



# **LET'S LEARN LAW**



***The Indian Contract Act, 1872***  
***Unit-04***

**Learn Module Keywords**

***By – CA Gurpreet sir***



# PURPOSE

CHANKYA NITI SERIES – UNDERSTANDING CONCEPT

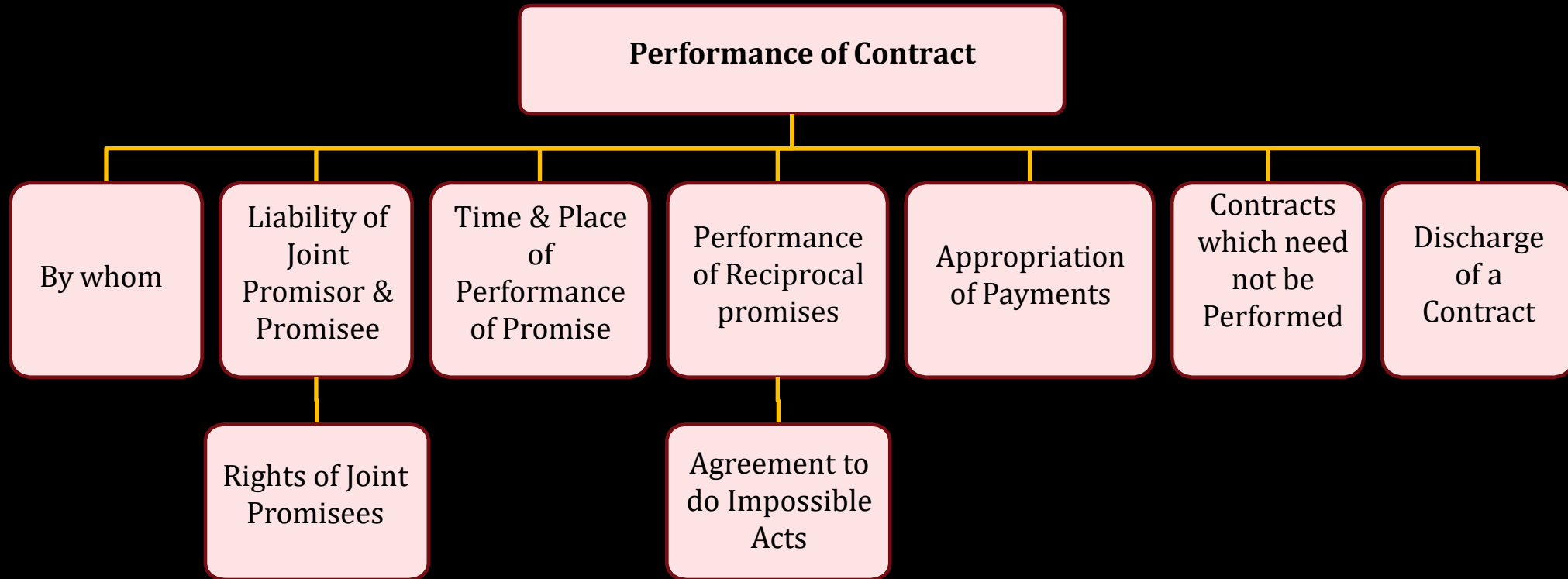
LET'S LEARN LAW SERIES – LEARNING KEYWORDS

NOTE :- WATCH THIS SERIES AFTER UNDERSTANDING ALL THE CONCEPTS. AS THE PURPOSE OF THIS SERIES IS TO HELP STUDENTS LEARN KEYWORDS



# Topic : UNIT OVERVIEW

Pg. No. 2.95



This unit explains who must perform his obligation, what should be the mode of performance, and what shall be the consequences of non- performance.



# Topic : PERFORMANCE OF CONTRACT

Pg. No. 2.96

**Meaning:** “Performance of Contract” means fulfilment of obligations to the contract. According to Section 37, **the parties to a contract must either perform, or offer to perform, their respective promises** unless such performance is dispensed with or excused under the provisions of the Contract Act or of any other law.

**Types:** On the basis of Section 37, “Performance of Contract” may be actual or attempted.



# Topic : PERFORMANCE OF CONTRACT

Pg. No. 2.96

(A) **Actual Performance:** Where a party to a contract has done what he had undertaken to do or either of the parties has fulfilled their obligations under the contract within the time and in the manner prescribed.

Example 1: X borrows Rs. 5,00,000 from Y with a promise to be paid after 1 month. X repays the amount on the due date. This is actual performance.



# Topic : PERFORMANCE OF CONTRACT

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**(B) Offer to perform or attempted performance or tender of performance:** It may happen sometimes, when the performance becomes due, **the promisor offers to perform his obligation but the promisee refuses to accept the performance.**

**Example 2:** A promises to deliver certain goods to B. A takes the goods to the appointed place during business hours but B refuses to take the delivery of goods. This is an attempted performance as A the promisor has done what he was required to do under the contract.



