

# INDIAN CONTRACT ACT, 1872

## MEANING

The law relating to the contracts is contained in the Indian Contract Act. 1872. It is that branch of law which lays down the essentials of a valid contract, the different modes of discharging the contract and the remedies available to the aggrieved parties in the case of breach on contract. It is the most important branch of business law. It is of particular importance to people engaged in trade, commerce and industry as bulk of their business transactions are based on contracts.

A contract is an agreement made between two or more parties which the law will enforce. Sec. 1 of the Indian Contract Act defines it as “An agreement enforceable by law”. Sec 10 lays down 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 hereby – expressly declared to be void.

## ESSENTIALS OF A VALID CONTRACT

A valid contract must have the following essentials

1. **Two parties** : for a valid contract, there must be two parties
2. **Offer and acceptance**: There must be an offer and acceptance. One party has to make an offer and the other party has to accept it.
3. **Consensus-ad-idem or Identity of Minds**: The parties to the contract must have agreed about the subject matter of the contract at the same time and in the same sense.

*Illustration*: A has two houses, one at Chennai and another at Coimbatore. He has offered to sell one to B. B accepts thinking to purchase the house at Coimbatore, while A, when he offers, has in his mind to dispose of house at Chennai. There is no Consensus-as-idem.

4. **Consideration**: It means “Something in return”. Every contract must be supported by consideration.

*Illustration* : A offers to sell his watch for Rs. 500 to B and B accepts the offer. Thus Rs. 500 is the consideration for the watch and vice-versa.

5. **Capacity**; The parties to the contract must be competent to contract. For example a contract by a minor is void
6. **Free Consent**: The consent of the parties must be free from any flaw – it must not be caused by a mistake or coercion or undue influence
7. **Lawful consideration**: The consideration to a contract must be lawful

*Illustration*: A promises to pay Rs. 500 – to B, in consideration of B murdering C. The consideration is illegal.

8. **The objects of the contract must be lawful**

*Illustration*: A promises to pay Rs. 500 – for letting B’s house for running a brothel. The objects are illegal. Hence, the contract is void.

Thus, “the essence of legal contract is that there shall be an agreement between two persons that one of them shall do something either for the benefit of the other or for his own detriment and that these persons intend that the agreement shall be enforceable at law”

## **CLASSIFICATION OF CONTRACTS**

Contracts may be classified according to their validity, formation or performance.

### **I. Classification According to validity**

A contract is based on an agreement. An agreement becomes a contract when all the essential elements referred to above are present. In such a case, the contract is a valid contract. If one or more of these elements are missing, the contract is either voidable, void, illegal or unenforceable.

#### **Voidable Contract**

An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract, Sec.2(i)

Example: A promises to sell his house to B for Rs. 2,00,000. His consent is obtained by use or force. The contract is voidable at the option of A. He may avoid the contract.

#### **Void Contract**

A contract which is not enforceable by law is a void contract. Example : A contract entered into by a minor is void.

#### **Illegal Agreement**

An illegal agreement is one which is criminal in nature or which is immoral. Such an agreement is a void contract. All illegal agreements are void but all more agreements or contracts are not necessarily illegal.

#### **Unenforceable Contract**

An unenforceable contract is one which cannot be enforced in a Court of law because of some technical defect, such as absence of writing or where the remedies have been barred by lapse of time.

## **II CLASSIFICATIONS ACCORDING TO FORMATION**

Contracts may be classified according to the mode of their formation as follows:

#### **Express Contract**

If the terms of a contract are expressly agreed upon whether by words spoken or written at the time of the formation of the contract, the contract is said to be an express contract.

#### **Implied Contract**

An implied contract is one which is inferred from the acts or conduct of the parties or course of dealings between them. It is not the result of any express promise or promises by the parties but of their particular act.

*Example:* A enters into a hotel and takes lunch. It is an implied contract that he has to pay the cost of lunch after taking it.

### **III CLASSIFICATION ACCORDING TO PERFORMANCE**

These may be classified as Executed contracts or Executory contracts. Unilateral contracts or Bilateral contracts.

#### **Executed Contracts**

An executed contract is one in which both the parties have performed their respective obligations. Example: A agrees to supply a watch to B for Rs. 500. When A supplies the watch and B pays the price, the contract is said to be executed.

#### **Executory Contracts**

An executory contract is one in which both the parties have yet to perform their obligations. Thus in the above example, the contract is executory if A has not yet supplied the watch and B has not paid the price.

#### **Unilateral Contract**

A unilateral or one-sided contract is one in which only one party has to fulfil his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the time of the contract or before the contract comes into existence.

#### **Bilateral Contract**

A bilateral contract is one in which the obligations on the part of both the parties to the contract are outstanding at the time of the formation of the contract. In this sense, bilateral contracts are similar to executory contracts.

### **OFFER AND ACCEPTANCE**

#### **OFFER**

An offer is also called a proposal. Sec. 2 (a) of the Indian Contract Act defines a proposal as, "When one person signifies to another his willingness to do or to 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 is called the "proposer" or "offerer" and the person to whom the proposal is made is called "offeree".

