**MODEL ANSWERS NOV-2018**

**1st SEMESTER 3 YEARS LL.B**

**SUBJECT: CONTRACT-I**

**Duration: 2 Hours 30 Min** **Max Marks: 80**

# Unit 1:

**(a) Define offer. Explain the rules regarding to valid offer with the help of examples.**

**Introduction:**

Every day we directly or indirectly enter into agreements for the purpose of carrying out various activities. Agreements can be for social/family or for legal relationships. An agreement entered for legal purpose which intends to have legal relationship can be termed as Contract.

It is the Contract which is considered to be legally enforceable in the eyes of Law as per section 2(h) of the Indian Contract Act, 1872.

Every Contract to be valid has to satisfy certain essential elements as laid down under the Contract Act, 1872. The first and foremost essential element for a valid Contract if-

**Meaning:**

An Offer is intimation by words or by conduct of a willingness to enter into a legally binding Contract.

**Definition:**

Section 2(a) of the Indian Contract Act, 1872 defines the term "Proposal" as follows: “when one person signifies to another his willingness to do or to abstain from doing something with a view to obtaining the assent of the other to such an act or abstinence, he is said to make a proposal”.

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

**Essentials of valid offer:**

**1. It may be express or implied:**

An offer may be made either by words or by conduct. An offer, which is made by words spoken or written, is called an express offer. The offer, which is made by the conduct of a person, is called an implied offer.

Example:

1. M says to N that he will sell his motorcycle to him for RS. 40,000. It is an express offer.
2. A railway coolie carries the luggage of B without being asked to do so B allows him to do so. It is an implied offer.
3. The new Khan Transport Company runs buses on different routes to carry passengers at the scheduled fares. This is an implied offer by the company.

**2. It must create legal relation:**

The offer must be made in order to create legal relations otherwise, there will be no agreement. If an offer does into give rise to legal obligations between the parties it is not a valid offer in the eye of law.

Example:

1. A invites B to dinner B accept the invitation. It does not create any legal relations, so there is no agreement.
2. A offers to sell his watch to B for Rs.200 and B agrees. There is an agreement because here the parties intend to create legal relations.
3. Three friends joined to enter a newspaper competition and agreed to share any winnings. It was held the intended to create legal relations and their agreement was therefore a contract.

**3. It must be definite & clear:**

An offer must be definite and clear, if the terms of an offer are not definite and clear, it cannot be called a valid offer. If such offer is accepted it cannot create a

binding contract.
Example:
A has two motorcycles. He offers B to sell one motorcycle for Rs.27,000. It is not a valid offer because it is not clear that which motor cycle A wanted to sell.

**4. It is different from invitation to offer:**
An offer is different from an invitation to offer. It is also called invitation to treat or invitation to receive offer. An invitation to offer looks like offer but legally it is not offer.
In the case of an invitation to offer, the person sending out the invitation does not make an offer but only invites the other party to make an offer. His object is to inform that he is willing to deal with anybody who after getting such information is willing to open negotiations with him. Such invitations for offers are not offers according to law and so cannot become agreement by acceptance.

Example:
1. Quotations, Catalogues of prices, display of goods with prices issue of prospectus by companies are examples of invitation to offer.

2. Display of goods in an auction sale is not an offer rather it is an invitation to offer. The offer will come from the buyer in the form of bids.

**5. It may be specific or general:**
When an offer is made to a specified person or group of persons, it is called specific offer. Such an offer can be accepted only by the person or persons to whom it is made. A general offer, on the other hand, is one, which is made to public in general and it may be accepted by any person who fulfils the conditions mentioned in it. Both specified and general offers are valid.

Example:
1. M makes an offer to N to sell his bicycle for Rs.800, it is a specific offer. In this case, only N can accept it.

2. A announces in a newspaper a reward of Rs.1,000 for any one who will return his lost radio. It is general offer.

**6. It must be communicated to the offeree:**

An offer is effective only when it is communicated to the offeree. If an offer is not communicated to the offeree it cannot be accepted. Thus an offer, which is not communicated, is not a valid offer. It applies to both specific and general offers.

Example:

A without knowing that a reward has been offered for the arrest of a particular criminal, catches the criminal and informs the police. A cannot recover the reward as he was not aware of it.

**7. It should not contain negative condition:**

An offer should not contain a condition the non-compliance of which may be assumed as acceptance. An offeror cannot say that if acceptance is not communicated up to a certain date, the offer would be presumed to have been accepted. If the offeree does not reply, there is no contract, because no obligation to reply can be imposed on him, on the ground of justice no agreement because such condition cannot be imposed on the offeree. It is only a one sided offer.

Example:

A wrote to B offering to sell his book for Rs.500 adding that if he didn't reply within 5 days, the offeree would be presumed to have been accepted. There is no agreement b/c such condition can't be imposed on the offeree. It is only a one sided offer.

**8. It may be subject to any terms & conditions:**

An offeror may attach any terms and conditions to the offer he makes. He may even prescribe the mode of acceptance. There is no contract, unless all the terms of the offer are accepted in the mode prescribed by the offeror. It must be noted that if the offeror asks for sending the acceptance by telegram and the offeree sends the acceptance by letter, and the offeror may reject such acceptance.

Example:
A asks B to send the reply of his offer by telegram but B sends reply by letter, A may reject such acceptance because it is opposed to the prescribed mode of communication.

**9. It must not contain cross offers:**
When two parties make similar offers to each other, in ignorance of each other's such offers are called cross-offers. The acceptance of cross-offers does not result in complete agreement.

Example:
On 23rd December 2007, A wrote B to sell him 100 ton of iron at Rs.10,000 per ton. On the same day, B wrote to A to buy 100 tons of iron at Rs.10,000 per ton. There is no contract between A & B because the offers wee similar and made in ignorance of the other and so there is no acceptance of each other's offer.

**Conclusion:**

Therefore, Offer is very important element for starting a Contract. Offer should be clearly differentiated between invitation to offer. Offer is legal binding one whereas invitation to offer is merely an invitation. Quotations, catalogues of prices or display of goods with prices marked thereon do not constitute an offer. They are instead an invitation for offer and hence if a customer asks for goods or makes an offer, the shopkeeper is free to accept the offer or not.

## OR

**"All contracts are agreements are but all agreements are not contracts. Explain.**

**INTRODUCTION:**
No doubt it is a valid and true statement. Before critically discussing the statement, we must know the exact and basic meanings of the two terms contract

and agreement in the context of business law. For understanding the meaning, we have to go to the contract act 1872 that is applicable in subcontinent.
***A contract*** is a legally binding agreement or relationship that exists between two or more parties to do or abstain from performing certain acts. There must be offer and acceptance for a contract to be formed. An offer must backed by acceptance of which there must be consideration. Both parties involved must intend to create legal relation on a lawful matter which must be entered into freely and should be possible to perform.

**Definition of contract**

According to section 2(h) of the Contract Act 1872:
" An agreement enforceable by law is a contract."
A contract therefore, is an agreement the creates a legal obligation i.e., a duty enforceable by law.
From the above definition, we find that a contract essentially consists of two elements:
(1) An agreement and (2) Legal obligation i.e., a duty enforceable by law.
Example;

A promises to sell a horse to B for Rs.100, 000, and B promises to buy horse at that price.

