

## Capacity to Contract

The parties who enter into a contract must have the capacity to do so. 'Capacity' here means *competence* of the parties to enter into a valid contract. According to Sec. 10, an agreement becomes a contract if it is entered into between the parties who are competent to contract. According to Sec. 11, every person is competent to contract who (a) is of the *age of majority* according to the law to which he is subject, (b) is of *sound mind*, and (c) is *not disqualified* from contracting by any law to which he is subject. Thus Sec. 11 declares the following persons to be incompetent to contract :

1. Minors,
2. Persons of unsound mind, and
3. Persons disqualified by any law to which they are subject.

### 1. MINORS

According to Sec. 3 of the Indian Majority Act, 1875, a minor is a person who has not completed eighteen years of age. In the following two cases, he attains majority after twenty-one years of age :

- (1) where a guardian of a minor's person or property has been appointed under the Guardians and Wards Act, 1890, or
- (2) where the superintendence of a minor's property is assumed by a Court of Wards.

The rules governing minors' agreements are based on two fundamental rules :

The first rule is that the *law protects minors against their own inexperience* and against the possible improper designs of those more experienced. It has been rightly observed, in support of this argument, that "the law protects their (minor's) persons, preserves their rights and estates, excuses their laches (negligence or undue delay in enforcing a right such as to disentitle a person to a certain remedy) and assists them in their pleadings ; the Judges are their Counsellors, the jury their Servants and Law is their Guardian."

The second rule is that, in pursuing the above object, *the law should not cause unnecessary hardship to persons who deal with minors.*

**Minor's agreements.** The position of a minor as regards his agreements may be summed up as under :

(1) *An agreement with or by a minor is void and inoperative ab initio.* The Privy Council affirmed this view most emphatically in *Mohiri Bibi v. Dharmodas Ghose*, (1903) 30 Cal. 539. In this case, a minor mortgaged his house in favour of a money-lender to secure a loan of Rs. 20,000 out of which the mortgagee (the money-lender) paid the minor a sum of Rs. 8,000. Subsequently the minor sued for setting aside the mortgage, stating that he was underage when he executed the mortgage. *Held*, the mortgage was void and, therefore, it was cancelled. Further the money-lender's request for the repayment of the amount advanced to the minor as part of the consideration for the mortgage was also not accepted.

(2) *He can be a promisee or a beneficiary.* Incapacity of a minor to enter into a contract means incapacity to bind himself by a contract. There is nothing which debars him from becoming a beneficiary, - e.g., a payee [*Sharafat Ali v. Noor Mohd.*, A.I.R. (1924) Rang. 136], indorsee or a promisee in a contract. Such contracts may be enforced at his option, but not at the option of the other party. The law does not regard him as incapable of accepting a benefit.

*Examples.* (a) *M*, aged 17, agreed to purchase a second-hand scooter for Rs. 5,000 from *S*. He paid Rs. 200 as advance and agreed to pay the balance the next day and collect the scooter. When he came with the money the next day, *S* told him that he had changed his mind and offered to return the advance. *S* cannot avoid the contract, though *M* may, if he likes.

(b) A mortgage was executed in favour of a minor. *Held*, he could get a decree for the enforcement of the mortgage [*Raghavachariah v. Srinivas*, (1917) 40 Mad. 30].

(c) *A*, a minor, under a contract of sale delivered goods to the buyer. *Held*, he was entitled to maintain a suit for the recovery of price [*Abdul Ghaffar v. Prem Piere Lal*, A.I.R. (1934) Lah. 480].

(3) *His agreement cannot be ratified by him on attaining the age of majority.* "Consideration which passed under the earlier contract cannot be implied into the contract which the minor enters on attaining majority." [*Nazir Ahmed v. Jivan Dass*, A.I.R., (1938) Lah. 159]. Thus consideration given during minority is no consideration. If it is necessary a fresh contract may be entered into by the minor on attaining majority provided it is supported by fresh consideration [*S. Shanmugam Pillai v. K.S. Pillai*, (1973) 2 SCC 312].

*Examples.* (a) *M*, a minor, borrows Rs. 5,000 from *L* and executes a promissory note in favour of *L*. After attaining majority, he executes another promissory note in settlement of the first note. The second promissory note is void for want of consideration [*Indran Ramaswamy v. Anthiappa Chettiar*, (1906) 6 M.L.J. 422].

(a) *K*, an infant, speculated on the stock exchange and became liable to the stockbrokers for £ 547. Subsequent to his attaining the age of majority he gave two bills for £ 50 each in satisfaction of the original debt. *Held*, *K* was not liable on the bills [*Smith v. King*, (1892) 2 Q.B. 543].

However, services rendered at the desire of the minor expressed during his minority and continued at the same request after his majority form a good consideration for a subsequent express promise by him in favour of the person who rendered the services [*Sindha v. Abraham* (1895) 20 Bom. 755].

(4) *If he has received any benefit under a void agreement. he cannot be asked to compensate or pay for it.* Sec. 65 which provides for restitution in case of agreements discovered to be void does not apply to a minor.

*Example.* *M*, a minor, obtains a loan by mortgaging his property. He is not liable to refund the loan. Not only this, even his mortgaged property cannot be made liable to pay the debt.

(5) *He can always plead minority.* Even if he has, by misrepresenting his age, induced the other party to contract with him, he cannot be sued either in contract or in tort for fraud because if the injured party were

The term 'necessaries' is not defined in the Indian Contract Act. The English Sale of Goods Act, 1893, defines it in Sec. 2 as "goods suitable to the condition in life of such infant or other person, and to his actual requirement at the time of sale and delivery." Such goods need not necessarily belong to a class of useful goods, but they must be (i) suitable to the position and financial status of the minor, and (ii) necessaries both at the time of sale and at the time of delivery.

Necessaries include—

(a) *Necessary goods.* Necessary goods are not restricted to articles which are required to maintain a bare existence, such as bread and clothes, but include articles which are reasonably necessary to the minor having regard to his station in life. A watch and a bicycle may well be considered to be necessaries. An engagement ring may be a necessary, but not a vanity bag bought for the minor's fiancée.

*Example.* I, a minor, bought eleven fancy waistcoats from N. He was at that time adequately provided with clothes. *Held*, the waistcoats were not necessaries, and I was not liable to pay for any of them [*Nash v. Inman*, (1908) 2 K.B. 1].

In *Byrant v. Richardson*, (1866) 14 L.T. 24, Martin, B. said that "a coat of suprefine broadcloth may be a necessary for the son of a nobleman, although it is impossible not to say that the coarse material of a ploughman's coat would be sufficient to keep a nobleman's body warm." In *Ryder v. Wombell*, (1868) L.R. 3 Exch. 90, Bramwell, B. said that "ear-rings for a male, spectacles for a blind man, a wild animal... a daily dinner of turtle and venison (the edible flesh of a wild animal taken by hunting) for a month for a clerk with a salary of 1 a week" could not be necessaries.

(b) *Services rendered.* Certain services rendered to a minor have been held to be necessaries. These include : education, training for a trade, medical advice [*Chappel v. Cooper*, (1844) 13 M & W 252], legal advice, provision of a funeral for deceased husband of a minor widow, and a house given to a minor on rent for the purpose of living and continuing his studies. As regards contracts which are not for the supply of necessaries but which are undoubtedly beneficial to the minor, the private estate of the minor is liable.

*Example.* G, a minor, entered into a contract with R, a noted billiards player, to pay him a certain sum of money to learn the game and play matches with him during his world tour. R spent time and money in making arrangements for billiards matches. *Held*, G was liable to pay as the agreement was one for necessaries as it was in effect "for teaching, instruction, and employment and was reasonable and for the benefit of the infant." [*Roberts v. Gray*, (1913) 1 K.B. 520].

*Loans incurred to obtain necessaries.* A loan taken by a minor to obtain necessaries also binds him and is recoverable by the lender as if he himself had supplied the necessaries [*Martin v. Gale*, (1876) 4 Ch. D. 428]. But the minor is not personally liable. It is only his estate which is liable for such loans.

## 2. PERSONS OF UNSOUND MIND

One of the essential conditions of competency of parties to a contract is that they should be of sound mind. Sec. 12 lays down a test of soundness of mind. It reads as follows :

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

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

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

*Examples.* (a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

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

Soundness of mind of a person depends on two facts : (i) his capacity to understand the contents of the business concerned, and (ii) his ability to form a rational judgment as to its effect upon his interests. If a person is incapable of both, he suffers from unsoundness of mind. Whether a party to a contract is of sound mind or not is a question of fact to be decided by the Court. There is a presumption in favour of sanity. If a person relies on unsoundness of mind, he must prove it sufficiently to satisfy the Court.

### **Contracts of persons of unsound mind**

*Lunatics.* A lunatic is a person who is mentally deranged due to some mental strain or other personal experience. He suffers from intermittent intervals of sanity and insanity. He can enter into contracts during the period when he is of sound mind.

*Idiots.* An idiot is a person who has completely lost his mental powers. He does not exhibit understanding of even ordinary matters. Idiocy is permanent whereas lunacy denotes periodical insanity with lucid intervals. An agreement of an idiot, like that of a minor, is void.

*Drunken or intoxicated persons.* A drunken or intoxicated person suffers from temporary incapacity to contract, i.e., at the time when he is so drunk or intoxicated that he is incapable of forming a rational judgment. The position of a drunken or intoxicated person is similar to that of a lunatic.

### **Agreements entered into by persons of unsound mind are void**

However, persons of unsound mind are liable for necessities supplied to them or to anyone whom they are legally bound to support. But even in such cases, no personal liability attaches to them. It is only their estate which is liable (Sec. 68).

### **3. OTHER PERSONS**

*Alien enemies.* An alien (the subject of a foreign state) is a person who is not a subject of the Republic of India. He may be (i) an alien friend, or (ii) an alien enemy.

Contracts with an *alien friend* (an alien whose State is at peace with the Republic of India), subject to certain restrictions, are valid. Contracts with an *alien enemy* (an alien whose State is at war with the Republic of India) may be studied under two heads, namely—

(a) contracts during the war, and



## (b) contracts made before the war.

During the continuance of the war, an alien enemy can neither contract with an Indian subject nor can he sue in an Indian Court. He can do so only after he receives a licence from the Central Government.

Contracts made before the war may either be suspended or dissolved. They will be dissolved if they are against the public policy or if their performance would benefit the enemy. For this purpose even an Indian who resides voluntarily in a hostile country, or who is carrying on business there would be treated as an alien enemy.

*Foreign sovereigns, their diplomatic staff and accredited representatives of foreign States.* They have some special privileges and generally cannot be sued unless they of their own submit to the jurisdiction of our law Courts. They can enter into contracts and enforce those contracts in our Courts. But an Indian citizen has to obtain a prior sanction of the Central Government in order to sue them in our law Courts. An ex-king can, however, be sued against in our Courts without any such sanction. [*Mighell v. Sultan of Johore*, (1894) 1 Q.B. 149].

