



13: Consent defined – Two or more persons are said to consent when they agree upon the same thing in the same sense.

14: Free consent defined – Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15: Coercion defined – Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation – It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (45 of 1860). A afterwards sues B for breach of contract at Calcutta. A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code (45 of 1860) was not in force at the time when or place where the act was done.

16: Undue influence defined –

- (1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
- (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another— (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
- (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

Illustrations

- (a) A having advanced money to his son, B, during his minority, upon B’s coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.
- (b) A, a man enfeebled by disease or age, is induced, by B’s influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.
- (c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.





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

17: Fraud defined – Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract: —

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

- (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse’s unsoundness. This is not fraud in A.
- (b) B is A’s daughter and has just come of age. Here, the relation between the parties would make it A’s duty to tell B if the horse is unsound.
- (c) B says to A—“If you do not deny it, I shall assume that the horse is sound.” A says nothing. Here, A’s silence is equivalent to speech.
- (d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B’s willingness to proceed with the contract. A is not bound to inform B.

18: Misrepresentation defined – Misrepresentation means and includes —

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, 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 make a mistake as to the substance of the thing which is the subject of the agreement.

19: Voidability of agreements without free consent – When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception. —If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation. —A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.





Illustrations

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

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

(c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

19A: Power to set aside contract induced by undue influence – When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

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

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

20: Agreement void where both parties are under mistake as to matter of fact – 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 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.

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

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

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

21: Effect of mistakes as to law – A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact.

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by



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| the Indian Law of Limitation: the contract is not voidable.                                                                                                                                                 |
| <b>22: Contract caused by mistake of one party as to matter of fact</b> – 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. |

## What is consent?

When two parties enter into a contract they should give their consent. The consent of the parties means that they understand the same thing in the same sense. There must be no misunderstanding between the parties about the subject matter of the contract.

**Section 13 of the Indian Contract Act 1872** defines consent as:

Two or more persons are said to consent when they agree upon the same thing in the same sense.

Thus, consent involves identity of minds in respect of the subject matter of the contract. In English Law, this is called '*consensus-ad-idem*'. If the parties are not ad-idem on the subject matter of the contract, then there is no real agreement between them. When two persons enter into a contract concerning a particular person or a thing and it turns out that each of them had a different person or thing in mind, no contract would exist between them.

For example, A has two Maruti cars, one is blue and the other red. He wants to sell his red Maruti car. B who knows of only A's blue car, offers to buy A's car for Rs. 60,000. B accepts the offer thinking it to be an offer for his red Maruti car. Here the two parties are not thinking in terms of the same subject matter. Hence, there is no consent and the contract will not be valid.

In **Foster v. Mackinnon (1869) LR 4 CP 704**, the defendant endorsed a bill of exchange believing it to be a guarantee. The court held that where a person signs a document fundamentally

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different from what he intended to sign, and is not negligent, the document is void under the doctrine of *non est factum* ("it is not my deed"). Since there was no real consent to the bill of exchange, no liability arose thereunder.

### What is free consent?

For a contract to be valid it is not enough that the parties have given their consent. The consent should also be free, i.e., it has been given by the free will of the parties involving no pressure or use of force. Section 10 of the Act specifically provides that all agreements are contracts if they are made by the free consent of the parties.

**Section 14** of the Act states that consent is said to be free when it is not caused by (i) coercion, or (ii) undue influence, or (iii) fraud, or (iv) misrepresentation, or (v) mistake. Thus, the consent of the parties to a contract is regarded as free if it has not been induced by any of the five factors stated under Section 14. In other words, the consent is not free if it can be proved that it has been caused by coercion, undue influence, fraud, misrepresentation, or mistake, For example, **X**, at a gun point, makes **Y** agree to sell his house to **X** for Rs. 50,000. Here, **Y**'s consent has been obtained by coercion and therefore, it shall not be regarded as free.

However, there is a difference between, the two situations viz., (i) when there is no free consent, and (ii) when there is no consent at all. In case the consent is not free the contract is voidable, at the option of the party whose consent was not free. But, in case there is complete absence of consent, the agreement is void ab-initio i.e., it is not enforceable at the option of either party.

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What is coercion?

Coercion means forcibly compelling a person to enter into a contract i.e., the consent of the party is obtained by use of force or under a threat.

Section 15 of the Act defines 'coercion' as – (i) the committing or threatening to commit, any act forbidden by the Indian Penal Code; or (ii) the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

In other words, the consent is said to be caused by coercion when it is obtained by exercising some pressure by either committing or threatening to commit any act forbidden by the Indian Penal Code or unlawfully detaining or threatening to detain any property. Coercion, thus, implies committing or threatening to commit some act which is contrary to law.

Committing any act forbidden by the Indian Penal Code:

When the consent of a person is obtained by committing any act which is forbidden by the Indian Penal Code, the consent is said to be obtained by coercion. Committing a murder, kidnapping, causing hurt, rape, defamation, theft etc. are some of the examples of the acts forbidden by the Indian Penal Code. For example, A beats B and compels him to sell his scooter for Rs. 2,000. In this case the consent of B is induced by coercion.

