THE INDIAN CONTRACT ACT, 1872

Introduction to Contracts Act:

The law relating to contract is governed by the Indian Contract Act, 1872 (Act No. IX of 1872). The preamble to the Act says that it is an Act "to define and amend certain parts of the law relating to contract". It extends to the whole of India except the State of Jammu and Kashmir.

The Act mostly deals with the general principles and rules governing contracts. The Act is divisible into two parts. The first part (Section 1-75) deals with the general principles of the law of contract, and therefore applies to all contracts irrespective of their nature. The second part (Sections 124-238) deals with certain special kinds of contracts, e.g., Indemnity and guarantee, bailment, pledge, and agency.

Various writers' ad authors have defined the term contract in the following manner:

1. "A contract is an agreement creating and defining obligations between the parties". -***Salmond***

2. "A contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others".
- ***Anson***

3. "Every agreement and promise enforceable at law is a contract". - ***Sir Fredrick Pollock***

The Indian Contract Act has defined contract in Section 2(h) as "an agreement enforceable by law".

These definitions resolve themselves into two distinct parts. First, there must be an agreement. Secondly, such an agreement must be enforceable by law. To be enforceable, an agreement must be coupled with an obligation.

A contract therefore, is a combination of the two elements:

(1) An agreement and

.

(2) An obligation.

Agreement

An agreement occurs when two minds meet upon a common purpose, which mean the same thing in the same sense at the same time. The meeting of the minds is called *consensus-ad-idem,* i.e., consent to the matter. Section 2(e) of the Indian Contract Act provides that "every promise and every set of promises forming the consideration for each other is an agreement."

Obligation:

An obligation is the legal duty to do or abstain from doing what one has promised to do or abstain from doing. A contractual obligation arises from a bargain between the parties to the agreement who are called the promisor and the promisee. Section 2(b) says that when the person to whom the proposal is made signifies his assent to it, the proposal is said to be accepted; and "a proposal when accepted becomes a promise." In broad sense, therefore, a contract is an exchange of promises by two or more persons, resulting in an obligation to do or abstain from doing a particular act, where such obligation is recognized and is enforced by law.

Rights and Obligations

Where parties have made a binding contract, they have created rights and obligations between themselves. The contractual rights and obligations are correlative, e.g., A agrees with B to sell his car for As. 10,000 to him. In this example the following rights and obligations have been created:

(i) A is under an obligation to deliver the car to B. B has a corresponding right to receive the car.

(ii) B is under and obligation to pay As. 10,000 to A. A has a resulting right to receive As. 10,000.

Agreements, which are not Contracts

Agreements in which the idea of bargain is absent and there is no intention to create legal relations are not contracts. These are:

(a) *Agreements relating to social matters:* An agreement between two persons to go together to the cinema, or for a walk, does not create a legal obligation on their part to abide by it. Similarly, if A promise to buy B a dinner and he breaks that promise A do not expect to be liable to legal penalties. There cannot be any offer and acceptance to friendliness.

(b) *Domestic arrangements between husband and wife:* In *Balfour* v. *Balfour*(1919) 2 KB 571, a husband working in Ceylone, had agreed in writing to pay a housekeeping allowance to his wife living in England. On receiving information that she was unfaithful to him, he stopped the allowance: *Held,* he was entitled to do so. This was a mere domestic arrangement with no. intention to create legally binding relations. Therefore, there was no contract.

Essential Elements of a Valid Contract

Section 10 of the Indian Contract Act, 1872 provides that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void".

The essential elements of a valid contract are:

1. Free (Genuine) **Consent** between the parties. - **C**
2. The **Capacity** of parties to contract. - **C**
3. The agreement is supported by lawful **Consideratio**n. - **C**
4. The **Object** and Consideration of the contract is legal - **O**
5. Agreements which are not expressly **Declared** void - **D**
6. **Consensus** Ad-idem.- **C**
7. **Legal** Formalities - **L**
8. An **Intention** to create legal relations. - **I**
9. Two or more **Parties**- one making an Offer and other giving acceptance. - **P**
10. The agreement is not impossible of being **Performed. -** **P**

Therefore, to form a valid contract there must be
(1) An agreement,
(2) Based on the genuine consent of the parties,
(3) Supported by consideration,
(4) Made for a lawful object, and
(5) Between the competent parties.

1. Free Consent

The basis of a contract is agreement, i.e., mutual consent. In other words, the parties should mean the something in the same sense and agree voluntarily. Not only consent is required but it must be a free consent. Consent is not free when it has been caused by coercion, undue influence, misrepresentation, fraud or mistake. These elements if present, may vitiate the contract.
When this consent is not free, the contract may turn to be void or voidable according to the nature of the flaw in consent.

i) Coercion (S.15) Committing or threatening to commit an Act forbidden by Law or Unlawful detention or threatening to detain any property, with an intention of making a person to enter into an agreement.
Simply stated, the doing of any act forbidden by the Indian Penal Code is coercion even though such an act is done in a place where the Indian Penal Code is not in force. If A at the point of a pistol asks B to execute a promissory note in his favour and B to save his life does so he can avoid this

agreement as his consent was not free. Even a threat to third-party, e.g., where A compels B to sign a document threatening to harm C, in case B does not sign would also amount to coercion.

ii) Undue Influence

Under Section 16 of the Indian Contract Act, 1872, a contract is said to be produced by undue influence "where the relations 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"
The elements of undue influence are (i) a dominant position, and (ii) the use of it to obtain an unfair advantage. Sub-section (2) of Section 16 provides that 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, e.g., minor and guardian; trustee and beneficiary; solicitor and client. There is, however, no presumption of undue influence in the relation of creditor and debtor, husband and wife (unless the wife is a parda-nishin woman) and landlord and tenant. In these cases the party has to prove that undue influence has been exercised on him, there being no presumption as to existence of undue influence.
(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 e.g., doctor and patient.
Illustration
A, a man weakened 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.

iii) Misrepresentation (Section 18)

The term "misrepresentation" is ordinarily used to indicate both "innocent misrepresentation" and "dishonest misrepresentation". Misrepresentation may, therefore, be either

(i) Innocent misrepresentation, or
(ii) Willful misrepresentation with intent to deceive.

