is not suffering from a particular disease while, though unknown to him he was in fact suffering from it, the insurance contract would be liable to be set-aside. Similarly, in a proposal for fire insurance, non-disclosure of the refusal of another insurance company would entitle the insuring company to repudiate the contract.
  - (b) **Contracts relating to Family Settlements :** Full disclosure of all material facts are necessary when family disputes are settled by mutual agreement. In *Gordan Vs. Gordan (1821)*, a secret marriage not disclosed by one of the parties to the family arrangement was held sufficient to entitle the other party to set-aside the family settlement.
  - (c) **Contracts for the allotment of Shares in Companies :** A Company inviting the public to subscribe to its share must disclose all information regarding itself in the prospectus with strict accuracy. The Companies Act, 1956 sets out certain items which must be contained in a prospectus and thus required a full disclosure of all material facts.
  - (d) **Contract of Agency :** The agent must disclose to his principal every information coming to his knowledge which may influence the principal in making the contract with the third person.
  - (e) **Contract of Partnership :** Mutual trust and confidence is the basis of a partnership. It requires utmost good faith between parties before and after its formation.

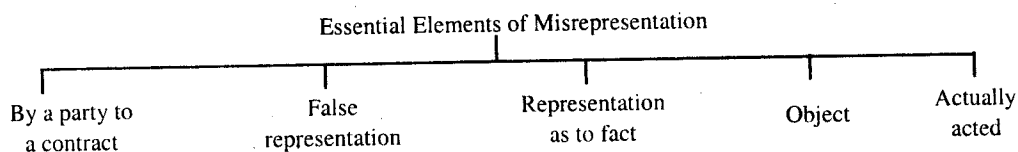
- (f) **Contract of Suretyship or Guarantee:** Sec. 143 of the Contract Act lays down that any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid. A creditor must disclose all material circumstances to the surety.
- (g) **Contracts in which Parties Stand in a Fiduciary Relation to each other :** Parties standing in a fiduciary relation to each other are duty bound to disclose all material facts to the other party which are likely to effect his willingness to enter into a contract, e.g., *solicitor and client, father and son, doctor and patient*. In all cases silence and non-disclosure of fact will itself amount to fraud.
- (h) **Contract to Marry :** Strictly speaking, contracts of marriage are not contracts of utmost good faith. However, in *Ahmad Yarknan Vs. Abdul Garni Khan*, the Nagpur High Court observed that, "But contract to marry may also come under this category though the case law on the subject is meagre and conflicting". Nevertheless, since a marriage cannot be nullified on the ground of non disclosure; when the contract is still in the executory stage, one party may set aside the contract and defend the suit for damages, if the other party has failed to disclose the material facts in accordance with the decision in the case cited above.
- (iii) **Silence is, in itself, equivalent to speech :** Silence will amount to fraud in all those cases where it shall be considered equivalent to speech.

### MISREPRESENTATION

Misrepresentation is any untrue statement made by a party to the contract to another, which is a material statement of fact and not of law and which induced the other party to act upon the statement and enter into the contract. Misrepresentation arises when the representation or statement made is inaccurate but the inaccuracy is not due to any desire to defraud the other party i.e., *there is no intention to deceive*.

**Definition :** Sec. 18 defines "*Misrepresentation*" means and includes -

- (1) The *positive assertion*, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true. Thus, in misrepresentation a person making a statement makes it without the knowledge of the statement being untrue and with an honest belief in its truth.
- (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.
- (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.



(a) **Mistake as to the existence of the subject-matter :**

**Illustration :** A agrees to buy from P 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.

(b) **Mistake as to the identity and quality of the subject-matter :** Cases are there in both the parties are mistaken as to the identity of the property which is the subject matter of the contract. A mistake as to the quality of an article is not material unless it is a mutual mistake, regarding some attribute of the article, without which the article is of an essentially different character from the article in the minds of the parties. In such a case, the contract is *void*.

(c) **Mistake as to the quantity of the subject-matter :** There may be a mistake as to the quantity or extent of the subject matter, which will render the contract void.

(d) **Mistake as to the title to the subject matter :** If the seller is selling a thing which he is not entitled to sell and both the parties are acting under render the contract void.

(e) **Mistake as to the price of the subject matter :** There may sometimes be a genuine mistake as to the price of an article for sale in which case the contract will be void. Where a seller intending to write the figure of Rs. 2,500 as price of an article, wrote Rs. 250 and the buyer knowing the mistake accepted the offer, the court held the contract as void.

(ii) **Mistake as to the possibility of performing the contract :** Consent is nullified if both the parties believe, at the time of entering into contract, that the contract is capable of being performed when in fact this is not the case. The contract, in such a case, is void on the ground of impossibility of performance. Impossibility may be :

(a) **Physical :** A contract for the hire of a room for witnessing the coronation procession was held to be void because, unknown to the parties, the procession had already been cancelled.

(b) **Legal :** A contract is void if it provides that something shall be done which cannot, as a matter of law, be done.

### Cases falling under Unilateral Mistake

Unilateral mistake does not generally affect the validity of a contract. But in the following cases, even though there is a unilateral mistake, *the agreement is void* :

(i) **Mistake as to the identity of persons contracted with :** This mistake is material only where the personality of the other party is of importance to the person making the error, and may arise out of either the negligence or the fraud of the other party.

(ii) **Mistakes as to the nature of transaction :** Where there is a mistake with regard to the nature of the transaction, there cannot be a contract. Where an old gentleman, not capable of reading, by reason of age, was asked to sign a document which he was told was a guarantee, thought it was really a bill of exchange, and he, believing it to be a guarantee and intending to sign a guarantee, signed the document, it was held that he was not liable even to a bona fide holder for value of the bill of exchange.