In **Ranganayakamma v. Alwar Setti (1889) ILR 13 Mad 214**, A Hindu Widow of 13, was forced to adopt a boy under threat that her husband's dead body would not be allowed to be removed unless she adopts the boy. The widow adopted the boy and subsequently applied for cancellation of the adoption. It was held that the adoption was voidable at her option as her consent was

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obtained by coercion because preventing the dead body from being removed for cremation is an offence under Section 297 of the Indian Penal Code.

Threatening to commit any act forbidden by the Indian Penal Code: From the definition you will observe that not only the committing of an act forbidden by the Indian Penal Code amounts to coercion but even a threat to commit such act amounts to coercion. Thus, a threat to shoot, to murder, to kidnap or to cause bodily injury will amount to coercion. For example, A threatens to shoot B, if he does not sell his ship to A for Rs. 1,00,000. B agrees to sell his ship to A. Here the consent of B has been obtained by coercion. As per the **explanation of Section 15**, it does not matter whether the Indian Penal Code is or is not in force in place where the coercion is employed. If the suit is filed in India, this provision will apply. For example, A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. A, afterwards sues B for breach of contract at Calcutta. A has employed coercion, although his act is not an offence by the law of England and although Section 506 of the Indian Penal Code was not in force at the time when, or the place where, the act was committed.

Unlawful detaining of any property: If a person unlawfully detains the property of another person and compels him to enter into a contract with him, the consent is said to be induced by coercion. In **Muthia Chetti v. Karuppan Chetti (1927) ILR 50 Mad 786**, where an agent refused to hand over the account books of the principal to the new agent appointed in his place unless the principal released him from all liabilities. The principal had to give a release deed as demanded. It was held that the release was

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not binding because the consent of the principal was obtained by exercising coercion.

**Threatening to detain any property unlawfully:** If a threat is held out to detain any property of another person, this also amounts to coercion. In **Bansraj Das v. Secretary of State, AIR 1939 All 373**, the Government gave a threat of attachment against the property of A for the recovery of a fine due from B, the son of A. A paid the fine. It was held that the consent of A was induced by coercion and he could recover the amount paid under coercion.

**Intention of causing any person to enter into an agreement:** The act of coercion must have been done with the object of inducing or compelling any person to enter into a contract.

**By whom or against whom coercion can be exercised:** The definition of coercion does not say anywhere as to by whom or against whom coercion can be exercised. Hence, whether the act of coercion is directed against the promisor or any other person in whose welfare the promisor is interested, the consent will not be free. For example, A threatens to kill B's son C if B refuses to sell his car to him. Here, the threat is directed against C (B's son). So, the consent is treated as induced by coercion. Similarly, it is not necessary that the threat should come from a party to the contract, it may come from a stranger. For example, A threatens to kill B if he does not sell his house to D. B agrees to sell his house to D. Though A is a Stranger to the contract the consent is caused by coercion. What is important, therefore, is that a forbidden act was involved to obtain the consent of the other party. Whether it moves from the party or a stranger to the contract, is immaterial.

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**Threat to File a Suit:** Sometimes a doubt may arise whether a threat to file a suit amounts to coercion or not. One should know that a threat to file a civil or criminal suit does not amount to coercion because it is not forbidden by the Indian Penal Code. However, a threat to file a suit on false charge amounts to coercion since such an act is forbidden by the Indian Penal Code.

**Threat to Commit Suicide:** Under the Indian Penal Code a suicide and a 'threat to commit suicide' are not punishable. But, an attempt to commit suicide is punishable. Now, the questions arises whether a 'threat to commit suicide' shall amount to coercion or not. This point was considered by Madras High Court in the case of **Chikkam Ammiraju v. Chikkam Seshamma AIR 1917 Mad 293**. In this case a person, by a threat to commit suicide, induced his wife and son to execute a release deed in favour of his brother in respect of certain property. The transaction was set aside on the ground of coercion. The court held that though a threat to commit suicide is not punishable under the Indian Penal Code, it is deemed to be forbidden by that code.

### **What is the effect of coercion?**

The effect of coercion is explained in Sections 19 and 72 of the Act.

**Section 19** provides that when the consent of a party to an agreement is obtained by coercion, the contract is voidable at the option of the party whose consent was not free (also called aggrieved party). In other words, it is upto the aggrieved party to decide whether to set aside the contract or perform it. If, however, the aggrieved party decides to avoid the contract, he cannot be compelled to perform his promise. But in that case, he

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has to restore any benefit received by him under the contract, to the other party from whom it had been received. For example, A threatens to kill B if he refuses to sell his scooter for Rs. 1,000 to A. B sells his scooter to A and receives the payments. Here **B's** consent was not free and if B decides to avoid the contract then he will have to return Rs. 1,000 which he had received from A.

**Section 72** clearly provides a person to whom money has been paid anything delivered under coercion, must repay or return it. For example, a railway company refused to deliver certain goods to the consignee, except upon the payment of some illegal charges for carriage. The consignee paid the illegal charges in order to obtain the goods. Here he is entitled to recover so much amount of the charges as were illegal and excessive.

**Burden of Proof:** The burden of proving that consent was induced by coercion lies on the party who wants to avoid the contract. In other words, it is for the aggrieved party to prove that his consent was not free. This could be done by proving that he would not have entered into this contract had coercion not been employed.