The Central Government grants permission to sue a foreign sovereign or ambassador, etc., (i) when he has instituted a suit in a Court against the person desiring to sue him ; or (ii) where he himself or through his agent carries on trade within the jurisdiction of the Court ; or (iii) where he is in possession of immovable property in the jurisdiction of the Court and is to be sued with reference to such property ; or (iv) when he has expressly waived the privilege accorded to him.

*Corporations.* A corporation is an artificial person created by law, having a legal existence apart from its members. It may come into existence by a Special Act of the Legislature or by registration under the Companies Act, 1956. As regards a statutory corporation, i.e., a corporation formed by a Special Act of the Legislature, its contractual capacity is limited by the Statute governing it. As regards a corporation formed under the Companies Act, 1956 (commonly known as a joint stock company), its contractual capacity is regulated by the terms of its Memorandum of Association and the provisions of the Companies Act. If it exceeds its powers, whether expressly conferred on it or derived by reasonable implication from its objects clause in the Memorandum, the contract is *ultra vires* the company and is void. Further it cannot enter into contracts of a strictly personal nature as it is an artificial and not a natural person.

*Insolvents.* When a debtor is adjudged insolvent, his property vests in the Official Receiver or Official Assignee. As such the insolvent is deprived of his power to deal in that property. It is only the Official Receiver or Official Assignee who can enter into contracts relating to his property, and sue and be sued on his behalf. The insolvent also suffers from certain disqualifications which are removed when the Court passes an order of discharge.

*Convicts.* A convict when undergoing imprisonment is incapable of entering into a contract. He can, however, enter into, or sue on, a contract if he is lawfully at large under a licence called "ticket of leave". This incapacity to contract, or to sue on a contract, comes to an end when the period of sentence expires or when he is pardoned. The convict, however, does not suffer from the rigours of the Law of Limitation. Limitation is held in abeyance during the period of his sentence.

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## SUMMARY

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject (Sec. 11).

1. **Minor.** A minor is a person who has not completed eighteen years of age. But where a guardian has been appointed to a minor under the Guardians and Wards Act or where a minor is under the guardianship of the Court of Wards, he attains majority at the age of twenty-one. The position as regards his agreements is as follows :

(1) His agreement is altogether void and inoperative. (2) He can be a promisee or a beneficiary in a contract. (3) His estate is liable for the necessary goods supplied or necessary services rendered to him or to anyone whom he is legally bound to support or for money lent to him to buy necessaries. (4) He may enter into contracts of apprenticeship, service, education and instruction provided these are beneficial to him. (5) He can be an agent. (6) He cannot be a partner. But he can be admitted to the benefits of an already existing partnership with the consent of the other partners. (7) If he has received any benefit under a void agreement, he cannot be asked to compensate or pay for it. (8) The Court never orders specific performance of his agreements. (9) He can always plead minority and is not estopped from doing so even when he enters into an agreement by falsely misrepresenting his age. (10) He cannot be adjudged insolvent.

2. **Persons of unsound mind. Lunatics.** A lunatic can enter into a contract when he is of sound mind.

*Idiots.* An agreement of an idiot like that of a minor is altogether void.

*Drunken or intoxicated persons.* Their position is similar to that of lunatics.

These persons, like a minor, are liable for necessaries supplied to them or their minor dependants.

3. **Other persons. Alien enemies.** During the war an Indian citizen cannot enter into a contract with an alien enemy. Contracts made before the war are either suspended or dissolved.

*Foreign sovereigns and accredited representatives of a foreign State.* They can enter into contracts and enforce these contracts in our Courts. But they cannot be sued in our Courts without the prior sanction of the Central Government.

*Corporations.* The contractual capacity of a statutory corporation is limited by the Statute governing it. As regards a company registered under the Companies Act, 1956, its contractual capacity is regulated by its Memorandum of Association and the Companies Act, 1956.

*Insolvents.* When a debtor is adjudged insolvent he is deprived of his power to deal in his property divisible among his creditors.

*Convicts.* A convict when undergoing imprisonment is incapable of entering into a contract.

## TEST QUESTIONS

1. State briefly the law relating to competence of parties to a contract.
2. What do you understand by 'capacity to contract'? What is the effect of agreements made by persons not qualified to contract?
3. What do you know about contracts entered into with a minor from the legal point of view in India? Do you know of any contracts with a minor to be valid? What are they?
4. What are necessaries? When is a minor liable on a contract for necessaries?
5. What is the legal effect of a minor's misrepresentation of his age while entering into an agreement?
6. Discuss with suitable illustrations the law relating to validity of contracts by minors.
7. Examine the legal position of (i) a minor promisor, (ii) a minor promisee, and (iii) a minor agent.
8. Name some persons, other than minors, who are not competent to contract.

## PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. A minor fraudulently represented to a money-lender that he was of full age and executed a mortgage deed for Rs. 10,000. Has the money-lender any right of action against the minor for the money lent or for damages for fraudulent misrepresentation ?

[Hint : No (*Mohiri Bibi v. Dharmodas Ghose* ; *Leslie v. Shiel*)].

2. A minor is supplied with necessaries of life by a grocer. He makes out a promissory note in favour of the grocer. Is the grocer entitled to claim payment under the promissory note (a) from minor personally, (b) against his estate ?

[Hint : (a) No. (b) Yes (Sec. 68)].

3. A executed a pronote in favour of B while he was a minor. The pronote was renewed by A in favour of B when he attained the age of majority. B brings a suit against A on the basis of the second pronote. Will he succeed ?

3. [Hint : No].

4. A renders some services to B during his minority at the request of B. B, on attaining majority, enters into an agreement with A to compensate him (A) for services rendered during B's minority. Is the agreement valid ?

[Hint : No (*Indran Ramaswamy v. Anthiappa Chettiar*)].

5. A sold some articles from his shop to B on credit, not knowing that B was a minor. The time fixed for payment expired and no payment was made. Some time after when B attained majority, A sued him for the price. Will he succeed ?

[Hint : No].

6. A supplies some articles of food to B, the wife of C who is a lunatic. C has assets worth Rs. 5,000. (a) On non-payment, can A proceed against the assets of C ? (b) Would your answer be the same if C instead of being a lunatic is a minor ?

[Hint : (a) Yes (Sec. 68). (b) Yes].

7. M, a minor aged 17, broke his right arm in a hockey game. He engaged a physician to set it. Does the physician have a valid claim for his services ?

[Hint : Yes, but it is only M's estate which will be liable (Sec. 68)].

8. For a loan of Rs. 15,000 to be received in three annual instalments, A (the borrower) executed a simple mortgage of his property in favour of B (the lender)—the borrower receiving Rs. 5,000 towards the first instalment, at the time of executing the mortgage deed. Examine B's rights on the mortgage deed, and respecting the money paid over to A : (i) If B did not know that A was a minor.

(ii) If B knew that A was a minor. (iii) If A fraudulently misrepresented his age.

(iv) If the moneys paid to A were required for advanced studies abroad.

[Hint : The mortgage deed is void in the first three cases and B cannot claim the money. In case (iii) if the money is traceable, the Court may ask the minor to restore it. In case (iv) the minor's property is liable under Sec. 68].

9. A minor falsely representing himself to be of age, enters into an agreement to sell his property to R and receives from him as price a sum of Rs. 72,000 in advance. Out of this sum, the minor purchases a car for Rs. 60,000 and spends the rest on a pleasure trip. After the minor has attained majority, R sues him for the conveyance of the property or in the alternative for the refund of Rs. 72,000 and damages. How would you decide ?

[Hint : A minor's agreement is void (*Mohiri Bibi v. Dharmodas Ghose*). The Court may direct the minor to restore the car to R].

10. A minor who wanted to become a professional billiards player entered into a contract with a famous billiards player and agreed to pay him a certain sum of money to learn the game. Is he liable to pay ?

[Hint : No. It is only his estate which is liable (*Roberts v. Gray*)].

11. A, an adult, said to M, a minor : "I will not pay the commission I promised you for selling my magazines. You are a minor and cannot force me to pay." Is A right ?

[Hint : No. A minor can be a beneficiary or a promisee].

12. A is aged 17 years. He enters into an agreement with B for hiring out certain machinery belonging to B. After the agreement was signed, A backs out of the agreement and B wants to enforce the same. Discuss with reasons whether B will succeed or not.

[Hint : B will not succeed].

## Free Consent

It is essential to the creation of a contract that the parties are *ad idem*, i.e., they agree upon the same thing in the same sense at the same time and that their consent is free and real. Sec. 10 also says that "all agreements are contracts if they are made by the free consent of parties...."

### Meaning of "consent" and "free consent" (Secs. 13 and 14)

**Consent.** It means acquiescence or act of assenting to an offer. "Two or more persons are said to consent when they agree upon the same thing in the same sense." (Sec. 13).

**Free consent.** Consent is said to be *free* when it is *not* caused by—

- (1) Coercion as defined in Sec. 15, or
- (2) Undue influence as defined in Sec. 16, or
- (3) Fraud as defined in Sec. 17, or
- (4) Misrepresentation as defined in Sec. 18, or
- (5) Mistake, subject to the provisions of Secs. 20, 21 and 22 (Sec. 14).

When there is no consent, there is no contract. Salmond describes it as *error in consensus*. If there is no *consensus ad idem*, there is no contract. One such circumstance which interferes with *consensus ad idem* is mistake.

**Example.** An illiterate woman executed a deed of gift in favour of her nephew under the impression that she was executing a deed authorising her nephew to manage her lands. The evidence showed that the woman never intended to execute such a deed of gift, nor was the deed ever read or explained to her. *Held*, the deed was void and inoperative [*Bala Devi v. S. Majumdar*, A.I.R. (1956) Cal. 575].

In the above case the consent of the woman is altogether absent. Had she known the true position, she would not have signed the document. A deed executed by a person in such circumstances is a mere *nullity*.

