9 INDIAN CONTRACT ACT, 1872

MEANING AND NATURE OF CONTRACT

The law relating to contract is governed by the Indian Contract Act, 1872. The Act came into force on the first day of September, 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.

As per section 2(h) of the Indian Contract Act, 1872, contract means *"an agreement enforceable by law".*

Essential elements of a valid contract

Sec. 10 of Indian Contract Act says, "All, agreements are contracts if it includes:

- Offer and Acceptance
- Intention to create legal relationship
- Lawful consideration and object
- Capacity to contract
- Free consent
- Lawful object
- Agreement not expressly declared void.
- Consensus -ad- idem i.e. meeting of minds
- Certainty of meaning
- Possibility to perform
- Legal formalities

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CHARACTERISTICS OF AN AGREEMENT

(a) ***Plurality of persons:*** There must be two or more persons to make an agreement because one person cannot enter into an agreement with himself.

(b) ***Consensus ad idem:*** The meeting of the minds is called consensus-ad-idem. It means both the parties to an agreement must agree about the subject matter of the agreement in the same sense and at the same time.

RIGHTS AND OBLIGATIONS

A agrees with B to sell his car for Rs 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 an obligation to pay Rs 10,000 to A. A has a correlative right to receive Rs 10,000.

OFFER OR PROPOSAL

As per Section 2(a) of the Indian Contract Act 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*".

The person making the proposal or offer is called the proposer or offeror and the person to whom the proposal is made is called the offeree.

Rules Governing Offers

(a) An offer must be clear, definite, complete. It must not be vague. For example, a promise to pay an increased price for a horse if it proves lucky to promisor, is vague and is not binding.

(b) An offer must be communicated to the offeree.

(c) The communication of an offer may be made by express words-oral or written-or it may be implied by conduct. A offers his car to B for Rs 10,000. It is an express offer. A bus plying on a definite route goes along the street. This is an implied

offer on the part of the owners of the bus to carry passengers at the scheduled fares for the various stages.

(d) The communication of the offer may be general or specific. Where an offer is made to a particular person or a particular group of person it is called ***specific offer*** and it can be accepted only by that particular person. But when an offer is addressed to an uncertain body of individuals i.e. the world at large, it is a ***general offer*** and can be accepted by any member of the general public by fulfilling the condition laid down in the offer.

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Carlill v. Carbolic Smoke Ball Co Case:

Facts:

(i) A co. advertised that it would give a reward of £ 100 to anyone who contracted influenza after using its smoke balls for a certain period according to printed directions.

(ii) Mrs Carlill purchased and used smoke balls as per the printed instructions, even then contracted influenza.

(iii) She claimed the reward of £100.

(iv) Co. resisted the claim on the ground that offer was not made to her and she had also not communicated her acceptance to the offer.

Decision:

She could recover the reward as she had accepted the co's offer by complying with terms.

Example:

A advertise in the newspapers that he will pay rupees one thousand to anyone who restores to him his lost son. B without knowing of this reward finds A's lost son and restore him to A. In this case since B did not know of the reward, he cannot claim it from A even though he finds A's lost son and restores him to A.

In India also, in the case of ***Harbhajan Lal v. Harcharan Lal*** (Lalman Shukla v. Gauri Dutt case), the same rule was applied. In this case, a young boy ran away from his fathers home. The father issued a pamphlet offering a reward of Rs 500 to anybody who would bring the boy home. The plaintiff saw the boy at a railway station and sent a telegram to the boys father. It was held that the handbill was an offer open to the world at large and was capable to acceptance by any person who fulfilled the conditions contained in the offer. The plaintiff substantially performed the conditions and was entitled to the reward offered.

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Cross offer

It occurs when two persons make identical offers to each other in ignorance of each other's offer. It leads to termination of the original offer.

Counter offer

Upon receipt of an offer from an offeror, if the offeree instead of accepting it, straightaway modifies or varies the offer, he is said to make a counter offer. It leads to rejection of original offer.

Standing/ Continuing / Open Offer

Offer which is made to public at large and kept open for public acceptance for a certain time period. It refers to a tender to supply goods as and when required. Each successive order given creates a separate contract. It does not binds either party unless and until such orders are given.

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AN OFFER MUST BE DISTINGUISHED FROM

(a) ***An invitation to treat or an invitation to make an offer:*** e.g., an auctioneers 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 shopkeepers 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 contract if the auction was cancelled. ***(Harris v. Nickerson)***

(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)***.

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LAPSE OF OFFER

(a) it is not accepted within the specified time (if any) or after a reasonable time, if none is specified.

(b) it is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, e.g., by sending a letter by mail when early reply was requested;

(c) the offeree rejects it by distinct refusal to accept it;

(d) either the offeror or the offeree dies before acceptance;

(e) the acceptor fails to fulfill a condition precedent to an acceptance.

(f) the offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror

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ACCEPTANCE

Under Section 2(b) of the Contract Act *when 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 express i.e. by words spoken or written or implied from the conduct of the parties.

(b) If a particular method of acceptance is prescribed, 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 ***Felthouse v. Bindley***, F offered by letter to buy his nephews horse for $ 30 saying: "If I hear no more about him I shall consider the horse is mine at $ 30". The nephew did not reply, but he told an auctioneer who was selling his horses not to sell that particular horse because it was sold to his uncle. The auctioneer inadvertently sold the horse. Held: F had no claim against the auctioneer because the horse had not been sold to him, his offer of $ 30 not having been accepted.

(g) If the offer is one which is to be accepted by being acted upon, no communication of acceptance to the offeror is necessary, unless communication is stipulated for the offer itself.

Thus, if a reward is offered for finding a lost dog, the offer is accepted by finding the dog after reading about the offer, and it is unnecessary before beginning to search for the dog to give notice of acceptance to the offeror.

(h) Acceptance must be given within a reasonable time and before the offer lapses or is revoked. An offer becomes irrevocable by acceptance.

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 Dutt (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.

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CONTRACTS BY POST

An offer by post may be accepted by post, unless the offeror indicates anything to the contrary.

CONTRACTS OVER THE TELEPHONE

- In this case, an oral offer is made and an oral acceptance is expected. It is important that the acceptance must be audible, heard and understood by the offeror.
- If during the conversation the telephone lines go "dead" and the offeror does not hear the offerees word of acceptance, there is no contract at the moment.
- If the whole conversation is repeated and the offeror hears and understands the words of acceptance, the contract is complete ***(Kanhaiyalal v Dineshwarchandra)***

COMPLETION & REVOCATION OF OFFER & ACCEPTANCE

- An offer is made only when it actually reaches the offeree and not before, i.e., when the letter containing the offer is delivered to the offeree.
- An acceptance is made as far as the offeror is concerned, as soon as the letter containing the acceptance is posted, to offerors correct address; it binds the offeror, but not the acceptor.
- An acceptance binds the acceptor only when the letter containing the acceptance reaches the offeror. The result is that the acceptor can revoke his acceptance before it reaches the offeror.
- An offer may be revoked by the offeror at any time before acceptance. Like any offer, revocation must be communicated to the offeree, as it does not take effect until it is actually communicated to the offeree.
- The revocation must reach the offeree before he sends out the acceptance.
- An offer may be revoked before the letter containing the acceptance is posted. An acceptance can be revoked before it reaches the offeror.