#### **LEGAL RULES RELATING TO OFFER**

- 1. It must contain either definite terms or capable of being made definite.**

*Montreal* : It was held in this case, that a clause to favourite consider the applies that renewal is ambiguous and not binding the companys

## **2. It must intend to give use to legal consequences**

A husband promised to pay Rs. 1000/- per month to his wife, staying away from him. Held that the promise was never intended to be enforced in law.

## **3. It must be distinguished from a quotation or an invitation to offer**

P offered to buy D's property for Rs. 6000. D replied, "Won't accept less than 10,000" P agreed to pay Rs. 10,000. But D sold it to another person. It was held that mere statement of price by D contained no implied contract to sell it at that price.

A catalogue or price list or tenders invited for the supplier to goods are not proposals.

## **4. An offer may be made to an individual or addressed to the worlds at large. An offer is called a specific offer when it is made to a particular person.**

The company has offered by advertisement, a reward of £ 100 to anybody contracting influenza after using their smoke ball according to their direction. Mrs. Carlill used it as directed but still had an attack of influenza. So, she sued for the award of £ 100. It was held that she was entitled to the award since an offer made at large, can ripen itself into a contract with anybody who performs the terms of the offer.

## **5. An offer is different from a tender**

A offers to supply goods at a particular rate for a particular period from a certain trade. If this offer is accepted by B, it is called a tender. It becomes an acceptance only when B places an order for a part of the goods.

## **6. An offer must be communicated to the offeree**

A's nephew was missing who was an employee of A, volunteered his services to search for the boy. Meanwhile, A had announced a reward to anybody who could trace the boy. It found the boy and brought him back to home and sued for the reward. It was held that he was not entitled to the reward as he was ignorant of the offer.

Section 4 lays down that the communication of an offer is complete only when it reaches the offeree. So an offer binds the offeror only when the offeree has the knowledge of an offer.

## **ACCEPTANCE**

Section 2 of the Indian Contract Act defines acceptance as. When the 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. An offer when accepted becomes a contract.

An offer can be accepted only by the persons to whom the offer is made. *Boulton Vs Jones* A sold his business to B. This sale is not known to V's customers. So Jones who is a usual customer of the vendor places an order for goods with the vendor. A by name B, the new owner

receives the order and supplies, the goods without disclosing the fact of sale of business to him. It was held that the price could not be recovered as the contract was not entered into with him.

### **Essentials of Valid Acceptance**

1. Acceptance must be communicated in usual and reasonable manner. It may be made by express words, spoken or written or by conduct of the parties, i.e. by doing an act which amounts to acceptance according to the terms of the offer or by the offeree accepting the benefit offered by the offeror.

Any method can be prescribed for the communication of acceptance. But silence can never be prescribed as a method of communication. Hence, mere mental assent without expressing it and communicating it by means of word or an act, is not sufficient.

*Brogden Vs Metropolitan Railway Co.* The Manager of a railway company simply wrote on the proposal "approved" and kept it in a drawer. By oversight it was not communicated. It was held that the acceptance was not communicated and hence there was no contract.

2. Communication of acceptance may be waived by the offeror : This rule is established in the case of *Carill V's* where the advertisement never wanted the communication apart from fulfilling the conditions of offer.
3. Acceptance should be made before the offer lapses or is revoked or is received
4. Acceptance must be absolute and unconditional and should correspond with the terms of the offeror. Otherwise, it amounts to counter offer which may be accepted or rejected by the offeror. For example, A offeror to sell his car for S. 1 lakh B asks for Rs. 70,000. It is not an acceptance but a counter offer only.
5. Acceptance once made, concludes the contract

### **CONSIDERATION**

Consideration means "something in return for something". Section 2 of the Indian Contract Act defined 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 abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

#### **1. Consideration at the Desire of the Promisor**

Consideration must proceed at the request of the promisor. Hence acts done voluntarily or at the request of third parties do not constitute a valid consideration.

*Durga Prasad Vs Baldev* : A built a market at the request of the Collector of the place B promised to pay. A commission on the articles sold in the market. It was held that B's promise to pay commission did not constitute a valid consideration because A did not build the market at the request of B.

#### **2. The Promisee or any other Person**

Consideration may move from the promisee or any third party. Hence, a stranger to consideration can sue on the contract.

### 3. Has done or abstained from doing or does or abstain from doing

- a) Consideration may be executed, i.e. an act or forbearance made or suffered for the promise given, or
- b) Consideration may be executory, i.e. a promise to act or abstain from doing in future, or
- c) Consideration may be past, i.e. an act or forbearance already taken place before the contract was entered into

### 4. Something

Consideration may not be adequate. But it must be real and lawful.

Example : A agrees to sell a cow worth Rs. 1200 for Rs. 10. He has given his consent freely. The agreement is a contract though consideration is inadequate.

An agreement made without consideration is void. But the following are exceptions.

- (1) An agreement expressed in writing and registered and made on account of natural love and affection between parties standing in near relation to each other.
- (2) A promise to compensate a person who has already voluntarily done something for the promisor, or
- (3) A promise to discharge a time-barred debt.

Types of contracts

#### On the basis of validity:

1. **Valid contract:** An agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law.

