could provide a judge with an excuse for invalidating any contract which he violently disliked." With this danger in mind, judges have sometimes criticised the doctrine of public policy. In the words of Burrough, J., "public policy was a very unruly horse, and when once you get astride it you never know where it will carry you." [*Richardson* v. *Mellish*, (1824) 2 Bing. 229, 252]. In *Janson* v. *Driefontein Consolidated Mines Ltd.*, (1902) A.C. 484, Lord Davey observed that "public policy is always an unsafe and treacherous ground for legal decisions.... and that categories of public policy are closed, and that no Court can invent a new head of public policy". But this represents a very rigid and narrow view. According to this "narrow view" school, Courts cannot create new heads of public policy. The adherents of the "narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground has been well established by authorities. A new head of public policy can be coined only when the harm to the public policy is substantially incontestable [*Fender* v. *Mildmay*, (1938) A.C. 1].

According to the current school of thought, known as the "broad view" school, the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Lord Denning, however, was not a man to shy away from unruly horses. In *Enderby Town Football Club Ltd.* v. *Football Assn. Ltd.*, he said : 'With a good man in the saddle the unruly horse can be kept in control. It can jump over obstacles." Again Danckwerts, L.J. in *Nagle* v. *Fielden*, (1966) 2 Q.B. 633, observed : "The law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it."

Rejecting the argument that new heads of public policy should not be evolved for the risk of unruliness and uncertainty involved in such an attempt, it has been held in *Ratanchand Hirachand* v. *Asker Nawaz Jung*, A.I.R. (1976) A.P. 112 that in a modern progressive society with fast changing social values and concepts, new heads of public policy need to be evolved whenever necessary. Law cannot afford to remain static. It has, of necessity, to keep pace with the progress of society and judges are under an obligation to evolve new techniques to meet the new conditions and concepts.

A reference to the case of *Gherulal Parakh* v. *Mahadeodas*, A.I.R. (1959) S.C. 781 will also prove to be enlightening at this stage. Subba Rao, J. (as he then was) observed in this case :

> "Public policy is a *vague* aand *unsatisfactory* term, it is an *elusive concept*.... The primary duty of a Court is to enforce a promise which the parties have made and to uphold the *sanctity* of contracts which form the basis of society ; but in certain cases, the Court may relieve them of their duty on a rule founded on what is called public policy. This doctrine of public policy is only a branch of Common Law... the doctrine should only be invoked in *clear* and *incontestable* cases of harm to the public. Though the heads of public policy are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is *advisable* in the interest of *stability* of the society *not to make any attempt to discover new heads* in these days."

In another landmark judgment *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath*, A.I.R. (1986) S.C. 1571, 1612, the Supreme Court observed :

"The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the Courts and similarly where there has been a well-recognized head of public policy, the Courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy.... Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the Court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our Courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

Some of the agreements which are, or which have been held to be, opposed to public policy and are unlawful are as follows :

1. *Agreements of trading with enemy.* An agreement made with an alien enemy in time of war is illegal on the ground of public policy. This is based upon one of the two reasons : either that the further performance of the agreement could involve commercial intercourse with the enemy, or that the continued existence of agreement would confer upon the enemy an immediate or future benefit. Contracts which are entered into before the outbreak of war are either suspended or dissolved according as the intention of the parties can or cannot be carried out by postponing performance till the end of hostilities.

2. *Agreement to commit a crime.* Where the consideration in an agreement is to commit a crime, the agreement is opposed to public policy. The Court will not enforce such an agreement. Likewise an agreement to indemnify a person against consequences of his criminal act is opposed to public policy and hence unenforceable.

*Examples.* (*a*) *A* promises to indemnify *B* in consideration of his beating *C*. The agreement is opposed to public policy.

(*b*) *A* promises to indemnify a firm of printers and publishers of a paper against the consequences of any libel which it might publish in its paper. *Held*, *A*'s promise could not be enforced in a law Court where the firm was compelled to pay damages for a published libel [*W.H. Smith & Sons* v. *Clinton*, (1908) 26 T.L.R. 34].

3. *Agreements which interfere with administration of justice.* An agreement the object of which is to interfere with the administration of justice is unlawful, being opposed to public policy. It may take any of the following forms :

(*a*) *Interference with the course of justice.* An agreement which obstructs the ordinary process of justice is unlawful. Thus an agreement for using improper influence of any kind with the judges or officers of justice is unlawful. But an agreement to refer present or future disputes to arbitration is valid.

(b) *Stifling prosecution.* It is in public interest that if a person has committed a crime, he must be prosecuted and punished. "You shall not make a trade of felony (a grave crime)." [*Williams* v. *Bayley*, (1866) 1 H.L. 200]. Hence an agreement not to prosecute an offender is an agreement for stifling prosecution and is unlawful. Thus where *A* promises to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the stolen property, the agreement is unlawful. But a compromise in case of compoundable offences is valid.

(c) *Maintenance and champerty.* 'Maintenance' is an agreement to give assistance, financial or otherwise, to another to enable him to bring or defend legal proceedings when the person giving assistance has got no *legal interest* of his own in the subject-matter. For example, *A* offers to pay *B* Rs. 2,000 if *B* will sue *C*. *A*'s motive is to annoy *C*. This agreement between *A* and *B* is a maintenance agreement. '*Champerty*' is an agreement whereby one party is to assist another to bring an action for recovering money or property, and is to *share in the proceeds of the action*. For example, *A* agrees to pay the expenses if *B* sues *C*, and *B* agrees to give *A* one-half of any proceeds received by *B* as a result of the said suit. This a champertous agreement. Under the English Law, both these agreements are void. The Indian Law, however, does not make them absolutely void. If the object of a contract is just to *assist* the other party in making a reasonable claim arising out of a contract and then to have a fair share in the profit, the contract is valid.

4. *Agreements in restraint of legal proceedings.* Sec. 28 (as amended in 1996) which deals with these agreements renders void two kinds of agreements, *viz.*,

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

(b) *Agreements curtailing period of limitation.* Agreements which curtail the period of limitation prescribed by the Law of Limitation are void because their object is to defeat the provisions of law.

*Example.* The rules of a crossword competition of a weekly published by *X* Ltd. are (1) that the first prize will be awarded for the solution that agrees most nearly with the one kept in a sealed cover; (2) that in matters arising in the competition, the editor's decision shall be final and legally binding on the competitors; and (3) that at the expiration of three months from the publication of the prize list, *X* Ltd. shall not be liable to pay any claim unless a suit for it is then pending.

*Held*, Rule No. 1 makes the competition a wagering agreement under Sec. 30 (discussed in next Chapter) [*State of Bombay* v. *R.M.D. Chamarbaugwala*, (1957) S.C. 699]; Rule No. 2 restricts persons absolutely from enforcing their rights through Court of law under Sec. 28; and Rule No. 3 limits the time to a period shorter than the period prescribed by the Law of Limitation.

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

5. *Trafficking in public offices and titles.* Agreements for the sale or transfer of public offices and titles or for the procurement of a public recognition like Padma Vibhushan or Param Veer Chakra for monetary

consideration are unlawful, being opposed to public policy. Such agreements, if enforced, would lead to inefficiency and corruption in public life. Similarly, an agreement to pay money to a public servant to induce him to act corruptly or to retire and thus make way for the appointment of the promisor or an agreement with voters to procure their votes for monetary consideration are void on the ground of public policy.

*Examples.* (*a*) *A* promised to obtain an employment to *B* in a public office and *B* promised to pay *A* Rs. 1,000. *Held*, the agreement was against public policy and illegal [*Parkinson* v. *College of Ambulance, Ltd.*, (1925) 3 K.B. 1].

(*b*) *R* paid a sum of Rs. 15,000 to *A* who agreed to obtain a seat for *R*'s son in a Medical College. On *A*'s failure to get the seat, *R* filed a suit for the refund of Rs. 15,000. *Held*, the agreement was against public policy [*N.V.P. Pandian* v. *M.M. Roy*, A.I.R. (1979) Mad. 42].

6. *Agreements tending to create interest opposed to duty.* If a person enters into an agreement whereby he is bound to do something which is against his public or professional duty, the agreement is void on the ground of public policy.

*Examples.* (*a*) *P* directs *A*, his agent, to buy a certain house for him. *A* tells *P* that it cannot be bought and buys the house for himself. *P* may, on discovering that *A* has bought the house, compel *A* to sell it to him (*P*) at the price *A* gave for it.

(*b*) An agreement by a newspaper proprietor not to comment on the conduct of a particular person is unlawful being opposed to public policy [*Neville* v. *Dominion of Canada News Co. Ltd.*, (1915) 3 K.B. 556].

7. *Agreements in restraint of parental rights.* A father, and in his absence the mother, is the legal guardian of his/her minor child. This right of guardianship cannot be bartered away by any agreement. A father is entitled by law to the custody of his legitimate child. He cannot enter into an agreement which is inconsistent with his duties arising out of such custody. If he enters into any such agreement, it shall be void on the ground of public policy.

8. *Agreements restricting personal liberty.* Agreements which unduly restrict the personal freedom of the parties to it are void as being against public policy.

*Example.* A debtor agreed with his money-lender that he would not, without the lender's written consent, leave his job, or borrow money, or dispose of his property, or change his residence. *Held*, the agreement was void [*Horwood* v. *Millar's Timber & Trading Co.*, (1917) 1 K.B. 305].

9. *Agreements in restraint of marriage.* Every agreement in restraint of the marriage of any person, other than a minor, is void (Sec. 26). This is because the law regards marriage and married status as the right of every individual.

*Examples.* (*a*) *P* promised to marry *L* only and none else and to pay *L* a sum of Rs. 2,000 if he married someone else. *P* married *X*. *Held*, *L* could not recover the sum agreed as the agreement was in restraint of marriage [*Lowe* v. *Peers*, (1768) Burr. 225].

(*b*) The consideration under a sale deed was for marriage expenses of a minor girl aged 12. *Held*, the sale was a void transaction, being

opposed to public policy [*Maheswar Das* v. *Sakhi Dei*, A.I.R. (1978) Ori. 84].

10. *Marriage brokerage or brocage agreements.* An agreement by which a person, for a monetary consideration, promises in return to procure the marriage of another is void, being opposed to public policy. Similarly, an agreement to pay money to the parent or guardian of a minor in consideration of his/her consenting to give the minor in marriage is void, being opposed to public policy.

11. *Agreements interfering with marital duties.* Any agreement which interferes with the performance of marital duties is void, being opposed to public policy. Such agreements have been held to include the following :

(*a*) A promise by a married person to marry, during the lifetime or after the death of spouse [*Roshan* v. *Mahomad*, (1887) P.R. 46].

(*b*) An agreement in contemplation of divorce, *e.g.*, an agreement to lend money to a woman in consideration of her getting a divorce and marrying the lender [*Tikyat* v. *Manohar*, 28 Cal. 751].

(*c*) An agreement that the husband and wife will always stay at the wife's parents' house and that the wife will never leave her parental house.

12. *Agreements to defraud creditors or revenue authorities.* An agreement the object of which is to defraud the creditors or the revenue authorities is not enforceable, being opposed to public policy. A contract by which an employee gets an expense allowance grossly in excess of the expenses actually incurred by him is illegal and a fraud on revenue authorities. Similarly, every transfer of property which is not made (*i*) before and in consideration of marriage, or (*ii*) to a purchaser in good faith and for valuable consideration, is void against the Official Receiver or Assignee, if the transferor is adjudged insolvent on a petition presented within two years of the date of the transfer.

13. *Agreements in restraint of trade.* An agreement which interferes with the liberty of a person to engage himself in any lawful trade, profession or vocation is called an 'agreement in restraint of trade'. Public policy requires that every man should be at liberty to work for himself and should not be at liberty to deprive himself of the fruit of his labour, skill or talent by any contract that he enters into [*S.B. Fraser & Co.* v. *The Bombay Ice Mfg. Co.*, (1904) 29 Bom. L.R 107]. It is also in the interest of the community that every man should be at liberty to engage himself in any trade, profession or business and use his skill to the best of his capacity consistent with the good of the community. As such, every agreement, by which anyone is restrained from exercising a *lawful profession, trade or business* of any kind, is *to that extent void* (Sec. 27).

Where an agreement is challenged on the ground of its being in restraint of trade, the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Once this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract [*Niranjan Shankar* v. *Century Spinning & Mfg. Co. Ltd.*, A.I.R. (1967) S.C. 1068].

*Examples.* (*a*) Out of 30 makers of combs in the city of Patna, 29 agreed with *R* to supply him and to no one else all their output. *R* was free to reject the goods if he found no market for them. *Held* the

agreement was void [*Shaikh Kalu* v. *Ram Saran Bhagat*, (1909) 8 C.W.N. 388].

(*b*) *A*, who was carrying on business of brazier (pan for holding burning coal), promised another person *B*, carrying on a similar trade in the same locality, to stop his business in consideration of *B* giving him a certain amount which he had advanced to his workers. *B*, subsequent to *A*'s closing the business, refused to pay. *A* filed a suit for the recovery of the amount. *Held*, the agreement was void [*Madhav* v. *Raj Coomar*, (1874) 18 B.L.R. 76].

In England the law relating to restraint of trade is based on the famous case of *Nordenfelt* v. *Maxim Nordenfelt Gun Co.*, (1894) A.C. 535. The general principle of law there is that all restraints of trade are void. A restraint can however be justified if it is reasonable in the interests of the contracting parties and the public. In India it is valid if it falls within any of the statutoty exceptions.

**Exceptions.** The following are the exceptions to the rule that "an agreement in restraint of trade is void" :

(*i*) *Sale of goodwill.* A seller of goodwill of a business may be restrained from carrying on (*i*) *a similar* business, (*ii*) within *specified* local *limits*, (*iii*) so long as the *buyer* or any person deriving title to the goodwill from him *carries on a like business* : provided (*iv*) that such limits appear to the Court reasonable regard being had to the nature of the business (Exception to Sec. 27)

"Limits" means "local limits" and the duration of the restraint is so long as the buyer or any person deriving title to the goodwill from him carries on the like business [*Hukmi Chand* v. *Jaipur Ice & Oil Mills Co.*, A.I.R. (1980) Raj. 155].

(2) *Partners' agreements.* (*a*) A partner shall not carry on any business other than that of the firm while he is a partner [Sec. 11 (2) of the Indian Partnership Act, 1932].

(*b*) An outgoing partner may agree with his partners not to carry on a business similar to that of the firm within a specified period or within specified local limits [Sec. 36 (2) of the Indian Partnership Act, 1932].

(*c*) 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 (Sec. 54 of the Indian Partnership Act, 1932).

(*d*) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business. But, subject to agreement between him and the buyer, he may not (*a*) use the firm name, (*b*) represent himself as carrying on the business of the firm, or (*c*) solicit custom of persons who were dealing with the firm before its dissolution [Sec. 55 (2) of the Indian Partnership Act, 1932].

(*e*) Any partner may, upon the sale of goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits [Sec. 55 (3) of the Indian Partnership Act, 1932].

In cases (*b*), (*c*) and (*e*), the Courts will enforce such agreements *only* if the *restrictions* imposed are *reasonable*.

**Trade combinations**

Traders and manufacturers in the same line of business normally form associations to regulate business or to fix prices. The regulations as to the opening and closing of business in a market, licensing of traders, supervision and control of dealers and the mode of dealing are not unlawful even if they are in restraint of trade.

*Examples.* (*a*) An agreement between certain ice manufacturing companies not to sell ice below a stated price and to divide the profits in a certain proportion is not void under Sec. 27. Such agreements are neither in restraint of trade nor opposed to public policy [*S.B. Fraser & Co.* v. *Bombay Ice Mfg. Co.*, (1904) 29 Bom. L.R. 107].

(*b*) A combination to regulate supply and maintain price is not necessarily disadvantageous to the public and as such is not opposed to public policy [*North Western Salt Co.* v. *Electrolytic Co.*, (1914) A.C. 461].

(*c*) An agreement among the members of a society of hop growers to deliver all hops grown by them to the society which was to sell the hops and divide the profit among the members is valid [*English Hop Growers* v. *Derring*, (1928) 2 K.B. 174].

But a combination which tends to create monopoly and which is against the public interest is void [*Attorney General of Australia* v. *Adelaid S.S. Co.*, (1913) A.C. 724]. Same is the case when two firms enter into an agreement to avoid competition [*Jai Ram* v. *Kahna Ram*, A.I.R. (1963) H.P. 3 ; *Kores Mfg. Co. Ltd.*, v. *Kolok Mfg. Co. Ltd.* (1958) 2 All E.R. 65].

**Service contracts**

Sometimes an employee, by the terms of his service agreement, is prevented from accepting—

(*i*) any other engagement during his employment, and/or

(*ii*) a similar engagement after the termination of his services.

As regards the first restraint, it is valid and is not in restraint of trade if it is to operate while the employee is contractually bound to serve his employer [*Niranjan Shankar* v. *Century Spinning & Mfg. Co. Ltd.*, A.I.R. (1967) S.C. 1068]. The doctors, for example, are usually debarred from private practice during the term of their employment.

As regards the second restraint, it is void if its object is merely to restrain competition by an employee in his employer's business. Therefore, a restraint on an employee not to engage in a similar business, or not to accept a similar engagement, after the termination of his services, is void. In *Brahamputra Tea Company* v. *Scarth*, (1885) 11 Cal. 545, it was held that an agreement restraining an employee from taking service or engaging in any similar business for a period of 5 years after the termination of his service was void. Similarly, a restraint on an actor that he would not act in any theatre other than that of the employer during his tour of India was held to be void, being in restraint of trade [*Cohen* v. *Wilkie*, 16 C.W.N. 534]

If a restraint is intended to protect an employer against an employee making use of trade secrets learned by him in the course of his employment, the restraint is valid provided it is not for any other purpose also.