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AGREEMENT

As per Section 2(e) of the Indian Contract Act *"every promise and every set of promises, forming the consideration for each other, is an agreement."*

ALL AGREEMENTS ARE NOT CONTRACTS

An agreement to become a contract must give rise to legal obligation. If an agreement is incapable to be enforced by law, it remains only agreement and not contract, such as:

(a) Social Agreements

(b) Agreements without legal intention

(c) Agreements without consideration.

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INTENTION TO CREATE LEGAL RELATIONS

The second 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.

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CONSIDERATION

Consideration is identified as "quid pro quo", i.e. "something in return". 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".

It must be noted that:

- Consideration must be at the desire of the promisor
- Consideration may move from the promise or any other person

KINDS OF CONSIDERATION

- Executory or future
- Executed or present
- Past

According to English law, a consideration may be executory or executed but never past. The English law is that past consideration is no consideration. The Indian law recognizes all the above three kinds of consideration.

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PRIVITY OF CONTRACT

A stranger to a contract cannot sue both under the English and Indian law for want of privity of contract. Its only the parties to the contract, who can sue each other.

In ***Dunlop Pneumatic Tyre Co. v. Selfridge Ltd***, D supplied tyres to a wholesaler X, on condition that any retailer to whom X re-supplied the tyres should promise X, not to sell them to the public below Ds list price. X supplied tyres to S upon this condition, but nevertheless S sold the tyres below the list price. Held: There was a contract between D and X and a contract between X and S. Therefore, D could not obtain damages from S, as D had not given any consideration for Ss promise to X nor was he party to the contract between D and X.

Thus, a person who is not a party to a contract is stranger to contract and cannot sue upon it even though the contract is for his benefit.

The leading English case on the point is ***Tweddle v. Atkinson***. In this case, the father of a boy and the father of a girl who was to be married to the boy, agreed that each of them shall pay a sum of money to the boy who was to take up the new responsibilities of married life. After the demise of both the contracting parties, the boy (the husband) sued the executors of his father-in-law upon the agreement between his father-in-law and his father. Held: the suit was not maintainable as the boy was not a party to the contract.

Exception to the doctrine of privity of contract:

- A beneficiary under an agreement to create a trust can sue upon the agreement, though not a party to it.

- An assignee under an assignment made by the parties, or by the operation of law (e.g. in case of death or insolvency), can sue upon the contract for the enforcement of his rights, tittle and interest.

- In cases of family arrangements or settlements between male members of a Hindu family which provide for the maintenance or expenses for marriages of female members, the latter though not parties to the contract, possess an actual beneficial right which place them in the position of beneficiaries under the contract, and can therefore, sue.

- In case of acknowledgement of liability, e.g., where A receives money from B for paying to C, and admits to C the receipt of that amount, then A constitutes himself as the agent of C.

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.

(d) Consideration must be real, indefinite and not vague, 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.

(f) Consideration must be lawful, e.g., it must not be some illegal act such as paying someone to commit a crime.

(g) Consideration must be something more than the promisee is already bound to do for the promisor.

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WHEN CONSIDERATION NOT NECESSARY

Thus, an agreement without consideration is valid in the following cases:

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, or done something which the promisor was legally compellable to do; or
3. If it is a promise in writing and signed by the person to be charged, or by his agent, to pay a debt barred by the law of limitation.
4. Consideration is not required to create an agency.
5. In the case of gift actually made, no consideration is necessary.

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Illustrations

A, for natural love and affection, promises to give his son B Rs 10,000. A put his promise to B into writing and registered it. This is a contract.

A registered agreement between a husband and his wife to pay his earnings to her is a valid contract, as it is in writing, is registered, is between parties standing in near relation, and is for love and affection (Poonoo Bibi v. Fyaz Buksh).

But where a husband by a registered document, after referring to quarrels and disagreement between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence, it was held that the promise was unenforceable, as it was not made for love and affection (Rajluckhy Deb v. Bhootnath).

WHETHER GRATUITOUS PROMISE CAN BE ENFORCED

A gratuitous promise to subscribe to a charitable cause cannot be enforced, but if the promisee is put to some detriment as a result of his acting on the faith of the promise and the promisor knew the purpose and also knew that on the faith of the subscription an obligation might be incurred, the promisor would be bound by promise.

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TERMS MUST BE CERTAIN

The parties must agree on the terms of their contract. They must make their intentions clear in their contract. The Court will not enforce a contract the terms of which are uncertain. Thus, an agreement to agree in the future (a contract to make a contract) will not constitute a binding contract e.g., a promise to pay an actress a salary to be "mutually agreed between us" is not a contract since the salary is not yet agreed.

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CLASSIFICATION OF CONTRACT/AGREEMENT

Void Agreement

A void agreement is one which is destitute of all legal effects. It cannot be enforced and confers no rights on either party. It is 'void an initio' i.e. not exist in the eyes of law. For example an agreement without consideration is void.

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Void Contract

A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. For example throat cancer a singer refused to sing for the musical concert for which he was agreed before six month without knowing his disease. The only remedy is whatever is advanced can be restored.

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Voidable Contract

A contract which is enforceable by law at the option of one or more parties but not at the option of the other or others is a voidable contract. A contract becomes voidable when the consent of the parties are induced by coercion, undue influence, misrepresentation or fraud.

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Illegal Agreement

An agreement with an unlawful object and consideration is known as illegal agreement. The object and consideration is said to be unlawful if –

- it is forbidden by any law time being in force
- it defeats the provisions of any law
- it is fraudulent
- it is injurious to a person or property
- it is immoral
- it is opposed to public policy

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 is also consider as void agreement.

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Quasi/Implied Contract

Certain relations resembling those created by contract" are known as quasi contract. Such contracts do not involve either offer or acceptance but are still considered as contracts.

Express Contract

A contract where the proposal acceptance and conditions are made in words either written or oral is an express contract.

Tacit Contract

A contract in which offer and acceptance are expressed other than words i.e. conduct of the parties, circumstances is a tacit contract. For example to withdraw money from an ATM machine is a tacit contract.

CONTRACTUAL CAPACITY

The general rule is that all natural persons have full capacity to make binding contracts except.

- Minors
- Lunatics
- Persons disqualified by any law.

AGREEMENT WITH 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.
- It was finally laid down by the Privy Council in the leading case of Mohiri Bibi v. Dharmodas Ghose, (1903), that a minor has no capacity to contract and minors contract is absolutely void. In this case, X, a minor borrowed Rs 20,000 from Y, a money lender. As a security for the money advanced, X executed a mortgage in Y's favour. When sued by Y, the Court held that the contract by X was void and he cannot be compelled to repay the amount advanced by him.

The following points must be kept in mind with respect to minors agreement:

(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.

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(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. 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 major and competent to contract, when in reality he was a minor. But where the loan was obtained by fraudulent representation by the minor or some property was sold by him and the transactions are set aside as being void, the Court may direct the minor to restore the property to the other party.

For example, a minor fraudulently overstates his age and takes delivery of a motor car after executing a promissory note in favour of the trader for its price. The minor cannot be compelled to pay the amount to the promissory note, but the Court on equitable grounds may order the minor to return the car to the trader, if it is still with the minor.