### Effect of Unilateral Mistake

According to Sec. 22, "A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact". Thus, *unilateral mistake does not generally affect the validity of a contract.*

### Remedies for Mistake

- (i) If the consent is caused by mistake of both parties, then agreement is *void* (S. 20).
- (ii) Where the contract is void on account of mistake, any person who has received any advantage under it, is *bound to restore it or make compensation for it to the person from whom he received it* (S. 65).

**Note :** Whether one party is playing fraud, and the other has been induced to enter into a contract under mistake, the case would be decided on the basis of mistake.

**Rectification :** When the parties are in fact agreed but the written instrument to which they have reduced their contract does not truly express the intention of both of them, then the terms of the instrument cannot be enforced, but the Court can rectify the instrument so as to make it express the true intentions of the parties and enforce it as rectified. The courts will not rectify an instrument on the ground of mistake unless it is shown that there was an actually concluded contract antecedent to the instrument sought to be rectified and that the contract is inaccurately described in the instrument.

### REVIEW QUESTIONS

1. What is consent? When is a consent said to be free and genuine?
2. When is consent said to be not free? Discuss the effect of such consent on the formation of a contract.
3. Define : (i) Coercion, (ii) Undue influence, (iii) Misrepresentation, (iv) Fraud and (v) Mistake.
4. What is coercion? What are its characteristics?
5. 'Mere silence is not fraud'. Explain the statement and state exception to this rule.
6. On whom does the burden of proof lies in case of undue influence? State the cases in which undue influence is (a) presumed and (b) not presumed.
7. What is mistake? Discuss the elements of mistake. What are the consequences of mistake on contract?
8. Can a person whose consent is caused by fraud claim damages under Indian Law? What are the remedies available to him?

### PRACTICAL PROBLEMS

**Attempt the following problems, giving reasons for your answers:**

1. A sells a horse to B knowing fully well that the horse is vicious. A does not disclose the nature of the horse to B. Is the sale valid?  
{Hint. Yes, the sale is valid, because A is under no duty to disclose the fault to B, the general rule of law being "let the buyer beware."}
2. A, who is trying to sell an unsound horse, forges a veterinary surgeon's certificate, stating that the horse is sound and pasted it on the stable door. B comes to examine the horse but the certificate goes unnoticed by him. He buys the horse and finds later on the horse to be unsound. He wants to avoid the agreement under the plea that he has been defrauded. Will he succeed?

Section 23 the Contract Act states that the object or consideration of an agreement is unlawful in the following cases : (a) Where it is forbidden by law, or (b) Where it defeats the provisions of any law, or (c) Where it is fraudulent, or (d) Where it is injurious to another person or his property, or (e) Where it is immoral, or (f) Where it is opposed to public policy.

1. **Forbidden by Law** : The term 'law' means the law for the time being in force in India, and includes the personal laws i.e., Hindu Law, Muslim Law, Tax Laws etc.

**Illustration** : A agreed to pay Rs. 600 to B if he steals C's scooter. This agreement is void as the consideration is unlawful. The theft is forbidden by law.

**Example I** : A promise B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful. (*William Vs. Bayley*).

**Example II** : X granted a loan to the guardian of a minor to enable him to celebrate the minor's marriage. It was held that X could not recover back because agreement is void as its object (i.e. minor's marriage) is illegal. [*C. Srinivasa Vs. K. Raja Rama Mohana Rao*].

**Example III** : A promises to obtain for B an employment in the public service, and B promises to pay Rs. 1,00,000 to A. The agreement is void as the consideration for it is unlawful.

**Example IV** : X, a Hindu already married and his wife alive, entered into a marriage agreement with 'Y' an unmarried girl. This agreement is void because the second marriage is forbidden by Hindu Law.

2. **The Object and Consideration must not defeat the provisions of any law** : Sometimes, the object or consideration of an agreement is not directly forbidden by the law. But it is of such a nature that, if permitted, it would defeat the provision of law. In such cases, the object or consideration is unlawful. The agreement with such an object or consideration is unlawful, and void. Here also the term 'law' means the law for the time being in force in India and includes Hindu Law, Muslim Law, Municipal Law, Tax Laws etc. The following are held if permitted, it would defeat the provisions of any law : (a) An insolvent debtor agreeing to pay in full any creditor in preference to the creditor (void under Insolvency Act). (b) A person agreeing to give annuity to the natural father of the person who is taken in adoption by him (void under Hindu Law). (c) A landlord agreement to pay consideration to a tenant to induce him to vacate possession of his premises. (*Illegal under Rent Restriction Control Act*). (d) An agreement by a debtor not to raise the plea of limitation (void under the Limitation Act).
3. **The Object and Consideration must not be Fraudulent** : Sometimes, the object or consideration of an agreement is fraudulent. In such cases, the object or the consideration and agreement is unlawful and void. The agreement based on such an object or consideration is unlawful, and void. If the two parties agree to practise fraud on a third party then the agreement between the first two parties is unlawful and void. The word 'fraud' means (i) the quality of being deceitful; (ii) criminal deception; (iii) using of false representation to obtain an unjust advantage or to injure the rights or interests of another party.
4. **If it involves or implies injury to the person or property of another**: The object or consideration of an agreement will be unlawful if it tends to injure any person or property of another. Thus, an agreement to pull down another's house is unlawful. The



word 'injury' means criminal or wrongful harm. Loss which ensues to a trader as a result of competition by a rival trader is not taken to be injury within the meaning of this clause.

**W.H. Smith & Sons Vs. C. Clington (1909)** : A requested B, an editor of a newspaper to publish a defamatory article (libel) against C and promised to indemnify B against the consequences arising from libel published. Held that the agreement is void as it involves injury to C and the editor cannot recover the amount from A.