***All contracts are agreements:***

For a Contract to be there an agreement is essential; without an agreement, there can be no contract. As the saying goes, "where there is smoke, there is fire; for without fire, there can be no smoke". It could will be said, "where there is contract, there is agreement without an agreement there can be no contract". Just as a fire gives birth to smoke, in the same way, an agreement gives birth to a contract.
What is agreement? An agreement is a form of cross reference between different parties, which may be written, oral and lies upon the honor of the parties for its fulfillment rather than being in any way enforceable.

As per section 2 (e) of Contract At 1872:
" Every promise and every set of promises, forming the consideration for each other, is an agreement." Thus it is clear from this definition that a 'promise' is an agreement.

*What is a 'promise*'?
The answer to this question is contained in section 2 (b) which defines the term." 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 agreement, therefore, comes into existence only when one party makes a proposal or offer to the other party and that other party signifies his assent thereto.

**All agreements are not contracts:**
As stated above, an agreement to become a contract must give rise to a legal obligation. If an agreement is incapable of creating a duty enforceable by law. It is not a contract. Thus an agreement is a wider term than a contract. Agreements of moral, religious or social nature e.g., a promise to lunch together at a friend's house or to take a walk together are not contracts because they are not likely to create a duty enforceable by law for the simple reason that the parties never intended that they should be attended by legal consequences on the other hand, legal agreements are contracts because they create legal relations between the parties.

EXAMPLE:
a- A Invites B to dinner. B accepts this invitation but does not attend the dinner. A cannot sue B for damages. It is social agreement because it does not create legal obligation. So it is not a contract.
b- A promises to sell his car to B for one million. It is legal agreement because it creates legal obligations between the parties. So it is a contract.
c- The leading case on this point is Balfour Vs Balfour case (1919).

According to section 10 of the contract act 1872, “All agreements are contracts if they are made by the free consent of the parties, competent to contract, for a lawful consideration and with a lawful object and not hereby declared to be void.”

Thus an agreement becomes a contract when at least the following conditions are satisfied.

1- free consent

2- competency of the parties’

3- lawful consideration

4- lawful object

5- two or more parties

6- Offer and Acceptance

7- Intention to create legal relationship

8- Certainty of meaning

9- Possibility of performance

10- Legal formalities

**Conclusion:**

In a nut shell, an agreement is the basis of a contract and contract is the structure constructed on this basis. An agreement starts from an offer and ends on consideration while a contract has to achieve another milestone that is enforceability. Due to this, breach of an agreement does not give rise to any legal remedy to the aggrieved party while breach of contract provides legal remedy to the aggrieved party against the guilty party. Thus we can say that all contracts are agreements but all agreements are not contracts.

**(b): In a self-service departmental store a customer picks up the article and takes into cash counter, cashier refuses to sell. Has the customer any right against the owner of the shop?**

In this case, the customer doesn’t have any right against the shop owner,

Reason – An offer is different from an invitation to offer. It is also called invitation to treat or invitation to receive offer. An invitation to offer looks like offer but legally it is not offer.
In the case of an invitation to offer, the person sending out the invitation does not make an offer but only invites the other party to make an offer. His object is to inform that he is willing to deal with anybody who after getting such information is willing to open negotiations with him. Such invitations for offers are not offers according to law and so cannot become agreement by acceptance.

In this above problem, the shop owner has just displayed the goods in his shop and this is not an offer to sale, it is just mere invitation to an offer hence the customer doesn't have any right against the shop owner.

Example:
1. Quotations, Catalogues of prices, display of goods with prices issue of prospectus by companies are examples of invitation to offer.

2. Display of goods in an auction sale is not an offer rather it is an invitation to offer. The offer will come from the buyer in the form of bids.

OR **OR**

**Classification of contract**

**Contract is** an agreement enforceable by law. Between two or more parties for the doing or not doing of something specified. Contracts can also be classified according to performance. A contract can be either **executed** or **executor**. An executed contract—is where one party has performed all that is required to be done according to the contract. For example, Alan delivers one tone of wood to Brian. Alan has performed his part of the contract, now it remains for Brian to pay the price. An executor contract—This is a contract where both parties still have obligations to perform under the contract.

**Classification of contract**

Contracts can be classified into five broad divisions namely

1. The method of formation of a contract
2. The time of performance of contract
3. The parties of the contract
4. The method of legality of the contract

**1. The method of formation of a contract**

Under the method of formation of a contract may be three kinds

- Ø Express contract
- Ø Implied contract
- Ø Quasi contract

**Express contract:** Express contract is one which expressed in words **spoken or written.** When such a contract is formal, there is no difficulty in understanding the rights and obligations of the parties.

**Implied contract:** The condition of an implied contract is to be understood form the acts, the contract of the parties or the course of dealing between them.

**Quasi contract:** There are certain dealings which are not contracts strictly, though the parties act as if there is a contract. The contract Act specifies the various situations which come within what is called Quasi contract.

**2.The time of performance of contract**

Under the method of the time of performance of contract may be two kinds

- Ø Executed Contract
- Ø Executory Contract

**Executed Contract:** There are contracts where the parties perform their obligations immediately, as soon as the contract is formed.

**Executory Contract:** In this contract the obligations of the parties are to be performed at a later time.

## 3. The parties of the contract

Under the method of the parties of the contract may be two kinds

- Ø Bilateral Contract
- Ø Unilateral Contract

**Bilateral Contract:** There must be at last two parties to the contract. Therefore all contracts are bilateral or multilateral.

**Unilateral Contract:** In certain contracts one party has to fulfill his obligations where as the other party has already performed his obligations. Such a contract is called unilateral contract.

## 5.The method of legality of the contract

Under the method of the method of legality of the contract may be five kinds

1. Valid Contract
2. Void Agreement
3. Void able Contract
4. Unenforceable Agreement
5. Illegal Agreement

**Valid Contract:** An agreement which satisfied all the essential of a contract and which is enforceable through the court is called valid contract.

**Void Agreement:** An agreement which is failed to satisfied all or any of the essential element of a contract and which is not enforceable by the court is called void agreement. An agreement not enforceable by law is said to be void. A void agreement has no legal fact. It confers no right on any person and created no obligation.

Example: An agreement made by a minor.

**Voidable Contract:** An agreement which is enforceable by law at the open of one or more parties of the contract but not at the open of the other or others is a void able contract.

A void able contract is one which can be avoided and satisfied by some of the parties to it. Until it is avoided, it is a good contract.

Example: contracts brought about by coercion or undue influence or misrepresentation or fraud.

**Unenforceable Agreement:** An Unenforceable Agreement is one which cannot be enforcing in a court for its technical and formal defect.

Example: (1) An agreement required by law to register but not resisted. (2) An agreement with not satisfied stamped.

**Illegal Agreement:** An illegal agreement is one which is against a law enforcing in Bangladesh.

Example: An agreement to compiled murder.

# Unit 2:

**(a): Define consent, discuss when Consent is said to be free.**

**Introduction:**

Free consent is an essential element for the formation of contract. According to Section 10 if the Indian Contract Act,1872 'All agreements are contracts, if they are made by the free consent'. Section 13 and Section 14 of the Indian Contract Act, 1872 defines 'Consent' and 'Free Consent' respectively.