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(d) A minors 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). However minor is not liable personally, such contracts are considered as quasi contract. The necessaries supplied must be according to the position and status in life of the minor and must be things which the minor actually needs. The following have also been held as necessaries in India. Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy; costs incurred in defending him in a prosecution; and money advanced to a Hindu minor to meet his marriage expenses have been held to be necessaries.

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(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 adjudicated as an insolvent.

(h) An agreement by a parent or guardian entered into on behalf of the minor is binding on him provided it is for his benefit or is for legal necessity. For, the guardian of a minor, may enter into contract for marriage on behalf of the minor, and such a contract would be good in law and an action for its breach would lie, if the contract is for the benefit of the minor.

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AGREEMENT BY PERSON OF UNSOUND MIND (SECTION 2)

- 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.
- A person of unsound mind cannot enter into a contract. A lunatics agreement is therefore void. But if he makes a contract when he is of sound mind, i.e., during lucid intervals, he will be bound by it.
- A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgement as to its effect on his interests cannot contract whilst such delirium or state of drunkenness lasts. A person under the influence of hypnotism is temporarily of unsound mind. Mental decay brought by old age or disease also comes within the definition.
- Agreement by persons of unsound mind are void. But for necessaries supplied to a lunatic or to any member of his family, the lunatics estate, if any, will be liable. There is no personal liability incurred by the lunatic.

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PERSONS DISQUALIFIED FROM ENTERING INTO CONTRACT

Alien Enemies

A person who is not an Indian citizen is an alien. 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.

Foreign Sovereigns and 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.

Professional Persons

In England, barristers-at law are prohibited by the etiquette of their profession from suing for their fees. So also are the Fellow and Members of the Royal College of Physicians and Surgeons. But they can sue and be sued for all claims other than their professional fees. In India, there is no such disability and a barrister, who is in the position of an advocate with liberty both to act and plead, has a right to contract and to sue for his fees.

Corporations

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. It can sue and can be sued in its own name. 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.

Married Women

In India there is no difference between a man and a woman regarding contractual capacity. A woman married or single can enter into contracts in the same ways as a man.

FREE IN 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 wanting, the contract may turn out to be void or voidable according to the nature of the flaw in consent.

COERCION

The committing or threatening to commit any act forbidden by the Indian Penal Code, or unlawful detaining or threatening to detain, any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement.

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.

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UNDUE INFLUENCE

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

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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.

(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.

Transaction with parda-nishin women

The expression 'parda-nishin denotes complete seclusion. Thus, a woman who goes to a Court and gives evidence, who fixes rents with tenants and collects rents, who communicates when necessary, in matters of business, with men other than members of her own family, could not be regarded as a parda-nishin woman (*Ismail Musafee v. Hafiz Boo*).

The principles to be applied to transactions with parda-nishin woman are founded on equity and good conscience and accordingly a person who contracts with parda-nishin woman has to prove that no undue influence was used and that she had free and independent advice, fully understood the contents of the contract and exercised her free will.

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Unconscionable transactions

An unconscionable transaction is one which makes an exorbitant profit of the others distress by a person who is in a dominant position. Merely the fact that the rate of interest is very high in a money lending transaction shall not make it unconscionable. But if the rate of interest is very exorbitant and the Court regards the transaction unconscionable, the burden of proving that no undue influence was exercised lies on the creditor.

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MISREPRESENTATION

Misrepresentation may be either

(i) Innocent misrepresentation, or

(ii) Wilful misrepresentation with intent to deceive and is called fraud.

Innocent Misrepresentation

If a person makes a representation believing what he says is true he commits innocent misrepresentation. The effect of innocent misrepresentation is that the party misled by it can avoid the contract, but cannot sue for damages in the normal circumstances.

Damages for Innocent Misrepresentation

Generally the injured party can only avoid the contract and cannot get damages for innocent misrepresentation. But in the following cases, damages are obtainable:

(a) From a promoter or director who makes innocent misrepresentation in a company prospectus inviting the public to subscribe for the shares in the company;

(b) Against an agent who commits a breach of warranty of authority;

(c) From a person who (at the Courts discretion) is estopped from denying a statement he has made where he made a positive statement intending that it should be relied upon and the innocent party did rely upon it and thereby suffered damages;

(d) Negligent representation made by one person to another between whom a confidential relationship, like that of a solicitor and client exists.

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Wilful Misrepresentation or 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.

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.

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless silence is in itself equivalent to speech, or where it is the duty of the person keeping silent to speak as in the cases of contracts uberrimae fidei

Contracts of Uberrimae Fidei

(a) ***Contract of insurance of all kinds:*** The assured must disclose to the insurer all material facts and whatever he states must be correct and truthful.

(b) ***Company prospectus:*** When a company invites the public to subscribe for its shares, it is under statutory obligation to disclose truthfully the various matters set out in the Companies Act. Any person responsible for non-disclosure of any of these matters is liable to damages.

(c) ***Contract for the sale of land:*** The vendor is under a duty to the purchaser to show good title to the land he has contracted to sell.

(d) ***Contracts of family arrangements:*** When the members of a family make agreements or arrangements for the settlement of family property, each member of the family must make full disclosure of every material fact within his knowledge.

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MISTAKE

Mistake must be a "vital operative mistake", i.e. it must be a mistake of fact which is fundamental to contract.

To be operative so as to render the contract void, the mistake must be:

(a) of fact, and not of law or opinion;

(b) the fact must be essential to agreement, i.e., so fundamental as to negative the agreement; and

(c) must be on the part of both the parties.

Thus, where both the parties to an agreement are under a mistake as to a matter of fact essential to agreement, the agreement is void (Section 20).

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 (ignorantia juris non-excusat).

But mistake of foreign law and mistake of private rights are treated as mistakes of fact and are execusable. The law of a foreign country is to be proved in Indian Courts as ordinary facts. So mistake of foreign law makes the contract void. Similarly, 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.

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Mutual or Unilateral Mistake

Mistake must be mutual or bilateral, i.e., it must be on the part of both parties. A unilateral mistake, i.e., mistake on the part of only one party, is generally of no effect unless (i) it concerns some fundamental fact and (ii) the other party is aware of the mistake. For this reason, error of judgement on the part of one of the parties has no effect and the contract will be valid.

Mutual or Common Mistake as to Subject-matter

(a) ***Mistake as to existence of the subject matter:*** Where both parties believe the subject matter of the contract to be in existence but in fact, it is not in existence at the time of making the contract, there is mistake and the contract is void.

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(b) ***Mistake as to identity of the subject matter:*** Where the parties are not in agreement to the identity of the subject matter, i.e., one means one thing and the other means another thing, the contract is void; there is no consensus ad idem.

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(c) ***Mistake as to quantity of the subject matter:*** There may be a mistake as to quantity or extent of the subject matter which will render the contract void even if the mistake was caused by the negligence of a third-party.

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(d) ***Mistake as to quality of the subject-matter or promise:*** Mistake as to quality raises difficult questions. If the mistake is on the part of both the parties the contract is void. But if the mistake is only on the part of one party difficulty arises.

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Unilateral Mistake as to Nature of the Contract

The general rule is that a person who signs an instrument is bound by its terms even if he has not read it. But a person who signs a document under a fundamental mistake as to its nature (not merely as to its contents) may have it avoided provided the mistake was due to either-

(a) the blindness, illiteracy, or senility of the person signing, or

(b) a trick or fraudulent misrepresentation as to the nature of the document.