2. **Void contract** [Section 2(j)]: A void contract is a contract which ceases to be enforceable by law. A contract when originally entered into may be valid and binding on the parties. It may subsequently become void. -- There are many judgments which have stated that where any crime has been converted into a "Source of Profit" or if any act to be done under any contract is opposed to "Public Policy" under any contract—than that contract itself cannot be enforced under the law-

3. **Voidable contract** [Section 2(i)]: *An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract. If the essential element of free consent is missing in a contract, the law confers right on the aggrieved party either to reject the contract or to accept it. However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.*

4. **Illegal contract:** A contract is illegal if it is forbidden by law; or is of such nature that, if permitted, would defeat the provisions of any law or is fraudulent; or involves or implies injury

to a person or property of another, or court regards it as immoral or opposed to public policy. These agreements are punishable by law. These are void-ab-initio.

“All illegal agreements are void agreements but all void agreements are not illegal.”

5. **Unenforceable contract:** Where a contract is good in substance but because of some technical defect cannot be enforced by law is called unenforceable contract. These contracts are neither void nor voidable.

#### **On the basis of formation:**

1. **Express contract:** Where the terms of the contract are expressly agreed upon in words (written or spoken) at the time of formation, the contract is said to be express contract.

2. **Implied contract:** An implied contract is one which is inferred from the acts or conduct of the parties or from the circumstances of the cases. Where a proposal or acceptance is made otherwise than in words, promise is said to be implied.

3. **Quasi contract:** A quasi contract is created by law. Thus, quasi contracts are strictly not contracts as there is no intention of parties to enter into a contract. It is legal obligation which is imposed on a party who is required to perform it. A quasi contract is based on the principle that a person shall not be allowed to enrich himself at the expense of another.

#### **On the basis of performance:**

1. **Executed contract:** An executed contract is one in which both the parties have performed their respective obligation.

2. **Executory contract:** An executory contract is one where one or both the parties to the contract have still to perform their obligations in future. Thus, a contract which is partially performed or wholly unperformed is termed as executory contract.

3. **Unilateral contract:** A unilateral contract is one in which only one party has to perform his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the time of the contract or before the contract comes into existence.

4. **Bilateral contract:** A bilateral contract is one in which the obligation on both the parties to the contract is outstanding at the time of the formation of the contract. Bilateral contracts are also known as contracts with executory consideration.

#### **Offer**

Proposal is defined under section 2(a) of the Indian contract Act, 1872 as "when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtain the assent of that other to such act or abstinence, he is said to make a proposal/offer". 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. An offer should be made to obtain the assent of the other. The offer should be communicated to the offeree and it should not contain a term the non compliance of which would amount to acceptance.

### **Classification of Offer**

1. *General Offer*: Which is made to public in general.
2. *Special Offer*: Which is made to a definite person.
3. *Cross Offer*: Exchange of identical offer in ignorance of each other.
4. *Counter Offer*: Modification and Variation of Original offer.
5. *Standing, Open or Continuing Offer*: Which is open for a specific period of time. The offer must be distinguished from an invitation to offer. ***Invitation to offer*** An invitation to offer is only a circulation of an offer, it is an attempt to induce offers and precedes a definite offer. Acceptance of an invitation to an offer does not result contract and only an offer emerges in the process of negotiation. A statement made by a person who does not intend to bound by it but, intends to further act, is an invitation to offer.

### **Acceptance**

According to Section 2(b), "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted."

### **Rules:**

1. Acceptance must be absolute and unqualified.
2. Communicated to offeror.
3. Acceptance must be in the mode prescribed.
4. Acceptance must be given within a reasonable time before the offer lapses.
5. Acceptance by the way of conduct.
6. Mere silence is no acceptance.

### **Silence does not per-se amounts to communication- Bank of India Ltd.**

Mere silence cannot amount to any assent. It does not even amount to any representation on which any plea of estoppel may be founded, unless there is a duty to make some statement or to do some act

7. offeree and offerer must be consent

### **Lawful consideration**

According to Section 2(d), Consideration is defined as: "When at the desire of the promisor, the promisee has done or abstained from doing, or does or abstains from doing, or promises to do or abstain something, such an act or abstinence or promise is called consideration for the promise." consideration means to do something. In short, Consideration means *quid pro quo* i.e. something in return. An agreement must be supported by a lawful consideration on both sides. The consideration or object of an agreement is lawful, unless and until it is:

1. forbidden by law, or
2. is of such nature that, if permitted, it would defeat the provisions of any law, or
3. is fraudulent, or involves or implies injury to the person or property of another, or
4. the court regards it as immoral, or opposed to public policy.



5. consideration may take in any form-money, goods, services, a promise to marry, a promise to forbear etc.

*Contract Opposed to Public Policy can be Repudiated by the Court of law even if that contract is beneficial for all of the parties to the contract- What considerations and objects are lawful and what not-Newar Marble Industries Pvt. Ltd. Vs. Rajasthan State Electricity Board, Jaipur, 1993 Cr. L.J. 1191 at 1197, 1198 [Raj.]*- Agreement of which object or consideration was opposed to public policy, unlawful and void- -- What better and what more can be an admission of the fact that the consideration or object of the compounding agreement was abstention by the board from criminally prosecuting the petitioner-company from offence under Section 39 of the act and that the Board has converted the crime into a source of profit or benefit to itself. This consideration or object is clearly opposed to public policy and hence the compounding agreement is unlawful and void under Section 23 of the Act. It is unenforceable as against the Petitioner-Company.

