S. SAKTHI PRIYA

THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY
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M.G.R. Main Road, Perungudi, Chennai - 600 096.

CONTRACT - I
STUDY MATERIAL

By
Dr.R.HarithaDevi
Assistant Professor
Department of Business Law
The Tamil Nadu Dr.Ambedkar Law University
Chennai

MESSAGE

Knowledge is power. Legal Knowledge is a potential power. It can be exercised effectively everywhere. Of all the domains of reality, it is Legal Knowledge, which deals with rights and liabilities, commissions and omissions, etc., empower the holder of such knowledge to have prominence over the rest. Law Schools and Law Colleges that offer Legal Education vary in their stature on the basis of their ability in imparting the quality Legal Education to the students. Of all the Law Schools and Colleges, only those that educate their students to understand the nuances of law effectively and to facilitate them to think originally, excel. School of Excellence in Law aims to be in top of such institutions.

The revolution in Information and Communication Technology dump lot of information in the virtual world. Some of the information are mischievous and dangerous. Some others are spoiling the young minds and eating away their time. Students are in puzzle and in dilemma to find out the right information and data. They do not know how to select the right from the wrong, so as to understand, internalise and assimilate into knowledge. Hence in the present scenario, the role of teachers gains much more importance in guiding the students to select the reliable, valid, relevant and suitable information from the most complicated, perplexed and unreliable data.

The teachers of the School of Excellence in Law have made a maiden attempt select, compile and present a comprehensive course material to guide the students in various subjects of law. The students can use such materials as guidance and travel further in their pursuit of legal knowledge. Guidance cannot be a complete source of information. It is a source that facilitates the students to search further source of information and enrich their knowledge. Read the materials, refer relevant text books and case laws and widen the knowledge.

Dr.P.Vanangamudi
Vice-Chancellor

PREFACE

Contract law plays a pivotal role in the society as almost all exchanges between persons and enterprises, come within the ambit and are regulated of Law of Contracts. This is the basis of all commercial interactions & all legislations relating to trade & commerce. But for the existence of statutory provisions pertaining to contract law, many a private, voluntarily made agreements wouldn't be enforceable due to lack of legal force. Also, it is appropriate to state that contract law is quintessential to transactions relating to goods & services.

The objectives of this course is to provide the students

a) An understanding of the Legal dimensions of the law relating to the formation of contracts.

b) An insight into the legal provisions, which buttress the operative performance of contracts.

c) To comprehend & appreciate the significance of the various modes in which contracts maybe discharged.

d) To familiarize with the redressal mechanisms available to the aggrieved parties.

The study materials provide only a brief outline of the subject. The students should refer the text books for more cases on the subject.

I express my sincere thanks to our Honourable Vice Chancellor Prof.Dr.P. Vanangamudi for giving me this opportunity.

Dr.R.HarithaDevi
Assistant Professor
Department of Business Law
The Tamil Nadu Dr.Ambedkar Law University
Chennai

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Statutory Material:

1. Indian Contract Act, 1872
2. Specific Relief Act, 1963

Books Prescribed :

1. Dr. Avtar Singh – Law of Contract & Specific Relief.
2. Anson's Law of Contract.
3. VenkateshIyer – Indian Contract Law
4. M. Krishnan Nair – Indian Contract Law.

Books for Reference

5. Cheshire &Fifoot – Law of Contracts.
6. Mulla – Indian Contract Act.
7. Sarkar – Specific Relief Act..
8. Basu – Specific Relief Act.
9. Smith & Thomas – A Casebook on Contract.

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LAW OF CONTRACT – I

UNIT I

The Indian Contract Act came into force on the first day of September 1872. The Act was molded on the basis of the principles of contracts established by courts of common law and equity. Before 1872 the law applied within the limits of the presidency towns of Calcutta, Bombay and Madras was the law of England with suitable modifications. In the mofussil the Courts were guided by the principles of justice, equity and good conscience.

Nature of the contract Act

The Indian Contract Act is not an exhaustive code containing the entire law of contracts. The Preamble says it is "to define and amend certain parts of law relating to contracts. The Act as it now stands contains the general principles of contract and contracts of indemnity, suretyship, bailments and agency. Many other Acts provide for various rules of law relating to other branches of contract. The Indian Sale of Goods Act, the Partnership Act, etc are examples.

Application of English law

When the Indian Contract Act is silent on a situation the courts in India have to be guided by the rules of the English Common Law applicable to contracts with sufficient modifications with regard to the Indian society and circumstances.

Meaning of Contract

The word contract is derived from the Latin word 'contractum' meaning drawn together. It therefore denotes drawing together of two or more minds to form a common intention giving rise to an agreement.

Definition of contract

The term contract is defined in section 2(h) of the Indian Contract Act as follows:

"An agreement enforceable by law is a contract" thus for the formation of contract there must be

a. Contract

b. Enforceability by law.

In other words, **Contract = Agreement + Enforceability.**

Agreement:

Section 2(e) defines agreement as "Every promise and every set of promises forming the consideration for each other"

In other words, **Agreement = Promises**

Promise:

Section 2(b) defines promise as;

"A proposal when accepted becomes a promise.

In other words **Promise = proposal + Acceptance.**

So the definition of contract can written by the following steps:

1. A contract is an agreement.
2. An agreement is a Promise.
3. A promise is an accepted proposal.

Hence every agreement is the result of a proposal from one side and its acceptance by the other.

When agreement becomes a contract

After an agreement is formed it becomes a contract only when enforced by law. The conditions of enforceability are stated in section 10.

Section 10

"All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and not hereby expressly declared to be void.

Hence, it can be said that every contract is an agreement but every agreement is not a contract. An agreement becomes a contract when the following conditions are satisfied:

a) Free consent of parties.

b) Competency of parties.

c) Lawful consideration.

d) Lawful object.

e) Not declared void by law.

PROPOSAL OR OFFER

The proposal or offer is the starting point for contract. Section 2(a) defines proposal as follows:

"When one person signifies to another his willingness to or to abstain from doing anything with a view to obtain the assent of that other, he is said to make a proposal"

So from the definition when one person says to another that he is willing to do or not to do certain thing with an expectation to get the permission of the other person to do or not to do the said thing he is said to make an offer. The Indian Contract Act uses the word proposal for offer.

The person who makes the offer is called offeror and the person who accepts the offer is called offeree.

OFFER MUST BE CERTAIN

The offer or the proposal by the offeror must be definite and certain. By section 29 the agreements the meaning of which is not certain or capable of being made certain are void. So for the agreement to be certain the offer must be reasonably definite and there must be nothing except acceptance to complete it.

For eg A agrees to sell to B "a hundred tons of oil". This is not a definite offer because there is nothing to indicate what kind of oil was intended by A. So this agreement is void for uncertainity.

OFFER MAY BE EXPRESS OR IMPLIED

An offer may be expressly stated by the party or it may be implied from the conduct of the parties.

Section 9 states about express or implied promises. In so far as the proposal or acceptance of any promise is made in words the promise is said to be express. If it is made otherwise than in words it is said to be implied.

For eg. : When a person buys something in a shop he asks the shopkeeper for the thing which he wants, this is express offer. When a person gets into the bus for travelling from one place to another he undertakes to pay for the ticket even though he does not make an express promise. Getting into the bus is itself an implied offer.

KINDS OF OFFER

There are two kinds of offer namely specific and general offer. An offer is said to be specific when it is addressed to a definite individual or group of individuals. It is general when it is made to a uncertained individual. Such an offer can be accepted by an ascertained individual.

For eg. A announces a reward of Rs. 1000 for finding his lost purse. Here A does not say to whom he will give the reward. Whoever finds it will be given the reward. This is general offer. The offeror does not prescribe the particular person to whom he is making the offer. It is for the world at large.

The leading case on general offer is Carlil v. Carbolic Smoke Ball co.

The defendants of this case advertised that they would pay £100 to anyone who got severe cold after using their smoke ball thrice daily for two weeks. They stated that £1000 was deposited in a bank to show their sincierity. Mrs. Carlil relying on the advertisement used the smoke ball for the said period but even after that she caught cold and so she filed a suit for the £100. The co argued that it was only an advertisement and there was no true offer. They also said that a notification of the acceptance by Mrs. Carlil was not made to the co. so they were not liable.

But the court held that an offer can be made to an ascertained person also and it is called general offer. This is a case of general offer and the deposit in the bank showed that it was not a mere advertisement. In the case of notification the performance of the conditions in the acceptance of the offer and so the co has made an offer and Mrs. Carlil has accepted it and the co was held liable.

OFFER AND INVITATION TO OFFER (OR TREAT)

Every expression of willingness to enter into a contract may not amount to an offer in the legal sense. If for eg. A company is making an advertisement that it has certain books to sell there is no offer to be bound. The co is actually inviting the public to make an offer. When any of the public goes and asks for the book only there is an offer. So the advertisement by the co is an invitation to offer.

An invitation to offer is an attempt to induce offers and it is the starting stage of an offer. By accepting an invitation to offer an offer results. But by accepting an offer an agreement results. This is the major distinction between an offer and invitation to offer.

There are some circumstances which are only invitation to offer and not offer. They are as follows:

a) QUOTATION OF PRICES : In a sale contract where parties quote prices it is only invitation to offer and not offer. An important case with regard to this is HARVEY V. FACEY. Here Harvey sent a telegram to Facey "will you sell us Bumper Hall Pen? Telegraph lowest price" Facey replied "Lowest price for Bumper Hall Pen is £900". Harvey again telegraphed " I agree to buy Bumper Hall Pen for the sum of £900 asked by you". But Facey did not reply. Harvey filed a suit for specific performance.

The court held that a suit for specific performance can succeed only if there is a concluded contract. But here Harvey's second telegram that he is ready to buy for £900 was not at all replied by Facey. So Facey's telegram is only an invitation to offer quoting the price and there is concluded contract between the parties.

This decision was followed by the Indian Supreme Court in Mcpherson v. Appanna and the court held that quotation of prices is only invitation to offer and not offer.

b) CALLING FOR TENDER

When a circular is sent calling for tender it is only an invitation to ffer and not offer. When a person makes the highest bid he is making an offer. In SPENCER V. HARDING the defendant sent out a circular calling for tender from intending purchasers of certain stock in trade. The plaintiff's tender was the highest. But the defendant failed to sell the stock to him. It was held that the circular was only an invitation to offer and that the tender was the real offer. There was thus no concluded contract in this case.

TENDER AS A STANDING OFFER

A tender undertaking to supply goods as and when required along a particular period is a standing offer. It is usually a continuing office to supply goods upto a specified limit or within a stipulated period of time. It is made to an ascertained person. In its acceptance no contract arises immediately. A contract results only if and when a specific requisition is made for a definite quantity of goods. Each requisition is treated as a separate act of acceptance. The tender in such case may be revoked at any time before any particular requisition is made by the person to whom the tender is made. GREAT NORTHERN RAILWAY CO V. WITHAM is an example case. Bank of India Vs. O.P Swaroopa.

c) PUBLISHED RAILWAY GUIDES;

The railways publish guides or timetables. This is only an invitation to offer. When a person makes his intention to purchase a ticket he is said to make an offer. It is because of this reason that eventhough the timetables say that a particular train runs from one place to another the railway refuses ticket when we make an offer. By issuing time table there is no implied promise that they will issue ticket. There is no offer and there is no contract. Mcpherson Vs Appanna.

d) PRICE CATALOUGE

A price catalogue which states the lst of goods and its prices is only an invitation to offer.

e) SELF SERVICE SHOPS Pharmaceutical Society of GBV S, Boots Cash Chemists (Southern) Ltd.

There is another example for invitation to offer. When goods are displayed their price tags attached to it is an invitation to offer. When a person selects an article and tries to pay at the counter he is making an offer. The contract is concluded only when the price is accepted by the shop keeper.

ACCEPTANCE

MEANING: acceptance means in general the expression of assent to the proposal by the person to whom the proposal s made. Or it is the final expression of assent to the terms of an offer. A contract is formed when the offerree has done something to signify his intention to accept the offer.

ESSENTIALS FOR A VALID ACCEPTANCE

1. To constitute a valid acceptance the assent must be communicated to the offeror. It is not sufficient that the offeree has made up his mind to accept. It must be communicated. N Brogden v. Metropolitan Railway Co the plantiff simply wrote approved on the offer and kept it in the drawer of his table. In a suit on this it was held that as the approval or acceptance was not communicated there was no contract.

Silence ≠ acceptance.

2. Acceptance may be express or implied. Acceptance may be by express conduct or may be implied from circumstances. But an offeror cannot impose contractual liability merely by proclaiming that silence shall be deemed to be consent. In Felthouse v. Bindley the plaintiff wrote to his nephew on 2nd January offering to buy his horse for £30 adding, "if I hear no more about him, I consider the horse mine at that price." No answer was made to this letter. But the nephew told the defendant the auctioneer to whom the horse was entrusted for sale not to sell the horse. The defendant inadvertently sold it to another person. The plaintiff sued the defendant for conversion alleging that the horse was already his. It was held that the offer remained open and that nothing was done to communicate the intention to accept the offer and therefore there was no binding contract.

3. Conditional acceptance: A conditional acceptance is no acceptance at all. Acceptance must be an absolute and unqualified one of all the terms of the offer. Where an acceptance of an offer is made conditional on the execution of a formal contract there is no binding agreement until such formal contract has been drawn up and signed. By section 7 of the Contract Act in order to convert a proposal into a promise the acceptance must be absolute and unconditional. In other words the offeree must assent unreservedly to the exact terms of the proposal. If any term is refused or varied or added by the offeree his purported acceptance merely operates as a counter offer. Then it cannot be said that there is an agreement between the parties. example case Hyde v. Wrench.

4. Manner of acceptance: if the offeror prescribes a particular method or type of acceptance it shall be effected in that manner. By section 7 the acceptance must be prescribed in some usual and reasonable manner unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes the manner in which it is to be accepted and the acceptance is not made in such manner the proposal may insist that his proposal should be accepted in the prescribed manner and not otherwise. This must be done within a reasonable time after the acceptance is communicated to him. If he fails to do so it will have the effect of waiving the necessity of accepting in the prescribed manner and there would be a binding contract.

COMMUNICATON OF ACCEPTANCE

Acceptance is not complete unless and until it is communicated to the offeror. By the Contract Act the communication can be effected by doing any act having the effect of communicating it. By section 8 performance of the conditions of a proposal or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal.

ACCEPTANCE THROUGH THE POST ✓m

When the contracting parties are face to face it is easy to fix the exact time at which the contract is complete. If they are at a distance from each other difficulties might arise. In such cases the communication will have to be effected through messenger or through the post or such other means of correspondence. Here English Law has recognized one extremely important exception to the requirement that the acceptance must actually reach the offeror. In the case of communication of acceptance by post, the contract is complete as soon as the acceptance is posted. In the case of Adams v. Lindsell the defendant on 2.9. 1817 offered to sell a quantity of wool at a certain price and required the answer in course of post. The letter reached the plaintiff on the 5th. The same day he posted the acceptance which reached the defendant on the 9th. The defendant not having received an answer by the 7th as he expected in the normal course sold the wool on the 8th to another person. The plantiff sued for damages for breach of contract. The precise question was regarding the time at which the letter of acceptance would become effective. It was held that the letter of acceptance when posted concluded the contract. The posting of the letter has the same effect as if it has been personally handed over to the offeror through the agent, the post office. Henthorn VS. Fraser

Other examples in this subject are, Dunlop v. Higgins, Household Fire Insurance co v. Grant, Entores v. Miles Far East Corporation (Telex).

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INDIAN POSITION

Under Indian Law the position is different. Posting of letter of acceptance completes the acceptance only against the proposer. The accept or can revoke the acceptance, for instance by sending the telegram. The justification is that the offeror would not be prejudiced by the revocation of the acceptance for he could not know of the acceptance until the communication of it reaches him subsequently. Under English Law the letter of acceptance once posted completes the transaction and there arises a binding obligation.

TERMINATON OF OFFER

An acceptance is to be effected when the offer is still kept alive. In this connection Anson points out: "Acceptance is to an offer what a lighted match stick is to a train of gun powder." So an offer may lapse for want of acceptance or be revoked before acceptance. Also the offeree may decide to reject the offer. Until an offer is accepted it creates no legal rights, and it may be terminated at any time. The different circumstances in which an offer will be terminated are discussed below:

1. LAPSE (PASSING OF TIME) : If a particular time is fixed for accepting the offer the acceptance must be effected within that time. After the expiry of the time so fixed the offer will lapse. The time may be fixed expressly or impliedly. F no time is fixed the offer will remain open for a reasonable time and then lapse. Eg. Ramsgate Victoria Hotel Co. v. Montifiore. Bradbury Vs. Morgan (ignorance K.C).

2. DEATH OR INSANITY : A contract depends upon the consensus ad idem of the parties. If the offeror dies before acceptance any subsequent acceptance will be ineffective. Similarly after an offeree's death without accepting the offer the heirs or legal representatives cannot accept for hm. By section 6(4) of the contract Act a proposal is revoked by the death or insanity of the proposor if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

3. REJECTION : If the offer is rejected by the offeree there is no more the possibility of any acceptance. Rejection may be direct or indirect. When the acceptance is not in the prescribed manner or when the offeree has not fulfilled the conditions precedent to the acceptance, the offer will be terminated. So also the offeree would defeat the very existence of the offer by making a counter offer.

4. REVOCATION: An offer may be revoked by the offeror at any time before acceptance. An offer is made irrecovable by acceptance. By section 5 a proposal may be revoked at any time before the communication of its acceptance s complete against the proposer, but not afterwards. The revcaton in order to be effective must be communicated to the other party. A revocation by post is not communicated until it is actualiy received.

5. FAILURE TO FULFILL A CONDITION : An offer may be conditional. If the condition is not satisfied the offer will not be capable of acceptance. The condition may be express or implied. Under section 6(3) of the Contract Act "A proposal is revoked by the failure of the acceptor to fulfill a condition precedent to acceptance.

REVOCATION OF ACCEPTANCE

In English Law an acceptance once complete cannot be revoked. Acceptance is necessarily irrevocable for it is acceptance that binds both the parties. Therefore when the acceptance is effected properly the offer ceases to be an offer and it becomes an enforceable contract.

STATUTORY RULES IN INDIA

In the Contract Act specific and detailed provisions are made regarding the communication of offer, acceptance and revocation of proposal and acceptance. The rules are contained in sections 4 and 5. As far as the revocation is concerned the communication would be complete against the person who makes it, when it

is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it. The revocation will be complete as against the person to whom it is made when it comes to his knowledge. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

INTENTION TO CREATE LEGAL OBLIGATION

The Indian Contract Act does not spell out that an offer or its acceptance should be made with the intention to create legal relations or legal obligations. Section 10 which prescribes the essentials for a valid contract does not provide for such an essential.

But in English Law it is a settled principle that to create a contract there must be a common intention of the parties to enter into a legal obligation. In other words even if the parties may come to an agreement they may not have any serious effect of making it into a contract. A clear illustration of this principle is given in Balfour v. Balfour. In this case the defendant and his wife were enjoying leave in England. When they wanted to return home his wife due to ill health could not accompany him. The defendant agreed to send her a certain amount for her expenses. But after some time they separated each other owing to some differences between them and the allowance fell into arrears. The wife filed a suit to recover the arrears. The suit was dismissed for the reason that it was a mere arrangement between the husband and wife and they did not have any intention to create legal obligation.

DISCRETION OF THE COURT

The intention of parties is to be ascertained from the terms of the agreement and the surrounding circumstances. It is for the court in each case to find out whether the parties had intended to enter into legal obligations. So the intention of the parties depends upon the facts and circumstances of each case and it is the discretion of the court to decide whether the parties intended to create legal obligation or not.

FAMILY AND SOCIAL MATTERS

If the parties had in their minds to create legal obligation then even family and social matters also would get a binding effect.

In Mcgregor v. Mcgregor an agreement between a husband and wife was held to be binding contract. here a husband and wife withdraw their complaint under an agreement by which the husband promised to pay her an allowance and in turn she had to reaffirm from pledging his credit. This agreement was held to be a binding contract.