## Topic : Conditions To Be Satisfied For A Valid Tender Or Attempted Performance

Pg. No. 2.96

(i) It must be **unconditional**.

Example 3: A offers to B to repay only the principal amount of the loan. This is not a valid tender since the whole amount of principal and interest is not offered.

(ii) It must be **made at proper time and place**.

Example 4: If the promisor wants to deliver the goods at 2 a.m., this is not a valid tender unless it was so agreed.

## Topic : Conditions To Be Satisfied For A Valid Tender Or Attempted Performance



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(iii) Reasonable **opportunity to examine goods.**

Example 5: A contract's to deliver B at his warehouse 1000 Kgs of wheat on certain date. A must bring the wheat to B's warehouse on the appointed day, under such circumstances that B may have reasonable opportunity of satisfying himself that the thing offered is wheat of the quality contracted for, and that there are 1000 Kgs.





## Topic : Conditions To Be Satisfied For A Valid Tender Or Attempted Performance

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(iv) It must be for **whole obligation**.

**Example 6:** X, a singer enters into a contract with Y, the manager of a theatre to sing at his theatres two nights in every week during the next two months, and Y engaged to pay her Rs. 10,000 for each night's performance. On the sixth night, X willfully absents herself from the theatre. Y is at liberty to put an end to the contract.

**Example 7:** A promises to deliver 100 bales of cotton on a certain day. On the agreed day and place 'A' offers to deliver 80 bales only. This is not a valid tender.



## Topic : By Whom a Contract May be Performed (section 40, 41 and 42)

Pg. No. 2.97

The promise under a contract may be performed, as the circumstances may permit, by the promisor himself, or by his agent or his legal representative.

1. **Promisor himself:** If there is something in the contract to show that it was the intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor. This means contracts which involve the exercise of personal skill or diligence, or which are founded on personal confidence between the parties must be performed by the promisor himself.

**Example 8:** A promises to paint a picture for B and this must be performed by the promisor himself.



## Topic : By Whom a Contract May be Performed (section 40, 41 and 42)

Pg. No. 2.97

2. Agent: Where personal consideration is not the foundation of a contract, the promisor or his representative may employ a competent person to perform it.
3. Legal Representatives: A contract which involves the use of personal skill or is founded on personal consideration comes to an end on the death of the promisor. As regards any other contract the legal representatives of the deceased promisor are bound to perform it unless a contrary intention appears from the contract (Section 37, para 2).

But their liability under a contract is limited to the value of the property they inherit from the deceased.



## Topic : By Whom a Contract May be Performed (section 40, 41 and 42)

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**Example 9:** A promises to B to pay Rs. 100,000 on delivery of certain goods. A may perform this promise either himself or causing someone else to pay the money to B. If A dies before the time appointed for payment, his representative must pay the money or employ some other person to pay the money. If B dies before the time appointed for the delivery of goods, B's representative shall be bound to deliver the goods to A and A is bound to pay Rs.100,000 to B's representative.



## **Topic : By Whom a Contract May be Performed (section 40, 41 and 42)**

**Pg. No. 2.98**

**Example 10:** A promises to paint a picture for B for a certain price. A is bound to perform the promise himself. He cannot ask some other painter to paint the picture on his behalf. If A dies before painting the picture, the contract cannot be enforced either by A's representative or by B.



## Topic : By Whom a Contract May be Performed (section 40, 41 and 42)

Pg. No. 2.98

4. Third persons: Effect of accepting performance from third person- Section 41: When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. That is, **performance by a stranger, if accepted by the promisee, this results in discharging the promisor, although the latter(promisor) has neither authorised nor ratified the act of the third party.**



## Topic : By Whom a Contract May be Performed (section 40, 41 and 42)

Pg. No. 2.98

**Example 11:** A received certain goods from B promising to pay Rs. 100,000/-. Later on, A expressed his inability to make payment. C, who is known to A, pays Rs. 60,000/- to B on behalf of A. However, A was not aware of the payment. Now B is intending to sue A for the amount of Rs. 100,000/-. Therefore, in the present instance, B can sue only for the balance amount i.e., Rs. 40,000/- and not for the whole amount.



## Topic : By Whom a Contract May be Performed (section 40, 41 and 42)

Pg. No. 2.98

### 5. Joint promisors (Section 42):

When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons must jointly fulfil the promise.

If any of them dies, his legal representatives must, jointly with the surviving promisors, fulfil the promise.

If all of them die, the legal representatives of all of them must fulfil the promise jointly.





## Topic : By Whom a Contract May be Performed (section 40, 41 and 42)

Pg. No. 2.98

Example 12: 'A', 'B' and 'C' jointly promised to pay Rs. 6,00,000 to 'D'. Here 'A', 'B' and 'C' must jointly perform the promise. If 'A' dies before performance, then his legal representatives must jointly with 'B' and 'C' perform the promise, and so on. And if all the three (i.e. 'A', 'B' and 'C') die before performance, then the legal representatives of all must jointly perform the promise.