**Meaning of Consent:**

It means an act of assenting or agreeing to an offer. According to section 13 of Indian Contract Act, 1872, "two or more persons are said to consent when they agree upon the same thing in the same thing in same sense." Thus, consent involves identity of minds in respect of the subject matter of the contract. In English Law, this is called 'consensus-ad-idem'.

**Effect of Absence of consent:**

When there is no consent at all, the agreement is void ab-initio, i.e. it is not enforceable at the option of either party.

Ex: X has one Maruti car and one fiat car. He wants to sell fiat car. Y does not know that X has two cars. Y offers to buy X's Maruti car Rs 50,000. X accepts the offer thinking it to be an offer for his Fiat car. Here, there is no identity of mind in respect of the subject of the subject matter. Hence there is no consent at all and the agreement is void ab-initio.

**Meaning of Free consent:**

It is one of the essential elements of a valid contract as it is evidenced by section 10 which provides that all agreements are contracts if they are made by the free consent of the parties... according to section 14, consent is said to be free when it is not caused by (a) Coercion, or (b)Undue influence, or (c) Fraud, or (d) Misrepresentation, or (e) Mistake. When there is consent but it is not free, the contract is usually voidable at the option of the party whose consent was so caused.

**Coercion (sec 15)**

It means compelling a person to enter into a contract, by use of physical force/activities forbidden by Indian penal code, or threatens to do activities forbidden by I.P.C, or threatens to damages the property.

**Effect of coercion:**

Voidable and can be canceled at the option of aggrieved party. OR A 'suicide and a 'threat to commit suicide' are not punishable but an attempt to commit suicide is punishable under the Indian penal code.

Ex: X threatens to kill Y if he does not sell his house for Rs. 1,00,000 to X. Y sells his house to X and receives the payments. Here, V's consent has been obtained by coercion. Hence, this contract is voidable at the option of Y. If Y decides to avoid the contract, he will have to return Rs 1,00,000 which he had received from X.

**Undue Influence (sec 16)**

The term 'undue influence' means dominating the will of the other person to obtain an unfair advantage over the other. According to section 16(1), a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of them is in a position to dominate the will of the other, and the dominant party uses that position to obtain an unfair advantage over the other.

When two-partner are in relation, and one of them is dominant and other is in weaker position and dominant person takes undue-Advantage, then it is called "Undue- influence."

Ex: Father and son, Teacher and student, Doctor and patient

Effect of undue influence:

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

**Fraud (sec17)**

The term 'fraud' means a false representation of fact made willfully with a view to deceive the other party. Fraud includes:

• Wrong suggestion about a fact, knowing that it is not-true;

Ex: X sells to Y locally manufactured goods as imported goods charging a higher price, it amounts to fraud.

• Active concealment (Hide) of defect in goods:

Ex: X a furniture dealer, conceals the cracks in furniture sold by him by using some packing material and polishing it in such a way that the buyer even after reasonable examination cannot trace the defect, it would amount to fraud through active concealment.

• Promise made without intention to perform:

Ex: A farmer agrees to supply 100kg potato that will be produced by him out of his field, after three months. Two months has been lapsed, but the farmer neither implant seeds, nor does cultivation. This is case of fraud.

Effect of Fraud

The effects of fraud are as follows:

(a) The party whose consent was caused by fraud can rescind (cancel) the contract, but he cannot do so in the following cases:

 Where silence amounts to fraud, the aggrieved party cannot rescind the contract if he had the means of discovering the truth with ordinary diligence;

 Where the party gave the consent in ignorance of fraud;

 Where the party after becoming aware of the fraud takes a benefit under the contract;

 Where an innocent third party before the contract is rescinded acquires for consideration some interest in the property passing under the contract.

 Where the parties cannot be restored to their original position.

(b) The party whose consent was caused by fraud may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.

**Misrepresentation (sec 18)**

The term "misrepresentation" means a false representation of fact made innocently or non-disclosure of a material fact without any intention to deceive the other party. Section 18 defines the term "misrepresentation" as follows

"Misrepresentation" means and includes-

 The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

 Any breach of duly which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him, by misleading an other to his prejudice or to the prejudice of anyone claiming under him;

 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.

**Essential elements of misrepresentation:**

By a party to a contract: The representation must be made by a party to a contract or by anyone with his connivance or by his agent. Thus, the misrepresentation by a stranger to the contract does not affect the validity of the contract. There must be a false representation and it must be made without the knowledge of its falsehood i.e. the person making it must honestly even it is to be true. "Innocent misstatement made into good faith OR without any intention to cause loss"

E.g. A farmer says that his land is very productive and produces 100 quintal per acre. This is misrepresentation and buyer can cancel the contract.

**Effect of misrepresentation:**

 Right to rescind the contract The party whose consent was caused by misrepresentation can rescind (cancel) the contract but he cannot do so in the following cases:

 where the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence;

 where the party gave the consent in ignorance of misrepresentation;

 where the party after becoming aware of the misrepresentation, takes a benefit under the contract;

 where an innocent third party, before the contract is rescinded, acquires for consideration some interest in the property passing under the contract;

 where the parties cannot be restored to their original position.

(b) Right to insist upon performance The party whose consent was caused by misrepresentation may if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

**Mistake (Section 20)**

A mistake is said to have occurred where the parties intending to do one thing by error do something else. Mistake is "erroneous belief" concerning something.

**Classification of Mistake of Law:**

(a) Mistake of Indian Law (In sense of penalty): The contract is not voidable because everyone is supposed to know the law of his country. e.g. disobeying traffic rules"

(b) Mistake of Foreign Law(void-ab-initio): A mistake of foreign law is treated as mistake of fact, i.e. the contract is void if both the parties are under a mistake as to a foreign law because one cannot be expected to know the law of other country.

**Mistake of fact:**

Mistake of fact be either Unilateral mistake or Bilateral mistake.

• Unilateral mistake (section 22): The term 'unilateral mistake' means where only one party to the agreement is under a mistake. According to section 22, "A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to matter of fact."

• Bilateral mistake (section 22): The term 'bilateral mistake' means where both the parties to the agreement are under a mistake. According to 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." thus, the following conditions must be satisfied before declaring a contract void under this section:

 Both the parties must be under a mistake

 Mistake must be of fact but not of law.

**Conclusion:**

Hence it is concluded that without free consent a contract cannot be enforced before the court of law. If there are any flaws in the contract, then the party who suffered loss due to it can terminate the contract.

**OR**

**What are agreements are said to be void? Explain with illustration.**

**Introduction:**

Void agreements are those agreements which are not enforced by law courts. Section 2(g) of the Indian Contract Act defines a void agreement as, "an agreement not enforceable by law". Thus the parties to the contract do not get any legal redress in the case of void agreements.

Void agreements arise due to the non-fulfillment of one or more conditions laid down by Section 10 of the Indian Contract Act. The Section states as follows:

All agreements are contracts if they are made with 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.

From the above, it is quite clear that non-fulfillment of any of these conditions by one of the parties to a contract shall make an agreement void.

**Agreements which expressly declared to be void by the Indian Contract Act:**

Certain agreements have been expressly declared to be void by Indian Contract Act 1872. Such agreements which have been expressly declared to be void by the act discussed below,

(1) Agreements made by incompetent person (Section 11).