iv) Fraud

Fraud is an untrue statement made knowingly or without belief in its truth or recklessly, carelessly, whether it be true or false with the intent to deceive. The chief ingredients of a fraud are:
(i) a false representation or assertion;
(ii) of fact (and not a mere opinion),
(iii) made with the intention that it should be acted upon,
(iv) the representation must have actually induced the other party to enter into the contract and so deceived him,
(v) the party deceived must thereby has suffrered damages, and
(vi) the statement must have been made either with the knowledge that it was false or without belief in its truth or recklessly without caring whether it was true or false.
It is immaterial whether the representation takes effect by false statement or with concealment. The party defrauded can avoid the contract and also claim damages.

v) Mistake (Sections 20 and 21)

The law believes that contracts are made to be performed. The whole structure of business depends on this as the businessmen depend on the validity of contracts. Accordingly, the law says that it will not aid anyone to evade consequences on the plea that he was mistaken.
On the other hand, the law also realises that mistakes do occur, and that these mistakes are so fundamental that there may be no contract at all. If the law recognises mistake in contract, the mistake will render the contract *void.*
Where both the parties to an agreement are under a mistake as to a matter of fact essential agreement, the agreement is void (Section 20). Such a mistake prevents the formation of any contract

at all and the Court will declare it void. For example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain though neither party was aware of the fact. The

Mistake of Law and Mistake of Fact

Mistakes are of two kinds: (i) mistake of law, and (ii) mistake of fact. If there is a mistake of law of the land, the contract is binding because everyone is deemed to have knowledge of law of the land and ignorance of law is no excuse.

If a contract is made in ignorance of private right of a party, it would be void, e.g., where A buys property which already belongs to him.

2. Capacity of the Party to Contract

In law, persons are either natural or artificial. Natural persons are human beings and artificial persons are corporations. Contractual capacity or incapacity is an incident of personality.

The general rule is that all natural persons have full capacity to make binding contracts. But the Indian Contract Act, 1872 admits an exception in the case of:

(i) Minors,
(ii) Persons of Unsound Mind
(iii) Persons disqualified by any law.

These persons are not competent to contract. Section 11 provides that every "person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. "A valid agreement requires that both the parties should understand the legal implications of their conduct. Thus both must have a mature mind. The legal yardstick to measure maturity, according to the law of contract is, that both should be major and of sound mind and if not, the law would presume that the maturity of their mind has not reached to the extent of understand the pros and cons of their acts, hence, a bar on minors and lunatics competency to contract.

The contractual capacity of a corporation depends on the manner in which it was created.

A. Minor

According to the Indian Majority Act, 1875, a minor is a person, male or female, who has not completed the age of 18 years. In case a guardian has been appointed to the minor or where the minor is under the guardianship of the Court of Wards, the person continues to be a minor until he completes his age of 21 years. According to the Indian Contract Act, no person is competent to enter into a contract who is not of the age of majority.

The following points must be kept in mind with respect to minor's contract:

(a) A minor's contract is altogether void in law, and a minor cannot bind himself by a contract. If the minor has obtained any benefit, such as money on a mortgage, he cannot be asked to repay, nor can his mortgaged property be made liable to pay.

(b) Since the contract is void *ab initio,* it cannot be ratified by the minor on attaining the age of majority.

(c) Estoppel is an important principle of the law of evidence. To explain, suppose X makes a statement to Y and intends that the latter should believe and act upon it. Later on, X cannot retract from this statement and make a new one. In otherwords, X will be estopped from denying his previous statement. But a minor can always plead minority and is not estopped from doing so even where he had produced a loan or entered into some other contract by falsely representing that he was of full age, when in reality he was a minor.

(d) A minor's *estate* is liable to pay a *reasonable price* for necessaries supplied to him or to anyone whom the minor is bound to support (Section 68 of the Act).

(e) An agreement by a minor being void, the Court will never direct specific performance of the contract.

(f) A minor can be an agent, but he cannot be a principal nor can he be a partner. He can, however, be admitted to the benefits of a partnership.

(g) Since a minor is never personally liable, he cannot be declared as an insolvent.

B. Persons of Unsound Mind

(a) Idiot: A person who suffers form permanent mental disorder is disqualified under the Indian contract act for entering into any contract.

(b) Lunatic: A person of unsound mind is a lunatic. That is to say for the purposes of making contract, a person is of unsound mind if at the time when he makes the contract, he is incapable of understanding it and of forming rational judgment as to its effect upon his interests.

(c) Drunkards: A sane man who is so drunk that he cannot understand the terms of a contract, or form a rational judgement as to its effect on his interests cannot contract while he in such a state of drunkenness.

(d) Hypnotism: A person under the influence of hypnotism is temporarily of unsound mind hence not qualified to enter into a contract.

(e) Mental Decay: Mental decay brought by old age or disease also comes within the definition.

C. Persons Disqualified by Law

(a) Alien Enemies

A person who is not an Indian citizen is an alien. An alien may be either an alien friend or a foreigner whose sovereign or State is at peace with India, has usually contractual capacity of an Indian citizen. On the declaration of war between his country and India he becomes an alien enemy. A contract with an alien enemy becomes unenforceable on the outbreak of war.

(b) Foreign Ambassadors

Foreign sovereigns and accredited representatives of foreign states, i.e., Ambassadors, High Commissioners. enjoy a special privilege in that they cannot be sued in Indian Courts, unless they voluntarily submit to the jurisdiction of the Indian Courts. Foreign Sovereign Governments can enter into contracts through agents residing in India. In such cases the agent becomes personally responsible for the performance of 'the contracts.

(c) Convicts – cannot enter into a contract while imprisoned, but only when released from prison they can enter into any contractual obligation

(d) Married Women - Cannot enter into a contract for their husbands' property, except for essential supplies, if the husband has failed to provide it.

(e) Insolvent – When not discharged, cannot sell his property with official receiver**.**

(f) Joint stock Companies

A corporation is an artificial person created by law, e.g., a company registered under the Companies Act. A corporation exists only in contemplation of law and has no physical shape or form.
The Indian Contract Act does not speak about the capacity of a corporation to enter into a contract. But if properly incorporated, it has a right to enter into a contract. There are some contracts into which a corporation cannot enter without its seal, and others not at all. A company, for instance,

cannot contract to marry. Further, its capacity and powers to contract are limited by its charter or memorandum of association. Any contract beyond such power in *ultra vires* and void.