# Topic : Distinction Between Succession and Assignment



Pg. No. 2.98

Distinction between two legal concepts, viz., succession and assignment may be noted carefully. When the benefits of a contract are succeeded to by process of law, then both burden and benefits attaching to the contract, may sometimes devolve on the legal heir.

Suppose, a son succeeds to the estate of his father after his death, he will be liable to pay the debts and liabilities of his father owed during his life-time. But if the debts owed by his father exceed the value of the estate inherited by the son then he would not be called upon to pay the excess. In other words, the liability of the son will be limited to the extent of the property inherited by him.

# Topic : Distinction Between Succession and Assignment



Pg. No. 2.99

**In the matter of assignment**, however the benefit of a contract can only be assigned but not the liabilities thereunder. This is because when liability is assigned, a third party gets involved therein. Thus, a debtor cannot relieve himself of his liability to creditor by assigning to someone else his obligation to repay the debt.

On the other hand, if a creditor assigns the benefit of a promise, he thereby entitles the assignee to realise the debt from the debtor but where the benefit is coupled with a liability or when a personal consideration has entered into the making of the contract then the benefit cannot be assigned.



# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.99

## Devolution of joint liabilities (Section 42)

If two or more persons have made a joint promise, ordinarily all of them during their life- time must jointly fulfil the promise. After death of any one of them, his legal representative jointly with the survivor or survivors should do so. After the death of the last survivor the legal representatives of all the original co-promisors must fulfil the promise.



# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.99

**Example 13:** X, Y and Z who had jointly borrowed money must, during their life-time jointly repay the debt. Upon the death of X his representative, say, S along with Y and Z should jointly repay the debt and so on. If in an accident all the borrowers X, Y and Z dies then their legal representatives must fulfil the promise and repay the borrowed amount. This rule is applicable only if the contract reveals no contrary intention.



# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.99

We have seen that **Section 42 deals with voluntary discharge of obligations by joint promisors**. But if they do not discharge their obligation on their own volition, what will happen? This is what Section 43 resolves.

## **Any one of joint promisors may be compelled to perform – Section 43**

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



# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.99

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

In other words, if one of the joint promisors is made to perform the whole contract, he can call for a contribution from others.



# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.100

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

## **Explanation to Section 43**

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





# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.100

**Example 14:** A, B and C jointly promise to pay D Rs. 3,00,000. D may compel either A or B or C to pay him Rs. 3,00,000.

**Example 15:** A, B and C are under a joint promise to pay D Rs. 3,00,000. C is unable to pay anything A is compelled to pay the whole. A is entitled to receive Rs. 1,50,000 from B.

**Example 16:** X, Y and Z jointly promise to pay Rs. 6,000 to A. A may compel either X or Y or Z to pay the amount. If Z is compelled to pay the whole amount; X is insolvent but his assets are sufficient to pay one-half of his debts. Z is entitled to receive Rs. 1,000 from X's estate and Rs. 2,500 from Y.



# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.100

We thus observe that the effect of Section 43 is to make the liability in the event of a joint contract, both joint & several, in so far as the promisee may, in the absence of a contract to the contrary, compel anyone or more of the joint promisors to perform the whole of the promise.

## **Effect of release of one joint promisor- Section 44**

The effect of release of one of the joint promisors is dealt with in Section 44 which is stated below:



# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.100

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

Example 17: 'A', 'B' and 'C' jointly promised to pay Rs. 9,00,000 to 'D'. 'D' released 'A' from liability. In this case, the release of 'A' does not discharge 'B' and 'C' from their liability. They remain liable to pay the entire amount of Rs. 9,00,000 to 'D'. And though 'A' is not liable to pay to 'D', but he remains liable to pay to 'B' and 'C' i.e. he is liable to make the contribution to the other joint promisors.



# Topic : Liability of Joint Promisor & Promisee

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## Rights of Joint Promisees