*Examples.* (*a*) *A* was chiefly engaged in making glass bottles. *B*, his works manager, was instructed in certain confidential methods

concerning correct mixture of gas and air in the furnaces. *B* agreed that during the five years after the termination of his service, he would not carry on in the United Kingdom, or be interested in, glass bottle manufacture. *Held.* *A* was entitled to protection and that the restraint was reasonable [*Forster & Sons Ltd.* v. *Suggett*, (1918) 35 T.L.R. 87].

(*b*) A servant copied the names and addresses of his employer's customers for use after he left his employment. *Held*, he could be restrained from using the list [*Robb* v. *Green*, (1895) 2 Q.B. 315].

(*c*) *H* employed *A* on a highly skilled work with access to the manufacturing data. In his spare time *A* worked for *B* on a similar work in competition with *H*. *Held*, *A* was in breach of his duty and could be restrained from working for *B* [*Hivac Ltd.* v. *Park Royal*, (1946) Ch. 169].

However, an employer cannot prevent an employee from earning his living by the exercise of his skill and the use of his knowledge. In *Herbert Morris, Ltd.* v. *Saxelby*, (1916) 1 A.C. 688, it was observed : "A man's aptitudes, his skill, his dexterity, his manual or mental ability..... are not his master's property ; they are his own property. There is no public interest which compels the rendering of these things dormant or sterile or unavailing."

*Example.* *A*, a tailor, employed as his assistant *L* under a contract by which *L* agreed on the termination of his employment not to carry on business as a tailor within sixteen kilometres of *A*'s establishment. *Held*, the agreement was void [*Attwood* v. *Lamont*, (1920) 3 K.B. 571].

**SUMMARY**

An agreement is a contract if it is made for a lawful consideration and with a lawful object (Sec. 10).

Every agreement of which the object or consideration is unlawful is void. The consideration or object of an agreement is unlawful if—it is forbidden by law ; or it is fraudulent ; or involves or implies injury to the person or property of another ; or the Court regards it as immoral, or opposed to public policy (Sec. 23).

**Effects of illegality.** No action is allowed on an illegal agreement. This rule is based on the following two maxims : (1) No action arises from a base cause. (2) Where there is equal guilt, the defendant is in a better position.

The effects of illegality are summed up as follows : (1) The collateral transactions to an illegal agreement also become tainted with illegality. (2) No action can be taken for the (*a*) recovery of money paid or property transferred under an illegal agreement, and (*b*) breach of an illegal agreement.

AGREEMENTS OPPOSED TO PUBLIC POLICY

An agreement is said to be opposed to public policy when it is injurious to the welfare of the society or it tends to be harmful to the public interest. The following agreements are, or have been held to be, opposed to public policy :

1. Agreements of trading with enemy. 2. Agreement to commit a crime. 3. Agreements interfering with administration of justice.These include (*a*) agreements for stifling prosecution, and (*b*) agreements which interfere with the course of justice. 4. Agreements in restraint of legal proceedings. These include (*a*) agreements to oust the jurisdiction of Courts, and (*b*) agreements to vary periods of limitation. 5. Agreements for the sale of public offices. 6. Agreements tending to create interest opposed to duty. 7. Agreements in restraint of parental rights. 8. Agreements restricting personal liberty. 9. Agreements in restraint of marriage. 10. Marriage brokerage agreements. 11. Agreements in restraint of marriage. 10. Marriage brokerage agreements. 11. Agreements interfering with marital duties. 12. Agreements in fraud of creditors or revenue authorities. 13. Agreements in restraint of trade. An agreement in restraint of trade is one which restrains a person from freely exercising his trade, business or profession. Every agreement, by which anyone is restrained from exercising a lawful profession, trade or business of any kind is, to that extent, void (Sec. 27). Exceptions are made

in case of agreements for sale of goodwill and partners' agreements provided the restraint is reasonable.

### TEST QUESTIONS

1. Under what circumstances is the object or consideration of a contract deemed unlawful ? Illustrate with examples.

2. What is an illegal agreement? What are the effects of illegality ?

3. "No action is allowed on an illegal agreement." What are the exceptions to this rule ?

4. "In cases of equal guilt, the position of the defendant is better than that of the plaintiff." Comment.

5. What are immoral agreements ? Why are they bad in law ?

6. Discuss the doctrine of public policy. Give examples of agreements contrary to public policy.

7. Name several types of agreements which are illegal because they are contrary to public policy.

8. "An agreement in restraint of trade is void." Examine this statement mentioning exceptions, if any.

9. "A person ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion in his own way." Discuss.

### PRACTICAL PROBLEMS

**Attempt the following problems, giving reasons :**

1. *A* is an employee of *B* & *Co.* After leaving the service, he agrees with *B* & *Co.* that he shall not employ himself in any similar concern within a distance of 1,000 kilometres of the town. Is this restraint valid ?

[*Hint* : No, unless it is intended to protect *B* & *Co.* against *A* making use of trade secrets learned by him in the course of his employment (*Forster &Sons, Ltd.* v. *Suggett*). However, *B* & Co. cannot prevent *A* from earning his living by the exercise of his skill and the use of his knowledge (*Herbert Morris, Ltd.* v. *Saxelby*)].

2. *A* borrows Rs. 500 from *B* to purchase certain smuggled goods from *C*. Can *B* recover the amount from *A* if he (*a*) knows of *A*'s purpose for which he borrows money, (*b*) does not know of *A*'s purpose .

[*Hint* :(*a*) No. (*b*) Yes].

3. *A* grants lease of certain premises at Calcutta to *B* for one year, knowing that the premises will be used for the purpose of (*a*) prostitution, or (*b*) installing machinery for minting base coins, at a monthly rental of Rs. 500. *B* does not pay the rent. Can *A* recover the rent?

[*Hint* : No (*Pearce* v. *Brooks*].

4. *X* promises to drop prosecution which he has instituted against *R* for robbery and *R* promises to restore the value of things taken. Can *X* enforce this promise ? If so, give reasons.

[*Hint* : No (Sec. 23).*Williams* v. *Bayley*)].

5. *G* pays Rs. 500 to *A*, a civil servant employed in a Government department, in consideration of *A*'s promise that a Government contract which is at the disposal of his department will be placed with *G*. Before this can be done, *A* is transferred to another department. *G* now wishes to reclaim from *A* Rs. 500 paid to him. Will *G* succeed ?

[*Hint* : No].

6. *A* promises to pay Rs. 500 to *B* who is an intended witness in a suit against *A* in consideration of *B*'s absconding himself at the trial. *B* absconds but fails to get the money. Can he recover ?

[*Hint* ; No, as the agreement is unlawful, being opposed to public policy].

7. *A*, a Mumbai doctor, employed another doctor, *B*, as an assistant for a period of three years on a salary of Rs. 5,000 per mensem. The agreement between *A* and *B* provided that after the termination of his employment *B* should not practise as a doctor in Mumbai within a radius of one kilometer of *A*'s dispensary for a period of one year and if *B* did so, he should pay Rs. 20,000 to *A* as liquidated damages. Immediately after the termination of his employment *B* began to practise as a

doctor next door to *A*'s dispensary. *A* thereupon sued *B* for the recovery of Rs. 20,000. How would you decide ?

[*Hint* : *A* cannot recover Rs. 20,000 from *B* as the agreement between them is void, being in restraint of trade (Sec. 27)].

8. *A* advances Rs. 2,000 to *B*, a married woman, to enable her to obtain a divorce from her husband. *B* agrees to marry *A* as soon as she obtained a divorce. *B* obtains the divorce but refuses to marry *A*. Can *A* recover the amount ?

[*Hint* : No (*Tikyat* v. *Manohar*)].

9. *A* sells his grocery business, including goodwill, to *B* for a sum of Rs. 50,000. It is agreed that *A* is not to open another grocery store in the whole of India for the next ten years. *A* opens another store in the same city two months later. What are the rights of *A* ?

[*Hint* : *B* cannot take any legal action against *A* (Sec. 27)].

10. *A* borrowed Rs. 10,000 from *B* for starting a gambling house. Afterwards he refused to return the money. What is the remedy available to *B* ?

[*Hint* : *B* cannot recover the money if he knows the purpose for which *A* borrowed money ; he can recover if he does not know the purpose].

11. *A*'s wife *B* paid Rs. 500 to *C* to be given as a bribe to a jailor for procuring release for her husband from jail. The jailor failed to procure the release. Can *B* recover the amount ?

[*Hint* : No, as the agreement is unlawful, being opposed to public policy (Sec. 23)].

12. *A* enters into a contract with *B* that he (*A*) shall sell her (*B*) his house for Rs. 20,000. They further agree that if (*B*) uses the house for carrying out prostitution she shall pay *A* Rs. 40,000 for it. Is this contract, as regards both parts, enforceable ?

[*Hint* : The first set of promises is a contract, but the second set is a void agreement (Sec. 57)].

13. S & Co., a firm of printers, agree to print 1,000 copies of a book for B & Co., a firm of publishers. After printing the book and delivering all copies to B & Co., S & Co. discover for the first time that parts of the book are libellous. B & Co. are now refusing to pay S & Co., the contract price. Advise S & Co.

[*Hint* : S & Co. can recover the printing charges on *Quantum Meruit*].

14. *X*, a physician practising in New Delhi, took *Y* as his assistant for three years during which *Y* agreed not to practise of his own in New Delhi. At the end of a year from the date of agreement with *X*, *Y* began his own independent practice while still in service. Has *X* any legal remedy against *Y* ?

[*Hint* : *X* can get an injunction from the Court restraining *Y* from practising].

15. *A* and *B* agree that *A* shall sell his house to *B* for a sum of Rs. 1 lakh provided he used it for residential purposes and would charge Rs. 2 lakhs if he were to use the house for gambling. It is further agreed between them that the consideration shall be paid after a year of registration of the house in the name of *B*. *A* executes a transfer in favour of *B*. After six months, *B* uses the house for gambling purposes. Discuss the rights of *A*.

[*Hint* : *A* can recover only Rs. 1 lakh (Sec. 57)].

16. *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 her. *C* sues *A* for damages for breach of promise to marry her. Decide.

[*Hint* : The promise is unenforceable (*Wilson* v. *Carnby*, (1908) 1 K.B. 729)].

# 7

# Void Agreements

An agreement, though it might possess all the essential elements of a valid contract, must not have been expressly declared as void by any law in force in the country. The Contract Act specifically declares certain agreements to be void. A *void agreement* is one which is not enforceable by law [Sec. 2 (*g*). Such an agreement does not give rise to any legal consequences and is void *ab initio*.

## VOID AGREEMENTS

The following agreements have been expressly declared to be void by the Contract Act :

1. Agreements by incompetent parties (Sec. 11).
2. Agreements made under a mutual mistake of fact (Sec. 20).
3. Agreements the consideration or object of which is unlawful (Sec. 23).
4. Agreements the consideration or object of which is unlawful in part (Sec. 24).
5. Agreements made without consideration (Sec. 25)
6. Agreements in restraint of marriage (Sec. 26).
7. Agreements is restraint of trade (Sec. 27).
8. Agreements in restraint of legal proceedings (Sec. 28).
9. Agreements the meaning of which is uncertain (Sec. 29).
10. Agreements by way of wager (Sec. 30).
11. Agreements contingent on impossible events (Sec. 36).
12. Agreements to do impossible acts (Sec. 56).
13. In case of reciprocal promises to do things legal and also other things illegal, the second set of reciprocal promises is a void agreement (Sec. 57).

Agreements from Nos. 1 to 8 and 13 have already been discussed in earlier Chapters. Agreements at Nos. 11 and 12 will be discussed in subsequent Chapters. The other agreements are discussed in this Chapter.

**Agreements the meaning of which is uncertain** (Sec. 29)

Agreements, the meaning of which is not certain, or capable of being made certain, are void (Sec. 29). The uncertainty may be as to (*i*) existence of, (*ii*) quantity of, (*iii*) quality of, (*iv*) price of, or (*v*) title to, the subject-matter.

*Examples.* (*a*) *A* agrees to sell to *B* "100 tons of oil". There is nothing to show what kind of oil was intended. The agreement is void for uncertainty.

(*b*) *A* agrees to sell to *B* 100 tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(*c*) *A*, who is a dealer in coconut oil only, agrees to sell to *B* "100 tons of oil". The nature of *A*'s trade affords an indication of the

meaning of the words, and *A* has entered into a contract for the sale of 100 tons of coconut oil.

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

(*e*) *A* agrees to sell to *B* "100 quintals of rice at a price to be fixed by *C*". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(*f*) *A* agrees to sell to *B* "my white horse for Rs. 5,000 or Rs. 8,000". There is nothing to show which of the two prices was to be given. The agreement is void.

(*g*) *L* promised to pay an extra £ 5 to *G* if the horse which he purchased from *G* proved lucky. The promise is too vague to be enforced [*Guthing* v. *Lynn*, (1831) 2 B. & Ad. 232].

(*h*) *A* agreed to pay a certain sum when he was able to pay. *Held*, the agreement was void for uncertainty [*Pushpabala* v. *L.I.C. of India*, A.I.R. (1978) Cal. 221].

**Wagering agreements or wager** (Sec. 30)

A wager is an agreement between two parties by which one promises to *pay money* or *money's worth on the happening* of some *uncertain event* in consideration of the other party's promise to pay if the event does not happen. Thus if *A* and *B* enter into an agreement that *A* shall pay *B* Rs. 100 if it rains on Monday, and that *B* shall pay *A* the same amount if it does not rain, it is a wagering agreement. The event may be uncertain either because it is to happen in future or if it has already happened, the parties are uncertain and express opposite views such as whether Hans Raj College were the champions in wrestling in 1990, or whether the result of an election which is over has gone in favour of party *X* or party *Y*.

The term 'wager' has been explained in the following decided cases :

"A contract by *A* to pay money to *B* on the happening of a given event in consideration of *B*'s promise to pay money to *A* on the event not happening." [*Hampden* v. *Walsh*, (1876) 1 Q.B.D. 189].

"The essence of gambling and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature, that is to say, if the event turns out one way *A* will lose but if it turns out the other way he will win." [*Thacker* v. *Hardy*, (1878) 4 Q.B.D. 695].

"It is essential to a wagering contract that each party under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract." [*Carlill* v. *Carbolic Smoke Ball Co.*, (1892) 2 Q.B. 484].

*Essentials of a wagering agreement*

(1) *Promise to pay money or money's worth.* The wagering agreement must contain a promise to pay money or money's worth.

(2) *Uncertain event.* The promise must be conditional on an event happening or not happening. A wager generally contemplates a future event, but it may also relate to a past event provided the parties are not aware of its result or the time of its happening.

(3) *Each party must stand to win or lose.* Upon the determination o the contemplated event, each party should stand to win or lose. A agreement is not a wager if either of the parties may win but cannot los or may lose but cannot win.

(4) *No control over the event.* Neither party should have control ove the happening of the event one way or the other. If one of the parties ha the event in his own hands, the transaction lacks an essential ingredien of a wager.

(5) *No other interest in the event.* Lastly, neither partly should have any interest in the happening or non-happening of the event other tha the sum or stake he will win or lose. Thus *an agreement is not a wager i the party to whom money is promised on the occurrence of an event ha an 'interest' in its non-occurrence.* That is why a contract of insurance is not a wagering agreement.

*Examples.* 1. In a wrestling bout, *A* tells *B* that wrestler No. 1 will win. *B* challenges the statement of *A*. They bet with each other over the result of the bout. This is a wagering agreement.

2. An agreement, or a share market transaction, to settle the difference between the contract price and the market price of certain goods or shares on a specified day, is a wagering transaction.

3. A lottery, which is a game of chance, is a wagering agreement. An agreement to buy a ticket for a lottery is also a wagering agreement. Sec. 294-A of the Indian Penal Code, 1860 provides that anyone who keeps any office or place for the purpose of drawing any lottery (other than a State lottery or a lottery authorised by the State Government) shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both. If the lottery is authorised by the Government, the persons conducting the lottery will not be punished, but the lottery remains a wager all the same [*Dorabji* v. *Lance*, (1918) 42 Bom. 676].

4. Commercial transactions, if the intention is not to deliver the goods but only to pay the difference in price [*Sukherdass* v. *Govindass*, (1928) 55 I.A. 32].

The following transactions are, however, not wagers :

1. A crossword competition involving a good measure of skill for its successful solution. But if prizes of a crossword competition depend upon the correspondence of the competitor's solution with a previously prepared solution kept with the editor of a newspaper, it is a lottery and a wagering transaction [*State of Bombay* v. *R.M.D. Chamarbaugwala*, A.I.R (1957) S.C. 699]. According to Prize Competition Act, 1955, prize competitions in games of skill are not wagers provided the amount of prize does not exceed Rs. 1,000.

2. Games of skill, *e.g.*, picture puzzles or atheletic competitions.

*Example.* Two wrestlers agreed to enter into a wrestling contest on the condition that the party failing to appear on the day fixed was to forfeit Rs. 500 and the winner was to be rewarded Rs. 1,125 out of the sale proceeds of tickets. *Held*, the agreement was not one of wagering [*Babasaheb* v. *Rajaram*, A.I.R. (1931) Bom. 264].