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Unilateral Mistake as to the Identity of the Person Contracted With

When a contract is made in which personalities of the contracting parties are or may be of importance, no other person can interpose and adopt the contract. For example, where M intends to contract only with A but enters into contract with B believing him to be A, the contract is vitiated by mistake as there is no consensus ad idem.

Mistake as to the identity of the person with whom the contract is made will operate to ***nullify the contract*** only if:

(i) the identity is for material importance to the contracts; and

(ii) the mistake is known to the other person, i.e., he knows that it is not intended that he should become a party to the contract.

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IMMORAL AGREEMENTS

An agreement is illegal if its object is immoral or where its consideration is an act of sexual immorality, e.g., an agreement for future illicit co-habitation, the agreement is illegal and so unenforceable.

Where A let a taxi on hire to B, a prostitute, knowing that it was to be used for immoral purposes, it was held that A could not recover the hire charges. *(Pearce v. Brookes)*.

AGREEMENTS VOID AS BEING OPPOSED TO PUBLIC POLICY

The following agreement are void as being against public policy but they are not illegal:

(a) ***Agreement in restrain of parental rights:*** An agreement by which a party deprives himself of the custody of his child is void.

(b) ***Agreement in restraint of marriage:*** An agreement not to marry at all or not to marry any particular person or class of persons is void as it is in restraint of marriage.

(c) ***Marriage brocage or brokerage Agreements:*** An agreement to procure marriage for reward is void. Where a purohit (priest) was promised Rs 200 in consideration of procuring a wife for the defendant, the promise was held void as opposed to public policy, and the purohit could not recover the promised sum.

(d) ***Agreements in restraint of personal freedom are void:*** Where a man agreed with his money lender not to change his residence, or his employment or to part with any of his property or to incur any obligation on credit without the consent of the money lender, it was held that the agreement was void.

(e) ***Agreement in restraint of trade:*** An agreement in restraint of trade is one which seeks to restrict a person from freely exercising his trade or profession.

AGREEMENTS IN RESTRAINT OF TRADE VOID

Section 27 of the Indian Contract Act states that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is, to that extent, void.

Some restrains are personal covenants between an employer and his employee whereby the latter agrees not to compete with the former or serve with any of his competitors after employment.

This issue came before the Supreme Court in *Niranjan Shanker Golikari v. The Century Spinning and Manufacturing Co. Ltd*. In this case N entered into a bond with the company to serve for a period of five years. In case, N leaves his job earlier and joins elsewhere with companys competitor within five years, he was liable for damages. N was imparted the necessary training but he left the job and joined another company. The former employer instituted a suit against N. The Supreme Court, held that the restraint was necessary for the protection of the companys interests and not such as the Court would refuse to enforce.

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WHEN CONTRACTS IN RESTRAINT OF TRADE VALID

(a) ***Sale of goodwill:*** Where the seller of the goodwill of a business undertakes not to compete with the purchaser of the goodwill, the contract is enforceable provided the restraint appears to be reasonable as to territorial limits and the length of time.

(b) ***Partners agreements:*** Section 11(2) of the Indian Partnership Act permits contracts between partners to provide that a partner shall not carry on any business other than that of the firm while he is a partner.

(c) ***Trade Combinations:*** An agreement, the object of which is to regulate business and not to restrain it is valid. Thus, an agreement in the nature of a business combination between traders or manufactures e.g. not to sell their goods below a certain price, to pool profits or output and to divide the same in an agreed proportion does not amount to a restraint of trade and is perfectly valid *(Fraster & Co. v. Laxmi Narain)*.

(d) ***Negative stipulations in service agreements:*** An agreement of service by which a person binds himself during the term of the agreement not to take service with anyone else is not in restraint of lawful profession and is valid.

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WAGERING AGREEMENTS

The literal meaning of the word "wager" is a "bet". Wagerning agreements are nothing but ordinary betting agreements.

For example, A and B enter into an agreement that if Englands Cricket Team wins the test match, A will pay B Rs 100 and if it loses B will pay Rs 100 to A. This is a wagering agreement and nothing can be recovered by winning party under the agreement.

In India except Mumbai, wagering agreements are void. In Mumbai, wagering agreements have been declared illegal by the Avoiding Wagers (Amendment) Act, 1865. Therefore, in Mumbai a wagering agreement being illegal, is void not only between the immediate parties, but taints and renders void all collateral agreements to it.

Thus, A bets with B and loses, applies to C for a loan, who pays B in settlement of A's losses. C cannot recover from A because this is money paid "under" or "in respect of" a wagering transaction which is illegal in Mumbai. But in respect of India such a transaction (i.e., betting) being only void, C could recover from A. Of course, if A refused to pay B the amount of the bet that he has lost, B could not sue A anywhere. Again, where an agent bets on behalf of his principal and loses and pays over the money to the winner, he cannot recover the money from his principal, if the transactions took place in Mumbai, but elsewhere he could recover. But if the agent wins, he must pay the winnings to the principal, as this money was received on behalf of the principal.

LIKH LE PAAPI

RESTITUTION

When a contract becomes void, it is not to be performed by either party. But if any party has received any benefit under such a contract from the other party he must restore it or make compensation for it to the other party.

A agrees to sell to B after 6 months a certain quantity of gold and receives Rs 500 as advance. Soon after the agreement, private sales of gold are prohibited by law. The contract becomes void and A must return the sum of Rs 500 to B.

LIKH LE PAAPI

CONTINGENT CONTRACT

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 B 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.

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Rules regarding Contingent Contracts

(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.

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.

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.

A agrees to pay B Rs 1,000 if B marries C. C marries D. The marriage of B to C must now be considered impossible although it is possible that D 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.

A promises 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.

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.

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

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).

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QUASI-CONTRACTS OR IMPLIED CONTRACTS UNDER ICA

Necessaries Supplied to incompetent person

Contracts by minors and persons of unsound mind are void. However, Section 68 of the Indian Contract Act provides that their estates are liable to reimburse the trader, who supplies them with necessaries of life.

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Suit for money had and received

A debtor may recover, from a creditor the amount of an over-payment made to him by mistake. The mistake may be mistake of fact or a mistake of law

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Obligations of finder of lost goods

The liability of a finder of goods belonging to someone else is that of a bailee. This means that he must take as much care of the goods as a man of ordinary prudence would take of his own goods of the same kind. So far as the real owner of the goods is concerned, the finder is only a bailee and must not appropriate the goods to his own use. If the owner is traced, he must return the goods to him. The finder is entitled to get the reward that may have been offered by the owner and also any expenses he may have incurred in protecting and preserving the property.

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Obligation of a person enjoying benefit of non-gratuitous act

Section 70 of the Indian Contract Act provides that where a person lawfully does something for another person or delivers anything to him without any intention of doing so gratuitously and the other person accepts and enjoys the benefit thereof, the latter must compensate the former or restore to him the thing so delivered.

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Liability for money paid or things delivered by mistake or by coercion

Under Section 72 of the Act prescribed that a person who has received money or things by mistake or under coercion must repay or return it. However, the word coercion is not necessarily governed by section 15 of this Act. It mean and include oppression, extortion or such other means. For example a payment of advance tax in excess is refundable by the Income tax Department.

