CHAPTER IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed

37. Obligation of parties to contracts – The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law. Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

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

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

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

Every such offer must fulfil the following conditions:—

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have areasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

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

Illustrations

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

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two night's in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night, A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

By whom contracts must be performed

40.Person by whom promise is to be performed — If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another ; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

41. Effect of accepting performance from third person — When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. Devolution of joint liabilities — When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

43. Any one of joint promisors may be compelled to perform — When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution — Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution — If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation — Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

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

(d) A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

44. Effect of release of one joint promisor — Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.

45. Devolution of joint rights — When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees, lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

Time and place for performance

46. Time for performance of promise, when no application is to be made and no time is specified — Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation — The question "what is a reasonable time" is, in each particular case, a question of fact.

47.Time and place for performance of promise, where time is specified and no application to be made — When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

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

48. Application for performance on certain day to be at proper time and place — When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation — The question "what is a proper time and place" is, in each particular case, a question of fact.

49. Place for performance of promise, where no application to be made and no place fixed for performance — When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

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

Illustrations

(a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

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

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

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

Performance of reciprocal promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform — When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

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

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery. A need not deliver, unless B is ready and willing to pay the first instalment on delivery. B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

52. Order of performance of reciprocal promises — Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

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

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

53. Liability of party preventing event on which the contract is to take effect — When a contract contains reciprocal promises, and one party to the contract prevents the other 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 non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises — When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

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

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

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

55. Effect of failure to perform at fixed time, in contract in which time is essential — When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential — If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

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

56. Agreement to do impossible act — An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful — A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful — Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.

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

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

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

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

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

Illustration

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

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

Illustration

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

Appropriation of payments

59.Application of payment where debt to be discharged is indicated — Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

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

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

60. Application of payment where debt to be discharged is not indicated — Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates — Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

Contracts which need not be performed

62. Effect of novation, rescission, and alteration of contract. — If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

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

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

63. Promisee may dispense with or remit performance of promisee — Every promisee may dispense with or remit, wholly or in part, the performance of the promisee made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

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

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under. a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

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

65. Obligation of person who has received advantage under void agreement, or contract that becomes void — When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Illustrations

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

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

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

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

66. Mode of communicating or revoking rescission of voidable contract — The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

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

Illustration

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

What is performance?

One has learnt that every valid contract creates legal obligation on both the contracting parties and this obligation continues till the contract has been actually performed or otherwise discharged. Performances of the contract is one of the various modes of discharge of the contract and this is the most natural, desired and usual mode of discharging an obligation.

The term 'performance' means that the parties to the contract have fulfilled or carried out their respective obligations arising out of the contract. For example, A contracts to sell his book to B for Rs. 50. A delivers the book and B makes the payment, the contract is discharged by performance.

Section 37 of the Indian Contract Act lays down the obligations of the parties regarding performance. It provides that, the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provision of this Act, or any other law.

What are different types of performance?

From Section 37 one can infer that the performance may be either actual or attempted.

1] Actual performance: When a party to a contract has done, what he had undertaken to do and there remains nothing to be done by him the promise is said to have been actually performed and the liability of such a party comes to an end. For example **A** who is indebted to B for Rs. 1,000, promises to repay the amount after two months. A repays the amount on the due date. This is actual performance.

2] Attempted Performance: Sometimes, when the performance becomes due, the promisor offers to perform his obligation but the promisee refuses to accept the performance. This is known as 'attempted performance' or 'tender'. For example, A promises to deliver certain goods to B. A takes the goods to the appointed place during business hours but B refuses to take the delivery of goods. Thus, A has done what he was required to do under the contract, It is, an attempted performance. In case of an attempted performance, the promisor shall not be held liable for non-performance as an attempted performance or tender is as good as performing the contract. Section 38 of the Contract Act provides that where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

What are different kinds of tender?

Tender or attempted performance can be of two types (i) tender of goods and services and (ii) tender of money.

i) Tender of goods and services: A contract to deliver goods or render some service is completely discharged when the goods are tendered for acceptance according to the terms of the contract. If the goods or services are refused, they need not be offered again and the promisor is discharged from his liability. At the same time, he may file a suit against the promisee for non-acceptance.

ii) Tender of money: Where the debtor (promisor) makes a valid tender i.e., offers to pay the amount to the creditor and the creditor refuses to accept the same, the debtor is not discharged from his liability to pay the amount. In' other words, a tender of money does not amount to discharge of the debt. The debtor continues to be liable for the payment of debt. But, the debtor will not be liable for interest from the date of a valid tender i.e., no interest shall become payable from the date of the rejection of a valid tender of money.

What are the essentials of a valid tender?