3. Lawful Consideration

Consideration is the third essential elements of a valid contract. The requirement of consideration for the enforcement of mutual promises of parties. A mere promise is not enforceable at law.

For example, if A promises to make a gift of Rs. 500 to B, and subsequently changes his mind, B cannot succeed against A for breach of promise, as B has not given anything in return. It is only when a promise is made for something in return from the promisee, that such promise can be enforced by law against the promisor. This something in return is the consideration for the promise.

Section 2(d) of the Indian Contract Act, 1872 defines consideration thus: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise" .

The fundamental principle that consideration is essential in every contract, is laid down by both the definitions but there are some important points of difference in respect of the nature and extent of consideration and parties to it under the two systems of law:

(a) *Consideration at the desire of the promisor:* Section 2(d) of the Act begins with the statement that consideration must move at the desire or request of the promisor. This means that whatever is done must have been done at the desire of the promisor and not voluntarily or not at the desire of a third party.
Example: If A rushes to B's help whose house is on fire, there is no consideration but a voluntary act. But if A goes to B's help at B's request, there is good consideration as B did not wish to do the act voluntarily.

(b) *Consideration may move from the promisee or any other person:*
In Indian Contract Act it is acceptable if consideration moves from the promisee or any other person.

Rules Governing Consideration
(a) Every simple contact must be supported by valuable consideration otherwise it is formally void subject to some exceptions.
(b) Consideration may be an act of abstinence or promise.
(c) There must be mutuality i.e. each party must do or agree to do something.
(d) Consideration must be real, and not vague, indefinite, or illusory, e;g., a son's promise to "stop being a nuisance" to his father, being vague, is no consideration.
(e) Although consideration must have some value, it need not be adequate i.e. a full return for the promise.
(f) Consideration must be lawful, e.g., it must not be some illegal act such as paying someone to commit a crime. If the consideration is unlawful, the agreement is void.
(g) Consideration must be something more than the promisee is already bound to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration. For example, if a seaman deserts his ship so breaking his contract of service and is induced to return to his duty by the promise for extra wages, he cannot later sue for the extra wages since he has only done what he had already contracted for: *Stilk* v. *Myrick* (1809).

Exceptions to the Rule of No Consideration-No Contract

The general rule is that an agreement made without consideration is void. But Section 25 of the Indian Contract Act lays down certain exceptions which make a promise without consideration valid and binding. Thus, an agreement without consideration is valid:

1. If it is expressed in writing and registered and is made out of natural love and affection between parties standing in a near relation to each other; or
2. If it is made to compensate a person who has already done something voluntarily for the promisor.
3. If it is a promise in writing and signed by the person or by his agent, to pay a debt barred by the law of limitation.
4. Besides, according to Section 185 of the Indian Contract Act, consideration is not required to create an agency.
5. In the case of gift actually made, no consideration is necessary. There need not be nearness of relation and even if it is, there need not be any natural love and affection between them. .

4. Legality of Object & Consideration

One of the requisites of a valid contract is that the object should be lawful. Section 10 of the Indian Contract Act, 1872, provides, "All agreements are contracts if they are made by free consent of parties competent to contract fur a *lawful consideration and with* a *lawful object...* " Therefore, it follows that where the consideration or object for which an agreement is made is unlawful, it is not a contract.

Section 23 of the Indian Contract Act, 1872 provides that the consideration or object of an agreement is lawful unless it is

(i) forbidden by law; or,
(ii) it is of such nature that if permitted it would defeat the provisions of law; or
(iii) is fraudulent; or
(iv) involves or implies injury to the person or property or another; or
(v) the Court regards it an immoral or opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Examples

(i) X, Y and Z enter into an agreement for the division among them of gains acquired by them by fraud. The agreement is void as its object is unlawful.

(ii) X promises to obtain for Y an employment in the Government service and Y promises to pay Rs. 1,500 to X. The agreement is void, as the consideration for it is unlawful.

5. Expressly declared void Agreements

The last essential of a valid contract as declared by Section 10 is that it must not be one which is 'expressly declared' to be void by the Act. Thus, there arises a question, as to what are 'expressly declared' void agreements? The following agreements have been 'expressly declared', to be void by the Indian Contract Act:

1. Agreements in restraint of marriage (Sec. 26).
2. Agreements in restraint of trade (Sec. 27).
3. Agreements in restraint of legal proceedings (Sec. 28).
4. Agreements the meaning of which is uncertain (Sec. 29).

5. Agreements by way of wager (Sec. 30).
6. Agreements contingent on impossible events (Sec. 36).
7. Agreements to do impossible acts (Sec. 56).

These are discuused in details as under

1. Agreements in Restraint of Marriage:

Every individual enjoys the freedom to marry and so according to Section 26 of the Contract Act "every agreement in restraint of the marriage of any person, other than a minor, is void."

The restraint may be general or partial but the agreement is void, and therefore, an agreement agreeing not to marry at all, or a certain person, or a class of persons, or for a fixed period, is void. However, an agreement restraining the marriage of a minor is valid under the Section.

It is interesting to note that a promise to marry a particular person does not imply any restraint of marriage, and is, therefore, a valid contract.

Illustrations:

(a) A agrees with B for consideration that she will not marry C. It is a void agreement.
(b) A agrees with B that she will marry him only. It is a valid contract of marriage.

2. Agreements in Restraint of Trade:

The Constitution of India guarantees the freedom of trade and commerce to every citizen and therefore Section 27 declares "every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void." Thus no person is at liberty to deprive himself of the fruit of his labour, skill or talent, by any contracts that he enters into.

It is to be noted that whether restraint is reasonable or not, if it is in the nature of restraint of trade, the agreement is void always, subject to certain exceptions provided for statutorily.