LIKH LE PAAPI

DISCHARGE OR TERMINATION OF CONTRACTS

Performance of Contracts

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

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Tender of Performance

In case 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.

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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. But an assignee of the rights and benefits under a contract may demand performance by the promisor, in the same way as the assignor, (i.e., the promisee) could have demanded.

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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.

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Devolution of Joint Liabilities

Under Section 42 of the Indian Contract Act, where two or more persons have made a joint promise then, unless a contrary intention appears from the contract all such persons should perform the promise. If any one of them dies, his representatives jointly with the survivor or survivors should perform. After the death of the last survivor, the representatives of all jointly must fulfil the promise.

Illustrations

(a) X, Y and Z jointly promise to pay 6,000 to A. A may compel either X or Y or Z to pay the amount.

(b) In the above example imagine, Z is compelled to pay the whole amount; X is insolvent but his assets are sufficient to pay one-half of his debts. Z is entitled to receive 1,000 from X's estate and 2,500 from Y.

(c) X, Y and Z make a joint promise to pay 5,000 to A, Z is unable to pay any amount and X is compelled to pay the whole. X is entitled to receive 3,000 from Y.

Devolution of Joint Rights

A promise may be made to two or more persons. The promisees are called joint promisees. For example, X may give a promise to repay 1,000 given by Y and Z jointly. In such case, in the absence of a contrary intention, the right to claim, performance rests with Y and Z. If Y dies, Y's representative jointly with Z may, demand performance. If Z also dies, the representatives of Y and Z may demand jointly performance from X.

Discharge by Mutual Agreement or Consent

The methods stipulated under Sections 62 and 63 of the Indian Contract Act for discharging a contract by mutual consent are:

Novation - when a new contract is substituted for existing contract either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.

Alteration - change in one or more of the material terms of a contract.

Rescission - Cancellation of contract by agreement between the parties at any time before it is discharged by performance or in some other way and as a result none requires to perform.

Remission - acceptance of a lesser sum than what was contracted for or a lesser fulfilment of the promise made. In other words discharge to a party by accepting his less performance in lieu of whole.

Waiver - deliberate abandonment or giving up of a right which a party is entitled to under a contract, where upon the other party to the contract is released from his obligation.

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Discharge by Lapse of Time

Where a debtor has failed to repay the loan on the stipulated date, the creditor must file the suit against him within three years of the default. If the limitation period of three years expires and he takes no action he will be barred from his remedy and the other party is discharged of his liability to perform.

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Discharge by Operation of the Law

Discharge under this head may take place as follows:

(a) ***By merger:*** When the parties embody the inferior contract in a superior contract.

(b) ***By the unauthorised alteration of items of a written document:*** Where a party to a written contract makes any material alteration without knowledge and consent of the other, the contract can be avoided by the other party.

(c) ***By insolvency:*** The Insolvency Act provides for discharge of contracts under particular circumstances. For example, where the Court passes an order discharging the insolvent, this order exonerates or discharges him from liabilities on all debts incurred previous to his adjudication.

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Discharge by Impossibility or Frustration

A contract which is entered into to perform something that is clearly impossible is void. For instance, A agrees with B to discover treasure by magic. The agreement is void.

Sometimes subsequent impossibility (i.e. where the impossibility supervenes after the contract has been made) renders the performance of a contract unlawful and stands discharged; as for example, where a singer contracts to sing and becomes too ill to do so, the contract becomes void.

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Supervening Impossibility

A contract will be discharged by subsequent or supervening impossibility in any of the following ways:

(a) Where the subject-matter of the contract is destroyed without the fault of the parties, the contract is discharged.

(b) When a contract is entered into on the basis of the continued existence of a certain state of affairs, the contract is discharged if the state of things changes or ceases to exist.

(c) Where the personal qualifications of a party is the basis of the contract, the contract is discharged by the death or physical disablement of that party.

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Discharge by Supervening Illegality

A contract which is contrary to law at the time of its formation is void. But if, after the making of the contract, owing to alteration of the law or the act of some person armed with statutory authority the performance of the contract becomes impossible, the contract is discharged. This is so because the performance of the promise is prevented or prohibited by a subsequent change in the law.

A enters into contract with B for cutting trees. By a statutory provision cutting of trees is prohibited except under a licence and the same is refused to A. The contract is discharged.

Cases in which there is no supervening impossibility

(a) Difficulty of performance: The mere fact that performance is more difficult or expensive than the parties anticipated does not discharge the duty to perform.

(b) Commercial impossibilities do not discharge the contract. A contract is not discharged merely because expectation of higher profits is not realised.

(c) Strikes, lockouts and civil disturbance like riots do not terminate contracts unless there is a clause in the contract providing for non-performance in such cases.

Supervening impossibility or illegality is known as frustration under English Law.

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Discharge by Breach

Where the promisor neither performs his contract nor does he tender performance, or where the performance is defective, there is a breach of contract. The breach of contract may be (i) actual; or (ii) anticipatory.

The actual breach may take place either at the time the performance is due, or when actually performing the contract. Anticipatory breach means a breach before the time for the performance has arrived. This may also take place in two ways - by the promisor doing an act which makes the performance of his promise impossible or by the promisor in some other way showing his intention not to perform it

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Anticipatory Breach of Contract

Breach of contract may occur, before the time for performance is due. This may happen where one of the parties definitely renounces the contract and shows his intention not to perform it or does some act which makes performance impossible. The other party, on such a breach being committed, has a right of action for damages.

He may either sue for breach of contract immediately after repudiation or wait till the actual date when performance is due and then sue for breach. If the promisee adopts the latter course, i.e., waits till the date when performance is due, he keeps the contract alive for the benefit of the promisor as well as for his own. He remains liable under it and enables the promisor not only to complete the contract in spite of previous repudiation, but also to avail himself of any excuse for non- performance which may have come into existence before the time fixed for performance.

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REMEDIES FOR BREACH OF CONTRACT

Rescission of contract

When a party to a contract has broken the contract, the other party may treat the contract as rescinded and he is absolved from all his obligations under the contract. When a party treats the contract as rescinded, he makes himself liable to restore any benefits he has received under the contract to the party from whom such benefits were received.

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Damages for Breach of Contract

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.

Such damages may be Liquidated or 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.

Unliquidated Damages

Those are of the following kinds:

Ordinary Damages

These are restricted to pecuniary compensation to put the injured party in the position he would have been had the contract been performed. It is the estimated amount of loss actually incurred.

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Special Damages

If at the time of entering into the contract, the party has notice of special circumstances which makes special loss the likely result of the breach in the ordinary course of things, then upon his-breaking the contract and the special loss following this breach, he will be required to make good the special loss.

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Exemplary Damages

These damages are awarded to punish the defendant and are not granted in case of breach of contract. In two cases, the court may award such damages, viz.,

(i) breach of promise to marry; and

(ii) wrongful dishonour of a customers cheque by the banker.

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Nominal Damages

Nominal damages consist of a small token award, e.g., a rupee of even 25 paise, where there has been an infringement of contractual rights, but no actual loss has been suffered. These damages are awarded to establish the right to decree for breach of contract.