In the foregoing paragraphs we have seen that a tender of performance discharges a party from further liability. However, it is necessary that the tender must be valid. For a tender to be valid, the following conditions must be satisfied;

i) It must be unconditional: An unconditional tender is one which is in accordance with the terms of the contract. Thus, a conditional offer of performance is not a good tender and the other party is entitled to reject it. For example, A, a debtor, offered to pay B, his creditor, the amount due to him if B sells certain goods to him. It is a conditional tender and. therefore, invalid.

ii) It must be made at a proper time and place: Generally, the time and place of performance are agreed upon by the parties and the tender must be made accordingly. Thus, a tender of goods after the business hours or of goods or money before the due date is not a valid tender. For example, if the promisor wants to deliver the goods at 1 a.m., this is not a valid tender unless it was so agreed.

iii) In case of tender of goods, **it must give a reasonable opportunity to the promisee** of ascertaining that the goods offered are the same as the promisor is bound to deliver. Thus, a tender of goods at such time when the other party cannot inspect the goods, is not a valid tender.

iv) It must be for the whole obligation: A piecemeal tender of goods or to pay the amount in instalments is not a valid tender. For example. A promises to deliver 100 bags of rice on a certain day. If on the agreed day and place A offers to deliver 80 bags only. This is not a valid tender and A is not discharged from his obligation. However, a minor deviation from the terms of the contract may not render the tender invalid.

v) It must be made to the promisee or his duly authorised agent: Thus, a tender to a stranger is not valid. In case there are joint promisees, it is not necessary for the promisor to offer performance to each one of them. A tender may be made to any one of the joint promisees. Thus, a tender made to one of several joint promisees has the same legal effects as a tender to all of them.

vi) In case of payment of money, tender **must be of the exact amount due and it must be in the legal tender**. It should not be in any other form such as foreign currency or cheque. A payment by cheque is a valid tender provided the person to whom it is made is ready and willing to accept it.

What is the effect of refusal to perform promise wholly?

When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract. But, if the promisee has signified by words or conduct, his acquiescence in the continuation of the contract, he cannot terminate it. For example, A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights every week during the next two months, and B engages to pay her at the rate of Rs.100 for each night. On the sixth night A wilfully absents herself from the theatre. In such a situation, B is at liberty to put an end to the contract. If however, with the consent of B, A sings on the seventh night, B has signified his acquiescence in the continuation of the contract and, therefore, he cannot now put an end to it. Of course, B is entitled to compensation for damage sustained by him through A's failure to sing on the sixth night.

Who can demand performance?

1] Promisee: Normally, the promisee is the only person who can demand performance of the promise under a contract. A third party cannot demand performance of the contract even if it was made for his benefit. For example, A promises B to pay Rs. 500 to C. The person who can demand performance is B and not C.

2] Legal Representative: In the case of death of the promisee, his legal representative can demand performance, unless a contrary intention appears from the contract or the contract is of a personal nature. For example, A agrees to marry B. However, before marriage takes place. B dies. Since it is a contract of personal nature the legal representative of B cannot demand performance of the promise from A.

3] Third Party: In some exceptional cases, the third party can also demand performance of the contract even though he is not a party to the contract. Such cases have been discussed under the heading 'stranger to a contract'.

4] Joint Promisees: When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the performance of the promise may be demanded either (i) by all the promisees jointly; or (ii) in case of death of any of joint promisees, by the representatives of such deceased person jointly with the surviving promisees, or (iii) in case of death of all joint promisees, by representatives of all of them jointly. Thus, the right of joint promisees is only joint and any of them cannot demand performance unless it was so agreed. For example, A for a consideration of Rs. 5,000 lent to him by B and C, promises B and C jointly to repay them Rs. 5,000 plus interest on a specified day. B dies. The right to claim performance rests with B's representative jointly with C during his life time, and after C's death it would lie with the representatives of B and C jointly.

Who must perform?

Normally, the contract should be performed by the promisor himself. However, in certain cases, it can also be performed by his agents or legal representatives. It all depends upon the intention of the parties. Normally a contract can be performed by the following persons.

1] Promisor himself: If from the nature of the contract it appears that it was the intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor. This usually applies to contracts involving personal skill, taste or art work. For example, A promises to paint a picture for B. As this promise involves personal skill of A, it must be performed by A.

2] Promisor or Agent: Where the contract does not involve personal skill of the promisor, the contract could be performed by the promisor himself or by any competent person employed by him for the purpose, For example, **A** promises to pay to B a sum of money, **A** may perform this promise either by paying the money personally to B or by causing it to be paid to B by his authorised agent.

3] Legal Representatives: The contracts which do not involve any personal skill or taste, may be performed by his legal representative after the death of the promisor. For example, A promises to deliver goods to B on a certain day on payment of Rs. 2,000. A dies before the said day. A's legal representatives are liable to deliver the goods to B and B is bound to pay Rs. 2,000 to A's representatives. If, however, the contract involves some personal skill or taste, it comes to an end with the death of the promisor.