5. **The Object and Consideration must not be Immoral** : Sometimes, the object or consideration of an agreement is such that it is regarded as immoral. In such cases, the object or the consideration is unlawful. The agreement with such an object or consideration is unlawful, and void. The term immoral depends upon the standard of 'morality' prevailing at a particular place and time. But certain acts have been regarded as immoral since times immemorial e.g., interference in marital relations.
6. **The Object and Consideration must not be opposed to Public Policy**: Sometimes, the object or consideration of an agreement is opposed to public policy, in such cases, the object or consideration is unlawful. The agreement based on such an object or consideration is *unlawful*, and *void*. An agreement is said to be opposed to public policy when it is against public interest i.e., when it is harmful to public welfare. '*Public Interest*' implies common good or general social welfare. The term '*public interest*' is, therefore, 'an elusive abstraction', yet it indicates a standard of goodness for judging private acts and conduct in the social context.

#### WHEN CONSIDERATION OR OBJECT IS UNLAWFUL

1. If it is forbidden by law.
2. If it is of such a nature that if permitted, it would defeat the provisions of any law.
3. If it is fraudulent.
4. If it involves or implies injury to the person or property of another.
5. If the court regards it as immoral.
6. If the court regards it as being opposed to public policy.

**Meaning of Public Policy or Interest** : '*Public interest*' implies common good or general social welfare. The term '*public interest*' is, therefore, 'an elusive abstraction', yet it indicates a standard of goodness for judging private acts and conduct in the social context. Public interest is to be distinguished from private interest. According to *Dictionary of Sociology*, a thing may be said to be in the public interest where it is or can be made to appear to be contributive to the general welfare rather than to the special privilege of a class, group or individual. Anything which is not detrimental to public good shall be in public interest. On the basis of decided cases on the subject, *the following agreements have been held to be void being against the public policy*:

1. Trading with an alien enemy.
2. Agreements to promote hostile action in a friendly State.
3. Agreements interfering with course of justice.

- (ii) **Agreement with outgoing partners** : A partner may make an agreement with his partners that on ceasing to be a partner, he will not carry on any business similar to that of the firm within a specified period or local limits. Notwithstanding anything contained in Section 27 of the Contract Act, as such the agreement shall be valid if the restrictions imposed are reasonable (*Section 36(2) of the Indian Partnership Act, 1932*).
- (iii) **Agreement upon dissolution** : Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits (*Section 54 of the Indian Partnership Act, 1932*).
- (iv) **Sale of firm's goodwill** : Any partner may, upon the sale of the goodwill of a firm, make agreement that such partner will not carry on any business similar to that of the firm within a specific period or within specific local limits. Such agreement shall be valid if the restrictions imposed are reasonable (*Section 55(3) of the Indian Partnership Act, 1932*).

3. **Service contracts** : Agreements of service often contain *negative covenants* preventing the employees from working elsewhere during the period covered by the agreements. For instance, Doctors are usually barred from private practice during term of their full-time employment in governing hospitals. But a restraint on a employee not to engage in a similar business, or not to accept a similar engagement, after the termination of service is taken to be void.

It is important that in such a contract, the restraint imposed must be reasonable. Whether a restraint is reasonable or not depends on particular facts of each case.

4. **Trade combinations** : A voluntary agreement among the members of the Trade Associations or Chambers of Commerce etc., to regulate their areas of operation or to fix prices of goods and commodities is not void under Section 27. Nowadays, traders carry on their trade in an organised way. There are combinations of manufacturers, grain merchants etc. Such ground being to about standardised goods fixed prices and certain extent eliminate cut throat competition. Thus regulations as to the opening and closing of business in a market, licensing of traders, mode of dealings etc., are valid, even if there is incidental diminution of freedom of trade. But a combination which tends to create monopoly and which is against public interest is declared void. Similarly, where the intention in such an agreement is to raise prices to an unreasonable extent, the agreement would be void under Section 27.

5. **Exclusive agency** : The principal may restrain his agent from dealing in goods of any other rival. For example, Reliance Textiles Co. Ltd., may grant a Selling Agency to Maharaja & Company on the condition that it will not deal in the goods of any other manufacturer.

### VOID AGREEMENTS

A void agreement is one without any legal effects and does not create any legal rights and obligations. Following are the various types of void agreements. These are contained in Sections 11, 20, 23 to 30 and 56 of the Indian Contract Act.

1. Agreements by persons who are not competent to contract (Section 11).
2. Agreements under a mutual mistake of fact material to the agreement (Section 20).
3. Agreements with unlawful consideration or object (Section 23).

4. Agreements, the consideration or object of which is unlawful in part (Section 24).
5. Agreements without consideration (Section 25).
6. Agreements in restraint of marriage (Section 26).
7. Agreements in restraints of trade (Section 28).
8. Agreements in restraint of legal proceedings (Section 28).
9. Agreements the meaning of which is uncertain (Section 29).
10. Wagering agreements (Section 30).
11. Agreements to do impossible acts (Section 56).

A void agreement is *void ab initio* (i.e., void from the very beginning) and without any legal effect. "An agreement not enforceable by law is said to be void".

### WAGERING AGREEMENT

According to Section 30 of the Indian Contract Act, 1872 "*agreements by way of wager are void*". The section does not define "wager".

**Definition :** *Sir William Anson* defines "wager as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event.

**Essentials of Wagering agreement :** 1. Uncertain event, 2. Mutual chances of gain or loss, 3. Neither party to have control over the event, 4. No other interest in the event, and (5) The promise must be to pay money or money's worth.

### Examples of Wagering Agreements

1. A and B agree that, if it rains on Monday, A will pay B Rs. 100, and if it does rain on that day, B will pay the same amount to A. It is a wagering agreement.