The principle applies to dealings between other relations such as father and son and daughter and mother.

TEST OF CONTRACTUAL INTENTION

The test of contractual intention is objective not subjective. What matters is not the parties had in mind but what a reasonable person would think in the circumstances their intention to be.

INDIAN SUPREME COURT'S VIEW ON INTENTION

It is still an open question whether the requirement of intention to contract is applicable under the Indian Contract Act in the way in which it has been developed in England.

A limited recognition of the applicability of this principle in India could be found in the decision of Banwari Lal v. Suhdarshan Daval. In an auction sale of plots of land a loudspeaker was spelling out the terms,

etc. of the sale. One of the statements was that a plot of certain lenghth and breadth could be reserved for Dharmashalas. But later n that particular plot also was sold for private purposes. The buyers wanted to restrain this. The court held that the announcement through loudspeaker was only for the purpose of advertising and it cannot be treated as intention to create a contract or intention to create legal obligation.

The Standard Form Contracts are standardized contracts that contain a large number of terms and conditions in fine print which restrict and often exclude liability under the contract. This gives a unique opportunity to the giant company to exploit the weakness of the individual by imposing upon him terms which often look like a kind of private legislation and which may go to the extent of exempting the company from all liability under the contract. The battle against abuse has fallen to the courts. The courts have found it very difficult to come to the rescue of the weaker party.

The courts have evolved and applied certain rules to protect the interest of the consumer, customer or passenger, as the case may be upon whom standard form contracts or exemption clauses are imposed, like reasonable notice should be given, notice should be given, notice should be contemporaneous with contract, theory of fundamental breach, contra proferentem interpretation of the contract, liability in tort, exemption clauses and third parties etc. These modes, along with other Acts help the courts in dealing with the problem of Standard Form Contract.

DEVICES In the Contract of Adhesion, the individual has no choice "but to accept"; he doesn't negotiate, but merely adheres to the contract. Therefore individual deserves to be protected against the possibility of exploitation inherent in such contracts. Some of the modes of protection which has been developed by the courts are as follows;

Olley Vs. Marlborough Court Ltd.

Thorton Vs. Shoe Lane Parking Ltd.

REASONABLE NOTICE

It is the duty of the person who is delivering a document to give adequate notice to the offeree of the printed terms and conditions. Where it is not done, the acceptor will not be bound by the terms.

In Henderson v. Stevenson, the plaintiff bought a steamer ticket on the face of which was these words only: "Dublin to Whitehaven"; on the back were printed certain conditions one of which excluded the liability of the company for loss, injury or delay to the passenger or his luggage. The plaintiff did not see the back of the ticket, nor was there any indication on the face about the conditions on the back. The plaintiff's luggage was lost in the shipwreck caused by the fault of the company's servants. This was laid down by the House of Lords that the plaintiff is entitled to recover the loss which he suffered from the company in spite of the exemption clauses. In Parker v. South Eastern Rail Co, the plaintiff deposited his bag at the cloakroom at a railway station and received a ticket. On the face of the ticket it was printed: "See back"; and on the back there was a notice "the company will not be responsible for any package exceeding the value of 10". A notice to the same effect was also hung up in the cloakroom. The plaintiff's bag was lost and he claimed the full value of his bag which was more than 10. The company relied upon the exemption clause. The plaintiff contended that although he knew there was some writing on the ticket, he did not see what it was as he thought that the ticket was a mere receipt of the moneyhepaid. In M/s Prakash Road Lines (P) Ltd v. HMT Bearing Ltd, it has been held that the carrier is bound to deliver the goods consigned at the appointed destination or else he will be liable to pay compensation for the same. Merely printing on the lorry receipt that the goods are transported at the owner's risk will not absolve the transporter from his duty unless it is proved that such terms were brought to the notice of the plaintiff. Mere printing on the lorry receipt cannot be deemed to be the term of contract unless the plaintiff's knowledge and the consent about the same.

NOTICE SHOULD BE CONTEMPORANEOUS WITH THE CONTRACT. If a party to the contract wants to have exemption from liability he must give notice about the exemption while the contract is being

entered into and not thereafter. If the contract has been entered into without any exemption clause then subsequent notice regarding the exemption from liability will be in effective.

In Olley v. Marlborough Court Ltd., plaintiff and her husband hired a room in the defendant's hotel for one week's boarding and lodging in advance. When they went to occupy the room they found a notice displayed there stating "proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the management for safe custody." Due to the negligence on the part of the hotel staff, plaintiff's property was stolen from the room. In an action against the defendant to recover the compensation for the loss, they sought exemption from liability on the basis of the notice displayed in the room. It was held that notice in the room was not forming the part of contract and therefore the defendants were liable to pay compensation.

FUNDAMENTAL BREACH OF CONTRACT

Another device which has been adopted to protect the interest of the weaker of the parties to the contract when they have an unequal bargaining position is to see that enforcing the terms of contract does not result in the fundamental breach of contract. In a standard form of contract it is likely that the party having a stronger bargaining power may insert such exemption clause in the contract that his duty to perform the main contractual obligation is thereby negative. In Alexander v. Railway Executive, the plaintiff deposited his luggage in defendant's cloak-room and in return received a ticket. A term printed on the ticket exempted the defendant from liability for loss or misdelivery of luggage. Plaintiff's luggage was delivered to an unauthorized person without the production of the ticket. It was held that non-delivery of luggage to the plaintiff amounted to fundamental breach of contract for which the defendant was liable. In Shivraj Vasant Bhagwat v. Shevanta D Indulkar, overloading an insured vehicle was a mere irregularity and not a fundamental breach so as to enable the insurer to get rid of his liability.

LIABILITY IN TORT

Even where an exemption clause is exhaustive enough to exclude all kinds of liability under the contract, it may not exclude the liability of tort. In White v. John Warwick & Co Ltd, plaintiff hired a cycle from the defendant. The defendant agreed to maintain the cycle in working condition and a clause in the agreement provided: "nothing in this agreement shall render the owners liable for any personal injuries..." while plaintiff was riding the cycle saddle titled forward and he was thrown and injured.

It was held that although the clause exempted the defendants from their liability of contract, it did not exempt from liability in negligence.

UNREASONABLE TERMS

Another mode of protection is to exclude unreasonable terms from the contract. A term is unreasonable if it would defeat the very purpose of the contract or if it is repugnant to the public policy. In M Siddalingappa v. T Nataraj where a condition that only eight per cent of the cost of garment would be payable in case of loss was held to be unreasonable. In RS Deebo v. MV Hindlekar, laundry receipt contained printed condition restricting liability for loss or damage to 20 times laundry charges or half the value of the garment, whichever was less. The condition was held to be unreasonable.

LIABILITY TOWARDS THIRD PARTY

On the basis of the principles of law of contract, a contract is a contract only between the parties to it and no third party can either enjoy any rights or suffer any liability under it12. In Morris v. CW Martin & Sons, the plaintiff gave her fur garment to a furrier for cleaning. Since the furrier himself could not do the job, he gave this garment to the defendant for cleaning, with the consent of the plaintiff. The defendant's servant stole the garment, for which the plaintiff bought an action against them. The defendant sought exemption

from the liability on the basis of agreement between the plaintiff and furrier. The defendants were not allowed exemption and they were held liable.

ENGLISH & INDIAN VIEW

In England, Unfair Contract Terms Act, 1977 severely limits the rights of the contracting parties to exclude or limit their liability through exemption clauses in their agreements. Liability for death or personal injury cannot be excluded or restricted through a term in the contract or notice. Moreover the manufacturer or the distributer cannot exclude their liability arising out of defective goods or for their negligence, as regards goods supplied for private use or consumption.

Unlike England, there is no specific legislation in India concerning the question of exclusion of contractual liability. There is a possibility of striking down unconscionable bargains either under section 16 of the Indian Contract Act on the ground of undue influence or under section 23 of that Act, as being opposed to public policy.

In Central Inland Water Transport Corp. Ltd v. Brojo Nath, the Supreme Court struck down a clause in service agreement whereby the service of a permanent employee could be terminated by giving him a 3 months' notice or 3 months' salary. It was held that such clause was unreasonable and against public policy and void under section 23 of Indian Contract Act. The Law Commission of India in its 103rd report (May, 1984), on Unfair Terms in Contract, has recommended the insertion of a new chapter IV- A consisting of section 67-A of Indian Contract Act. According to this recommendation where the court on the terms of contract or evidence adduced by the parties, comes to the conclusion that contract or any part that it holds to be unconscionable. A contract according to this provision is considered to be unconscionable if it exempts any party there to from either the liability for willful breach of contract, or consequence of negligence.

TERMS OF CONTRACT

Terms of contract set out duties of each party under that agreement.

The terms will be of two kinds:

1) Express terms: these are laid down by the parties themselves;

2) Implied terms: these are read into the contract by the court on the basis of the nature of the agreement and the parties' apparent intentions, or on the basis of law on certain types of contract.

Terms are to be distinguished from statements made prior to the contract being made. Two main types of statement:

– A representation about a state of affairs, or

– A promise that something will or will not occur in the future.

• Either type of statement can become a term of the contract, whether or not they are oral or written, or partly oral and partly written.

Three types of contractual terms, each of which has normative importance relative to the others:

1. Conditions

2. Warranties

3. Innominate terms

CONDITIONS

These are the most important terms of contract. Serious consequences if breeched. Innocent party can treat contract as repudiated (and thus is freed from rendering further performance of contract) and can sue for damages.

– Description in contract of term as "condition" is not necessarily determinative of question whether term is condition. Courts tend to search for evidence that parties really intended term to be such. e.g. Schuler AG v. Wickman Machine Tool Sales Ltd. (1974). 1400 visits N.L

Statute may determine that certain terms are to be treated as conditions.

E.g. Sale of Goods Act 1979 provides that certain terms relating to title to goods and quality of goods are not just to be implied into consumer contracts but also to be conditions.

Case law also determines that certain terms – typically standard terms in commercial contracts – are to be treated as such. See, e.g. The Mihalis Angelos (1970) C 1st July -> 14th July - 17th July.

WARRANTIES

– Of lesser importance than conditions, and can be breached without such serious consequences. Innocent party can sue for damages but is not able to terminate the contract.

INNOMINATE TERMS

– Can be either conditions or warranties. Breach of them can be serious or trivial depending on particular fact situation. If effects serious, they are conditions and vice versa.

– Notion of such terms first emerged in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Ltd. N.L (1962). 2yrs – 5+15 weeks.

– Introduction or recognition of this category of terms has given more flexibility to law, but also created more potential for uncertainty.

Hence, courts have subsequently been inclined to hold that certain terms will usually be conditions to give commercial actors in a particular market certainty. Hence (as seen above) term in shipping contract stipulating that the ship will be ready within certain number of days will often be held as condition, breach of which enables discharge of contract even in cases when there is only slight delay with trivial or no harm. See The Mihalis Angelos case. See, too, follow-up cases such as Bunge Corp. V. Tradax Export SA (1981) and The Naxos(1990).

L 5000 tons of soya beans 54 15 days of notice.

UNIT II

CONSIDERATION

Section 10 of the Indian Contract Act requires lawful consideration as an essential factor for giving enforceability to an agreement. By section 25, an agreement made without consideration is void. Sections 23 and 24 deals with the circumstances in which the consideration will be treated unlawful. Section 2(d) defines consideration. Even though in some details the Indian law differs from the English law, in general it follows the English principles.

DEFINITION OF CONSDERATION

Even though the concept of consideration as an essential requirement of a valid contract can be described in terms of quid pro quo or as the price for promise, there is no single definition in English law which is universally followed.

In Curie v. Misa it was defined as: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsil .lity, given, suffered or undertaken by the other."

In Thomas v. Thomas t was defined as: "Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant."

Section 2(d) Indian Contract Act defines as: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstained from doing or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

Essentials

In accordance with Section 2(d), the essential features of a valid consideration are as follows:

1) It is given 'at the desire of the promisor';
2) It may move from any person;
3) It can be past, present or future consideration;
4) It must be real and possess value. It must not be illusory;
5) It must be something other than the Promisor's existing obligation;
6) It must be lawful.
7) It is given 'at the desire of the Promisor'

The action or abstinence from action must be done at the desire of the promisor.

If the promisee has done something or abstains from doing something at the desire of a third party or voluntarily, it is not valid consideration. The consideration has to be done at the instance of the promisor or the promise will not be able to enforce the same.

Illustration: At the request of the collector of the District, X spent money and constructed some shops. Y, a shopkeeper who occupied one of those shops, promised to pay to X commission on the sale of goods made by him as consideration for the money X spent on the construction. X sued Y to recover the promised commission. Since, X had not constructed the shops at the desire of the Y (the promisor here); there was no valid consideration as required by Section 2 (d). Thus, the agreement was void and Y was held not liable to pay the promised amount. The facts are similar to the case of Durga Prasad vs. Baldeo.

2) **It may move from any person.**

It does not matter who furnishes the consideration. The consideration may be moved by the promise himself or any other person including.

In the case of Chinnaya v. Ramaya, X – an old woman, gave away certain immovable property to her daughter through by a registered deed. She also directed her daughter to pay an annuity to Y – the old woman's sister. The same day, the daughter executed a deed in writing and undertook to pay annuity to Y. Subsequently, the daughter failed to pay annuity and Y brought a suit for its recovery. The daughter pleaded that she was not liable because no consideration had moved from Y. The Court held that the words' the promisee or any other person' in Section 2(d) made it clear that consideration need not move from the promise only and Y was entitled to maintain the suit for recovery.

3) **It can be past, present or future consideration.**

a) Past Consideration. Consideration is the price for a promise and thus, it is usually given in response to and as an inducement for the promise. If the consideration is given earlier than the date of promise by the promisor, then it is known as past consideration.

For instance, the promise to pay a debt that one is already under an obligation to pay is past consideration. Past consideration is usually not considered to be consideration for the new promise because it has not been given in exchange for the 'new' promise.

Past consideration as good consideration under Indian Law as long as it was given at the desire of the promisor.

Illustration: X renders service to Y during months of agricultural harvesting. Y promises to pay Rs 1000 to X for his past services when the new crop is being sown in the fields. The past services of X constitute valid consideration.

English Law does not recognise past consideration. However, the English Law treats an act done at request to be good consideration for a subsequent promise. In the case of Lampleigh vs. Brathwait, X – guilty of committing murder, requested Y to try and get him a pardon from the King. Y travelled at his own expense and put in effort to secure a pardon. X promised to pay him a certain sum of money but refused subsequently. It was held that Y had a right to enforce the promise.

Past voluntary services. A person may render voluntary services to another without any request or promise. In some cases, the receiving party may subsequently make a promise to pay for the services rendered. Such a promise in enforceable in India under Section 25(2) that provides that "*a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor*" is enforceable.

Illustration: X found Y's purse on the road. He returns the same to Y who promises to give Rs 100 to X for his services. This is a valid contract.

Section 25(2) also covers acts done at request and for which a promise to pay is given later. Every request for an act carries an implied promise to pay.

In Sindha Shri Ganpatsingji vs Abraham, it was held that services rendered to a minor at his request and also continued after his majority at the same request were good consideration for the minor's promise to pay

b) Present Consideration. When consideration and promise take place simultaneously, it is called present or executed consideration. For example, in cash sales, the promise to pay the price and promise to deliver the goods are performed at the same time. Executed consideration is good consideration.

Illustration: X goes to a shop and buys a bottle of water from there. He also pays the price on the spot.

c) Future Consideration. If the consideration for a promise moves after the formation of the contract, it is called future or executory consideration.

Illustration: X promises to deliver 10 bags of rice to Y after 10 days and Y promises to pay for the rice 10 days after the delivery by X.

It is a promise to do, abstain or suffer which is made by one party in return for a similar promise from the other party. Even is the promise given for a promise is dependent on a condition, it serves as valid consideration.

Illustration: X promises to landscape the garden of Y and Y agrees to pay X as long as the landscape plans are approved by Z, a third party. Y's promise is valid consideration for X's promise.

4) It must be real and possess value. It must not be illusory.

Consideration must have some value in the eyes of law. A worthless act cannot satisfy the spirit of the definition.

Illustration: While the consideration must be real, it does not need to be adequate for the promise. It is for the parties to consider what is adequate consideration for them? This principle of English Law is also enforced in India.

Explanation 2 to Section 25 provides that a contract which is supported by consideration is valid irrespective of the fact that the consideration is in adequate.

A contract is not invalid merely due to inadequacy of consideration. However, the Courts may look into inadequacy of consideration to ascertain whether the consent of a party was free or not. Consideration need not be adequate but it must be sufficient in the eyes of law.

'Forbearance to sue' refers to a scenario where a party has a right of action against the other party or a third person and he refrains from bringing action in consideration of promise by the other or third party. Forbearance to sue is valuable consideration provided such action does not give rise to an illegal contract.

In Kasturi Devi v Chiranji Lal, X – the wife of Y, withdrew her suit against Y in return for his promise to pay her maintenance. It was held that it was good consideration.

English common law insists on real and valuable consideration.

In the case of White v Bluett X – the son of Y, used to constantly complain to his father that his brothers had received more property than X. Y promised to release him from an outstanding debt if X promised to stop complaining. It was held that the promise by X to not bore Y in the future did not constitute good consideration for Y's promise to release him from a debt.

5) It must be something other than the Promisor's existing obligation;

Performance of an existing obligation or legal duty is no consideration for a promise.

Illustration: X receives summons to appear before court of law as a witness for Y. He is promised certain amount of money by Y for appearing in Court. The promise to pay X is void because of lack of consideration for Y as X was already under a legal duty to appear as a witness before the Court. (Collins vs. Godefroa)

6) It must be lawful.

The consideration must not be unlawful or opposed to public policy.

Illustration: X offers Rs 1000 to Y for beating up Z, his enemy. Y beats up Z but X refuses to pay him. Y cannot recover the money promised to him because the consideration is unlawful.

Section 24. Agreement void, if considerations and objects unlawful in part. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

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 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

In the Pinnel case, it was held that a promise to pay less than what is due under a contract cannot be regarded as consideration. This rule was affirmed in Foakes v Beer.

X, a doctor, was ordered to pay 2000 pounds to Y, a lady, by a judgment decree. He was unable to pay the entire amount together, so he entered into an agreement with her that he would 200 pounds immediately and the rest 1800 pounds in installments. After the last installment was paid, she sued for recovery of interest on judgment debt. It was held that Y was entitled to the payment of judgment debt as well as the interest till the date of final payment because there was no consideration for her promise to accept anything less than the sum to which she was entitled.

COMPETENCY OF PARTIES

Section 10 of the Indian Contract Act declares that the parties to the contract must be competent to contract. By Section 11 every person is competent to contract who is of the age of majority according to the law to which he is subject, who is of sound mind and who is not disqualified from contracting by any law to which he is subject. Section 12 explains the circumstances in which a person will be of sound mind for the purpose of entering into a contract.

MINORITY:

English Law: Under the common law an infant was a person under 21 years of age. By the Family Law Reform Act, 1925 every person under 18 years of age is a minor. In English Common Law, the effect of infancy upon the enforceability of a contract depends upon the nature of the contract entered into by the minor.

(a)Contracts for Necessaries: The Common Law allows even infants to enter into contracts for necessaries. The term 'necessaries' is not confined to things which are necessary for support of life. Goods suitable to the condition in life of the infant having regard to his position in society are regarded as necessaries. For example, in Ryder v Wombell, the defendant was a person moving in a high society. He purchased a gift made out of silver to make a present to his friend in credit. This was said to be a contract not enforceable because even if the social status of the party is considered, these articles cannot be considered as necessaries. In regarding whether certain things are necessary or not, the quantity supplied and the particular circumstances of the infant at the time of the contract should be considered.

(b)Beneficial Contract of Service: Some contracts of service are beneficial to the infant as they provide him education and enable him to earn his livelihood. Such contracts are valid. In Roberts v Gray, the plaintiff was a billiards player. The defendant was an infant who entered into a contract agreeing to join the plaintiff in a world tour. Before the tour began, the defendant avoided the contract. The plaintiff filed a suit against the infant and was awarded 1500 pounds as damages because the agreement was in effect for teaching, instruction and employment and was for the benefit of the infant.