4] Third Person: In some cases, a contract may be performed by a third person provided the promisee accepts the arrangement. According to **Section 41**, once the promisee accepts the performance from a third person, he cannot compel the promisor to perform the contract again.

5] Performance of Joint Promisees: According to section 42, when two or more persons have made a joint promise, the joint promisors must fulfil the promise jointly during their life time. And if any one of them dies, then his legal representatives and survivors must jointly fulfil the promise. For example, A, B and C jointly promise to pay Rs. 3,000 to D. A dies. B and C along with A's legal representative are jointly and severally liable to pay the amount to D. This rule is called 'devolution of joint liabilities'. It is however, subject to the condition that no other intention appears from the contract. In other words, if a contrary intention appears from the contract then the rule given above shall not apply.

In case the joint promisors do not perform their promise jointly, then **Section 43** comes into operation. It provides 'When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. Thus, the liability of joint promisors is joint and several and any of the joint promisors can be compelled to perform. For example, A, B and C jointly promised to pay Rs. 3,000 to D. In this case D may compel either A, or B or C to pay the entire amount of Rs. 3,000.

Section 43 further provides that unless a contrary intention appears from the contract, each joint promisor may compel every other joint promisor to contribute equally to the performance of the promise. If any joint promisor makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. For example, A, B and C jointly promise to pay D Rs. 3,000. C is compelled to pay the whole amount, A is insolvent but his assets are sufficient to pay one half of his debts. C is entitled to receive Rs. 500 from A's estate and Rs. 1,250 from B.

In the above example if nothing could be recovered from A's estate, then C is entitled to recover Rs. 1,500 from B i.e., the loss of A shall be shared by B and C equally. It should be noted that when a promisee releases one of the joint promisors it does not discharge the other joint promisor or promisors. This means that the remaining joint promisors continue to be liable to pay the amount. The released joint promisor remains liable to contribute to the other joint promisors (**section 44**).

For example, A, B and C jointly promise to pay Rs. 3,000 to D. D releases A from liability, this release of A does not discharge B and C from their liability. If D recovers the entire amount from C, he can claim contribution from A and B.

What is the time and place for performance?

It is for the parties to a contract to decide the time and place for the performance of the contract. The rules regarding the time and place of performance are given in **sections 46 to 50** of the Contract Act. These are as follows:

1] Performance of a promise within a reasonable time: According to **section 46** where the time for performance is not specified in the contract, and the promisor himself has to perform the promise without being asked for by the promisee, the contract must be performed within a reasonable time. The question 'what is a reasonable time' is, in each particular case, a question of fact. Thus, it is clear from this provision that if time for performance is not stated, the contract is not bad for want of certainty.

2] Performance of promise where time is specified: Sometimes, the time for performance is specified in the contract and the promisor has undertaken to perform it without any application or request by the promisee. In such cases, the promisor must perform his promise on that particular day during the usual hours of business and at a place where the promise ought to be performed (**section 47**). For example, A promises to deliver goods at B's warehouse on January 1, 1990. On that day

A brings the goods to B's warehouse, but after the usual hours of closing, and they are not received. A's performance is not valid.

3] Performance of promise on an application by the Promisee: It may also happen that the day for the performance of the promise is specified in the contract but the promisor has not undertaken to perform it without application or demand by the promisee. In such cases, the promisee must apply for performance at a proper place and within the usual hours of business (**Section 48**)

4] Performance of promise where no place is specified and also no application is to be made by promisee: When a promise is to be performed without application or demand by the promisee, and no place is specified for performance, then it is the duty of the promisor to apply or ask the promisee to fix a reasonable place for the performance of the promise and to perform it at such place (**Section 49**). For example, A undertakes to deliver 1,000 kilos of jute to B on a fixed day. A must apply to B to fix a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

5] Performance of promise in the manner and time prescribed or sanctioned by promisee: Sometimes the promisee himself prescribes the manner and the time of performance. In such cases, the promise must be performed in the manner and at the time prescribed by the promisee. The promisor shall be discharged from his liability if he performs the promise in the manner and time prescribed by the promisee (**Section 50**).

Examples

i) B owes A Rs. 2,000. A desires B to pay the amount to A's account with C, a banker. B, who also has an account with Bank C, orders the amount to be transferred to A's credit and this is done by the banker. Afterwards, and before A knows of the transfer, the Bank C fails. There has been a good payment by B and he is discharged from his obligation.

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

Time as the essence of the contract

The term 'time as the essence of the contract' means that the time is an essential factor and the concerned parties must perform their respective promises within the specified time. Now the question arises that if one of the parties fail to perform his promise in time then can the other party rescind the contract? This can be answered by finding out whether time was or was not the essence of the contract.