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Liquidated Damages and Penalty

Where the contracting parties fix at the time of contract the amount of damages that would be payable in case of breach, in English law, the question may arise whether the term amounts to "liquidated damages" or a "penalty"? The Courts in England usually give effect to liquidated damages, but they always relieve against penalty.

The test of the two is that where the amount fixed is a genuine pre-estimate of the loss in case of breach, it is liquidated damages and will be allowed. If the amount fixed is without any regard to probable loss, but is intended to frighten the party and to prevent him from committing breach, it is a penalty and will not be allowed. In Indian law, there is no such difference between liquidated damages and penalty.

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Specific Performance

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 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.

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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.

Quantum Meruit

The expression "Quantum Meruit" literally means "as much as earned" or reasonable remuneration. The general rule is that where a party to a contract has not fully performed what the contract demands as a condition of payment, he cannot sue for payment for that which he has done. The contract has to be indivisible and the payment can be demanded only on the completion of the contract.

But where one party who has performed part of his contract is prevented by the other from completing it, he may sue on a quantum meruit, for the value of what he has done.

LIKH LE PAAPI

SPECIAL CONTRACTS

CONTRACT OF INDEMNITY AND GUARANTEE

Meaning 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.

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 the loss suffered by the assured on account of the destruction by fire of his property insured against fire.

LIKH LE PAAPI

RIGHTS OF INDEMNITY HOLDER WHEN SUED

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 indemnify applies;

(2) all ***costs*** which he may be compelled to pay in any such suit if, in bringing or defending it,

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

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MEANING OF CONTRACT OF GUARANTEE

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

EXTENT OF SURETY'S LIABILITY

The liability of the surety is ***co-extensive with that of the principal debtor*** unless the contract otherwise provides. A creditor is not bound to proceed against the principal debtor. He can sue the surety without sueing the principal debtor. As soon as the debtor has made default in payment of the debt, the surety is immediately liable. But until default, the creditor cannot call upon the surety to pay. In this sense, the nature of the surety's liability is secondary.

KINDS OF GUARANTEES

A ***specific guarantee*** is given for a single debt and comes to an end when the debt guaranteed has been paid.

A ***continuing guarantee*** is one which extends to a series of transactions. The liability of surety in case of a continuing guarantee extends to all the transactions contemplated until the revocation of the guarantee.

LIKH LE PAAPI

REVOCATION OF CONTINUING GUARANTEE

A continuing guarantee is revoked in the following circumstances:

(a) ***By notice of revocation by the surety:*** The notice operates to revoke the surety's liability as regards future transactions. He continues to be liable for transactions entered into prior to the notice (Offord v. Davies).

(b) ***By the death of the surety:*** The death of the surety operates, in the absence of contract (Lloyds v. Harper) as a revocation of a continuing guarantee, so far as regards future transactions. But for all the transactions made before his death, the surety's estate will be liable.

RIGHTS OF SURETY

LIKH LE PAAPI

(a) ***Surety's Rights against the Creditor:*** A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into whether the surety knows of the existence of such security or not; and, if the creditor losses or, without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security.

(b) ***Rights against the Principal Debtor:*** After discharging the debt, the surety steps into the shoes of the creditor or is subrogated to all the rights of the creditor against the principal debtor. He can then sue the principal debtor for the amount paid by him to the creditor on the debtors default; he becomes a creditor of the principal debtor for what he has paid.

(c) ***Surety's Rights Gains Co-sureties:*** When a surety has paid more than his share of debt to the creditor, he has a right of contribution from the co-securities who are equally bound to pay with him. A, B and C are sureties to D for the sum of 3,000 lent to E who makes default in payment. A, B and C are liable, as between

themselves to pay 1,000 each. If any one of them has to pay more than 1,000 he can claim contribution from the other two to reduce his payment to only 1,000. If one of them becomes insolvent, the other two shall have to contribute the unpaid amount equally.

DISCHARGE OF SURETY

A surety may be discharged from liability under the following circumstances:

(a) By notice of revocation in case of a continuing guarantee as regards future transaction.

(b) By the death of the surety as regards future transactions, in a continuing guarantee in the absence of a contract to the contrary.

(c) Any variation in the terms of the contract between the creditor and the principal debtor, without the consent of the surety, discharges the surety as regards all transactions taking place after the variation.

(d) A surety will be discharged if the creditor releases the principal debtor, or acts or makes an omission which results in the discharge of the principal debtor.

(e) Where the creditor, without the consent of the surety, makes an arrangement with the principal debtor for composition, or promises to give time or not to sue him, the surety will be discharged.

(f) If the creditor does any act which is against the rights of the surety, or omits to do an act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

(g) If the creditor loses or parts with any security which at the time of the contract the debtor had given in favour of the creditor, the surety is discharged to the extent of the value of the security, unless the surety consented to the release of such security by creditor in favour of the debtor. It is immaterial whether the surety was or is aware of such security or not.

BAILMENT

A bailment is a transaction whereby one person delivers goods to another person for some purpose, upon a contract that when the purpose is accomplished to be returned or otherwise disposed of according to the directions of the person delivering them. The person who delivers the goods is called the ***bailor*** and the person to whom they are delivered is called the ***bailee***.

LIKH LE PAAPI

Gratuitous Bailment

A gratuitous bailment is one in which neither the bailor nor the bailee is entitled to any remuneration. Such a bailment may be for the exclusive benefit of the bailor, e.g, where you lend your book to a friend of yours for a week. A gratuitous bailment terminates by the death of either the bailor or the bailee.

Bailment for Reward

This is for the mutual benefit of both the bailor and the bailee. For example, A lets out a motor-car for hire to B. A is the bailor and receives the hire charges and B is the bailee and gets the use of the car.

DUTIES OF BAILEE

(a) The bailee must take as much care of the goods bailed to him as a man of ordinary prudence would take under similar circumstances of his own goods of the same bulk, quality and value as the goods bailed.

(b) The bailee is under a duty not to use the goods in an unauthorised manner or for unauthorised purpose.

(c) He must keep the goods bailed to him separate from his own goods.

(d) He must not set up an adverse title to the goods.

(e) It is the duty of the bailee to return the goods without demand on the expiry of the time fixed or when the purpose is accomplished.

(f) The bailee must return to the bailor any increase, or profits which may have accrued from the goods bailed.

PARTICULAR AND GENERAL LIEN

A particular lien is one which is available only against that property of which the skill and labour have been exercised. A bailee's lien is a particular lien.

A general lien is a right to detain any property belonging to the other and in the possession of the person trying to exercise the lien in respect of any payment lawfully due to him.

LIKH LE PAAPI

BAILEES PARTICULAR LIEN

Where the goods are bailed for a particular purpose and the bailee in due performance of bailment, expands his skill and labour, he has in the absence of an agreement to the contrary a lien on the goods, i.e., the bailee can retain the goods until his charges in respect of labour and skill used on the goods are paid by the bailor. A gives a piece of cloth to B, a tailor, for making it into a suit, B promises to have the suit ready for delivery within a fortnight, B has the suit ready for delivery. He has a right to retain the suit until he is paid his dues.

LIKH LE PAAPI

DUTIES OF BAILOR

(a) The bailor must disclose all the known faults in the goods; and if he fails to do that, he will be liable for any damage resulting directly from the faults

(b) It is the duty of the bailor to pay any extraordinary expenses incurred by the bailee.