Illustrations:

An agreement whereby one of the parties agrees to close his business in consideration of the promise by the other party to pay a certain sum of money is void, being an agreement is restraint of trade, and the amount is not recoverable, if the other party fails to pay the promised sum of money (Madhub Chander vs Raj Kumar)

3. Agreements in Restraint of Legal Proceedings:

Section 28, as amended by the Indian Contract (Amendment) Act, 1996, declares the following three kinds of agreements void:

Illustrations:

(a) An agreement by which a party is restricted absolutely from taking usual legal proceedings, in respect of any rights arising from a contract.
(b) An agreement which limits the time within which one may enforce his contract rights, without regard to the time allowed by the Limitation Act.
(c) An agreement which provides for forfeiture of any rights arising from a contract, if suit is not brought within a specified period, without regard to the time allowed by the Limitation Act.

4. Uncertain Agreements:

"Agreements, the meaning of which is not certain, or capable of being made certain, are void" (Sec. 29). Through Section 29 the law aims to ensure that the parties to a contract

should be aware of the precise nature and scope of their mutual rights and obligations under the contract. Thus, if the words used by the parties are vague or indefinite, the law cannot enforce the agreement.

Illustrations:

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

(b) A, who is a dealer in coconut oil only, agrees to sell to B "one hundred tons of oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.

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

(d) A agrees to sell to B "his white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

5. Agreement by way of Wager or Wagering Agreements :

What is a wager? Literally, the word 'wager' means an 'a bet': something stated to be lost or won on the result of a doubtful issue, and, therefore, wagering agreements are nothing but ordinary betting agreements.

Illustrations:

(a) A and B mutually agree that if it rains today A will pay B Rs 100 and if it does not rain B will pay A Rs 100

(b) C and D enter into an agreement that on tossing up a coin, if it falls head upwards C will pay D Rs 50 and if it falls tail upwards D will pay C Rs 50, these are wagering agreement and hence void.

6. Agreements Contingent on Impossible Events:

"Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made." (Sec. 36)

Illustrations:

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

(b) A agrees to pay B Rs 1,000 (as a loan) if B will marry A's daughter, C. C was dead at the time of the agreement. The agreement is void.

7. Agreements to do Impossible Acts:

"An agreement to do an act impossible in itself is void."

Illustrations:

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

(b) A agrees with B to run with a speed of 100 kilometres per hour. The agreement is void.

6. Consensus Ad Idem

Consensus ad idem means agreement in Latin and in contract law, it means that there has been a meeting of the minds of all parties involved.

Consensus ad idem in contract law means there has been a meeting of the minds of all parties involved and everyone involved has accepted the offered contractual obligations of each party. Consensus ad idem is a Latin term that means, simply, agreement. This is the

principle that's the foundation of enforceable contracts because for contracts to be enforceable, agreement or a meeting of the minds of all involved parties is required. Consensus or agreement on a contract is considered a necessary condition of a valid contract in many legal systems, under the argument that people who are not aware of or do not understand a contract cannot be held responsible for it. In a written contract, the presence of clauses spelling out the specifics of the contract is used to show that a *consensus ad idem* was reached during the development of the contract, as anyone who signs the contract should have read and understood the terms.

When people develop a contract, an offer is extended and accepted, and the terms of the offer are worked out. This is the stage where the *consensus ad idem* comes in, as the parties to the contract discuss the specifics and the details, and focus on developing a contract all are satisfied with.

Illustration

A offered to B to sell his property which he will inherit from his father both parties understood the inheritance of a different property hence it is implied that the contract lacked the *consensus ad idem.*

7. Legal Formalities

The agreement may be oral or in writing. When the agreement is in writing it must comply with all legal formalities as to attestation, registration. If the agreement does not comply with the necessary legal formalities, it cannot be enforced by law. According to the Indian contract Act, a contract to be valid, must be in writing and registered. For example, it requires that an agreement to pay a time barred debt must be in writing and an agreement to make a gift for natural love and affection must be in writing and registered to make the agreement enforceable by law which must be observed.
However as regards to legal effects, an oral contract has same weight-age as a contract in writing.

8. Intention to create Legal Relations

The seventh essential element of a valid contract is that there must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. If there is no such intention on the part of the parties, there is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship. As such they are not contracts.
There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. Agreements of a social or domestic nature do not contemplate legal relations, and as such they do not give rise to a contract. An agreement to dine at a friend's house in not an agreement intended to create legal relations and therefore is not a contract. Agreements between husband and wife also lack the intention to create legal relationship and thus do not result in contracts.

Balfour v Balfour [1919] 2 KB 571

A husband worked overseas and agreed to send maintenance payments to his wife. At the

time of the agreement the couple were happily married. The relationship later soured and the husband stopped making the payments. The wife sought to enforce the agreement.It was held by the court that, the agreement was a purely social and domestic agreement and therefore it was presumed that the parties did not intend to be legally bound.

Merritt v Merritt **[1970] 1 WLR 1211 Court of Appeal**

A husband left his wife and went to live with another woman. There was £180 left owing on the house which was jointly owned by the couple. The husband signed an agreement whereby he would pay the wife £40 per month to enable her to meet the mortgage payments and if she paid all the charges in connection with the mortgage until it was paid off he would transfer his share of the house to her. When the mortgage was fully paid she brought an action for a declaration that the house belonged to her. It was decided by the court that the agreement was binding. The Court distinguished the case of *Balfour v Balfour* on the grounds that the parties were separated. Where spouses have separated it is generally considered that they do intend to be bound by their agreements. The written agreement signed was further evidence of an intention to be bound.

9. Two or More parties (One makes an Offer and other accepts the offer)

Section 2(a) defines an offer as, "a proposal made by one person to another to do an act or abstain from doing it." The person who makes the offer is known as the promisor or offer or and the person to whom an offer is made is known as the promisee or the offeree.

An offer may require a unilateral act or acts by two or more parties. Thus if X gifts Y his horse, it is an offer of unilateral acts as Y has to do nothing or pay nothing to X in return of the gifts of X. But in case of offers of bilateral acts or requiring actions by two or more persons, then the offeree is supposed to act or respond in a specified manner. Now suppose X offers to sell his horse for Rs. 1000 to Y then here Y also is expected to pay Rs. 1000 to X. It is only the second type of offers about which we are concerend in the Indian Contract Act. Thus an offer can be analysed into two parts comprising of :

(a) a promise by the offeror, and

(b) a request to the offeree for something in return of the offer.