The mere fact that time is specified for the performance of a contract is not by itself sufficient to prove that time is the essence of the contract. For this we have to ascertain the real intention of the parties. Time is generally considered to be the essence of the contract in the following cases.

a) Where the parties have expressly agreed to treat it as the essence of the contract;

b) Where the delay operates as an injury to the party; and

c) Where the nature and necessity of the contract requires it to be performed within the specified time.

In mercantile contracts, unless a different intention appears from the terms of the contract, time fixed for the delivery of the goods is considered to be the essence of the contract but not the time for the payment of the price. This is so because the prices of goods keep on fluctuating so rapidly that if punctuality is not observed it may result in heavy losses. But in case of the sale of an immovable property, the time is presumed to be not the essence of the contract.

According to **Section 55 first paragraph**, where time is the essence of the contract and a party fails to perform his/her promise in time the contract becomes voidable at the option of the other party i.e., if the promisee wants he can rescind the contract. But in contracts where time is not the essence of the contract, if a party fails to perform the contract in time, then the other party cannot rescind the contract but it has the right to claim damages for delay in performance.

How is performance of reciprocal promises achieved?

We have learnt that parties to an agreement make mutual promises to do or to abstain from doing something, they are known as 'reciprocal promises'. Section 2(f) of the Contract Act defines a reciprocal promise as promises which form the consideration or part of the consideration for each other. In such cases there is an obligation on each party to perform his own promise and to accept performance of the others' promises.

Types of Reciprocal Promises

Reciprocal promises have been classified by Lord Mansfield in **Jones v. Barkley (1781) 99 ER 434** in the following three categories:

a) Mutual and independent: When each party must perform his part of the promise independently without waiting for the performance or readiness to performance by the other party, the promises are called mutual and independent.

b) Conditional and dependent: When the performance of one party depends on the prior performance of the other party, the promises are called conditional and dependent.

c) Mutual and concurrent: When the parties have to perform their promises simultaneously, they are said to be mutual and concurrent.

Rules for the performance of reciprocal promises

After having learnt the meaning and types of reciprocal promises, let us now discuss the rules regarding the performance of reciprocal promises.

1] Mutual and Independent: One will notice that as it is clear from the name itself, such promises are to be performed by each party independently without waiting for the other party to perform his promise. If a party fails to keep his promise, the other party cannot excuse himself from performance on the ground of non-performance by the defaulting party. In such a situation, the aggrieved party can claim damages from the defaulting party.

2] Conditional and Dependent: In such cases, the performance of promise by one party depends on the prior performance of the promise by the other party. If the party who is liable to perform first, fails to perform it, then he cannot claim performance from the other party. Not only that, the party at fault becomes liable to pay compensation to the other party for any loss which the other party may sustain by the non-performance of the contract (**section 54**). For example, A contracts with B to execute certain building work for a fixed price. B is to supply the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber. So, the work cannot be executed. A need not execute the work and B will be bound to make compensation to A for any loss caused to him by the non-performance of the contract.

3] Mutual and Concurrent: Section 51 lays down the rule by saying that when reciprocal promises are to be performed simultaneously, a promisor need not perform his part unless the promisee is ready and willing to perform his part. For example, A and B agree that A shall deliver goods to B to be paid for by B on delivery. In this case, A need not deliver the goods unless B is ready and willing to pay for the goods on delivery; and B need not pay for the goods unless A is ready and willing to deliver them on payment.

Order of performance of reciprocal promises

Sometimes a problem arises, with regard to the order in which reciprocal promises are to be performed. In this connection **section 52** of Contract Act provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. For example, A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

Effects of preventing the performance of reciprocal promises

Sometimes it may so happen that one party to a reciprocal promise prevents the other from performing his promise, in such a situation, the contract becomes voidable at the option of the party so prevented, and he is also entitled to claim compensation from the other party for any loss suffered due to non-performance of the contract. For example, A and B contracted that B shall execute certain work for A for Rs. 1,000. B was ready and willing to execute the work accordingly. But, A prevents him from doing so. The contract is voidable at the option of B and if he decides to rescind it, he is entitled to recover from A compensation for any loss which he has incurred due to its non-performance.

What is assignment of contracts?

Assignment of contract means transfer of rights and liabilities arising out of a contract to a third party. Actually, there are no specific provisions in the Contract Act dealing with assignment it is a term used in the Transfer of Property Act 1882.

We have already learnt that contracts involving personal skill or taste or ability must be performed by the promisor himself as required **under section 40 of the Contract Act**. In other words, such contracts cannot be assigned. But where the contract is not of a personal nature, it can be assigned subject to certain conditions.