3. A subscription or contribution or an agreement to subscribe or contribute toward any plate (a cup or other prize for a race or other

contest), prize or sum of money of the value of Rs. 500 or above to be awarded to the winner or winners of a horse race (Exception to Sec. 30).

4. Share market transactions in which delivery of stocks and shares is intended to be given and taken.

5. A contract of insurance.

*Contracts of insurance and wagering agreements.* Contracts of insurance bear a certain superficial resemblance to wagering agreements, but they are really transactions of a different character. The principal differences between the two are as follows :

1. In insurance, the assured has an *insurable interest* in the subject-matter. In a wagering agreement, there is no such interest.

2. In insurance, both the parties are interested in the *protection* of the subject-matter whereas in a wagering agreement it is only one of the parties who is interested in its protection.

3. A contract of insurance, *except* life insurance, is a *contract of indemnity*. In a wagering agreement, the amount is fixed.

4. Contracts of insurance are *beneficial* to the public whereas wagering agreements do not serve any useful purpose.

5. A contract of insurance is based on scientific and actuarial calculation of risks. A wagering agreement is just a gamble.

*Effect of wagering agreements.* Wagering agreements have been expressly declared to be void in India. In the State of Maharashtra and Gujarat they have been declared to be illegal. No suit can be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made (Sec. 30). Thus where a promissory note was executed for payment of indebtedness arising out of wagering transactions in shares, it was held that the promissory note was not enforceable by the Court [*Badridas* v. *Meghraj*, A.I.R. (1967) Cal. 25].

*Suit to recover money deposited.* Money deposited with a person (called stakeholder) to be paid to the party winning upon a wager cannot be recovered by the winner. On the other hand, the loser can recover his deposit from the stakeholder. But where the stakeholder pays the money to the winner, the loser cannot recover it from him [*Bridger* v. *Savage*, (1885) 15 Q.B.D. 363].

*Principal and agent.* (1) An agent cannot recover from the principal any money paid on a wagering agreement entered into on behalf of his principal since the act done by the agent is not lawful (Sec. 222).

(2) Where the agent fails to carry out his instructions in respect of a wagering transaction, the principal cannot sue him for breach of the contract of agency [*Cohen* v. *Kittell*, (1819) 2 Q.B.D. 680] because a contract which is void cannot be the basis of a legal claim.

(3) Where the agent receives the winnings on successful bets made on behalf of his principal, he is bound to hand them over to the principal [*De Mottos* v. *Benjamin*, (1894) 63 L.J.Q.B. 248]. He cannot resist the pricipal's claim on the ground that he received money in respect of a void transaction [*Cheshire & Co.* v. *Vaughan Bros. & Co.*, (1930) 3 K.B. 240].

*Collateral transactions.* Since wagering agreements are void, transactions collateral to them are not affected. However, in the States of Maharashtra and Gujarat, the wagering agreements have been declared to be illegal. The rule in England regarding the wagering agreements is also

the same. The collateral transactions to such wagering agreements, therefore, both in the State of Maharashtra and Gujarat and also England, become tainted with illegality. In the rest of India, collateral transactions are valid.

## VOID CONTRACTS

1. A contingent contract to do or not to do something on the happening of an event becomes void when the event becomes impossible (Sec. 32). 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 (Sec. 31). Contingent contracts are discussed in detail in the next Chapter.

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

2. A voidable contract becomes void when the party whose consent is not free repudiates the contract.

*Example.* *A*, by misrepresenting certain facts to *B*, enters into a contract with *B*. *B* comes to know of the misrepresentation and repudiates the contract. When *B* repudiates the contract, it becomes void.

3. A contract becomes void by supervening impossibility or illegality (Sec. 56, para 2).

*Example.* *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

## RESTITUTION

When a contract becomes void, the party who has received any benefit under it must restore it to the other party or must compensate the other party by the value of the benefit. This restoration of the benefit is called '*restitution* '. The principle of restitution is that *a person who has been unjustly enriched at the expense of another is required to make restitution to that other.* In essence, restitution is not based on loss to the plaintiff but on benefit which is enjoyed by the defendant at the cost of the plaintiff which is unjust for the defendant to retain.

Secs. 64 and 65 which deal with 'restitution' are reproduced below :

"*Consequences of rescission of voidable cohyract.*—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received." (Sec. 64).

"*Obligation of person who has received advantage under void agreement or contract that becomes void.*—When an agreement is discovered to be void or when a contract 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." (Sec. 65).

*Examples.* (*a*) *A* pays *B* Rs. 1,000 in consideration of *B*'s promise to marry *C*, *A*'s daughter. *C* is dead at the time of the promise. The agreement is void but *B* must repay *A* Rs. 1,000.

(*b*) *A* contracts with *B* to deliver to him 250 quintals of rice before the first of May. *A* delivers 130 quintals only before that day and none after. *B* retains the 130 quintals after the first of May. He is bound to pay *A* for them.

(*c*) *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* agrees to pay her Rs. 1,000 for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre. *B* in consequence rescinds the contract. He must pay *A* for the five nights on which she had sung.

(*d*) *A* contracts to sing for *B* at a concert 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 profit which *B* would have made if *A* had been able to sing, but must refund to *B* Rs. 1,000 paid in advance.

(*e*) *A* hired a godown from *B* for twelve months and paid the whole of the rent in advance. After seven months the godown was destroyed by fire without any fault or negligence on the part of *A*. *A* claimed refund of a proportionate amount of the rent. *Held*, he was entitled to recover the rent for the remaining five months [*Dharamsey* v. *Ahmedbhai*, (1893) 23 Bom. 15].

(*f*) A contractor entered into an agreement with the Government to construct a godown and received advance payments for the same. He did not complete the work and the Government terminated the contract. *Held*, the Government under Sec. 65 could recover the amount advanced to the contractor under the contract [*State of Orissa* v. *Rajballav*, A.I.R. (1976) Ori. 10].

Sec. 65 applies to contracts "discovered to be void" and "contracts which become void". It does not apply to—

(1) contracts which are known to be void when they are entered into. Thus if *P* pays Rs. 500 to *D* to beat T, the money cannot be recovered [*Inderjit Singh* v. *Sunder Singh*, A.I.R. (1969) Raj. 155] ; and

(2) contracts of parties who are incompetent to contract, *e.g.*, contracts of a minor or of a person of unsound mind. But the Court *may*, on equitable grounds, order for the restoration of the benefit by the minor where he has misrepresented his age.

**SUMMARY**

VOID AGREEMENTS

A void agreement is one which is not enforceable by law [Sec. 2 (*g*)].

The following agreements have been expressly declared to be void :

1. Agreements made by incompetent persons (Sec. 11). 2. Agreements made under a mutual mistake of fact (Sec. 20). 3. Agreements the consideration or object of which is unlawful (Sec. 23). 4. Agreements the consideration or object of which unlawful in part (Sec. 24). 5. Agreements made without consideration (Sec. 25). 6. Agreements in restraint of marriage (Sec. 26.) 7. Agreements in restraint of trade (Sec. 27). 8. Agreements in restraint of legal proceedings (Sec. 28). 9. Agreements the meaning of which is uncertain (Sec. 29). 10. Agreements by way of wager (Sec. 30). 11. Agreements contingent on impossible events (Sec. 36). 12. Agreements to do impossible acts (Sec. 56).

**Wagering agreements.** A wagering agreement is an agreement to pay money or money's worth on the happening or non-happening of a specified uncertain event. Wagering agreements are void in India. In the States of Maharashtra and Gujarat, however, they have been delcared to be illegal. The collateral transactions to such wagering agreements in the States of Maharashtra and Gujarat also become illegal. In the rest of India, collateral transactions are valid.

**Uncertain agreements.** Agreements the meaning of which is not certain, or capable of being made certain, are void.

**Restitution.** It means return of the benefit received from the plaintiff under a void contract. The principle of restitution is that the defendant who has been unjustly enriched at the expense of the plaintiff is required to make restitution to the plaintiff.

## TEST QUESTIONS

1. What are void agreements and void contracts ? Is the party who has received some benefit under a void contract bound to restore it to the other party ?

2. What are agreements by way of wagers ? What are the legal effects of such agreements ? Is a contract of insurance a wager ?

3. What tests would you apply to determine if, or not, an agreement is by way of wager ?

4. "Insurance contracts are basically wagering agreements." Comment.

## PRACTICAL PROBLEMS

1. *A* and *B* of Delhi each deposit Rs. 1,000 with *C* to abide by the result of a bet between them. *A* wins the best. *C* refuses to pay the amount to *A*. Can *A* recover the amount (*i.e.*, Rs. 2,000) from *C* ?

[*Hint* : *A* cannot recover the amount from *C*. But where the money has been paid to *A*, *B* cannot recover it. Where it has not been paid to *A*, *A* and *B* can recover the amount deposited by them].

2. *A* agrees to sell to *B* a horse for Rs. 20,000 if it wins a race and for Rs. 500 if it does not. The horse wins the race. Advise the parties if—

(*i*) *B* refuses to pay Rs. 20,000 and buy the horse.

(*ii*) *A* refuses to sell the horse to *B*.

(*iii*) *B* agrees to buy the horse for Rs. 10,000.

[*Hint* : The agreement is a wager (Sec. 30). (*i*) *A* cannot compel *B* to buy the horse and pay Rs. 20,000. (*ii*) *B* cannot compel *A* to sell the horse. (*iii*) *A* is not bound to sell the horse (*Brogden* v. *Marriott*, (1836) 3 Bing. N.C. 88)].

3. *A* agreed to buy a radio from *B* "on hire-purchase terms". The terms are not specified. Is it a contract ?

[*Hint* : No (Sec. 29)].

4. *A* lends Rs. 100 to *B* in Delhi in order to enable him to bet with *C* as to the result of a horse-race. Can *A* recover money from *B* ?

[*Hint* : Yes (Sec. 30)].

5. *A* instructs *B* to enter on his behalf into a wagering transaction. *B* loses in the transaction and pays from his pocket. He thereafter sues *A* for reimbursement. Can *A* raise the plea of wager ?

[*Hint* : No (*Daya Ram* v. *Murli Dhar*, 49 All. 1926) as the agent's transaction which is collateral to the main transaction which is void (except in the States of Maharashtra and Gujarat) is not affected (Sec. 30)].

6. *A* took a bet of Rs. 500 with *B* that a certain horse would win a certain race. Under the agreement *A* had to deposit Rs. 100 with *B*. Since *A* had no money he approached his friend *C*, who advanced the sum to him on the condition that *A* was to return Rs. 200 if he won the bet against *B*, but to return nothing if he lost. *A* won the bet against *B*. Can *C* recover Rs. 200 from *A* ?

[*Hint* : No (Sec. 30)].

7. Are the following agreements void ? Give reason in each case :

(*a*) *A* agrees to sell to *B* "a hundred tons of oil."

(*b*) *A* who is a dealer in coconut oil only agrees to sell to *B* a hundred tons of oil.

(*c*) *A* agrees to sell to *B* "one hundred tons of rice at a price to be fixed by *C*."

(*d*) *A* agrees to sell to *B* "my white horse for Rs. 5,000 or Rs. 10,000."

[*Hint* : (*a*) The agreement is void for uncertainty. (*b*) The agreement is valid as the nature of *A*'s trade affords an indication to the meaning of the words. (*c*) The agreement is valid as the price is capable of being made certain. (*d*) The agreement is void as there is nothing to show which of the two prices was to be given (Examples to Sec. 29)].

# 8

# Contingent Contracts

A contract may be—

(*i*) an absolute contract, or

(*ii*) a contingent contract.

An 'absolute contract' is one in which the promisor binds himself to performance in any event without any conditions.

'Contingent' means that which is dependent on something else.

A contingent contract' i. a contract *to do* or *not to do something*, if some *event*, collateral to such contract, *does* or *does not happen* (Sec. 31). Where, for example, goods are sent on approval, the contract is a contingent contract depending on the act of the buyer to accept or reject the goods.

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

(*b*) *A* agrees to sell a certain piece of land to *B*, in case he succeeds in his litigation concerning that land. This is a contingent contract.

There are three essential characteristics of a contingent contract :

1. Its performance depends upon the *happening* or *non-happening* in future of some event. It is this dependence on a future event which distinguishes a contingent contract from other contracts.

2. The event must be *uncertain*. If the event is bound to happen, and the contract has got to be performed in any case it is not a contingent contract.

3. The event must be *collateral*, *i.e.*, incidental to the contract.

*Example.* There was a contract for the sale of American parachute cloth by *A* to *B*. The goods were to be delivered when they arrived. *A* failed to give delivery and *B* sued for damages for breach. *A* pleaded that the contract was a conditional one and as the goods had not arrived he had no obligation to give delivery. *Held*, the contract was an absolute one and the obligation of *A* was not contingent upon the arrival of the goods [*Ranchhodas* v. *Nathmal Hirachand & Co.*, (1949) 51 Bom. L.R. 491].

Contracts of insurance, indemnity and guarantee are the commonest instances of a contingent contract.

**Contingency dependent on act of party.** The performance of a contingent contract depends on the happening or non-happening of an event collateral to such contract. The word 'event' includes an 'act' and a contract may be contingent on some act of the promisor or of a third party. But if the performance of the promise depends on the mere will and pleasure of the promisor, it is no promise at all. Thus a promise by *A* to pay *B* Rs. 100 if *A* so chose is no promise and, therefore, it cannot be deemed to depend on a contingency. Similarly, if a promisor says that for a certain service he will pay whatever he himself thinks right or reasonable, there is no promise [*Roberts* v. *Smith*, (1859) 4 H. & N. 315]. But a promise to pay what a third party shall determine is valid, *e.g.*, a

promise in an agreement between *A* and *B* to pay what *C* shall determine, and a promise to pay under a policy of insurance subject to the approval of directors, are valid promises.

RULES REGARDING CONTINGENT CONTRACTS

1. Contingent contracts dependent on the happening of an uncertain future event cannot be enforced until the event has happened. If the event becomes *impossible*, such contracts become *void* (Sec. 32).

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

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

In both the above examples, there is a *condition precedent* on the happening of which would arise the liability of the promisor, *i.e.*, *A*.

2. Where a contingent contract is to be performed if a particular event does not happen, its performance can be enforced when the happening of that event becomes *impossible* (Sec. 33).

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

(*b*) *A* agrees to sell his car to *B* if *C* dies. The contract cannot be enforced so long as *C* is alive.

In both the above examples, there is a *condition subsequent* on the happening of which would arise the liability of the promisor, *i.e.*, *A*.

The fact that by supervening circumstances performance of a promise is rendered more difficult and expensive will not ordinarily excuse the promisor.

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

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

(*b*) *A* agreed to take shares in a company if the company would appoint him its sole agent at a certain place. The company went into liquidation before appointing him agent and *A* was entered on the list of contributories. *Held*, *A* was not liable as the contract to take shares was contingent on his appointment as agent which event never took place [*Jaunpur Sugar Factory, Re* (1925) All. 658].

4. Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become *void* if the event does not happen or its happening becomes impossible before the expiry of that time.

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced if the event does not happen or its happening becomes impossible before the expiry of that time (Sec. 35).

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

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

5. Contingent agreements to do or not do anything, if an impossible event happens, are void, whether or not the fact is known to the parties (Sec. 36).

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

(*b*) *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.

**Difference between a wagering agreement and a contingent contract**

1. A wagering agreement consists of reciprocal promises whereas a contingent contract may not contain reciprocal promises.

2. A wagering agreement is essentially of a contingent nature whereas a contingent contract may not be of a wagering nature.

3. A wagering agreement is void whereas a contingent contract is valid.

4. In a wagering agreement, the parties have no other interest in the subject-matter of the agreement except the winning or losing of the amount of the wager. In other words, a wagering agreement is a game of chance, This is not so in case of a contingent contract.

5. In a wagering agreement the future event is the sole determining factor while in a contingent contract the future event is only collateral.

**SUMMARY**

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.

**Characteristics of contingent contract.** 1. Its performance depends upon the happening or non-happening in future of some event.

2. The event must be uncertain.

3. The uncertain future event must be collateral to the contract.

**Rules regarding contingent contracts.** 1. If a contingent contract is to be performed if an uncertain future event happens, it cannot be enforced until the event has happened. If it is to be performed if a particular event does not happen, its performance can be enforced if the event becomes impossible.

2. If a contingent contract depends for its performance on doing of an act by the promisor, the contract becomes void where the promisor makes the performance impossible.

3. If a contingent contract contemplates doing of a thing if a specified event happens within a fixed time, it becomes void if the event does not happen within that time.

4. If a contingent contract contemplates to do anything if an impossible event happens, it is void.

**TEST QUESTIONS**

1. Explain the meaning of a contingent contract. What are the rules relating to contingent contracts ?

2. What do you understand by a contingent contract ? Discuss how far the contingency may be dependent on the act of a party.

3. Distinguish between a wagering agreement and a contingent contract. Discuss the rules reading enforcement of contingent contracts

## PRACTICAL PROBLEMS

**Attempt the following problems, giving reasons :**

1. *A* contracts to pay *B* a certain sum of money when *B* marries *C*. *C* dies without being married to *B*. Is the contract valid and enforceable ?

[*Hint* : No, as the contract becomes void when *C* dies without being married to *B* (Illustration to Sec. 32 ; Also refer to Sec. 56].

2. *A* agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. Advise *B*.

[ *Hint* : When *C* marries *D*, the marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and *C* may afterwards marry *B*. The contract, till this contingency happens, stands discharged and *B* cannot recover the amount from *A* (Sec. 34)].