#### Competent To Contract

Section 11 of The Indian Contract Act specifies that every person is competent to contract provided:

1. He should not be a minor i.e. an individual who has not attained the age of majority i.e. 18 years.
2. He should be of sound mind while making a contract. A person with unsound mind cannot make a contract.
3. He is not a person who has been personally disqualified by law.

#### Free Consent

According to Section 14, "two or more persons are said to be consented when they agree upon the same thing in the same sense (*Consensus-ad-idem*). A consent is said to be free when it not caused by coercion or undue influence or fraud or misrepresentation or mistake.

#### Elements Vitiating free Consent

1. Coercion (Section 15): "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code under(45,1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
2. Undue influence (Section 16): "Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."
3. Fraud (Section 17): "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract.

4. Misrepresentation (Section 18): "causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement".

5. Mistake of fact (Section 20): "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void".

#### Revocation of Offer

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

A proposal is revoked -

- (1) by the communication of notice of revocation by the proposer to the other party;
- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
- (3) by the failure of the acceptor to fulfill a condition precedent to acceptance; or
- (4) by the death or insanity of the proposer, if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.

#### Agency

In law, the relationship that exists when one person or party (the principal) engages another (the agent) to act for him, e.g. to do his work, to sell his goods, to manage his business. The law of agency thus governs the legal relationship in which the agent deals with a third party on behalf of the principal. The competent agent is legally capable of acting for this principal vis-à-vis the third party. Hence, the process of concluding a contract through an agent involves a twofold relationship. On the one hand, the law of agency is concerned with the external business relations of an economic unit and with the powers of the various representatives to affect the legal position of the principal. On the other hand, it rules the internal relationship between principal and agent as well, thereby imposing certain duties on the representative (diligence, accounting, good faith, etc.).

Under section 201 to 210 an agency may come to an end in a variety of ways:

- (i) By the principal revoking the agency – However, principal cannot revoke an agency coupled with interest to the prejudice of such interest. Such Agency is coupled with interest. An agency is coupled with interest when the agent himself has an interest in the subject-matter of the agency, e.g., where the goods are consigned by an upcountry constituent to a commission agent for sale, with power to recoup himself from the sale proceeds, the advances made by him to the principal against the security of the goods; in such a case, the principal cannot revoke the agent's authority till the goods are actually sold, nor is the agency terminated by death or insanity. (Illustrations to section 201)
- (ii) By the agent renouncing the business of agency;
- (iii) By the business of agency being completed;
- (iv) By the principal being adjudicated insolvent (Section 201 of The Indian Contract Act. 1872)

The principal also cannot revoke the agent's authority after it has been partly exercised, so as to bind the principal (Section 204), though he can always do so, before such authority has been so exercised (Sec 203).

Further, as per section 205, if the agency is for a fixed period, the principal cannot terminate the agency before the time expired, except for sufficient cause. If he does, he is liable to compensate the agent for the loss caused to him thereby. The same rules apply where the agent, renounces an agency for a fixed period. Notice in this connection that want of skill continuous disobedience of lawful orders, and rude or insulting behavior has been held to be sufficient cause for dismissal of an agent. Further, reasonable notice has to be given by one party to the other; otherwise, damage resulting from want of such notice, will have to be paid (Section 206). As per section 207, the revocation or renunciation of an agency may be made expressly or impliedly by conduct. The termination does not take effect as regards the agent, till it becomes known to him and as regards third party, till the termination is known to them (Section 208).

When an agent's authority is terminated, it operates as a termination of subagent also. (Section 210).<sup>[1]</sup>

### **Transfer of property act**

Entry 6 of List III (Concurrent List) of Seventh Schedule to Constitution reads 'Transfer of property other than agricultural land; registration of deeds and documents'. Thus, transfer of property is a 'Concurrent Subject'. Both Central and State Government can take legislative action in respect of transfer of property except that relating to agricultural land. [Transfer of agricultural land is a State subject under Entry 18 of List II (State List)]

The Act proposes to prescribe law relating to transfer of property by act of parties. Thus, the Act applies only to voluntary transfer of property. It does not cover transfer of property by 'will'.

Section 4 of the Act clarifies that the part of the Act which relates to contracts shall be taken as part of Indian Contract Act and some specified sections shall be read as supplemental to Indian Registration Act. Thus, the Act is complimentary to Indian Contract Act and Registration Act. The Act applies both to movable and immovable property.

**TRANSFER OF PROPERTY** – 'Transfer of Property' means an act by which a living person conveys property, in present or future, to one or more living persons, or to himself or to himself and one or more other living persons. 'Living person' includes a company or association or body of individuals, whether incorporated or not. [section 5]. - - The property may be movable or immovable, present or future. - - Such transfer can be made orally, unless transfer in writing is specifically required under any law. [section 9]. - - Any person competent to contract and entitled to transferable property, or authorised to dispose of transferable property on his own, is competent to transfer such property. The property can be transferred wholly or in part. It can be transferred either absolutely or conditionally. Such transfer can be only to the extent and in manner allowed and prescribed by law. [section 7].