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



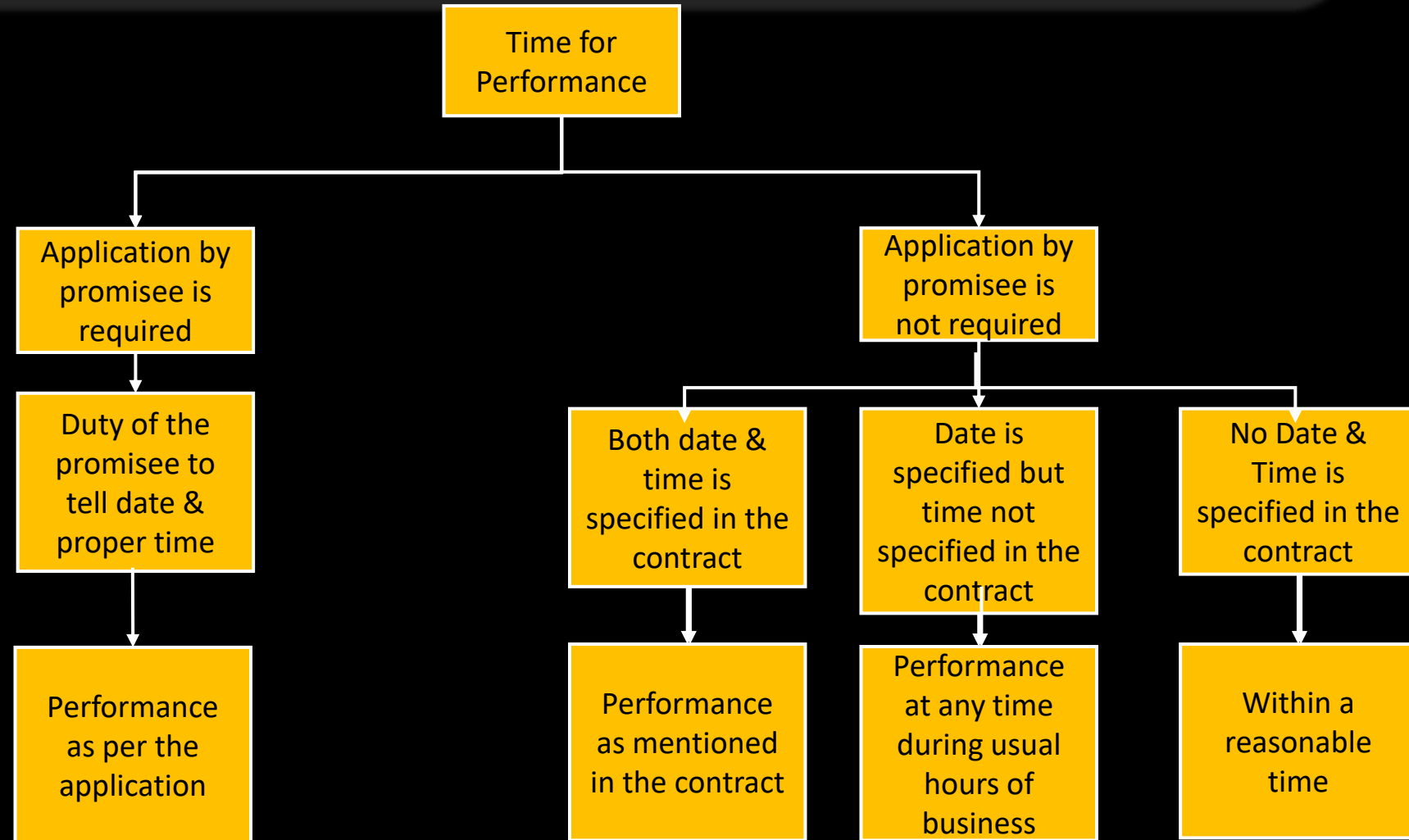
# Topic : Liability of Joint Promisor & Promisee

Pg. No. 2.101

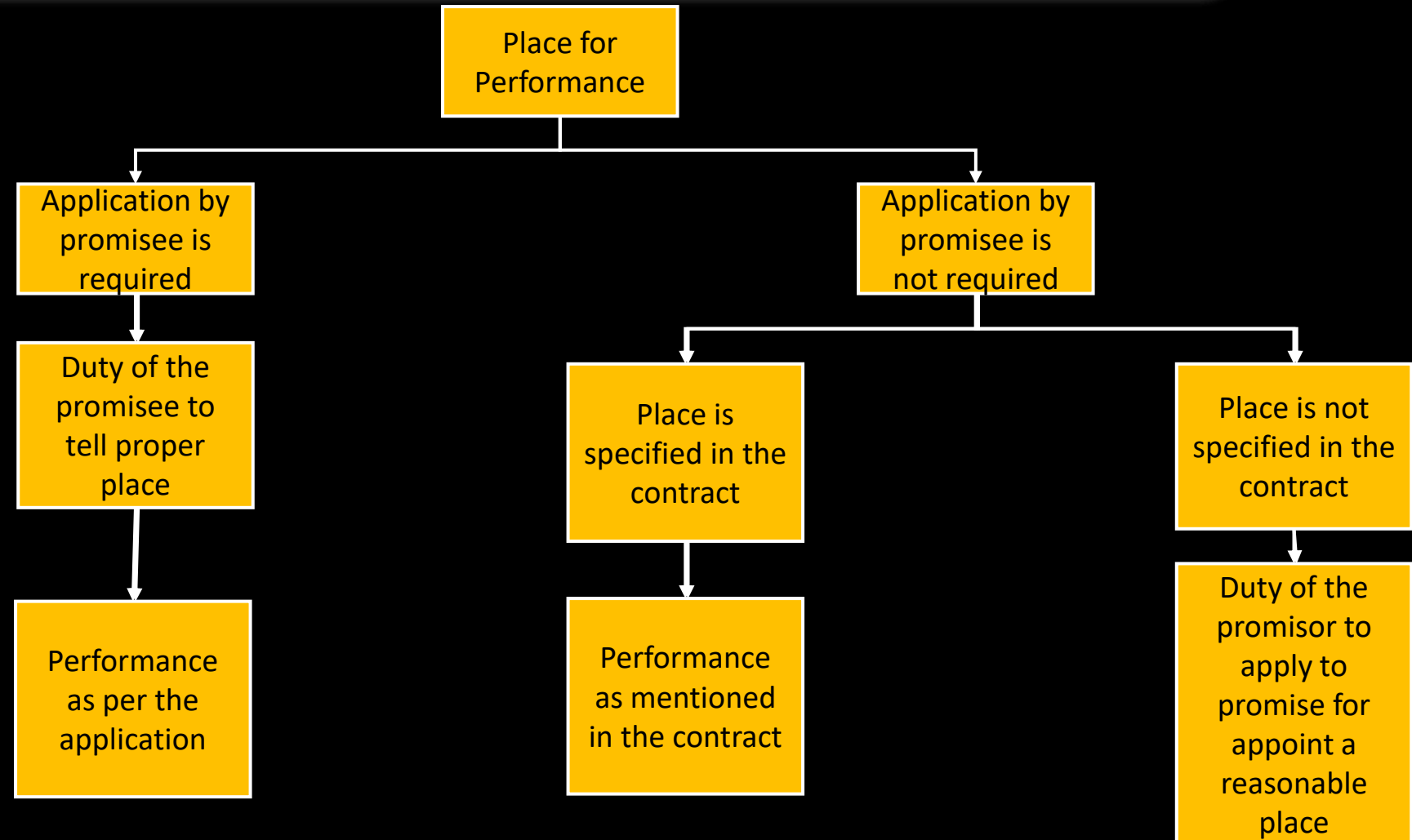
**Example 18:** A, in consideration of Rs. 5,00,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a specified day but B dies. In such a case right to demand payment shall rest with B's legal representatives, jointly with C during C's life-time, and after the death of C, with the legal representatives of B and C jointly.