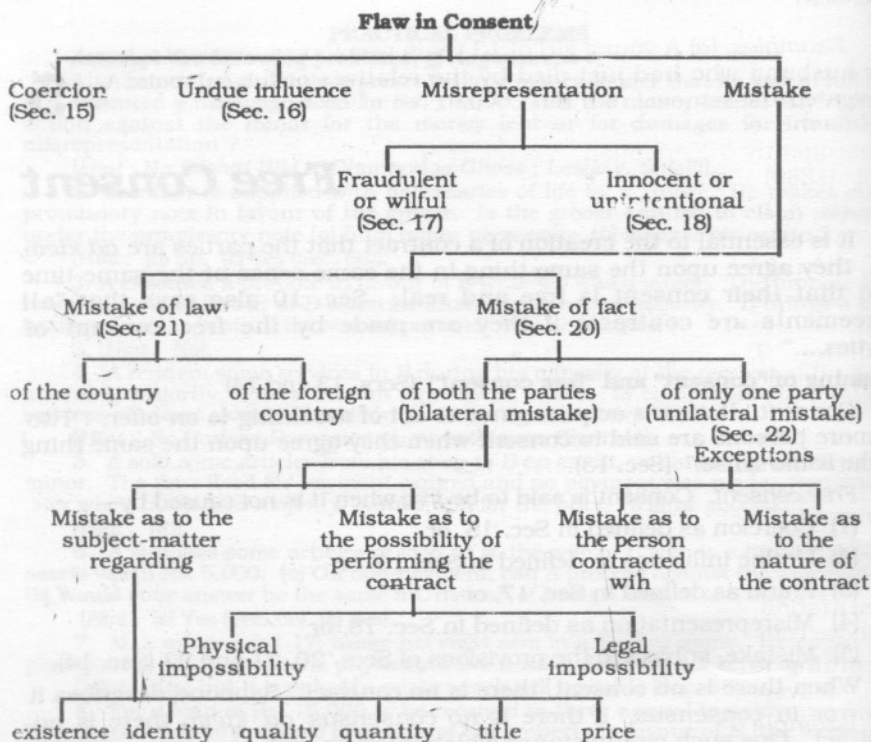
But where there is consent, but it is not free, i.e., where it is caused by coercion, undue influence, fraud or misrepresentation, the contract is voidable at the option of the party whose consent is so caused (Secs. 19 and 19-A).

**Example.** A is forced to sign a promissory note at the point of pistol. A knows what he is signing but his consent is not free. The contract in this case is voidable at his option.

The consent, in the above example, is not altogether missing. It is there, but it is not free. Salmond calls it as *error in causa*, i.e., error in the inducing cause. Such an error results from coercion, undue influence, fraud, or misrepresentation.

For various flaws in consent refer to the chart on the next page.





### COERCION

When a person is compelled to enter into a contract by the use of force by the other party or under a threat, "coercion" is said to be employed. Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, 1860 or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. It is immaterial whether the Indian Penal Code, 1860 is or is not in force in the place where the coercion is employed (Sec. 15).

The threat amounting to coercion need not necessarily proceed from a party to the contract. It may proceed even from a stranger to the contract. Likewise, it may be directed against any body—not necessarily the other contracting party. The intention of the person using coercion should, however, be to cause any person to enter into an agreement.

Coercion includes fear, physical compulsion and menace to goods.

*Examples.* (a) A threatens to shoot B if he (B) does not release him (A) from a debt which A owes to B. B releases A under the threat. The release has been brought about by coercion.

(b) A threatens to kill B if he does not lend Rs. 1,000 to C. B agrees to lend the amount to C. The agreement is entered into under coercion.

Consent is said to be caused by coercion when it is obtained by :

1. *Committing or threatening to commit any act forbidden by the Indian Penal Code, 1860.*

*Examples.* (a) A young girl of 13 years was forced to adopt a boy to her husband who had just died by the relatives of the husband who prevented the removal of his body for cremation until she consented. *Held*, the consent was not free but was induced by coercion. Consequently the adoption was set aside [*Ranganayakamma v. Alwar Setty*, (1889) 13 Mad. 214].

(b) A threatens to shoot B if he does not lend him Rs. 500. B lends the amount. The threat amounts to coercion.

## 2. Unlawful detaining or threatening to detain any property.

*Examples.* (a) An agent refused to hand over the account books of a business to the new agent unless the principal released him from all liabilities. The principal had to give a release deed as demanded. *Held*, the release deed was given under coercion and was voidable at the option of the principal [*Muthia v. Muthu Karuppa*, (1927) 50 Mad. 786].

(b) The Government gave a threat of attachment against the property of P for the recovery of the fine due from T, the son of P. P paid the fine. *Held*, the contract was induced by coercion [*Bansraj v. The Secretary of State*, (1939) A.W.R. 247].

### Effect of coercion

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused (Sec. 19).

According to Sec. 72, a person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

*Example.* A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

The onus of proving that the consent of a party to a contract was caused by coercion and that he would not have entered into it had coercion not been employed, lies on the party who wants to relieve himself of the consequences of coercion.

### Threat to commit suicide—Does it amount to coercion ?

The question whether a threat to commit suicide amounts to coercion arose in *Chukham Amiraju v. Seshamma*, (1917) 41 Mad. 33. In this case, a person held out a threat of committing suicide to his wife and son if they did not execute a release in favour of his brother in respect of certain properties. The wife and son executed the release deed under the threat. *Held*, "the threat of suicide amounted to coercion within Sec. 15 and the release deed was, therefore, voidable." In another case, *Purabi Bannerjee v. Basudev Mukerjee*, A.I.R. (1969) Cal. 293, it was observed that "one committing suicide places himself or herself beyond the reach of the law, and necessarily beyond the reach of any punishment too. But it does not follow that suicide is not forbidden by the Penal Code. Sec. 306 of the Penal Code punishes abetment of suicide. Sec. 309 punishes an attempt to commit suicide. Thus suicide as such is no crime, as indeed, it cannot be. But its attempt is ; its abetment too is. So, it may very well be said that the Penal Code does forbid suicide."

As such, a threat to commit suicide amounts to coercion.

**Duress.** In the English Law, the near equivalent of the term "coercion" is "duress". Duress involves actual or threatened violence over the person of another (or his wife, parent, or child) with a view to obtaining his consent to the agreement. If the threat is with regard to the goods or property of the other party, it is not duress.

#### UNDUE INFLUENCE

Sometimes a party is compelled to enter into an agreement against his will as a result of unfair persuasion by the other party. This happens when a special kind of relationship exists between the parties such that one party is in a position to exercise *undue influence* over the other. Sec. 16 (1) defines "undue influence" as follows :

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

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

(a) *Where he holds a real or apparent authority over the other, e.g., the relationship between master and servant, doctor and patient.*

(b) *Where he stands in a fiduciary relation; (relation of trust and confidence) to the other. It is supposed to exist, for example, between father and son, solicitor and client, trustee and beneficiary and promoter and company.*

(c) *Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Such a relation exists, for example, between a medical attendant and his patient [Sec. 16 (2)].*

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

(b) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant, to agree to pay to B an unreasonable sum for his professional services. B employs undue influence.

(c) A spiritual guru induced his devotee to gift to him the whole of his property in return of a promise of salvation of the devotee. *Held*, the consent of the devotee was given under undue influence [*Mannu Singh v. Umadat Pandey*, (1890) 12 All. 523].

(d) A poor Hindu widow was persuaded by a money-lender to agree to pay 100 per cent rate of interest on money lent by him to her. She needed the money to establish her right to maintenance. *Held*, it was a case of undue influence and the Court reduced the rate of interest to 24 per cent [*Ranee Annapurni v. Swaminath*, (1910) 34 Mad. 7].

(e) An illiterate elderly woman made a deed of gift of practically the whole of her property to her nephew who managed her affairs. *Held*, the gift should be set aside on the ground of undue influence [*Inche Noriah v. Shaikh Allie Bin Omar*, (1929) A.C. 127].

(f) An illiterate villager aged about 90 years, physically infirm and mentally in distress, executed a deed of gift under the influence of his nearest relatives (who at one time formed a joint family) who looked after his daily needs and managed his cultivation. *Held*, the

relatives were in a position to dominate his will [*Sher Singh v. Pirthi Singh*, A.I.R. (1975) All. 259].

(g) A minor female child who had lost her parents was living with her cousin brother who was in the position of *loco-parentis* (in the place of parents). A deed was executed by her in favour of latter. Held, there was undue influence [*Niko Devi v. Kripa*, A.I.R. (1989) H.P. 51].

Undue influence is also sometimes called moral coercion. Halsbury defined undue influence as "the unconscientious use by one person of power possessed by him over another in order to induce the other party to enter into a contract."

#### Effect of undue influence

When consent to an agreement is obtained by undue influence, the agreement is a contract *voidable* at the option of the party whose consent was so obtained. Any such contract may be set aside either absolutely or if the party who is entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just and equitable (Sec. 19-A).

*Examples.* (a) A's son has forged B's name to a promissory note. B under threat of prosecuting A's son obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court *may* set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and by undue influence induces B to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court *may* set the bond aside, ordering B to repay Rs. 100 with such interest as may seem to it just.

The granting of relief on account of undue influence is founded on the principle of correcting abuses of confidence.

#### Relationships which raise presumption of undue influence

The following relationships usually raise a presumption of undue influence, *viz.*, (i) parent and child, (ii) guardian and ward, (iii) trustee and beneficiary, (iv) religious adviser and disciple, (v) doctor and patient, (vi) solicitor and client, and (vii) fiancé and fiancée. The presumption of undue influence applies whenever the relationship between the parties is such that one of them is, by reason of confidence reposed in him by the other, able to take unfair advantage over the other.

There is, however, no presumption of undue influence in the relationship of (i) landlord and tenant, (ii) creditor and debtor, and (iii) husband and wife. The wife should not be *pardanashin* otherwise the presumption will arise. In these cases undue influence will have to be proved.

#### Burden of proof

In an action to avoid a contract on the ground of undue influence, the plaintiff has to establish that—

(i) the other party was in a position to dominate his will. Mere proof of nearness of relationship is not sufficient for the Court to assume that one relation was in a position to dominate the will of the other [*P. Saraswathi v. Lakshmi Kantam*, A.I.R. (1978) Mad. 361];

(ii) the other party actually used his influence to obtain the plaintiff's consent to the contract; and

(iii) the transaction is unconscionable (unreasonable).



Where a person, who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence lies upon the person in a position to dominate the will of the other [Sec: 16 (3)]. The reason for the rule in Sec. 16 (3) is that a person who has obtained an advantage over another by dominating his will may also remain in a position to suppress the requisite evidence in support of the plea of undue influence [*Ladli Parshad v. Karnal Distillery Co. Ltd.* A.I.R. (1963) S.C. 1279].

*Examples.* (a) A being in debt to B, a money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(b) An illiterate woman enfeebled by physical and mental distress, with none to advise her, executed a mortgage. *Held*, the burden is on the mortgagee to prove that the woman fully understood what she was doing [*Kanwarani Madna Wati v. Raghunath Singh*, A.I.R. (1976) H.P. 41].

Now the question is : what is an unconscionable transaction ? When a person who is in a dominant position makes an unreasonable use of his superior power over the other and enters into a bargain which is so much to his own advantage that it "shocks the conscience" or makes an exorbitant profit of the other's distress, the transaction is said to be unconscionable. The mere fact that the rate of interest is very high in a money-lending transaction will not make it unconscionable, because it is usual for money-lenders to charge high rate of interest from the needy borrowers.