### **What is undue influence?**

The second factor which affects consent and makes it unfree, is undue influence. The term 'undue influence' means the improper or unfair use of one's superior power in order to obtain the consent of a person who is in a weaker position.

**Section 16(1)** of the Act states that a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

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On analysis, two essentials of undue influence become clear :

- i) the relations subsisting between the parties should be such that one of them is in a position to dominate the will of the other, and
- ii) the dominant party should have used that position to obtain an unfair advantage over the other.

Both the characteristics must be present simultaneously. The presence of one without the other will not invalidate the contract on the ground of undue influence.

For example,

- a) A, a lady gifted all her property to B, her spiritual guru so that she may secure benefits to her soul in next world. Later on, she disputed the validity of the gift deed. Here, the spiritual guru was in a position to dominate the will of his disciple A and by using his strong position obtained an unfair advantage. Hence, it was held that the consent of A was obtained by undue influence.
- b) A was suffering from a number of ailments and B was treating him. B by exercising his influence over A as his medical attendant, induced A to agree to pay B an unreasonable sum for his professional services. In this case B has used his superior position to obtain an unfair advantage over A.

Thus, one observes that undue influence compels a person in a weaker position to do something which he otherwise would not have done had he been left free to do the things. Undue influence destroys the free mind of a person and compels him to do something which is against his will. Thus, undue influence is a kind of mental pressure and not a physical coercion.

When a person is presumed to dominate the will of the other?

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We have learnt that undue influence is involved only when one party is in a position to dominate the will of the other. Now the question arises as to when can a person be said to be in a position to dominate the will of the other. Answer to this question is provided by **Section 16(2)** of the Act. It states that a person is deemed to be in a position to dominate the will of another where:

i) He holds a real or apparent authority over the other:

Examples of such cases are relations between master and the servant, parent and child, income tax officer and assessee.

ii) He stands in a fiduciary relation to the other: It means a relationship based on trust and confidence. The category of fiduciary relation is very wide. It includes the relationship of guardian and ward, spiritual adviser (guru) and his disciples, doctor and patient, solicitor and client, trustee and beneficiary, a woman and her confidential managing agent. We should note that by judicial decisions it has been held that undue influence cannot be presumed between husband and wife, landlord and tenant, and creditor and debtor.

iii) He makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. Persons of weak intelligence, old age, indifferent health or those who are illiterate can be easily influenced. Hence, the law gives them protection. In **Sher Singh v. Prithi Singh, AIR 1975 All 318**, where A, an illiterate old man of about 90 years, physically infirm and mentally in distress, executed a gift deed of his properties in favour of B, his nearest relative who was looking after his daily needs and managing his cultivation. The court held that B was in a position to dominate the will of A.

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What is the effect of Undue Influence?

If the consent of a party is induced by undue influence, the contract is voidable at the option of the party whose consent has been so caused. **Section 19A** of the Act states the effect of undue influence as when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely, or, if the party who was entitled to avoid has received any benefit thereunder, upon such terms and conditions as the court may seem just. For example, A, a money-lender, advanced Rs. 100 to B, an agriculturist, and by undue influence, induced B to execute a bond for Rs. 200 with an interest at 6 percent per month. The court may set the bond aside, ordering B to repay Rs. 100 with such interest as may seem just.

In case of coercion, we learnt that if the aggrieved party decides to avoid the contract, he has to return or restore the benefit received by him. But, when a contract is avoided on the ground of undue influence, the court has the discretion to ask the aggrieved party for refunding the benefit either in full or in part or set aside the contract without any direction to the aggrieved party to refund the benefit.

Burden of Proof: When a party to a contract decides to avoid the contract on the ground of undue influence, he will have to prove that:

i) **the other party was in a position to dominate his will.** It may be remembered that mere proof of nearness of relations is not sufficient for the court to assume that one person was in a position to dominate the will of the other, the dominating position of the stronger party has to be proved.

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ii) **the other party actually used** his influence to obtain an unfair advantage. The aggrieved party has not only to prove the dominating position of the stronger party but he has also to show that the stronger party had actually used his position and influenced his will to obtain an unfair advantage over him.

When the weaker party has proved the above mentioned two points, it is then for the stronger party to prove that he has not used any undue influence and show that the consent of the other party was freely obtained.

The above provision is contained in **Section 16(3)** of the Contract Act which states that where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or in the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

What is unconscionable transaction?

One will notice that in **Section 16(3)** the term 'unconscionable transactions' has been used. The transaction is said to be unconscionable when a person who was in a position to dominate the will of the other makes use of his position and enters into a contract which is of great benefit to himself and is unfair to the other party. In other words, if the stronger party makes an exorbitant profit of the other's distress, the transaction will be unconscionable i.e., it is something which shocks the conscience.

In case of unconscionable transactions, the stronger party has to prove that the contract is not induced by any undue influence. For example, A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be

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unconscionable. It lies on B to prove that the contract was not induced by undue influence.