3. *A* agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. *A* refuses to pay. Advise *B*.

[*Hint* : *A* can enforce the contract when the ship sinks (Illustration to Sec. 33)].

4. *A* agrees to construct a swimming pool for *B* for Rs. 80,000. The payment is to be made by *B* only on the completion of the pool. Is this a contingent contract ?

[*Hint* : No, this is not a contingent contract as the completion of the work being the very thing contracted for, is not collateral to the contract (Sec. 31)].

5. *A* entered into a contract for the supply of timber to the Government. One of the terms of the contract was that the timber would be rejected if it is not approved by the Superintendent of the Gun Carriage Factory for which the timber was required. The timber supplied was rejected. *A* filed a suit for breach of contract. Will he succeed ?

[ *Hint* : No (*Secretary of State for India* v. *Arathoon*, (1879) Mad. 173)].

6. *X* agrees to pay *Y* a sum of money if *Y* marries *Z*. *Z* marries *F*. Subsequently *F* dies and *Z* marries *Y*. Is *X* then legally bound to pay the agreed sum ? Decide stating reasons.

[*Hint* : *X* is not liable to pay when *Z* marries *F* because in that case the marriage of *Y* with *Z* must be considered impossible. If no time is specified and *Z* marries *Y*, *X* is bound to pay (Sec. 34)].

# 9

# Performance of Contract

Performance of a contract takes place when the parties to the contract fulfil their obligations arising under the contract within the time and in the manner prescribed. Sec. 37 (para 1) lays down that the parties to a contract must either *perform* or *offer to perform*, their respective promises, unless such performance is dispensed with or excused.

## OFFER TO PERFORM (Sec. 38)

Sometimes it so happens that the promisor offers to perform his obligation under the contract at the proper time and place but the promisee does not accept the performance. This is known as "*attempted performance*" or "*tender*". Sec. 38 sums up the position in this regard thus : 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. Thus, a tender of performance is equivalent to actual performance. It excuses the promisor from further performance and entitles him to sue the promisee for the breach of contract.

**Requisites of a valid tender**

1. It must be unconditional. It becomes conditional when it is not in accordance with the terms of the contract.

*Examples.* (*a*) *D*, a debtor offers to pay to *C*, his creditor, the amount due to him on the condition that *C* sells to him certain shares at cost. This is not a valid tender.

(*b*) A tender was made on a condition that a receipt for the full discharge of the contract be given. *Held* the tender was invalid [*Finch* v. *Miller*, (1848) 5 C.B. 428].

2. It must be of the whole quantity contracted for or of the whole obligation. A tender of an instalment when the contract stipulates payment in full is not a valid tender.

*Example.* *D*, a debtor, offers to pay *C*, his creditor, the amount due in instalments and tenders the first instalment. The tender is not of the whole amount due and hence it is not a valid tender.

If, however, the deviation from the terms of the contract is "microscopic", *i.e.*, *very negligible*, the Court may take a practical view of the matter by holding that the contract has been correctly performed.

*Example.* In a contract requiring delivery of 4,950 tons of wheat, the seller delivered 4,950 tons 55 lbs. *Held*, the contract was duly performed by the seller [*Shipton, Anderson & Co.* v. *Weil Bros & Co.*, (1912) 1 K.B. 574].

3. It must be by a person who is in a position, and willing, to perform the promise.

4. It must be made at the proper time and place. A tender of goods after the business hours or of goods or money before the due date is not a valid tender.

*Example.* *D* owes *C* Rs. 100 payable on the 1st of August with interest. He offers to pay on the 1st of July the amount with interest up to the 1st of July. It is not a valid tender as it is not made at the appointed time.

5. It must be made to the proper person, *i.e.*, the promisee or his duly authorised agent. It must also be in proper form.

6. It may be made to one of the several joint promisees. In such a case it has the same effect as a tender to all of them.

7. In case of tender of goods, it must give a reasonable opportunity to the promisee for inspection of the goods. A tender of goods at such time when the other party cannot inspect the goods is not a valid tender. But in the following case, tender was held to be valid.

*Example.* The plaintiffs agreed to sell ten tons of linseed oil to the defendant to be delivered "within the last fourteen days of March". Delivery was tendered at 8.30 p.m. on March 31, a Saturday. The defendant refused to accept the goods owing to lateness of the hour. *Held*, though the hour was unreasonable, the defendant could still take delivery before midnight [*Startup* v. *Macdonald*, (1843) 6 Man. G. 523].

8. In case of tender of money, the debtor must make a valid tender in the legal tender money. If the creditor refuses to accept it, the debtor is not discharged from making the payment. Tender, in this case, does not discharge the debt. But when the creditor files a suit against the debtor, the debtor can set up the defence of tender. If he deposits the money in the Court and proves his pleas, the creditor gets the amount originally tendered to him but without any interest, whereas the debtor gets judgment for his cost of defence.

**Effect of refusal of a party to perform promise wholly** (Sec. 39)

When a party to a contract refuses to perform, or disables himself from performing, his promise in its entirety, the promisee may put an end to the contract. But if the promisee has signified, by words or conduct, his acquiescence (tacit assent) in the continuance of the contract, he cannot repudiate it [*Union of India* v. *S. Kesar Singh*, A.I.R. (1978) J. & K. 102].

*Examples.* (*a*) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months and *B* agrees to pay her Rs. 100 for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(*b*) In the above example, *A* sings on the seventh night with the consent of *B*. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage substained by him through *A*'s failure to sing on the sixth night.

(*c*) A servant is employed for one year on a salary of Rs. 600 per month, the whole salary to be paid at the end of the year. The servant wrongfully leaves the service after three months. He is not entitled to the salary for the period he has been employed because, by leaving the service, he has disabled himself from performing his promise in its entirety.

When a promisee puts an end to a contract under Sec. 39, being rightly entitled to do so, it shall be deemed as if he has rescinded a voidable

contract and he shall, by virtue of Sec. 64, be bound to restore to the other party all the benefits that he may have received under the contract [*Murlidhar Chatterjee* v. *International Film Co.*, A.I.R. (1943) P.C. 34].

## CONTRACTS WHICH NEED NOT BE PERFORMED

A contract need not be performed—

1. When its performance becomes impossible (Sec. 56).

2. When the parties to it agree to substitute a new contract for it or to rescind or alter it (Sec. 62).

3. When the promisee dispenses with or remits, wholly or in part, the performance of the promise made to him or extends the time for such performance or accepts any satisfaction for it (Sec. 63).

4. When the person at whose option it is voidable, rescinds it (Sec. 64).

5. When the promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise (Sec. 67).

*Example.* *A* contracts with *B* to repair *B*'s house. *B* neglects or refuses to point out to *A* the places in which his house requires repairs. *A* is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

6. When it is illegal.

## BY WHOM MUST CONTRACTS BE PERFORMED ?

1. *Promisor himself.* If there is something in the contract to show 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 (Sec. 40). This means contracts which involve the exercise of personal skill, volition, or diligence of the promisor (for instance, a contract to paint a picture or sing), or which are founded on personal confidence between the parties (for instance a contract to marry) must be performed by the promisor himself.

2. *Agent.* Where personal consideration is not the foundation of a contract, the promisor or his representative may employ a competent person to perform it (Sec. 40).

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

3. *Legal representatives.* A contract which involves the use of personal skill or is founded on personal considerations comes to an end on the death of the promisor. The rule of law is : *actio personalis moritur cum persona, i.e.*, a personal action dies with the person. As regards any other contract, the legal representatives of the deceased promisor are bound to perform it unless a contrary intention appears from the contract (Sec. 37, para 2). But their liability under a contract is *limited* to the value of the property they inherit from the deceased [*New India Motors (Pvt.) Ltd.* v. *Smt. S.P. Duggal*, (1982) Comp. Cas. 352].

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

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

4. *Third persons.* When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor (Sec. 41).

5. *Joint promisors.* This is discussed below under the heading "Devolution of joint liabilities and rights".

## DEVOLUTION OF JOINT LIABILITIES AND RIGHTS

**Devolution of joint liabilities** (Sec. 42 to 44)

'Devolution' means passing over from one person to another.

When two or more persons have made a joint promise, they are known as joint promisors. Unless a contrary intention appears from the contract, all joint promisors must jointly fulfil the promise. If any of them dies, his legal representatives must, jointly with the surviving promisors, fulfil the promise. If all of them die, the legal representatives of all of them must fulfil the promise jointly (Sec. 42). It would be seen that Sec. 42 deals with voluntary discharge of obligations. If the parties do not discharge their obligations of their own volition, Sec. 43 comes into play. Sec. 43 lays down three rules as regards performance of joint promises :

(1) *Any one of the joint promisors may be compelled to perform* (Sec. 43, para 1). When two or more persons make a joint promise and there is no express agreement to the contrary, the promisee may compel any one or more of the joint promisors to perform the whole of the promise. This means the liability of joint promisors is *joint and several.*

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

(2) *A joint promisor compelled to perform may claim contribution* (Sec. 43, para 2). When a joint promisor has been compelled to perform the whole of the promise, he may compel the other joint promisors to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

*Examples.* (*a*) *A, B* and *C* are under a joint promise to pay *D* Rs. 300. *A* is compelled to pay the whole amount to *D*. He may recover Rs. 100 each from *B* and *C*.

(*b*) A partner of a firm is a joint promisor with other partners. He is entitled to claim contribution from other partners in case he is required to pay the debt of the firm [*Bakshi Hardatt* v. *The State of J. & K.*, A.I.R. (1977) NOC 270 (J. & K.)].

(3) *Sharing of loss arising from default* (Sec. 43, para 3). If any one of the joint promisors makes default in the contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. The same principle applies in the case of recovery of a loan by a creditor from the heirs who by operation of law become joint promisors after the death of the single promisor [*Orissa Cement Ltd.* v. *Union of India*, A.I.R. (1967) Ori. 158].

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

(*b*) *A, B* and *C* jointly promise to pay *D* the sum of Rs. 3,000. *C* is compelled to pay the whole sum. *A* is insolvent but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive Rs. 500

(being one-half of Rs. 1,000) from *A*'s estate and Rs. 1,250 (being one-half of Rs. 2,500) from *B*.

*Release of a joint promisor* (Sec. 44). A release by the promisee of any of the joint promisors does not discharge the other joint promisors from liability. The released joint promisor also continues to be liable to the other joint promisors.

*Example.* $D_1$, $D_2$ and $D_3$ jointly owe a debt to *C*. *C* releases $D_1$ from his liability and files a suit against $D_2$ and $D_3$ for payment of the debt. $D_2$ and $D_3$ are not released from their liability nor is $D_1$ discharged from his liability to $D_2$ and $D_3$ for contribution.

**Devolution of joint rights** (Sec. 45)

When a person (say *A*) has made a promise to several persons (say, *B*, *C* and *D*), these persons are known as joint promisees. Unless a contrary intention appears from the contract, the right to claim performance rests with all of the joint promisees (*B*, *C* and *D*). When one of the joint promisees (say *B*) dies, the right to claim performance rests with his (*B*'s) legal representatives jointly with the surviving joint promisees (*C* and *D*). When all the joint promisees (*B*, *C* and *D*) die, the right to claim performance rests with their legal representatives jointly.

*Example.* *B* and *C* jointly lend Rs. 5,000 to *A* who promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representatives jointly with *C* during *C*'s life. After the death of *C*, the right to claim performance rests with the representatives of *B* and *C* jointly.

The partners of a firm, the members of a joint Hindu family, co-sharers, or mortgagees are all joint promisees when a person, say a debtor, makes a promise in their favour. Unless a contrary intention appears from the contract, a suit to enforce such promise must be instituted by all the joint promisees.

## WHO CAN DEMAND PERFORMANCE ?

It is only the promisee who can demand performance of the promise under a contract. It makes no difference whether the promise is for the benefit of the promisee or for the benefit of any other person.

*Example.* *A* promises *B* to pay *C* a sum of Rs. 500. *A* does not pay the amount to *C*. *C* cannot take any action against *A*. It is only *B* who can enforce this promise against *A*.

In certain cases, a third party can also enforce a promise under a contract even though he is not a party to the contract. These cases have already been discussed in the Chapter on "Consideration".

*Death of promisee.* In case of death of the promisee, his legal representatives can demand performance.

## TIME AND PLACE OF PERFORMANCE

Time and place of performance of a contract are matters to be determined by an agreement between the parties themselves. Secs. 46 to 50 lay down the following rules in this regard :

1. *Where no application is to be made and no time is specified.* Where, by the contract, a promisor is to perform his promise without application by the promisee, and *no time* for performance is *specified*, the promise must be performed within a *reasonable time* (Sec. 46). The question "what is a reasonable time" is, in each particular case, a question of fact

(Explanation to Sec. 46). It depends on the special circumstances of the case, the usage of trade, or the intention of the parties at the time of entering into the contract.

2. *Where time is specified and no application is to be made.* When a promise is to be performed on a certain day, the promisor may undertake to perform it without application by the promisee. In such a case, the promisor may perform the promise at any time during the *usual hours* of business on *such day* and *at the place* at which the promise ought to be performed (Sec. 47).

*Example. A* promises to deliver goods at *B*'s warehouse on the 1st January. On that day *A* brings the goods to *B*'s warehouse, but after usual hour for closing it and they are not received. *A* has not performed his promise.

3. *Application for performance on a certain day and place.* When a promise is to be performed on a certain day, the promisor may undertake to perform it after the application by the promisee to that effect. In such a case, it is the duty of the promisee to *apply* for performance at a *proper place* and within the *usual hours* of business. The question "what is a proper time and place" is, in each particular case, a question of fact (Sec. 48)

4. *Application by the promisor to the promisee to appoint place.* When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to *appoint a reasonable place* for the performance of the promise, and to perform it at such place (Sec. 49).

*Example. A* undertakes to deliver 1,000 quintals of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

5. *Performance in manner or at time prescribed or sanctioned by the promisee.* The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions (Sec. 50).

*Examples. (a) A* and *B* are mutually indebted. They settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to payment by *A* and *B*, respectively, of the sums which they owed to each other.

(*b*) *A* owes *B* Rs. 2,000. *B* accepts some of *A*'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

(*c*) *A* desires *B*, who owes him Rs. 100, to send him a promissory note for Rs. 100 by post. The debt is discharged as soon as soon as *B* puts into the post a letter containing the promissory note duly addressed to *A*.

## RECIPROCAL PROMISES

Promises which form the consideration or part of the consideration for each other are called "reciprocal promises" [Sec. 2 (*f*)]. Where, for example, *A* promises to do or not to do something in consideration of *B*'s promise to do or not to do something, the promises are reciprocal.

These promises have been classified by Lord Mansfield in *Jones* v. *Barkley*, 4 Doug. 659, as follows :

(1) *Mutual and independent.* Where each party must perform his promise *independently* and irrespective of the fact whether the other

party has performed, or is willing to perform, his promise or not, the promises are mutual and independent.

*Example.* In a contract of sale, *B* agrees to pay the price of goods on 10th instant. *S* promises to supply the goods on 20th instant. The promises are mutual and independent.

(2) *Conditional and dependent.* Where the performance of the promise by one party depends on the prior performance of the promise by the other party, the promises are conditional and dependent.

*Example. A* promises to remove certain debris lying in front of *B*s house provided *B* supplies him with the cart. The promises, in this case, are conditional and dependent. *A* need not perform his promise if *B* fails to provide him with the cart.

(3) *Mutual and concurrent.* Where the promises of both the parties are to be performed simultaneously, they are said to be mutual and concurrent. The example of such promises may be sale of goods for cash.

**Rules regarding performance of reciprocal promises**

These are contained in Secs. 51 to 54 and 57 and are reproduced below :

1. *Simulatenous performance of reciprocal promises* (Sec. 51). When a contract consists of reciprocal promises to be simutaneously performed, the promisor need not perform his promise unless the promisee is ready ready and willing to perform his reciprocal promise.

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

2. *Order of performance of reciprocal promises* (Sec. 52). Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must be performed in that order ; and where the order is not expressly fixed by the contract, they must be performed in that order which the nature of the transaction requires.

*Examples.* (*a*) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

(*b*) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until security is given, for the nature of the transaction requires that *A* shall have security before he delivers up his stock.

3. *Effect of one party preventing another from performing promise* (Sec. 53). When a contract contains reciprocal promises, it may happen that one party to the contract prevents the other from performing his promise. In such a case, the contract becomes voidable at the option of the party so prevented. Further, the party so prevented is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

*Example. A* and *B* contract that *B* shall execute certain work for *A* for Rs. 1,000. *B* is ready and willing to execute the work accordingly but *A* prevents him from doing so. The contract is voidable at the option of *B* and if he elects to rescind it, he is entitled to recover from *A*

compensation for any loss which he has incurred by its non-performance.

4. *Effect of default as to promise to be performed first* (Sec. 54) Where the nature of reciprocal promises is such that one of them cannot be performed till the other party has performed his promise then if the other party fails to perform it, he cannot claim the performance of the reciprocal promise from the first party. In such a case, the other party must make compensation to the first party to the contract for any loss which the first party may sustain by the non-performance of the contract.

*Examples.* (*a*) *A* hires *B*'s ship to take in and convey, from Calcutta to Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(*b*) *A* contracts with *B* to execute certain builder's work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber and the work cannot be executed. *A* need not execute the work and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

5. *Reciprocal promise to do things legal and also other things illegal* (Sec. 57). Refer to Chapter on "Legality of object".