2. A promises to B to pay him Rs. 100 if Indian Hockey Team beats Pakistan Hockey Team, in consideration to which B promises to pay Rs. 100 to A. if Pakistan Hockey Team beats Indian Hockey Team. This agreement is a wagering agreement.

3. A bet on a horse race carrying a prize of less than Rs. 500 is a wagering agreement, though horse race is permitted by some local laws.

4. A lottery is a game of chance. So, an agreement to buy a ticket for a lottery is a wagering agreement, even though it is authorised by the Government. (*Dorabji Vs. Lance*) The only effect of Government authorising a lottery is to exempt the person conducting the lottery and the buyer of the lottery ticket from criminal prosecutions.

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

6. A commercial transaction (i.e., a transaction for the purchase and sale of commodities) in which there is no intention to give or take delivery of the commodities and where the parties intend to deal only with the differences in prices is a wagering transaction.

7. A cross-word 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 so, is a wagering transaction. (*Coles Vs. Odham's Press*).

6. **Chit Fund** : It is a plan under which all subscribers are paid back their contribution of capital to the fund by a fixed date. Though in some cases it is determined by lots to get more than capital and sooner. Thus, it is not lottery.

7. **Flower show competition, Dog show competition, Beauty contest etc.:** These types of contests or competitions are not matter of chance competitions-they require skill and judgement.

8. **Contract of Insurance** : Contract of insurance is not a wager. In this contract the insured has insurable interest in the property or life. The insurer promise to pay a certain sum of money on the death of insured provided the insured pays the premium regularly to the insurance company.

#### Distinction Between Wagering Agreement and Contract of Insurance

|    | <b>Wagering Agreement</b>   | <b>Contract of Insurance</b>  |
|----|---|---|
| 1. | <b>Gambling</b> : It is a game of chance  | It is not a game of chance  |
| 2. | <b>Intention</b> : In this case, the parties contemplate to get a certain sum of money on the happening of an uncertain future event. | There is no such intention.   |
| 3. | <b>Insurable Interest</b> : The parties do not cover up their risk of future loss. There is no insurable interest.                    | One of the parties covers up his risk for future loss. He has insurable interest. |
| 4. | <b>Indemnity</b> : It is not a contract of indemnity.   | Non-life insurance is a contract of indemnity.                                    |
| 5. | <b>Legal effect</b> : It is void agreement <i>ab initio</i> .   | It is a valid contract.   |
| 6. | <b>Parties Interest</b> : Only one of the parties is interested in protecting the subject matter.                                     | Both the contracting parties are interested.                                      |
| 7. | <b>Stakes</b> : There is the same stake for both the parties.   | The stakes of the parties are not the same.                                       |
| 8. | <b>Risk</b> : Neither of the parties is subject to any particular risk before entering into a contract                                | The insured (subject matter) is subject to risk.                                  |

### ILLEGAL AGREEMENTS

The term '*illegal agreement*' may be defined as the agreement which is expressly or impliedly prohibited by law e.g., by Indian Penal Code, or by some other special legislation etc. Thus, an agreement to commit a murder, or to publish a libel (a defamatory statement) is an illegal agreement. Moreover, the agreements, which are immoral or opposed to public policy, are also illegal. As a matter of fact, the illegal agreements are *void* and do not confer any rights and obligations on the parties concerned. As a result of this, they are *not enforceable* in a Court of Law.

#### Illustrations

- (i) A, B, and C entered into an agreement to carry on the business of smuggling and agreed to divide the profits in equal shares. It is an illegal agreement as the smuggling is forbidden by law.

- (ii) A agreed with B, a prostitute, to give her certain ornaments on hire. A knew that B had to use these ornaments in the furtherance of her trade. B failed to pay the hire charges, and A filed a suit for the recovery of the same. It was held that the agreement was illegal and void. Thus, A could not recover anything from B.

**Effects of Illegal Agreements :** The effects of illegal agreements may be discussed under two heads : (i) *Effects on main transaction* and (ii) *Effects on collateral transaction*.

- (i) **Effects on main transaction :** We have already discussed that an illegal agreement is *void ab initio* (i.e., void from the very beginning) and without any legal effects. As a matter of fact, an illegal agreement is non-existent, and the law will not permit the parties to enforce any right under it. This is so because the law treats the illegal agreement as if it had not been made at all. Therefore, no remedy is available to either party. Thus, nothing can be recovered under the illegal treatment. If something has been paid by any party, that party cannot get it back from the other party.

The general principle of law that *no suit can be filed in respect of an illegal agreement* is based on the following two *maxims* :

- (a) *From an illegal cause, no action arises.* Thus, the courts refuse to help either party. Moreover, the law discourage people from entering into an illegal agreement which arises from an illegal cause.
- (b) *In case of equal guilt, the defendant is in a better position.* Thus the party, who has paid some money against an illegal agreement, cannot get it back. In other words, the defendant can keep whatever has been received by him against the illegal agreement. This is because of the fact, that the courts do not help either party.
- (ii) **Effects on collateral transactions :** We know that 'collateral transaction' is an incidental or parallel transaction. In other words, it is the transaction which is subsidiary to the main transaction, e.g., the loan taken for the purpose of carrying an illegal business such as smuggling. The collateral transaction to an illegal agreement, also becomes illegal. Consequently, a collateral transaction is void and cannot be enforced in a Court of Law. It may be noted that even if the collateral transaction is lawful in itself, it will be treated as illegal and void.
- (iii) **Plaintiff not relying on the illegal contract :** If the plaintiff has parted with possession of his property on an illegal contract, he can recover the property provided he relies upon his independent right of ownership. In case such as bailment or a lease in which only a limited interest is transferred, the owner can recover the property from the bailee or the lessee, if he relies upon his title to the same but does not establish his claim on the illegal contract.