(2) Agreements made under Mistake of Facts (Section 23).

(3) Agreements having unlawful objects and Consideration (Section 23).

(4) Agreements having unlawful objects and consideration in Part (Section 24).

(5) Agreement made without considered as Section 25.

(6) Agreement in restraint of marriage (Section 26).

(7) Agreement in restraint of trade. (Section 27).

(8) Agreement in restraint of legal proceedings (Section 28).

(9) Agreements to do impossible acts. (Section 56).

These agreements are being discussed here.

**Agreements made by incompetent person:**

Section 11 of contract act deals with the competency of parties and provides every person is competent to contract. It is follows that the following persons are incompetent to contract

i. Minor

ii. Person of unsound mind

iii. Person disqualified by any law to which they are subject.

Contracts entered into by persons mentioned above are void.

Illustration:

Mohari bibi Vs Dharmo Das Ghose 1903. In this case the court was held that mortgage by a minor was void.

**Agreements made under Mistake of Facts:**

Agreement made under a mutual mistake as a matter of where both the parties to agreement are under a mistake as to a matter of fact essential to the agreement.

Illustration:

**A** agrees to purchase a house from **B** who is distant relation of his father, never knowing that he is the actual owner of the house. After getting registration of transfer deed in his favor he comes to know of his ownership of the said house but could not get back the consideration money from **B**.

**Agreements having unlawful objects and Consideration:**

The agreements declared as void if their object is unlawful. If either object or consideration of an agreement is unlawful then the agreement becomes void.

Illustration:

An agreement for sale or purchase of smuggled goods.

An agreement to kill/harm someone.

An agreement to do immoral activities

An agreement to publish a defamatory statement in newspaper etc.

**Agreement made without considered as Section 25:**

Every agreement to be enforceable at law must be supported by valid consideration. An agreement made without consideration is void and is unenforceable except in certain cases, section 25 specifies the cases where an agreement though made without consideration will be valid.

**Agreement in restraint of marriage:**

Agreements in restraint of marriage have been declared void u/s 26 of the Indian Contract Act since they are illegal. Sec. 26 states, "Every agreement in restraint of the marriage of any person, other than a minor, is void. This is because of the fact that every person has got a right as well as freedom of choice to marry. If an agreement is made interfering in this right, that is unlawful.

Illustration:

A promised to marry B only and none else, and in default to pay rupees 2000. But A Married C. B file a suit, here suit was dismissed on the ground that agreement was in restraint of marriage and so, void.

**Agreement in restraint of trade:**

Every person has a lawful right to do or adopt any lawful profession, trade or business. If any agreement is made to put restriction over this right, that shall be an infringement of his fundamental right and shall also be against Public Policy. This is why the Indian Contract Act has specifically declared such agreements void.

**Agreement in restraint of legal proceedings:**

Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

**Agreements to do impossible acts:**

Impossibility of performance of an act does not give or creat any obligation upon the parties to a contract. Section 56 of the Act, declared such contract as void. This section states as follow:

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

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

Illustration:

(a) A agrees with B to discover treasure by magic. The agreement is void.
(b) (b) A and b contract to marry each other. Before the time fixed for the marriage. A goes mad. The contract becomes void.

**(b): Solve the following problem.**

**Raju, a shopkeeper, supplied wife and children of Ramu, a lunatic with necessaries suitable to their condition in life. Raju intends to recover price of the goods from Ramu? Advise him.**

Yes, Raju can recover the price of the goods.

As per the Indian Contract Act, 1872 Sec 68 provides that any person who has supplied any goods suitable for his life to the minor or lunatic person can recover the price of the goods. However, the exception to this is lunatic will not be personally liable but his estate or any property will be liable out of which the lunatic person can reimburse the money. In the above case Raju can recover the money from Ramu's estate or property but Ramu will not be personally liable.

To render lunatic estate liable for necessaries to conditions must be satisfied those are listed below,

1. A contract must be for the goods reasonably necessary for his support in his life.
2. The lunatic person must not have already a sufficient supply of these necessaries.

**OR**

## Write a note on wagering contract.

Agreements by way of wager are void and no suit be bought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event of which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or towards any place, prize or sum of money of the value of amount of five hundred rupees or upwards, to be awarded to the inner or winners of any horse race.

Nothing in this section shall be deemed to legalize any transaction connected with horse racing to which the provisions or section 294-A of the Indian Penal Code apply. (sec.30).

Section 30 of the Indian Contract has stated in clear terms that an agreement by way of wager is void.

William Anson has defined Wager as a contract by A to pay money to B on the happening of a given event in consideration of B paying to him money on the event not happening. (Hampden v Wash, 1876 1 A.B.D. 189, 192). According to Justice Hawkins, a wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event mutually agree that, dependant on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake, neither or the contracting parties having any other interest in that contract then the sum of stake he will win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to wagering contract that each party may under it either win or lose, whether he will win or lose being dependant on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties win and cannot lose, or may lose but cannot win, it is not a wagering contract (Carlil v Carbolic Smoke Bail Co., 1892, 2 Q.B. 484) Jenkins C.J. has stated in Sasson v Tokersy (1904, 28 Bom. 616, 621). “It is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event, in reference to which the chance or risk is taken.”

**Characteristics:**

From the above, we can state that a Wager must have the following characteristics:

a. It is a promise to pay money or money's worth.

b. The promise depends upon the happening or not happening of an event.

c. The event upon which the promise is to depend is uncertain, the parties do not know the occurrence of the event.

d. None of the parties has a control on the occurrence of the uncertain event.

e. None of the parties has an interest in the occurrence or non-occurrence of the event. We can explain our point with the help of the following examples: -

1. On a cloudy day A bets Rs. 10 with B that it will rain, B being of the view that it shall not rain. A says to B, if it rains he will receive Rs. 10 from B, but it is does not rain A shall pay Rs. 10 to B. It is a Wager.

2. A lottery is also a wager since it is a game of chance. An agreement to buy a ticket for a lottery is also a wagering agreement. When the lottery is authorized by the state, the person conducting the lottery is not punished, but that does not make the lottery a valid one, it remains a wagering transaction.

A wager may have all other requisities of a legal contract. It may have two or more parties consideration, subject matter and the identity of minds of the parties. But the peculiarity lies in its performance. Its performance is in the alternative, i.e., one party has to pay the amount to the other. Only one party is to gain and the other is to lose.

# Unit 3:

## (a): Explain the grounds of impossibility of performance of contract

**Introduction:**

A contracts is discharged when the obligations created by it come to an end. Discharge of termination of a contract means the termination of contractual relationship between the contracting parties. There are different modes or ways in which a contract may be discharge. In that one of the following mode has been discussed below.

**Discharge by impossibility of performance:**

Supervening impossibility arises due to the happening of certain events which were neither in the contemplation of the parties when they entered into the agreement nor either of the parties are responsible for causing the performance of the contract impossible. In such a case the contract will be void as soon as such events make the performance of the contract impossible. The impossibility must be either legal or physical but not commercial. This is called "Doctrine or Supervening Impossibility". Section 56 of the Indian Contract Act lays down:

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

A contract to do an act, which after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful. This is called "Supervening Impossibility", i.e. impossibility arising subsequent to the formation of the contract. The supervening impossibility may be due to any of the following causes:

(a) By the destruction of the subject matter. If the subject matter of the contract is destroyed subsequent to the formation of the contract, without any fault of either of the parties, the contract shall become void.