One should note, that simply because the rate of interest is very high, it does not become an unconscionable transaction. For example, A applied to a banker for a loan at a time when there was stringency in the money market. The banker declined to make the loan except at an unusually high rate of interest. A accepted the loan on these terms. This was a transaction in the ordinary course of business and the contract was not induced by undue influence. Thus, a transaction will not be set aside merely because the rate of interest is too high. However, if the rate of interest is so high that the court considers it unconscionable, say when the interest rate is 75 per cent or 100 per cent per annum, the court may modify the rate of interest. In **Ranee Annapurni Nachiar v. Swaminatha Chettiar, (1910) ILR 34 Mad 7**, where A, a poor Hindu Widow was in great need of money to establish her right to maintenance. She took a loan of Rs. 1,500 bearing a rate of interest of 100% p.a. the court held it to be an unconscionable transaction and modified the interest rate to 24% p.a.

One should also note that a party to a contract cannot avoid it on the ground of undue influence by merely showing that the transaction is unconscionable. He will also have to prove that the other party was in a position to dominate his will and he has used that position to obtain an unfair advantage.

How the presumption of undue influence may be rebutted?

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As held in **Poosathurai v. Kannappa Chettiar, AIR 1920 PC 65**, the presumption of undue influence can be rebutted by showing that:

- i) the stronger party had made a full disclosure of all the facts to the aggrieved party before making the contract,
- ii) the price was adequate, and
- iii) the weaker party was in receipt of competent independent advice before entering into the contract.

Distinguish between coercion and undue influence.

In case of both coercion and undue influence the consent is not free and the contract is voidable at the option of the aggrieved party. But there are some basic points of difference between the two. These are summarised as follows:

Coercion	Undue Influence
1) Relationship between the parties is not necessary.	Some sort of relationship must exist between parties.
2) Consent is given under the threat of an offence.	Consent is obtained by dominating the will, no offence is committed.
3) It involves physical force or threat.	It involves moral pressure.
4) It may move from even a stranger and may be against the promisor himself or a person in whose welfare the promisor is	It is employed by a party to the contract.

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| Coercion                                                                              | Undue Influence                                                                                                                             |
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| interested.                                                                           |                                                                                                                                             |
| 5) When the contract is avoided, any benefit received has to be restored or refunded. | When the contract is avoided, it is at the discretion of the court to direct the aggrieved party to restore or refund the benefit received. |

**What is Fraud?**

Fraud simply means a wilful wrong representation of fact, made by a party to a contract with the intention to deceive the other party or to induce him to enter into a contract. The term 'fraud' is defined by Section 17 of the Indian Contract Act as follows:

"Fraud means and includes any of the following acts committed by a party to a contract or by any one with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- i) the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;
- ii) the active concealment of a fact by one having knowledge or belief of the fact;
- iii) a promise made without any intention of performing it;
- iv) any other act fitted to deceive;
- v) any such act or omission as the law specially declares to be fraudulent."

From the analysis of the above definition it follows that the following elements must be present in the act to constitute fraud.



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1) The fraud must be committed by a party to the contract by or any one with his connivance, or by his agent. The fraud by a stranger to the contract does not affect the validity of the contract. For example, A was induced to buy shares of a company on the basis of a false statement made by B, B was neither the director nor the representative of the company, he was a mere stranger. Hence, A cannot avoid the contract on the ground of fraud because the false statement was made by a stranger to the contract and not by company or its agent. But, if the false statement had been made by a director of the company, A could avoid the contract.

2) The fraud must be committed with an intention to deceive the other party. For example, A intending to deceive B makes a false statement to him that 100 units are manufactured every month in his factory, though A is aware that only 75 to 80 units are produced every month. B is induced to buy the factory. Here B's consent is obtained by fraud.

3) There must be a representation or assertion and it must be false. To constitute fraud there must be some representation or assertion which is false and the party making it knows that it is false. Example, A while selling his scooter to B says that it is brand new knowing fully well that it is a used one. A's statement amounts to fraud.

Sometimes it may so happen that when a representation was made it was true, but before the contract is entered into, it becomes untrue and this fact is known to the party. In such a situation, it must be corrected. If it is not corrected, it will amount to fraud. In this connection you should also note that if the person making representation honestly believes his statement to be true, he cannot be held liable for fraud, no matter how ill-

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advised, negligent or stupid he might have been. In order to constitute fraud, the false representation must have been made intentionally.

4) The representation must relate to a fact. A mere opinion, a statement of expression or intention or puffing expression is not treated as fraud. For example, A says to B while selling his horse, "my horse is as good as that of Y". This is a statement of opinion. But, if A says that this horse cost him Rs. 5,000, it becomes a statement of fact and if it is incorrect it amounts to fraud.

5) Active concealment of a fact also amounts to fraud. When the party takes positive steps to prevent an information from reaching the other party it is called active concealment and this amounts to fraud. For example, A, a horse dealer showed a horse to B. A knew that the horse had a cracked hoof which he had filled up in such a way as to defy detection. The defect was subsequently discovered by B. So, he refused to buy the horse. It was held that the contract could be avoided by B as his consent was obtained by fraud.

6) The fraud must have actually deceived the other party. The act committed with intent to deceive must actually deceive. The party must have relied on it to accord his consent. In other words, an attempt to deceive the other party by which the other party is not actually deceived, is not fraud. In **Horsefall v. Thomas (1862) 1 H & C 90**, the seller concealed a defect in a cannon by inserting a metal plug. The buyer did not inspect the concealed part and purchased the cannon without knowledge of the concealment. The court held that the buyer could not avoid the contract for fraud because the concealment had not induced him to enter into the contract. The case establishes that a misrepresentation or concealment must actually influence the

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other party's consent; a deceit that does not deceive is not actionable fraud.