**Exceptions :** The maxim, *From an illegal cause no action arises* subject to the following exceptions.

- (a) **Illegal purposes not carried out :** Where the contract which is illegal remains executory, i.e., the illegal purpose has not been carried out in whole or in part, either party to it is allowed an opportunity for repentance and is permitted to recover money paid or goods delivered in respect of the contract. It is however necessary, that the party seeking to recover must withdraw from the transaction before the illegal purpose is executed and the withdrawal should be genuine.

- (b) Where the parties to an illegal contract, the less guilty party may be able to recover money paid, or property transferred under the following circumstances :
- (i) Where the plaintiff has been the victim of fraud or oppression at the hands of the defendant, he may, upon proof of such fraud or oppression, recover anything paid or delivered to the defendant under the contract.
  - (ii) Where the contract is rendered illegal by a statute in the interests of a particular class of persons of whom the plaintiff is one.

### REVIEW QUESTIONS

1. What do you understand by the legality of object and consideration. State essentials and legal rules for lawful objects and considerations.
2. All agreements are contracts if they are made for lawful consideration and with lawful object.
3. "Every agreement of which the object or consideration is unlawful, is void". Explain, and state the cases in which the object and consideration is unlawful.
4. Explain the doctrine of public policy. What are the heads of public policy? Do you agree with the view that the heads of public policy are not closed?
5. 'An agreement in restraint of trade is void'. Discuss the statement giving exceptions to it, if any.
6. "A wagering agreement is void and unenforceable, but it is not forbidden by law". Critically examine the statement with suitable examples.
7. 'No action is allowed on an illegal agreement'. Explain the statement and state the exceptions to this rule.

### PRACTICAL PROBLEMS

**Attempt the following problems, giving reasons for your answers:**

1. A promises to pay a certain sum of money to B, who is an intended witness in a suit A, in consideration sum of money to B, who is an intended witness but fails to get the money. Can he recover?  
{Hint. B cannot recover the money because an agreement which tends to create a conflict between interest and duty is illegal and void being opposed to public policy.}
2. In a suit by A against B for the recovery of Rs.5,000, A is in need of money. C agrees to provide funds to A in consideration of sharing one-fourth of the money recovered from B. Decide the validity of the agreement between C and A.  
{Hint. The agreement between C and A is valid . It is a champertous agreement which is valid provided its terms are fair and reasonable and is made with a bona fide object of assisting a just claim}
3. A, While his wife B was alive, promised to marry C in the event of B's death. Subsequently B died but A refused to marry C. C sues A for damages for breach of promise. Decide.  
{Hint. C will not succeed because an agreement for future marriage, after the death of first wife is against good public morals and hence illegal and void (Wilson vs Carnely, 1908, 1 K.B.729).}
4. A, entered into an agreement with B and engaged B for the purpose of performing puja (prayer) for A's success in a suit which he had before the court and promised to pay Rs.2,000 in the event of success. A succeeded in the suit. B sued A for the amount agreed upon. Will B succeed?  
{Hint: No, B will not succeed as the object of the agreement is to interfere with the course of justice, making the agreement is to exercise some extraneous influence, un authorised by law, on the mind of the court, the agreement is contrary to public policy and hence void (Bhagwan Datt Shastri vs Raja Ram, (1972) All.406). However, in Balasundara Mudaliar vs Mahomed Usman,A.I.R (1929) Mad. 812, a promise of reward

by a Muslim litigant to a Hindu devotee in consideration of offering prayers for the success of his suit has been held not against public policy. Thus accordingly the agreement between A and B is valid and B must succeed.)

5. A agrees to sell all the goods manufactured by him in the ensuing season to B. In breach of the said agreement A sold some goods manufactured during the said season to C. There upon B sued A for breach of contract. Will B succeed?

{Hint. Yes, B will succeed because the agreement between him and A is valid as it aims to promote business and does not restrain it.}

6. A agrees to sell his cow to B for Rs.500 if the cow gives 6 liters milk every day, but for Rs.10 only if it fails to do so. The cow fails, whereupon B demands the cow for Rs.10 as agreed. A refuses. B brings a suit against him. Will B succeed?

{Hint. No, B will not succeed as transaction, though ostensibly a sale, is in reality a wager (Brogden vs Marriott, 5 LJ (CP) 302).}

7. A lends money to B to enable him to pay off the loss which he has sustained in a wagering transaction with C. Can A recover the money lent by him?

{Hint. Yes, A can claim the amount from B because a wagering agreement is only void and not illegal and therefore a collateral to a wagering agreement remains valid except in Maharashtra and Gujarat States where wagering agreements are illegal.}

8. A and B are partners in a business. They enter into a wagering agreement with a third party. On losing the bet A satisfies his own and also B's liability under the agreement. Can A claim from B the amount paid on his behalf?

{Hint. Yes, A can claim the amount from B because wagering agreement is only void and not illegal and therefore a collateral contract can be enforced.}

9. A and B enter into a wagering agreement and deposit Rs. 500 each with C instructing him to give the total sum to the winner. A wins. He sues C for the stake amount. B also sues C for a return of the stake deposited by him with C. Decide.