When the person to whom the proposal is made signifies his assent to it, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

10. Possibility of Performance:

Possibility of Performance: A valid contract must be capable of being performed, An agreement to do an impossible act is void. If the act is legally or physically impossible to perform, the agreement cannot be enforced by law.

Example:

1. "A" agrees with "B" to discover a treasure by magic, the agreement is not enforceable.
2. A and b contract to marry each other. Before the time fixed for the marriage. A goes mad. The contract becomes void.

3. 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.

4. A contracts to act a theater 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.

After going through the provisions of S.56 as stated above we find that impossibility is of two types (1) Impossibility at the time of entering into a contract, and (2) Subsequent impossibility, i.e. after the contract has taken place.

Rules for Offer and Acceptance

A. Offer

One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance. Thus, when one party (the offeror) makes a definite proposal to another party (the offeree) and/ the offeree accepts it in its entirety and without any qualification, there is a meeting of the minds of the parties, and a contract comes into being, assuming that all other elements are also present.

What is an Offer or a Proposal?

An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in- return for a promise, act or forbearance. Section 2(a) defines proposal or offer as "when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

Thus, for a valid offer, the party making it must express his willingness 'to do' or 'not to do' something. But mere expression of willingness does not constitute an offer.

For example, where 'A' tells 'B' that he desires to marry by the end of 2019, it does not constitute an offer of marriage by 'A' to 'B'. Therefore, to constitute a valid offer expression of willingness must be made to obtain the assent (acceptance) of the other. Thus, if in the above *example*, 'A' further adds, 'Will you marry me', it will constitute an offer. Thus "doing" is a positive act and "not doing", or "abstinence" is a negative act; nonetheless both these acts have the same effect in the eyes of law.

The person making the proposal or offer is called the 'promisor' or 'offeror', the person to whom the offer is made is called the 'offeree' and the person accepting the offer is called the 'promisee' or 'acceptor '.

An Offer must be distinguished from

(a) ***An invitation to treat or an invitation to make an offer:*** e.g., an auctioneer's request for bids (which are offered by the bidders), the display of goods in a shop window with prices marked upon them, or the display of priced goods in a self-service store or a shopke.eper's catalogue of prices are invitations to an offer.

(b) ***A mere statement of intention:*** e.g., an announcement of a coming auction sale. Thus a person who attended the advertised place of auction could not sue for breach of contact if the auction was cancelled *(Harris* v. *Nickerson* (1873) L.A. 8 QB 286).

(c) **A *mere communication of information in the course of negotiation:*** e.g., a statement of the price at which one is prepared to consider (negotiating the sale of piece of land *(Harvey* v. *Facey* (1893) A.C. 552).
An offer that has been communicated, properly continues as such until it lapses, or until it is revoked by the offeror, or rejected or accepted by the offeree.

B. Acceptance

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. Under Section 2(b) of the Contract Act uwhen a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise.".

Rules Governing Acceptance

A. Acceptance may be expressed i.e.by words spoken or written or implied from the conduct of the parties.
B. If a particular method of acceptance is prescribed then the offer must be accepted in the prescribed manner.
C. Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.
D. A counter offer or conditional acceptance operates as a rejection of the offer and causes it to lapse, e.g., where a horse is offered for Rs. 1,000 and the offeree counter-offers Rs. 990, the offer lapses by rejection.
E. Acceptance must be communicated to the offeror, for acceptance is complete the moment it is communicated. Where the offeree merely intended to accept but does not communicate his intention to the offeror, there is no contract. Mere mental acceptance is not enough.
F. Mere silence on the part of the offeree does not amount to acceptance. Ordinarily, the offeror cannot frame his offer in such a way as to make the silence or inaction of the offeree as an acceptance. In other words, the offeror can prescribe the mode of acceptance but not the mode of rejection.
G. If the offer is one which is to be accepted by way of some action then, no communication of acceptance to the offeror is necessary, unless communication is asked for in the offer itself.
H. Acceptance must be given within a reasonable time and before the offer lapses or is revoked. An offer becomes irrevocable by acceptance.
I. An acceptance *never* precedes an offer. There can be no acceptance of an offer which is not communicated. Similarly, performance of conditions of an offer without the knowledge of the specific offer, is no acceptance. Thus in *Lalman Shukla* v. *Gauri Duff* (1913) where a servant brought the boy without knowing of the reward, he was held not entitled to reward because he did not know about the offer.

QUASI CONTRACTS

A valid contract must contain certain essential elements, such as offer and acceptance, capacity to contract, consideration and free consent. But sometimes the law implies a promise imposing obligations on one party and conferring right in favour of the other even when there is no offer, no acceptance, no *consensus ad idem,* and in fact, there is neither agreement nor promise. Such cases are not contracts in the strict sense, but the Court recognises them as relations resembling those of contracts and enforces them as if they were contracts, hence the term ***quasi-contracts*** (i.e. resembling a contract).

Generally a contract comes into existence as a result of offer made by one party and its acceptance by the other party, with free will of both the parties. However under certain conditions even though no

will is expressed by both the parties for creating contractual relations, the law creates and enforces legal rights and obligations. Such contracts are known as Quasi Contracts. The principle behind Quasi Contracts is that a person shall not be allowed to enrich himself at the expense of another.

Section 68 to 72 of the Contract Act deals with 5 different kinds of Quasi Contracts explained below:

1. Supply of Necessaries to Incapable Person (Section 68):

If a person incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries, suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Example: A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

2. Payment by Interested Person (Section 69):
A person, who is interested in payment of money, which another is bound by law to pay, and who therefore, pays it, is entitled to be reimbursed by the other.

Example: A holds land in Bengal on a lease. B is the owner of the land. The land revenue payable by B to the government is in arrears and therefore the government advertised the land for sale to recover the dues. To prevent the sale of land A pays the arrears of land revenue. In this case B is bound to reimburse the amount to A.

3. Payment for Non-gratuitous act (Section 70):
Where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously (by his own will) and such other person enjoys the benefit thereof, the later is bound to make compensation to the former in respect of, or, to restore the thing so done or delivered.

Example: A, a tradesman, leaves his good at B's house by mistake. B treats the goods as his own and uses them. B is bound to pay for the goods.