Example:

(i) A music hall was let for a series of concerts on certain days. The hall was burnt down before the date of the first concert. The contract was held to be void.

(ii) A person contracted to deliver a part of a specific crop of potatoes. The potatoes were destroyed through no fault of the party. The contract was held to be discharged. Howell V. Coupland,1876).

(b) By the non-existence of a state of things necessary for the performance. If a contract is made on the basis of continued existence of certain state of circumstances, the contract stands discharged if the state of things ceases to exist.

Example:

(i) H hired a room from K for two days to witness the coronation procession of King Edward VII. K knew the object of the contract though the contract contained no reference to the coronation. Owing to King's illness the procession was cancelled. It was held that H was excused from paying rent for the room, as the

existence of the procession as the basis of the contract and its abandonment discharged the contract. (Krell V. Henry 1903).

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

(c) Death or personal incapacity of the promisor. Contracts involving personal skill of the promisor will stand discharged in the case of his death or personal incapacity.

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

(d) Change of law. On account of subsequent change in law, the performance of the contract may become impossible. The object of the contract may be declared to be unlawful.

Example:

(i) A, who is governed by Muslim law and who already had a wife promises to marry B. Subsequent to this promise and before it is carried out, Special Marriage Act prohibiting polygamy is passed. The contract to marry becomes void.

(ii) X sold to Y a specific parcel of wheat in a warehouse. Before delivery could be made, the warehouse was sealed by the Government and the entire quantity was requisitioned by the Government under Statutory Power. The contract was held discharged (Re Shipp, Anderson & Co. V. Harrison Brs. and Co's Arbitration (1915).

(E) Outbreak of War. A contract entered into with an alien enemy during the war is unlawful and, therefore, void ab initio contracts made before the outbreak of war either suspended or declared void by the Government. If they are suspended, they may be performed after the termination of the war.

Example:

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

It is worthwhile to not that the word "impossible" under Section 56 has not been used in the physical or literal sense. A contract may not have become literally or physically impossible to perform but if an untoward event has happened which

has totally upset the very foundations of the contract will be taken to be impossible to perform.

**Cases not Covered by Supervening Impossibility:**

It may be stated that impossibility to perform arising subsequently to the agreement will not, as a rule, relieve the promisor from performing his part in all cases, because, "Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible (Tayler V. Caldwell (1863). Therefore, in the following cases the doctrine of supervening impossibility will not apply.

(a) Difficulty in performance. A contract can be avoided on the ground of supervening impossibility only when the events taking place make the performance of the contract physically or legally impossible as contemplated by the parties at the time of the making of the contract. Difficulty in performance will not discharge a contract on the ground of impossibility of performance.

Example:

(i) A sold to B a certain quality of Finland timber to be delivered between July and September1914. Before any timber was supplied, war broke out in the month of August and transport was disorganized so that A could not bring any timber from Finland. It was held, B was not concerned with the way in which A was going to get timber, and, therefore, impossibility of getting timber from Finland did not excuse performances. Blakburn Bobbin Co. V.T.W. Allen & Sons, 1918).

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

(b) Commercial impossibility: A party cannot be discharged from performing his part of the contract simply on the ground that it will be now-profitable for him to perform the contract.

Example: A agrees to supply certain goods to B. Due to outbreak of war the price of goods suddenly shoots up. A is not discharged from his liability to supply goods to B.

(c) Impossibility due to behavior of a third person: A contract, the performance of which depends on the behavior of a third person, shall not become impossible of performance merely because the third party acted in a particular manner agreed upon, on the ground that if a person chooses to answer for the voluntary act of third person, he must be held to warrant his ability to procure that act.

Example:

X enters into a contract with Y for the sale of certain goods to be produced by Z a manufacturer of those goods. Z does not manufacture the goods. X is liable to Y for damages.

(d) Strikes, lockouts and civil disturbances: Strikes lock-outs and civil disturbances will not discharge a party from performing his part of the contract unless a specific provision to this effect has been made in the contract.

Example:

X agreed to supply certain goods to Y. The goods were to be procured from Algeria. Due to riots and civil disturbances in that country goods could not be procured. It was held that there was no excuse for the non-performance of the contract. (Jacobs V. Credit Ilyonnais 1884).

(e) Partial Impossibility: Where there are several purposes for which a contract is made, failure of one of the objects will not terminate the contract.

Example:

A company agreed to let a boat to H to view, (i) the naval review at the coronation; and (ii) to cruise round the fleet. Due to the illness of the King the naval review was cancelled, but the fleet was assembled. The boat, therefore, could sail round the fleet. Held, the contract was not discharged. (H.B. Steamboat Co. V. Hulton, 1903).

**Effects of supervening Impossibility**

1. The contract becomes void in case its performance becomes subsequently impossible Parties to the contract will be released from further performance (Sec. 56 para 2).

2. The person, who has received any advantage under a contract which becomes subsequently void is bound to restore it or to make compensation for it to the person from whom he received it (Sec. 65).

3. Where one person has promised to do something which he knew or with reasonable diligence might have known, and which the promises did not know to be impossible or unlawful, such promisor must make compensation to such promises for any loss which such promises sustains through the non- performance of the promise (Sec. 56 para 3).

Example:

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

**OR**

**Define breach of contract, discuss kinds of breach of contract.**

**Introduction:**

Parties to a lawful contract are bound to perform their respective obligations. But when one of the parties repudiates the contract, by refusing to perform his obligations he is said to have committed a breach of the contract. The breach of contract maybe actual or anticipatory.

**Meaning:**

If any party fails to perform his obligation, there takes place a breach of contract. Breach of contract operates as a discharge of the contract. Breach means failure of a party to perform his or her obligation under a contract Breach of contract may arise in two ways.

1. Actual Breach.
2. Anticipatory Breach.

**Actual Breach:**

Actual breach means breach committed either;

(i) at the time when the performance of the contract is due;
(ii) during the performance of the contract.

Example:

(i) agrees to supply to B on the 1st February, 1975, 1000 bags of sugar. On 1st February, 1975 he fails to supply. This is actual breach of contract at the time when the performance is due. The breach has been committed by A.

(ii) If on 1st February, 1975 A is prepared to supply the required number of bags of sugar and B without any valid reasons refuses to accept them, B is guilty of breach a contract.

**Anticipatory Breach:**

Breach of a contract committed before the date of performance of the contract is called anticipatory breach of contract. (Sec. 39). The contract in this case is repudiated before the time fixed for its performance arrives and is so discharged.

Example:

(i) A agrees to employ B from 1st of March. On 1st February, he writes to B that he need not join the service, the contract has been expressly repudiated by A before the date of its performance.

(ii) A agrees to marry B. But before the date A marries C. The contract has been repudiated by A by his conduct before the due date of its performance.

Anticipatory breach of contract does not give rise to a right of action unless the promise elects to treat it as equivalent to actual breach.