{Hint. A cannot recover the bet amount from C because the law will not assist in the enforcement of in wagering agreement. Both A and B, however, can recover the amount deposited by them, because it is clear from the facts of the case that the sum is still in the hands of C. Of course they cannot even recover their deposit money if the transaction took place in Maharashtra and Gujarat States where a wagering agreement is not only void but also illegal.}

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# CHAPTER - 7

## CONTINGENT AND QUASI CONTRACTS

### CHAPTER OUTLINE

#### CONTINGENT CONTRACT

- CHARACTERISTICS OF CONTINGENT CONTRACT
- PERFORMANCE OF CONTINGENT CONTRACT
- CONTINGENT AND WAGERING AGREEMENTS

#### QUASI-CONTRACTS

- KINDS OF QUASI CONTRACTS
- NECESSARIES SUPPLIED TO INCOMPETENT PERSONS
- PAYMENT BY AN INTERESTED PERSON
- LIABILITY FOR NON-GRATUITOUS ACT
- FINDER OF LOST GOODS
- QUANTUM MERUIT
- QUASI CONTRACT AND GENERAL CONTRACT DISTINGUISHED

(2) A agrees to pay B Rs. 1,000 if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

**The event should not be the discretion of the promisor :** We have already discussed that an event, upon which the contingent contract is dependent, also includes an '*act of the party*'. However, the '*mere will or discretion*' of the promisor is not an event for the purpose of a contingent contract. Thus, if the performance of a contract depends upon the good will or discretion of the promisor, the contract is not contingent contract. Such a contract is rendered void on the ground of uncertainty.

### Difference between Contingent Contracts and Wagering Agreements

1. **Mutual Promise :** A wagering agreement consists of mutual promises each of which are conditional on the happening or non-happening of a certain event. A contingent contract may not consist of the mutual promise. It may be said that all wagers are contingent contracts but all contingent contracts are not wagers. For example, insurance contracts, contracts of indemnity and guarantee are contingent contracts but not wagers.
2. **Validity :** A wagering agreement is absolutely void. It is illegal in Maharashtra and England. But a contingent contract is a valid contract.
3. **Performance :** In a wagering agreement, neither party intends to perform the contract, but only to deal in differences. This is not so in contingent contracts.
4. **Interest in the subject matter :** In wagering agreement, the parties to the agreement have no other interests in the subject matter of the agreement, except for the stake. But in a contingent contract, parties do have some other interest in the subject matter. They are interested in the occurrence or non-occurrence of the event.
5. **Future Event :** In a wagering agreement the future event is the sole determining factor of the contract while in a contingent contract, the future event is merely collateral or incidental to the contract.
6. **Nature :** All contingent contracts are not of a wagering nature, because all the contingent contracts are not void. All wagering agreements are also contingent contracts because they are dependent on uncertain event.

### QUASI-CONTRACTS

Certain obligations are imposed by law. These obligations are similar to those which are created by contract. When such obligations are imposed by law in the absence of any contract, it is called *quasi-contract*. The quasi-contracts are based on the maxim of no man must grow rich out of another person's costs. In other words, these are based on the equitable principle, that *a person shall not be allowed to enrich himself at the expense of another*.

**Quasi-contracts under Indian Contract Act :** The Indian Contract Act refers the Quasi-contracts under the heading.

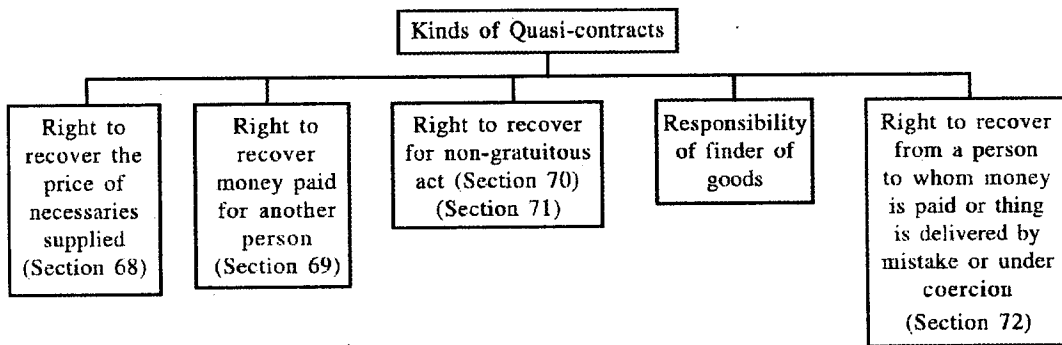
*Certain relations resembling those created by contract*, (Sections 68 to 72).

- (1) Claim for necessities supplied to a person incapable of contracting on his account (Sec. 68).

- (2) Reimbursement of a person paying money due by another in payment of which he is interested (Sec. 69).
- (3) Obligation of person enjoying benefit of a non-gratuitous act (Sec. 70).
- (4) Rights and liabilities of the finder of lost goods (Sec. 71).
- (5) Liability of persons to whom money is paid or things delivered, by mistake or under coercion (Sec. 72).

### Kinds of Quasi-Contracts

The various kinds of Quasi-contracts are shown below.



(1) **Necessaries Supplied to Person Incapable of Contracting** : 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 has furnished such supplies is entitled to be reimbursed from the property of such incapable person (Sec. 68). Thus, though the contracts by minors, idiots, lunatics, etc., are void, but Section 68 provides that their estates are liable to reimburse the trader who supplies them with necessaries of life. This is on the basis of quasi-contracts.

(2) **Payment by an Interested Person** : A person (i) who is interested in the payment of money, (ii) in which another is bound by law to pay, and (iii) who therefore pays it, is entitled to be reimbursed by the other (Sec. 69).

**Illustration** : B holds land in Chennai on a lease granted by A, the landlord. The revenue payable by A to the Government being in arrears towards his land is advertised for sale by the Government. Under the revenue law, the consequences of such a sale will be the annulment B's lease. B in order to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

The essentials of Sec. 69 are as follows : (i) The payments made should be bona fide for the protection of one's interest. (ii) The payment should not be a voluntary one. (iii) The payment must be such as the other party was bound by law to pay.