**7) The party acting on the representation must have suffered some loss.** It is a common rule that "there can be no fraud without damage and there can be no damage without an injury". The damage or injury may be in the form of loss of money or money's worth or in some other form.

### **Does Silence Amount to Fraud?**

Mere silence on the part of a party to the contract about certain material facts relating to the subject matter of the contract does not generally amount to fraud. The general rule is that a party to the contract is under no legal obligation to disclose the whole truth to the other party or to give him the whole information in his possession. This rule is given in **Explanation to Section 17** which says "Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud". For example, A sells by auction to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not a fraud.

However, there are two exceptions to this rule in which silence also amounts to fraud. These are as follows.

**Exception 1** – Where the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak. Such duty to speak arises in the following cases.

**i) Fiduciary relationship:** Where one party reposes trust and confidence in the other, the party must reveal the truth. For example, A sells by auction a horse to B, his daughter who has just come of age. Here, the relation between the parties are such

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that it becomes A's duty to tell B about the unsoundness of the horse.

ii) Contracts of absolute good faith: Where one party has to depend upon the good faith of the other, the other party is bound to speak. For example, in all contracts of insurance, it is the duty of the proposer to make full disclosure of all material facts to the insurance company. If an assured conceals the material facts like long illness, the insurance company can avoid the contract on the ground of fraud. Similarly, contracts of family settlements, marriage, allotment of shares, sale of immovable property, guarantee, etc. are such where full disclosure must be made.

Exception 2 – Where the silence is, in itself, equivalent to speech. Sometimes, the silence is equivalent to speech. In such cases, the silence of a person amounts to fraud. For example, A is selling his horse to B. The horse appears to be sound. Even then B says to A, "If you don't deny it, I shall assume that the horse is sound" A says nothing. Here A's silence is equivalent to speech.

What are the consequences of fraud?

When consent to a contract is induced by fraud, the contract is voidable at the option of the party whose consent was so caused as per **section 19**. In case of fraud, the aggrieved party usually has the following remedies:

1) He can rescind (cancel) the contract, but it must be done within a reasonable time. The right to avoid the contract is, however, lost in the following cases.

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- i) When the party whose consent was caused by fraudulent silence had the means of discovering the truth with ordinary diligence;
- ii) Where the party was not defrauded i.e., the party gave the consent in ignorance of fraud;
- iii) Where a party, after becoming aware of the fraud, takes a benefit under the contract or affirms it in some other way;
- iv) Where, an innocent third party, before the contract is rescind, acquires, for consideration, some interest in the property passing under the contract; or
- v) Where the parties cannot be restored to their original position.

2) If the party whose consent was not free thinks it proper to accept the contract, he may do so and insist upon its performance. The **second para of Section 19** provides that a party whose consent was caused by fraud may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true. For example, A fraudulently informs B that A's estate is free from encumbrances. B, believing the statement to the true, bought the estate. It was later discovered that the estate was subject to a mortgage. In this case, B may either avoid the contract or insist on its being carried out subject to the mortgage debt being redeemed.

3) The aggrieved party can also sue for damages. Fraud is a civil wrong. Hence, compensation can be claimed. For example, a party suffers some injury because of the unsound horse. If the fact of the unsoundness of horse was not disclosed despite enquiry, due compensation can be demanded.

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What is Misrepresentation?

The word representation means a statement of fact made by one party to the other, either before or at the time of making the contract, with regard to some matter essential for the contract, with an intention to induce the other party to enter into contract. A representation, when wrongly made, either innocently or intentionally, is called 'misrepresentation'. We know when a wrong representation is made wilfully with the intention to deceive the other party, it is called fraud. But, when it is made innocently i.e., without any intention to deceive the other party, it is termed as 'misrepresentation'. In such a situation, the party making the wrong representation honestly believes it to be true. For example, A while selling his car to B, informs him that the car runs 18 kilometers per litre of petrol. A himself believes this. Later on, B finds that the car runs only 10 kilometers per litre. This is a misrepresentation by A.

Section 18 of the Contract Act classifies acts of misrepresentation into the following three groups:

i) Positive assertion: When a person makes a positive statement of material facts honestly believing it to be true though it is false, such act amounts to misrepresentation as per **section 18(1)**. For example, A while selling his farm to B, tells him that 100 quintals of rice are produced in his farm. A honestly believes the statement to be true. Later on, it is found that the farm produces only 80 quintals of rice. Here, A has made a misrepresentation.

2) Breach of Duty: Section 18(2) says that any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone under him, by misleading another to his prejudice or to the prejudice of anyone claiming

under him, amounts to misrepresentation. In such a case, there is no intention to deceive, but party representing commits a breach of duty which he owes to the other party. A breach of duty would also exist where a party bound to disclose certain information does not do so. Such non-disclosure would also amount to misrepresentation. For example, in a life policy, the assured does not disclose the fact that he had previously suffered from some serious ailments. The non-disclosure, however, innocent it may be, would entitle the insurer to avoid the contract on the ground of misrepresentation of facts. Such a duty exists between banker and customer, landlord and tenant and all contracts of utmost good faith. Such cases can also be termed as 'constructive fraud'.