**SALE OF IMMOVABLE PROPERTY** – ‘Sale’ is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. Such transfer in case of tangible immovable property of value of Rs 100 or more can be made only by a registered instrument. Delivery of tangible immovable property is made when seller places the buyer, or such person as he directs, in possession of property. Thus, delivery of immovable property can be only by handing over actual possession to buyer or to a person authorised by buyer. [section 54].

**MORTGAGE** – ‘Mortgage’ is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced, by way of loan or an existing or future debt. The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured are called as ‘mortgage money’ and the instrument by which transfer is effected is called a mortgage-deed. [section 58(a)]. Mortgage can be \* simple mortgage \* Mortgage by conditional sale \* Unstructuary mortgage \* English Mortgage \* Mortgage by deposit of title deeds or \* Anomalous mortgage.

### **WHEN MORTGAGEE CAN TAKE POSSESSION OF MORTGAGED PROPERTY IN CASE OF DEFAULT**

Under provisions of section 69 of Transfer of Property Act, mortgagee can take possession of mortgaged property and sale the same without intervention of Court only in case of English mortgage, if there is default of payment of mortgage money. In addition, mortgagee can take possession of mortgaged property where there is specific provision in mortgage deed and the mortgaged property is situated in towns of Kolkata, Chennai or Mumbai. In other cases, possession of property can be taken only with intervention of Court. [English Mortgage is where mortgagor binds himself to repay the mortgaged money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a *proviso* that he will re-transfer the property to the mortgagor upon payment of the mortgage-money as agreed. - section 58(e) of Transfer of Property Act].

**CHARGE** – Where immovable property of one person is, by act of parties or by operation of law, made security for payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all provisions in respect of ‘simple mortgage’ will apply to such charge. [section 100]. [Mortgage is not a ‘charge’ as per section 100 of Transfer of Property Act, but it will be a ‘charge’ for purpose of registration under Companies Act, as per section 124 of Companies Act].

A ‘charge’ is not ‘mortgage’. In every mortgage, there is ‘charge’, but every charge is not a mortgage. Section 100 of Transfer of Property Act states that if immovable property is made as security for payment of money and if it does not amount to mortgage, then the later person is said to have a charge on property. However, a ‘charge’ does not create an interest in the property. - *Dattatreya Mote v. Anand Datar* - (1994) 2 SEC 799. Thus, no particular form is necessary to create ‘charge’. [However, for purpose of registration under Companies Act, ‘charge’ includes mortgage].

## **LEASE OF IMMOVABLE PROPERTY**

A lease of immovable property is transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity. Such transfer of right should be in consideration of a price paid or promised, or of money, or a share of crops, or service or anything of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. [section 105]. Lease of property from year to year or for any term exceeding one year can be made only by registered instrument. [section 107].

**EXCHANGE** – When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an ‘exchange’. [section 118].

**ACTIONABLE CLAIM** – ‘Actionable claim’ means a claim to any debt or to any beneficial interest in movable property not in possession (either actual or constructive) of the claimant. The debt should be other than a debt secured by mortgage of immovable property or pledge of movable property. The claim should be such as Civil Court would recognise as affording grounds for relief. Such debt or beneficial interest be existent, accruing, conditional or contingent. [section 3 para 6]. Such transfer of an actionable claim shall be effected only by execution of an instrument in writing. [section 130]. - - One normal example is that receivable from a person is ‘actionable claim’, which can be transferred to another (e.g. one bank may transfer some of its receivables to another).

## **CAPACITY TO CONTRACT**

The parties who enter into a contract must have the capacity to do so ‘Capacity’ means competence of the parties to enter into a valid contract. According to Sec. 10, an agreement becomes a contract if it is entered into between the parties who are competent to contract. Thus Sec. 11 declares the following person to be incompetent to contract.

- (i) Minors
- (ii) Persons of unsound mind, and
- (iii) Persons disqualified by any law to which they are subject.

### **Incapacity to contract**

#### **1. Foreign Sovereigns and Ambassadors**

They may enter into contracts. But they cannot be sued except with the permission of the Central Government and certified by the Secretary.

#### **2. Alien Enemy**

The enemy’s status is to be determined by the place at residence of the individual, but not by his nationality. If a contract is already entered into before the declaration of war, its performance will be suspended during the period of war and in case the war continues to where period, the contract becomes void on the ground of impossibility of particular contract.

#### **3. Convict**

He is not competent to contract during the period of sentence.

#### **4. Bankrupt**

He cannot enter into contract and bind his property as his property shall be vested in the official receiver when he is adjudged an insolvent.

#### **5. Artificial Person : Corporation**

It is a person in the eye of law. It is a legal entity. It can purchase properties enter into contracts, sue and be sued on such contracts. Its contractual capacity is limited. For example, it cannot enter into contract to marry or which is *ultra vires* its powers.