# Topic : Time and Place For Performance Of The Promise



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Pg. No. 2.101

The law on the subject is contained in Sections 46 to 50 explained below:

- (i) Time for performance of promise, where no application is to be made and no time is specified - Section 46

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

Explanation to Section 46 - The expression reasonable time is to be interpreted having regard to the facts and circumstances of a particular case.



# Topic : Time and Place For Performance Of The Promise



Pg. No. 2.101

- (ii) Time and place for performance of promise, where time is specified and no application to be made – Section 47

When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business, on such day and the place at which the promise ought to be performed.

Example 19: If the delivery of goods is offered say after 8.30 pm, the promisee may refuse to accept delivery, for the usual business hours are over. Moreover, the delivery must be made at the usual place of business.

# Topic : Time and Place For Performance Of The Promise



Pg. No. 2.102

- (iii) Application for performance on certain day to be at proper time and place –  
Section 48

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

Explanation to Section 48 states that the question “what is a proper time and place” is, in each particular case, a question of fact.

# Topic : Time and Place For Performance Of The Promise



Pg. No. 2.102

- (iv) Place for the performance of promise, where no application to be made and no place fixed for performance - Section 49

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

Example 20: A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

# Topic : Time and Place For Performance Of The Promise



Pg. No. 2.102

(v) **Performance in manner or at time prescribed or sanctioned by promisee - Section 50**

The performance of any promise may be made in any such manner, or at any time which the promisee prescribes or sanctions.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.102

The law on the subject is contained in Sections 51 to 58. The provisions thereof are summarized below:

- (i) Promisor not bound to perform, unless reciprocal promisee ready and willing to perform- Section 51

When a contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Example 21: A and B contract that A shall deliver the goods to B to be paid for by B on delivery. A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.103

- (ii) Order of performance of reciprocal promises- Section 52
- When the order of performance of the reciprocal promises is expressly fixed by the contract, they shall be performed in that order; and
- where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.
- Example 22: A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.103

- (iii) Liability of party preventing event on which the contract is to take effect –  
Section 53

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss he may sustain in consequence of the non- performance of the contract.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.103

**Example 23:** A and B contract that B shall execute some work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

**Example 24:** In a contract for the sale of standing timber, the seller is to cut and cord it, whereupon buyer is to take it away and pay for it. The seller cords only a part of the timber and neglects to cord the rest. In that event the buyer may avoid the contract and claim compensation from the seller for any loss which he may have sustained for the non-performance of the contract.