**Conclusion:**

Breach of contract is a legal cause of action in which a binding agreement is not honored by one or another more of the parties. There can be a variety of reasons for breaching a contract and the consequences of such a breach can be very serious, even if the breach was unavoidable. When a breach of contract happens, the parties who involved should find out the remedies and consequences of breaching an enforceable contract. There are main three remedies which are suit for specific performance, liquidated damages and injunction.

**(b): Solve the following problem,**

**B hires a marriage hall from C, the hall was accidentally burnt down even before the marriage took place. B files a suit against C, advise C.**

No, B cannot recover the any damages from C.

As per Indian Contract Act, Sec 56 says a contract discharged automatically on the ground of supervening impossibility. In the above case after entering into the contract the subject matter is destroyed without any fault of the party, hence the party is not liable in the case and cannot file suit for damages.

In the above case B and C are discharged from the contract and C is not liable for any compensation.

Illustration in one of the leading case:

Taylor Vs Cadwell: A music hall is taken on rent for several nights for arranging a series of concert. The hall is burnt down before the date of the first concert. The contract shall be declared void on the ground of supervening impossibility.

**OR**

## Reciprocal Promises.

**Introduction:**

According to Sec. 2(f), "Promises which form the consideration or a part of consideration for each other are called reciprocal promises."

Promises which form the consideration or part of the consideration for each other are called reciprocal promises, in short reciprocal or mutual promises are promise by one party in written for the promise of the other party, mainly there are three types of reciprocal promises as per Lord Mansfield as listed below,

1. Mutual and independent reciprocal promise:
When each party performs his promise independently and irrespective of the fact whether the other party has performed, or is willing to perform his promise or not, the promises are mutual and independent. Example: X agrees Y to supply milk daily, while Y agrees to pay the price of milk every month. Both these are mutual and independent promises.

2. Conditional and dependent reciprocal promises:
When the performance of a promise by one party depends upon the prior permission of the other party, it will be a conditional and dependent promise.

Example:

X promises to construct Y's house, provided that Y supplies cement and bricks. This will be a conditional and dependent promise. Here, X need not perform the promise if Y fails to supply cement and bricks.

3. Mutual and concurrent or simultaneous reciprocal promise:
This is the state when two contracts are to be performed simultaneously.

# Unit 4:

## (a): Explain various remedies available in a case of breach of contract

**Introduction:**

The parties to a contract are required to perform or fulfill their respective promises. But, sometimes, one of the parties to the contract may break the contract this is known as breach of contract, whenever there is a breach of contract by one party the other party is entitled to one or more of the following remedies against the defaulter or the guilty.

- Rescission of the contract.
- Damages.
- Quantum Meruit.
- Specific Performance.
- Injunction.

**Rescission of the Contract:**

Rescission means the setting aside of the contract. The aggrieved party may be allowed by the court of treat the contract at an end and thereby, terminate all his liabilities under the contract. The court, however, will not allow recession of the contract in the following cases:

(i) Where the party wishing to set aside the contract has expressly or impliedly ratified the contract.

(ii) Where only a part of the contract is sought to be set aside and that part cannot be separated from the rest of the contract.

(iii) Where without fault of either party, there is a change in the circumstances since the making of the contract, on account of which the parties canot be

substantially restored to the position in which they were before the contract was made.

(iv) Where during the subsistence of the contract, third parties have acquired rights in the subject matter of the contract in good faith and for value.

The party rescinding the contract will have to restore all benefits received by him under the contract to the other party. Of course, he will be entitled to get compensation for the loss suffered by him on account of non-fulfillment of the contract.

**Damages:**

Damages mean monetary compensation payable by the defaulting party to the aggrieved party in the event of the breach of a contract. The object of providing damages is to put the aggrieved party in the same position, so far as money can do, in which he would have been, had the contract been performed.

**Quantum Meruit:**

Literally speaking the words "Quantum Meruit" mean "as much as merited" or "as much as earned". It is principle which provides for payment of compensation under certain circumstances, to a person who has rendered goods or services to another person under a contract which could not or has not been fully performed.

Example:

(i) A person renders some service to a company under contract of employment which is duly approved by the Board of Directors of that company. Subsequently the constitution of Board of Director's found to be illegal and, therefore, the contract of employment becomes void. The employee who has rendered some service to the company shall be entitled to claim remuneration for his service under the doctrine of quantum meruit.

(ii) X forgets certain goods at Y's house. He had no intention to have them with him gratuitously. Y uses those goods for his personal benefit. X can compel Y to pay for those goods.

**Specific performance:**

Law courts can at their discretion, order for the specific performance of a contract according to the provisions of the Specific Relief Act in those cases where compensation will not be an adequate remedy or actual damages cannot accurately be assessed.

Specific performance means the actual carrying out by the parties to contract, and in proper cases the court will insist on the parties carrying out their agreement. Specific performance of agreement will not be granted in the following cases: -

(1) Where the agreement has been made without consideration.

(2) Where the court cannot supervise the execution of the contract e.g. a building contract.

(3) Where the contract is of a personal nature.

(4) Where one of the parties is a minor.

Specific performance is usually granted in contracts connected with land or sale of rare articles. It is, however, to be noted that the plaintiff who seeks specific performance must, in his term perform all the terms of the contract which he ought to have performed at the date of the action (Pudi Lazarus V. Rev. Johnson Edard. 1976 A.P. 243).

**Injunction:**

Where a contract is of a negative character, i.e., a party has promised not to do come thing and he does it, and thereby commits a breach of the contract, the aggrieved party may under certain circumstances, seek the protection of the court and obtain an injunction forbidding the party from committing breach. An injunction is an order of the court instructing a person to refrain from doing some act which has been the subject matter of a contract, Courts, at their discretion, may grant a temporary or a perpetual injunction for an indefinite period.

For example: A agreed to sing at B's theatre and to sing nowhere else for a certain period. Afterwards A made a contract with E to sing at E's theatre and refused to sing at B's theatre. The court refused to order specific performance as the contract was of a personal nature but granted an injunction to restrain the breach of A's promise not to sing elsewhere.

Equitable rights of specific performance or injunction may be lost by laches. Equity is for the benefit of the diligent and not for the sleepy.

**OR**

**What is meant by Quasi contract? Explain different kinds of Quasi contract.**

**Introduction:**

Its govern a contract created by the court for the purpose of equal treatment when two parties are involved in a dispute in which no official agreement exists.3 min read

The rules regarding quasi-contract govern a contract created by the court for the purpose of equal treatment when two parties are involved in a dispute in which no official agreement exists. The quasi-contract is designed to prevent either party from being unjustly enriched. This is not a legally binding document, but a legal method to impose equity in a dispute used when a contract should have been formed.

For a contract there must be offer and acceptance, free consent, lawful consideration and object and such other elements described under Sec. 10 of the Indian Contract Act. But Quasi Contracts do not have such essential elements of a contract and, therefore, Indian Contract Act has now here used the term 'Quasi or Implied' Contracts'. Instead it has referred to "certain relations resembling those created by Contract" under Chapter V of the Act. Such relations are deal with in the Contract Act under Sections 68-72.