## **(B) INCAPACITY ARISING FROM MENTAL DEFICIENCY**

A person is said to be mentally deficient when (a) he does not attain majority. E.g. a minor or (b) he is of unsound mind.

### **1. When he does not attain majority: Minor**

A minor is a person who has not completed 18 years of age. He attains majority on completion of his 21 years in England and 18 years in India. A minor cannot enter into a valid contract.

### **2. When he is of Unsound Mind**

Section 12 lays down that : A person is said to be of sound mind for the purpose of making a contract if at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind may make a contract when he is of sound mind.

Illustration: a patient in a lunatic asylum, who is at intervals of sound mind may contract during those intervals.

## **MINOR IN INDIAN LAW**

A minor is a person who is not a major. He attains majority on completion of 21 years in England and 18 years in India. Even in India he attains majority on completion of 21 years when his property is managed by a court of wards or a guardian.

1. In Indian law, a contract by a minor is void. It cannot be even ratified by him after attaining majority.
2. A contract entered into by a minor by fraudulently misrepresenting his age is void. He cannot be stopped from setting up the plea of minority.
3. "Minors can have no privilege to cheat men", though law protects them, so that people may not exploit their tender age. So, if a minor receives goods on credit while payment cannot be enforced goods can be recovered, if restitution is possible.
4. The property of the minor is liable for the necessities supplied to him, provided the goods are suitable to the condition of his life and status. Even here, he is not personally liable, but his estate only is liable.
5. While a sale or mortgage by a minor is void, a sale or mortgage in favour of a minor is enforceable by him.
6. A contract by a guardian on behalf of the minor is enforceable by or against the minor, provided the guardian is competent to contract and the contract is beneficial to the minor. But he cannot purchase immovable property without obtaining the consent of the court.
7. Under Sec. 3 of the Indian Partnership Act a minor may be admitted to the benefits of partnership with the consent of all the partners.

## **CONSENT AND FREE CONSENT**

Consent: It means acquiescence or act of assenting to an offer. "Two or more persons are said to consent when they agree upon the same thing in the same sense". (Sec. 13)

Free Consent: Consent is said to be free when it is not caused by

- (1) Consent as defined in Sec. 15 or
- (2) Undue influence as defined in Sec. 16, or
- (3) Fraud as defined in Sec. 17, or
- (4) Misrepresentation as defined in Sec. 18, or
- (5) Mistake, subject to the provisions of Secs. 20, 21, and 22 (Sec. 14)

When there is no consent, there is no contract

*Example* : A is forced to sign a promissory note at the point of pistol. A knows what he is signing but his consent is not free. The contract in this case is voidable at this option.

## **COERCION**

When a person is compelled to enter into a contract by the use of force by the other party or under a threat, "coercion" is said to be employed. Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code 1860 or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Example: A threatens to kill B if he does not lend Rs. 1000 to C. B agrees to lend the amount to C. The agreement is entered into under coercion.

A threat to commit suicide also amounts to coercion.

## **EFFECT OF COERCION**

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused (Sec. 19)

## **UNDUE INFLUENCE**

Sometimes a party is compelled to enter into an agreement against his will as a result of unfair persuasion by the other party. This happens when a special kind of relationship exists between the parties such that one party is in a dominant position to exercise undue influence over the other.

Sec. 16(1) defines : undue influence" as follows

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

The following relationships usually raise a presumption of undue influence viz.

- (i) Parent and child
- (ii) Guardian and ward
- (iii) Trustee and beneficiary
- (iv) Doctors and patient
- (v) Solicitor and client, and
- (vi) Finance and fiancée

The presumption of undue influence applies whenever the relationship between the parties is such that one of them is by reason of confidence reposed in him by the other, able to take unfair advantage over the other.

## **EFFECT OF UNDUE INFLUENCE**

When consent to an agreement is obtained by undue influence, the agreement is a contract voidable at the option of the party whose consent was so obtained. Any such contract may be set aside either absolutely or if the party who is entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just and equitable (Sec. 19-A)

<b>DIFFERENCE BETWEEN COERCION AND UNDUE INFLUENCE</b>		
<b>S. No.</b>	<b>Coercion</b>	<b>Undue Influence</b>
1.	The consent is given under the threat of an offence	The consent is given by a person who is so situated in relation to another that the other person is in a position to dominate his will
2.	Coercion is mainly of a physical character. It involves mostly use of physical or violent force.	Undue influence is of moral character. It involves use of moral force or mental pressure.
3.	There must be intention of causing any person to enter into an agreement	Here the influencing party uses its position to obtain an unfair advantage over the other party
4.	It involves a criminal act	No criminal act is involved

## **MISREPRESENTATION AND FRAUD**

### **MISREPRESENTATION**

Misrepresentation is a false statement which the person making it honestly believes to be true or which he does not know to be false. It also includes non-disclosure of a material fact or facts without any intent to deceive the other party.

Sec. 18 defines “misrepresentation” According to it, there is misrepresentation

- (1) When a person positively asserts that a fact is true when his information does not warrant it to be so, though he believes it to be true.
- (2) When there is any breach of duty by a person which brings an advantage to the person committing it by misleading another to his prejudice.
- (3) When a party causes, however innocently, the other party to the agreement to make a mistake as to the substance of the thing which is the subject of the agreement.