(c)Positive Voidable Contract: These are contracts which are binding unless disaffirmed by the minor. For example, when the infant becomes a shareholder in a company, he gets some contractual obligations. Such obligations are voidable at his instance but it is binding until he disclaims them.

(d)Negative Voidable Contract: These are not binding unless affirmed by the minor. Here the contracts are not binding on the infant unless he ratifies them within a reasonable time after attaining majority.

Changes made by the Infants Relief Act of 1874:

The Infants Relief Act of 1874 has made an important change in regard to the enforceability of such contracts. It divides them into two classes: (a) those giving rise to debts – cannot be revived even by ratification after attaining majority. They cannot even support a fresh promise to pay. (b) Contracts other than those giving rise to debt (e.g.) promise of an infant to marry. These cannot be ratified after majority but a fresh promise to perform the same contract would be binding.

The most important change is in declaring 3 types of contracts of infants to be void. They are (a) contracts for repayment of money lent, (b) for payment in regard to goods supplied (other than necessaries) and (c) accounts stated with an infant. கடன், பொருள், கணக்கு VOID

Prior to this Act, no contract of an infant was absolutely void. The infant could always sue in damages for breach of contract to which he is party. The Act of 1874 has deprived him of that remedy in regard to the 3 specific types of contract which it declares to be absolutely void.

Indian Law:

Section 11 of the Indian Contract Act provides that to be competent to contract, a person must be a major. Under the Indian Majority Act of 1875, a person becomes a major on the attainment of 18 years of age. If the minor is under guardianship, minority ceases only on the attainment of 21 years of age.

Section 11 has not indicated whether a minor's contract is void or voidable. This was pointed out in the leading case of Mohiribibi v Dharmadas Ghose.

In that case, the plaintiff was a minor. He borrowed Rs. 8000 and executed a mortgage for Rs. 2000 in favour of the defendant who was aware of the plaintiff's minority. He then brought a suit for setting aside the mortgage. A mortgage is a transfer of property and to execute a transfer the law requires that a person should have contractual capacity. So the minor's mortgage was set aside.

The defendant claimed that a minor's contract was voidable and became void when it was avoided by the minor and so the minor should restore the benefit i.e. Rs. 2000 to the defendant. But the Court held that the minor's contract was void ab initio and there was no question of avoiding it or ratifying it. It needed no avoidance and could not be cured by ratification.

Thus it was clearly laid down that a minor's contract was void ab initio.

Guardian's Contract: When a guardian enters into a contract on behalf of a minor, the validity of a contract depends upon whether the guardian is acting within the scope of his legal powers or not.

Minors and Estoppel: Estoppel is a rule of evidence by which aperson is not allowed to go back upon his previous representations. When A makes a representation to B and B acts upon that representation to his prejudice A is estopped as against B from denying the truth of his representation.

But in the case of a minor, if he represents that he is a major and thereby induces another to enter into a contract, it cannot be enforced against him as he is not estopped from setting up his minority as a defense.

Restitution of Benefits: A minor who makes a false representation as to his age will be compelled to make restitution of the benefit received by him. If the minor is in possession of any property obtained by the fraud he can be compelled to restore it to its former owner.

If the benefit consisted of the receipt of money, in English Law, restitution stops where payment begins. In India, by Section 33 of the Specific Relief Act, any benefit which includes even cash received may be directed to be restored. But it must be shown that the minor or his estate derived some benefit therefrom.

LAW RELATING TO CONTRACTS OF LUNATICS AND INTOXICATED PERSONS

A lunatic or a person of unsound mind for purposes of contracting is one incapable of understanding the contract and forming a right judgement as to its effects upon his interests.

In England, the contract of a lunatic is voidable at his instance. To avoid the contract two things should be proved on behalf of the lunatic (1) That at the time of the contract he did not know what he was doing and (2) that the other party to the contract had knowledge of this incapacity.

In India, a lunatic's contract is void. So Indian Law diverges from the English Law on this point.

Both in India and England a lunatic may enter may enter into a contract during lucid intervals i.e. if a person is not a lunatic during a particular period of time.

Drunken Person:

In England, a drunken person's contract is voidable. In Mathews v Baxter, a drunken person who did not know what he was doing agreed to purchase some horses. After becoming alright, he confirmed that the contract concluded during intoxication was void it would not be capable of ratification. It was held that the contract was only voidable and was capable of ratification. So the drunken person was held liable since he had ratified the voidable contract. In India, the contract of a drunken person is void.

OTHER INCAPACITIES:

Political Status:

Alien enemies: During times of peace, one can enter into contracts with aliens or subjects of foreign countries. In times of war, one cannot enter into a contract with an alien enemy unless he is residing in this country and has obtained permission to carry on trade. The test to be applied to see whether a person is an alien enemy or not is not by testing his nationality but by enquiring the place in which he resides or carries on business.

If the contract has already been entered into and after that war is declared, then the performance of obligations already created will be suspended. If the period is too long, the contract will become void on the ground of impossibility of performance.

Foreign sovereigns and ambassadors: Foreign sovereigns and representatives of foreign states under English Law have full legal capacity to enter into contract in England. Suits can be instituted against them only if they submit themselves to the jurisdiction of the English Courts.

By Section 86 of the Civil Procedure Code if a suit in connection with a contract by a foreign sovereign is to be instituted, it is required to get the consent of the Central Government.

Corporation: A Corporation is a legal person which means any subject or entity other than a human being to which law the attributes personality. Being an artificial person the contractual capacity of a corporation is essentially limited. It may be either (a) physical, natural or necessary limitations or (b) express or legal limitations.

Physical impossibility: the Corporation being a creature of law has no physical existence. As a consequence of this, the corporation has to act through an agent and therefore it has no power to enter into any contract of a strictly personal nature (e.g.) contract to marry.

Legal limitations: The statutory corporation can exercise only those powers which are expressly or impliedly conferred by the statute itself. A registered company is required to have a memorandum of association which defines the statutory creature by stating its objects of its existence, the scope of its operations and the extent of its powers. A company can enter into contracts only which relates to the objects set out in the memorandum of association. Everything else is ultra vires and void. This is known as the doctrine of ultra vires.

The very famous case in this doctrine is Ashbury Railway Carriage Co. v Riche.

A company was incorporated with the following objects: (1) to make and sell or lend or hire railway carriages etc. (2) to carry on the business of mechanical engineers and general contractors (3) to purchase, lease, work and sell mines, minerals, land and buildings. Then the company contracted to "purchase a concession for building a railway" in Belgium. It was held that the agreement was ultra vires since it related to the construction of a railway, a subject matter not included in the memorandum.

Recent Changes:

A few important changes have been effected in the doctrine of ultra vires by the new provisions of the English Companies Act 1989 by introducing the new sections 35, 35A and 35B. The effect of the new provisions was to make the rule of ultra vires a rule relating to the internal management of the company. Third parties are fully protected. In the case of directors going beyond the powers granted by the memorandum a shareholder could restrain them by injunction.

Form required for corporate contracts:

As a general rule, a contract entered into by a corporation must be under its corporate seal. In case of a trading company acting within the scope of its constitution, it could make contracts without seal. In case of non-trading corporations, when a contract forwork or services in respect of matters connected with the object of the corporation and the corporation had accepted the benefit of such work or services a case can be filed against the corporation at the suit of the party who had performed the work and a defense cannot be pleaded that there is no seal.

In India also, the rule relating to requirement of seal has been practically abolished by the Companies Act of 1956. As a general rule, a company can contract without seal.

FREE CONSENT –UNDUE INFLUENCE

Sec: 16 of the Act deals with undue influence. A person induced to enter into a contract by undue influence may treat the contract as voidable.

Sec: 16 divided into 3 parts. The first part deals with definition of undue influence, second part with presumption of undue influence and the third part with burden of proof in case the contract is induced by undue influence.

Definition of undue influence: sec 16 (1):

A contract is said to be induced by undue influence when the relations subsisting between the parties are such that (1) one of the party to the contract is able to dominate the will of the other party and (2) the person who is able to dominate the will of the other party uses that position to obtain an unfair advantage over the other.

These points would be clear from the case of ALLCARD Vs SKINNER

Allcard joined as a sister in an association in 1862, she executed a gift deed in respect o her property under the influence of her superior in charge of the sisterhood. She left the association in 1879. In 1885 she brought a suit for setting aside the gift deed. The judgment in this case may be summarized as follows:-

(1) The relationship between the parties was such that the religious superior can be deemed to dominate the will of the plaintiff.

(2) A gift being a transfer without any consideration was in the face of it unfair.

(3) The effect of undue influence was to render gift voidable.

(4) The avoidance of a contract on the reason that it was induced by undue influence must be made at the earliest possible time.

(5) Since the plaintiff did not take any action between 1879 when she left the sisterhood and 1885 when the action was brought and her conduct during this period must be taken to be a confirmation of the transaction and so the gift could not be set aside.

PRESUMPTION OF UNDUE INLUENCE: 16(2).

There are certain relationship in which it would be presumed that one party is in a position to dominate the will of the other party. A person holding a real or apparent authority over the other or standing in a fiduciary relation to other would be deemed to be in a position to dominate the will of such other person. Eg. parent and child, trustee and beneficiary, advocate and client or any person whose mental capacity is affected because of age, illness or badly distress, etc.

BURDEN OF PROOF:

The existence of fiduciary relationship does not by itself establish undue influence. When one person avoids a contract on the reason that is induced by undue influence then the burden of proving that the contract was not induced by undue influence his on the person who was in a position to dominate the will of the other or in other words the person in the upper position.

For eg. in the case of pardhanashin women the burden of proof is on the person benefitting by the document executed by them to show that they had independent legal advice.

Undue influence is another form of duress. In duress there is physical threat but in undue influence it is only the existence of a relationship which induces the other party. In other words undue influence may be called mental duress.

FRAUD: SEC. 17

According to sec 17 Fraud means and includes any of the following acts committed by a party to a contract or with his connivances or by his agent with and intent to deceive another party or his agent or to induce him to enter into the contract. (1) The suggestion as to a fact which is not true by on who does not believe if to be true. (2) The active concealment of fact by one having knowledge or belief of the fact (3) A promise made without any intention of performing it (4) Any other act fitted to deceive. (5) Any such act or omission as the law specially declares to be fraudulent.

So the important aspect with regard to fraud is that the acts must be done with and into defraud the other person.

A contract is said to be vitiated by fraud under sec: 17 when one of the party commits the following acts with intent to defraud.

(1) A Suggestion as to a fact:

The first requirement to commit a fraud is that there must be some suggestion as to a fact. There can be not fraud with representation except where silence will amount to fraud in some cases.

The representation must relate to a fact and not of law. Mere information given by the sellers to influence the purchasers of a product, does not amount to a representation of fact according to section 17 eg. Statement made in advertisements.

This was stated in DIMMOCK V. HALLETT. In this case a land sold by auction was stated to be very fertile and improvable. In fact, the land was abandoned as mere waste land. The court held that the statement of the auctioneer was only a commendatory description and not a representation of fact.

So a mere expression of opinion cannot be treated as an expression of fact and if such a representation turns to be false it cannot be treated as fraud.

Another point is that the representation must be made with knowledge that it is false or without knowledge in its truth. The leading case on this DERRY V. PEEK.

In this case the Directors of Company issued a prospectus stating that the company had right to run trams by steam power. But actually the company could run trams only by horse power and the consent of the board of trade was required to run them by steam power. But the Directors had submitted a plan to the board and so they honestly believed that they could get the consent. The plaintiff purchased shares in the Company on the faith of the representation on contained in the prospectus. But the board of trade did not give the consent and the co. was close. The plaintiff filled a suit for compensation on the ground that the statement in the prospectus was fraudulent. The court held that fraud was not proved and they were not entitled to compensation. It was observed by the court that fraud is proved when it is shown that a false representation on has been made (1) knowingly or (2) without belief in its truth or (3) recklessly careless whether it be true or false.

The next point is that a person cannot complain of having been mislead by a statements which did not lead him of all.

"suppressio veri suggestio falsi"

(2) FRAUD BY ACTIVE CONCEALMENT:

According to section 17(2) an active concealment of a fact to mislead the other and make him enter into a contract amounts to fraud. This is called SUPPRESSIO VERI (concealing a fact).

In PEEK V. GURNEY the prospectus of a co. deliberately avoided reference to a particular document which would have disclosed certain liabilities of a co. this was done to create an impression in the minds of the public that the co. was prosperous by actually it was running in loss. This was held by the court as fraud because here was concealment of a fact which is vital to the contract.

(3) OTHER ELEMENTS OF FRAUD:

sec: 17(3) to (5) speaks about other elements of fraud. If any promise is made by one of the party without any intention of performing it then it will amount to fraud.

Another point is that any act will amount to fraud if the law itself declares such acts or omission to be fraudulent. For eg. the Transfer of Property Act 1882 imposes certain duties of disclosure about defects of products between a buyer and seller. A breach of these duties is declared as fraudulent by section :55 of that Act.

In addition to these if any act is done by one of the party with intent to deceive the other party then the court may declare the contract vitiated bty fraud by sec. 17(4).

WHETHER SILENCE AMOUNTS TO FRAUD?

Explanation to sec.17 answers these questions generally silence about a fact during negotiations in a contract does not amount to fraud. But there are certain exceptions to this rule. They are:

(1) Contracts of utmost good faith (Uberrimae fidei):

In contracts of utmost good faith it is duty of the party to make certain disclosures. Non disclosure in such a cases would be treated as fraudulent eg. Insurance contracts. In a life insurance contract if the person whose life insured declares that he is not suffering from a particular disease, but actually he is suffering from it, the insurance contract would be liable to be set aside. Other examples are family settlements, contracts for allotment of shall in a company etc.

(2) SILENCE EQUIVALENT TO SPEECH:

Silence will amount to fraud when a person's silence is equivalent to speech. For example 'B' say to 'A' If you do not deny it, I shall assume that the horse is sound A say nothing, Here A's silence.

FREE CONSENT- COERCION (sec: 15)

An agreement the consent to which is caused by coercion is voidable at the option of the party whose consent was so caused.

COERCION:

According to sec: 15 of Indian Contract Act 1872 consent is said to be caused by coercion when it is obtained by pressure by suing the following methods.

(1) Committing or threatening to commit any act forbidden by Indian Penal Code,

(2) Unlawfully detaining or threatening to detain any property.

For example if a consent to a contract is obtained at the point of Pistol or by threatening to cause hurt it is coercion.

DIFFERENCE BETWEEN ENGLISH LAW AND INDIAN LAW:

Coercion in English Law is called duress. Duress means actual violence or threats of violence in English law when a person makes another to enter into a contract by threatening him to cause bodily injury or to unlawfully imprison such party to the contract or members of his family the contract is vitiated by duress.

Coercion under Sec:15 of Indian Contract Act more or less corresponds to duress under English. But coercion is much wider in its scope.

The above difference between English and Indian Law would be clear from the following case.

In AMMURAJU V. SESHAMMA a held out a threat to commit suicide and made his wife to sign a deed in his favour. The suit was filed for setting aside the document. It was held that the transaction was vitiated by coercion and was liable to be set aside. This is because the attempt to commit suicide in punishable under IPC and so a threat to commit an act which is forbidden by IPC is coercion under sec.15 Indian Contract Act

But in English law the threat to commit suicide is not duress the there was no threat to cause bodily violence or to imprison the executants' of the document this was held in COOPER V. CRANE.

Hence it is clear that coercion under section 15 of ICA is much wider than dress under English law.

ECONOMIC DURESS:

Economic duress arises in cases where a person is found to render labour or service to another due to compulsion arising from his economic incapability.

" Ceshire" in his Law of Contracts points out that "Economic duress as a factor would render a contract voidable provided it amounts to a coercion of will which vitiates consent".

In equality of bargaining power English law coupled with undue influence or pressures.

MISREPRESENTATION: (section 18)

Before entering into an agreement the parties concerned makes various statements regarding the subject matter and various other matters which are very essential to an agreement. These statements may call Pre-contractual representations. Some of them any is true and some of them may be false. If any misstatement is made as to these pre- contractual representations then the contract is said to be induced by Misstatement. The consent which is induced by misrepresentation is voidable at the option of the deceived party.

Definition: Misrepresentation is defined is section: 18 of ICA. It means and includes

(1) The positive assertion in a manner not warranted by the information of the person making if of that which is not true through he believes it to be true.

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

(3) Causing however innocently a party to an agreement to a mistakes to the substance of the thing which is the subject of the agreement.

TYPES OF MISREPRESENTATION:

Sec: 18 includes the following type of misrepresentations

(1) UNWARRANTED STATEMENTS OR INNOCENT MISREPRESENTATION

Sec.18(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 this is innocent misrepresentation. In innocent misrepresentation the assertion is false but the person making it believes it to be true or does not know it to be false. For example in Oceanic steam Navigation Co. V. Dharamsey, the defendants booked a ship from the plaintiff and plaintiff stated that the ship was certainly not more than 2800 tonnage register. But in fact the ship had never been in Bombay and to the plaintiffs did not know anything about it. The ship was actually 3000 tonnes. The defendants avaoided the contract and the plaintiffs sued him. It was held that the defendants were entitled to avoid the contract because there was a positive assertion by the plaintiff about the size of the ship which was not true and the plaintiff did not have any information about the ship when he gave the statement.

A person is said to be warranted by the information of the person making it when he receives the information from a trustworthy source. If a person makes a positive assertion on the basis of a second hand information or a hearsay information, it will be treated as an unwarranted information.

(2) BREACH OF DUTY OR NEGLIGENT MISREPRESENTATION:

Any breach of duty which brings an advantage to the person committing it by misleading the other to his prejudice is misrepresentation. In this type of misrepresentation on the party who gives any statement has a duty to speak and he branches that duty and he gain an advantage by misleading the other party. Since their is a breach of duty, and the contract is induced by misrepresentation it is called negligent misrepresentation.

ORIENTAL BANKING CORPORATION V. JOHN FLEMING

The plaintiff having not time to read the contents of deed signed it as he was given a false impression that it contained nothing but formal matters already settled between them. But the deed was actually a deed in favour of the defendants. The court allowed the plaintiff to set aside the deed because it was induced by misrepresentation. The reason given by the court was that even though there was no obligation legally or merely to communicate the contents of the deed since the plaintiff has placed confidence on the defendants to know the contents of the documents then it becomes the duty of the defendants to state fully without concealments all that was essential to the knowledge of the contents of a documents.

In case of innocent misrepresentation on general damages cannot be claimed but contract can be rescinded. But in negligent misrepresentation damages also can be claimed and the contract may also be rescinded.

(3) INDUCING MISTAKE ABOUT SUBJECT MATTER SEC.18(3)

The subject matter of every agreement is supposed by the parties to posses certain value or quality. If one of the parties leads the other however innocently to make a mistake as to the nature or quality of the subject matter there is misrepresentation on. For example in **Dambarudhar V. State of Orissa** the Government auctioned certain forest coupes. A part of the land was occupied by tenants. The forest department knew this fact but did not disclose it to the purchaser. The contract was held to be vitiated by misrepresentation. The purchaser was allowed to recover damages for loss.

SUPPRESSION OF VITAL FACTS:

Misrepresentation may also arise from suppression of vital facts. Cases of the concealment or suppression will fall either under 18(2) when it amounts to a breach of duty or under 18(3) when it leads the other party to make a mistake about the subject matter of the agreement. For example in R.V. KYLSANT the prospectus of a company stated that the company had regularly paid dividends which created the impression that the company was making profits whereas the truth was that company had been running into losses for the last several years and dividends could only be paid out wartime accumulated profits. The suppression of this fact was held to be a misrepresentation.