4. Liability of Finder of Goods (Section 71):
A person who finds the goods belonging to another, and takes them into his custody is subject to same responsibility as a bailee. He must take reasonable care of the goods and keep them in sound condition and try to find out its true owner.

5. Payment of Delivery by Mistake or under Coercion (Section 72):
A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it.

Example: A and B jointly owe Rs.5,000 to C. A alone pays this amount to C. B not knowing this again pays Rs.5,000 to C. In this case C is bound to repay Rs.5,000 to B as this amount is paid to him by mistake.

Contracts with flaws

There may be the circumstances under which a contract made under these rules may still be bad, because there is a flaw, vice or error somewhere. As a result of such a flaw, the apparent agreement is not a real agreement.
Where there is no real agreement, the law has three remedies:
Firstly: The agreement may be treated as of no effect and it will then be known as void agreement.

Secondly: The law may give the party aggrieved the option of getting out of his bargain, and the contract is then known as voidable.
Thirdly: The party at fault may be compelled to pay damages to the other party.

(a) Void Agreement

A void agreement is one which is deprived of all legal effects. It cannot be enforced and offers no rights on either party. It is really not a contract at all, it is non-existent. Technically the words 'void contract' are a contradiction in terms. But the expression provides a useful label for describing the situation that arises when a 'contract' is claimed but in fact does not exist. For example, a minor's contract is void.

(b) Voidable Contract

A voidable contract is one which a party can put to an end. He can exercise his option, if his consent was not free. The contract will, however be binding, if he does not exercise his option to avoid it within a reasonable time. The consent of a party is not free and so he is entitled to avoid the contract, if he has given misrepresentation, fraud, coercion or undue influence.

(c) Illegal Agreement

An illegal agreement is one which, like the void agreement has no legal effects as between the immediate parties. Further transactions collateral to it also become tainted with illegality and are, therefore, not enforceable. Parties to an unlawful agreement cannot get any help from a Court of law, for no polluted hands shall touch the pure fountain of justice. On the other hand, a collateral transaction can be supported by a void agreement.
For example, one party may have deceived the other party, or in some other way there may be no genuine consent. Th~ parties may be labouring under a mistake, or one or both the parties may be incapable of making a contract. Again, the agreement may be illegal or physically impossible. All these are called "the *FLA WS* in contract or the *VICES* of contract".
The chief flaws in contract are:

1. Incapacity
2. Mistake
3. Misrepresentation
4. Fraud
5. Undue Influence
6. Coercion
7. Illegality
8. Impossibility.

(d) Void Agreements

The following types of agreements are void under Indian Contract Act:
(a) Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract - Section 11;
(b) Agreement made under a mistake of fact, material to the agreement on the part of the both the parties - Section 20.
(c) An agreement of which the consideration or object is unlawful - Section 23.
(d) If any part of a single consideration for one or more objects, or anyone or any part of anyone of several considerations for a single object, is unlawful, the agreement is void - Section 24.
(e) An agreement made without consideration subject to three exceptions provided to Section 25.
(f) An agreement in restraint of marriage - Section 26.
(g) An agreement in restraint of trade - Section 27.
(h) An agreement in restraint of legal proceedings - Section 28.
(i) Agreements, the meaning of which is not certain, or capable of being made certain - Section 29.
(j) Agreement by way of wager- Section 30.

(k) An agreement to enter into an agreement in the future.
(l) An agreement to do an act impossible in itself - Section 56

When contract becomes void?

An agreement not enforceable by law is *void ab initio* – Section 2(g).
A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable - Section 20)
A contract becomes void when due to some event which the promisor could not prevent, the performance of the contract becomes impossible, e.g., by destruction of the subject-matter (the physical material) of the contract after the formation of the contract.
Example:
A promises to B to sell his Horse in the month of May and the Horse dies in the month of March, the subject matter of the contract is destroyed, hence the contract becomes void.
A contract becomes void by reason of subsequent illegality.
Example :
A in India agrees to supply goods to B in Pakistan. After the formation of the contract war breaks out between India and Pakistan and the supply of goods to Pakistan is prohibited by law. The contract becomes void.

CONTINGENT CONTRACTS (Section 31)

As per Section 31, a contingent contract is a contract to do or not to do something, if some event *collateral to such contract,* does or does not happen. For example, A contracts to sell 8 10 bales of cotton for Rs. 20,000, if the ship by which they are coming returns safely. This is a contingent contract.
Contract of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

Rules regarding contingent contracts

The following rules are contained in Section 32-36:
(a) Contracts contingent upon the happening of a future uncertain event cannot be enforced by law unless and until that event has happened. If the event becomes impossible, the contract becomes void - Section 32.

Examples:

(i) A makes a contract to buy 8's house if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
(ii) A contracts to, pay B a sum of money when B marries C, C dies without being married to B. The contract becomes void.

(b) Contracts contingent upon the non-happening of an uncertain future event can be enforced when the happening of that event becomes impossible and not before - Section 33.
Example: A contracts to pay B a certain sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

(c) If a contract is contingent upon how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time or otherwise than under further contingencies
Example: A agrees to pay 8 Rs. 1,000 if 8 marries C. C marries D. The marriage of B to C must now be considered impossible although it is possible that 0 may die and C may afterwards marry B.

(d) Contracts contingent on the happening of an event within a fixed time become void if, at the expiration of the time, such event has not happened, or if, before the time fixed, such event becomes impossible
Example: A promise to pay B a sum of money if a certain ship returns with in a year. The contract

may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(e) Contracts contingent upon the non-happening of an event within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or before the time fixed has expired, if it becomes certain that such event will not happen
Example: A promises to pay B a sum of money if a certain ship does not return within the year. The contract may be enforced if the ship does not return within the year or is burnt within the year.

(f) Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not known to the parties to the agreement at the time when it is made
Example: A agrees to pay Rs. 1,000 to B if two straight lines should enclose a space. The agreement is void.

II - PERFORMANCE OF CONTRACT

Section 37 of the Act 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 the Indian Contract Act, or any other law. In case of death of the promisor before performance, the representatives of the promisor are bound to perform the promise *unless* a *contrary intention appears from the contract.*
Illustration
X promises to deliver a horse to Y on a certain day on payment of Rs 1,000. X dies before that day. X's representatives are bound to deliver the horse to Y and Y is bound is pay Rs. 1,000 to X's representatives.