*Example.* A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

But if the rate of interest is very exorbitant, and the Court regards the transaction unconscionable, the burden of proving that no undue influence was used lies on the lender.

*Rebutting the presumption.* The presumption of undue influence can be rebutted by showing that—

(a) *Full disclosure of facts was made* by the influencing party to the party alleged to have been influenced at the time of entering into the contract.

(b) *The price was adequate.* Inadequacy of consideration is only an evidence of undue influence. It is, however, not conclusive. Mere pecuniary inadequacy of consideration will not generally make the terms of a contract seem too unfair for enforcement unless the degree of inadequacy is extreme. The inadequacy must be so extreme so as to call for interposition of equity, either offensively or defensively [*Vinayakappa v. Duttachand*, A.I.R. (1986) Bom. 193].

(c) *That the weaker party was in receipt of independent advice, before making the promise.* The mere fact that independent advice was received will, not necessarily save the transaction. The advice, it must be shown, was competent and based on knowledge of all relevant facts.

**Contracts with pardanashin women**

Call No.:

A contract with a *pardanashin* woman is presumed to have been induced by undue influence. A *pardanashin* woman is one who observes *complete seclusion* because of the custom of the particular community to which she belongs. A woman who goes to the Court and gives evidence, settles rents with tenants and collects rents, communicates in matters of business with men other than the members of her family, is not a *pardanashin* woman [*Ismail Mussajee v. Hafiz Boo*, (1906) 33 Cal. 773 ; *Shaikh Ismail v. Amir Bibi*, (1902) 4 Bom. L.R. 146]. A *pardanashin* woman is, in view of her particular situation, especially open to undue influence.

Any person who enters into a contract with a *pardanashin* woman has strictly to prove that no undue influence was used and that she had free and independent advice, understood the contents of the contract and exercised her free will. The law throws around her a special cloak of protection. The Court, when called upon to deal with a deed executed by a *pardanashin* woman, must satisfy upon evidence :

*first*, that the deed was executed actually by her with full understanding of what she was about to do ;

*secondly*, that she had full knowledge of the nature and effect of the transaction in which she is said to have entered ; and

*thirdly*, she had independent and disinterested advice in the matter.

**Difference between coercion and undue influence***Coercion*

1. The consent is given under the *threat of an offence* (i.e., committing or threatening to commit an act forbidden by the Indian Penal Code or detaining or threatening to detain property unlawfully).

2. Coercion is mainly of a *physical character*. It involves mostly use of physical or violent force.

3. There must be intention of causing any person to enter into an agreement.

4. It involves a criminal act.

*Undue influence*

1. The consent is given by a person who is so situated in relation to another that the other person is in a position to dominate his will. In other words, consent is given under *moral influence*.

2. Undue influence is of *moral character*. It involves use of moral force or mental pressure.

3. Here the 'influencing party' uses its position to obtain an unfair advantage over the other party.

4. No criminal act is involved.

**MISREPRESENTATION AND FRAUD**

A statement of fact which one party makes in the course of negotiations with a view to inducing the other party to enter into a contract is known as a *representation*. It must relate to some fact which is material to the contract. It may be expressed by words spoken or written or implied from the acts and conduct of the parties.

A representation, when wrongly made, either innocently or intentionally, is a misrepresentation. Misrepresentation may be—

(i) an innocent or unintentional misrepresentation, or

(ii) an intentional, deliberate or wilful misrepresentation with an intent to deceive or defraud the other party.

The former is called "*misrepresentation*" and the latter "*fraud*".

### MISREPRESENTATION

Misrepresentation is a false statement which the person making it honestly believes to be true or which he does not know to be false. It also includes non-disclosure of a material fact or facts without any intent to deceive the other party.

*Examples.* (a) A, while selling his mare to B, tells him that the mare is thoroughly sound. A genuinely believes the mare to be sound although he has no sufficient ground for the belief. Later on B finds the mare to be unsound. The representation made by A is a misrepresentation.

(b) A company's prospectus contained a representation that it had statutory powers to run its tramways by steam provided the consent of a Government authority was obtained. The directors issued a prospectus stating therein that the company had the right to use steam power. They honestly believed that the permission for the use of steam power would be granted. The permission was refused. The company was then wound up. *Held*, the directors were guilty of misrepresentation and not of fraud [*Derry v. Peek*, (1889) 14 App. Cas. 337].

Sec. 18 defines "misrepresentation". According to it, there is misrepresentation—

1. When a person positively asserts that a fact is true when his information does not warrant it to be so, though he believes it to be true.
2. When there is any breach of duty by a person which brings an advantage to the person committing it by misleading another to his prejudice.
3. When a party causes, however innocently, the other party to the agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

#### Requirements of misrepresentation

A misrepresentation is relevant if it satisfies the following requirements :

1. It must be a representation of a material fact. Mere expression of opinion does not amount to misrepresentation even if it turns out to be wrong.
2. It must be made before the conclusion of the contract with a view to inducing the other party to enter into the contract.
3. It must be made with the intention that it should be acted upon by the person to whom it is addressed.
4. It must actually have been acted upon and must have induced the contract.
5. It must be wrong but the person who made it honestly believed it to be true.
6. It must be made without any intention to deceive the other party.
7. It need not be made directly to the plaintiff. A wrong statement of facts made to a third person with the intention of communicating it to the plaintiff, also amounts to misrepresentation.

*Example.* A told his wife within the hearing of their daughter that the bridegroom proposed for her was a young man. The bridegroom, however, was over sixty years. The daughter gave her

consent to marry him believing the statement by her father. *Held*, the consent was vitiated by misrepresentation and fraud [*Babul v. R.A. Singh*, A.I.R. (1968) Pat. 190].

Misrepresentation results not only from mis-statement of facts but also from suppression of material facts [*R. v. Kylsant*, (1932) 1 K.B. 142].

#### Consequences of misrepresentation

The aggrieved party, in case of misrepresentation by the other party, can—

- (1) avoid or rescind the contract ; or
- (2) accept the contract but insist that he shall be placed in the position in which he would have been if the representation made had been true (Sec. 19).

*Loss of right of rescission.* The aggrieved party loses the right to rescind or avoid the contract for misrepresentation or fraud—

- (1) if he, after becoming aware of the misrepresentation or fraud, takes a benefit under the contract or in some other way affirms it.

*Example.* A induced B to buy his lorry on the false representation that it was "in excellent condition". On discovering that lorry was in a very bad shape when B used it, he wanted to return it to A. A, however, agreed to bear half the cost of repairs to which B agreed. On a subsequent journey when the lorry completely broke down, B wanted to rescind the contract. *Held*, B could not do so as his acceptance of the offer of A to bear half the cost of repairs impliedly amounted to final acceptance of the sale [*Long v. Lloyd*, (1958) 1 S.L.R. 753].

- (2) if *restitutio in integrum* (i.e., restoration to the original position) of the parties is not possible, e.g., where the subject-matter of the contract has been consumed or destroyed. Further, if a contract cannot be rescinded *in toto* (entirely, wholly), it cannot be rescinded at all [*Sheffield Nickel Co. v. Unwin*, (1877) 2 Q.B.D. 215].

- (3) if a third party has acquired rights in the subject-matter of the contract in good faith and for value.

*Example.* A purchases goods from B by fraud and pawns them with C. B cannot rescind the contract on learning of the fraud so as to be able to recover the goods from C [*Phillips v. Brooks*, (1919) K.B. 243].

#### FRAUD

Fraud exists when it is shown that—

- (1) a false representation has been made (a) *knowingly*, or (b) *without belief* in its truth, or (c) *recklessly*, not caring whether it is true or false, and the maker *intended the other party to act upon it*, or

- (2) there is a *concealment* of a material fact or that there is a partial statement of a fact in such a manner that the withholding of what is not stated makes that which is stated false.

The intention of the party making fraudulent misrepresentation must be to deceive the other party to the contract or to induce him to enter into a contract.

According to Sec. 17, "fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance



(intentional active or passive acquiescence), or by his agent with intent to deceive or to induce a person to enter into a contract :

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

*Examples.* (a) A sells, by auction, to B a horse which A knows to be unsound. A says nothing to B about horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A, "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

#### **Essential elements of fraud**

1. *There must be a representation or assertion and it must be false.* Without a representation or assertion there can be no fraud except in cases where silence may itself amount to fraud or where there is an effective concealment of a fact.

*Example.* The prospectus of a company did not refer to the existence of a document disclosing liabilities. This gave the impression that the company was prosperous. If the existence of the document had been disclosed the impression would have been quite different. *Held*, non-disclosure amounted to fraud and anyone who purchased shares on the faith of this prospectus could avoid the contract [*Peek v. Gurney*, (1873) L.R. 6 H.L. 377].

If a representation is true when it is made, but to the knowledge of the party making it, becomes untrue before the contract is entered into, it must be corrected. If it is not corrected, the other party can rescind the contract.

*Example.* The negotiations for the sale of a medical practice started in January when it was represented that the annual takings (receipts) were £2,000. In May when the contract was concluded, the takings had dwindled to £5 a week. *Held*, the contract would be rescinded as there was failure to disclose the fall in the takings [*With v. O'Flanagan*, (1936) 1 Ch. 575].

2. *The representation must relate to a material fact which exists now or existed in the past.* A mere opinion, commendatory or puffing expression or hearsay or flourishing description, is not regarded as representation of fact.

*Examples.* (a) A sells some spoons to B and makes the following statements :

(i) The spoons are as good as that of X. This is a statement of opinion.

(ii) The spoons have as much silver in them as that of X. This is a statement of fact.

(iii) The spoons are the best available in the market for the price. This is a puffing statement.

(b) A, while negotiating with B for the sale of certain goods, tells him that the goods cost him Rs. 2,000. This is a statement of fact. But if he states that the goods are worth Rs. 2,000, this is a statement of opinion.

(c) The vendor of a piece of land told a prospective purchaser that, in his opinion, the land would carry 2,000 sheep. In fact the land could carry only a number less than this. *Held*, there was no misrepresentation as the statement was one of opinion which was honestly held [*Bisset v. Wilkinson*, (1927) A.C. 177].

3. *The representation must have been made before the conclusion of the contract with the intention of inducing the other party to act upon it.* Not only must the representation be false and made with the knowledge of its falsity, but it must also be made with an intent to deceive the other party.

4. *The representation or statement must have been made with a knowledge of its falsity or without belief in its truth or recklessly, not caring whether it is true or false.* Further, the representation amounting to fraud must have been made either by a party to the contract or with his connivance or by his agent.

*Example.* A company issued a prospectus giving false information about the unbounded wealth of Nevada. A shareholder who had taken shares on the faith of the prospectus wanted to avoid the contract. *Held*, he could do so as the false representation in the prospectus amounted to fraud [*Reese River Silver Mining Co. v. Smith*, (1869) L.R. 4 H.L. 64].