Another important point is that misrepresentation should be FACTS MATERIAL TO THE CONTRACT. Mere commendatory expression such as men of business will habitually make about their goods are not sufficient to avoid the contract example expressions in a case of advertisements. A mere expression of opinion cannot be regarded as a misrepresentation on of facts even if the opinion turns but to be wrong. A representation on of fact may sometimes he inherent in a statement of opinion. But it depends on the facts of the transaction, the knowledge of the parties respectively and their relative position etc.,

CHANGE OF CIRCUMSTANCES:

There is often a gap of time between the representation of a fact and the ultimate conclusion of the contract. Any change of circumstances in the meantime affecting the fact represented earlier must be brought to the knowledge of the other party. In With V. O. FLANGAN there was a negotiations for the sale of Medical practice. The defendant represented that his practice had brought in 2000 pound per year for the last three years and he had specified number of patients. The actual contract was made only, after 5 months of negotiation. During, this time the defendant became ill and could not attend practice and this resulted in the serious less of practice and the plaintiff came to know of this only after the completion of sale. It was held that the plaintiff was entitled to received the contract. The court stated the reason that the change of circumstances should have been brought to the notice of the purchaser.

INDUCEMENT: It is necessary that misrepresentation must be the cause of the consent or in other words a party cannot complain of misrepresentation if he had the means of discovering the truth with ordinary diligence, for example a person who bought a quantity of rice was precluded from alleging misrepresentation about its quality because he lived very near the place where the goods were lying and therefore he had every chance to discover the truth. This principle is recognized by way of an exception stated in section 19 as follows:- If consent to an agreement is caused by misrepresentation or by silence fraudulent within the meaning of section 17 the contract is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

DISTINCTION BETWEEN FRAUD AND MISREPRESENTATION:

Misrepresentation and fraud have many points in common for instance, both render the contract voidable, there is a false representation in both in either case it is necessary that the consent should have been caused by the fraud or misrepresentation and finally where there is a fraud by silence the fact that there were means of discovering the truth by ordinary diligence is a good defence. This is so in misrepresentation also. Damages for loss caused by innocent misrepresentation on are assessed on the some principles as in the case of a deliberate fraud. The points of distinction are also noticeable.

FRAUD	MISREPRESENTATION
1.It is an intentional wrong that done with an intention to deceive the other person	Misrepresentation is not intentional. It is done without any intention (sec. 18(1)and 18(2))
2. In fraud the contract is voidable and it is a cause of action in tort for damages	Innocent misrepresentation is not for t and a person affected can avoid the contract. Damages may be awarded only in some cases depending upon the facts and circumstances each case (sec. 75)
3. A person committing fraud cannot take the defence that the victim had the means of discovering the truth	A person committing misrepresentation can take the defence that the victim had every means of discovering the truth

LIMITS OF RESCISSION (Section: 19)

A contract, the consent to which is caused by coercion, fraud or misrepresentation is voidable at the option of the party whose consent was so caused. This is provided in section 19 of Indian contract Act. But accordingly to the same section 19 the party who was induced by misrepresentation on coercion or fraud has the option either to avoid the contract or alternatively to affirm it. The onus is on the plaintiff to prove fraud etc., He can exercise his option only once. If the contract is affirmed it become a enforceable by both the parties and if it is avoided it becomes void as against both. This right to rescind is subject to certain limitations which are as follows :

(1) BY AFFIRMATION:

When a party after becoming aware of his right to rescind affirms the contract the right of rescission is lost. Affirmation may express or implied. Affirmation may be understood even from his activities for example where he appropriates to his use the goods received under a voidable contract or has sold or attempted to sell them. For example in LONG V. LLOYD The defendant induced the plaintiff to buy to his lorry falsely convincing him that it was in "excellent condition". On the very first journey, the plaintiff discovered serious defects but accepted the defendants offer to bear half the cost of repairs. The lorry completely broke down on the next journey and he then claimed rescission.

The court held that on the first journey itself the plaintiff came to know that the representation was false. But instead of asking for rescission, he accepted the offer of repair and sent the lorry for a second trip. This amounted to an implied affirmation and so he has lost the right of rescission.

(2) BY LAPSE OF TIME:

Rescission must be claimed within reasonable time after discovering the misrepresentation otherwise the party will lose the right of rescission example Allcard V. Skinner

(3) INTERVENTION OF RIGHTS OF THIRDPARTIES:

The right of rescission is lost as soon as a third party acting in good faith acquires lights in the subject matter of the contract. Thus where a person obtains goods by fraud and before the seller is able to avoid the contract disposes them off to a bonafide party the seller cannot then rescind.

MODE OF RESCISSION:

The usual method of rescinding a contract is by giving a notice to the other party of the intention to rescind. According to section 66 of Indian Contract Act the rescission of a voidable contract may be communicated or revoked in the same manner and subject to the same rules as applied to the communication of a proposal.

CONSEQUENCES OF RESCISSION:

According to section 64 of Indian Contract Act when a party at whose option a contract is voidable rescinds it the other party thereto needs not perform any premise therein contained in which he is promise. The rescinding a voidable contract shall be has received any benefit there under from another party to such contract restore such benefit to the person from whom it was received. Even where the party seeking rescission is not in a position to restore to the defendant his status quo and (Position as it was before) the court may allow rescission by doing what is practically just in the circumstances.

According to section 75 of Indian contract Act a person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non fulfillment of the contract.

FREECONSENT- MISTAKE (sections: 20, 21, and 22)

Mistake may operate upon a contract in two ways.

(1) It may defeat the consent which the parties have given to the contract

i.e., consent is unreal

(2) The mistake may mislead the parties as to the purpose for which the contract has been extended into.

(1) CONSENT UNREAL:

The cases in which the consent of the parties are unreal falls under sec.13 of Indian contract Act. According to the section 13 consent is defined as "Two persons are said to consent when they agree upon the something in the same sense"

An agreement upon the something in the same sense is known as true consent or "consensus ad idem" and is at the root of every contract. Thus if two persons enter into an agreement concerning a particular person and it turns out that each of them misled by a similarity of name had a different person in mind no contract would arise between them because the consent given is unreal.

(2) MISLEADING ABOUT THE SUBJECT MASTER

Section 20 of the Indian Contract Act deals with mistake which misleads the parties to the Contract. Section 20 where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

EXPLANATION: An erroneous opinion as to the values of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact.

So, sec: 20 can apply only when three things are satisfied.

1. When both the parties to an agreement are mistaken.
2. This mistake is as to a matter of fact.
3. The fact bout which they are mistaken is essential to the agreement.

(1)BOTH THE PARTIES ARE MISTAKEN:

Section 20 is dealing with the effect of two kinds of mistakes namely common mistake and mutual contract are mistake the same mistake. For example clothes are sold by 'A' to 'B'. If both of them think that those clothes are made out of pure polyester, but actually they are not pure buy cotton mixed polyester, but actually they are not pure but cotton mixed polyester. Here this is a common mistake because both are entering into the contract thinking that they are pure polyester.

MUTUAL mistake means both the parties to the contract are not making the same mistake but misunderstand each other. If in the above said example. 'A' knew that the clothes are not pure polyester and 'B' thinks that they are pure, but 'A' does not know that 'B' is thinking like that. Here also both are mistaken but the mistake made by 'A' does not know that 'B' is thinking like that. Here also both are mistaken buy the mistake made by 'A' is different from the mistake made by 'B'. They really misunderstand each other. This is mutual mistake.

UNILATERAL: Both these mistakes may be otherwise called as Bilateral mistakes and section: 20 applies only to them. There is another type of mistake which is only unilateral. For instance in the example cited above suppose A knows that clothes are cotton mixed polyester and he also knows that B is thinking that they are pure polyester. Here only 'B' is making the mistake. This is called UNILATERAL MISTAKE. And it is dealt within sec. 22 of Indian Contract Act. 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.

The nature of unilateral mistake as provided under sec. 22 has been best explained by the case of ABDULREHMAN V. BOMBAY AND PERSIA TEAM NAVIGATION CO.,

The plaintiff chartered a ship which was to sail from Jedda on 10th August 1892. (Fifteen days after the Haj) The plaintiff believed that 10th August 1892 and fifteen days after the Haj were one and the same. The defendant had no such belief and contracted only with respect to English date that equal to 10th August 1892. But later on the plaintiff discovered that the English date and fifteen days after Haj were different dates and they sued for rectification of the charter party. But the court held that it was a unilateral mistake and the plaintiff were not entitled to any relief.

But it is to be noted that if the unilateral mistake has the effect of nullifying the consent given to a contract as defined in sec.13 there no contract will arise between the parties. To avoid a contract on the basis of unilateral mistake it is necessary to show that :

(1) One party erroneously believed that the document sought to be rectified contained a particular term or provision or possibly did not contain a particular term or provision by mistake.

(2) The other party was aware of the omission or the inclusion and that it was due to a mistake on the parts of one party.

(3) One party who was aware of the mistake omitted a draw a mistake to the motive of the other party and

(4) The mistake must be calculated to benefit one party.

The above said Principles were applied in the case of THAOMAS BATES & SONS LTD.V. WYNDHAM (Lingerie) Ltd., In this case a lease deed contained arbitration clause buy the deed which was prepared by the landlord did not contain that provision without the knowledge of the land lord and though the lessee was aware of the omission he did not draw it to the attention of the land lord so the court held that the lord was entitled to seek rectification of the document for inserting arbitration clause.

(2) MISTAKE AS TO MATTER OF FACT:

Sec.21 of Indian Contract Act emphasizes that to avoid a contract by reason that it is vitiated by mistake then the mistake must be of fact and not of law. Sec.21 declares that "a contract not voidable because it is caused by a mistake as to any law in force in India".

For example A and b make a contract on the belief that particular debt is barred by Indian law of limitation. This contract is not voidable by stating the reason that they were under a mistaken belief about the Indian Law of limitations. But if the mistake is committed about the law which is not applicable in India then contract can be avoided by mistake of law.

(3) MISTAKE OF FACT ESSENTIAL TO THE AGREEMENT:

A contract is said to be vitiated by mistake under sec.20 only if the mistake relates to the facts which are essential to the agreement. This is also provided by the explanation to sec 20 which provides that an opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact.

But facts which are essential to the agreement depends upon the circumstances of each case.

Generally speaking certain facts are essential to every agreement they are:

(a) identity of the parties

(b). the identity and nature of the subject matter of the contract

(c) the nature and content of the premise itself

a) IDENTITY OF PARTIES

Mistake as to identity occurs when one of the party represents himself to be some person other than he really is. This may be caused by fraud by the parties. For example in HARDMAN V. BOOTH the plaintiff wanted to deal with Thomes Gandell and sons went to their office and took order from a person who represented him to be a partner in the firm. He told the plaintiff that the goods should be sent in the name of Edward Gandell and sons; He received the goods and sold them to the defendant who was a bonafide buyer. The plaintiff sued the defendant to recover their goods. It was held that there was no contract between the parties as there was not consenting minds drawn together to the same agreement.

But a distinction is there between the present identity and his qualities. If a mistake is committed about the quality of a person then the contract is only voidable and not void.

(B) MISTAKE AS TO SUBJECT MATTER:

Another fact essential to every agreement is the identity or quality of the subject matter of the contact. Mistake as to subject matter may take various forms. It may be due to the non existence of the subject matter of it may be mistake in cases where unknown to both the parties the buyer is already the owner of that which the seller wants to sell to him or a mistake may be committed when both the parties a having, different subject matters in mind.

In COURTUSIER V. HASTE: the defendant was employed to sell the plaintiff goods which was coming in a ship. After the defendant had sold the goods to a third person it was found out that the goods were sold at a port in between because they were damaged by bad weather. The buyer that equal to the third person avoided the contract and sued the defendant for the price. But the court held that he was not liable. The reason stated was that as the goods had been totally lost before the contracts were made the contract was void abnitio (from the beginning).

b) MISTAKE AS TO NATURE OF PROMISE:

This type of mistake is usually applied in the case of deeds. When a deed of one character is executed under the mistaken impression that it is of a different character than it is wholly void and inoperative. For example where a gift deed is signed under an impression that is only a power of attorney the deed is in operative. If a mistake of this kind is common to both the parties the agreement is void under section 20 the parties being mistaken about the very nature of the promise.

But usually this type of mistake occurs when one of the parties fails to disclose to the other the true nature of the document. In such a case there is not true agreement as the consent is nullified by the mistake. When a fraudulent misrepresentation as to the character of the document is made by one of the party the contract is void, but if it is only about the contents of the document then the contract is only voidable and not void.

LIMITATIONS: Mistake operates to avoid and agreement subject to the following limitations.

(1) Mistake must be of both the parties.

(2) mistake must be of a fact essential to the agreement and not an opinion.

(3) mistake must be of a fact and not of a law which is applicable in India.

UNLAWFUL AGREEMENTS: (section 23)

Section 10 of the Indian contract Act an agreement is enforceable only if it is made for a lawful consideration and lawful object sec 23 gives the circumstances in which the consideration or object is unlawful. An agreement in which the object or consideration is unlawful is called unlawful agreements.

UNLAWFUL AGREEMENTS:

According to sec 23 the consideration or object of an agreement is lawful unless:

(1) it is forbidden by law or,

(2) is of such a nature that if permitted would defeat the provisions of any law or,

(3) is fraudulent or,

(4) involves or implies injury to the person or property of another or,

(5) the court regards it as immoral or opposed to public party.

In each of these cases the consideration or object of the agreement is said to be unlawful and unlawful agreements are void in nature.

1. Forbidden by law :

The first circumstance in which the consideration or object of a contract will be treated unlawful is when it is forbidden by law. It may be violating a prohibitory enactment of the legislature or a principle of unwritten law. If the object of imposing a penalty in a statue is merely to protect revenue a contract in violation of the terms of the statute is not necessarily illegal. If the object is to protect the general public or a particular class of it an agreement for which the penalty is imposed will be regarded as forbidden by law and therefore unlawful.

In Sreenivas Rao v. Raja Rama Mohana Rao where money was borrowed for the purpose of the marriage of a minor court found that the marriage in question was hit by the provisions of the child marriage restraint Act of 1929 and therefore was an unlawful agreement.

2. Defeating the provisions of any law

Sometimes the object for the consideration for an agreement is such that though not directly forbidden by law. It would defeat the provisions of any law it is is permitted. Such an agreement is also treated as unlawful and so void. For example under the Companies Act a partnership of more than 20 persons is illegal unless registered as a company. A suit cannot be filed for the dissolution of such a partnership as it would defeat the provisions of the Companies Act.

3. Fraudulent

The third clause refers to contracts which are entered into between parties with an object which is fraudulent or with a purpose which will in effect promote fraud. The contract thereby created would be void.

4. Injury to person or property

An agreement between two persons to injure the person or property of another is unlawful. In the same way if the object of an agreement is such that it involves or implies injury to the person or property of another, the agreement is unlawful and void. In Ram Sarup v. Bansi Mandir a person borrowed a sum of hundred rupees and executed a bond promising to work for the plaintiff without pay for period of two years. In case of default the borrower was to pay more interest and the principle at once. The court held that the contract contained in the bond was equal to slavery which involves injury to the person and was therefore void.

5. Immoral

The law does not allow an agreement which is immoral to be enforced. So it is clear that every agreement the object or consideration for which is immoral is unlawful. But what is immoral cannot be given a standard definition. Immorality depends upon the standards or morality prevailing at a particular time and as approved by the courts. It differs from society to society. But there are certain kinds of acts which have been regarded as immoral from time immemorial. They are:

Bai Bilji Vs. Nansa Nagar (Money lender)

a. Interference in marital relations is always treated immoral. For eg. A promise to marry a married woman after the death of her husband or after she obtains divorce from him is immemorial.

Pearce Vs. Brooks (carriage to prostitute)

b. Dealing with prostitutes is another act which is regarded as immoral. For eg. If articles are sold or something is hired to a prostitute for the purpose of enabling her to carry on her profession neither the price of the articles sold nor the rent of the thing hired can be recovered.

c. Public Policy: An agreement is unlawful if the court regards it as opposed to public policy. The normal function of the courts is to enforce contracts but consideration of public interest may require the

courts to depart from their primary function and to refuse to enforce a contract. So the courts sometimes refuse to enforce a contract in its discretion in order to safeguard the public interest.

Public policy is a vague and unsatisfactory term and it is invoked in clear cases in which the harm to the public is substantially incontestable. The test to be applied to invoke public policy is the advancement of public good and prevention of public mischief.

Heads of public policy: Damlers Co. Vs. Continental Tyre & Rubber Co.

i. Trading with an enemy is treated as opposed to public policy it is unlawful to enter into a contract with a foreign enemy during war or to perform such a contract entered into before the war.

ii. Stifling of prosecution: contracts for stifling of prosecution are a common type of contracts opposed to public policy. To stifle means to suppress. The criminal procedure code divides offences into compoundable and non compoundable. Regarding the first class a withdrawal or agreement to withdraw is not objectionable. Where the offence is non compoundable an agreement to withdraw a prosecution cannot be enforced. In Narasimharaju v. Gurumurthy Raju the Supreme Court considered the effect of an agreement stifling prosecution of a pending criminal case regarding non compoundable offence. In that case the parties to the pending criminal case wth regard to offences under section 420, 465, 468 and 477 r/w ss.107 and 120B of the Indian Penal Code. Some of which are non compoundable entered into an agreement on the date of hearing of the criminal case. The parties thereby agreed to refer their dispute to arbitration in consideration of the complainant withdrawing the criminal case and the dispute was actually referred to arbitration. The Supreme Court held that in the circumstances the arbitration agreement was invalid under section 23 of Indian Contract Act as opposed to public policy. Ramlal Vs. St. of J+K CU/S 320 of CrPC, non. comp. x comp, even by court).

iii. Maintenance and Champerty: According to English Law agreements by way of maintenance and champerty are opposed to public policy and thereby void.

Kothi Jai Ram Vs. Vishwanath. (Ad-d-after winning).

Maintenance means an agreement to promote litigation in which one has no interest of his own. Champerty means one party promises to assist another in recovering property by suit in consideration of his receiving a share in that property. Thus, champerty is to share the proceeds while maintenance in general is to promote litigations. In India generally agreement by way of maintenance and champerty are not void but depending upon the facts of the case and nature of the terms courts declare such agreements as void one.

Sati Bhagwan Dutt Shastri Vs. Rajaram (Puja, judge).

iv. Interference with course of justice: An agreement for the purpose of using improper influence of any kind with judges or officers of court is void. For example an agreement to pay fee to a judge to induce him to decide in a party's favour is against public policy.

(Title of Knighthood). Parkinson Vs. Clge of Ambulance

v. Sale of public offices and titles: An agreement for sale of a public office is void. Such an agreement has a tendency to injure the public service by corrupting public servants to make them decide upon issues otherwise then on merits. In N.V.K Pandian v. M.M.Roy A paid Rs.15000/- to B to secure for her son a seat in a medical college by using his influence with the selection committee. B fails to secure the seat. A filed a suit against B to recover Rs.150000/- But it was held that the agreement was against the public policy.

Gujadhari Singh Vs. Neeladhon Singh (Fathers sells daug-for R).

vi. Marriage Brokerage Contracts: Agreements to procure a marriage for reward are void on the ground that marriage ought to proceed from the free and voluntary decision of the parties. The public policy depends on the facts and circumstances of each case.

VOID, VOIDABLE AND UNENFORCEABLE CONTRACTS

An agreement enforceable by law is a contract. An agreement when it satisfied all the essential elements necessary for its enforceability is called a vald contract. All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and not expressly declared to be void by law. If all the elements are present the parties are entitled to assume that the

expectations reasonably raised by their conduct will be sanctioned by the courts. If any of the essential elements is absent the contract will be rendered voidable or in some cases unenforceable according to the circumstances.

A contract without any legal effect is said to be void. It is a nullity in the eye of law. It cannot be enforeced and it confers no right on either party. Void contract is a contradiction in terms because the very definition of a contract postulates the idea of enforceability. But the term is convenient and commonly used. The term indicates that the attempt of the parties to form an enforceable agreement has been defeated owing to some incapacity, flaw in consent or illegality. There are a number of agreement which are declared to be void by the act on account of morality, social considerations, impracticability or because they are opposed to public policy.