## TIME AS THE ESSENCE OF THE CONTRACT

When we say that "time is the essence of the contract", we mean that the performance of the promise by a party to the contract is essential within the specified period, in order to entitle him to enforce performance from the other party. In other words, the expression "time is of the essence of the contract" means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract [*Hind Construction Contractors* v. *State of Maharashtra*, A.I.R. (1979) S.C. 720]. Whether time is of the essence of the contract is a mixed question of law and fact [*Municipal Corpn. of Delhi* v. *Jagan Nath Ashok Kumar*, (1987) 4 SSC 497].

Sec. 55 deals with the question of "time as the essence of the contract" and provides thus :

(1) *When time is of the essence.* In a contract, in which time is of the essence of the contract, if there is a failure on the part of the promisor to perform his obligation within the fixed time, the contract (or so much of it as remains unperformed) becomes voidable at the option of the promisee (Sec. 55, para 1). If, in such a case, the promisee accepts performance of the promise after the fixed time, he cannot claim compensation for any loss occasioned by the non-performance of the promise at the agreed time. But if at the time of accepting the delayed performance he gives notice to the promisor of his intention to claim compensation, he can do so (Sec. 55, para 3).

In *commercial* or *mercantile contracts* which provide for performance within a specified time, time is ordinarily of the essence of the contract. This is so because businessmen want certainty.

*Examples.* (*a*) In a contract for the purchase of a chassis for a diesel truck to be supplied within two months, time was held to be of

the essence of the contract [*Hitkari Motors* v. *Attar Singh*, A.I.R. (1962) J. & K. 10].

(*b*) In a contract for the sale or purchase of goods the prices of which fluctuate rapidly in the market, the time of delivery and payment are considered to be of the essence of the contract [*Mahabir Pershad* v. *Durga Dutt*, A.I.R. (1961) S.C. 900].

2. *When time is not of the essence.* In a contract, in which time is not of the essence of the contract, failure on the part of the promisor to perform his obligation within the fixed time does not make the contract voidable, but the promisee is entitled to *compensation* for any loss occasioned to him by such failure (Sec. 55, para 2).

Intention to make time as the essence of the conract, if expressed in writing, must be in a language which is unambiguous and unmistakable. The mere fact that a certain time is specified in a contract for the performance of a promise does not necessarily make time as the essence of the contract. If the contract includes clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of time provided in the contract, such clauses are construed as rendering ineffective the express provision relating to the time being of the essence of the contract [*Hind Construction Contractors* v. *State of Maharashtra*, A.I.R. (1979) S.C. 720].

In cases other than commercial or mercantile contracts, the presumption is that time is not of the essence of the contract.

*Examples.* (*a*) In a contract of sale of immovable property time is not of the essence unless it is shown that the intention of the parties was that time should be the essence of the contract [*Indira Kaur* v. *Sheo Lal Kapoor*, A.I.R. (1988) S.C. 1074].

(*b*) The time fixed for the performance of a contract was extended twice and the object of the purchaser was also not a commercial undertaking. *Held*, time was not of the essence of the contract [*Devendra* v. *Sonubai*, A.I.R. (1971) Mys. 217].

**Subsequent notice**

Time may be made the essence of a contract by a subsequent notice. The subsequent notice, specifying time, ought to fix the *longest time* that could reasonably be required for the performance of acts which remain to be done [*Crawford* v. *Toogwood*, 13 Ch. 153]. Any subsequent notice making time as the essence of the contract ought to fix a *reasonably long* time requiring the other party to perform his contract.

## APPROPRIATION OF PAYMENTS

When a debtor owes several distinct debts to a creditor and makes a payment insufficient to satisfy the whole indebtedness, a question arises : To which debt should the payment be appropriated ? Secs. 59 to 61 lay down the following three rules in this regard :

1. *Where the debtor intimates* (Sec. 59). If the debtor expressly intimates at the time of actual payment that the payment should be applied towards the discharge of a particular debt, the creditor must do so. If there is no express intimation by the debtor, the law will look to the circumstances attending on the payment for appropriation.

"There is an established maxim of law that, when money is paid, it is to be applied according to the expressed will of the payer, not of the receiver." [Lord Campbell in *Croft* v. *Lumley*, (1858) 5 E. & B. 648].

*Examples.* (*a*) *A* owes *B*, among other debts, Rs. 1,000 upon a promissory note which falls due on 1st June. He owes *B* no other debt of that amount. On 1st June *A* pays to *B* Rs. 1,000. The payment is to be applied to the discharge of the promissory note.

(*b*) *A* owes *B*, among other debts, the sum of Rs. 567. *B* writes to *A* and demands payment of this sum. *A* sends to *B* Rs. 567. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

2. *Where the debtor does not intimate and the circumstances are not indicative* (Sec. 60). Where the debtor does not expressly intimate or where the circumstances attending on the payment do not indicate any intention, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor. The creditor may also, until he has declared appropriation to the debtor, alter the appropriation [*Simson* v. *Ingham*, (1823) 2 B. & C. 65]. He cannot, however, apply the payment to a disputed or unlawful debt, but he may apply it to a debt which is barred by the Law of Limitation.

On the question whether a part payment should be treated towards principal or interest, the general principle, subject to any contract to the contrary, is that the payment should first be applied to the interest and after the interest is fully paid off, to the principal [*Rulia Devi* v. *Raghunath Prasad*, A.I.R. (1979) Pat. 115].

3. *Where the debtor does not intimate and the creditor fails to appropriate* (Sec. 61). Where the debtor does not expressly intimate and where the creditor fails to make any appropriation, the payment shall be applied in discharge of the debts in chronological order, *i.e.*, in order of time. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

*Rule in Clayton's Case* (1816) 1 Mer. 572. This rule is applicable where the parties have a current account, *i.e.*, a running account between them. In such a case appropriation impliedly takes place in the order in which the receipts and payments take place and are carried into the account. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side ; the appropriation is made by the very act of setting the two items against each other. In simple words, it means that, unless there is a contrary intention, the items on the credit of an account must be appropriated against the items on the debit in order of date.

*To conclude* : (1) The debtor has, at the time of payment, the right of appropriating the payment ; (2) in default of debtor, the creditor has the option of election ; and (3) in default of either, the law will allow appropriation of debts in order of time.

## ASSIGNMENT OF CONTRACTS

To 'assign' means to 'transfer'. Assignment of a contract means transfer of contractual rights and liabilities under the contract to a third party with or without the concurrence of the other party to the contract. It may take place by—

1. Act of the parties

Assignment is said to take place by an act of the parties when they themselves make the assignment.

**Assignment of contractual obligations.** This is subject to the following rules :

(1) *Contractual obligations involving personal skill or ability cannot be assigned* (Sec. 40), *e.g.*, a contractual obligation by an opera singer to sing or by a film actor to act in a film or a contract to marry or paint a picture, cannot be assigned.

(2) *A promisor cannot assign his liabilities or obligations under a contract, i.e.*, a promisee cannot be compelled by the promisor or a third party to accept any person other than the promisor as the person liable to him on the promise. The rule is based on sense and convenience. The promisee in a contract is entitled to know to whom he is to look for the satisfaction of his rights under the contract. For example, if *D* owes *L* Rs. 5,000 and is owed the same sum by $D_1$, *D* cannot ask *L* to recover the amount from $D_1$ unless *L* accepts the performance from $D_1$.

*Example.* *D* hired a carriage from *S* at a yearly rent for five years. *S* undertook to paint the carriage every year and to keep it in repair. *R* was the partner of *S*, but the contract was made with *S* alone. After three years *S* retired from business, and *D* was informed that *R* would paint and repair the carriage and receive payment. *D* refused to deal with *R* and returned the carriage. *Held*, he was entitled to do so [*Robson Sharpe* v. *Drummond*, (1831) 2 B. & Ad. 303].

*Limitations to the rule.* (i) It is open to a party to have the contract performed through the agency of a competent person provided the contract does not expressly or implied contemplate performance only by the promisor. However, the original party remains liable for the proper performance of the obligations under the contract. For example, if *A* undertakes to do some work for *B* which needs no special skill, *B* cannot complain if *A* gets the work done by an equally competent person.

(ii) The promisor may transfer his liability with the consent of the promisee and of the transferee. In such a case, *novation* takes place. Notation is the substitution of a new contract for an existing one between one of the parties and a third party, the discharge of the old contract on the same terms being the consideration for the new one. It can take place only by the tripartite agreement between the parties.

**Assignment of contractual rights.** This is subject to the following rules :

(1) *The rights and benefits under a contract not involving personal skill may be assigned*, subject to all equities between the original parties. This means that when sued by the assignee, the debtor can raise against the assignee all defences (including right of set-off) that he could have raised against the assignor at the time he received notice of the assignment.

*Examples.* (*a*) *D* owes Rs. 500 to *C*. *C*, the creditor, can transfer his right to *T* to recover the amount from *D*. If *D* has already paid Rs. 200 to *C*, *T* will be bound by this payment and shall be entitled to recover only Rs. 300 from *D*.

(*b*) *A* bought certain goods from *B* for Rs. 1,000. The goods were defective and *B* therefore promptly offered to return the goods. *B*

refused to take the goods back and assigned the debt of Rs. 1,000 to C. C sued A for Rs. 1,000. A can set up as a defence against C the defective character of the goods.

(2) *An actionable claim can always be assigned* but the assignment to be complete and effectual must be effected by an instrument in writing. Notice of such assignment must also be given to the debtor. An actionable claim is defined in Sec. 3 of the Transfer of Property Act, 1882, as "a claim to any debt (except a secured debt) or to any beneficial interest ... whether such claim or beneficial interest be existent, accruing, conditional or contingent." Thus a money debt, shares in a company, and a right of action arising out of a contract, are all actionable claims.

**2. Operation of law**

Assignment by operation of law takes place by intervention of law. This takes place in the following two cases :

(*a*) *Death.* Upon the death of a party to a contract his rights and liabilities under the contract (except in the case of contracts requiring personal skill or services) devolve upon his heirs and legal representatives.

(*b*) *Insolvency.* In case of insolvency of a person, his rights and liabilities incurred previous to adjudication pass to the Official Receiver or Assignee, as the case may be.

**SUMMARY**

The parties to a contract must either *perform* or *offer to perform* their respective promises.

**Attempted performance or tender.** Attempted performance or tender is an offer of performance by the promisor in accordance with the terms of the contract. If the promisee does not accept performance, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract. Thus a tender is equivalent to actual performance. The tender, in order to have this effect, must be unconditional, of the whole quantity contracted for, at the proper time, place and in the manner specified ; and, where these are not specified, it must be made in a reasonable manner.

**Reciprocal promises.** Promises which form the consideration or part of the consideration for each other are called 'reciprocal promises'.

*Rules regarding performance of reciprocal promises.* 1. When reciprocal promises have to be simultaneously performed the promisor is not bound to perform, unless the promisee is ready and willing to perform his promise. 2. The reciprocal promises must be performed in the order fixed by the contract. 3. Where the nature of reciprocal promises is such that one cannot be performed unless the other party performs his promise in the first place, then if the latter fails to perform he cannot claim performance from the other, but must make compensation to the first party for his loss.

**By whom must contract be performed.** 1. *By promisor himself* if that was the intention of the parties, *i.e.*, where personal consideration is the foundation of the contract.

2. *By agent*—where personal consideration is not the foundation of the contract.

3. *By* legal *representatives* — in case of death of the promisor.

4. *By joint promisors* —when two or more persons have made a joint promise, then unless a contrary intention appears from the contract, all such persons must jointly fulfil the promise. If any of them dies, his legal representative must, jointly with the surviving promisors, fulfil the promise. If all the promisors die, the legal representatives of all of them must fulfil the promise jointly.

**Who can demand performance ?** It is only the promisee, and in case of his death, his legal representatives, who can demand performance.

When a person has made a promise to several persons, then, unless a contrary intention appears from the contract, the right to claim performance rests with all of them. When one of the promisees dies, it rests with his legal representatives

jointly with the surviving promisees. When all the promisees die, it rests with their legal representatives jointly.

**Time and place of performance.** Time and place of performance of a contract are matters to be determined by agreement between the parties themselves. Where no time for performance is specified, the promisor must perform the promise within a reasonable time. If no time and place is fixed for the performance of the promise, the promisor must apply to the promisee to fix the day and time for performance.

**Time as the essence of contract.** Time for the performance of a contract may be fixed in the contract itself. In that case the contract must be performed *within* that time when time is of the essence of the contract. The general rule is that *in commercial contracts time is of the essence of contract.* In other contracts stipulations as to time are, in the absence of an express or implied evidence to the contrary, presumed not to be of the essence of the contract.

**Appropriation of payments.** The debtor has, at the time of payment, right of choice of appropriating the payment ; in default of the debtor, the creditor has the right to appropriate ; in default of either, the law will allow appropriation of debts in order of time.

*Rule in Clayton's Case.* Where the parties have a current account between them, appropriation impliedly takes place in the order in which the receipts and payments take place and are entered in the account. The first item on the debit side of the account is discharged or reduced by the first item on the credit side.

**Assignment of contract.** Assignment of a contract means transfer of contractual rights and liabilities under the contract to a third party. It may take place by —

1. *Act of the parties.* This is subject to the following rules :

(1) Contracts involving personal skill or ability or other personal qualifications cannot be assigned.

(2) A promisor cannot assign his liabilities or obligations under a contract.

(3) The rights and benefits under a contract may be assigned if the obligation under the contract is not of a personal nature.

(4) An actionable claim can always be assigned but the assignment to be complete and effectual must be effected by an instrument in writing. Notice of such assignment must also be given to the debtor.

2. *Operation of law.* This takes place in case of death or insolvency of a party to the contract.

## TEST QUESTIONS

1. What do you understand by performance of a contract ?

2. What are the rules of law relating to time and place of performance of a contract ?

3. When is time deemed to be the essence of a contract in the performance of the contract and with what consequences ?

4. Give with illustrations the provisions of the Indian Contract Act relating to the performance of reciprocal promises.

5. What are the essential requisites of a valid tender of performance ? What is the effect of refusal by the promisee to accept correct tender of goods and money?

6. Under what circumstances need a contract not be performed ?

7. State the rules relating to appropriation of payments made by a debtor to his creditor.

8. What do you mean by assignment of contracts ? What conditions should be fulfilled for assignment of contracts ? What is assignment by operation of law ?

9. Discuss the law relating to the rights and liabilities of joint promisors in a contract. Also explain the devolution of joint liabilities.

10. Write short note on (1) Assignment of contract. (2) Time as the essence of the contract. (3) Performance of contract.

## PRACTICAL PROBLEMS

**Attempt the following problems, giving reasons :**

1. *A, B* and *C* jointly promise to pay *D* Rs. 3,000. *A* and *B* are untraceable. Can *D* compel *C* to pay him in full ?

[*Hint* : Yes (Sec. 43, para 1)].

2. *A* makes a promise to three joint promisees *X*, *Y*, and *Z*. *X* and *Y* die before the promise is performed. Who can demand performance of the promise ?

[*Hint* : Legal representatives of *X* and *Y* jointly with *Z* (Sec. 45)].

3. *A*, *B* and *C* jointly promise to pay *D* a sum of Rs. 6,000.

(*a*) Can *D* compel any of the three parties *A*, *B* and *C* to pay him Rs. 6,000 ?

(*b*) *C* is compelled to pay the whole of the amount to *D*. Can he recover anything from *A* and *B* when (*i*) both *A* and *B* were solvent, (*ii*) *A* (and not *B*) is insolvent and pays 50 paise in a rupee to his creditors, (*iii*) *A* is not in a position to pay anything.

[*Hint* : (*a*) Yes. (*b*) *C* can recover (*i*) Rs. 2,000 each from *A* and *B*, (*ii*) Rs. 1,000 from *A* and Rs. 2,500 (half of Rs. 5,000) from *B*, (*iii*) Rs. 3,000 from *B* (Sec. 43)].

4. A servant is employed for one year on a monthly salary of Rs. 800, the whole salary to be paid at the end of the year. The servant wrongfully leaves the service after six months. Is he entitled to any salary ?

[*Hint* : No (Sec. 39)].

5. *A* owes *B* two sums, one for Rs. 1,000 which is barred by limitation and another for Rs. 1,500 which is not barred. *A* pays *B* Rs. 500 on account generally. Later *B* sues for Rs. 1,500. *A* pleads (*i*) as to Rs. 1,000 that it was time-barred ; and (*ii*) as to Rs. 1,500 a part payment of Rs. 500.

Examine these contentions

[*Hint* : Both the contentions of *A* are wrong (Sec. 60). *B* can appropriate the payment of Rs. 500 towards the first debt and *A* is bound to pay Rs. 1,500 which is not yet barred by limitation].

6. *A* borrows Rs. 3,000 from *B*, *C* and *D*. When the debt becomes due, *A* tenders it to *B* who accepts it. Is *A* discharged by the payment.

[*Hint* : Yes, unless a contrary intention appears from the contract (Sec. 45)].

7. *A* enters into a contract with *B* to build a house for *C*. *A* builds the house according to specifications. *B* tenders payment. *A* refuses to accept the money, claiming that it is insufficient because the job was more difficult than he had anticipated. What effect has the tender on *B*'s obligation ?

[*Hints* : *B* is released from the liabilities for interest on the amount and for the costs of any suit brought against him by *A* to recover the amount].