Now let us see how the contract can be assigned? Contracts can be assigned in two ways: (a) By the act of parties and (b) by operation of law.

a) **Assignment by act of parties:** This means that the parties themselves make the assignment. The rules in this regard are as under:

i) The liabilities or obligations under a contract cannot be assigned. It means that the promisor cannot compel the promisee to accept some other person as the promisor in his place. For example, A owes B Rs. 500 and A is also to recover Rs. 500 from P. A cannot compel B to recover the money from P.

But the promisor may transfer his liability to a third person with the consent of the promisee and the transferee. In the example given above, A can transfer his liability to P with the consent of B and P. This is technically known as 'novation' under **section 62 of the Contract Act.**

ii) If the contract does not expressly or impliedly provide that the contract shall be performed by the promisor only, the parties can decide that the performance be done by another competent person. But even then, the promisor remains liable to the promisee for proper performance.

iii) The rights and benefits under a contract, which is not of a personal nature, can be assigned. For example, A owes B Rs. 1,000. B may assign his right to C. But in such a situation the assignee takes assignment subject to all equities between the original parties. In the above example if A has already paid a portion of the debt to B, he will be liable to pay to C a correspondingly less amount.

iv) An actionable claim can always be assigned. But this must be done by an instrument in writing as required **under section 130 of the Transfer of Property Act 1882**. It is also necessary that a notice of assignment has been given to the debtor. An actionable claim is a claim to any debt (except a secured debt) or to any beneficial interest in movable property. Examples of actionable claims are book debts, money debts, right of action arising out of a contract etc.

b) Assignment by operation of Law: Contracts which are not of a personal nature get assigned due to operation of law. Assignment by operation of law takes place in cases of death or insolvency of any party to the contract. Upon the death of a party to the contract his rights and obligations under contracts automatically pass on to his heirs or legal representatives as provided in **section 37 of the Contract Act**. In case of insolvency, all the rights and obligations pass on to the official Receiver or Assignee.

How is appropriation of payment made?

The term 'appropriation of payment' means the application of payment. When a debtor owes several distinct debts to one creditor and makes a payment to the creditor which is insufficient to discharge all the debts, a problem may arise as to which particular debt, should the payment be applied. In some cases, the debtor may himself expressly point out to which particular debt the payment be applied, while in others the circumstances may indicate the debt to which the payment is to be applied. But the difficulty arises when neither there is an express indicating nor can it be implied from circumstances. In India, the rules regarding appropriation of payments are given in **sections 59 to 61**. These rules are as follows:

1] Where there is an express or implied intimation by the debtor (Section 59): A debtor has the right to instruct his creditor to which particular debt the payment is to be applied. If the creditor accepts the payment, he is duty bound to follow the instructions. If the debtor expressly informs the creditor while making payment that the payment be applied to a particular debt, the creditor must do so. But if there is no express intimation by the debt then the intention should be seen from the circumstances of the case. Let us now explain this rule by the following two examples:

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

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

One should note that if the creditor does not want to apply the payment as per the express or implied instructions of the debtor, he must refuse to accept the payment. In no case the creditor can alter the appropriation after accepting the payment.

2] Where there is no express or implied intimation: If, while making the payment, the debtor does not intimate and there are no circumstances indicating to which debt the payment is to be applied, then the creditor has the option to apply the payment to any lawful debt due from the debtor. The amount, in such a case, can be applied even to a debt which has become time-barred. However, it cannot be applied to a disputed debt. But, once an appropriation has been made by the creditor and the debtor is informed, he creditor cannot change his option later on.

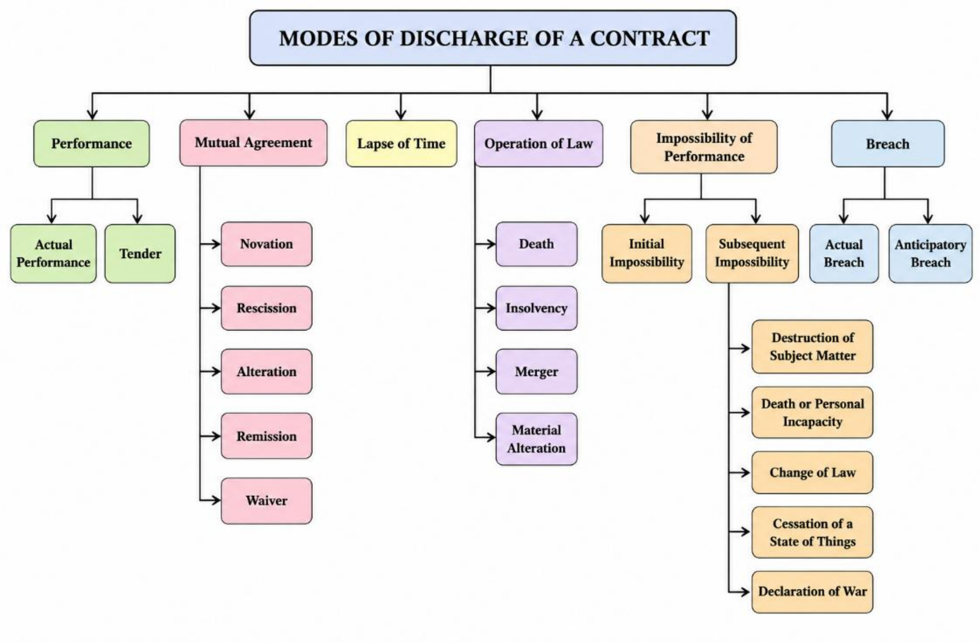
3] Where neither party appropriates: Where neither the debtor nor the creditor makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether or not they are time-barred. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately. It should be noted that where moneys are received by the creditor without any definite appropriation on either side, the money so received must first be applied in payment of interest and then in payment of principal.