3) Inducing mistake about subject-matter: The subject matter of every agreement must clearly be understood by the concerned parties. If one of the parties, leads the other, even innocently, to commit a mistake regarding the nature or quality of the subject-matter, it is considered misrepresentation. **Section 18(3)** of the Act says when a party causes, however innocently, the other party to the agreement to make a mistake as to the substance of the thing which is the subject-matter of the contract, this is misrepresentation. In **Oceanic Steam Navigation Co. Ltd. v. Soonderdas Dhurumsey, (1890) ILR 14 Bom 241**, where A chartered a ship from B. The vessel was described in the charterparty as having a registered tonnage not exceeding 2,800 tons. It was subsequently discovered that her registered tonnage was 3,045 tons. The charterer refused to accept the vessel, and it was held that he was entitled to avoid the charterparty because the erroneous statement regarding tonnage had induced him to enter into the contract.

Essentials of Misrepresentation

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- 1) The representation should be made innocently, honestly believing it to be true and without the intention of deceiving the other party.
- 2) Misrepresentation should be of facts material to the contract. A mere expression of one's opinion is not a statement of facts.
- 3) The representation must be untrue, but the person making it should honestly believe it to be true.
- 4) The representation must be made with a view to inducing the other party to enter into contract and the other party must have acted on the faith of the representation. A party cannot complain of misrepresentation if he had the means of discovering the truth with ordinary diligence.
- 5) The false representation must have been made by one party to the contract to the other who is misled. If it is not addressed to the party who is misled, then it is not misrepresentation. In **Peek v. Gurney (1873) LR 6 HL 377**, where it was held that a person who purchases shares in the secondary market cannot sue for misrepresentation on the basis of statements contained in a prospectus issued to induce original subscriptions (allottee). Since the representation was not made for the purpose of influencing such a purchaser, no action for misrepresentation lay against the company.

### **What are the effects of Misrepresentation?**

**Section 19** of Contract Act provides that when consent to an agreement is caused by misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. Thus, the aggrieved party has the following two rights:

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a) He can rescind the contract. This right is available only in such cases where he was not in a position to discover the truth with ordinary diligence. For Example, A by misrepresentation, leads B erroneously to believe that 500 quintals of indigo are made annually at A's factory. B examines the records of the factory, which show that only 400 quintals of indigo have been produced. After this B decides to buy the factory. Here, the contract cannot be avoided by B on the ground of misrepresentation.

b) If the aggrieved party thinks it proper, he may accept the contract and insist upon its performance. He may compel the other party to put him in the position in which he would have been if the representation made had been true.

**Loss of right to rescind the contract:** We have seen that the party whose consent was caused by misrepresentation can avoid or rescind the contract. However, this right is lost in the following cases:

- i) If he could discover the truth with ordinary diligence.
- ii) If his consent is not induced by misrepresentation.
- iii) If he, after coming to know about the misrepresentation, expressly affirms the contract or acts in such a manner which shows that he has accepted it.
- iv) If, before the contract is rescinded, the third party acquires some right in the subject-matter in good faith and for some consideration.
- v) If the parties cannot be restored to their original position.

**Distinguish between Fraud and Misrepresentation.**

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Fraud and misrepresentation have many points in common. For example, in both cases a false representation is made by a party. Similarly, in both cases the contract is voidable. But there are many points of difference. These are summarised as follows:

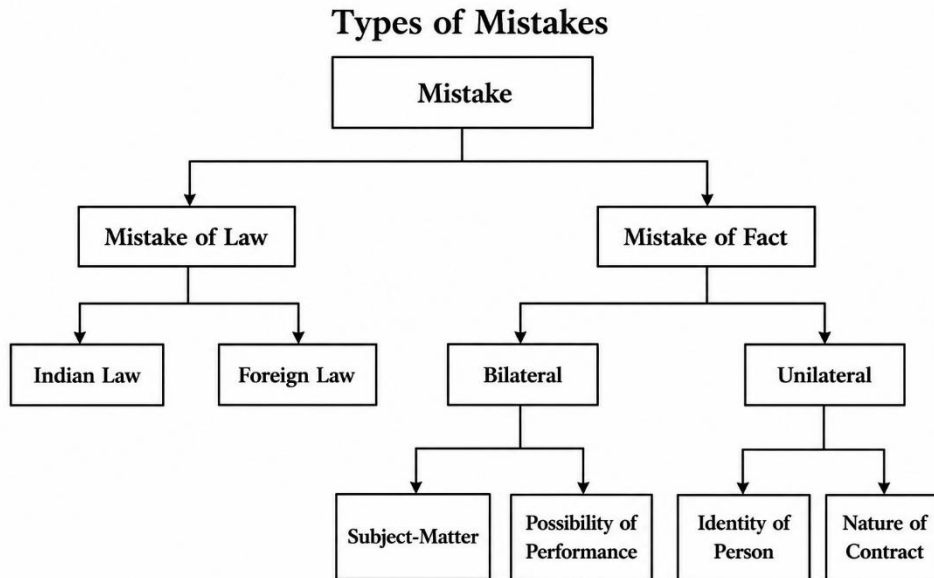
| Fraud                                                                                                                                                              | Misrepresentation                                                                                                   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|
| 1) Wrong statement is made intentionally.                                                                                                                          | Wrong statement is made innocently.                                                                                 |
| 2) The person making the wrong statement does not believe it to be true.                                                                                           | The person making the wrong statement believes it to be true.                                                       |
| 3) There is an intention to deceive.                                                                                                                               | There is no intention to deceive.                                                                                   |
| 4) Besides rescinding the contract, the aggrieved party can also claim damages.                                                                                    | The aggrieved party can rescind the contract but cannot claim damages.                                              |
| 5) Except where the silence amounts to fraud, the contract is voidable even if the party defrauded had the means of discovering the truth with ordinary diligence. | The aggrieved party cannot avoid the contract if he had the means of discovering the truth with ordinary diligence. |