8. *X* lent to *Y* three sums of Rs. 100, Rs. 200 and Rs. 500. *Y* sent a sum of Rs. 100 asking *X* to appropriate this money towards the third debt of Rs. 500. *X* wants to appropriate this money to the first loan. Can he do so ?

[*Hint* : No (Sec. 59)].

9. *A* and *B* enter into a contract that *A* shall do some work for *B* for Rs. 500. *A* is ready and willing to do the work, but *B* prevents him from doing so. Advise *A*.

[*Hint* : The contract is voidable at the option of *A* (Sec. 53)].

10. *A* promises to sell and deliver on the 5th of January a lorry to *B*. The parties have stipulated that time should be the essence of the contract. *A* delivers the lorry only on the 5th of February. Explain what are the rights of *B* against *A* in this case. Suppose *B* desires to accept the belated delivery and also to claim compensation for loss occasioned by the non-performance of the promise at the time agreed. Advise *B* as to whether he can achieve these two objectives.

[*Hint* : *B* can repudiate the contract (Sec. 55, para 1). In the latter case, *B* may accept the delivery and also claim compensation if he gives notice of his intention to do so (Sec. 55, para 3)].

11. *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*. Can *B* claim payment from *C* ?

[*Hint* : Yes (Sec. 62)].

12. *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing in his theatre two nights in every week during the next two months and *B* agrees to pay her at the rate of Rs. 100 for each night. On the sixth night *A* wilfully absents himself. With the assent of *B*, *A* sings on the seventh night. But on the following day, *B* puts an end to the contract. Can *A* claim damages for breach of contract ? Advise *A*.

[*Hint* : On the sixth night when *A* wilfully absents herself from the theatre, *B* is at liberty to put an end to the contract. If *A* sings on the seventh night with the consent of *B*, *B* has signified his acquiescence in the continuance of the contract and cannot now put an end to it. He is entitled to compensation for the damage sustained by him because of *A*'s failure to sing on the sixth night. If *B* puts an end to the contract, *A* can claim damages for breach of contract (Sec. 39)].

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# *Discharge of Contract*

Discharge of contract means termination of the contractual relationship between the parties. A contract is said to be discharged when it ceases to operate, *i.e.*, when *the rights and obligations created by it come to an end.* In some cases, other rights and obligations may arise as a result of discharge of contract, but they are altogether independent of the original contract.

A contract may be discharged—

1. By performance.
2. By agreement or consent.
3. By impossibility.
4. By lapse of time.
5. By operation of law.
6. By breach of contract.

The various modes of discharge of a contract (shown in a chart on the next page) are discussed below.

## 1. DISCHARGE BY PERFORMANCE

Performance means the doing of that which is required by a contract. Discharge by performance takes place when the parties to the contract fulfil their obligations arising under the contract within the time and in the manner prescribed. In such a case, the parties are discharged and the contract comes to an end. But if only one party performs the promise, he alone is discharged. Such a party gets a right of action against the other party who is guilty of breach.

Performance of a contract is the most usual mode of its discharge. It may be (1) actual performance, or (2) attempted performance.

(1) *Actual performance.* When both the parties perform their promises, the contract is discharged. Performance should be complete, precise and according to the terms of the agreement. Most of the contracts are discharged by performance in this manner.

(2) *Attempted performance or tender.* Tender is not actual performance but is only an *offer to perform* the obligation under the contract. Where the promisor offers to perform his obligation, but the promisee refuses to accept the performance, *tender is equivalent to actual performance*, except in case of tender of money. The effect of a valid tender is that the *contract is deemed to have been performed by the tenderer.* The tenderer is discharged from the responsibility for non-performance of the contract without in any way prejudicing his rights which accrue to him against the promisee.

## 2. DISCHARGE BY AGREEMENT OR CONSENT

As it is the agreement of the parties which binds them, so by their further agreement or consent the contract may be terminated. The rule of law in this regard is as follows : *Eodem modo quo quid constituitur, eodem modo destruitur, i.e.*, a thing may be destroyed in the same manner

## Discharge of Contract

**By performance**

1. Actual
2. Attempted

**By agreement or consent**

1. By express consent
2. By implied consent
   - (a) Novatio
   - (b) Rescission
   - (c) Alteration
   - (d) Remission
   - (e) Waiver
   - (f) Merger

**By impossibility of performance**

1. Known to the parties
2. Unknown to the parties
3. Supervening impossibility

*An execuse*

- (a) Destruction of subject-matter
- (b) Non-existence of a state of things
- (c) Death or incapacity for personal services
- (d) Change of law
- (e) Outbreak of war

*Not on execue*

- (a) Difficulty of performance
- (b) Commercial impossibility
- (c) Failure of a third party
- (d) Strikes, lock-outs and civil disturbances
- (e) Failure of one of the objects

**By lapse of time**

**By operation of law**

1. Death
2. Merger
3. Insolvency
4. Unauthorised alteration of terms of contract
5. Rights and liabilities vesting in the same person

**By breach of contract**

*Actual*

1. At the time of the performance
2. During the performance

*Anticipatory*

1. By an act of the promisor making performance impossible, *i.e.*, implied repudiation
2. By renunciation of the obligation, *i.e.*, expres. repudiation

in which it is constituted. This means a contractual obligation may be discharged by agreement which may be *express* or *implied*.

*Example.* *A* sells a car to *B* 'on approval' with the condition that it should be returned within seven days if it is found wanting in efficient functioning. *B* may return the car within seven days if it is found wanting. Consent to return the car is given to *B* at the time of the formation of the contract.

The various cases of discharge of a contract by mutual agreement are dealt with in Secs. 62 and 63 and are discussed below :

(*a*) *Novation* (Sec. 62). Novation takes place when (*i*) a new contract is substituted for an existing one between the same parties, or (*ii*) a contract between two parties is rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party. A common instance is where a creditor at the request of the debtor agrees to take another person as his debtor in place of the original debtor. The consideration for the new contract is the discharge of the old contract. It is essential for the principle of novation to apply that there must be the mutual or tripartite consent of all the parties concerned.

*Examples.* (*a*) *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.

(*b*) *A* owes *B* Rs. 10,000. He enters into an agreement with *B* and gives *B* a mortgage of his (*A*'s) estate for Rs. 5,000 in place of the debt of Rs. 10,000. This is a new contract which extinguishes the old one.

*Novation should take place before expiry of the time of the performance of the original contract.* If it does not, there would be a breach of the contract. If a new contract is subsequently substituted for the existing contract, it would only be to adjust the remedial rights arising out of the breach of the old contract. If for any reason the new contract cannot be enforced, the parties can fall back upon the old contract.

*Example.* An existing mortgage was discharged by the substitution of a new agreement of mortgage. The new agreement was not enforceable for want of registration. *Held*, the parties could fall back upon the original mortgage [*Shanker Lal Damodar* v. *A. Ajaipal*, A.I.R. (1946) Nag. 260].

(*b*) *Rescission* (Sec. 62). Rescission of a contract takes place when all or some of the terms of the contract are cancelled. It may occur—

(*i*) by mutual consent of the parties, or

(*ii*) where one party fails in the performance of his obligation. In such a case, the other party may rescind the contract without prejudice to his right to claim compensation for the breach of contract.

*Examples.* (*a*) *A* promises to supply certain goods to *B* six months after date. By that time, the goods go out of fashion. *A* and *B* may rescind the contract.

(*b*) *A* and *B* enter into a contract that *A* shall deliver certain goods to *B* by the 15th of this month and that *B* shall pay the price on the first of the next month. *A* does not supply the goods. *B* may rescind the contract, and need not pay the price.

(c) *A* induces *B* to enter into a contract by fraud. In this case the contract is voidable at the option of *B*. He may rescind the contract.

Rescission may be total or partial. Total rescission is the discharge of the entire contract ; partial rescission is the variation of the original contract by (*a*) rescinding some of the terms of the contract, or (*b*) substituting new terms for the ones which are rescinded, or (*c*) adding new terms without rescinding any of the terms of the original contract.

*Mode of communicating or revoking rescission.* The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication, or revocation, of a proposal (Sec. 66) The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received (Sec. 64)

(c) *Alteration* (Sec. 62). Alteration of a contract may take place when one or more of the terms of the contract is/are altered by the mutual consent of the parties to the contract. In such a case, the old contract is discharged.

*Example. A* enters into a contract with *B* for the supply of 100 bales of cotton at his godown No. 1 by the first of the next month. *A* and *B* may alter the terms of the contract by mutual consent.

(*d*) *Remission* (Sec. 63). Remission means acceptance of a lesser fulfilment of the promise made, *e.g.*, acceptance of a lesser sum than what was contracted for, in discharge of the whole of the debt. It is not necessary that there must be some consideration for the remission of the part of the debt [*Hari Chand Madan Gopal* v. *State of Punjab*, A.I.R. (1973) S.C. 381]. Sec. 63 allows the promisee to dispense with or remit the performance of the promise by the promisor, or to extend the time for performance or to accept any other satisfaction instead of performance.

*Example. A* owes *B* Rs. 5,000. *A* pays to *B* and *B* accepts, in satisfaction of the whole debt, Rs. 2,000 paid at the time and place at which Rs. 5,000 were payable. The whole debt is discharged.

(*e*) *Waiver.* Waiver takes place when the parties to a contract agree that they shall no longer be bound by the contract. This amounts to a *mutual abandonment* of rights by the parties to the contract. Consideration is not necessary for waiver.

(*f*) *Merger.* Merger takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under the same or some other contract.

*Example. P* holds a property under a lease. He later buys the property. His rights as a lessee merge into his rights as an owner.

### 3. DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

If an agreement contains an undertaking to perform an impossibility, it is void *ab initio*. This rule is based on the following maxims :

(1) *lex non cogit ad impossibilia, i.e.*, the law does not recognise what is impossible ; and

(2) *impossibilium nulla obligato est, i.e.*, what is impossible does not create an obligation.

According to Sec. 56, impossibility of performance may fall into either of the following categories :

1. *Impossibility existing at the time of agreement.* The first paragraph of Sec. 56 lays down that "an agreement to do an act impossible in itself is void." This is known as *pre-contractual* or *initial impossibility.* The fact of impossibility may be—

(*i*) *known to the parties.* This is known as *absolute impossibility.* In case of absolute impossibility, the agreement is void *ab initio.* For example, when *A* agrees with *B* to discover treasure by magic, or undertakes to put life into the dead wife of *B*, the agreement is void.

(*ii*) *unknown to the parties.* Where at the time of making the contract both the parties are ignorant of the impossibility, as in the case of destruction of subject-matter to the ignorance of both the parties, the contract is void on the ground of mutual mistake. If, however, the promisor alone knows of the impossibility of performance at the time of making the contract, he shall have to compensate the promisee for any loss which such promisee sustains through the non-performance of the promise (Sec, 56, para 3).

*Examples*, (*a*) *A* sold to *B* certain goods supposed to be on a voyage. The goods had ceased to exist due to the perils of the sea. *Held*, the contract was void [*Couturier* v. *Hastie*, (1856) 5 H.L.C. 673].

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

2. *Impossibility arising subsequent to the formation of contract.* Impossibility which arises subsequent to the formation of a contract (which could be performed at the time when the contract was entered into) is called *post-contractual* or *supervening impossibility.* In such a case, the contract becomes void when the act becomes impossible or unlawful [Sec. 56, para 2]. Impossibility of performance of a contract, as a general rule, is no excuse for the non -performance of the contract ; but where this impossibility is caused by the circumstances *beyond the control of the parties*, the parties are discharged from further performance of the obligation under the contract.

**Discharge by supervening impossibility**

*A* contract is *discharged* by supervising impossibility in the following cases :

1. *Destruction of subject-matter of contract.* When the subject-matter of a contract, subsequent to its formation, is destroyed without any fault of the parties to the contract, the contract is discharged.

*Examples.* (*a*) *C* let a music hall to *T* for a series of concerts for certain days. The hall was accidentally burnt down before the date of the first concert. *Held*, the contract was void [*Taylor* v. *Caldwell*, (1863) 3 B. & S. 826].

(*b*) A contracted to sell a specified quantity of potatoes to be grown on his farms. The crop largely failed. *Held*, the contract was discharged [*Howell* v. *Coupland*, (1876) Q.B.D. 258].

(*c*) *A* sold to *B* a cargo of cotton seed to be shipped by a particular ship. Before the time for shipping arrived, the ship was damaged by stranding so as to tender the loading of the cargo impossible according to the contract, *Held*, the contract was discharged [*Nickoll & Knight* v. *Ashton, Edridge & Co.* (1901) 2 K. B. 126].

2. *Non-existence or non-occurrence of a particular state of things.* Sometimes, a contract is entered into between two parties on the basis of a continued existence or occurrence of a particular state of things. If there is any change in the state of things which formed the basis of the contract, or if the state of things which ought to have occurred does not occur, the contract is discharged.

*Examples.* (*a*) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.

(*b*) *H* hired a flat from *K* for June 26 and 27, 1902 for witnessing a coronation procession of King Edward VII. *K* knew of *H*'s purpose though the contract contained no reference to this. The coronation procession was cancelled due to the illness of the King. *Held*, *H* was excused from paying the rent for the flat on the ground that existence of the procession was the basis of the contract. Its cancellation discharged the contract [*Krell* v. *Henry*, (1903) 2 K.B. 740].

This kind of failure of the object of a contract is often called "frustration of the contract".

3. *Death or incapacity for personal service.* Where the performance of a contract depends on the personal skill or qualification of a party, the contract is discharged on the illness or incapacity or death of that party. The man's life is an implied condition of the contract.

*Examples.* (*a*) An artist undertook to perform at a concert for a certain price. Before she could do so, she was taken seriously ill. *Held*, she was discharged due to illness [*Robinson* v. *Davison*, (1871) L.R. 6 Ex. 269].

(*b*) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions, *A* is too ill to act. The contract to act on those occasions becomes void.

4. *Change of law or stepping in of a person with statutory authority.* When, subsequent to the formation of a contract, change of law takes place, or the Government takes some power under some Ordinance or Special Act, as for example, the Defence of India Act, so that the performance of the contract becomes impossible, the contract is discharged.

*Examples.* (*a*) *D* leased some land to *B* and agreed to erect a building on the adjoining land. The adjoining land, after some time, was acquired under statutory powers by a railway company which built a railway station on it. *Held*, *D* was excused from performance of the contract [*Baily* v. *De Crespigny*, (1869) L.R. 4 Q.B. 180].

(*b*) *D* enters into a contract with *P* on 1st March for the supply of certain imported goods in the month of September of the same year. In June by an Act of Parliament, the import of such goods is banned. The contract is discharged.

(*c*) *A* agreed to transport goods of *B* from place *X* to place *Y*. Subsequent to the formation of the contract, the trucks of *A* were requisitioned by the Government under a statutory power. *Held*, the contract was discharged [*Noor Bux* v. *Kalyan*, A.I.R. (1945) Nag. 127].

(*d*) *A* sold to *B* a specific parcel of wheat in a warehouse. Before the delivery was given, the wheat was requisitioned by the Government under statutory power. *Held*, the contract was discharged [*Shipton Anderson & Co., Re*, (1915) 3 K.B. 676].



5. *Outbreak of war.* A contract entered into with an alien enemy during war is unlawful and therefore impossible of performance. Contracts entered into before the outbreak of war are suspended during the war and may be revived after the war is over.

*Example.* *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

**Impossibility of performance—not an excuse**

"Impossibility of performance is, as a rule, not an excuse for non-performance," observed Scrutton, L.J. in *Ralli Bros.* v. *Companía Naviera, etc.*, (1920) 2 K.B. 287. Ordinarily when a person undertakes to do something, he must do it unless its performance becomes absolutely impossible due to any of the circumstances already discussed.

In the following cases, a contract is *not discharged* on the ground of supervening impossibility :

1. *Difficulty of performance.* A contract is not discharged by the mere fact that it has become more difficult of performance due to some uncontemplated events or delays.

*Examples.* (*a*) *A* sold a certain quantity of Finland timber to *B* to be supplied between July and September. Before any timber was supplied, war broke out in the month of August and transport was disorganised so that *A* could not bring any timber from Finland. *Held*, the difficulty in getting the timber from Finland did not discharge *A* from performance [*Blackburn Bobbin Co.* v. *Allen & Sons*, (1918) 1 K.B. 540].

(*b*) *A* agreed to sell to *B* 300 tons of Sudan groundnuts c.i.f. Hamburg. The usual and normal route at the date of the contract was *via* Suez Canal. Shipment was to be in November/December, 1956, but on November 2, 1956 the canal was closed to traffic and it was not reopened until the following April. *A* refused to ship the goods *via* the Cape of Good Hope on the plea that the contract had been frustrated by reason of the closing of the Suez route. *Held*, the contract was not frustrated as *A* could have transported the goods *via* the Cape of Good Hope [*Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*, (1962) A.C. 93].

2. *Commercial impossibility.* A contract is not discharged merely because expectation of higher profits is not realised, or the necessary raw material is available at a higher price because of the outbreak of war, or there is a sudden depreciation of currency.

*Example.* *A* promised to send certain goods from Bombay to Antwerp in September. Before the goods were sent, war broke out and there was a sharp increase in shipping rates. *Held*, the contract was not discharged [*Karl Ettlinger* v. *Chagandas & Co.*, (1915) 20 I.L.R. Bom. 30].

3. *Impossibility due to failure of a third person.* Where a contract could not be performed because of the default by a third person on whose work the promisor relied, it is not discharged.