5. *The other party must have been induced to act upon the representation or assertion.* A mere falsehood is not enough to give a right of action. It must have induced the other party to act upon it. The other party cannot shut his eyes to the obvious defects or flaws which he could have easily ascertained by reasonable investigation or inspection.

*Example.* A bought shares in a company on the faith of a prospectus which contained an untrue statement that one B was a director of the company. A had never heard of B and, therefore, the statement was immaterial from his point of view. A's claim for damages in this case was dismissed because the untrue statement had not induced A to buy the shares [*Smith v. Chadwick*, (1884) 9 App. Cas. 187].

6. *The other party must have relied upon the representation and must have been deceived.* A mere attempt at deceit by one party is not fraud unless the other party is actually deceived. If a representation does not come to the notice of a party, it cannot be said to have misled that party because it does not lead that party at all.

*Example.* T bought a cannon from H. The cannon was defective but H had plugged it. T did not examine the cannon, but when he used

it, it burst. *Held*, as the plug had not deceived T, he was liable to pay [*Horsefull v. Thomas*, (1862) 1 H. & C. 90].

7. *The other party, acting on the representation or assertion, must have subsequently suffered some loss.* It is a common rule of law "that there is no fraud without damage". As such "fraud without damage" or "damage without fraud" does not give rise to an action on deceit.

#### **Consequences of fraud**

A contract induced by fraud is voidable at the option of the party defrauded. Until it is avoided, it is valid. The party defrauded has, however, the following remedies :

1. He can rescind the contract (Sec. 19, para 1). Where he does so, he must act within a reasonable time. If in the interval, while he is deliberating, an innocent third party has acquired an interest in the property for value, he cannot rescind the contract.

*Example.* A purchases certain goods from B by making a misrepresentation. A sells the goods to X before B avoids the contract. B loses the right to avoid the contract.

2. He can insist on the performance of the contract on the condition that he shall be put in the position in which he would have been if the representation made had been true (Sec. 19, para 2).

3. He can sue for damages.

#### **Contract not necessarily voidable—Exceptions**

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused (Sec. 19, para 1). But in the following cases, the contract is not voidable :

1. Where the consent of a party to a contract was caused by misrepresentation or fraud and that party could discover the truth by ordinary diligence (Exception to Sec. 19). The phrase "ordinary diligence" means such diligence as a prudent man would take in his own case under similar circumstances.

*Example.* A, by a misrepresentation, leads B erroneously to believe that five hundred tonnes of indigo are made annually at his factory. B examines the accounts of the factory, which show that only four hundred tonnes of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

3. Where a party enters into a contract in ignorance of the misrepresentation or fraud (Explanation to Sec. 19).

4. Where, before the contract is avoided, the interests of third parties intervene. But it is important that the third parties acquire interest in the subject-matter for *value* and act *bona fide*.

5. Where a party to a contract, whose consent was caused by misrepresentation or fraud, cannot be put in the position in which he would have been if the representation made had been true.

#### **Silence as to facts**

The general rule is that a person before entering into a contract need not disclose to the other party the material facts which he knows, but he must refrain from making *active concealment* (like concealing a crack on

the surface of a table by filling it and repolishing it). This means mere silence is not fraud.

*Examples.* (a) Before letting his house, a landlord failed to tell the tenant that it was in a ruinous condition. *Held*, he was not liable in deceit as the tenant should have inspected the house [*Keates v. Lord Cadogan*, (1851) 10 C.B. 591].

(b) *H*, a commercial traveller, obtained an employment with *S*. *S* regarded driving as an essential part of *H*'s duties but he did not specifically ask *H* if he was qualified to drive a car. *H* kept quiet about his disqualification to drive a car. *S* contended that *H*'s silence amounted to misrepresentation. *Held*, *H* was under no duty to volunteer the information and there was no misrepresentation [*Hands v. Simpson, Fawcett & Co. Ltd.*, (1928) 44 T.L.R. 295].

Explanation to Sec. 17 also lays down that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud.

*Statutory exceptions.* There are two statutory exceptions to the above rule :

1. Where the *circumstances* of the case are such that, regard being had to them, it is the *duty of the person keeping silence to speak*.

*Example.* *F* sells by auction to *D*, his daughter, who has just come of age, a horse which *F* knows to be unsound. Here, the relation between the parties would make it *F*'s duty to tell that the horse is unsound. If *F* does not do so, it will amount to fraud.

2. Where *silence* is, in itself, *equivalent to speech*.

*Example.* *A* says to *B*, "If you do not deny it, I shall assume that the horse that you are selling me is sound." If *B* says nothing his silence is equivalent to speech.

*Other exceptions.* 1. If a representation becomes false due to change of circumstances at the time when the contract is entered into, although it was true at the time when it was made, it is the duty of the person who made the representation to communicate the change of circumstances.

2. If a seller fails to inform the buyer as to a latent defect (*i.e.*, a defect known to the seller and not apparent on an ordinary inspection), his silence amounts to fraud.

3. If a trustee does not make full disclosure of facts to the beneficiary while entering into a contract with him as to the property of which he is a trustee, his silence as to any material facts amounts to fraud.

#### **Distinction between fraud and misrepresentation**

1. *Intention.* In misrepresentation, there is a mis-statement or concealment of a material fact or facts essential to the contract *without* any intention to deceive the other party. In fraud, the intention is to deceive the other party. Misrepresentation is innocent, fraud is deliberate or wilful.

2. *Belief.* In case of misrepresentation, the person making the suggestion believes it to be true, while in case of fraud he does not believe it to be true.

3. *Rescission and damages.* In misrepresentation, the aggrieved party can rescind the contract or sue for restitution (Sec. 64). There can be no suit for damages. In fraud, the remedy available to the aggrieved party is not limited to rescission alone. He can also claim damages.



4. *Discovery of truth*: In case of misrepresentation, the aggrieved party cannot avoid the contract if it had the means to discover the truth with ordinary diligence. But in case of fraud, where there is active concealment, the contract is voidable even though the aggrieved party had the means of discovering the truth with ordinary diligence.

### MISTAKE

Mistake may be defined as an erroneous belief about something. It may be a mistake of law or a mistake of fact.

#### Mistake of law

Mistake of law may be—(1) mistake of law of the country, or (2) mistake of law of a foreign country.

(1) *Mistake of law of the country*. *Ignorantia juris non excusat*, i.e. ignorance of law is no excuse, is a well settled rule of law. A party cannot be allowed to get any relief on the ground that it had done a particular act in ignorance of law. A mistake of law is, therefore, no excuse, and the contract cannot be avoided. [Solle v. Butcher, (1950) 1 K.B. 671].

*Example*. A and B enter into a contract on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. This contract is not voidable.

But if a person enters into a contract by making a mistake of law through the inducement of another, whether innocent or otherwise, the contract may be avoided.

(2) *Mistake of law of a foreign country*. Such a mistake is treated as mistake of fact and the agreement in such a case is void (Sec. 21).

#### Mistake of fact

Mistake of fact may be (1) a bilateral mistake, or (2) a unilateral mistake.

##### 1. Bilateral mistake

Where both the parties to an agreement are under a *mistake as to a matter of fact essential* to the agreement, there is a bilateral mistake. In such a case, the agreement is void (Sec. 20). The following two conditions have to be fulfilled for the application of Sec. 20 :

(i) *The mistake must be mutual*, i.e., both the parties should misunderstand each other and should be at cross-purposes.

*Example*. A agreed to purchase B's motor-car which was lying in B's garage. Unknown to either party, the car and garage were completely destroyed by fire a day earlier. The agreement is void.

(ii) *The mistake must relate to a matter of fact essential to the agreement*. As to what facts are essential in an agreement will depend upon the nature of the promise in each case.

*Example*. A man and a woman entered into a separation agreement under which the man agreed to pay a weekly allowance to the woman, mistakenly believing themselves lawfully married. Held, the agreement was void as there was mutual mistake on a point of fact which was material to the existence of the agreement [Galloway v. Galloway, (1914) 30 T.L.R. 531].

But an erroneous opinion as to the value of a thing which forms the subject-matter of an agreement is not to be deemed a mistake as to a matter of fact (Explanation to Sec. 20).

*Example.* A buys an old painting for Rs. 5,000 thinking that it is an excellent piece of art. Actually the painting is a new one and is worth only Rs. 500. A cannot avoid the contract on the ground of mistake.

The various cases which fall under bilateral mistake are as follows :

(1) *Mistake as to the subject-matter.* Where both the parties to an agreement are working under a mistake relating to the subject-matter, the agreement is void. Mistake as to the subject-matter covers the following cases :

(i) *Mistake as to the existence of the subject-matter.* If both the parties believe the subject-matter of the contract to be in existence, which in fact at the time of the contract is non-existent, the contract is void.

*Examples.* (a) A agreed to sell a cargo of corn supposed at the time of the contract to be in transit from Salonica to the United Kingdom. Unknown to the parties, the corn had become fermented and had already been sold by the master of the ship at Tunis. *Held*, the agreement was void and the buyer was not liable for the price [*Couturier v. Hastie*, (1856) 5 H.L.C. 673].

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

(ii) *Mistake as to the identity of the subject-matter.* It usually arises where one party intends to deal in one thing and the other intends to deal in another.

*Examples.* (a) W agreed to buy from R a cargo of cotton "to arrive *ex-peerless* from Bombay". There were two ships of that name sailing from Bombay, one sailing in October and the other in December. W meant the former ship but R meant the latter. *Held*, there was a mutual or a bilateral mistake and there was no contract [*Raffles v. Wichelhaus*, (1864) 2 H. and C. 906].

(b) In an auction sale, the auctioneer was selling *tow*. A bid for a lot, thinking it was *hemp*. The bid was extravagant for *tow*, but reasonable for *hemp*. *Held*, there was no contract [*Scriven Bros. & Co. v. Hindley & Co.*, (1913) 3 K.B. 564].

The result is the same even if the mistake was caused by the negligence of a third party.

*Example.* A who inspected fifty rifles in B's shop inquired from him the price of the rifles. Later, he wired B, "send three rifles". By mistake of the telegraph clerk the message transmitted to B was "send the rifles". B sent fifty rifles. A, however, accepted three rifles and sent back the rest. *Held*, there was no contract. But A had to pay for the three rifles on the basis of an implied contract [*Henkel v. Pape*, (1897) L. R. 6 Ex. 7].

(iii) *Mistake as to the quality of the subject-matter.* If the subject-matter is something essentially different from what the parties thought it to be, the agreement is void.

*Example.* Table napkins were sold at an auction by a description "with the crest of Charles I and the authentic property of that monarch". In fact the napkins were Georgian. *Held*, the agreement was void as there was a mistake as to the quality of the subject-matter [*Nicholson & Venn v. Smith Marriott*, (1947) 177 L.T. 180].