**What is Mistake?**

Mistake may be defined as the erroneous belief concerning something. Whenever an agreement is made under a mistake, there is no consent, and the agreement is not valid. Broadly

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speaking, Mistake may be of two types: (1) Mistake of Law and (2) Mistake of fact. Mistake of law can be further classified into (a) mistake of Indian law, and (b) mistake of foreign law. Similarly, mistake of fact can be (a) bilateral mistake or (b) unilateral mistake.



What are mistakes of law?

As stated earlier, mistake of law may be (a) mistake of Indian Law, or (b) mistake of foreign law.

a) Mistake of Indian Law: The general rule is that mistake of law of the land is no excuse. **Section 21** lays down that a contract is not voidable because it was caused by a mistake as to any law in force in India. It is because everyone is supposed to know the law of the country and if a person does not know the law of his country, then he must suffer the consequences, Thus, a mistake of Indian law will not affect the validity of the contract. For example, A and B make a contract grounded on the erroneous belief that a particular debt is time barred by the Indian Law of limitations. This contract is valid.

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**b) Mistake of Foreign Law:** A person is supposed to know the laws of his country but he cannot be expected to know the laws of other countries. Therefore, the rule that 'ignorance of law is no excuse' cannot be applied to foreign law. A mistake of foreign law is treated as a mistake of fact. **Section 21** lays down that a mistake as to a law not in force in India has the same effect as a mistake of fact. Hence, the contract will be void, if both the parties are under a mistake as to a foreign law.

### **What are mistakes of fact?**

Mistake of fact may be classified into two groups viz., (a) Bilateral mistake, and (b) Unilateral mistake. Let us now understand the nature and effect of such mistakes.

#### **Bilateral Mistake**

When both the parties to an agreement are under a mistake of fact essential to the agreement, the mistake is known as bilateral mistake of fact. In such a situation, there is no agreement at all because there is complete absence of consent. **Section 20** of the Act provides 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. Thus, for declaring an agreement void under this section, the following two conditions must be satisfied.

**i) Both the parties must be under a mistake:** The mistake must be mutual. For example, A, having two cars, a Fiat and another Maruti, offers to sell his Fiat car to B and B not knowing that A has two cars, thinks of the Maruti car and agrees to buy it. In this case, there is no consent whatsoever. Therefore, the agreement shall be void.

**ii) Mistake must relate to an essential fact:** The mistake must relate to a matter of fact which is essential to the agreement. In

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other words, only such mistake of fact that goes to the root of the agreement, renders the agreement void. For example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void, because the mistake relates to something i.e., the horse, which is essential to the contract.

**Mistake as to value is not a mistake of fact:** Explanation to **Section 20** provides that an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not treated as mistake relating to a matter of fact. For example, A buys a painting believing it to be worth Rs. 10,000 while in fact it is worth only Rs. 2,000. The contract remains valid. A will have to blame himself for ignorance of the true value of the painting.

A bilateral mistake may be (a) mistake as to the subject-matter, or (b) mistake as to the possibility of performance.

**a) Mistake as to the subject-matter of the contract:** Where both the parties to an agreement are under a mistake relating to the subject-matter of the contract, the agreement is void. A mistake as to the subject-matter may take following forms.

**i) Mistake as to the existence of the subject-matter:** When both the parties are under a mistake regarding the existence of the subject-matter, the agreement is void. For example, A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship carrying the cargo had been cast away and the goods lost. Neither the party was aware of these facts. The agreement is void.

**ii) Mistake as to the identity of subject-matter:** Where the parties to a contract have different subject-matter in their minds

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i.e., one party had one thing in mind and the other party had another, the agreement is void because there is no consensus-ad-idem. For example, A offers to sell his old Delhi house to B. A had another house in South Delhi. B thinks he is buying the South Delhi's house. There is no agreement between A and B.

iii) Mistake as to the title of the subject-matter: Where both parties mistakenly believe that the seller has title to the property when, in fact, the buyer already possesses the title or a proprietary interest in it, the agreement is void because of a bilateral mistake relating to the title of the subject-matter. [**Cooper v. Phibbs (1867) LR 2 HL 149**]

iv) Mistake as to the quantity of the subject-matter: Where both the seller and the buyer make a mistake regarding the quantity of the subject-matter, the agreement is void. In **Henkel v. Pape (1870) LR 6 Ex 7**, P inquired about the price of rifles from H suggesting that he might buy fifty rifles. On receiving the quotation, P telegraphed "send three rifles". But because of the mistake of the telegraph authorities, the message transmitted was "send the rifles". H despatched fifty rifles. P accepted three rifles and returned the remaining forty-seven rifles. It was held that there was no contract. However, P was liable to pay for three rifles on the basis of an implied contract.

v) Mistake as to the quality of the subject-matter: If the subject-matter is something essentially different from what the parties thought it to be, the agreement is void. For example, A contracts to sell a particular horse to B. A and B believe it to be a race horse. But, it turns to be a cart horse. The agreement is void.

vi) Mistake as to the price of the subject-matter: Where there is a mutual mistake as to the price of the subject-matter, the agreement is void. For example, where a seller of certain goods

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mentioned in his letter the price as Rs. 1,250 when he really intended to write Rs. 2,250, the agreement is void. In this connection, you should remember that an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not treated as a mistake of fact.