Tender of Performance (Section 38)
In cases of some contracts, it is sometimes sufficient if the promisor performs his side of the contract. Then, if the performance is rejected, the promisor is discharged from further liability and may sue for the breach of contract if he so wishes. This is called discharge by tender.

Who can demand performance?
Generally speaking, a stranger to contract cannot sue and the person who can demand performance is the party to whom the promise is made. However, an assignee of the rights and benefits under a contract may demand performance by the promiser, in the same way as the assignor, (i.e the promisee) could have demanded.

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

Illustration
(a) X, a singer enters into a contract with Y, the manager of a theatre to sing at his theatres two nights in every week during the next two months, and Y engaged to pay her Rs. 100 for each nights performance. On the sixth night X wilfully absents herself form the theatre. Y is at liberty to put an end to the contract.

(b) If in the above illustration, with the assent of Y, X sings on the seventh night, Y is presumed to have signified his acquiescence in the continuance of the contract and cannot put an end to it; but is entitled to compensation for the damages sustained by him through X's failure to sing on the sixth night.

By whom contract must be performed

Under Section 40 of the Act, if it appears from the nature of the case that it was the intention of the parties to a contract that it should be performed by the promisor himself such promise must be performed by the promisor himself. In other cases, the promisor or his representative may employ a competent person to perform it.

Illustration

(a) X promises to pay Rs. 1,000 to Y. X may either personally pay the money to Y or cause it to be paid to Y by another. If X dies .before making payment, his representatives must perform the promise or employ some proper person to do so.

(b) X promises to paint a picture for Y. X must personally perform the promise.

DISCHARGE OF CONTRACTS:

Discharge of contract means termination of contractual relationship between the parties. A contract is said to be discharged when the rights and duties created by it come to an end. A contract may be discharged by any of the following ways-

1) Discharge by Performance:

When both the parties to a contract perform their respective promises, the contract is discharged by performance. The performance must be complete, precise & according to the terms of the agreement.

2) Discharge by Agreement:

A contract is the result of an agreement. In the same way a contract can also be discharged by agreement in the following ways:

Novation: Novation means forming a new contract in place of the existing contract by the same or different parties.

Example**:** Ram owes Shyam Rs.5,000 under a contract. It has been agreed between Ram, Shyam and Ghanshyam that Shyam shall henceforth accept Ghanshyam as his debtor instead of Ram. In this case the contract between Ram and Shyam is replaced by contract between Shyam and Ghanshyam.

Alteration: Alteration means change in one or more of the terms of the contract. If the parties to the contract agree to alter it, the original contract need not be performed. Alteration is valid only if it is done with the consent of all the parties.

Remission: Remission means acceptance of lesser fulfillment of the promise made.

Example: A owes B a sum of Rs.5,000. B pays A Rs.2,000, and A accepts it in full settlement. In this case the whole debt is discharged.

Rescission: Rescission of the contract takes place when all or some of the terms of the contract are cancelled. Rescission may be total or partial. Total rescission is the discharge of the entire contract whereas partial rescission is the variation of the original contract by altering only some of the terms of the contract.

3) Discharge by Lapse of Time:

According to Limitation Act, a contract should be performed within a specified period called as limitation period. If the contract is not performed, and no action is taken by the promisee within a specified time, the contract is discharged and the aggrieved party is deprived of legal remedy.

4) Discharge by Impossibility:

i) Pre-contractual Impossibility:

a) When a person has promised to so something, which at the time of entering into contract is impossible to perform, the contract is void.

b) If the fact of impossibility was known to the promisee only at the time of making of the contract then he must compensate the promisee for any loss suffered to the promisee due to non performance of the contract.

c) where at the time of making of the contract, the fact of impossibility is unknown to all the parties to the contract, the contract is void on the ground of mutual mistake.

ii) Post Contractual Impossibility:
When the contract is originally capable of being performed but later on due to change in circumstances its performance becomes impossible, the contract becomes void. It is also called as supervening impossibility. Supervening impossibility may occur in the following circumstance-
a) By destruction of the subject matter.
b) By death or disablement of the parties.
c) By change in law.
d) By declaration of war.
e) By change in the state of things.

5) Discharge by Operation of Law:
Sometimes a contract is terminated, even if the parties do not wish to terminate it. This is termination by operation of law.

Termination by operation of law may take place-
a) By Death: Where the performance of the contract depends on the personal skill, quality or qualification of the promisor, the contract is discharged on the death of the promisor.

b) By Insolvency: When a person is adjudged insolvent he is discharged from all liabilities incurred by him prior to his adjudication.

c) By Merger: Merger takes place when an inferior right of a party merges into a superior right of the same party.

d) By Unauthorised Alteration of Terms: If one party makes some alterations in the written agreement without the consent of the other party, then the other party can avoid the contract.

6) Discharge by Breach of Contract:
The breach of contract can be divided into 2 main types-
a) Actual Breach of Contract: Actual breach of contract takes place when one of the parties to a contract fails to perform his promise, when the performance is due. For example, A agrees to deliver certain goods to B on a certain date. A does not supply those goods on that date. This is actual breach of the contract.

b) Anticipatory Breach of Contract: Anticipatory breach of contract occurs when a party to the contract declares his intention of not performing the contract, before the performance is due. For example, A contracts to supply certain goods to B on 1st January. Just before this date, A informs B that he will not supply those goods. This is anticipatory breach of contract.

III- REMEDIES FOR BREACH OF CONTRACT

Where a contract is broken, the injured party has several courses of action open to him. The appropriate remedy in any case will depend upon the subject-matter of the contract and the nature of the breach.