(3) **Liability for 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,

**Example III :** A, a singer contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her Rs. 100 for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence rescinds the contract. B must pay A for the five nights on which she had sung.

**Example IV :** A contracts to sing for B for Rs. 1,000 which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B Rs. 1,000 paid in advance.

(b) **In case of Non-gratuitous Act (Section 70) :** The obligation to pay arises if the following three conditions are satisfied :

- (i) The thing must have done or delivered lawfully;
- (ii) The person who had done or delivered the thing must not have intended to do so gratuitously; and
- (iii) The person for whom the act is done must have enjoyed the benefit of the act.

**Example :** A, a tradesman leaves goods at B's shop by mistake. B treats the goods as his own. He is bound to pay A for them.

(c) **In case of Act preventing the Completion of Contract :** If one party himself does not complete the contract or prevents the other party to complete the contract, the aggrieved party can sue on quantum meruit.

**Example :** C an owner of a magazine engaged P to write a book to be published as series in his magazine. After a few series were published, the publication of the magazine was stopped. It was held that P could claim payment on quantum meruit for the part already published. (*Planche Vs. Calburn*).

(d) **In case of Divisible Contract :** The party at default may sue on a quantum meruit if the following conditions are satisfied :

- (i) If the contract is divisible; and
- (ii) If the party not at default has enjoyed benefits of the part performance.

**Example :** S agreed to construct a house for H for Rs. 965 but he abandoned this contract after having done the work worth Rs. 333. Afterwards, H got the work completed. It was held that H could not recover anything for the work done because he was entitled to the payment only on the completion of the work.

(e) **In case of Indivisible Contract performed completely but badly :** The party at default may claim the lumpsum less deduction for bad work if the following conditions are satisfied :

- (i) If the contract is indivisible ;
- (ii) If the contract is for lumpsum;
- (iii) If the contract is completely performed; and
- (iv) If the contract is performed badly.

**Example :** X agreed to decorate Y's flat for a lumpsum of Rs. 20,000. X did the complete work but Y complained of faulty workmanship. It costs Y another Rs. 3,000 to remedy the defect. It was held that X could recover only Rs. 17,000 from Y (*Hoenig Vs. Issacs (1952)*).

**Planche Vs. Calburn, (1831)** : C engaged P to write a book on ancient armoury to be published in instalments in a periodical called "The Juvenile Library" for the fee of £100. After a few issues of the periodical had appeared, it was abandoned. Held, P could recover on quantum meruit for the work he had done under the contract.

#### Distinction between Quasi-Contract and General Contract

| <i>Basis of distinction</i>                         | <i>Quasi-contract</i>   | <i>Contract</i>  |
|---|---|--|
| 1. Essentials for the formation of a valid contract | The essentials for the formation of a valid contract are absent | The essentials for the formation of a valid contract are present |
| 2. Obligation                                       | Obligation is imposed by law.                                   | Obligation is created by the consent of the parties.             |

**Similarity between Quasi-contracts and Contracts** : The outcome of quasi-contracts resemble that created by a contract. So far as *claim for damages* are concerned, there is a similarity between a Quasi-contracts and contract because in case of breach of a quasi-contract, Section 73 provides for the same remedies as provided in case of breach of a contract.

*Compensation for failure to discharge obligation created by quasi-contracts* (Sec. 73) : When an obligation created by a quasi-contract has not been discharged, the injured party is entitled to receive the same compensation from the party in default, as if the sued person had contracted to discharge it and had broken his contract.

#### REVIEW QUESTIONS

1. What do you understand by a contingent contract? What are the essentials and legal rules for a valid contingent contract?
2. Define quasi-contracts. State the circumstances in which quasi-contractual obligations arise.
3. State the legal position of a finder of lost goods.
4. What is quantum meruit? Under what circumstances is quantum meruit granted?

#### PRACTICAL PROBLEMS

**Attempt the following problems, giving reasons for your answers:**

1. A agrees to construct a building for B for Rs.2 lakhs, on the terms that no payment shall be made till the completion of the work. Is this a contingent contract?  
{Hint. No, this is not a contingent contract because the uncertain event (i.e., A's completing the work). is not collateral to the contract but is the very thing contracted for, and is thus an integral part of the contract}.
2. A agrees to sell land to B at a price to be fixed by C.C refuses to fix the price. Is the contract enforceable?  
{Hint. No, the contract is not enforceable because by C's refusal to fix the price, the agreement becomes void for uncertainty in terms.}
3. A promises to pay B for his services whatever A himself will think right or reasonable. Later, being dissatisfied with the payment made, B sues A. Decide.  
{Hint. B's suit will not be admitted by the Court because if the performance of a promise is contingent upon the mere will and pleasure of the promisor, there is no contract. The rule of law being "agreements, the meaning of which is not certain, or capable of being made certain, are void" (Sec.29).}

A contract may be terminated or discharged in any one of the following ways :

- (i) Performance of the promise or tender, (ii) Mutual consent cancelling the agreement or substituting a new agreement in place of the old, (iii) Subsequent impossibility of performance, (iv) Operation of Law, and (v) Breach made by one party.

### DISCHARGE OF CONTRACT BY PERFORMANCE

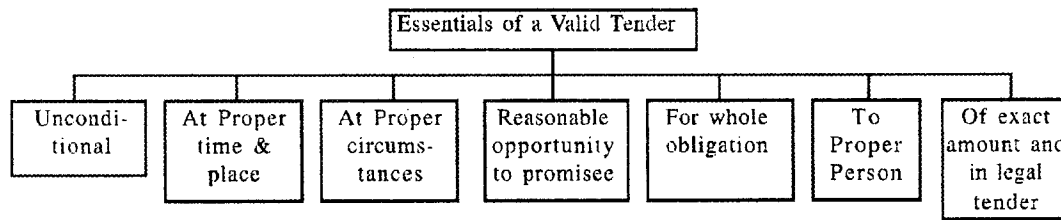
Performance may be (i) Actual Performance, or (ii) Attempted Performance. A party to contract is said to have actually performed his promise when he has fulfilled all his obligation under the contract. It then becomes a duty of the other party to do what he had undertaken to do. When both the parties perform their respective promises, a contract is said to have been actually performed. Actual performance brings the contract to an end.