*Examples.* (*a*) *A*, a wholesaler, entered into a contract with *B* for the sale of a certain type of cloth to be produced by *C*, a manufacturer of that cloth. *C* did not manufacture that cloth. *Held*, *A* was liable to *B* for damages [*Harnandrai Fulchand* v. *Pragdas*, A.I.R. (1923) P.C. 54].

(*b*) *A* agreed to sell to *B* a specified quantity of cotton goods to be manufactured by a particular mill. *B* agreed to take delivery as and when goods might be received from the mill. A time was named for the completion of the delivery. *A* could not fulfil his agreement as the mill failed to produce the goods. *Held*, *B* was entitled to recover damages from *A* [*Ganga Saran* v. *Ram Charan*, A.I.R. (1952) S.C. 95].

4. *Strikes, lock-outs and civil disturbances.* Events such as these do not discharge a contract unless the parties have specifically agreed in this regard at the time of formation of the contract.

*Examples.* (*a*) The unloading of a ship was delayed beyond the date agreed with the shipowners owing to a strike of dock workers. *Held*, the shipowners were entitled to damages, the impossibility of performance being no excuse [*Budget* v. *Binnington*, (1891) 1 Q.B. 35].

(*b*) *A* agreed to supply to *B* certain goods to be procured from Algeria. The goods could not be produced due to riots and civil disturbances in that country. *Held*, there was no excuse for non-performance of the contract [*Jacobs* v. *Credit Lyonnais*, (1814) 12 Q.B.D. 589].

5. *Failure of one of the objects.* When a contract is entered into for several objects, the failure of one of them does not discharge the contract.

*Example. HB* agreed to let out a boat to *H* (*a*) for viewing a naval review on the occasion of the coronation of Edward VII, and (*b*) to sail round the fleet. Owing to the King's illness the naval review was abandoned but the fleet was assembled. The boat, therefore, could be used to sail round the fleet. *Held*, the contract was not discharged [*Herne Bay Steamboat Co.* v. *Hutton*, (1903) 2 K.B. 683].

**Effects of supervening impossibility**

1. When the performance of a contract becomes impossible or unlawful subsequent to its formation, the contract becomes void (Sec. 56, para 2).

2. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains though the non-performance of the promise (Sec. 56, para 3).

3. Where an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for t, to the person from whom he received it (Sec. 65).

*Example. A* pays *B* Rs. 1,000 in consideration of *B*'s promise to marry *C*, *A*'s daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* Rs. 1,000.

**Doctrine of frustration**

In England the doctrine of frustration is the parallel concept of 'supervening impossibility". It comes into play when the common object of a contract can no longer be achieved or when the contract, after it is made, becomes impossible of performance due to circumstances beyond the control or contemplation of the parties. It is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the



purview of Sec. 56 [*Boothaliga Agencies* v. *U.T.C. Portaswami*, A.I.R. (1969) S.C. 110].

In *Satyabrata Ghose* v. *Mugneeram*, A.I.R. (1954) S.C. 44, the Supreme Court observed in this regard :

> "Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract ; *in fact impossibility and frustration are often used as interchangeable expressions.*"

## 4. DISCHARGE BY LAPSE OF TIME

The Limitation Act, 1963 lays down that a contract should be performed within a specified period, called period of limitation. If it is not performed, and if no action is taken by the promisee within the period of limitation, he is deprived of his remedy at law. In other words, we may say that the contract is terminated. For example, the price of goods sold without any stipulation as to credit should be paid within three years of the delivery of the goods. Where goods are sold on credit to be paid for after the expiry of a fixed period of credit, the price should be paid within three years of the expiry of period of credit. If the price is not paid and creditor does not file a suit against the buyer for the recovery of price within three years, the debt becomes time-barred and hence irrecoverable.

## 5. DISCHARGE BY OPERATION OF LAW

A contract may be discharged independently of the wishes of the parties, *i.e.*, by operation of law. This includes discharge—

(*a*) *By death.* In contracts involving personal skill or ability, the contract is terminated on death of the promisor. In other contracts, the rights and liabilities of a deceased person pass on to the legal representatives of the deceased person.

(*b*) *By merger.* This has already been explained in the previous Chapter.

(*c*) *By insolvency.* When a person is adjudged insolvent, he is discharged from all liabilities incurred prior to his adjudication.

(*d*) *By unauthorised alteration of the terms of a written agreement.* Where a party to a contract makes any material alteration in the contract without the consent of the other party, the other party can avoid the contract. A material alteration is one which changes, in a significant manner, the legal identity or character of the contract or the rights and liabilities of the parties to the contract.

An alteration which is not material or which is made to carry out the common intention of the parties does not affect the validity of the contract.

(*e*) *By rights and liabilities becoming vested in the same person.* Where the rights and liabilities under a contract vest in the same person, for example when a bill gets into the hands of the acceptor, the other parties are discharged. This is to avoid *circuity of action.*

## 6. DISCHARGE BY BREACH OF CONTRACT

Breach of contract means a breaking of the obligation which a contract imposes. It occurs when a party to the contract without lawful excuse does not fulfil his contractual obligation or by his own act makes

it impossible that he should perform his obligation under it. It confers a right of action for damages on the injured party.

Breach of contract may be—

1. Actual breach of contract, or
2. Anticipatory or constructive breach of contract.

**1. Actual breach of contract**

It may take place :

(1) *At the time when the performance is due.* Actual breach of contract occurs, when at the time when the performance is due, one party fails or refuses to perform his obligation under the contract.

*Example.* A agrees to deliver to *B* 5 bags of wheat on 1st January. He does not deliver the wheat on that day There is a breach of contract.

If time is not of the essence of the contract and the defaulting party expresses his willingness to perform the obligation after the appointed time, the other party may accept the performance subject to the payment of compensation for failure to perform the obligation at the appointed time. A prior notice shall have to be given to the party in default by the party not in default if compensation is to be claimed.

(2) *During the performance of the contract.* Actual breach of contract also occurs when during the performance of the contract, one party fails or refuses to perform his obligation under the contract. This refusal to perform may be by—

(*a*) *Express repudiation* (by word or act). Where there has been some performance of the contract and one party by his *word* or *act* refuses to continue to perform his obligation in *some essential respect*, the other party can treat the contract as no longer binding on him and sue for breach of contract.

*Example.* *C* contracted with a railway company to supply it 3,000 tons of railway chairs at a certain price, to be delivered in instalments. After 1,787 tons had been supplied, the railway company asked *C* to deliver no more. *Held*, *C* could bring an action for breach of contract [*Cort* v. *Ambergate etc. Rly. Co.*, (1851) 17 Q.B. 127].

(*b*) *Implied repudiation* (impossibility created by the act of a party to the contract). If a party, during the performance, makes by his own act the complete performance of the contract impossible, the effect is as if he has breached the contract, and the other party is discharged from the further performance of the contract.

*Example.* *P*, a British subject, was engaged by the Captain of a warship owned by the Japanese Government to act as a fireman. Subsequently when the Japanese Government declared war with China, *P* was informed that the performance of the contract would bring him under the penalties of the Foreign Enlistment Act. He consequently left the ship. *Held*, he was entitled to recover the wages agreed upon [*O'Neil* v. *Armstrong*, (1895) 2 Q.B. 418].

In both cases (*a*) and (*b*) the party not in breach can treat the contract as no longer binding on him and sue for breach of contract.

**2. Anticipatory breach of contract**

It occurs when a party to an executory contract declares his intention



of not performing the contract *before* the performance is due. He may do so—

(1) By expressly renouncing his obligation under the contract.

*Example.* *A* undertakes to supply certain goods to *B* on 1st January. Before this date, he informs *B* that he is not going to supply the goods. This is anticipatory breach of contract by express repudiation.

(2) By doing some act so that the performance of his promise becomes impossible.

*Example.* *A* promised to assign to *B*, within seven years from the date of his promise, all his interest in a lease for the sum of £ 140. Before the end of seven years he assigned his interest to another person. *Held*, this was anticipatory breach of contract by implied repudiation [*Lovelock* v. *Franklyn*, (1846) 8 Q.B. 371].

Sec. 39 (discussed in the Chapter on "Performance of Contract") gives expression to the doctrine of anticipatory breach.

The rights of the promisee (the party not in breach or the aggrieved party) in case of anticipatory breach are as follows :

(1) He can treat the contract as discharged so that he is absolved of the performance of his part of the promise.

(2) He can immediately take a legal action for breach of contract or wait till the time the act was to be done.

*Anticipatory breach does not necessarily discharge the contract*, unless the promisee (the aggrieved party) so chooses.

*Example.* *D* engaged *H* on 12th of April to enter into his service as courier and to accompany him upon a tour. The employment was to commence on 1st June. On 11th May *D* wrote to *H* telling him that his services would no longer be required. *H* immediately brought an action for damages although the time for performance had not yet arrived. *Held*, he was entitled to do so [*Hochster* v. *De La Tour*, (1853) 2 E. & B. 678].

If the promisee refuses to accept the repudiation of the contract by the promisor and treats the contract as alive, the consequences are as follows :

(1) The promisor may perform his promise when the time for its performance comes and the promisee will be bound to accept the performance.

(2) If, while the contract is alive, an event (say, a supervening impossibility) happens which discharges the contract legally, the promisor may take advantage of such discharge. In such a case, the promisee loses his right to sue for damages.

*Example.* *B* chartered *A*'s ship and agreed to load it with a cargo at Odessa within 45 days. When the ship reached Odessa, *B* was unable to supply the cargo. *A* did not accept the refusal and continued to demand the cargo. Before the expiry of 45 days, the Crimean War broke out rendering the performance of the contract impossible. *Held*, the contract was discharged and *A* could not sue for damages [*Avery* v. *Bowden*, (1856) 6 E. & B. 953].

*Measure of damages in anticipatory breach of contract. If the contract is ended by the promisee at once*, he can sue the promisor for damages. The amount of damages will be measured by the difference between the price prevailing on the date of breach and the contract price.

*If the contract is kept alive till the date of performance of the contract*, the measure of damages will be the difference between the price prevailing on the date of the performance and the contract price.

## SUMMARY

A contract is said to be discharged when the obligations created by it come to an end. The various modes of discharge of a contract are as follows :

1. **Discharge by performance.** Discharge of a contract by performance takes place when the parties to the contract fulfil their obligations arising under the contract within the time and in the manner prescribed. The performance may be (*i*) actual performance, or (*ii*) attempted performance.

2. **Discharge by agreement or consent.** A contract rests on the agreement of the parties. As it is agreement which binds them, so by their agreement or consent they may be discharged.

The discharge by consent may be express or implied. Discharge by implied consent takes place by— (*a*) *Novation*, *i.e.*, when a new contract is substituted for an existing one, either between the same parties or between one of the parties and a third party. (*b*) *Alteration*, *i.e.*, when one or more of the terms of the contract is/are altered by the mutual consent of the parties to the contract. (c) *Rescission*, *i.e.*, when all or some of the terms of the contract are cancelled. (*d*) *Remission*, *i.e.*, acceptance of a lesser fulfillment of the promise made. (*e*) *Waiver* which means intentional relinquishment or giving up of a right by a party entitled thereto under a contract. (*f*) *Merger*, *i.e.*, when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under a new contract.

**3. Discharge by impossibility.** Impossibility of performance may be—

**Initial impossibility.** An agreement to do an act impossible in itself is void.

**Supervening impossibility.** Impossibility which arises subsequent to the formation of a contract (which could be performed at the time when the contract was entered into) is called subsequent or supervening impossibility. The cases covered by supervening impossibility include ; (*a*) Destruction of subject-matter of contract ; (*b*) Non-existence or non-occurrence of a particular state of things ; (*c*) Death or incapacity for personal service ; (*d*) Change of law or stepping in of a person with statutory authority ; (*e*) Outbreak of war. The contract is discharged in these cases.

The following cases are not covered by supervening impossibility : (*a*) Difficulty of performance ; (*b*) Commercial impossibility ; (*c*) Failure of a third person on whose work the promisor relied ; (*d*) Strikes, lock-outs and civil disturbances ; (*e*) Failure of one of the objects. The contract is not discharged in these cases.

**4. Discharge by lapse of time.** If a contract is not performed within the period of limitation and if no action is taken by the promisee in a Law Court, the contract is discharged.

5. **Discharge by operation of law.** This includes discharge by (*a*) death, (*b*) merger, (*c*) insolvency, (*d*) unauthorised alteration of the terms of a written agreement, and (*e*) rights and liabilities becoming vested in the same person.

6. **Discharge by breach of contract.** If a party breaks his obligation which the contract imposes, there takes place breach of contract. Breach of contract may be (1) actual breach, or (2) anticipatory breach.

(1) *Actual breach of contract* may occur (*a*) at the time when the performance is due, or (*b*) during the performance of the contract.

(2) *Anticipatory breach of contract occurs* when a party repudiates his liability or obligation under the contract before the time for performance arrives.

## TEST QUESTIONS

1. What are the various ways in which a contract may be discharged ?
2. Write a note on discharge of a contract by consent.
3. Discuss fully the law relating to novation of contracts.
4. "Impossibility of performance is, as a rule, not an excuse for non-performance of a contract." Discuss.
5. Discuss the effects of supervening impossibility on the performance of a contract.
6. Does an impossibility which arises subsequent to the formation of a contract excuse the promisor from performing the contract in all cases ?
7. How far are liabilities of the parties to a contract affected by supervening impossibility ?



8. Explain, with illustrations, what is meant by the frustration of a contract.
9. "If the foundation of a contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated." —*per* Goddard, J., in *Tatem* v. *Gamboa*, (1939) 1 K.B. 142. Explain and comment on this statement.
10. "The doctrine of frustration has often been said to depend on adding a term to the contract by implication." Comment.
11. Explain 'breach of contract' as a mode of discharge of contract.
12. What do you understand by 'anticipatory breach of contract' ? State the rights of the promisee in case of such breach.

## PRACTICAL PROBLEMS

**Attempt the following problems, giving reasons :**

1. *P* let premises in Calcutta to *D* in January, 1942, at a high rent for opening a restaurant, the agreement to remain in force as long as British European troops would remain stationed in Calcutta. Although British European troops continued to be stationed in the town, the particular locality of the restaurant was declared out of bounds for the troops and thus *D* lost their custom. *D* refused to pay *P* the dues of rent on the plea of frustration of contract. Advise *P*.

[*Hint* : *P* can claim the rent from *D* as this case is not covered by supervenning impossibility (*Sachindra Nath* v. *Gopal Chandra*, A.I.R. (1949) Cal. 240)].

2. In July, 1989 Radhey Shyam entered into a contract with Raja Ram to build a house for a fixed sum of Rs. 10,00,000. Owing to unexpected shortage of skilled labour and of certain materials, the contract took 24 months to complete instead of the 12 months expected and cost about Rs. 12,50,000. Radhey Shyam contended that the contract had been frustrated and that he was entitled for the cost actually incurred. Advise Raja Ram.

[*Hint* : The doctrine of supervening impossibility does not apply in this case. The present case is that of mere difficulty and not of impossibility].

3. Is the promisor absolved from performing the contract in the following cases :

(*a*) A music hall was agreed to be let out on certain dates but before those dates it was destroyed by fire.

(*b*) An artist undertook to paint a picture for a certain price, but before he could do so, he met with an accident and lost his eye-sight.

(*c*) *A* entered into a contract with *B* on 1st March for the supply of certain imported goods in the month of September of the same year. In June, by an Act of Parliament, the import of such goods was banned.

(*d*) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy.

(*e*) *A* promises *B*, for valuable consideration, to put back the life of a dead relation of *B* by some supernatural powers but fails to keep up his promise.

(*f*) *A* agreed to sell to *B* the entire crop of apples growing in his field. After the agreement was made a sudden frost destroyed the crop.

[*Hint* : Yes, as the contract is or becomes void in all the cases on the ground of initial or supervening impossibility due to : (*a*) destruction of subject matter (*Taylor* v. *Caldwell*). (*b*) disablement of one of the parties (*Robinson* v. *Davison*). (c) subsequent illegality (*Baily* v. *De Crespigny*). (*d*) *Illegality* (Para 3 of Sec. 56). (*e*) initial impossibility of performance (Para 1 of Sec. 56). (*f*) superventing impossibility (*Howell* v. *Coupland*)].

4. *A* owned a room in a hotel which was hired to *B* for watching the coronation procession of King Edward II, at £ 141 payable at the time of the contract. £ 100 were paid in cash. But before the balance was paid, the procession was cancelled. *B* filed a suit for the recovery of the amount he had paid. Decide.

[*Hint* : *B* can recover £ 100 paid in cash and is not bound to pay the balance £ 41. But if *A* has incurred some expense in partial performance of the contract, he can claim compensation from *B*].

5. A contract between *G* and *R* provided that "60 bales are to be given to you by me ; I shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to me by the said mill." *R* failed to deliver the goods as agreed. In a suit for damages for non-delivery of goods, *R* pleaded impossibility on the ground that the goods were not supplied to him by the mill. Advise *G*.

[*Hint* : G is entitled to claim damages for the non-delivery of goods by R (*Ganga Saran* v. *Ram Charan*)].

6. *A* made a contract with *B* for supplying to him certain goods at a place outside the State when there was no prohibition against sending the goods outside the State. Subsequently prohibition was imposed on the sending of those goods to that place and the railway booking was consequently closed. *A* failed to supply the goods. *B* sued *A* for damages for non-supply of goods. *A*, *inter alia*, pleaded that the contract became impossible of performance and so he was absolved from performing it. Will *A* succeed in his said defence ?

[*Hint* : Yes (Para 2 of Sec. 56)].