# Topic : Performance Of Reciprocal Promise

Pg. No. 2.103

- (iv) Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises (Section 54)

Section 54 applies when the promises are reciprocal and dependent. If the promisor who has to perform his promise before the performance of the other's promise fails to perform it, he cannot claim performance of the other's promise, and is also liable for compensation for his non-performance.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.103

**Example 25:** A hires B's ship to take in and convey, from Kolkata to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

**Example 26:** A hires B to make a shoe rack. A will supply the plywood, fevicol and other items required for making the shoe rack. B arrived on the appointed day and time but A could not arrange for the required materials. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.104

## (v) Effects of Failure to Perform at a Time Fixed in a Contract in which Time is Essential (Section 55)

The law on the subject is contained in Section 55 which is reproduced below:

“When a party to a contract promises to do certain thing at or before the specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract”.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.104

## **Effect of such failure when time is not essential**

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

## **Effect of acceptance of performance at time other than agreed upon -**

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



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.104

- (vi) Agreement to do Impossible Act (Section 56)  
The impossibility of performance may be of the two types, namely (a) initial impossibility, and (b) subsequent impossibility.
  - (a) **Initial Impossibility (Impossibility existing at the time of contract):**  
When the parties agree upon doing of something which is obviously impossible in itself the agreement would be void. Impossible in itself means impossible in the nature of things. The fact of impossibility may be and may not be known to the parties.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.105

Example 27: 'A', a Hindu, who was already married, contracted to marry 'B', a Hindu girl. According to law, 'A' being married, could not marry 'B'. In this case, 'A' must make compensation to 'B' for the loss caused to her by the non-performance of the contract.

- (1) If known to the parties: It would be observed that an agreement constituted, quite unknown to the parties, may be impossible of being performed and hence void.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.105

**Example 28:** B promises to pay a sum of Rs. 5,00,000 if he is able to swim across the Indian Ocean from Mumbai to Aden within a week. In this case, there is no real agreement, since both the parties are quite certain in their mind that the act is impossible of achievement. Therefore, the agreement, being impossible in itself, is void.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.105

- (2) If unknown to the parties: **Where both the promisor and the promisee are ignorant of the impossibility of performance, the contract is void.**

Example 29: A contracted B to sell his brown horse for Rs. 2,50,000 both unaware that the horse was dead a day before the agreement.





# Topic : Performance Of Reciprocal Promise

Pg. No. 2.105

- (3) If known to the promisor only: Where at the time of entering into a contract, the promisor alone knows about the impossibility of performance, or even if he does not know though he should have known it with reasonable diligence, the promisee is entitled to claim compensation for any loss he suffered on account of non- performance.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.105

- (b) Subsequent or Supervening impossibility (Becomes impossible after entering into contract): **When performance of promise become impossible or illegal by occurrence of an unexpected event or a change of circumstances beyond the contemplation of parties, the contract becomes void e.g. change in law etc.**

In other words, sometimes, the performance of a contract is quite possible when it is made. But subsequently, some event happens which renders the performance impossible or unlawful. Such impossibility is called the subsequent or supervening. **It is also called the post-contractual impossibility. The effect of such impossibility is that it makes the contract void, and the parties are discharged from further performance of the contract.**



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.105

Example 30: 'A' and 'B' contracted to marry each other. Before the time fixed for the marriage, 'A' became mad. In this case, the contract becomes void due to subsequent impossibility, and thus discharged.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.106

(vii) Reciprocal promise to do certain things that are legal, and also some other things that are illegal- Section 57

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

**Example 31:** A and B agree that A will sell a house to B for Rs. 50,00,000 and also that if B uses it as a gambling house, he will pay a further sum of Rs. 75,00,000. The first set of reciprocal promises, i.e. to sell the house and to pay Rs. 50,00,000 for it, constitutes a valid contract. But the object of the second, being unlawful, is void.



# Topic : Performance Of Reciprocal Promise

Pg. No. 2.106

(viii) 'Alternative promise' one branch being illegal- Section 58

The law on this point is contained in Section 58 which says that **“In the case of the alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced”**.

Example 32: A and B agree that A shall pay B Rs. 1,00,000, for which B shall afterwards deliver to A either rice or smuggled opium.  
This is a valid contract to deliver rice, and a void agreement as to the opium.



# Topic : APPROPRIATION OF PAYMENTS

If there are several debts to be paid, the payment shall be appropriated as per the provisions of section 59, 60 and 61 of the Indian Contract Act, 1872

1. At the time of payment, debtor has the right to expressly intimate regarding the appropriation of payment or circumstances imply the payment to be adjusted against particular debt
2. If there is no intimation from debtor, then creditor can apply as per its choice to any debt including time barred debt. However, he cannot apply the payment to the disputed debt.
3. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time including time barred debt. If the debts are of equal standing, the payments shall be applied in discharge of each proportionately.



# Topic : APPROPRIATION OF PAYMENTS

Pg. No. 2.106

Sometimes, a debtor owes several debts to the same creditor and makes payment, which is not sufficient to discharge all the debts. In such cases, the payment is appropriated (i.e. adjusted against the debts) as per Section 59 to 61 of the Indian Contract Act.

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



# Topic : APPROPRIATION OF PAYMENTS

Pg. No. 2.106

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





# Topic : APPROPRIATION OF PAYMENTS

Pg. No. 2.107

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

## **Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties**



Pg. No. 2.107

Under this heading, we shall discuss the principles of Novation, Rescission and Alteration. The law is contained in Sections 62 to 67 of the Contract Act.

- (i) **Effect of novation, rescission, and alteration of contract (Section 62)**  
“If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed”.

# Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties



Pg. No. 2.107

## Analysis of Section 62

- (a) Effect of novation: The parties to a contract may substitute a new contract for the old. If they do so, it will be a case of novation. On novation, the old contract is discharged and consequently it need not be performed. Thus, it is a case where there being a contract in existence some new contract is substituted for it either between the same parties or between different parties the consideration mutually being the discharge of old contract. Novation can take place only by mutual agreement between the parties.

## **Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties**



Pg. No. 2.107

**Example 33:** A owes B Rs. 100,000. A, B and C agree that C will pay B and he will accept Rs. 100,000 from C in lieu of the sum due from A. A's liability thereby shall come to an end, and the old contract between A and B will be substituted by the new contract between B and C.

## Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties



Pg. No. 2.107

- (b) Effect of rescission: **A contract is also discharged by rescission.** When the parties to a contract agree to rescind it, the contract need not be performed. **In the case of rescission, only the old contract is cancelled and no new contract comes to exist in its place.** It is needless to point out that novation also involves rescission. Both in novation and in rescission, the contract is discharged by mutual agreement.

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Pg. No. 2.107

- (c) Effect of alteration of contract: As in the case of novation and rescission, so also in a case where the parties to a contract agree to alter it, the original contract is rescinded, with the result that it need not be performed. In other words, a contract is also discharged by alteration. The terms of contract may be so altered by mutual agreement that the alteration may have the effect of substituting a new contract for the old one. In other words, the distinction between novation and alteration is very slender.

## Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties



Pg. No. 2.108

**Novation and alteration:** The law pertaining to novation and alteration is contained in Sections 62 to 67 of the Indian Contract Act. In both these cases the original contract need not be performed. Still there is a difference between these two.

## Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties



Pg. No. 2.108

1. Novation means substitution of an existing contract with a new one. Novation may be made by changing in the terms of the contract or there may be a change in the contracting parties. But in case of alteration the terms of the contract may be altered by mutual agreement by the contracting parties but the parties to the contract will remain the same.



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Pg. No. 2.108

1. In case of novation there is altogether a substitution of new contract in place of the old contract. But in case of alteration it is not essential to substitute a new contract in place of the old contract. In alteration, there may be a change in some of the terms and conditions of the original agreement.

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Pg. No. 2.108

- (ii) Promisee may waive or remit performance of promise (Section 63): “**Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him**, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit”. **In other words, a contract may be discharged by remission.**

Example 34: A owes B Rs.5,00,000. A pays to B, and B accepts, in satisfaction of the whole debt, Rs. 2,00,000 paid at the time and place at which the Rs. 5,00,000 were payable. The whole debt is discharged.

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Pg. No. 2.108

### (iii) Restoration of Benefit under a Voidable Contract (Section 64)

The law on the subject is “

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor.

The party rescinding avoidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received”.

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## Analysis of Section 64

Such a contract can be terminated at the option of the party who is empowered to do so. If he has received any benefit under the contract, he must restore such benefit to the person from whom he has received it.

Example 35: An insurance company may rescind a policy on the ground that material fact has not been disclosed. When it does so, the premium collected by it in respect of the policy reduced by the amount of expenses incurred by it in this connection must be repaid to the policy holder.

## Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties



Pg. No. 2.109

- (iv) Obligations of Person who has Received Advantage under Void Agreement or contract that becomes void (Section 65)

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

### **Analysis of Section 65**

From the language of the Section, it is clear that in such a case either the advantage received must be restored back or a compensation, sufficient to put the position prior to contract, should be paid.

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Example 36: A pays B Rs. 1,00,000, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A Rs. 1,00,000.

In a case, the plaintiff hired a godown from the defendant for twelve months and paid the whole of the rent in advance. After about seven months the godown was destroyed by fire, without any fault or negligence on the part of the plaintiff and the plaintiff claimed a refund of a proportionate amount of the rent. Held, the plaintiff was entitled to recover the rent for the unexpired term, of the contract.

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The Act requires that a party must give back whatever he has received under the contract. The benefit to be restored under this section must be benefit received under the contract (and not any other amount). A agrees to sell land to B for Rs. 400,000. B pays to A Rs. 40,000 as a deposit at the time of the contract, the amount to be forfeited by A if B does not complete the sale within a specified period. B fails to complete the sale within the specified period, nor is he ready and willing to complete the sale within a reasonable time after the expiry of that period. A is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received under the contract, it is a security that the purchaser would fulfil his contract and is ancillary to the contract for the sale of the land.

## Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties



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- (v) Communication of rescission (Section 66): You have noticed that **a contract voidable at the option of one of the parties can be rescinded; but rescission must be communicated to the other party in the same manner as a proposal is communicated** under Section 4 of the Contract Act. Similarly, a rescission may be revoked in the same manner as a proposal is revoked.
- (vi) Effects of neglect of promisee to afford promisor reasonable facilities for performance (Section 67): **If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.**



## Topic : Contracts, Which Need Not Be Performed With The Consent Of Both The Parties



Pg. No. 2.110

Example 37: If an apprentice refuses to learn, the teacher cannot be held liable for not teaching.