A contract may be void abnitio from the beginning or expost facto subsequently thus is a case is made without the true consent of the partners or for an mmoral consideration it is void abinitio by section 2(g) "A contract which ceases to be enforceable by law becomes void when it ceases to enforceable".

A voidable contract is one which may be rescinded or affirmed at the option of one of the parties. Until it is rescinded it is valid and binding. According to section 2(i) "An agreement which is enforceable by law at the option of one of the parties but not at the option of other or others is voidable".

A voidable contract becomes void and enforceable when it is avoided by the party entitled to do so by exercising his option in that behalf. The distinction between void and voidable has many practical results. A third party who purchased goods which had been the subject of a void agreement will acquire no title to the goods. But a person who purchases goods which have been the subject of a voidable contract but not avoided acquires a good title and cannot be compelled to surrender them to their former owner. Unenforceable contracts are those which though good in substance cannot be enforced because of some technical defect like want of a written form or stamp. The unenforceable contract is clearly a creative of procedural rather than of substantive law. The rule is applicable to debt barred by limitations.

ILLEGAL CONTRACTS

It is very difficult to define an illegal contract. It does not just mean a contract contrary to criminal law. The list of illegal contract includes interalia agreements to commit a crime or tort, to defraud the revenue, to lend money to an alien enemy to procure a wife for a person in return for a reward and an agreement in restraint of trade between a master and servant. The effect of illegality may vary according to the degree of moral turputide involved in the capability of parties and whether or not the contract itself is rendered illegal. The effect of illegality in English Law of contract was well established from time to time by Lord Mansfield. In 1775 the learned Chief Justice held the principle of public policy is this, "Ex dolo malo non oritur action". No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If the cause of action appears to arise exturpi causa or the transgression of a positive law of this country then the court says he has no right to be assisted. An illegal contract is always void while a void contract need not necessarily be illegal.

UNILATERAL AND BILATERAL CONTRACTS

A contract may be unilateral or bilateral. In a bilateral contract a promise or set of promises on the one side is exchanged for a promise or a set of promises on the other side. Then there are reciprocal promises each promise forming consideration for the other. Each party will n turn be a promisor and a promisee. In a unilateral contract a promise by one is exchanged for an act or forbearance on the other side. In a bilateral contract of sale the seller may promise to deliver the goods on a subsequent day in return for a promise by the purchaser to pay the price. The promise to give a reward to the person who finds a lost item forms a unilateral contract when the item is actually found. In a unilateral contract the offeror contemplates not the creation of natural promises, but the dependability of his own promise upon the offerree's performance of an act. It then creates then an one sided obligation.

EXPRESS, INPLIED AND QUASI CONTRACT

Express are those in which the fact of the agreement can be proved by words written or spoken which expresses the intention of the parties. Thus contracts under seal and contract in writing and oral by spoken words can be collectively called express contracts as distinct from implied contracts.

VOID AGREEMENTS

Section 10 of the Indian Contract Act declare that "all agreements are contracts if they are.....not expressly declared to be void by law. Sections 24 to 30 expressly declare certain types of contracts void. Section 2(g) defines void agreement as "an agreement not enforceable by law is void.

AGREEMENTS IN WHICH A PART OF CONSIDERATION OR OBJECT VOID – SECTION 24

If any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful the agreement is void.

This section comes into play when a part of the consideration for an object or more than one object of an agreement is unlawful. The whole of the agreement would be void unless unlawful portion can be severed or parted without damaging the lawful portion.

BLUE PENCIL RULE:

Severance is possible only when the illegal part is separate from the rest of the contract. This is known as blue pencil rule.

It means that if it is possible to run a blue pencil between the lawful part and the unlawful part will be declared as void and the lawful part will be declared valid by the court. For example A promises two things to B for Rs100 (1) to dig B's garden. (2) to murder B's enemy. Here there can be severance of the contract and the whole contract is void.

Suppose the same contains 2 separate promises and two separate considerations (1) a promise to dig for Rs 50 and (2) a promise to murder his enemy for Rs.50, here the two may be severed. The illegal contract contract may be separated only in such a case and the lawful part can be declared valid.

AGREEMENTS IN RESTRAINT OF MARRIAGE VOID (SECTION 26)

Every agreement in restraint of marriage of any person other than a minor is void. It is the policy of law to discourage agreements which restraints freedom of marriage. The restraint may be general or partial that is to say the party may be restrained from marrying at all or from marrying for a fixed period or from marrying a particular person or a class of persons the agreement is void. The only exception is in favour of a minor.

AGREEMENTS IN RESTRAINT OF TRADE (SECTION 27)

Every agreement by which any one is restrained from carrying on a lawful profession, trade or business of any kind is to that extent void. Freedom of trade and commerce is a right which is preserved by the Constitution of India. (Article 19 (1) (g)) just as the state cannot take away the individuals freedom of trade an individual also cannot take away another individual's right by way of agreement.

The principle behind this section is that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of hs labour, skill or talent by any contract that he enters into.

Khemchand Manek Chand vs. Daipaldas (3months a void. yr).

ALL RESTRAINTS WHETHER PARTIAL OR GENERAL

Madhub Chander v. Raj Coomar is the first case in which the scope of the section came for consideration before the Calcutta High Court. The plantiffs and the defendants were rival shopkeepers in a locality in Calcutta. The defendant agreed to pay a sum of money to the plaintiff if he would close his business in that locality. The plaintiff accordingly did so, but the defendant refused to pay. The court held that the agreement was void and laid down that section 27 was intended to prevent not merely a total restraint but also a partial restraint. Nur Ali Dubaash Vs. Abdul Ali (3 yrs). void.

DEVELOPMENTS IN ENGLISH LAW

In England the law relating to restraint of trade was considered by the House of Lords in NORDENFELT V. MAXIM NORDENFELT GUNS AND AMMUNITION CO LTD.

An English company purchased the business of nordenfelt a Swedish man who was manufacturing quick firing guns. The company paid Rs.287500/- for purchasing that business. There were two conditions in the sale agreement (1) For 25 years he should not engage in the manufacture of guns except on behalf of the company, (2) he would not engage in any business which would compete in any way with which the business carried on by the company.

The question arose whether he was bound by the conditions or whether they were void. The court held that the first condition was reasonable because he had sold that very business for a large sum of money. It was also reasonable from the view of public interest since an English company was securing the benefit of the invention of a foreigner.

But the second condition was held to be void since it was reasonable as it restrained the person to start any business.

2E reasonable.

GENERAL PRINCIPLE IN INDIA AND ENGLISH SAME

In both England and in India the general principle is the same namely that all restraints of trade whether partial or total is void. The only difference is that in England a restrictin will be valid if it is reasonable. In India it will be valid if it falls within any of the statutory of judicially created exceptions. But the English may be a little more flexible as the word reasonable enables the court to adapt it to changing conditions.

EXCEPTIONS

There are two kinds of exceptions to the rule in section 27.

1) Those created by statutes.

2) Those arising from judicial interpretations in section 27.

1) STATUTORY EXCEPTIONS

a. Contract Act: the seller of the good will of a business can validly contract not to carry on a similar business within specified local limits which are reasonable. If there is a dispute as to the reasonableness of those limits it is for the curt to decide that point. Goodwill means name and reputation which the company has in a particular area.

b. Partnership Act: A partner may agree that he will not carry on any business in competition with that of the partnership firm during the continuance of the partnership. On the dissolution of a firm some or all of the partners may agree not to carry on within specified local limits a business similar to that carried on by the firm.

c. Trade Union Act: Agreements between member of a trade union are valid though they are in retraint of trade.

2) UNDER JUDICIAL INTERPRETATIONS:

a) Trade combinations:

It is now almost a universal practice for traders or manufacturers in the same line of business to carry on their trade in an organized day the primary object of such associations is to regulate business and not to restraint it. They bring about standarised goods, fixed prices and eliminate unnecessary competition. This regulations as to the opening and closing of business in the market, licensing of traders, supervision and control of dealers , etc., are not illegal.

But the courts would not allow a restraint to be imposed on business under the cover of trade regulations. Thus in Kores Mfg co. ltd. V. Kulok Mfg. co. ltd. An agreement between two companies that one would not employ the former employees of the other was held to be void by reason of its generality and it was a restrain on trade in the name of trade combinations.

b) SOLUS OR EXCLUSIVE DEALING AGREEMENTS:

Subha Naidu Vs Hajee Badshah Sahib. (omica).

Another business practice is that a producer or manufacturer likes to market his goods through a single agent or distributor and the agent not to deal with the goods of any other manufacturer. The agency or dealership is treated by the courts as exception to section 27. But here also the courts does not allow dealership for an unreasonable period. In Shaik kalu v. Ram Sarah Bhagar seller of cmbs entered into an agreement with all the manufacturers of combs in the city of Patna whereby the manufacturer undertook during their lifetime to sell all their products to R.S. and to their heirs and not to sell the same to any one else. The court held the agreement to be void because it was unrestricted both as to time and place and it was intended to create a monopoly.

c) RESTRAINTS UPON EMPLOYEES;

Agreements of service contain negative conditions preventing the employee from working elsewhere during the period covered by the agreement. This restriction is also treated by the courts as exception to section 27 with suitable reasonability i.e. for the protection of trade secrets.

AGREEMENTS IN RESTRANT OF LEGAL PROCEEDINGS VOID (SECTION 28)

Agreements which restrains a person from taking legal proceeding is void. For example A promise to B not to take legal proceedings is void. B's promise to A in consideration of this will also be void.

In Benett v. Benett a separation agreement provided that the wife was to get a maintenance amount in return for her promise not to take legal proceedings for her maintenance. The payments fell into arrears and the wife sued for the recovery. It was held that consideration for the promise by the husband was the wife's invalid promise not to take legal proceedings. So the suit for arrears of maintenance was dismissed. Here the proper way for the wife was to file a petition before the court for maintenance.

EXTENDING OR CURTAILING LIMITATION PERIOD

According to section 28 agreements which require legal remedies to be taken within time limits different from those under the limitation Act are also void. In Saroj Bandhu v. Jnanda it was agreed in a maintenance agreement that the maintenance holder should not file a suit for arrears for two or more years. It was held that his condition was designed to curtail the period of limitation and was void.

FIXING WHERE SUIT ON CONTRACT SHOULD BE BROUGHT

Where several courts have jurisdiction to entertain in a suit under the provisions of civil procedure code an agreement between the parties concerned that suits arising out of the transactions should be brought only in the jurisdiction of one specified court or of courts is valid. What public policy forbids is an agreement

Hamil Esa Textiles Ltd. Vs. Puronatic Filters Ltd. (Bombay)
which would give right to a party to exercise his legal right under the civil procedure code and not to select the proper forum to exercise it.

ABSOLUTELY: PARTIAL RESTRICTION AS TO JURISDICTION

Section 28 will come into play when the restriction imposed upon the right to sue is absolute which means that the parties are wholly restricted from getting their legal remedies in the ordinary tribunals.

AGREEMENTS TO AGREE TO NEOTIATE

An agreement to agree in the future is void for there is no certainity whether the parties will be able to agree.

The decision of the House of Lords in May & Butcher v. R. gives a guding principle to this. There was an agreement for the sale of certain goods with a condition that the price, dates of payment and manner of delivery shall be agreed upon from time to time. This agreement was held to be void for uncertainity.

The law requires that for making a good contract a concluded bargain is necessary and a concluded contract is one which settles everything to be settled and leaves nothing to be settled by agreement between the parties.

PARTIAL UNCERTAINITY

Where only a part or a clause of the contract is uncertain but the rest is capable of bearing a reasonably certain meaning the contract will be regarding as binding because section 29 uses the expression 'capable of beng made certain'.

EXCEPTIONS: Coringa Oil Co. Vs. Koegler (Ceased Arb, -> court)

1) REFERENCE OF FUTURE DISPUTES TO ARBITRATION: void ← ✗

This section does not render void a contract by which two or more persons agree that any dispute which may arise between them shall be referred to arbitration and that only the amount awarded in the arbitration shall be recoverable. An agreement between the parties to refer disputes to arbitration is perfectly valid.

2) REFERENCE OF EXISTING QUESTION TO ARBITRATION:

This exception saves contracts to refer to arbitration questions that have already arisen between the parties earlier. +3). Banking Laws Amendment Act, 2012

AGREEMENTS VOID FOR UNCERTAINITY (SECTION 29)

Agreements the meaning of which is not certain or capable of being made certain are void. For eg. A agrees to sell to B a hundred tons of oil. There is nothing whatever to show what kind of oil was intended. This agreement is void for uncertainity.

PRINCIPLE: this section is that it is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. It means terms must be so definite or capable of being made definite without further agreement of the parties and that promises and performances to be rendered by each party are reasonably certain.

WAGERING AGREEMENTS (SECTION 30)

Section 30 of Indian Contract Act deals with wagering agreement. According to this section an agreement by way of wager are void and no suit shall be brought for recovering anything which is to be won on any

wager of which is entruseted to any person to abide by the result of any game or other uncertain event on which any wager is made.

DEFINITION:

Section 30 only says that agreements by way of wager are void. But it does not define wager. Sir William Anson defines it as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event".

The most illustrative definition of wager is that given by Hawkins J in Carlil v. Carbolil Smoke Ball co. A wagering contract is one by which two persons holding opposite views with regard to a future uncertain event mutually agree that dependant on the determination of that event one shall pay or hand over to him a sum of money or other stake neither of the contracting parties having any other interest in that contract other than the sum or stake which he will win or lose. It is essential that each party may either win or lose and so the issue of the event must be uncertain to bot the parties until it is known."

This definition brings out all the essential features of a wagering contract.

ESSENTIALS OF A WAGERING CONTRACT

The following are the essentials of a wagering contract.

1) UNCERTIAN EVENT: The first thing essential to wager is that the performance of the bargain must depend upon the determination of an uncertain event. A wager generally speaks about the future event but it may even relate to an event which has already happened in the past but the parties must not be aware of the result or the time of its happening when they enter into the agreement.

2) MUTUAL CHANCES OF GAIN OR LOSS

THE SECOND ESSENTIAL FEATURE IS THAT UPON THE DETERMINED of the uncertain event each party must either stand to win or lose. If there is no mutual chances of gain or loss there is no wager.

3) NEITHER PARTY TO HAVE CONTROL OVER THE EVENT:

Thirdly neither party should have control over the event. If one of the parties is in a position to influence the event or in ther words if he is in a position of changing the event in his favour then the agreement cannot be called as a wagering agreement.

4) NO OTHER INTEREST IN THE EVENT:

Lastly neither party must have any nterest in the happening of the event other than the sum he will win or lose in the agreement. If one of the party has some proprietory or interest which is to be save from loss it would not be a wager. Example a fire insurance contract is not a wagering contract since there is property to be protected against risk of loss. Here the party in interested in something more than mere winning or losing a sum. An insurance contract is therefore not a wagering contract. If the above essentials are present in an agreement only it can be called a wagering agreement.

EFFECT OF WAGERING TRANSACTIONS:

A wagering agreement being void cannot be enforced in a court of law. According to section 30 no case can be filed in a court of law for recovering anything which is to be won on a wager.

COLLATERAL TRANSACTIONS:

A wager is void andunenforceable but it is not forbidden by law. Hence a wagering agreement is not unlawful under section 23 of the Contract Act and therefore the transactions collateral to the main transaction are enforceable.

EXCEPTIONS:

A) HORSE RACE: According to the exception in section 30 a subscription or contribution or an agreement to subscribe or contribute towards any prize or sum f money of the value or amount of Rs 500 or upwards to the winner or winners of any horse race.

CROSSWORD COMPETITIONS: If skill plays a substantial part in the result and prizes are awarded according to the merits of the solution the competition is not a lottery. It is thus literary competition which involve the application of skill and in which an effort is made to select the best and most skilful competitor are not wager. But where the prizes depend upon a chance there is a lottery.

UNIT III

PERFORMANCE OF CONTRACTS

PRIVITY OF CONTRACT

The phrase privity of contract simply means a stranger to a contract cannot sue. In other words no one except the parties t a contract can be bound by it or entitled under a contract. only a party to a contract is entitled to enforce a right created by a contract. no one may be entitled to be bound by the terms of a contract to which he is not an original party. This is known as privity of contract.

This principle has been taken firm roots in English common law. As far as English Law is concerned even today the courts are adopting this principle very strictly except in a very few rare situations.

In India it is seen that the Indian Contract Act is silent as to whether privity of contract principle is to be strictly followed or not. Hence, it can be seen that there are both type of decisions both following privity of contract as well as not following privity of contract.

ENGLISH LAW

Generally speaking in England privity of contract is strictly followed but during the earlier days in the court of Kings Bence the position was different. For example in 1677 in Dutton v. Poole a person had a daughter to marry and in order to provide her a marriage portion he intended to sell a wood of which he was possessed at that time. His son the defendant promised that if the father did not sell the wood at hs request he would pay the daughter £1000. The father accordingly did not sell the wood but the son did not pay. The daughter and her husband sued the defendant for the amount. The defendant was held liable by the court. The reason specified was even though it was the defendant who gave the promise to his father and it was the father by not selling the wood gave consideration and the plaintiff was neither privy to the contract nor interested in the consideration, the whole object of the agreement was to provide a portion to the plaintiff. If the defendant is not held liable that would be doing injustice because she would be enjoying what is to be given to the plaintiff.

Thus it is seen that beneficiary to a contract was allowed to enforce the contract even though he was a stranger to the contract.

Nearly two hundred years later in 1861 in Tweedle v. Atkinson the Court of Queen's Bench refused to follow this principle.

The plaintiff was to be married to the daughter of one G and in consideration of this intended marriage G and the plaintiff's father entered into a written agreement by which it was agreed that each would pay the plaintiff a sum of money. G failed to do so and the plaintiff sued his executors. The court did not allow to sue. The reason stated by the court was that even though the sole object of the contract was to secure a benefit to the plaintiff he was not allowed to sue as the contract was made with his father and not with him. It was this case which laid the foundation of what subsequently came to be know as the doctrine of privity of contract which means that a contract is a contract between the parties only and a third person cant sue upon it even if it s made for his benefit.

The principle was affirmed by the House of Lords in Dunlop Pneumatic Tyre co. v. Selfridge co. in this case the plantiffs Dunlop co sold certain goods to one Dew and co and secured an agreement from them not to sell the goods below the list price and if they sold the goods to another trader they would obtain from him a similar under taking to maintain the price list. Dew and co sold the motor tyres to the defendants selfridge and co who agreed not to sell the tyres to any customer at less than the list prices. The plaintiffs filed a case against the defendants for breach of this contract.

It was held by the court that since the defendants were a third party to the contract and there was not consideration from them to the plaintiffs the contract was not enforceable by them. In this case it was very firmly stated that in the law of England certain principles are fundamental one is that only a person who is a party to contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Jus quaesitum tertio means a right acquired by a third party. Such a right may be conferred by way of property as for example under a trust. But it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.

Another principle is that if a person with whom a contract not under seal written document has been made it is to be able to enforce it consideration must have been given by him.

Hence it is clear that in England privity of contract principle is applied very strictly. But the principle has been generally criticized. In 137 the Law Revision Committee under the Chairmanship of Lord Wright also criticized the doctrine and recommended its abolition. In its 6th report the committee has stated as where a contract by its express terms purports to confer a benefit directly on the third party then the third party shall be permitted to enforce the provision in his own name even though he is a third party.

Lord Justice Denning was one of the main persons who criticized the doctrine of privity of contract. Beswick v. Beswick was the important judgment given by Lard Justice Denning. In that case B was a coal merchant. The defendant was assisting him in his business. B entered into an agreement with the defendant by which the business was to be transferred to the defendant. B was employed in it as a consultant for his life and after his death the defendant was to pay his wife an annuity of £5 per week which was to come out of the business. After B's death the defendant paid B's wife one sum of £5.she brought an action to recover the amount. It was held that she was entitled to enforce the agreement. But the approach by the House of Lords in this case was that she can enforce the contract not in her personal capacity because she is a third party, but she can sue as the administratix of her husband's property.