(iv) *Mistake as to the quantity of the subject-matter.* If both the parties are working under a mistake as to the quantity of the subject-matter, the agreement is void.

*Example.* A silver bar was sold under a mistake as to its weight. There was a difference in value between the weight of the bar as it was and as it was supposed to be. *Held*, the agreement was void [*Cox v. Prentice*, (1815) 3 M. & S. 344].

(v) *Mistake as to the title to the subject-matter.* If the seller is selling a thing which he is not entitled to sell and both the parties are acting under a mistake, the agreement is void.

*Example.* A person took a lease of a fishery which, unknown to either party, already belonged to him. *Held*, the lease was void [*Cooper v. Phibbs*, (1867) L.R. 2 H.L. 149].

(vi) *Mistake as to the price of the subject-matter.* If there is a mutual mistake as to the price of the subject-matter, the agreement is void.

*Example.* C wrote to W offering to sell certain property for £ 1,250. He had earlier declined an offer from W to buy the same property for £ 2,000. W who knew that this offer of £ 1,250 was a mistake for £ 2,250, immediately accepted the offer. *Held*, W knew perfectly well that the offer was made by mistake and hence the contract could not be enforced [*Webster v. Cecil*, (1861) 30 Beav. 62].

(2) *Mistake as to the possibility of performing the contract.* Consent is nullified if both the parties believe that an agreement is capable of being performed when in fact this is not the case (Sec. 56, para 1). The agreement, in such a case, is void on the ground of impossibility.

Impossibility may be—

(i) *Physical impossibility.*

*Example.* A contract for the hire of a room for witnessing the coronation procession of Edward VII was held to be void because, unknown to the parties, the procession had already been cancelled [*Griffith v. Brymer*, (1903) 19 T.L.R. 434].

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

## 2. Unilateral mistake

When in a contract only one of the parties is mistaken regarding the subject-matter or in expressing or understanding the terms or the legal effect of the agreement, the mistake is a unilateral mistake. According to Sec. 22, a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. A unilateral mistake is not allowed as a defence in avoiding a contract unless the mistake is brought about by the other party's fraud or misrepresentation.

*Examples.* (a) A offers to sell his house to B for an intended sum of Rs. 44,000. By mistake he makes an offer in writing of Rs. 40,000. He cannot plead mistake as a defence.

(b) H bought oats from S a sample of which had been shown to H. H erroneously thought that oats were old. The oats were, however, new. *Held*, H could not avoid the contract [*Smith v. Hughes*, (1871) L.R. 6 Q.B. 597].

(c) A buys an article thinking that it is worth Rs. 1,000 when it is worth only Rs. 50. A cannot subsequently avoid the contract.

(d) A buys a horse mistakenly believing it is sound or a dwelling house mistakenly believing it is habitable. The contract in both these cases is valid.

(e) J was the highest bidder at an auction sale of a public plot. At the time when he made his bid, he believed that a certain field was a part of the plot offered for sale. The field was, however, held under a separate lease from a third party. There was no misdescription or ambiguity in the particulars as to what was included in the plot. *Held*, J was bound to the contract [*Tamplin v. James*, (1879) 15 Ch. 3. 215].

### Exceptions

A unilateral mistake is generally not allowed as a defence in avoiding a contract. But in certain cases, the consent is given by a party under an error or mistake which is so fundamental as goes to the root of the agreement. In such cases the agreement is void. Thus in the following cases, even though there is a unilateral mistake, the agreement is void.

(1) *Mistake as to the identity of the person contracted with*. It is a fundamental rule of law that if one of the parties represents himself to be some person other than he really is, there is a mistake as to the identity of the person contracted with. If, for example, A intends to contract with B but finds he has contracted with C, there is no contract if the identity of B was a material element of the contract and C knows it. Likewise if A makes an offer to B, C cannot give himself any rights in respect of the contract by accepting the offer. If he does so, the contract will be void.

*Examples.* (a) *Boulton v. Jones*, (1857) 2 H. & N. 564, discussed in the Chapter on "Offer and Acceptance".

(b) Blenkarn ordered by letter goods from Lindsay and signed it in such a way that Lindsay believed it came from the well-known firm of Blenkiron & Co. *Held*, there was no contract between Lindsay and Blenkarn as Lindsay never intended to deal with Blenkarn, having never heard of him [*Cundy v. Lindsay*, (1878) 3 A.C. 459].

(c) In May 1938, a lady by the name of Ann Robinson was convicted of permitting disorderly conduct in her cafe. In July of the same year she assumed another name, Ann Potter, and took a lease of Sowler's premises. *Held*, the lease was void *ab initio* because of Sowler's mistaken belief that Ann Potter was not Ann Robinson [*Sowler v. Potter*, (1949) 1 K.B. 271].

It should be noted that the principle holds good only when the identity of the contracting party is important.

*Examples.* (a) S wanted to go to the first night of a play. B, the managing director of the theatre, gave instructions that a ticket was not to be sold to S as he had in the past published virulent criticism of its production. S knew this. He asked one of his friends to buy a ticket for him. He was, however, refused admission by the manager of the theatre. *Held*, there was no contract as the theatre company never intended to contract with S [*Said v. Butt*, (1920) 3 K.B. 497].

(b) A advertised his car for sale. B who falsely called himself Hutchinson agreed to buy the car, and when he offered to pay by cheque A said the deal was over. Then he gave an address which A checked in the telephone directory and found that it corresponded with the name B had given. A thereupon agreed to accept the cheque which was subsequently dishonoured. The car was subsequently sold to L who bought it in good faith. *Held*, there was no contract between



A and B as A intended to enter into contract only with *Hutchinson* and as B had no title to the car, he could pass none to L [*Ingram v. Little*, (1961) 1 Q.B. 31].

Where, however, the seller is prepared to enter into contact with anyone who enters the shop, so that the identity of the purchaser is immaterial, a mistake as to the purchaser's identity will not make the contract void.

*Example.* A man, called North, entered a jeweller's shop and selected some articles of jewellery. He wrote a cheque for £ 3,000 saying that he was Sir George Bullough and gave the latter's address. The jeweller accepted the cheque from North in good faith believing that the person was Sir George Bullough. North later pledged the jewellery with a pawnbroker. The jeweller alleged that there was never any contract between him and North. *Held*, the jeweller had contracted to sell and deliver the jewellery to the person who came to his shop even though he believed he was Sir George Bullough [*Phillips v. Brooks*, (1919) 2 K.B. 243]. The mistake in this case was not about identity but only about the attributes of the buyer.

It should be noted that mistake as to an attribute of the other party, as distinguished from mistake as to his identity, does not necessarily negative consent. If D induces P to enter into a contract with him by falsely representing that he is a rich man, the contract is not void for mistake but at the most voidable for fraud.

*Example.* P received an order from "H & Co." which was described as a substantial firm having big establishments. In fact, "H & Co." belonged to a person called W, almost a pauper. P supplied the goods to "H & Co.". W took possession of the goods and failed to pay. He then sold the goods to D. *Held*, the property in the goods had passed to W as W and "H & Co." were one and the same person, and P had not made any mistake as to the identity of the contracting party. The property in the goods passed to W so that he could pass a good title to D [*King's Norton Metal Co. Ltd. v. Edridge Merrett & Co. Ltd.* (1897) 14 T.L.R. 98].

(2) *Mistake as to the nature of contract.* If a person enters into a contract in the mistaken belief that he is signing a document of a different class and character altogether, there is a mistake as to the nature of contract and the contract is void. He can successfully plead *non est factum* (it is not his deed, i.e., document). The very basis of the contract, i.e. consent, is missing in this case. Thus, where in signing a document the mind of the signer does not go with signature, there is a mistake which would vitiate the contract.

*Example.* M, an old man of poor sight, indorsed a bill of exchange thinking that it was a guarantee. *Held*, there was no contract on the ground that the mind of the signer did not accompany the signature [*Foster v. Mackinnon*, (1869) L. R. 4 C.P. 701].

### SUMMARY

All agreements are contracts if they are made by the free consent of the parties. Two or more persons are said to consent when they agree upon the same thing in the same sense (Sec. 13.) Consent is said to be free when it is not caused by (i) coercion, or (ii) undue influence, or (iii) fraud, or (iv) misrepresentation, or (v) mistake, subject to the provisions of Secs. 20, 21, and 22.

**Effect of agreement without free consent.** When consent to an agreement is caused by coercion, fraud, misrepresentation, or undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused (Secs. 19 and 19-A).

#### COERCION

"Coercion" is the committing or threatening to commit any act forbidden by the Indian Penal Code, 1860 or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement (Sec. 15).

A threat to commit suicide amounts to coercion.

#### UNDUE INFLUENCE

A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other. A person is deemed to be in a position to dominate the will of another where he— (a) holds real or apparent authority over the other, or (b) stands in a fiduciary relation to the other; or (c) makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears to be *unconscionable*, the burden of proving that such contract was not induced by undue influence lies upon the person in a position to dominate the will of the other (Sec. 16).

*Relationships which raise presumption of undue influence* : (1) parent and child, (2) trustee and beneficiary, (3) religious guru and disciple, (4) guardian and ward, (5) solicitor and client, (6) doctor and patient, and (7) fiancé and fiancée.

*No presumption of undue influence in the following cases* : (1) husband and wife, (2) landlord and tenant, (3) creditor and debtor.

#### MISREPRESENTATION AND FRAUD

"Misrepresentation" is a mis-statement of a material fact made innocently with an honest belief as to its truth or non-disclosure of a material fact, without any intent to deceive the other party.

"Fraud" exists when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, not caring whether it is true or false, and (4) the maker intends the other party to act upon it. It also exists when there is a concealment of a material fact.

#### MISTAKE

Mistake is erroneous belief about something. It may be a (1) mistake of law, or (2) mistake of fact.

1. *Mistake of law.* It may be a (1) mistake of law of the country, or (2) mistake of law of a foreign country. The general rule as regards mistake of law of the country is that *ignorance of law is no excuse*. Mistake of law of a foreign country is regarded as a mistake of fact.

2. *Mistake of fact*, it may be a —

(1) *Bilateral mistake.* Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void (Sec. 20).

Mistake of fact (bilateral mistake) may relate to :

(a) *Subject-matter.* Mistake of fact regarding subject-matter may relate to existence of the subject-matter; (i) price of the subject-matter; (ii) quantity of the subject-matter; (iii) identity of the subject-matter; (iv) quality of the subject-matter, or (v) title to the subject-matter.

(b) *Possibility of performance.* Mistake of fact may also relate to (i) physical, or (ii) legal, impossibility of performance.

In both these cases, the agreement is void.

(2) *Unilateral mistake.* Where only one of the parties is under a mistake as to a matter of fact, the contract is not voidable (Sec. 22). There are however two exceptions to this rule.