Example 38: A contracts with B to repair B's house. B neglects or refuses to appoint out to A the places in which his house requires repair. A is excused for the non- performance of the contract, if it is caused by such neglect or refusal.



# Topic : DISCHARGE OF A CONTRACT

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A contract is discharged when the obligations created by it come to an end. A contract may be discharged in any one of the following ways:

- (i) Discharge by performance: It takes place when the parties to the contract fulfil their obligations arising under the contract within the time and in the manner prescribed.

Discharge by performance may be

- (1) Actual performance; or
- (2) Attempted performance.



# Topic : DISCHARGE OF A CONTRACT

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Actual performance is said to have taken place, when each of the parties has done what he had agreed to do under the agreement. When the promisor offers to perform his obligation, but the promisee refuses to accept the performance, it amounts to attempted performance or tender.

Example 39: A contracts to sell his car to B on the agreed price. As soon as the car is delivered to B and B pays the agreed price for it, the contract comes to an end by performance.



# Topic : DISCHARGE OF A CONTRACT

Pg. No. 2.111

Example 40: A contracted to supply certain quantity of timber to B. B made the supply of timber at appointed time and place but A refused to accept the delivery. This is called as attempted performance.



# Topic : DISCHARGE OF A CONTRACT

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- (ii) Discharge by mutual agreement: Section 62 of the Indian Contract Act provides **if the parties to a contract agree to substitute a new contract for it, or to rescind or remit or alter it, the original contract need not be performed.** The principles of Novation, Rescission, Alteration and Remission are already discussed.

Example 41: A owes B Rs. 1,00,000. A enters into an agreement with B and mortgage his (A's), estates for Rs. 50,000 in place of the debt of Rs. 1,00,000. This is a new contract and extinguishes the old.

Example 42: A owes B Rs. 5,00,000. A pays to B Rs. 3,00,000 who accepts it in full satisfaction of the debt. The whole is discharged.



# Topic : DISCHARGE OF A CONTRACT

Pg. No. 2.111

- (iii) Discharge by impossibility of performance: **The impossibility may exist from the very start.** In that case, it would be impossibility ab initio. **Alternatively, it may supervene.** Supervening impossibility may take place owing to:
- (a) **an unforeseen change in law;**
  - (b) **the destruction of the subject-matter essential to that performance;**
  - (c) **the non-existence or non-occurrence of particular state of things,** which was naturally contemplated for performing the contract, as a result of some personal incapacity like dangerous malady;
  - (d) **the declaration of a war** (Section 56).



# Topic : DISCHARGE OF A CONTRACT

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- Example 43: A agrees with B to discover a treasure by magic. The agreement is void due to initial impossibility.
- Example 44: A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- Example 45: A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.
- Example 46: X agrees to sell his horse to Y for ` 5,000 but the horse died in an accident. Here, it become impossible to perform the contract due to destruction of the subject. Thus, a valid contract changes into void contract because of impossibility of performance.



# Topic : DISCHARGE OF A CONTRACT

Pg. No. 2.111

- (iv) Discharge by lapse of time: A contract should be performed within a specified period as prescribed by the Limitation Act, 1963.

If it is not performed and if no action is taken by the promisee within the specified period of limitation, he is deprived of remedy at law.

Example 47: If a creditor does not file a suit against the buyer for recovery of the price within three years, the debt becomes time-barred and hence irrecoverable.





# Topic : DISCHARGE OF A CONTRACT

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- (iv) Discharge by operation of law: **A contract may be discharged by operation of law which includes by death of the promisor, by insolvency etc.**
- (vi) Discharge by breach of contract: Breach of contract may be actual breach of contract or anticipatory breach of contract. If one party defaults in performing his part of the contract on the due date, he is said to have committed breach thereof. When on the other hand, a person repudiates a contract before the stipulated time for its performance has arrived, he is deemed to have committed anticipatory breach. If one of the parties to a contract breaks the promise the party injured thereby, has not only a right of action for damages but he is also discharged from performing his part of the contract.



# Topic : DISCHARGE OF A CONTRACT

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Example 49: A owes B Rs. 5,00,000. C pays to B Rs.1,00,000 and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.



# Topic : DISCHARGE OF A CONTRACT

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- (viii) Effects of neglect of promisee to afford promisor reasonable facilities for performance: **If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.** (Section 67)
- (ix) Merger of rights: **Sometimes, the inferior rights and the superior rights coincide and meet in one and the same person. In such cases, the inferior rights merge into the superior rights.** On merger, the inferior rights vanish and are not required to be enforced.



# Topic : DISCHARGE OF A CONTRACT

Pg. No. 2.113

Example 50: A took a land on lease from B. Subsequently, A purchases that very land. Now, A becomes the owner of the land and the ownership rights being superior to rights of a lessee, the earlier contract of lease stands terminated.



# LAWS KE GOD

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**CA GURPREET SINGH**





Thank  
you