What are the different modes of discharge of a contract?

We have learnt that a valid contract creates certain obligations for the contracting parties and the parties become liable to fulfil their respective promises. When such promises are performed, the contract is said to be discharged. The term 'discharge of a contract' means that the parties to it are no more liable under the contract. The most obvious or desirable method of discharge of a contract is to perform it. We have discussed the various rules regarding the performance in the foregoing pages. Let us now have some idea about the other modes of discharge of a contract.

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

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



Discharge by Performance

The most obvious or natural mode of discharge of a contract is by performance. The performance may be either actual or an attempted one. We have learnt about the performance above.

Discharge by Mutual Agreement

Just as a contract is created by means of an agreement, it can be terminated or discharged by mutual agreement. If the parties to a contract agree to make a fresh contract in place of the original contract, the original contract is discharged. A contract can be discharged by mutual agreement in any of the following ways.

a) Novation: The term 'novation' means the substitution of a new contract for the existing one. This arrangement may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the original contract. Since novation implies a new contract, all the parties to the existing contract must agree to it. [**Section 62**]

Examples

i) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is discharged, and a new debt from C to B has been contracted. This is novation involving change of parties.

ii) A owes B Rs. 10,000. A enters into an agreement with B and gives B a mortgage of his estate for Rs. 5,000 in place of the debt of Rs. 10,000. This arrangement constitutes a new contract and terminates the old.

b) Rescission: Rescission means cancellation of the contract. If by mutual agreement the contracting parties agree to rescind the contract, the contract is discharged. A contract can be rescinded before the performance becomes due. Non-performance of a contract by both the parties for a long period, without complaint, amounts to implied rescission. Rescission is different from novation in the sense that in case of novation a new contract is substituted for the original contract whereas in rescission the original contract is cancelled and no new contract is made. [**Section 62**]

c) Alteration: It means a change in one or more of the terms of a contract with consent of all the parties. Alteration has the effect of terminating the original contract. In an alteration there is a change in the terms of a contract but no change of parties to it. In novation there may be change of parties. [**Section 62**]

d) Remission: It means the acceptance of a lesser sum than what was contracted for or a lesser fulfilment of the promise made. According to **section 63**, every promisee may (a) remit or dispense with it, wholly or in part, or (b) extend the time of performance, or (c) accept any other satisfaction instead of performance. A owes B Rs. 5,000. A pays to B Rs. 3,000 who accepts it in full satisfaction of the debt. The whole debt is discharged.

e) Waiver: Waiver means abandonment or intentional relinquishment of a right under the contract. When a party waives his rights under it,, the other party is released from his obligation. For example, A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise. [**Section 63**]

Discharge by Lapse of Time

The rights and obligations under a contract can be enforced only within a specified period called the 'period of limitation'. The Limitation Act has prescribed the period of limitation for various contracts. For example, period of limitation for exercising right to recover an immovable property is twelve years and right to recover a debt is three years. After the expiry of this limitation period, the contractual rights cannot be enforced. In other words, if a debt is not recovered within three years of its payment becoming due, the debt becomes time barred and is discharged by lapse of time.

Discharge by Operation of Law

A contract may be discharged by operation of law in the following cases.

i) Death of the Promisor: Contracts involving the personal skill or ability of the promisor come to an end with the death of the promisor.

ii) Insolvency: When a person is declared insolvent by an Insolvency Court, he is discharged from his obligation existing at that time. So, if a promisor is declared insolvent, he is discharged from his liability.

iii) Merger: When an inferior right accounting to a party in a contract merges into the superior rights accruing to the same party, the earlier contract is discharged. For example, A took a land on lease from B. Subsequently, A purchases that very land. Now A becomes the owner of the land and the earlier contract of lease stands terminated.

iv) Material alteration: In a written contract if any party makes some material alteration in the terms of the contract without the approval of the other party, the contract stands terminated. A material alteration is one which varies the rights, liabilities or the position of the parties as such, one should note that immaterial alterations, such as correcting the clerical errors or the spelling of a name has no effect on the validity of the contract.