(i) *Identity of the person contracted with.* If A intends to enter into a contract with B, C cannot give himself any right in respect of the contract by accepting the offer. In such a case the contract is void.

(ii) *Nature of contract.* Where a person is made to enter into a contract through the inducement of another but through no fault of his own, there is a misake as to the nature of the contract, and the contract is void.

### TEST QUESTIONS

1. "Two or more persons are said to consent when they agree upon the same thing in the same sense." Explain this statement and give illustrations.
2. "An agreement requires a meeting of the minds." Comment.
3. Discuss the law relating to the effect of mistake on contracts.
4. Explain and illustrate the effect of mistake of fact on contracts.
5. Explain, with illustrations, the effect of mistake of fact on an agreement, with reference to (i) mistake relating to subject-matter, (ii) mistake relating to the identity of the parties, and (iii) mistake relating to the nature of the transaction.
6. "It is a rule of law that if a person intends to contract with A, B cannot give himself any right under the contract." Discuss.
7. "Fundamental error will not prevent a contract from coming into existence unless the mistake is as to the identity of the other party as opposed to his attributes." Discuss.
8. What is misrepresentation? Distinguish it from fraud.
9. What remedies are available to a person induced to enter into a contract by (a) misrepresentation which is not fraudulent, (b) fraud?
10. "A mere silence as to facts is not fraud." Discuss.
11. "Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that regard being had to them, it is the duty of the person keeping silence to speak or unless his silence is equivalent to speech." Explain.
12. Define fraud and point out its effect on the validity of an agreement. Give suitable examples to illustrate your answer.
13. (a) "An attempt at deceit which does not deceive is not fraud." Explain.  
(b) It is the duty of a contracting party to disclose all material facts to the other party? When does non-disclosure of material facts amount to fraud?
14. When is a contract said to be induced by "undue influence"? When is a party deemed to be in a position to dominate the will of another? What is the effect of undue influence on a contract?
15. (a) When is consent said to be given under "coercion"? What is its effect on the contract? Also discuss the position of the parties to a contract entered into under coercion.  
(b) Does a threat to commit suicide amount to coercion?

### PRACTICAL PROBLEMS

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

1. A sold some land to B. At the time of sale both parties believed in good faith that the area of the land sold was 10 hectares. It, however, turned out that the area was 7 hectares only. How is the contract of sale affected? Give reasons.  
[Hint : The agreement is void (Sec. 20)].
2. A agreed to sell B a specific cargo of corn per S.S. Malwa supposed to be on its way from London to Mumbai. It turned out that before the day of the bargain the ship had been cast away, and the goods lost. Discuss the rights of A and B.  
[Hint : The agreement is void (*Couturier v. Hastie*)].
3. L, the owner of a gold mine in west Africa, sold the mine to M. During the preliminary discussion L had made certain statements about the mine which were incorrect, though L honestly believed them to be true. After having worked the mine for six months M discovered the true position. What remedies, if any, will M have?  
[Hint : M can only claim damages. The contract cannot be rescinded because the parties cannot be restored to their original position [*Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392].

4. C offers to sell to D a painting which C knows is a good copy of a well-known masterpiece. D thinking that the painting is an original one and that C must be unaware of this, immediately accepts D's offer. Does this result in a contract?

[Hint: Yes. The doctrine of *Caveat Emptor* (let the buyer beware) will apply].

5. A and B, being traders, enter into a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. Is A bound to inform B?

[Hint: No. The doctrine of *Caveat Emptor* will apply].

6. C, with the intention of inducing D to enter into a contract with him, makes a statement to D, which is in fact untrue and thereby induces D to enter into the contract. What are D's rights, if the statement is made by C— (i) knowing that it was untrue, (ii) recklessly, without caring to know whether it was true or false, (iii) in good faith, but negligently, (iv) in good faith and without negligence?

[Hint: In cases (i) and (ii), there is fraud, and in cases (iii) and (iv), there is misrepresentation on the part of C. In all the four cases the contract is voidable at the option of D. In the first two cases, D can also recover damages (Secs. 17 and 18)].

7. A man, by the name of Sham, called at a jeweller's shop and chose a costly ring. He tendered in payment a cheque which he signed in the name of Ram Nath, a person of credit. He took the ring and pledged it to Bhola Nath, who had no notice of the fraud. Can the jeweller recover the ring from Bola Nath?

[Hint: No (Phillips v. Brooks)].

8. A woman fraudulently represented to a firm of jewellers that she was the wife of a certain baron and thus obtained two pearl necklaces on credit on some pretext with a view to buying them. She sold those necklaces to X, a third person. Can the jewellers recover the necklace from X?

[Hint: Yes (Cundy v. Lindsay)].

9. A, an old man of feeble sight, signed a bill of exchange thinking it was a guarantee. There was no negligence on the part of A. Is A liable?

[Hint: No (Foster v. Mackinnon)].

10. A tells his wife that he would commit suicide, if she did not transfer her personal assets to him. She does so under this threat. Can the wife avoid the contract?

[Hint: Yes (Chikham Amiraju v. Seshamma)].

11. A is enfeebled by age and illness. B, his medical attendant, uses his personal influence over him and induces him to pay an unreasonable fee for his professional services. (a) Can A avoid the contract? (b) If so, on what plea?

[Hint: (a) Yes. (b) A can avoid the contract on the plea of undue influence; Sec. 16 (2)].

12. A applies to a banker for a loan at a time when India is passing through a period of recession. The banker agrees to make the loan only at an unusually high rate of interest. A accepts the loan on these terms. Subsequently A pleads that the contract has been procured by exercising undue influence. Will this plea succeed?

[Hint: No, as the transaction is in the ordinary course of business and the contract is not induced by undue influence].

13. A advances money to his son B during his minority. Upon B's coming of age, A obtains by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. Is B bound by the bond?

[Hint: No. The contract is voidable at the option of B as it is induced by undue influence [Sec. 16 (2)].

14. B sends an order for various stationery supplies to his usual supplier, S. Unknown to B, S had sold his business to T. T sends the stationery to B. B upon discovering the facts, refuses to accept the stationery. Advise T.

[Hint: T must take back the stationery as there is no contract between T and B; B never intended to enter into a contract with T (Boulton v. Jones)].

15. A knows that the car he was buying from B was ten years old although B has represented that he had purchased it new only four years ago. Can A avoid the contract on the ground of fraud?

[Hint: No, as he knew that the car was ten years old and as such he could not have relied upon the false statement made by B].



16. *H* contracted with *N* Corporation for the erection of a number of houses. In calculating his price for the houses, *H* by mistake deducted a particular sum twice over. The Corporation affixed its seal to the contract which correctly represented its intention. Is the contract binding?

[Hint: Yes (*Higgins Ltd. v. Northampton Corpn.*, (1927) 1 Ch. 128)].

17. *X* buys from *Y* a painting which both believe to be the work of an old master and for which *X* pays a high price. The painting turns out to be only a modern copy. Has *X* any remedy?

[Hint: No. The doctrine of *Caveat Emptor* will apply in this case].

18. *A* fraudulently informs *B* that his house is free from encumbrances. *B* thereupon buys the house. The house is subject to a mortgage. What are the rights of *B*?

[Hint: The contract is voidable at the option of *B*. He may avoid the contract and get back his money].

19. The managing director of a theatre gave instructions that no tickets were to be sold to *S*. *S*, knowing this, asked a friend to buy a ticket for him. With this ticket *S* went to the theatre but was refused admission. He filed a suit for damages for breach of contract. Would he succeed?

[Hint: No. There is a mistake as to the identity of the person contracted with and this vitiates the contract (*Said v. Butt*)].

20. A young widow was forced to adopt a boy under the threat of preventing the body of her husband, who had just died, from being removed for cremation. Is this adoption valid under law?

[Hint: No. The adoption is voidable at the option of the widow as it is induced by coercion (*Ranganayakamma v. Alwar Setty*)].

21. *A* contracts with *B* to buy a necklace, believing it is made of pearls whereas in fact it is made of imitation pearls of no value. *B* knows that *A* is mistaken and takes no steps to correct the error. Is *A* bound by the contract?

[Hint: Yes, as the doctrine of *Caveat Emptor* will apply].

22. *A* purchased a second-hand car thinking that it was powerful enough to help him in hill areas. The car turned out to be inadequate for the purpose and so he wanted to return the car to the seller and get out of the contract on ground of mistake. Will he succeed?

[Hint: No, as the doctrine of *Caveat Emptor* will apply in this case].

23. *A* purchased a typing machine on a dealer's representation that it was a new model. After paying the purchase price, he discovered that, although the machine looked new, it was actually a rebuilt model. What are *A*'s legal rights?

[Hint: *A* may avoid the contract on the ground of fraud and claim damages].

24. *M*, a medical practitioner, truly represented to *B*, a prospective buyer, that his practice was worth £ 20,000 a year. Five months later when *B* bought the practice, it had considerably gone down on account of *M*'s serious illness. *M* did not disclose this fact to *B*. Can *B* avoid the contract?

[Hint: Yes (*With v. O'Flanagan*)].

25. *M*, after declining an offer from *P* to buy certain property for £ 2,000, wrote to *P* offering to sell it for £ 1,250. This was a mistake for £ 2,250. *P*, immediately on receipt of the offer, wrote accepting it. Is *P* entitled to enforce the contract?

[Hint: No, as *P* had snapped at the offer he knew to be made by mistake (*Webster v. Cecil*)].

because the parties cannot be restored to their original position  
(*Lopanus Nizic Co. v. Lopanus Spadkote*, (1898) 2 Ch. 362)

## Legality of Object

A contract must not only be based upon mutual assent of competent parties but must also have a lawful object. If the object of an agreement is the performance of an unlawful act, the agreement is unenforceable. Sec. 23 declares that the 'object' or the 'consideration' of an agreement is not lawful in certain cases. The words 'object' and 'consideration' in Sec. 23 are not used synonymously. They are distinct in meaning. The word 'object' means purpose or design. In some cases, consideration for an agreement may be lawful but the purpose for which the agreement is entered into may be unlawful. In such cases the agreement is void. As such both the object and the consideration of an agreement must be lawful, otherwise the agreement is void.

### When consideration or object is unlawful (Sec. 23)

The *consideration* or *object* of an agreement is unlawful—

1. *If it is forbidden by law.* If the object or the consideration of an agreement is the doing of an act forbidden by law, the agreement is void. An act is forbidden by law when it is punishable by the criminal law of the country or when it is prohibited by special legislation or regulations made by a competent authority under powers derived from the Legislature.

*Examples.* (a) A promises to obtain for B an employment in the public service and B promises to pay Rs. 1,000 to A. The agreement is void, as the consideration for it is unlawful.

(b) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void as its object is unlawful.