**Types of Quasi Contract:**

The types of relations dealt here in the Contract Act in these sections are stated as below:

1. Supplier of necessaries to minors. Lunatics, married women etc. (S. 68).
2. Person paying moneys due by another (S.69).
3. Person enjoying benefit to non-gratuitous act or Quantum Meruit. (S. 70).
4. Finder of goods (S.71).
5. Person receiving money or goods belonging to another under mistake or under coercion (S.72). Let us now take these cases one by one

**Claim for necessaries suppled to a person Incapable of contracting (Section 68):**

If a person, incapable to entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his

life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustration

(a) A supplies B, a lunatic, with necessaries suitable to his conditions in life. A is entitled to be reimbursed from B's property.

(b) A supplied the wife and children of B lunatic with accessories suitable to their conditions in life A is entitled to be reimbursed from B's property.

**Reimbursement to person paying money due by another in payment of which he is interested (Section 69):**

A person who is interested in the payment of money another is bound by law to pay and who, therefore, pay it, is entitled to be reimbursed by the other.

Illustration:

B hold land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being a arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulement of B's lease to prevent the sale and the consequent annulement of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

**Obligation of a person enjoying benefit of non-gratuitous act (Sec.70):**

Where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered.

Illustrations:

(i) A, trademen, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

**Responsibility of a finder of goods (Section 71):**

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as Bailee.

Hollins V. Fowler, is a good case over the point. The facts of the case are:

H picked up a diamond on the floor of K's shop and handed it to K to keep it till the owner appeared. In spite of wide advertisement in the newspapers no one appeared to claim it. After the lapse of some weeks, A tendered to K the cost of advertisement and an identity bond and requested him to return the diamond to H.K. refused. K is liable for damages. His entitled to retain the goods as against everyone except the true owner, so if after wide advertisement the real owner does not turn up and if H is prepared to given indemnity to K, K must deliver the diamond to H.

The position of finder of Good is s akin to that of a Bailee. Section 71 charges the finder of goods with certain obligations. But Sec. 168 and 169 strengthen him with certain rights.

Obligations:

The finder of goods must take all reasonable measures to find out the true owner and take all reasonable care for the protection of the goods. If he does not make reasonable efforts for finding out the true owner, he shall be liable of wrongful conversion of property.

Rights:

The finder of goods has a right to retain the goods so found till he finds out the true owner, has got a right to claim for the reward if any from the true owner. He has got a right to claim for the reasonable expenditures incurred by him. He can also sell out such goods under the following circumstances.

(a) Where the goods are perishing.

(b) Where the owner has not been found out even after great diligence.

(c) Where the owner is found out, but he refused to pay the reasonable expenses incurred by the finder of goods, for finding out the owner, as well as for preserving the goods.

(d) Where the reasonable charges so incurred by him, amount to more than two thirds of the value of the thing found.

**Liability of person to whom money has been paid or anything delivered, by mistake or under correction (Section 72):**

A person to whom money has been paid, or anything delivered by mistake or under coercion must repay or return it.

Illustrations.

A and B jointly owe to 100 Rs. to C. A alone pays the amount to C, and B not knowing this fact, pays 100 Rs. over again to C.C is bound to repay the amount to B.

**Write a short note:**

**(a): Explain the rule in Hadley Vs Baxendale:**

The case is discussed below:

"His mill was stopped on account of the breakage of a crankshaft B, a common carrier was entrusted with the delivery of this machine part for taking it to its makers at Green which as a pattern for a new one. B, did not have this information that delay in carrying the machine would result in loss of profits. The delivery was delayed beyond a reasonable time by some neglect on the part of B. H. claimed from B compensation for the wages of workers and depreciation charges which were incurred during the period the factory was idle for the delayed delivery and for loss of profit which might have been made if the factory was working the first two items were allowed because they were the natural consequences of breach but the loss of profit was disallowed as it was special or remote loss which could be recovered only when the party had information of it."

Alderson, J. Observed in the above case as follows.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract as the probable result of the breach of it."

It was held that only ordinary damages where due from the defendant not special damages.

**OR**

**(b): Liquidated damages and penalty**

**Introduction:**

Sometimes, parties to a contract stipulate at the time of its formation (i.e., in advance) that in case of breach of its performance by either of the parties, a certain specified sum will be payable as damages. Such a sum is known as: -

- Liquidated Damages
- Penalty.

**Liquidated damages:**
It is a sum fixed or ascertained by the parties to the contract, which is a fair and genuine per-estimate of the probable loss that might occur as a result of breach of contract. Thus, liquidated damages are an assessment of loss which in the opinion of the parties will occur due to breach. Such damages are effective and recoverable by the aggrieved party from the other.

**Penalty:**
On the other hand, penalty is the sum mentioned in the contract at the time of its formation which is disproportionate to the damages likely to occur as a result of the breach of the contract. Penalty is fixed with a view to getting the contract performed, but it has no concern with the probable loss likely to occur to the parties due to the breach of the contract.

Indian Contract Act recognizes both 'liquidated damages' and 'penalty', while the English Law gives effect to 'liquidated damages' only. The courts in India allow only a reasonable compensation which may include both 'liquidated damages' and 'penalty'. Section 74 is very clear in this regard, which reads as under: -

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining breach, is entitled, whether or not actual damage or is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

Example:
X agrees with A to pay Y Rs. 400, if he fails to pay Rs. 200 on a given day, X fails to pay Y Rs. 200 on that day. Y is entitled to recover from X such compensation not exceeding Rs. 400 as the court considers reasonable.

Thus, the essence of liquidated damages is a genuine per-estimate of damages for breach, while essence of a penalty is the payment as in terrorism of the offending party. However, the courts in India allow only reasonable compensation.

# Unit 5:

## (a): By whom and against whom a specific performance of contract can be claimed?

Section 15. Who may obtain specific performance. -

Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by-

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest of his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainder-man;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

It is a general rule that a contract cannot be got enforced except by a party to the contract. This general rule is embodied in clause (a) of Section 15. But there are certain exceptions to this general rule. These exceptions are contained in clause (b) to (h) of the section and contain list of persons who although not a party to the contract, are entitled to obtain specific performance of contract. These are:

1) A representative in interest or the principal thereto.
2) Any person beneficially entitled
3) The remainder man
4) A revesioner in possession
5) A revesioner in remainder
6) The amalgamated company
7) The company

Other situation where contract can be enforced by any person other than the party thereto are where:

1) A trust is created in favor of a stranger by the contract.
2) The promisor constitutes himself as agent for the stranger.
3) It is so provided by a marriage settlement
4) The contract itself provides for maintenance
5) The contract itself provides for marriage expenses.
6) The aim of contract itself is to benefit a stranger.
7) A change is created in favor of a stranger by the contract etc.

Shyam Singh, v. Daryao Singh

Under the provisions of S. 15(b) specific performance of the contract may be obtained by 'any party thereto' or their representative in interest.' This expression clearly includes the transferees and assignees from the contracting party in whose

favor the right exists. Such right of seeking specific performance would, however, be not available in terms of proviso below Cl. (b) where the contract provides that the 'interest shall not be assigned.

**OR**

**Explain the provision of recovery of movable and immovable property.**

**Section 5. Recovery of specific immovable property.**

Section 5 of the Specific Relief Act deals with the recovery of specific immovable property. -

“A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).”