## **FRAUD**

Fraud exists when it is shown that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, not caring whether it is true or false, and the maker intended the other party to act upon it.

## **MISTAKE OF LAW**

Mistake of law be (1) mistake of law of the country or (2) mistake of law of a foreign country.

1. ***Mistake of law of the country:*** Ignorantia juris non excusat Ex. Ignorance of laws is no excuse : is a well settled rule of law. A party cannot be allowed to get any relief on the ground that it had done a particular act in ignorance of law. A mistake of law is, therefore, no excuse, and the contract cannot be avoided.

Example: A and B enter into a contract on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. This contract may be voidable.

2. ***Mistake of law of a foreign country:*** Such a mistake is treated as mistake of fact and the agreement in such a case is void. (Sec. 21)

## **MISTAKE OF FACT**

Mistake of fact may be (1) a bilateral mistake, or (2) a unilateral mistake

### **1. Bilateral Mistake**

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, there is a bilateral mistake. In such a case the agreement is void (sec. 20). The following two conditions have to be faced for the application of Sec. 20.

- (i) The mistake must be mutual i.e. both the parties should misunderstand each other and should be at a cross-purposes.  
Example: A agreed to purchase B's motor-car which was lying in B's garage. Unknown to either party, the car and garage were completely destroyed by fire a day earlier. The agreement is void
- (ii) The mistake must relate to a matter of fact essential to the agreement. As to what facts are essential in an agreement will depend upon the nature of the promise in each case.

Example: A man and a woman entered into a separation agreement under which the man agreed to pay a weekly allowance to the woman mistakenly believing themselves lawfully married. The agreement was void as there was mutual mistake on a point of fact which was material to the existence of the agreement.

The various cases which fail under bilateral mistake are as follows:

### **Mistake as to the Subject – Matter:**

Where both the parties to an agreement are working under a mistake relating to the subject-matter, the agreement is void. Mistake as to the subject-matter covers the following cases.

- (1) ***Mistake as to the existence of the subject-matter:*** If both the parties believe the subject-matter of the contract to be in existence, which in fact at the time of the contract is non-existent, the contract is void.

*Example:* A agrees to buy from B a certain goat. It turns out that the goat was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

- (2) ***Mistake as to the identity of the subject-matter:*** It usually arises where one party intends to deal in one thing and the other intends to deal in another.

*Example:* W agreed to buy from R a cargo on cotton to arrive ex-peerless from Bombay". There were two ships of that name sailing from Bombay, one sailing in October and the other in December. W meant the former ship R meant the latter. Held, there was a mutual or a bilateral mistake and there was no contract.

- (3) ***Mistake as to the quality of the subject-matter:*** If the subject matter is something essentially different from what the parties thought it to be the agreement is void.

*Example:* A sells to B a piece of silk B thinks that it is foreign silk. A knows that B thinks so but knows that it is Indian silk only.

- (4) ***Mistake as to the quantity of the subject-matter:*** If both the parties are working under a mistake as to the quantity of the subject-matter the agreement is void.

*Example:* A silver bar was sold under a mistake as to its weight. There was a difference in value between the weight of the bar as it was and as it was supposed to be. Held the agreement was void.

- (5) ***Mistake as to the title to the subject-matter:*** If the seller is selling a thing which he is not entitled to sell and both the parties are acting under a mistake, the agreement is void.

*Example:* A person took a lease of a fishery which, unknown to either party already belonged to him. Held, the lease was void.

- (6) ***Mistake as to the price of the subject-matter:*** if there is a mutual mistake as to the price of the subject-matter, the agreement is void.

*Example:* C wrote to D offering to sell certain property for Rs. 15,000. He had earlier declined an offer from D to buy the same property for Rs. 20,000. D who knew that his offer of Rs. 15,000 was a mistake for Rs. 25,000, immediately accepted the offer. Held, D knew perfectly well that the offer was made by mistake and hence the contract could not be enforced.

### **Mistake as to the Possibility of Performing the Contract**

Consent is nullified if both the parties believe that an agreement is capable of being performed when in fact this is not the case. The agreement, in such a case, is void on the ground of impossibility.

Impossibility may be—

- (i) ***Physical Impossibility***

*Example:* A contract for the hire of a room for witnessing the coronation procession of Edward VII was held to be void because unknown to the parties the procession had already been cancelled.

- (ii) **Legal Impossibility:** A contract is void if it provides that something shall be done which cannot, as a matter of law be done.

## **2. Unilateral Mistake**

When in a contract only one of the parties is mistaken regarding the subject matter or in expressing or understanding the terms or the legal effect of the agreement the mistake is a unilateral mistake. According to Sec. 22, a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. A unilateral mistake is not allowed as a defence in avoiding a contract unless the mistake is brought about by the other party's fraud or misrepresentation.

*Example:* A offers to sell his house to B for an intended sum of Rs. 44,000. By mistake he makes an offer in writing of Rs. 40,000. He cannot plead mistake as a defence.