(c) The bailor is bound to indemnify the bailee for any cost or costs which the bailee may incur because of the defective title of the bailor of the goods bailed.

LIKH LE PAAPI

TERMINATION OF BAILMENT

Where the bailee wrongfully uses or dispose of the goods bailed, the bailor may determine the bailment.

As soon as the period of bailment expires or the object of the bailment has been achieved, the bailment comes to an end, and the bailee must return the goods to the bailor. Bailment is terminated when the subject matter of bailment is destroyed or by reason of change in its nature, becomes incapable of use for the purpose of bailment.

A gratuitous bailment can be terminated by the bailor at any time, even before the agreed time, subject to the limitation that where termination before the agreed period causes loss in excess of benefit, the bailor must compensate the bailee. A gratuitous bailment terminates by the death of either the bailor or the bailee.

LIKH LE PAAPI

FINDER OF LOST GOODS

As against the true owner, the finder of goods in a public or quasi public place is only a bailee; he keeps the article in trust for the real owner. As against every-one else, the property in the goods vests in the finder on his taking possession of it.

CARRIER AS BAILEE

A common carrier undertakes to carry goods of all persons who are willing to pay his usual or reasonable rates. He further undertakes to carry them safely, and make good all losses, unless they are caused by act of God or public enemies. Carriers by land including railways and carriers by inland navigation, are common carriers. Carriers by Sea for hire are not common carriers and they can limit their liability. Railways in India are now common carriers.

C stayed in a room in a hotel. The hotel-keeper knew that the room was in an insecure condition. While C was dining in the dining room, some articles were stolen from his room. It was held that the hotel-keeper was liable as he should have taken reasonable steps to rectify the insecured condition of the rooms.

LIKH LE PAAPI

PLEDGE

Pledge or pawn is a contract whereby an article is deposited with a lender of money or promisee as security for the repayment of a loan or performance of a promise. The bailor or depositor is called the Pawnor and the bailee or depositee the "Pawnee"

LIKH LE PAAPI

The following are the essential ingredients of a pledge

- The property pledged should be delivered to the pawnee.
- Delivery should be in pursuance of a contract.
- Delivery should be for the purpose of security.
- Delivery should be upon a condition to return.

RIGHTS OF THE PAWNEE

- file a suit for the recovery of the amount due to him while retaining the goods pledged as collateral security; or
- sue for the sale of the goods and the realisation of money due to him; or
- himself sell the goods pawned, after giving reasonable notice to the pawnor, sue for the deficiency, if any, after the sale.

RIGHTS OF PAWNOR

- He can file a suit for redemption of goods by depositing the money treating the sale as if it had never taken place; or
- He can ask for damages on the ground of conversion.

PLEDGE BY NON-OWNERS

(a) ***Mercantile agent:*** A pledge by mercantile agent with the consent of the owner, in possession of goods or the documents of title to goods, is as valid as if he were expressly authorised by the owner of the goods to make the same.

(b) ***Pledge by seller or buyer in possession after sale:*** A seller, left in possession of goods sold, is no more the owner, but pledge by him will be valid, provided the pawnee acted in good faith and had no notice of the sale of goods to the buyer.

(c) ***Pledge where pawnor having limited interest:*** When the pawnor is not the owner of the goods but has a limited interest in the goods which he pawns, e.g., he is a mortgagee or he has a lien with respect of these goods, the pledge will be valid to the extent of such interest.

(d) ***Pledge by co-owner in possession:*** One of the several co-owners of goods in possession thereof with the assent of the other co-owners may create a valid pledge of the goods.

(e) ***Pledge by person in possession under a voidable contract:*** A person may obtain possession under a contract which is voidable at the option of the lawful owner on the ground of misrepresentation, fraud, etc. The person in possession may pledge the goods before the contract is avoided by the other party.

LAW OF AGENCY

An agent is a person who is employed to bring his principal into contractual relations with third-parties. As the definition indicates, an agent is a mere connecting link between the principal and a third-party. But during the period that an agent is acting for his principal, he is clothed with the capacity of his principal.

CREATION OF AGENCY

(a) ***Express Agency:*** A contract of agency may be made orally or in writing. The usual form of written contract of agency is the Power of Attorney, which gives him the authority to act on behalf of his principal. In an agency created to transfer immovable property, the power of attorney must be registered. A power of attorney may be general, giving several powers to the agent, or special, giving authority to the agent for transacting a single act.

(b) ***Implied Agency:*** Implied agency may arise by conduct, situation of parties or necessity of the case.

(i) ***Agency by Estoppel:*** Estoppel arises when you are precluded from denying the truth of anything which you have represented as a fact, although it is not a fact. Thus, where P allows third-parties to believe that A is acting as his authorised agent, he will be estopped from denying the agency if such third-parties relying on it make a contract with A even when A had no authority at all.

LIKH LE PAAPI

(ii) ***Wife as Agent:*** Where a husband and wife are living together, the wife is presumed to have her husbands authority to pledge his credit for the purchase of necessaries of life suitable to their standard of living. But the husband will not be liable if he shows that (i) he had expressly warned the trademan not to supply goods on credit to his wife; or (ii) he had expressly forbidden the wife to pledge his credit; or (iii) his wife was already sufficiently supplied with the articles in question; or (iv) she was supplied with a sufficient allowance. Similarly, where any person is held out by another as his agent, the third-party can hold that person liable for the acts of the ostensible agent, or the agent by holding out. Partners are each others agents for making contracts in the ordinary course of the partnership business.

LIKH LE PAAPI

(iii) ***Agency of Necessity***: In certain circumstances, a person who has been entrusted with anothers property, may have to incur unauthorised expenses to protect or preserve it. Such an agency is called an agency of necessity. For example, A sent a horse by railway and on its arrival at the destination there was no one to receive it. The railway company, being bound to take reasonable steps to keep the horse alive, was an agent of necessity of A.

LIKH LE PAAPI

(iv) ***Agency by Ratification***: Where a person having no authority purports to act as agent, or a duly appointed agent exceeds his authority, the principal is not bound by the contract supposedly based on his behalf. But the principal may ratify the agents transaction and so accept liability. In this way an agency by ratification arises. This is also known as ex post facto agency— agency arising after the event.

LIKH LE PAAPI

CLASSES OF AGENTS

(a) ***Special Agent:*** A special agent is one who is appointed to do a specified act, or to perform a specified function. He has no authority outside this special task. The third-party has no right to assume that the agent has unlimited authority. Any act of the agent beyond that authority will not bind the principal.

(b) ***General Agent:*** A general agent is appointed to do anything within the authority given to him by the principal in all transactions, or in all transactions relating to a specified trade or matter. The third-party may assume that such an agent has power to do all that is usual for a general agent to do in the business involved. The third party is not affected by any private restrictions on the agents authority.

SUB-AGENT

A person who is appointed by the agent and to whom the principal's work is delegated to known as sub-agent. A sub-agent is a person employed by, and acting under the control of the original agent in the business of the agency. So, the sub-agent is the agent of the original agent.