Remedies for Breach of Contract

In case of breach of contract, the injured party may:
(a) Rescind the contract and refuse further performance of the contract
(b) Sue for damages;
(c) Sue for specific performance;
(d) Sue for an injunction to restrain the breach of a negative term; and
(e) Sue on *quantum meruit*

1. Suit for Rescission of Contract

In contract law, the term "rescission" refers to the undoing, or "unmaking" of a contract between parties. Rescission of a contract may be ordered by a court as a fair remedy in a civil lawsuit, and is intended to bring the parties as close to the same position they were in before they entered into the contract as possible. While there are a number of reasons for which a contract may be cancelled, not all contracts may be rescinded. Contract rescission requires that all parties give back any benefits they have received while the contract was in force, and be returned to their original states, as though the contract had never been formed in the first place. While some jurisdictions use the words rescission and cancellation interchangeably, others use the term rescission to refer to making something void, or for reversing a contract or a judicial decision.

2. Suit for Damages for Breach of Contract

Under Section 73 of the Indian Contract Act, when a contract has been broken, a party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage, caused to him thereby, *which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract to be likely to result from the breach of it.* Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Liquidated and Unliquidated damages: Where the contracting parties agree in advance the amount payable in the event of breach, the sum payable is called *liquidated damages.*
Where the amount of compensation claimed for a breach of contract is left to be assessed by the Court, damages claimed are called *unliquidated damages.*

3. Suit for Specific Performance

It means the actual carrying out by the parties of their contract, and in proper cases the Court will insist upon the parties carrying out this agreement. Where a party fails to perform the contract, the Court may, at its discretion, order the defendant to carry out his undertaking according to the terms of the contract. A decree for specific performance may be granted in addition to or instead of damages.
Specific performance is usually granted in contracts connected with land, e.g., purchase of a particular plot or house, or to take debentures in a company. Specific performance will not be ordered:
(a) where monetary compensation is an adequate remedy;
(b) where the Court cannot supervise the execution of the contract, e.g., a building contract;
(c) where the contract is for personal service; and
(d) where one of the parties is a minor.

4. Suit for Injunction

An injunction, is an order of a Court restraining a person from doing a particular act. It is a mode of securing the specific performance of a *negative term* of the contract, (i.e. where he is doing something

which he promises not to do), the Court may in its discretion issue an order to the defendant restraining him from doing what he promised not to do. Injunction may be prohibitory or mandatory. In prohibitory it is the order of the Court restraining the commission of a wrongful act whereas in mandatory, it restrains continuance of wrongful commission.
In *Lumley* v. *Wagner* (1852) 90 R.R. 125. W agreed to sing at L's theatre and nowhere else W, in breach of contract with L entered into a contract to sing for Z. The courts held tha although W could not be compelled to sing at L's theatre, yet she could be restrained by injunction from singing for Z.

5. Suit upon Quantum Meruit
Quantum Meruit means 'as much as earned'. It is a payment for the proportion of work that is done when work cannot be measured in terms of money. The doctrine of quantum meruit is legally applied in some cases when there is a breach of contract. It is like compensation when the performance of the work is not complete. A reasonable compensation is given to the extent that the performance has been completed. The amount of compensation is paid because further performance has been stopped either because there is a breach of contract or because an agreement is discovered to be void.

CONTRACT OF INDEMNITY AND GUARANTEE (Section '124 to 147)

Meaning of Contract of Indemnity
A contract of indemnity is a contract by which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person (Section 124). For example, A contracts to indemnify B against the consequence of any proceedings which C may take against B in respect of a certain sum of 300 rupees. This is a contract of indemnity. The contract of indemnity may be express or implied, and the later may be inferred from the circumstances of a particular case, e.g., an act done by A at the request of B. If A incurs any expenses, he can recover the same from B.
The person who promises to indemnify or make good the loss is called the indemnifier and the person whose loss is made good is called the indemnified or the indemnity holder. A contract of insurance: is an example of a contract of indemnity according to English Law. In consideration of premium the insurer promises to make good and loss suffered by the assured 00 account of the destruction by fire of his property insured against fire.
Under the Indian Contract Act, the contract of indemnity is restricted to such cases only where the loss, promised to be reimbursed, is caused by the conduct of the promisor or of any other person. The loss caused by events or accidents which do not depend on the conduct of any person, it seems, cannot be, sought to be reimbursed under a contract of indemnity,
Rights of Indemnity Holder when Sued
Under Section 125, the promisee, in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor
(1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnity applies;

(2) All costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as if it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit; and

(3) All sums which he may have paid under the terms of any compromise of any such suit,

if the compromise was not contrary to the orders. of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Meaning of Contract Guarantee

A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of is default. The person who gives the guarantee is called the Surety, the person f,or whom the guarantee is given is called the Principal Debtor; and the person to whom the guarantee is given is called the Creditor (Section 126). A guarantee' may be either oral or written, although in the English law, it must be in writing.

Illustration

A advances a loan of As. 5,000 to B and C promises to A that if B does not repay the loan, C will do so. This is a contract of guarantee. Here B is the principal debtor, A is the creditor and C is the surety or guarantor.

Like a contract of indemnity, a guarantee must also satisfy all the essential elements of a valid contract. There is, however, a special feature with regard to consideration in a contract of guarantee. The consideration received by the principal debtor is . sufficient. for surety. Section 127 provides that anything done or any promise made for the benefit of the principal debtor may be a, sufficient consideration to the surety for giving the, guarantee.

Illustration

(i) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise.

(ii) A sells and delivers goods to 8, C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so. C will pay for them in default of payment by B, A agrees to forbear as requested. This is sufficient consideration for C's promise.

Distinction between Indemnity and Guarantee

A contract of indemnity differs from a contract of guarantee in the following ways:

(a) In a contract of indemnity there are only two parties: the indemni~ier and the indemnified. In a contract of guarantee, these are three parties; the surety, the principal debtor and the creditor.

(b) In a contract of indemnity, the liability of the indemnifier is primary. In a contract of guarantee, the liability of the surety is secondary. The surety is liable only if the principal debtor makes a default, the primary liability being that of the principal debtor.

(c) The indemnifier need not necessarily act at the request of the debtor; the surety gives guarantee only' at the request of the principal debtor.

(d) In the case of a guarantee there is an existing debt or duty, the performance of which is guaranteed by the surety, whereas in the case of indemnity the possibility of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.

(e) The surety, on payment of the debt when the principal debtor has failed to pay is entitled to proceed against the principal debtor in his own right, but the indemnifier cannot sue third-parties in his own name, unless there be assignment. He must sue in the name of the indemnified.