**b) Mistake as to the possibility of performance:** If the parties to the agreement believe that the contract is capable of performance, while in fact it is not so, the agreement is treated as void on the ground of impossibility. It may be (i) a physical impossibility or (ii) a legal impossibility.

**i) Physical impossibility:** In **Griffith v. Brymer (1903) 19 TLR 434**, a room was hired for the purpose of viewing the coronation procession of King Edward VII. Unknown to both parties, the procession had already been cancelled owing to the King's illness. Since the foundation of the contract had failed, the agreement was held void.

**ii) Legal impossibility:** An agreement is void if it provides that something shall be done which cannot legally be done.

### **Unilateral Mistake**

The term 'unilateral mistake' means where only one party to the agreement is under a mistake. Generally, a unilateral mistake does not make the agreement void. According to **Section 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. If a man due to his own negligence or lack of reasonable care does not ascertain what he is contracting about, he must bear the consequences. In **Smith v. Hughes (1871) LR 6 QB 597**, the buyer mistakenly believed that the oats were old oats. Since the seller had not represented them to be old oats, the buyer's

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unilateral mistake did not affect the validity of the contract. The buyer was therefore bound by the contract.

In some cases, however, a unilateral mistake may be fundamental and may affect the character of the contract. In such a situation, the agreement is void. Thus, in the following cases, even though the mistake is unilateral, the agreement is void.

1) Mistake as to the identity of the person contracted with:

Mistake as to the identity of the person violates a contract. For example, where A intends to contract only with B, but enters into a contract with C believing him to be B, the contract is void. It should be noted that a mistake about the identity of the contracting party will render the contract void only if (a) the identity of the party is of material importance to the agreement, and (b) the other party knows that he is not intended to be a party to the agreement. The following cases illustrate this point.

In **Cundy v. Lindsay (1878) 3 App Cas 459 (HL)**, Blenkarn fraudulently induced Lindsay & Co. to believe that he was Blenkiron & Co., a reputable customer. Lindsay supplied goods which Blenkarn subsequently sold to Cundy, an innocent purchaser. It was held that Lindsay intended to contract only with Blenkiron & Co. and not with Blenkarn. Therefore, no contract existed between Lindsay and Blenkarn, and no title passed to him. Consequently, Cundy acquired no title and was required to return the goods.

In **Lake v. Simmons [1927] AC 487 (HL)**, a woman fraudulently represented herself as the wife of a wealthy Baron and obtained possession of two pearl necklaces from a jeweller on the pretext of showing them to her husband before purchase. She pledged the necklaces to a broker who advanced money in good faith. The House of Lords held that the jeweller intended to

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deal only with the person whom the woman purported to be. Accordingly, the transaction was void for mistake as to identity, no title passed to the woman, and the broker acquired no title. The necklaces had to be returned to the jeweller.

In **Said v. Butt [1920] 3 KB 497**, the plaintiff, knowing that the theatre management did not wish to admit him, obtained a ticket through a friend. When admission was refused, he sued for breach of contract. The court held that no contract existed between the plaintiff and the theatre company because the company never intended to contract with him.

**2) Mistake as to the nature of the contract:** A contract is void when one of the parties, without any fault of his own, makes a mistake as to the very nature of the contract. Thus, when a person is induced to sign a written document containing a contract fundamentally different in nature from what he thinks he is signing, the contract shall be void. In **Foster v. Mackinnon (1869) LR 4 CP 704**, where an old illiterate man was induced to sign a bill of exchange, by means of a false representation that it was a mere guarantee. Held, he is not liable for the bill as he never intended to sign a bill of exchange.

### **What are the effects of mistake?**

While discussing various types of mistakes, the effect of each type of mistake has been clearly stated. It can now be summarised as follows:

- 1. Mistake of Indian law (Section 21):** A contract is not voidable merely because it was caused by a mistake as to any law in force in India.
- 2. Mistake of foreign law (Section 21):** A mistake as to a law not in force in India is treated as a mistake of fact. Accordingly,

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if both parties are under such a mistake regarding a matter essential to the agreement, the agreement may be void.

3. Bilateral mistake of essential fact (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.

4. Unilateral mistake (Section 22): In most cases of unilateral mistake, the contract is not void. However, where the mistake negatives real consent (e.g., mistake as to identity or nature of the contract), the agreement is void.

5. Restoration of advantage (Section 65): Any person who has received an advantage under an agreement discovered to be void is bound to restore it, or to make compensation for it, to the person from whom he received it.

6. Money paid or thing delivered by mistake (Section 72): A person to whom money has been paid or anything delivered by mistake must repay or return it.

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