Discharge by Impossibility of Performance

We have learnt earlier that for a contract to be valid it must be capable of being performed. But sometimes, due to some reasons which are beyond the control of the parties, the performance of a contract becomes impossible. In such cases, the contract is discharged on the ground of impossibility of performance. **Section 56** of Contract Act provides that an agreement to do an act impossible in itself is void. This rule is based on the principle that law does not recognise the impossible and what is impossible does not create any obligations.

Impossibility may be of two types: (i) initial and (ii) subsequent.

Initial impossibility: It means impossibility at the time of making the contract. Whether the fact of impossibility is known or unknown to the parties, the agreement is void ab-initio. For example A agrees with B to discover a treasure by magic. The agreement is void due to initial impossibility.

If, however, the promisor alone knows about the initial impossibility while making the contract, he shall have to compensate the promisee for any loss which the promisee may suffer on account of non-performance. This rule is given in **Para 3 of section 56**. For example, A contracts to marry B, being already married to C. Being forbidden by the law of which he is subject to practise polygamy, A must compensate B for the loss caused to her by the non-performance of the contract on account of impossibility.

One should note that where initial impossibility is unknown to both the parties, the contract will become void because of mutual mistake of fact. For example, A agrees to sell his horse to B for Rs. 1000. Unknown to both the parties, the horse was dead at the time of making the agreement. This agreement is void.

Subsequent or Supervening Impossibility: Impossibility which arises subsequent to the making of the contract is called supervening impossibility. If the contract was capable of performance at the time of making it, but subsequently because of some event (over which neither party has any control) the performance becomes impossible or unlawful, the contract becomes void and the parties are discharged from their obligations.

One will notice that supervening impossibility is different from initial impossibility. In case of initial impossibility, the agreement is void ab-initio while in case of supervening impossibility the contract becomes void.

Discharge by Breach

We have learnt that when a contract is made, the parties to it are expected to perform it, unless they are excused. If any party refuses or fails to perform his part of the contract, a breach of contract occurs and the contract is discharged. In case of breach the aggrieved party is relieved from performing his obligation and gets a right to proceed against the party at fault. A breach of contract may arise in two ways: (i) actual breach and (ii) anticipatory breach.

Actual Breach: Actual breach of contract may take place either on the due date of performance or during the course of performance. For example, A agreed to deliver 100 bags of rice to B at a certain price on 10th July. If A refuses or fails to deliver the goods on time, there occurs an actual breach. If the promisor has performed part of the contract and then refuses or fails to deliver the remaining goods, it is also actual breach of contract.

Anticipatory Breach: Anticipatory breach occurs when the party declares his intention of not performing the contract before the performance is due. This intention may be declared expressly or impliedly. For example, A agrees to supply certain goods to B on 10th July. Before this date A informs B that he shall not supply the goods. If, instead of expressly informing B about his intention of not performing the contract, A does something which makes it impossible for him to perform, this will also amount to anticipatory breach. If in the example given above, A sells all the goods before the said date to P at a higher price, this action of A clearly indicates his intention.

Thus, a breach of contract operates a discharge of contract. In case of breach, the aggrieved party gets the right to claim compensation or damages from the defaulter. The various remedies available to the aggrieved party shall be discussed in unit 8.

What is supervening impossibility (doctrine of frustration)?

The doctrine of supervening impossibility is contained in **Para 2 of Sec. 56** which provides that a contract to do an act which, after the contract is made, becomes impossible or unlawful by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful.

The contract will become void on the ground of supervening impossibility only if the following conditions are satisfied.

a) The act should have become impossible.

b) The impossibility should be by reason of some event which the promisor could not prevent.

c) The impossibility should not be self-induced by the promisor.

The performance of a contract may become subsequently impossible due to any of the following reasons.

1] Destruction of Subject-Matter: If the subject-matter of a contract is destroyed after the formation of the contract, without the fault of either party, the contract becomes void.

Examples

i) A musical hall was agreed to be let out on certain dates, but before those dates the hall was destroyed by fire. The contract was held to have become void on the ground of impossibility of performance [**Taylor v. Caldwell (1863) 122 ER 309**].

ii) A person agreed to deliver a part of a specific crop of potatoes. The potatoes were destroyed by a pest through no fault of the party. The contract was held to be discharged [**Howell v. Coupland (1876) 1 QBD 258**].

2] Death or personal incapacity: When the performance of a contract depends upon the personal skill or ability of a party, the contract stands discharged on the death or incapacity of that person. For example, A agreed to perform at a concert on a specified day. A fell seriously ill and so could not perform on the said day. It was held that the contract is discharged on the ground of impossibility [**Robinson v. Davison (1871) LR 6 Ex 269**].