But Lord Denning was of the view that when a contract is made for the benefit of a third person who has a legitimate interest then he should be allowed to enforce the contract. He gave two circumstances where in a third party should be allowed to enforce the contract.

They were

(1) To protect the reasonable expectations or the legitimate interest of the parties: This means that in some contracts a third person may get a right and relying on that right he might have created certain other rights. So when the original contract fails his interest or rights which he created subsequently will get affected. This will be doing injustice to the third party. For example if A and B agreed together to deposit certain amount of money for C's marriage. Here the contract between A and B is the original contract and C is the third party. Relying on the original contract C made arrangements for the marriage. Suppose A did not deposit the money C's marriage will get affected. If privity of contract principle is strictly followed C will not be allowed to enforce the agreement it will be affecting his reasonable expectations about his marriage or in other words he has a legitimate interest in the contract between A and B because it is his marriage that is affected due to the breach of promise by A. So Lord Denning is of the view that in such type of cases when the personal interest of the parties is affected they should be allowed to enforce the contract even if they are third parties. On the other hand, if the party is not having any personal interest not only a general interest like that of the case in Dunlop Tyre's case then if the party is a third party the principle of privity of contract must be applied strictly and not where the legitimate interests are getting affected.

(2) Impose benefit but not burden without permission

Lord Denning is also of the view that it is implied in the law of contract itself that burden should not be imposed on a third party without his consent. But if a benefit is allowed to a third party by a contract he

should be allowed to enforce. In other words, no person should be allowed to carry on his shoulder a burden even without his knowledge.

In Beswick v. Beswick, the court has adopted by the recommendation given by the Law Revision Committeee. But even after this case the courts in England are not ready to accept the principle of jus quaesitum tertio that is right acquired by a third party. In other words, the courts in England are of the view that if any change has to brought in the principle of privity of contract it is the legislature that has to bring a law and not the courts. Hence in England the present situation is that a stranger to the contract is not allowed to enforce a contract in his own name.

Indian Law

In India also there has been a great divergence of opinion in the courts as to how far a stranger to a contract can enforce it. There are many decided cases which declare that a contract cannot be enforced by a person who is not a party to it and that the rule in Tweedle v. Atkinson is applicable in India as it is in England. But there is no provision in the Contract Act either for or against the rule.

Decisions following English Law:

In an old decision the privy council extended the rule in Tweedle to India in Jamna Das v. Ram Autur. A borrowed Rs. 40000 by executing a mortgage of her land in favour of B subsequently when the property was in mortgage she sold the property to C for Rs. 44000 and allowed C the purchaser to retain Rs. 40000 of the price in order to redeem the mortgage if he thought fit. B sued C for the recovery of the mortgage money but he culd not succeed because he was no party to the agreement between A and B.

Similar view was taken by the Supreme Court in M.C. Ckacko v. State Bank of Travancore.

Exceptions to privity Rule

In the course of time the courts have introduced a number of exceptions in which the rule of privity of contract does not prevent a person from enforcing a contract which has been made for his benefit but without his being a part to it. Some of the most commonly known expectations are considered below;

A. Beneficiaries under Trust or Charge or other arrangements: a person in whose favour a charge or other interest in some specific property has been created may enforce it though he is not a party to the contract. The decision of the privy council in Khwaja Muhammed Khan v. Hussaini Begum is illustrative of this principle. The facts were, the appellant executed an agreement with the respondent's father that in consideration of the respondents marriage with his son he would pay to the respondent Rs500 a month for expenses and charged certain properties with the payment with power to the respondent to enforce it. The husband and wife separated in account of a quarrel and the suit by the plantff respondent for the recovery of the arrwars.

It was held that the respondent although no party to the agreement was clearly entitled to proceed to enforce her claim. The reason stated by the court was that the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself t pay to the plaintiff she is the only person beneficially entitled under it.

Another example of trust in favour of a third party is to be found in the facts of another privy council decision namely Rana Uma Nath Baksh Singh v. JanBahadur. In this case U was appointed by his father as his successor and was in possession of his entire estate. In consideration thereof U agreed with his father to pay a certain sum of money and to give a village to J the second son of his father on his attaining majority. T was held that in the circumstances mentioned above a trust was created in favour of J for the specified amount and the village. Hence he was entitled to maintain the suit. In England also there is a line of cases in which trust

has been used as a device for holding the promisor to his promise. One such case is Gregory & Parker v. Williams. Parker was indebted to both Williams and Gregory. Parker assigned all his property to Williams in satisfactory of the the debt and Williams promised to pay parker's debt to Gregory. Williams failed to pay. But he was held liable to pay Gregory in terms of his promise with Parker.

Another illustration is Touche v. metropolitan Railway Warehousing Co.

Thus in cases f trust even the English courts are allowing a third party to enforce the contract if they are beneficiary under the trust.

Not only in cases of trust and charge even in some other arrangements the Indian courts has allowed a third party to enforce a contract if he is the beneficiary.

B. MARRIAGE SETTLEMENT, PARTITION OR OTHER FAMILY ARRANGEMENTS:

When an arrangement is made in connection with marriage, partition or other family arrangement and a provision is made for the benefit of a person he may take advantage of that agreement although he is n party to it. For example in Rose Fernandez v. Joseph Consalves a girl's father entered into an agreement for her marriage with the defendant it was held that the girl after attaining majority could sue the defendant for damages for breach of the promise of marriage and the defendant could not take the plea that she was not party to the agreement.

Similarly, in Shuppu Ammal v. Subramaniyam where two brothers on a partition of joint properties agreed to invest in equal shares certain sum of mney for the maintenance of their mother she was held entitled to require them to make the investment.

C. Acknowledgement or Estoppel:

Where by the terms of a contract a party is required to make a payment to a third person and he acknowledged it to that third person, a binding bligation is thereby incurred towards him. Acknowledgement may be express or implied. This exception covers where the promisor by his conduct, acknowledgement or otherwise constitutes himself an agent of the third party. The case of Devaraja v. Ram Krishnan is a good example.

A sold his house to B under a registered sale deed and left a part of the sale price in his hands desiring him to pay this amount to C his creditor subsequently B made part payment to C informing him that they were out of the sale price left with him and that the balance would be remitted immediately. B however failed to remit the balance and C sued him for the same. The suit was held to be maintainable. The court held that though originally there was no privity of contract between B and C having subsequently acknowledged C was entitled to sue him for recovery of the amount.

D. Covenants running with land: Leicester Square

The rule of privity may also be modified by the principles relating to transfer of immovable property. The principle of the famous case of Tulk v. Moxhay is that person who purchases a land with notice that the owner of the land is bound by certain duties created by an agreement on covenant affecting the land shall be bound by them although he was not a party to the agreement.

An illustration of this principle is Smith and Snipes Hall Farm ltd v. River Douglas Catchment Board the defendants the board agreed with certain land owners adjoining a stream to improve the banks of the stream and to maintain them in good condition. The land lords on their part paid the respective costs. Subsequently one of the land lords sold his lands to the first plaintiff and he to the second plaintiff. There was negligence on the part of the board in maintenance the banks which burst and the land was flooded.

Both the plaintiffs were strangers to the agreement with the board, but even so the court allowed then to sue the board for branch of the contract, for the whole arrangement was for the benefit of the land owners whoever they might be and not merely the parties to the agreement.

Thus it is seen that the general principle of that strangers to contract can enforce its applied in India with exceptions wherever necessary. The reason is that the situations or circumstances in England cannot be directly applied to India due to the special situations here. For example marriages conducted by parents. If privity of contract is strictly applied serious injustice would be caused to the parties and so the courts have created the above exceptions and apples it accordingly.

PERFORMANCE OF CONTRACTS

Secton 37 says that, "the parties to a contract must either perform or offer to perform, their respective promises..." thus each party is bound to perform his obligation under the contract, unless the performance is dispensed with or excused under the provisions of the Contract Act, or of any other laws.

TIME AND PLACE OF PERFORMANCE (sections 46 – 50)

When a promise has to be performed within a certain time, it must be performed on a certain day, and the promisor has not undertaken to perform it withut application by the promise, it is the duty of the promise to apply for performance at a proper place and within the usual hours of business. The question what is a proper time and place is in each particular case, a question of fact. Where the day of performance is fixed, but the promisor has to perform without application from the promise it is the duty of the promise to apply for performance at a proper place and within the usual business hours.

When a promise is to be performed without any application by the promise and no place is fixed for performance it is the duty of the promisor to apply to the promise to appoint a reasonable place for the performance of the promise, and to perform it as such place. The performance of any promise may be made in any manner or at any time which the promise prescribes or sanctions.

TIME FOR PERFORMANCE (SECTION 55)

According to section 55 if the intention of the parties was that time should be the essence of the contract, then a failure to perform at the agreed time renders the contract voidable at the option of the opposite party. Time is generally considered to be the essence of the contract in the following cases:

1. Where the parties have expressly agreed to treat it as of the essence of the contract.
2. Where delay operates as an injury.
3. Where the nature and necessity of the contract requires it to be so construed for example, where a party asks for extension of time for performance.

BUSINESS MATTERS: In business matters time is generally of essence. The matter depends on the intention of the parties. Even where a specific date is mentioned for the completion of the contract, one has to look into the intention of the parties. In commercial contracts time is ordinarily of the essence of the contract. This is so because the business world requires certainty and also because merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.

CONSTRUCTION CONTRACTS:

Time schedule in a construction contract is likely to be of the essence because construction is a commercial service.

SALE TRANSACTIONS:

The courts would have to see on the facts of each case involving a sale transaction whether time factor was essential to performance or not. A leading case on this subject is China Cotton Exporters v. Beharilal Ramachandran Cotton Mills Ltd.

LAND AND PROPERTY DEALINGS:

In a contract for the sale of land or immovable property the Supreme Court has laid down that it would normally be presumed that time was not of the essence of the contract. It depends on the intention of the contract. Intention of the parties can be ascertained from factors like nature of the property agreed to be sold the possibility of price fluctuation the need for entering into the contract conduct of the parties before and at the time and subsequent to the contract and other surrounding circumstances. A declaration that time shall be of the essence would have to be taken in the light of other provisions and such other factors may either exclude or strengthen the inference that time was to be of the essence.

In other than commercial contracts the ordinary presumption is that time is not of the essence of the contract. If it was not the intention of the parties that time should be of the essence of the contract the contract does not become voidable by the failure to do such things at or before the specified time. It means that the innocent party will have to accept performance even if it is delayed. He does not heve the right to reject. But he may sue the other party for any loss caused by the delay. Where on the other hand the time of performance is of the essence of the contract any delay will render the contract voidable at the option of the other party. He may reject the performance and immediately sue for the breach. But he may at this option accept the delayed performance. If he does so he cannot afterwards recover compensation for the delay unless at the time of such acceptance he gives a notice to the promisor of his intention to do so.

PERFORMANCE OF RECIPROCAL PROMISES (sections 51 – 54)

When a contract consists of an exchange of promises, they are called reciprocal promises. Section 2(f) say that "promises which form the consideration or part of the consideration for each other are called reciprocal promises." When such promises have to be simultaneously performed, the promisor is not bound to perform unless the promise is ready and willing to perform his promise. This principle is laid down in section 51.

The order in which reciprocal promises must be performed may be fixed by the contract and the order so fixed must be followed. But where the order is not expressly fixed, they will have to be performed in the order which the nature of the transaction admits.

Section 53 lays down the principle that where one of the parties to reciprocal promises prevents the order from performing his promise, the contract becomes voidable at the option of the party so prevented, and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the contract.

Where the nature of the reciprocal promises is such that one cannot be performed or its performance cannot be claimed unless the other party performs his promise in the first place, then if the latter fails to perform he cannot claim performance from the other, but he must make compensation to him for his loss. (Section 54)

PERFORMANCE OF JOINT PROMISES

According to English Law, if one of the several joint promisors dies, the rights and liabilities under the contract devolve upon the surviving joint promisors. The representatives of the deceased promisor neither obtain any rights nor assume any liability, unless they are the representatives of the last surviving promisor. This rule may sometimes cause injustice in as much as the creditor loses the security of the solvency of a promisor. Section 42 of the Contract act therefore lays down a different rule.

According to section 42, joint promisors must, during their joint lives fulfill the surviving promise, fulfill the promise and so on. On the death of the last survivor, the representatives of all of them must fulfll the promise. But this is subject to any private arrangement between the parties. They may expressly or impliedly prescribe a different rule.

Another important rule is laid down in section 43.

1. When a joint promise is made, and there is no express agreement to the contrary, the promise may compel any one or more of the joint promisors to perform the whole of the promise. A, B and C jointly promise to pay D, 3000 rupees. D may compel either A or B or C to pay him 3000 rupees.

2. A joint promisor who has been compelled to perform the whole of the promise, may require the other joint promisors to make an equal contribution to the performance of the promise, unless a different intention appears from the agreement. A, B and C are under a joint promise to pay D, 3000 rupees. D recovers the whole amount from A. A may require B and C to make equal contributions.

3. If any one of the promisors makes a default in such contribution, the remaining joint promisors must bear the deficiency in equal shares. A, B and C are under a joint promise to pay D, 3000 rupees. C is unable to pay anything. The deficiency must be shared by A and B equally. If C's estate is able to pay one half of his share, the balance must be made up by A and B in equal proportions.

The creditor is also given the right to release anyone of the joint promisors from his liability and this does not discharge the others from their liability. This makes a departure from English Law, according to which a discharge of one joint promisor amounts to a discharge of all, unless the creditor expressly preserves his rights against them.

JOINT PROMISEES (Section 45)

Devolution of joint rights is governed by almost the same kind of principles as the devolution of joint liabilities. When a promise is made to more than one person jointly, the right to clam performance rests with all of them jointly. If any one of them dies, it rests with his legal representatives jointly, with the survivors and after the death of the last survivor, with the representatives of all jointly.

CONTINGENT CONTRACT

A contract which is subject to a certain or an absolute type of condition cannot be regarded as a contingent contract. A contract for example, to pay a sum of money on the expiry of a time or on the death of a person is not contingent contract because these events are of a certain nature. The time or the person in question will definitely expire and the money will become payable. When the condition is of uncertain nature, then only the contract can be regarded as truly contingent. For example a contract to pay a sum of money on the destruction of a premises by fire is a contingent contract, for the contingency may or may not happen. From this pont of view all contracts of insurance are contingent contracts. Ordinarily therefore a contingent contract will contemplate a future event. But a contract may also relate to an event which has already happened and the only thing uncertain being that the parties do not know which way it happened.

A contract to do an act on the happening of a future uncertain condition cannot be enforced unless and until that event happens. If the happening of that event has become impossible the contract becomes void. The contract would also not be enforceable where the event does not happen in the way contemplated by the contract. Once the event has happened the contingent contract ripens into an absolute one.

When the performance of a contract depends upon the non happening of an event, naturally the parties have to wait till the happening of that event becomes impossible. When such circumstances come to pass that show that the event can no more happen, then only the performance of the contract can be demanded.

When the event for which the parties are waiting is linked with the future conduct of a person, that is to say where the contract is enforceable if a certain person is to act in a certain way, the event shall be considered to have become impossible if that person does something which makes it impossible that he should act in that way in any definite time or without further contingencies being fulfilled.

APPROPRIATION OF PAYMENTS (SECTIONS 59 – 61)

The Rule in Clayton's case is Quiequid solvitur secundum modum solventis. It means, "whatever paid is paid or is to be applied according to the mode laid down by the payer." Thus, according to this maxim," when a debtor makes a payment, he may appropriate it to any debt he pleases, and the creditors must apply it accordingly.

In India the Rule in Clayton's case has been followed subject to the provision of the Indian Contract Act, 1872.

The Rules relating to the appropriation of payments made by a debtor, who owes a number of distinct debts to his creditor are contained in Sections 59 to 61 of the Indian Contract Act, 1872.

These rules are:-

1. Where the debtor intimates (Sec. 59):

(i) Appropriation of payment is a right primarily of the debtor and for his benefit. If the debtor expressly intimates at the time of actual payment that the payment must be applied towards the discharge of a particular debt, the creditor must do so.

(ii) If there is no express intimation by the debtor, the law will look to the circumstances attending on the payment for appropriation. There is an established maxim that when money is paid, it is to be applied according to the express will of the payer, not to the receiver. [Craft Vs. Lumlay]

Example:

X owes two distinct debts of Rs. 350 and Rs. 396. He pays Rs. 396. It will be presumed that it is the payment of the latter debt as it is revealed from the amount of the second debt.

2. When the debtor does not intimate and the circumstances are not indicative (Sec. 60):

(i) When the debtor does not expressly intimate or where the circumstances attending on the payment do not indicate any intention, the creditor may apply his own discretion to any lawful debt actually due and payable to him from the debtor.

(ii) The creditor may also, until he has declared appropriation to the debtor, alter the appropriation.[Simson Vs. Ingham]

(iii) He cannot, however, apply the payment to a disputed and unlawful debt, but he may apply it to a debt, which a barred by the law of limitation.

3. Part-payment is applied for the interest first and for the principal afterwards:

Regarding part-payment, the general principle, subject to any contract to the contrary, is that the payment should first be applied to the interest and after the interest is fully paid off, to the principal.[Rubia Devi Vs. Raghunath Prasad]

4. Appropriation in order of receipts and payments:

The Rule of Clayton's Law is applicable where the parties have a current account. In such case appropriation impliedly takes place in the order in which receipts and payments take place and are carried into the account.

Thus, as per the Rule, unless there is contrary intention, the items on the credit of an account must be appropriated against the items on the debit in order of date. [Rule of Clayton's Law]

5. When the debtor does not intimate and creditor fails to appropriate (Sec. 61):

Where the debtor does not expressly intimate and where the creditor fails to make any appropriation, the payment shall be applied in discharge of the debt in chronological order, i.e., in order of time

If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

Example:

X owes Y three loans-(1) Rs. 1,000 taken on 1st April, (2) Rs. 700 taken on 1st May, and 1,200 taken on 1st July. If he pays Rs.2,000, the payment shall be appropriated towards the 1st and 2nd loans in full and the rest Rs. 300 towards the third one.

UNIT IV

DISCHARGE OF CONTRACTS

The last stage of a contract is bringing an end to the contract. When the parties to the contract fulfill the objects which they had in mind when the contract was made the contract comes to an end. This is said to be 'discharge'. A contract may be discharged in four ways:

a) by performance
b) by impossibility of performance
c) by agreement
d) by breach

Performance of contracts: Section 37 of the Act makes the promisor responsible for performing the contract. On his death, his legal representatives become liable. If the contract is of such a nature that it is to be performed by the promisor himself then the legal representatives will not be liable (e.g.) contract with a painter to paint a picture.

Tender:A promisor may either perform or offer to perform. Offer of performance is called Tender of performance. Section 38 deals with tender or offer of performance. The effect of tender is to preserve the rights of the promisor under the contract and at the same time to discharge him from responsibility for non-performance. Tender should satisfy the following conditions:

a) Tender should be unconditional.
b) Tender must be made at a proper time.
c) Tender must be made at a proper place.
d) Tender must be of proper quantity.
e) Payment should be in legal tender.
f) The tender should provide reasonable opportunity for inspection.
g) The tender should be to the proper promise.

Impossibility of performance: Section 56 of the Act deals with impossibility of performance of contracts. Impossibility is of two types, namely initial impossibility and subsequent impossibility.

Initial: An agreement made by the parties to do an impossible act is void for its initial impossibility (e.g.) to discover a treasure by magic.

Subsequent: Subsequent impossibility is otherwise called as frustration. Sometimes it happens that the contract when made, the circumstances are such that the parties are able to perform the promises given in the contract. But subsequently due to some event, it happens that the parties are not able to perform the contract. This is called impossibility of performance or frustration. When the act becomes impossible the contract becomes void.

Frustration may be due to many reasons and the parties to the contract are discharged from performance of the obligations under the contract. This doctrine may be invoked when there is fundamental change in the contract or when there is some physical impossibility.

Situations of Frustration:

(1)Destruction of subject matter: If the very subject matter relating to the contract disappears, the contract is discharged. In Taylor v Caldwell, the subject matter of the contract was a music hall which was let out for rent. The hall was destroyed by fire. The contract was said to be discharged.