The section in simple words provides that any person who is lawful owner of immovable property can get the possession of such property by due course of law. It means that when a person is entitled to the possession of specific immovable property he can recover the same by filling the suit as per provisions of CPC. He may file suit for ejectment on the strength of his title and can get a decree for ejectment on the basis of title within 12 years of the date of possession. Section 5 of the Act declares that in a suit for the recovery of immovable property by person ‘entitled to’ provisions Order XXI, Rules 35 and 36 of CPC would apply. There are three types of actions which can be brought in law for the recovery of specific immovable property:

(i). A suit based on title by ownership;

(ii). A suit based on possessory title; and

(iii). A suit based merely on the previous possession of the plaintiff, where he has been dispossessed without his consent, otherwise than in due course of law.

The last remedy is provided in Section 6 of the Act. The suits of the first two types can be filed under the provisions of the Civil Procedure Code.

The word ‘entitled to possession’ means having a legal right to title to possession on the basis of ownership of which the claimant has been dispossessed. Plaintiff must show that he had possession before the alleged trespasser got possession. In Ismail Ariff v. Mohammed Ghouse, the Privy Council held, “the possession of

the plaintiff was sufficient evidence as title of owner against the defendant by Section 6 of Specific Relief Act, if the plaintiff had been dispossessed otherwise than in due course of law." There may be title by contract, inheritance, and prescription or even by possession and the last will prevail where no preferable title is shown.

**Section 6. Suit by person dispossessed of immovable property.**

Section 6 of the act deals with the suit by person dispossessed of immovable property. -

(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought- (a) after the expiry of six months from the date of dispossession; or (b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

The main object of Section 6 is to discourage forcible dispossession on the principle that disputed rights are to be decided by due process of law and no one should be allowed to take law into his own hands, however good his title may be. The operation of Section is not excluded in cases between landlords and tenants where there is no question of title involved. The Section 6 provide summary and speedy remedy through the medium of Civil Court for the restoration of possession to a party dispossessed by another, within 6 months of its dispossession, leaving them to fight out the question of their respective titles in a competent Court if they are so advised. The object of the Section has been beautifully summed up by Mittar,J. in Khojah Enaetoohal v. Kissen Saonder The object of this Section appears to have been to give special remedy to the party illegally dispossessed by depriving the dispossessor of the privilege of proving a better title to the land in dispute. Section 6 should be read as part of Limitation Act and its object to put an additional restraint upon illegal dispossession with a view to prevent the author of that dispossession, from getting rid of the operation

of the Act by his unlawful conduct. If the suit is brought within the period prescribed by that Section, even the right owner of the land is precluded from showing his title.

**Section 7. Recovery of specific movable property.**

A person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

Explanation 1. A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled. Explanation 2. A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

Section 7 provides for the recovery of movable property in specie i.e. the things itself. The things to be recovered must be specific in the sense they are ascertained and capable of identification. The nature of things must continue without alteration. This section entitles a person to bring a regular suit for the recovery of possession of movable property if he has right to the same at the time of action for detenue. Suit can be filed under Order 20, Rule 10 of CPC and the form of the plaints are laid down in Schedule I and Appendix A of CPC. Where the Court decrees delivery of such property, the decree shall also state the amount of money to be paid in alternative, if delivery cannot be had.

State of Gujrat V. Biharilal

There was agreement between Biharilal and occupants of land, in 1964 authorizing Biharilal to cut and remove trees standing on certain land, for period of two years. The forest authorities did not grant permission to cut and remove trees a period expired. There was no fresh agreement between the parties, nor was the period of authority in favor of Biharilal extended. Biharilal filed a suit for declaration of his right to cut and remove the trees and also for the necessary permission to do the needful. It was held that since the right in respect of the trees had already expired the suit filed by Biharilal could not be decreed.

**Section 8. Liability of person in possession, not as owner, to deliver to persons entitled to immediate possession.**

Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases: -

(a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;

(b) when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed;

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Explanation. Unless and until the contrary is proved, the court shall, in respect of any article of movable property claimed under clause (b) or clause (c) of this section, presume-

(a) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;

(b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

Section 8 of the Specific Relief Act which is analogous to the equitable relief of English law in an action of detenue entitles a person to recover the specific movable property itself from the defendant who is not the owner thereof in cases where the property has a peculiar value or association and cannot be adequately compensated in terms of money. The relief under this section can only be granted against a person having the possession control of the particular article claimed by the plaintiff. The object of this section is to provide special remedy so that persons having the possession or control of particular articles of movable property, although not their owners, may be compelled specifically to deliver them to the persons entitled to their immediate possession. Possession is foundation of that suit though a suit is not competent under this section against one who is the owner of the movable property. Possession and control of the defendant must therefore be clearly alleged in the plaint and proved.

**Write Short Notes:**

**(a): Declaratory decree**

**Section 34. Discretion of court as to declaration of status or right.**

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation. -A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

A declaratory decree is a mode of relief where there is no specific performance and no award of compensation. There is only a declaration of rights of the parties without any consequential relief which can be enforced by the execution of the decree. In other words, declaratory decrees are those where some right is declared in favor of the plaintiff but nothing is sought to be paid or performed by the defendant. Further, the declaration does not confer any new rights upon the plaintiff; it merely declares what he had before.

Object

The object of such decrees is that where a person's status or legal character has been denied or where a cloud has been cast upon his titles to rights and interests in some property, he may have the cloud removed by having his legal status or rights declared by the court. But it is not a matter of absolute right to obtain a declaratory decree. It is discretion of the Court. The object of Section 34 is to perpetuate and strengthen testimony regarding title and protect it from adverse attacks. The policy of legislature is not only to secure to a wronged party possession of the property taken away from him but also to see that he is allowed to enjoy that property peacefully.

Essential requisites for a declaratory action.

1. The plaintiff must be entitled to any legal character or to any right as to any property.

2. The defendant should have denied or be interested in denying the character or title of the plaintiff. It is this denial which gives a cause of action for declaratory relief.

3. The plaintiff is not in a position to claim further relief than mere declaration of his title, or where he is so able to seek further relief, he seeking such relief also.

**Section 35. Effect of declaration:**

A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

According to this section the declaratory decree is not binding on everybody in the world. It cannot bind strangers and as such a declaration will not operate as a judgement in rem and will be binding only between parties to the suit and their representatives. Hence, a declaratory decree is binding between the parties inter se and its effect does not bind persons who are not connected with the suit in question.

**OR**

## Injunction

**Injunction (Section 36-42):**

A Preventive relief or injunction is an order or command of the court preventing a party from doing something which he is under a legal duty not to do. An injunction is a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful acts.

The object to grant the injunctions are:

(1) breach of obligation to be prevented;

(2) to restrain judicial proceedings;

(3) to restrain breach of contracts;

(4) to prevent tortious acts.

Injunctions are granted to prevent miss-happenings and injury to the aggrieved parties. The relief granted by injunctions are preventive nature.

Essential ingredients of injunctions:

1. It is a judicial process.
2. The object attained thereby is to restraint or prevention.
3. The thing restrained or prevented is a wrongful act.

Kinds of injunctions: section 35 of specific relief act lays that there are 2 kinds of injunctions.

- Temporary Injunction
- Perpetual Injunction

**Conclusion:**

Specific performance is most often used as a remedy in transactions regarding land, such as in the sale of land where the vendor refuses to convey title. The reason being that land is unique and that there is not another legal remedy available to put the non-breaching party in the same position had the contract been performed.