3] Change of Law: A contract which was lawful at the time of making it but becomes unlawful by reasons of subsequent change in law, the performance becomes impossible and the contract is discharged.

Examples

i) A agreed to transport certain goods belonging to B from one place to another. Subsequently, A's trucks were requisitioned by the Government under a statutory power. It was held that A was discharged from his obligation (**Noor Bux v. Kalyan AIR 1945 Nag 189**).

ii) A agreed to sell his land to B. Subsequently, the land was acquired by the Government. Now A cannot perform his promise, the contract was held to become void on the ground of impossibility.

4] Cessation of a state of things: If a contract is entered into on the basis of the continued existence or occurrence of a particular state of things, the contract is discharged if the state of things ceases to exist or changes. It should be noted carefully that the contract is discharged only when the happening of the event was the basis of the contract,

Examples

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

ii) A took a room on hire in a hotel for viewing the coronation procession of King Edward VII. Because of King's illness the procession was cancelled. It was held that A was not liable to pay the room rent because the very purpose of hiring the room was defeated (**Krell v. Henry (1903) 2 KB 740**). This is a classic example of frustration of contract, where the common purpose underlying the agreement is defeated.

Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44, is the leading authority on the doctrine of frustration of contract under Section 56 of the Indian Contract Act, 1872. The Court held that impossibility under Section 56 includes not only physical impossibility but also situations where a supervening event destroys the foundation or purpose of the contract.

5] Declaration of War: If a war is declared subsequent to the formation of the contract, all pending contracts are either suspended or declared as void. If the war is of a short duration, such contracts may be revived after the end of the war. For example, A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared.

Exceptions i.e., cases not covered by supervening impossibility

The above rule is not applicable in some cases. When a person has promised do something, he must fulfil his promise unless the performance becomes absolutely impossible. Impossibility of performance is, as a rule, not an excuse from performance. Some of the cases which do not come within the principle of supervening impossibility are as follows:

a) Difficulty of Performance: The contract is not discharged simply because the performance has become more difficult, more expensive or less profitable than stipulated at the time of its formation.

Examples

i) A agreed to supply coal within certain period. Due to government's restrictions on the transport of coal from collieries, he failed to supply in time. But since coal was available in the open market from where A could have obtained it, A will not be discharged on the ground of impossibility.

ii) A promised to send certain goods from Bombay to Antwerp in September. In August, war broke out and shipping space was not available except at very high rates. It was held that the increase of freight rates did not excuse performance.

b) Commercial Impossibility: Performance cannot be excused on the ground of commercial impossibility. If the raw material is available at a very high rate or wages have gone up and the performance becomes less profitable than anticipated, the contract does not become void. Commercial impossibility does not discharge the parties. For example, A agreed to supply certain goods to B. As a result of an increase in the cost of raw material and wage bill, it is now no longer profitable for A to supply the goods at the agreed rate, A cannot be excused for non-performance,

c) Default of a Third Party: If the contract cannot be performed because of the default of a third person on whose work the promisor relied, the promisor is not discharged. For example, A entered into a contract with B for the supply of certain cotton goods to be manufactured by C, a manufacturer of these goods. C did not manufacture those goods. A is not discharged from his obligation and is liable to B for damages.

d) Strikes, Lockouts and Civil Disturbances: A strike by the workers or a lockout by the employer or riots etc. will not excuse the parties from performing the contract unless there is a clause in the contract to that effect. For example, a contract was entered into between two merchants for the sale of certain goods which were to be imported from Algeria. The goods could not be imported because of riots and civil disturbances in that country. It was held that this was no excuse for non-performance of the contract.

e) Partial Impossibility: If the contract is made for several purposes, the failure of one or more of them does not discharge the contract. For example, A agreed to let a boat to H to (i) view the naval review at the coronation of King, and (ii) to cruise round the fleet. Due to the illness of the King, the naval review was cancelled, but the fleet was assembled and the boat could have been used to cruise round the fleet. It was held that the contract was not discharged. [**Herne Bay Steam Boat Co. v. Hutton (1903 2 KB 683)**]

Effects of Supervening Impossibility

a) Contract becomes void: When the performance of a contract becomes subsequently impossible or unlawful, the contract becomes void (section 56 para 2).

b) Compensation for Non-performance: When the promisor alone knows that the performance is impossible or unlawful, he must compensate the promisee for any loss which he might have suffered on account of non-performance (section 56 para 3).

c) Benefit to be Restored: When a contract becomes void, any person who has received any advantage under such contract is bound to restore it, or to make compensation for it, to the person from whom he received it (section 65). For example, A contracts to sing for B at a concert for Rs. 1,000, which is paid in advance, A is too ill to sing. A must refund the advance of Rs. 1,000 to B.