(2)Non-occurrence of expected events: If the event based on which the contract is entered into did not occur, the contract would be frustrated. In Coronation Cases Krell v Henry, the plaintiff owner of flat let it out on a certain day to view the procession of King Edward VII which was expected to take place on a particular day. But owing to illness the King's procession was postponed. The plaintiff filed a case for recovery of rent. But the Court held the contract was frustrated and so the rent could not be recovered.

(3)Government interference: A contract will be dissolved when legislature or administrative intervention has so directly operated upon the fulfillment of the contract for a specific work (e.g.) suppose an export contract is entered into between parties and a Government brings a law saying that the particular product should not be exported, the contract is frustrated due to legislative interference.

(4)Intervention of war: Intervention of war or warlike conditions renders the performance of a contract frustrated. But intervention of war must be such that the performance must be totally impossible and not mere delay of performance.

Theories of Frustration:

(1)Theory of implied term: A Court can examine the contract and the circumstances in which it was made and see whether the intention of the parties can be performed in spite of the intervention. The Court sees the contract through a reasonable man's approach.

(2)Just and reasonable solution: While applying the doctrine of frustration the Court exercises really exercises a qualifying power, a power to qualify the absolute, literal or wide terms of the contract in order to do what is just and reasonable in a new situation.

Effects: In order to applythe doctrine of frustration it should not be self-induced and it must have been operated automatically and not by the act of parties.

Discharge by Agreement:Section 62 provides that if the parties to a contract agree to substitute a new contract for it or rescind it or alter it the original contract need not be performed.

Novation: When the parties to the contract agree to substitute the existing contract with a new contract that is called novation. Novation may be by change of parties alone or by substituting a new agreement altogether.

When the parties agree to substitute a new contract for it the original contract is discharged and need not be performed. It is necessary for the application of this principle that the original contract must be subsisting and unbroken.

If due to any reason the new contract becomes void the old contract gets revived back. This is the peculiar feature of novation.

Discharge by Breach:A breach of contract occurs when a party to the contract does not perform his liability or he renounces his liability by some act which makes it impossible to perform or fails to perform partially or totally his obligations to the contract. Breach is of two kinds, namely, anticipatory breach and present breach.

Anticipatory breach occurs when prior to the promised date of performance the promisor absolutely repudiates the contract. It is an announcement by the contracting party of his intention not to fulfill the contract and that he will no longer be bound by it.

Effect upon rights: The other party is excused from performance or from further performance. The obligation under the contract comes to an end and is replaced by operation of law by another obligation namely to pay money damages. It entitles the injured party to an option either to sue immediately or to wait until the act is done.

QUASI CONTRACTS

'Quasi' is a Latin word which means 'as if'. In quasi contract there s no actual contract but it represents situations which gives consequences which are similar to those of contracts.

EVOLUTION

Quasi contracts can be seen to have its origin in England. The early English Common Law had only two kinds of remedies namely contractual and tortuous. Thus if A obtained some money from B by fraud though there was no contract B can recover the money since he can base his acton on the tort of fraud. But if the money was paid by B to A under a mistake that ws actually paying to somebody else then B could not recover the money either by contract or in tort. But justice required that A should be made liable for what he had received unjustly. The courts in order to find a remedy to such a situation invented the liability under quasi contracts. Since the situation was not truly contract and it resembled that of contract it was named as quasi contracts.

BASIS OF QUASI CONTRACT

Quasi contractual obligations are based on two theories namely (1) Theory of unjust enrichment and (2) Implied promise theory.

(1) Theory of unjust enrichment:

This theory was propounded by Lord Mansfield. If any person received anything which in justice and equity belongs to another then he has a duty to refund. Ths is called the theory of unjust enrichment.

(2) Implied Promise Theory:

According to this theory a quasi contractual liability was invoked when it was possible to imply a condition that money was to be repaid or in other words an imputed promise to repay which does not belong to one.

Among the two theories the doctrine of unjust enrichment is preferable. It is this principle which underlies quasi contractual liability in the various relations resembling contract dealt with in the Indian Contract Act and so this theory may be accepted in India.

QUASI CONTRACTS IN INDIAN CONTRACT ACT

The Indian Contract Act does not define a quasi contract. It does not even use the words quasi contracts but sections 68 – 72 deals them as 'certain relations resembling those created by contracts'.

1. CLAIM FOR NECESSARIES (SECTION 68)

Section 68 deals with the quasi contractual liability of a minor or a lunatic. According to this section if any person who is incapable of entering into a contract that is a minor or a lunatic or his dependants are supplied with necessaries then he is bound to pay from his property, a reasonable compensation to the person who has supplied such necessaries. This is not a personal liability and so only the property of the person can be proceeded against.

2. PAYMENT BY AN INTERESTED PERSON (SECTION 69)

Section 69 deals with another type of quasi contractual liability which corresponds to what in English Law is called 'Action for money paid by plaintiff to defendant's use'. According to the section when one person is bound by law to pay money and another being interested in payment actually makes the payment then the law imposes an obligation on the person who was bound by law to pay to reimburse the person who actually made the payment. The points to be noted herein is that the defendant must be under a legal duty to

pay and the plaintiff should be interested in the payment of the money and he should not be a mere volunteer or intervener.

For illustration B holds on a lease granted by A the Zamindar. As the Zamindar did not pay the taxes to the government his land was advertised for sale by the government. Under the revenue law the consequence of such sale will be the cancellation of B's lease. In order to prevent this B pays to the government the taxes which A was liable to pay to the government. Here A is liable to pay back the amount to B which he had paid to the government even though there is no contract between a and B for that amount.

3. LIABLITY TO PAY FOR NON GRATUITOUS ACTS (SECTION 70)

Secton 70 corresponds to what in England are called actions for 'Quantum Merit'which means as he deserves.

According to this section though there is no contract as such or the contract is invalid when a person has enjoyed a benefit as a result of what another has done he should compensate for such benefit. If that other had intended to act gratuitously that is acted without any intention to create an obligation he cannot claim compensation. For example A saves B's property from fire. A is not entitled to compensation from b if the circumstances show that i.e. intended to act gratuitously.

REQUIREMENTS OF QUANTUM MERIT

1) The plaintiff lawfully does something for the defendant. The lawfully indicates that when something is done by one person to another and the thing is accepted and enjoyed by the latter a lawful relationship is born between the two which under section 70 give rise to a claim for compensation.

2) The existence of a contract which for some reason is nvalid shows that what was done was not done gratitusly.

For example in Caven Ellis v. Canons Ltd. A was appointed as managing director of a company. The agreement appointing him was void as the directors did not secure qualifying shares in the company as required by the articles of association of the company. But A rendered services under the agreement and he sued for his salary. Here the contract between a and the company has been void and so there is no contract. but he claimed remuneration on the basis of quantum merit. The liability is imposed on the company because it had received the benefit of the services which were not intended to be rendered gratituosly.

3) The third requirement is that the defendant has enjoyed the benefit. The liability to pay for the benefit it les because the benefit has been enjoyed.

Hence it is clear that the remedy of quantum merit is restitutory and compensatory. That is the defendant has to pay for the benefit it received by him and not for the loss caused to the plaintiff.

4) RESPONSIBILITY OF FINDER OF GOODS 9SECTON 71)

Section 71 spells out the responsibility of a finder of goods. The finder of goods if he takes them into his custody shall be subject to all the liabilities and responsibilities of a bailee. If knowing the owner of having sufficient knowledge of the rightful owner and not using the means to discover the owner the finder of goods, appropriates them to his own use he will be guilty of criminal misappropriation under section 403 of Indian Penal Code.

5) MONEY OR THING DELVERED BY MISTAKES OR COERCION (SECTION 72)

This section is based upon the English action for money had and received such an action lies in England for recovery of money paid to the defendant under a mistake of fact. According to section 72 Indian Contract

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

Section 72 makes no distinction between mistake of fact and law so even a payment under a mistake of law may be recovered. The mistake lies in thinking that money was due when in fact it was not due.

Coercion under section 72 should be understood in the dictionary sense as the definition under section 15 is inapplicable here. So any payment induced by compulsion would be covered by section 72.

Trilokchand v. Commissioner of Saales Tax is a leading case on this subject. The petitioner obtained a refund of sales tax by him as the state of Bombay could not impose the said tax. The refund was made subject to the condition that the petitioner in turn should return it to the customer from whom he had collected the tax. But the petitioner did not fulfill the condition. So the sales tax officer forfeited the amount and the property of the petitioner. In order to get rid of the attachment he paid the amount on 8.8.1960. Later in the case of Kantilal Bublal v. Sales Tax officer the provisions of sales tax relating to forfeiture was held to be invalid. So the petitioner filed a writ for refund of the amount paid by hm. The court held that it was a payment trader under coercion because his property was attached and he had to make that payment. Coercion under section 72 means only that the payment was made under pressure and not voluntarily. But the amount thus paid can be recovered under section 72 but has to be made within 3 years and so it was dismissed.

REMEDIES FOR BREACH OF CONTRACT (SECTIONS 73 TO 78)

A breach of contract always has an injured party and he may bring an action for damages. Damages means compensation in terms of money for the loss suffered by the injured party in consequence of the breach of contract. Sections 73 to 75 of Indian Contract Act deals with damages

PRNCIPLE BEHIND DAMAGES

In contracts the fundamental principle behind the theory of damages is not punishment but compensation. The object of awarding damages for breach of contract is to compensate the injured party for the loss he suffered and to put him in the same position in which he would have been if the contract had been performed.

TYPES OF DAMAGES

Section 73 deals with 2 types of damages. They are general and special damages.

GENERAL

These damages are those which arises naturally in the usual course of things from the breach itself. In other words the defendant is liable for all that which directly arose from the breach of contract.

For example when there is a breach of contract for sale the difference between the contract price and the market price on the date of breach is the loss which directly arose from the breach.

SPECIAL

These are damages given to compensate the injured party for the loss resulting from special circumstances which are known to both parties at the time of making the contract. They are not recoverable unless the special circumstances were brought to the knowledge of the defendant so that possibility of the special loss could have been avoided by the parties.

OTHER TYPES

EXEMPLARY

Though the principle underlying the award of damages is compensation, damages by way of punishment are granted and are called exemplary or vindictive damages. They are (1) breach of promise to marry, (2) bank dishonouring a customer's cheque though the customer had sufficient funds in his account.

NOMINAL

Sometimes the breach of contract does not cause any loss. For example if the market price is raising a breach buyer does not create loss to the seller because the seller can easily sell even for a higher price. But since a breach of contract is wrong and so the seller can recover damages in the technical sense. The damages awarded in such a case is called nominal damages.

HADLEY V. BAXENDALE the distinction between general and special damages was laid down in this case and it was this principle which was incorporated in section 73. This rule is also known as Hadley v. Baxendale rule.

In this case the plaintiff was the owner of a mill. A machine in the mill broke down and so the work was stopped in the mill. The machine had to be sent to another place for repairs. The defendant was the carrier to whom it was delivered for being taken to the place for repair. There was delay on the part of the defendant and the suit was brought for damages (1) in respect of delay (2) for loss of profit owing to the mill stopped working.

The first head of damages was held to be recoverable as general damages. The second head is special damages which can be recovered only if the special circumstances causing such damage had been known to the defendant. In this case the defendant had not been informed that the plaintiff would suffer loss of the mill. So special damages were not awarded.

REMOTENESS OF DAMAGE

Compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. This is provided in section 73 of Indian Contract Act. But damages which may reasonably be supposed to be in the contemplation of the parties at the time of entering into the contract as the probable result of the breach though not naturally arising out of the breach can be recovered and they are not considered as too remote.

In Victoria Laundry Ltd. V. Newman Industries Ltd. The plaintiff were running the business of laundry purchased a large boiler from the defendants inorder to extend their business. The defendant's knew at the time of contract that the plaintiff needed the machine urgently. Even then the delivery of the machine was delayed by five months. The plaintiff's claimed damages for the delay as well as for the profit which they would have made if the mll had been expanded. The court held that the defendants had the knowledge that some loss was likely to result by the delay in delivering the boiler and so they were liable for the loss of profit also.

The judgment in the above case lies to the view that reasonable forseability was the test of remoteness in contract. There must be a serious possibility or real danger that the loss will occur. A higher degree of probability is required to satisfy the test of remoteness in contract.

MITIGATION OF DAMAGES

The explanation to section 73 laid down that in estimating the loss or damage caused to a party by breach the means which existed in remedying the inconvenience caused by the breach must also be taken into account. So a duty is given by the law on the party suffering by the breach to do all that is possible by time in minimizing the loss. To mitigate means to lessen or minimize.

Thus if A has undertaken to repair B's wall and A fails to repair it B cannot remain inactive and see the whole wall collapse by rain and then claim the whole loss from A. By section 73 the law says that B has to take steps to repair the wall by other means. If he does so and spend money on it he can recover it from A. But if does not do so and the wall collapses he cannot recover for the loss of wall from A.

LIQUIDATED DAMAGES AND PENALTY

Liquidated damages are in the nature of ascertained damages. The parties themselves in the contract fix in advance what would be the measure of damages sustained as a result of the breach of the contract. This is called liquidated damages.

Usually it is for the court to determine the amount of damages. When the parties themselves fix the amount and the court awards the same then it is called liquidated damages.

In Mehta and sons v. Century Spinning and Manufacturing co the plaintiffs claimed damages for premature termination by the defendant's company of the plaintiff's services as managing agents. They claimed as damages 10 percentage of the profit of the company. The contract provided that in event of premature termination the company was to pay not less than Rs 6000 per month. In view of this clause it was held that the plaintiff should be granted only Rs 6000 per month as provided in the contract as liquidated damages and nothing more.

PENALTY

The parties to the contract while fixing the damages may have fixed an excessive amount which is not reasonable with the contract and may be against the parties intention to commit a breach of the contract. It is then called a penalty.

In such case the court is not necessarily bound to accept the figure named in the contract even if the parties have specifically stated that they are liquidated damages.

TEST OF PENALTY

The test to be applied is to consider whether the amount fixed by the parties really represents a reasonable pre estimate of the probable damage. If the amount is so high when compared to the probable loss it would be penalty.

EXCEPTIONS TO SECTION 74

The doctrine of penalties is inapplicable to bail bonds, etc. courts take from persons released on bail bonds binding them to appear in court wherever called upon to do so. In such bonds a sum of money is indicated as liable to forfeiture if default is committed in observing the terms of the bond. These bonds are called recogninzances. They cannot be said to be penalty under section 74 and can be enforced as indicated.

Section 75

A party who rightfully rescinds a contract is entitled to compensation for any damage he has sustained through the non fulfillment of the contract. The remedy of rescission is provided in the Specific Relief Act.

UNIT V

SPECIFIC RELIEF ACT 1963

ORIGIN

In England originally the only remedy available to an aggrieved party under the common law was the remedy of damages. In many cases as for instance a breach of contract relating to immovable property such a remedy was found to be inadequate. So the courts invented certain remedies to avoid such difficulties. These reliefs are called specific relief since they lie outside the ordinary order of legal redress.

CODIFICATION

The law as to specific relief was codified in the Specific Relief Act 1877. This act has been repealed and replaced by the Specific Relief Act 163 which came into force from 1-3-164.

DIFFERENT MODES OF SPECIFIC RELIEF

The several modes of specific relief dealt within the specific relief act of 1963 are:

1. Restoration of Possession.
2. Specific performance of Contracts.
3. Injunction.
4. Declaratory Relief.
5. Other Forms.

RESTORATION OF POSSESSION;

A possessory action is one in which plaintiff seeks restoration of possession on the strength of his earlier possession. He need not prove in such a suit prove his title. His earlier possession is itself sufficient for the court to restore possession to him. This remedy is conferred by section 6 of the Specific Relief Act.

ESSENTIAL CONDITIONS

In a possessory action a person dispossessed of immovable property can recover possession even if the person dispossessed is the real owner himself. The essential conditions to be fulfilled by the plaintiff according to section 6 are:

A. The plaintiff should have been in possession.

B. The possession should be of immovable property.

C. The plaintiff should have been dispossessed otherwise than in due course of law.

D. The suit should be for recovery of possession.

E. The suit should be brought within 6 months from the date of dispossession.

F. Such a suit cannot be brought against a government.

When a decree or order is passed deciding the title in violation of the provisions of section 6 a revision petition under section 115 Civil procedure Code can be filed.

RESTORATION OF POSSESSION – MOVABLE PROPERTY

Section 8 of the Specific Relief Act deals with the liability of a person in possession not as owner to deliver to persons entitled to immediate possession.

Any person having the possession or control of a particular article or movable property of which he is not the owner may be compelled to restore it to the person entitled to immediate possession in the following cases:

1. When the thing claimed is held by the defendant as the agent or trustee of the property.
2. When compensation in money would not be adequate for the loss caused to the property.
3. When it would be difficult to ascertain the actual damage caused by its loss.
4. When the possession of the thing claimed has been wrongfully transferred from the property.

These are the circumstances in which specific delivery of movable property can be ordered by the court.

SPECIFIC PERFORMANCE OF CONTRACTS

Sections 10 and 11 of the specific Relief Act relate to contracts which can be specifically enforced. They are as follows:

CONTRACTS WHCH CAN BE SPECIFICALLY ENFORCED:

CONDITIONS;

Two conditions must be satisfied before a contract can be specifically enforced.

a) There should be no standard for ascertaining the damage caused by the breach of contract.

b) Compensation in money is not an adequate remedy. This will be presumed in the case of contracts for transfer of immovable property. In case of a contract to transfer of movable property in two exceptional cases such a presumption is made. They are;

1. When property is not an ordinary article of commerce.
2. When the defendant is holding it as trustee or as agent of the property.

In other cases contracts relating to movable property are presumed to be such that damages would be an adequate remedy.

BURDEN OF PROOF;

When a party seeks specific performance of contracts in a court of law, it is he who has to prove before the courts that he was always ready and willing to perform his part of the contract and it was the other party who was not ready to perform his part of his promise.

There should be privity of contract between the property and the defendant. Since specific performance is a discretionary remedy it will not be granted if its enforcement is inequitable. Example a contract to execute a mortgage is enforceable specifically if the loan has been already advanced.

CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED:

The remedy of specific performance is a discretionary remedy. It will not be granted in the following cases.

1. WHEN COMPENSATION IN MONEY IS AN ADEQUATE RELIEF:

Specific performance would be refused if the remedy of damages is considered to be an adequate remedy. Contracts relating to the delivery or the sale of movable property cannot be specifically enforced for this reason. In Abdul Rahman v. Manikram A sold machinery to b under a purchase agreement between the parties. the price was to be paid in certain instalments. When there was a default in payment A sued for recovery of unpaid instalments and for a declaration that the defendant was liable to pay the remaining

instalments. The suit was held to be one for specific performance of a contract for the sale of goods and was dismissed on the ground that the remedy of damages in such a case is quite adequate.

In the case of contracts relating to movable property it would be generally presumed that money compensation is an adequate remedy except where the contract relates to an article which is not an ordinary article of commerce and where the defendant is holding the property as a trustee or agent of the property.

1. CONTRACTS WHICH ARE INCAPABLE OF SUPERVISION BY COURTS:

If the contract consists of many details of the performance of which cannot be supervisied by the court the remedy of specific performance will be refused. Example service contracts.

1. DETERMINABLE CONTRACT:

Revocable contracts are also not specifically enforced. An example of this is a contract for a partnership for which no duration of limit is fixed. Such a partnership may be dissolved at any moment and so courts do not allow specific performance.

2. PLAINTIFF WITH CLEAR HANDS:

Specific performance being a discretionary remedy if the property has not come to court with clean hands it will not be granted. Thus if the property has not performed his party of the contract the remedy will not be granted to him.

3. HARDSHIP TO DEFENDANT:

If the granting of the remedy will cause great hardship to the defendant the remedy may be withheld. But the hardship will be considered with reference to the circumstances existing at the time of the contract.