## **LEGALITY OF OBJECT**

A contract must have a lawful object. The word object means purpose of design. In some cases consideration for an agreement may be lawful but the purpose for which the agreement is entered into may be unlawful. In such cases the agreement is void. As such both the object and the consideration of an agreement must be lawful otherwise the agreement is void.

The consideration or object of an agreement is unlawful

1. If the object is forbidden by law

*Example:* A promise to obtain for B an employment in the public service and B promises to pay Rs. 1,00,000 to A. the agreement is void, as the consideration is unlawful.

2. If the object is permitted, it would defeat the provisions of any law

*Example:* N agreed to enter a company's service in consideration of a weekly wage of Rs. 75 and a weekly expense allowance of Rs. 25. Both the parties knew that the expense allowance was a device to evade tax. Held the agreement was unlawful.

3. If the object is fraudulent: An agreement which is made for a fraudulent purpose is void. Thus an agreement in fraud of creditors with a view to defeating their rights is void.

4. If the Court regards the object as immoral

*Example:* A agrees to let her daughter to B for concubinage (state of living together as man and wife without being married). The agreement is unlawful, being immoral.

5. Where the Court regards it as opposed to public policy.

## **UNLAWFUL AND ILLEGAL AGREEMENTS**

An unlawful agreement is one which, like a void agreement, is not enforceable by law. An illegal agreement is not only, void as between the immediate parties but has further effect that the collateral transactions to it also become tainted with illegality.

Example: T lends Rs. 50,000 to B to help him to purchase some prohibited goods from T, an alien enemy. If B enters into an agreement with T, the agreement will be illegal and the agreement between B and T shall also become illegal, because it is collateral to the main transaction. T cannot, therefore, recover the amount.

### **AGREEMENTS OPPOSED TO PUBLIC POLICY**

An agreement is said to be opposed to public policy when it is harmful to the public welfare. Some of the agreements which are opposed to public policy and are unlawful are as follows.

1. *Agreements of trading with enemy*: An agreement made with an alien enemy in time of war is illegal on the ground of public policy.
2. *Agreement to commit a crime*: Where the consideration in an agreement is to commit a crime, the agreement is opposed to public policy. The Court will not enforce such an agreement.
3. *Agreements which interfere with administration of police*: An agreement, the object of which is to interfere with the administration of justice is unlawful, being opposed to public policy. It may take any of the following forms.

(a) *Interference with the course of justice*: An agreement which obstructs the ordinary process of justice is unlawful.

(b) *Stifling prosecution*: It is in public interest that if a person has committed a crime, he must be prosecuted and punished.

(c) *Maintenance and champerty*: Maintenance' is an agreement to give assistance, financial or otherwise, to another to enable him to bring or defend legal proceedings when the person giving assistance has got no legal interest of his own in the subject-matter.

4. *Agreements in restraint of legal proceedings* : Sec. 28 which deals with these agreements.
  - (a) Agreements restricting enforcement of rights: An agreement which wholly or partially prohibits any party from enforcing his rights under or in respect of any contract is void to that extent.
  - (b) Agreements curtailing period of limitation: Agreements which curtail the period of limitation prescribed by the Law of Limitation are void because their object is to defeat the provisions of law.
5. *Trafficking in public offices and rules*: Agreements for the sale or transfer of public offices and titles or for the procurement of a public recognition like Padma Vibhushan or Param Veer Chakra for monetary consideration are unlawful being opposed to public policy.

Example: R paid a sum of Rs, 2,50,000 to A who agreed to obtain a seat for R's son in a Medical College. On A's failure to get the seat, R filed a suit for the refund of Rs. 2,00,000. Held, the agreement is void on the ground of public property

6. *Agreements tending to create interest opposed to duty*: If a person enters into an agreement whereby he is bound to do something which is against his public or professional duty the agreement is void on the ground of public property.
7. *Agreements in restraint of paternal rights*: A father, and in his absence the mother, is the legal guardian of his/her minor child. This rights of guardianship cannot be bartered away by any agreement.
8. *Agreements restricting personal liberty*: Agreements which unduly restrict the personal freedom of the parties to it are void as being against public policy.
9. *Agreements in restraint of marriage*: Every agreement in restraint of the marriage of any person, other than a minor, is void (Sec. 26). This is because the law regards marriage and married status as the right of every individual.
10. *Marriage brokerage or brokerage agreements*: An agreements by which a person for a monetary consideration, promises in return to procure the marriage of another is void being opposed to public policy.
11. *Agreements interfering with marital duties*: Any agreement which interferes with the performance of marital duties is void being opposed to public policy. Such agreements have been held to include the following.
  - (a) A promise by a married person to marry during the lifetime or after the death of spouse.
  - (b) An agreement in contemplation of divorce e.g. an agreement to lend money to a woman in consideration of her getting a divorce and marrying the lender.
  - (c) An agreement that the husband and wife will always stay at the wife's parents' house and that the wife will never leave her parental house.
12. *Agreements to defraud creditors or revenues authorities*: An agreement the object of which is to defraud the creditors or the revenue authorities is not enforceable being opposed to public policy.
13. *Agreements in restraint of trade*: An agreement which interferes with the liberty of a person to engage himself in any lawful trade profession or vocation is called an agreement in restraint of trade.