Offer to perform is called *Tender of Performance*. When the parties to a contract offer to perform their respective promises it is a tender or offer of performance. Offer to perform or Tender may also be called *Attempted Performance*.

**Essentials of a Valid Tender :** Every offer of performance or tender must fulfil the following conditions :

1. *Tender must be unconditional.* A conditional offer of performance is not a good offer and the other party is entitled to reject it.
2. Tender must be made at a *proper time and place*.
3. Tender must be made under such *circumstances*, that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing, to fulfil the whole of the promise.
4. If the offer is an offer to delivery anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound to deliver (Section 38).
5. The tender must be of *whole and not only of the part*. A tender of less than actually due is not a tender at all.
6. Tender must be made to the promisee or his duly authorised agent. Tender made to a stranger would be invalid.
7. Tender made to one of several promisees has the same effect as a tender to all of them.
8. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of the promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby. (Section 67).
9. The tender must be in the *proper form*. Tender of money should be in the legal tender i.e., current coins/currency notes. A tender by cheque is valid when the person to whom it is tendered is willing to accept such payment.
10. The party making the tender must always be ready and willing to fulfil the obligation whenever called upon. If the tender is of cash payment, actual cash must be available in readiness for payment.

11. A mere *offer by post to pay the amount* is not a valid tender. There is no readiness and willingness in this case to pay the money then and there.
12. A tender may either be *tender of goods* or *tender of money*.



**Effect of Refusal to accept offer of performance (Section 38) :** Where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

**Effect of refusal of party to perform promise wholly (Section 39) :** When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he had signified by words or conduct, his acquiescence in its continuance.

### Persons entitled to demand Performance

1. **Promisee :** The performance of a contract can only be demanded by the promisee. A third party cannot demand the performance of the contract, even though it was made for his benefit.

2. **Legal Representative :** In case of death of the promisee, his legal representative can demand performance, unless a contrary intention appears from the contract or the contract is of personal nature.

3. **Joint promisees :** Where a person has made promise to two or more persons jointly, the performance of the promise may be demanded either (i) by all the promisees jointly; or (ii) in case of death of any of the joint promisees, by the representatives of such deceased person jointly with the surviving promisee; or (iii) in case of death of all joint promisees, by the representatives of all of them jointly.

4. **Third party :** A third party can demand performance of a contract in the following cases : (i) *Trust* : Where a contract between A and B creates an express or implied trust in favour of C, C can demand performance. (ii) *Estoppel* : Where a party is estopped from denying his liability to pay or to do something to a third person, that third person can demand performance. (iii) *Contract for maintenance or marriage expenses of a female member* : Where on a partition of a joint Hindu family, a benefit is secured to female member of the family who was entitled to maintenance or marriage expenses such female member can demand performance. (iv) Where the money to be paid under the contract is *charged on some immovable property*. (v) Where the rights under a *contract have been assigned to a third person* by operation of law, or act of the parties.

### Persons bound to perform the promise in a contract

1. **By the parties :** According to Section 37 of the Act, the parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with

regard the time fixed for performance as of the essence of the contract, so that if the performance is not made at the stipulated time, the other party can treat the whole contract as broken and claim damages on that footing.

- (1) **Effect of failure to perform at fixed time contract in which time is essential :** When a party to a contract promises to do a certain thing at or before a specified time, and fails to do any such thing at or before the specified time the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. Thus, whenever time is of the essence of the promise, failure to perform the whole of the promise at the stipulated time entitles the other party to avoid the agreement
- (2) **Effect of such failure when time is not essential :** If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time. But the promisee

is entitled to compensation from the promisor for any loss occasioned to him by such failure.

- (3) **Effect of acceptance of performance at time other than that agreed upon** : If in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance, he gives notices to the promisor of his intention to do so.

### **PLACE FOR PERFORMANCE OF A CONTRACT**

**Without application for performance by promisee (Section 49)** : When a promise is to be performed, without application by the promisee, and no place is fixed for the performance of it, is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place. If, however, a place for performance is fixed by the contract, the promisor is bound to perform at that place only. Place to be fixed should be reasonable to both the parties. Place for performance applies both to delivery of goods as well as to payment of money.

**Manner of Performance (Section 50)** : The performance of any promise may be made in any manner or at any time, which the promisee prescribes or sanctions.

### **Performance of Reciprocal Promises**

'*Reciprocal promises*' means a promise in return for a promise. Thus, where a contract consists of promises 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 may be divided into three groups. 1. Mutual and Dependent, 2. Mutual and Independent, and 3. Mutual and Concurrent.

1. **Mutual and Dependent** : In such a case, the performance of one party depends upon the prior performance of the other party. In such a case, if the promisor who must perform fails to perform it, he cannot claim the performance of the reciprocal promise. On the other hand, he must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.
2. **Mutual and Independent** : In such cases, each party must perform his promise without waiting for the performance or readiness to perform of the other.
3. **Mutual and Concurrent** : In such cases, the promise has to be simultaneously performed. According to Section 51, when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

**Reciprocal promise 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.

**Alternative promises (Section 58)** : In the case of an alternative promise, one branch of which is legal and other illegal, the legal branch alone can be enforced. The rule also applies