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

*Examples.* (a) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(b) N agreed to enter a company's service in consideration of a weekly wage of £ 13 and a weekly expense allowance of £ 6. Both the parties knew that the expense allowance was a device to evade tax. *Held*, the agreement was unlawful [*Napier v. National Business Agency Ltd.* (1951) 2 All E.R. 263].

(c) A was licensed under an Excise Act to run a liquor shop. The Act forbade the sale, transfer or sub-lease of the licence or the creation of a partnership to run the shop. A took B into partnership. *Held*, the agreement was void (*Nandlal v. Thomas*, 171 I.C. 948).

(d) A leased a flat to R at a rent of £ 1,200 a year. With the object of deceiving the municipal authority, agreements were entered into, one purporting to lease the flat at £ 450 a year and the other for services in connection with the flat at £ 750 a year. A sued R for the recovery of an instalment of £ 750. *Held*, the agreement being void, A could not recover and R was entitled to remain in possession of the flat for the remainder of the term of the lease [*Alexander v. Rayson*, (1936) 1 K.B. 169].

(e) An agreement by a debtor not to raise the plea of limitation is void [*Rama Murthy v. Goppayya*, (1971) 40 Mad. 701].

3. *If it is fraudulent.* An agreement which is made for a fraudulent purpose is void. Thus an agreement in fraud of creditors with a view to defeating their rights is void.

*Examples.* (a) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(b) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A on his principal.

4. *If it involves or implies injury to the person or property of another.* 'Injury' means 'wrong', 'harm', or 'damage'. 'Person' means one's body. 'Property' includes both movable and immovable property.

*Examples.* (a) B borrowed Rs 100 from L and executed a bond promising to work for L without pay for a period of two years. In case of default, B was to pay interest (at a very exorbitant rate) and the principal sum at once. *Held*, the contract was void as it involved injury to the person of B [*Ram Saroop v. Bansil Mandar*, (1915) 42 Cal. 742].

(b) An agreement between some persons to purchase shares in a company, and thus by fraud and deceit to induce other persons to believe, contrary to that fact, that there is a *bona fide* market for the shares, is void [*Gherulal Parakh v. Mahadeo Dass*, A.I.R. (1959) S.C. 781].

(c) The proprietors of a newspaper agreed with the printers to indemnify the latter against consequences arising from libels printed in the newspaper. *Held*, the agreement was void [*W. H. Smith & Sons v. Clinton*, (1908) 26 T.L.R. 34].

5. *If the Court regards it as immoral.* An agreement, the consideration or object of which is immoral, e.g., an agreement between a husband and wife for future separation, is unlawful [*Sumitra Devi v. Sulekha Kundu*, A.I.R. (1976) Cal. 197, ].

*Examples.* (a) A married woman was given money to enable her to obtain divorce from her husband and then to marry the lender. *Held*, the agreement was immoral and the lender could not recover the money [*Batvijli v. Nansa Nagar*, (1885) Bom 152].

(b) A agrees to let her daughter to B for concubinage (state of living together as man and wife without being married). The agreement is unlawful, being immoral.

(c) A, who is B's *mukhtiar*, promises to exercise his influence as such with B in favour of C, and C promises to pay Rs. 1,000 to A. The agreement is void, because it is immoral.

However, agreements for immediate separation between a husband and wife, both in England and in India, are enforceable. The principle underlying this is preservation of the peace and reputation of families. Similarly agreements in respect of past separation are also valid.

An agreement is unlawful for immorality in the following cases :

(1) *Where the consideration is an act of sexual immorality e.g.,* illicit cohabitation or prostitution. For example, where A agrees to let her daughter on hire to B for concubinage, the agreement is unlawful, being immoral. But a promise to compensate a woman who has rendered services in the past, whether immoral or otherwise, forms a good consideration for the contract to compensate her [*Dhiraj Kaur v. Bikramjit Singh*, (1881) 3 All. 787]. If the past cohabitation is of an adulterous kind, a promise relating to it cannot be enforced as adultery is an offence punishable under the Indian Penal Code, 1860 [*Alice Mary Hill v. William Clark*, (1905) 27 All. 266]. The Bombay High Court has, however, held that agreements for past or future cohabitation are void [*S. Yellappa v. Y. Sabu*, A.I.R. (1933) Bom. 209]. Consideration, according to it, which is immoral at the time when it passes, cannot become legal by passage of time.

(2) *Where the object of the agreement is the furtherance of sexual immorality, e.g.,* lending money to a prostitute to help her in her trade.

*Examples.* (a) A firm of coach-builders hired out a carriage to a prostitute, knowing that it was to be used by the prostitute to attract men. *Held*, coach builders could not recover the hire as the agreement was unlawful [*Pearce v. Brooks* (1866) L. R. 1 Ex. 213].

(b) A let a flat to B, a woman whom he knew to be a prostitute. *Held*, the agreement was unlawful if A knew the purpose that B's object was to use the flat for immoral purposes [*Uphill v. Wright*, (1911) 1 K.B. 506].

6. *Where the Court regards it as opposed to public policy.* The agreements opposed to public policy have been discussed in detail later in this Chapter.

#### UNLAWFUL AND ILLEGAL AGREEMENTS

An *unlawful agreement* is one which, like a void agreement, is not enforceable by law. It is void *ab initio* and is destitute of legal effects altogether. It affects only the immediate parties and has no further consequences. An *illegal agreement*, on the other hand, is not only void as between immediate parties but has this further effect that the collateral transactions to it also become tainted with illegality.

*Examples.* (a) L lends Rs. 5,000 to B to help him to purchase some prohibited goods from T, an alien enemy. If B enters into an agreement with T, the agreement will be illegal and the agreement between B and L shall also become illegal, being collateral to the main transaction which is illegal. L cannot, therefore, recover the amount. He can recover the amount if he did not know of the purpose of the loan.

(b) An agreement to commit a crime or tort, e.g., an agreement to assault A [*Allen v. Rescous*, (1670) 2 Lev. 174]. or an agreement to



publish a libel is illegal [*Apthorp v. Neville & Co.*, (1907) 23 T.L.R. 575].

*Every illegal agreement is unlawful, but every unlawful agreement is not necessarily illegal.* It is sometimes difficult to decide as to whether an act is illegal or unlawful as many of the illegal and the unlawful acts lie on the borderline. It may, however, be observed that illegal acts are those which involve the commission of a crime or contain an element of obvious moral turpitude and where the wicked attribute is reasonably obvious, or are, in some other way, contrary to public policy. A criminal act is one which is both forbidden by law and which is revolting to the moral sentiments of the society. A crime is something more than a mere disobedience to a law. As such illegal agreements include acts opposed to public morals, e.g., an agreement for illicit cohabitation, or an agreement to defraud the revenue or commit a crime, or an agreement which tends to endanger the public safety. On the other hand, unlawful acts are those which are less rigorous in effect and involve a "non-criminal breach of law". These acts do not affect public morals, nor do they result in the commission of a crime. These are simply disapproved by law on some ground of public policy. These include agreements in restraint of trade, marriage or legal proceedings, etc.

#### Effects of illegality

The general rule of law is that no action is allowed on an illegal agreement. This is based on the following two maxims :

1. *Ex turpi causa non oritur actio.* No action arises from a base cause. The effect of this is that the law discourages people from entering into illegal agreements which arise from base causes.
2. *In pari delicto, potior est conditio defendentis.* In cases of equal guilt, the defendant is in a better position.

*Example.* A promises to pay B Rs. 500 if he beats T. If B beats T, he cannot recover the amount from A. If A has already paid the amount and B does not beat T, A cannot recover the amount.

If an agreement is illegal, the law will help neither party to the agreement. This means that as a result of the refusal of the Court to help the plaintiff in recovering the amount, the defendant who is equally guilty stands to gain. But in such cases, the Court allows the defendant to have that advantage, not because it approves of his conduct, but because it is not prepared to grant any relief on the basis of the illegal agreement. The Court is, in fact, neutral in such cases and as a result of that neutrality the defendant stands to gain.

The effects of illegality may now be summed up as under :

1. The collateral transactions to an illegal agreement become tainted with illegality and are treated as illegal even though they would have been lawful by themselves.
2. No action can be taken (a) for the recovery of money paid or property transferred under an illegal agreement, and (b) for the breach of an illegal agreement.
3. In cases of equal guilt in an illegal agreement, the position of the defendant is better than that of the plaintiff. The plaintiff (i.e., the innocent party) may, however, sue to recover money paid or property transferred :

(1) Where he is not *in part delicto* (equally guilty) with the defendant, e.g., where he was induced to enter into an agreement by fraud, undue influence or coercion.

(2) Where he does not have to rely on the illegal transaction [*Sajan Singh v. Sardara Ali*, (1960) A.C. 167].

(3) Where a substantial part of the illegal transaction has not been carried out, and he is truly and genuinely repentant [*Bigos v. Boustead*, (1951) All E.R. 92]. This way, the law encourages repentance even in bad men.

*Whether illegality is severable.* A contract may contain several distinct promises or a promise to do several distinct acts of which some are legal and others illegal, or a part of which is legal and a part of which is illegal. If the illegal promise or act is severable from the legal one, the Court will enforce the legal promise or act and reject the one which is illegal. If the illegal promise or act cannot be separated from the legal one, the whole contract is declared illegal.

*Reciprocal promises* (Sec. 57). Where persons reciprocally promise, *firstly*, to do certain things which are legal, and *secondly*, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

*Example.* A and B agree that A shall sell B a house for Rs. 10,000 but that if B uses it as a gambling house, he shall pay A Rs. 50,000 for it. The first set of reciprocal promises, namely to sell the house and pay Rs. 10,000 for it, is a contract. The second set is for an unlawful object, namely that B may use the house as a gambling house, and is a void agreement.

*Alternative promise, one branch being illegal* (Sec. 58). In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

*Example.* A and B agree that A shall pay B Rs. 1,000, for which B shall afterwards deliver to A either rice or smuggled opium. This is a valid contract to deliver rice, and a void agreement as to the opium.

*Agreements void, if consideration and objects unlawful in part* (Sec. 24). If there are several objects but there is a single consideration, the agreement is void if any one of the objects is unlawful. Similarly, if there is a single object but there are several considerations, the agreement is void if any one of the considerations is unlawful.

*Example.* A promises to superintend on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A a salary of Rs. 90,000 a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

#### AGREEMENTS OPPOSED TO PUBLIC POLICY

An agreement is said to be opposed to public policy when it is *harmful to the public welfare*. Public policy is that principle of law which holds that no subject can lawfully do that which has a mischievous tendency to be injurious to the interests of the public, or which is against the public good or public welfare [*Egerton v. Brownlow*, (1853) 4 H.L.C 1].

It is not possible to give a precise or exact definition of the term "public policy". It is, in a way, a vague and elastic term. Moreover, "the flexibility of the doctrine of public policy is potentially dangerous. It