As between themselves, the relation of sub-agent and original agent is that of agent and the principal. A sub-agent is bound by all the duties of the original agent. The sub-agent is not directly responsible to the principal except for fraud and wilful wrong. The sub-agent is responsible to the original agent. The original agent is responsible to the principal for the acts of the sub-agent. As regards third persons, the principal is represented by sub-agent and he is bound and responsible for all the acts of sub-agent as if he were an agent originally appointed by the principal.

LIKH LE PAAPI

MERCANTILE AGENTS

Mercantile Agent: A mercantile agent having in the customary course of business as such agent authority either to sell goods or consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods". This definition covers factors, brokers, auctioneers, commission agents etc.

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Factors: A factor is a mercantile agent employed to sell goods which have been placed in his possession or contract to buy goods for his principal. He is the apparent owner of the goods in his custody and can sell them in his own name and receive payment for the goods. He has an insurable interest in the goods and also a general lien in respect of any claim he may have arising out of the agency.

LIKH LE PAAPI

Brokers: A broker is a mercantile agent whose ordinary course of business is to make contracts with other parties for the sale and purchase of goods and securities of which he is not entrusted with the possession for a commission called brokerage. He acts in the name of principal. He has no lien over the goods as he is not in possession of them.

LIKH LE PAAPI

Del Credere Agent: A del credere agent is a mercantile agent, who is consideration of an extra remuneration guarantees to his principal that the purchasers who buy on credit will pay for the goods they take. In the event of a third-party failing to pay, the del credere agent is bound to pay his principal the sum owned by third-party.

LIKH LE PAAPI

Auctioneers: An auctioneer is an agent who sells goods by auction, i.e., to the highest bidder in public competition. He has no authority to warrant his principals title to the goods. He is an agent for the seller but after the goods have been knocked down he is agent for the buyer also for the purpose of evidence that the sale has taken place.

LIKH LE PAAPI

Partners: In a partnership firm, every partner is an agent of the firm and of his co-partners for the purpose of the business of the firm.

Bankers: The relationship between a banker and his customer is primarily that of debtor and creditor. In addition, a banker is an agent of his customer when he buys or sells securities, collects cheques dividends, bills or promissory notes on behalf of his customer.

RIGHTS OF AGENTS

Where the services rendered by the agent are not gratuitous or voluntary, the agent is entitled to receive the agreed remuneration, or if none was agreed, a reasonable remuneration. The agent becomes entitled to receive remuneration as soon as he has done what he had undertaken to do.

EXTENT OF AGENT'S AUTHORITY

The extent of the authority of an agent depends upon the terms expressed in his appointment or it may be implied by the circumstances of the case. The contractual authority is the real authority, but implied authority is to do whatevers incidental to carry out the real authority. This implied authority is also known as apparent or ostensible authority, Thus, an agent having an authority to do an act has authority to do everything lawful which is necessary for the purpose or usually done in the course of conducting business.

LIKH LE PAAPI

RESPONSIBILITIES OF PRINCIPAL TO THIRD-PARTIES

(a) ***Disclosed principal:*** Where the agent contracts as agent for a named principal, he generally incurs neither rights nor liabilities under the contract, and drops out as soon as it is made. The contract is made between the principal and the third-party and it is between these two that rights and obligations are created. The legal effect is the same as if the principal had contracted directly with the third-party.

LIKH LE PAAPI

(b) ***Undisclosed principal:*** Where the agent disclose that he is merely an agent but conceals the identity of his principal, he is not personally liable, as the drops out in normal way. The principal, on being discovered, will be responsible for the contract made by the agent.

LIKH LE PAAPI

(c) ***Concealed principal:*** Where an agent appears to be contracting on his own behalf, without either contracting as an agent or disclosing the existence of an agency (i.e., he discloses neither the name of the principal nor his existence), he becomes personally liable. The third-party may sue either the principal (when discovered) or the agent or both. If the third-party chooses to sue the principal and not the agent, he must allow the principal the benefit of all payments made by him to the agent on account of the contract before the agency was disclosed. The third-party is also entitled to get the benefit of anything he may have paid to the agent.

LIKH LE PAAPI

PRINCIPAL LIABLE FOR AGENT'S TORTS

If an agent commits a tort or other wrong (e.g., misrepresentation or fraud) during his agency, whilst acting within the scope of his actual or apparent authority, the principal is liable. But the agent is also personally liable, and he may be sued also. The principal is liable even if the tort is committed exclusively for the benefit of the agent and against the interests of the principal.

PERSONAL LIABILITY OF AGENT TO THIRD-PARTY

An agent is personally liable in the following cases:

(a) Where the agent has agreed to be personally liable to the third-party.

(b) Where an agent acts for a principal residing abroad.

(c) When the agent signs a negotiable instrument in his own name without making it clear that he is signing it only as agent.

(d) When an agent acts for a principal who cannot be sued (e.g., he is minor), the agent is personally liable.

(e) An agent is liable for breach of warranty of authority. Where a person contracts as agent without any authority there is a breach of warranty of authority. He is liable to the person who has relied on the warranty of authority and has suffered loss.

(f) Where authority is one coupled with interest or where trade, usage or custom makes the agent personally liable, he will be liable to the third-party.

(g) He is also liable for his torts committed in the course of agency.

MEANING OF AUTHORITY COUPLED WITH INTEREST

Where the agent was appointed to enable him to secure some benefit already owed to him by the principal, the agency was coupled with an interest. For example, where a factor had made advances to the principal and is authorised to sell at the best price and recoup the advances made by him or where the agent is authorised to collect money from third-parties and pay himself the debt due by the principal, the agencies are coupled with interest.

LIKH LE PAAPI

TERMINATION OF AGENCY

An agency comes to an end or terminates -

(a) By the performance of the contract of agency; (Section 201)

(b) By an agreement between the principal and the agent;

(c) By expiration of the period fixed for the contract of agency;

(d) By the death of the principal or the agency; (Section 201)

(e) By the insanity of either the principal or the agent; (Section 201)

(f) By the insolvency of the principal, and in some cases that of the agent; (Section 201)

(g) Where the principal or agent is an incorporated company, by its dissolution;

(h) By the destruction of the subject-matter; (Section 56)

(i) By the renunciation of his authority by the agent; (Section 201)

(j) By the revocation of authority by the principal. (Section 201)

WHEN AGENCY IS IRREVOCABLE

(a) Where the authority of agency is one coupled with an interest, even the death or insanity of the principal does not terminate the authority in this case.

(b) When agent has incurred personal liability, the agency becomes irrevocable.

(c) When the authority has been partly exercised by the agent, it is irrevocable in particular with regard to obligations which arise from acts already done (Section 204).

WHEN TERMINATION TAKES EFFECT

Termination of an agency takes effect or is complete, as regards the agent when it becomes known to the agent. If the principal revokes the agents authority, the revocation will take effect when the agent comes to know of it.

As regards the third-parties, the termination takes effect when it comes to their knowledge. Thus, if an agent whose authority has been terminated to his knowledge, enters into a contract with a third-party who deals with him bona fide, the contract will be binding on the principal as against the third-party. The termination of an agent's authority terminates the authority of the sub-agent appointed by the agent.

E-CONTRACT

The conventional law relating to contracts is not sufficient to address all the issues that arise in electronic contracts. The Information Technology Act, 2000 solves some of the peculiar issues that arise in the formation and authentication of electronic contracts.

As in every other contract, an electronic contract also requires the following necessary ingredients.