7. A shipbuilder contracted to build and supply a ship of specified dimensions according to a model to be approved by the buyers, it being a term of the contract that the ship was to carry a certain dead weight on a certain draught. The model was approved and it was subsequently found to be a mathematical impossibility to produce a ship which would fulfil the terms of the contract. Can the shipbuilder plead impossibility of performance in a suit against him by the buyer ?

[*Hint* : Yes (Para 1 of Sec. 56)].

8. By a contract dated 6th September, 1956, a seller agreed to sell groundnuts for shipment from Port Sudan during November, 1956 to Belfast. At the date of the contract the usual and customary route was *via* the Suez Canal. On 2nd November, 1956, the Suez Canal was closed to navigation and only the route *via* the Cape of Good Hope was open. The seller did not ship the goods and the buyer sued for breach of contract. Give your decision.

[*Hint* : The contract is not discharged by supervening impossibility (*Blackburn Bobbin Co.* v. *Allen & Sons*). Further the buyer can recover damages].

9. *A* was due to perform a contract on 1st May, 1991, but on 20th April he repudiated his obligation. On 29th April the contract became illegal through a change in the law. *B*, the other party to the contract, filed a suit for breach of contract on 30th April, 1991. Discuss.

[*Hint* : *B* has no remedy against *A* as, when *B* files a suit for breach of contract, the contract has already been discharged by supervening illegality].

10. *A* contracted to make and deliver 500 pairs of shoes to *B* by January 1. A strike of *A*'s employees prevented him from fulfilling his contract. In a suit by *B* for breach of contract, *A* claimed that the contract was terminated by impossibility of performance. Was his defence good ?

[*Hint* : No. Further *A* is liable to *B* in damages].

11. *A* contracts to supply a specific car to *B* a month after the date of the contract. Within the month *A* sells the car to *C*. Thereupon *B* sues *A* for the breach of contract. *A* contends that he could still perform the contract by repurchasing the car from *C*. Is *C*'s contention valid ?

[*Hint* : No. The sale of the car by *A* amounts to an anticipatory breach of contract by implied repudiation (*Lovelock* v. *Franklyn*)].

12. *P* hired a godown from *D* for a period of twelve months and paid the whole rent to him in advance. After six months the godown was destroyed by fire and *P* claimed a refund of a proportionate amount of the rent. Is the claim valid ?

[*Hint* : In this case the contract becomes void subsequent to its formation (Para 2 of Sec. 56). Under Sec. 65 *P* can recover rent for the unexpired part of the term [*Dharamsey* v. *Ahmedbhai*)].

13. *A* contracted to supply *B* a certain quantity of 'Finland Birch Timber' to be delivered at Bombay from July to October 1939. No deliveries were made before September 1939 when World War II broke out. Transport was disorganised and *A* could not get any timber from Finland. Is A discharged from his obligation ?

[*Hint* : No (*Blackburn Bobbin Co.* v. *Allen & Sons*)].

14. The unloading of a ship was delayed beyond the date agreed with the shipowners owing to a strike of dock labourers. On a suit by the shipowners for damages, the plea of impossibility of performance was raised. Advise the shipowners.

[*Hint* : The shipowners can claim damages].

15. *A* enters into a contract with *B* for singing at his theatre for three nights for a fee of Rs. 100 for every night. She sings for two nights and is taken ill. (*a*) Can *B* ask for damages for loss of profit from *A* ? (*b*) Would your answer be different if *A* sings for the theatre another night ?

[*Hint* : (*a*) No (Sec. 56). (*b*) No].

# 11

# *Remedies for Breach of Contract*

**Where there is a right, there is a remedy**

A contract gives rise to correlative rights and obligations. A right accruing to a party under a contract would be of no value if there were no remedy to enforce that right in a Law Court in the event of its infringement or breach of contract. *A remedy is the means given by law for the enforcement of a right.*

When a contract is broken, the injured party (*i.e.*, the party who is not in breach) has one or more of the following remedies :

1. Rescission of the contract.
2. Suit for damages.
3. Suit upon *quantum meruit*.
4. Suit for specific performance of the contract.
5. Suit for injunction.

## 1. RESCISSION

When a contract is broken by one party, the other party may sue to treat the contract as rescinded and refuse further performance. In such a case, he is absolved of all his obligations under the contract.

*Example.* *A* promises *B* to supply 10 bags of cement on a certain day. *B* agrees to pay the price after the receipt of the goods. *A* does not supply the goods. *B* is discharged from liability to pay the price.

The Court may grant rescission—

(*a*) where the contract is voidable by the plaintiff ; or

(*b*) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

The Court may, however, refuse to rescind the contract—

(*a*) where the plaintiff has expressly or impliedly ratified the contract ; or

(*b*) where, owing to the change of circumstances (not being due to any act of the defendant himself), the parties cannot be restored to their original positions ; or

(*c*) where third parties have, during the subsistence of the contract, acquired rights in good faith and for value ; or

(*d*) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract (Sec. 27 of the Specific Relief Act, 1963).

When a party treats the contract as rescinded, he makes himself liable to restore any benefits he has received under the contract to the party from whom such benefits were received (Sec. 64). But if a person rightfully rescinds a contract he is entitled to compensation for any damage which he has sustained through non-fulfilment of the contract by the other party (Sec. 75).

## 2. DAMAGES

Damages are a monetary compensation allowed to the injured party

[*Hint* : *G* is entitled to claim damages for the non-delivery of goods by *R* (*Ganga Saran* v. *Ram Charan*)].

6. *A* made a contract with *B* for supplying to him certain goods at a place outside the State when there was no prohibition against sending the goods outside the State. Subsequently prohibition was imposed on the sending of those goods to that place and the railway booking was consequently closed. *A* failed to supply the goods. *B* sued *A* for damages for non-supply of goods. *A*, *inter alia*, pleaded that the contract became impossible of performance and so he was absolved from performing it. Will *A* succeed in his said defence ?

[*Hint* : Yes (Para 2 of Sec. 56)].

7. A shipbuilder contracted to build and supply a ship of specified dimensions according to a model to be approved by the buyers, it being a term of the contract that the ship was to carry a certain dead weight on a certain draught. The model was approved and it was subsequently found to be a mathematical impossibility to produce a ship which would fulfil the terms of the contract. Can the shipbuilder plead impossibility of performance in a suit against him by the buyer ?

[*Hint* : Yes (Para 1 of Sec. 56)].

8. By a contract dated 6th September, 1956, a seller agreed to sell groundnuts for shipment from Port Sudan during November, 1956 to Belfast. At the date of the contract the usual and customary route was *via* the Suez Canal. On 2nd November, 1956, the Suez Canal was closed to navigation and only the route *via* the Cape of Good Hope was open. The seller did not ship the goods and the buyer sued for breach of contract. Give your decision.

[*Hint* : The contract is not discharged by supervening impossibility (*Blackburn Bobbin Co.* v. *Allen & Sons*). Further the buyer can recover damages].

9. *A* was due to perform a contract on 1st May, 1991, but on 20th April he repudiated his obligation. On 29th April the contract became illegal through a change in the law. *B*, the other party to the contract, filed a suit for breach of contract on 30th April, 1991. Discuss.

[*Hint* : *B* has no remedy against *A* as, when *B* files a suit for breach of contract, the contract has already been discharged by supervening illegality].

10. *A* contracted to make and deliver 500 pairs of shoes to *B* by January 1. A strike of *A*'s employees prevented him from fulfilling his contract. In a suit by *B* for breach of contract, *A* claimed that the contract was terminated by impossibility of performance. Was his defence good ?

[*Hint* : No. Further *A* is liable to *B* in damages].

11. *A* contracts to supply a specific car to *B* a month after the date of the contract. Within the month *A* sells the car to *C*. Thereupon *B* sues *A* for the breach of contract. *A* contends that he could still perform the contract by repurchasing the car from *C*. Is *C*'s contention valid ?

[*Hint* : No. The sale of the car by *A* amounts to an anticipatory breach of contract by implied repudiation (*Lovelock* v. *Franklyn*)].

12. *P* hired a godown from *D* for a period of twelve months and paid the whole rent to him in advance. After six months the godown was destroyed by fire and *P* claimed a refund of a proportionate amount of the rent. Is the claim valid ?

[*Hint* : In this case the contract becomes void subsequent to its formation (Para 2 of Sec. 56). Under Sec. 65 *P* can recover rent for the unexpired part of the term [*Dharamsey* v. *Ahmedbhai*)].

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## 2. DAMAGES

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by the Court for the loss or injury suffered by him by the breach of a contract. The object of awarding damages for the breach of a contract is to put the injured party in the same position, so far as money can do it, as if he had not been injured, *i.e.*, in the position in which he would have been had there been performance and not breach. This is called the doctrine of restitution (*restitutio in integrum*). The fundamental basis of awarding damages is compensation for the pecuniary loss which naturally flows from the breach.

The foundation of modern law of damages, both in India and England, is to be found in the judgment in the case of *Hadley* v. *Baxendale*, (1854) 9 Ex. 341. The facts of this case were as follows :

*Hadley* v. *Baxendale*. *X*'s mill was stopped by 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 loss of profits. By some neglect on the part of *Y* the delivery of the shaft was delayed in transit beyond a reasonable time (so that the mill was idle for a longer period than otherwise would have been the case had there been no breach of the contract of carriage). *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 the shaft would entail loss of profits to the mill.*

Alderson, B observed in this case as follows :

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may *fairly* and *reasonably* be considered either arising *naturally*, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the *contemplation* of both the parties at the time they made the contract, as the *probable* result of the breach of it."

This statement of law is generally known as the *Rule in Haaley* v. *Baxendale*.

Sec. 73 of the Contract Act which deals with "compensation for loss or damage caused by breach of contract" is based on the judgment in the above case. The rules as given in Sec. 73 are as follows :

When a contract has been broken, the injured party is entitled to—

(*a*) such damages which naturally arose in the usual course of things from such breach. This relates to *ordinary* damages arising in the usual course of things ;

(*b*) such damages which the parties knew, when they made the contract, to be likely to result from the breach. This relates to *special* damages. But—

(*c*) such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach ; and

(*d*) such compensation for damages arising from breach of a quasi-contract shall be same as in any other contract.

In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

The rules relating to damages may now be considered :



**1. Damages arising naturally—ordinary damages**

When a contract has been broken, the injured party can recover from the other party such damages as *naturally* and *directly* arose in the *usual course of things* from the breach. This means that the damages must be the proximate consequence of the breach of contract. These damages are known as *ordinary damages*.

*Examples.* (*a*) *A* contracts to sell and deliver 50 quintals of Farm Wheat to *B* at Rs. 475 per quintal, the price to be paid at the time of delivery. The price of wheat rises to Rs. 500 per quintal and *A* refuses to sell the wheat. *B* can claim damages at the rate of Rs. 25 per quintal.

(*b*) *A* contracts to buy of *B* at Rs. 950 per quintal of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. The market price of rice on that day is Rs. 930 per quintal. *B* is entitled to receive from *A* compensation at the rate of Rs. 20 per quintal.

In a contract for the sale of goods, the measure of damages on the breach of a contract is the *difference between the contract price and the market price* of such goods on the date of the breach. If, however, the thing contracted for is not available in the market, the price of the nearest and best available substitute may be taken into account in calculating damages. In the absence of market at the place of delivery, market price of the nearest place or prevailing in the controlling market is to be considered. Where the subject-matter of a contract is goods specially made to order and which are not marketable, the price of the goods is the measure of damages [*Punjab State Electricity Board* v. *A.T.T. Agencies*, A.I.R. (1986) P. & H. 323].

Under Sec. 73, compensation is not to be given for any remote or indirect loss or damage.

*Examples.* (*a*) *A* contracts to pay a sum of money to *B* on a specified day. He does not pay the money on that day. *B*, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay together with interest up to the day of payment.

(*b*) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill.

Further Sec. 73 does not give any cause of action unless and until damage is actually suffered [*Union of India* v. *T.D.L. Patel*, A.I.R. (1971) Delhi 120].

*Effect of neglect by promisee* (Sec. 67). If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

*Example.* *A* contracts with *B* to repair his house. *B* neglects or refuses to point out to *A* the places in which his house requires repair. *A* is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

**2. Damages in contemplation of the parties—special damages**

Damages other than those arising from the breach of a contract may be recovered if such damages may reasonably be supposed to have been in the contemplation of both the parties as the probable result of the breach of the contract. Such damages, known as *special damages*, cannot be claimed as a matter of right. These can be claimed only if the special circumstances which would result in a special loss in case of breach of a contract, are brought to the notice of the other party.

*Examples.* (*a*) *S* sent some specimens of his goods for exhibition at an agricultural show. After the show he entrusted some of his samples to an agent of a railway company for carriage to another show ground at New Castle. On the consignment note he wrote "Must be at New Castle Monday certain". Owing to a default on the part of the railway company, the samples arrived late for the show. *Held*, S could claim damages for the loss of profit at the show [*Simpson* v. *London & N.W. Rail. Co.*, (1876) 1 Q.B.D. 274].

(*b*) *G*, a tailor, delivered a sewing machine and some cloth to a railway company to be delivered at a place where a festival was to be held. He expected to earn some exceptional profit at the festival but he did not bring this fact to the notice of the railway authorities. The goods were delivered after the conclusion of the festival. *Held*, he could not recover the loss of profit [*Madras Rail. Co.* v. *Govind Rau*, (1898) 21 Mad. 173].

(*c*) *A*, a builder, contracts to erect a house for *B* by the 1st of January, in order that *B* may give possession of it at that time to *C* to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that before the 1st January, it falls down and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of the contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

(*d*) *P* bought from *L* some copra cake. He sold it to *B* who sold it to various dealers, and they in turn sold it to farmers, who used it for feeding cattle. The copra cake was poisonous and the cattle fed on it died. Claims were made by the various buyers against their sellers and *P* claimed against *L* the damages and costs he had to pay to *B*. *Held*, as it was within the contemplation of the parties that the copra cake was to be used for feeding cattle *P* could claim compensation [*Pinnock Bros.* v. *Lewis & Peat Ltd.* (1923) 1 K.B. 690].

**3. Vindictive or exemplary damages**

Damages for the breach of a contract are given by way of compensation for loss suffered, and not by way of punishment for wrong inflicted. Hence, 'vindictive' or 'exemplary' damages have no place in the law of contract because they are punitive (involving punishment) by nature. But in case of (*a*) breach of a promise to marry, and (*b*) dishonour of a cheque by a banker wrongfully when he possesses sufficient funds to the credit of the customer, the Court may award exemplary damages.

**4. Nominal damages**

Where the injured party has not in fact suffered any loss by reason of the breach of a contract, the damages recoverable by him are nominal,



*i.e.*, very small, for example, a rupee. These damages merely acknowledge that the plaintiff has proved his case and won.

*Example.* A firm consisting of four partners employed *B* for a period of two years. After six months two partners retired, the business being carried on by the other two. *B* declined to be employed under the continuing partners. *Held*, he was only entitled to nominal damages as he had suffered no loss [*Brace* v. *Calder*, (1895) 2 Q.B. 253].

**5. Damages for loss of reputation**

Damages for loss of reputation in case of breach of a contract are generally not recoverable. An exception to this rule exists in the case of a banker who wrongfully refuses to honour a customer's cheque. If the customer happens to be a tradesman, he can recover damages in respect of any loss to his trade reputation by the breach. And the rule of law is : the smaller the amount of the cheque dishonoured, the larger the amount of damages awarded. But if the customer is not a tradesman, he can recover only nominal damages.

**6. Damages for inconvenience and discomfort**

Damages can be recovered for physical inconvenience and discomfort. The general rule in this connection is that the measure of damages is not affected by the *motive* or the *manner* of the breach.

*Examples.* (*a*) *A* was wrongfully dismissed in a harsh and humiliating manner by *G* from his employment. *Held*, (*a*) *A* could recover a sum representing his wages for the period of notice and the commission which he would have earned during that period ; but (*b*) he could not recover anything for his injured feelings or for the loss sustained from the fact that his dismissal made it more difficult for him to obtain employment [*Addis* v. *Gramophone Co. Ltd.*, (1909) A.C. 488].

(*b*) *A* hires *B*'s ship to go to Bombay, and there take on board on 1st January, a cargo which *A* is to provide, and to bring it to Calcutta, freight to be paid, when earned. *B*'s ship does not go to Bombay. *A* procures suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship, but is put to trouble and expense in doing so. He is entitled to receive compensation from *B* in respect of such trouble and expense.

(*c*) *H*, with his wife and children, took a ticket for a midnight train, to be transported to a particular place where he lived. They were, however, transported to a wrong place and they had to walk several miles home on a drizzling wet night. *Held*, *H* could recover the sum of £ 8 to compensate him for the inconvenience, but nothing for the medical expenses of his wife who caught cold as this consequence was too remote [*Hobbs* v. *London & S.W. Rail. Co.*, (1875) L.R. 10 Q.B. 111].

If, however, the inconvenience or discomfort caused by a breach is *substantial*, the damages can be recovered on the ground of *fairness*.

**7. Mitigation of damages**

It is the duty of the injured party to take all reasonable steps to mitigate the loss caused by the breach [*Union of India* v. *B. Prahlad & Co.*, A.I.R. (1976) Delhi 236]. He cannot claim to be compensated by the party in default for loss which he ought reasonably to have avoided [*M. Lachia Setty & Sons Ltd.* v. *Coffee Board, Bangalore*, A.I.R. (1986) S.C. 162]. That