4. CONTRACT TO LEND MONEY:

A contract to lend money cannot be specifically enforced since damages would be the proper remedy. Where money has already been lent the lender can specifically enforce a contract for furnishing security or executing a mortgage.

WHO MAY OBTAIN SPECIFIC PERFORMANCE:

According to section 15 of the Specific Relief Act specific performance of a contract may be obtained by (1) any party to the contract (2) the representative in interest or the principal of any party.

Ordinarily privity of contract is essential for enforcing a contract. The following are the exceptions.

1. Marriage Settlements;

The father of the bride and bridegroom enter into a settlement to settle certain property on the bride or bridegroom. The bride or bridegroom is not a party to the contract. still he or she can enforce the contract and obtain the benefit intended for her or for him.

2. Compromise:

The disputes in a family may be settled under a compromise. The beneficiaries can enforce the compromise though they were not parties to it.

3. Tenant for life and Remainder man:

A is the owner. He transfers the property to B for life and then to C. C is called the reminder man. Usually B cannot bind C by his acts beyond B's lifetime. Suppose A has conferred on B a power to deal with

the property (eg. to lease it for 60 years.) B acts under this power. So C can enforce the contract of lease to pay rent.

4. Privity of estate:

Privity of estate means the relationship of landlord and tenant. Suppose A is the owner. He makes B a tenant for life. Then A is the reversioner. (landlord) A dies and C is his legal representative. Between B and C is privity of estate and C can enforce B's document to pay rent by this privity of estate. C transfers his interest to D and B transfers his interest to E. between D and E there is no privity of contract but there is privity of estate. So the documents are enforceable.

5. Company;

When a company has entered into a contract and later on becomes amalgamated with another company the new company which arises out of amalgamation can enforce the contract.

6. Promoters:

When the promoters of a company have before its incorporation entered into a contract for the purposes of the company and such contract is accepted by the terms of the incorporation of the company and the company has communicated such acceptance to the other party to the contract then the company can enforce the contract.

AGAINST WHO CONTRACTS CAN BE SPECIFICALLY ENFORCEABLE:

Section 19 of Specific Relief act provides that specific performance of a contract may be enforced against (a) either party to the contract, (b) any other person claiming under him by a title arising after the contract is made except a transferee for value who has paid his money in good faith and without notice of the original contract, (c) any person claiming under a title which though prior to the contract and known to the plaintiff might have been displaced by the defendant, (d) when a company has entered into a contract and later on becomes amalgamated with another company, the new company which arises out of the amalgamation, (e) when the promoters of a company have before its incorporation entered into a contract for the purpose of the company and such contract is accepted by the terms of the incorporation of the company.

DISCRETIONARY POWERS OF COURTS

The courts jurisdiction with regard to specific performance is discretionary. So the courts are not bound to grant this relief simply because it is lawful to do so. They can consider the conduct of the parties before deciding this question. Section 20(2) (a) provides that if the plaintiff had gained an unfair advantage over the defendant the remedy may be withheld even though there may be no fraud or misrepresentation.

Section 20(2)(b) provides that if the performance of the contract involves some hardship on the defendant which was not forseen but its non performance would involve no such hardship on the plaintiff the court would refuse specific performance. It is on this principle that the court will not force a doubtful title upon the defendant. For example specific performance of a contract to sell immovable property will be dismissed when the title is doubtful even though the court itself may have a favourable opinion of it.

Section 20(2)(c) provides that when the defendant enters into a contract under such circumstances which though do not render the contract voidable but make it inequitable to enforce specific performance to relief can be granted.

Section 20(3) provides that the court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

PREVENTIVE RELIEF – INJUNCTION

Preventive relief is a mode of specific relief. When the Court prevents a party from doing that which he is under an obligation not to do it is said to be preventive relief. Such a relief is granted in the form of an injunction. The purpose for which an injunction is granted is usually to restrain the breach of contract or the violation of rights arising otherwise than by the contract.

Types of Injunctions:

According to Section 36 of the Specific relief Act, there are 2 types of injunctions namely, (a) Temporary and (b) Perpetual. There is another type mentioned in Section 39 which is called Mandatory Injunctions.

a) Temporary: These are injunctions which are to continue until a specified time or until further order of the Court. And they may be granted at any stage of a suit and are regulated by the Code of Civil Procedure. When a suit is pending before the Courts a temporary injunction may be granted. This is done on the balance of convenience without prejudice to the final disposal of the claim in the suit.

b) Perpetual: These may only be granted by the decree made at the hearing and upon the merits of the suit. The defendant is thereby prohibited permanently from the assertion of a right or from the commission of an act which would be contrary to the rights of the plaintiff. So perpetual injunction is a form of specific relief granted by the Court after the suit is heard on the merits.

This type of injunction is granted in the following cases:

a) where the defendant is trustee of the property of the plaintiff

b) where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion

c) where the invasion is such that compensation in money would not afford adequate relief

d) where the injunction is necessary to prevent a multiplicity of judicial proceedings

c) Mandatory: Section 39 of the Specific Relief Act deals with mandatory injunction. The purpose of this injunction is to compel the defendant to do something positive. The conditions to be satisfied for the grant of a mandatory injunction are as follows:

(1) It should be necessary to prevent the breach of an obligation

(2) For preventing the breach of the obligation, it should be necessary to compel the performance of certain acts.

(3) The Court should be capable of enforcing those acts.

Prohibitory: A mandatory injunction compels the performance of certain acts. The acts may be positive or negative i.e. to do something or to not do something. When the act which is compelled is negative, the injunction is said to be a prohibitive injunction. It forbids the defendant from doing something (e.g.) an injunction requiring the defendant not to trespass upon the plaintiff's land.

Injunction when refused: According to section 41 an injunction cannot be granted:

a) to restrain any person from prosecuting a judicial proceeding unless such restraint is necessary to prevent a multiplicity of proceedings

b) to restrain any person from instituting any proceeding in Court not subordinate to that from which the injunction is sought

c) to restrain any person from applying to any legislative body

d) to restrain any person from instituting any proceeding in a criminal matter

e) to prevent the breach of contract the performance of which would not be specifically enforced

f) to prevent on the ground of nuisance an act of which is not reasonably clear it will be a nuisance

g) to prevent a continuing breach in which the plaintiff has a part

h) when relief can be obtained by any other usual mode of proceedings in case of breach of trust

i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court

j) when the plaintiff has no personal interest in the matter

Injunctions and negative contracts:When a contract comprises an affirmative agreement (i.e. a positive agreement) coupled with a negative agreement and if the affirmative agreement is incapable of being specifically enforced and the plaintiff has not failed to perform the contract so far as it is binding on him he may be granted an injunction to perform the negative agreement under Section 42 of the Specific Relief Act.

This is well illustrated in Lumley v Wagner. In that case, Wagner, a singer contracted with the plaintiff that she would sing in the plaintiff's theatre during a certain period and would not sing elsewhere during that period without his written authority. But later on Wagner entered into an agreement with Gye to sing at his theatre. The suit was brought by Lumley for an injunction to restrain Wagner from singing at the theatre of Gye.

It was held that though the contract was of service of which specific performance could not be granted, an injunction was granted for the negative agreement in the in the contract i.e. not to sing elsewhere during the pendency of the contract.

RECTIFICATION OF INSTRUMENTS

Section 26 of the Specific relief Act deals with rectification of contracts or any instruments in writing. When through fraud or a mutual mistake of parties a contract or other instrument in writing does not express their real intention then either party or his representative in interest may institute a suit to have the instrument rectified.

Rectification can also be claimed by the plaintiff or the defendant of any suit in which any right arising under the instrument is in issue in the suit. The courts may grant this only at its discretion and only if the parties have specifically claimed for rectification.

Rectification of a contract can be granted when the written contract does not represent the real intention of the parties. If the real intention of the parties is correctly recorded there is no scope for rectification. Even where it is incorrectly recorded there is no scope for rectification unless there is fraud or mutual mistake. Thus unilateral mistake is not a ground for rectification. Mistake of law is not ground for rectification.

CANCELLATION OF INSTRUMENTS

Section 31 and 32 of Specific Relief Act deals with cancellation of instruments.

Any person against whom a written instrument or document is void or voidable or any one has a fear that such instrument if left outside may cause him serious injury may file a suit and claim before the court to declare it as void or voidable and the court at its discretion may order it to be delivered and cancelled.

If the said document has been registered under the Indian Registration Act the court shall also send a copy of its decree to the officer in whose office the instrument contained has been so registered and such

officer shall note on the copy of the document contained in the office the document has been cancelled. Where an instrument is evidence of different rights or different obligations the court may cancel that part and allow the remaining to be valid.

According to section 33 of the Act any party against whom an instrument has been cancelled has power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully registered as being void or voidable.

DECLARATORY DECREES

Declaratory decrees in India was governed by section 15 of the Civil Procedure Code 1859 before the Specific relief Act came into force. The section was modeled upon section 50 f the English Chancery procedure Act of 1852.

The effect of that section was to enable courts to grant declaratory relief provided there was some other relief which could also be claimed either in the same court or in some other court.

Conditions:

The conditions to be satisfied for granting to a bare declaration are as following: The declaration must relate either to the plaintiff's legal character or to a right in property.

1. The defendant should have denied or be interested in denying the plaintiff's title to such legal character or property.

2. The plaintiff should not be in a position to ask for consequential relief. If on the basis of the declaration some consequential relief can also be sought such relief should be prayed for. Otherwise the suit would be dismissed.

Effect of decree: the effect of declaratory decree is to eliminate future controversy, bring about evidence of the claim and to bring and to an end dispute regarding titles to property.

1. K.S. Bakshi And Anr. vs State And Anr, 146 (2008) DLT 125

The jural concept of the consideration requires that something of value must be given, and that this can either be a benefit to the promisor or some detriment to the promisee. Thus, "consideration" is a very wide term and is not restricted to monetary benefit. Consideration does not necessarily means money in return of money or money in lieu of goods or service. Any benefit or detriment of some value can be a consideration. Thus, in the present case all reciprocal obligations of the builder would also be a consideration for the contract.

2. Paltanbazar Municipal Corpn. vs Rafia Shah And Ors. 2007 (1) GLT 958

The court held that the promise made by the plaintiffs to execute a deed of gift in future as and when the property in question vests on them, is a contract after considering the provisions of Sections 2(b), 2(d), 2(e), 2(f), 2(h) and Section 10 of the Indian Contract Act which is enforceable under the law.

A bare reading of the agreement would show that an offer was made which was specific and certain and the Government of Assam and the Gauhati Municipal Corporation had accepted the terms of offer in regard to handing over the Khas and vacant possession of land measuring 3 Kathas 12 Lechas of land along with the building described in schedule 'B' of the plaint and on release as aforesaid the plaintiffs would execute a deed of gift of land measuring 4 Kathas 4 Lechas described in schedule 'A' of the plaint, which gives rise to a legal relationship between the parties. Hence, it is a contract under Section 10 of the Contract Act and therefore, enforceable under the law.

3. State of Maharashtra and others v. A.P. Paper Mills Ltd. (2006) 4 SCC 209)

A person may have a right to withdraw his offer, but if he has made his offer on a condition that the bid security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the bid security should not be forfeited and it should be returned to him. Forfeiture of such bid security amount does not, in any way, affect any statutory right under Section 5 of the Indian Contract Act.

4. Bank of India & Ors. Vs. O.P. Swaranakar etc 2003 (2) SCC 721

The voluntary retirement scheme is not a proposal or an offer but merely an invitation to offer and the applications filed by the employees constitutes 'offer'. Once the application filed by the employees it is held to be an 'offer'; Section 5. If the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement.

5. Union of India Vs. Peeco hydraulic private limited, (AIR 2002 Delhi 367)

Under Section 7 of the Indian Contract Act, 1872, the acceptance of the offer has to be absolute and need not be conditional. However, if there is a conditional or counter offer and it is acted upon without protest and the acceptance has been conveyed subject to that, to which there is no dispute raised.

An agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties. It is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence.

6. Mathai Mathai vs Joseph Mary @ Marykkutty Jopseph & (2015) 5 SCC 622

A deed of mortgage is a contract and it cannot be said that a mortgage in the name of a minor is valid, simply because it is in the interests of the minor unless she is represented by her natural guardian or guardian appointed by the court. The law cannot be read differently for a minor who is a mortgagor and a minor who is a mortgagee as there are rights and liabilities in respect of the immovable property would flow out of such a contract on both of them. Therefore, the Court held that the mortgage deed is void ab initio in law and the appellant cannot claim any rights under it.

7. Joseph John Peter Sandy v. Veronica Thomas Rajkumar, (2013) 3 SCC 801

Court expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the party seeking relief has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Once that position is substantiated, the second stage has been reached - namely, the issue whether the transaction has been induced by undue influence. Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

8. Dr. Vimla v. Delhi Administration (1963 Supp. 2 SCR585) and Indian Bank v. Satyam Febres (India) Pvt. Ltd. (1996 (5) SCC 550).

The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

9. State of Andhra Pradesh and Anr. v. T. Suryachandr Rao (2005 (5) SCALE 621)

Suppression of a material document would also amount to a fraud on the court. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud under section 17 of the Indian Contract Act.

10. Ganga Retreat & Towers Ltd. v. State of Rajasthan, (2003) 12 SCC 91

Misrepresentation is defined in Section 18 of the Contract Act. A right to rescind for misrepresentation can be lost in a variety of ways, some depending on the right of election. A representee on discovering the truth loses his right to rescind if once he has elected not to rescind. But he may lose even before he has made any election where by reason of his conduct or other circumstances. Again, delay in election may make it unjust that the right to elect should continue. For this reason the right to rescission for misrepresentation in general must be promptly exercised.

11. McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 & ONGC Ltd.v. Saw Pipes Ltd. [(2003) 5 SCC 705]

The Court while dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act.

12. Ranganayakamma and Anr. v. K.S. Prakash (D) By LRs and Ors., 2008(9)SCALE144 (MANU/SC/7734/2008)

Section 19 of the Indian Contract Act provides that any transaction which is an outcome of any undue misrepresentation, coercion or fraud shall be voidable. If, however, a document is prima facie valid, a presumption arises in regard to its genuineness.

13. Ramesh Kumar & Anr vs Furu Ram & Anr. (2011) 8 SCC 613

Section 17 of the contract act was analyzed. The Court held that the word ` fraud' is used in section 12 of Hindu Marriage Act, 1955 in a narrower sense. The said section provides that a marriage shall be voidable and annulled by a decree of nullity if the consent of the petitioner was obtained by ` fraud' as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent.

14. Jehal Tanti v. Nageshwar Singh. - 2013 AIR SCW 3663

The sale deed executed in favour of respondent No.1 in the teeth of the order of injunction passed by the trial Court, was held to be unlawful, since Section 23 of the Indian Contract Act, 1872, lays down that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

15. A.V. Murthy v. B.S. Nagabasavanna [(2002)ALL MR (Cri) 709 (S.C.)]

A promise to pay a time barred debt is a valid contract. A cheque issued for discharge of a debt which is barred by law of limitation is itself a promise within the meaning of Sub-section (3) of Section 25 of the Contract Act. A promise is an agreement and such promise which is covered by Section 25(3) of the Contract Act becomes enforceable contract provided that the same is not otherwise void under the Contract Act.

16. Suresh Dhanuka vs Sunita Mohapatra (2012) 1 SCC 578

The court held that there is no violation of Section 27 of the Indian Contract Act, 1872, as the injunction sought for in the instant case was not on trade or business but in respect of use of the Trade Mark.

17. Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited ; (2009) 9 SCC 403.

It was held that if the purport of the agreement was to completely oust the jurisdiction of the Court, such a condition would be unlawful and void being against public policy and would, therefore, be hit by Section 28 of the Contract Act. However, if it was found that the jurisdiction agreed to would also be an appropriate jurisdiction in the matter of the contract, it could not be said that it ousted the jurisdiction of the Court.

18. Bharat Sanchar Nigam Limited & Anr. Vs. Motorola. India Private Limited 2009 (2) SCC 357: 2008 (13) SCR 445

The provision under clause 16.2 of the Arbitration agreement between the parties provided that quantification of the Liquidated Damages shall be final and cannot be challenged by the supplier Motorolla was clearly held to be in restraint of legal proceedings under section 28 of the Indian Contracts Act. So the provision to that effect was held to be bad in law by the Court.

19. New India Assurance Co. Ltd. vs K.A. Abdul HameedII (2005) CPJ 54 NC

It was agreed that the appellant would not have any right under the bond after the expiry of six months from the date of the termination of the contract. It only puts embargo on the right of the appellant to make its

claim known not later than six months from the date of termination of contract. Curtailment of the period of limitation is not permissible in view of Section 28 but, extinction of right itself unless exercised within a specified time is permissible and can be enforced.

20. Insure Policy Plus Services vs The Life Insurance Corporation 2007 (109) Bom L R 559, 2007 79 SCL 583 Bom

To constitute a wagering contract, there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded but only difference in prices should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference in prices on the happening of an event.

MODEL QUESTION PAPER

Sub: CONTRACTS I

Time : 1 ½ Hours Maximum : 70 marks

PART – A (2 x 12 = 24 marks)

Answer any TWO of the following in about 500 words each:

1. Explain how the courts have protected the parties who have been affected by standard form contracts.

2. "A stranger to contract cannot sue." State the exceptions to the said rule. Is there any difference between the Indian and the English Law?

3. "No one shall enrich himself unjustly at the expense of another". To what extent does the Indian Contract Act give effect to this principle?

PART B – (2X7 = 14 MARKS)

Answer TWO of the following in about 300 words each

4. State the circumstances under which a contract is discharged by impossibility of performance.

5. Explain the law relating to agreements in restraint of trade and its exceptions.

6. Discuss the circumstances in which fraud will vitiate a contract.

PART – C (4 x 5 = 20 marks)

Write short notes on FIVE of the following

7. A. Intention to create legal obligation.
   B. Voidable contracts.
   C. Injunctions.
   D. Adequacy of considerations.
   E. Necessaries.
   F. Wagering contract.
   G. Liquidated damages and penalty.1

PART – C (2 X 6 = 6 marks)

Answer any TWO of the following by referring to relevant provisions of law and decided cases.

Give cogent reasons.

8. 'A' contracts to sell and deliver to B on a specified date certain materials which B intends to manufacture into finished goods which have a demand only during a particular period. The materials are not delivered till after the appointed time and too late to be used for the season. Discuss B's right to damages.

9. A husband induced his wife to sign a contract under threat of suicide. Can the wife later on repudiate the contract?

10. 'A' applies to 'B' a banker for a loan at a time when the money market is stringent and the banker insists upon payments of a exceptionally high rate of interest. A agrees to pay interest at that rate. Is the agreement binding.

*****

KEY FOR THE MODEL QUESTION PAPER

1. Write the definition for standard form contracts. Explain the circumstances under which courts have held standard form contracts void. For each circumstance write at least one case.

2. Discuss the principle of privity of contract both under English Law and Indian Law. Explain the past and the present situation with cases both under English and Indian Law.

3. Discuss the principle of quasi contracts under Indian Contract Act sections 68 – 72 has to be explained with cases for each.

4. Explain doctrine of frustration under section 56 of Indian Contract Act with cases.

5. Explain section 27 Indian Contract Act with its exceptions and decided cases.

6. Discuss the definition of fraud under section 17 Indian contract Act with cases.

7. A. explain the English principle of intention to create legal obligation with cases lke Balfour v. Balfour.

B. section 2(i) Indian Contract act definition and the situations when a contract can be declared as voidable.

C. Injuctions under specific relief Act with its kinds has to be explained.

D. write the definition of consideration under section 2(d) and the explanation to section 25 of Indian Contract act which explains adequacy of consideration.

E. Write the provisions relating to minors contracts and then explain section 68 of Indian Contract Act with cases.

F. Explain section 30 with cases and exceptions.

G. Explain section 74 of Indian Contract Act.

8, 9 & 10. Problem question has to be answered as follows;

Facts of the case: write the facts given in the question shortly.

Decision: explain the section applicable to the case and then write the decision for the problem give.

Related case law: write any case which gives the same decision as the problem given.