

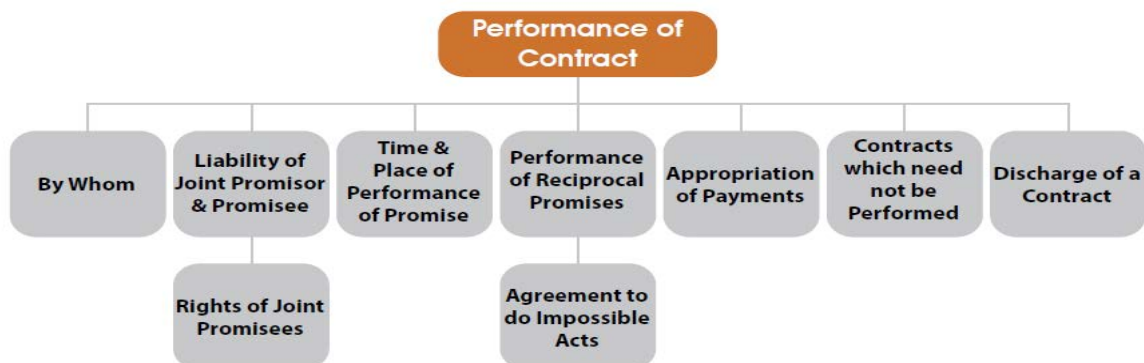
## UNIT – 4: PERFORMANCE OF CONTRACT

### LEARNING OUTCOMES

After studying this unit, you would be able to understand-

- ◆ Understand how obligations under a contract must be carried out by the parties.
- ◆ Be familiar with the various modes of performance.
- ◆ Be clear about the consequence of refusal of performance or refusal to accept performance, by either of the parties.
- ◆ Understand rights of joint promisees, liabilities of joint promisors, and rules regarding appropriation of payments.

### UNIT OVERVIEW



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



### 4.1 OBLIGATIONS OF PARTIES TO CONTRACTS (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.

Promises bind the representatives of the promisor in case of death of such promisor before performance, unless a contrary intention appears from the contract.

**Example 1:** A promises to deliver goods to B on a certain day on payment of ₹ 1,00,000. A die before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay ₹ 1,00,000 to A's representatives.

**Example 2:** A promises to paint a picture for B by a certain day, at a certain price. A die before the day. The contract cannot be enforced either by A's representatives or by B because it involves use of personal skill. It is a contract of personal nature.

### Analysis of Section 37

A contract being an agreement enforceable by law, creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge.

The basic rule is that the promisor must perform exactly what he has promised to perform. The obligation to perform is absolute. Thus, it may be noted that it is necessary for a party who wants to enforce the promise made to him, to perform his promise for himself or offer to perform his promise. Only after that he can ask the other party to carry out his promise. This is the principle which is enshrined in Section 37. Thus, it is the primary duty of each party to a contract to either perform or offer to perform his promise. He is absolved from such a responsibility only when under a provision of law or an act of the other party to the contract, the performance can be dispensed with or excused.

Thus, from above it can be drawn that performance may be actual or offer to perform.

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

**Example 3:** X borrows ₹ 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.

**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.



## 4.2 EFFECT OF REFUSAL TO ACCEPT OFFER OF PERFORMANCE (SECTION 38)

According to Section 38 of the Act - where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, then the promisor is not responsible for non performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill certain conditions which are as follows, namely:

- (i) it must be unconditional;
- (ii) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
- (iii) if the offer is an offer to deliver anything to the promisee, then the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

**Example 4:** P promises to deliver certain goods to R. P takes the goods to the appointed place during business hours but R refuses to take the delivery of goods. This is an attempted performance as P the promisor has done what he was required to do under the contract.



### 4.3 EFFECT OF REFUSAL OF PARTY TO PERFORM WHOLLY (SECTION 39)

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

**Example 5:** 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.

#### Analysis of Section 39

From language of Section 39 it is clear that in the case under consideration, the following two rights accrue to the aggrieved party, namely, (a) to terminate the contract; (b) to indicate by words or by conduct that he is interested in its continuance.

In case the promisee decides to continue the contract, he would not be entitled to put an end to the contract on this ground subsequently. In either case, the promisee would be able to claim damages that he suffers as a result on the breach.



### 4.4 BY WHOM A CONTRACT MAY BE PERFORMED (SECTION 40, 41 AND 42)

#### Person by whom promise is to be performed-Section 40

If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

**Example 6:** A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to B by another; and if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

**Example 7:** A promises to paint a picture for B and this must be performed by the promisor himself.

#### Analysis of Section 40

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.

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.

**Example 9:** A promises to B to pay ₹ 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 ₹100,000 to B's representative.

**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.

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 has neither authorised nor ratified the act of the third party.

As per Section 41 of the Indian Contract Act, 1872, 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, accepted by the promisee, produces the result of discharging the promisor, although the latter has neither authorised nor ratified the act of the third party.

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

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.

**Example 12:** 'A', 'B' and 'C' jointly promised to pay ₹ 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.



## 4.5 DISTINCTION BETWEEN SUCCESSION AND ASSIGNMENT

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.

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.



## 4.6 LIABILITY OF JOINT PROMISOR & PROMISEE

### Devolution of joint liabilities (Section 42)

When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of last survivor, the representatives of all jointly, must fulfil the promise.

### Analysis of 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.

**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.

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.

**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.

**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.

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

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

**Example 16:** X, Y and Z jointly promise to pay ₹ 6,000 to A. A may compel either X or Y or Z to pay the amount. 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 ₹ 1,000 from X's estate and ₹ 2,000 from Y.

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:

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 ₹ 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 ₹ 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.

#### Rights of Joint Promisees

The law relating to Devolution of joint rights is contained in Section 45 which is reproduced below:

“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”.

**Example 18:** A, in consideration of ₹ 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.



## 4.7 TIME AND PLACE FOR PERFORMANCE OF THE PROMISE

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.

- (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.

- (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.

- (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.

- (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.





## 4.8 PERFORMANCE OF RECIPROCAL PROMISE

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 promise 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.

**Analysis of Section 51**

**Simultaneous performance of reciprocal promises:** Reciprocal promises may have to be performed simultaneously, or one after the other. Where A promises to deliver rice and B promises to pay the price on delivery, both the promises are to be performed simultaneously, and both A and B must be ready and willing to perform their respective promises. Such promises constitute concurrent conditions and the performance of one of the promises is conditional on the performance of the other. If one of the promises is not performed the other too need not be performed. If A, in the above-mentioned *example*, is unwilling to deliver the rice on payment, A will be guilty of breach of promise and the breach would relieve B of the obligation to perform his promise and would enable B to treat the contract as at an end.

(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.

**Analysis of Section 52 -** The order of performance may sometimes be indicated not expressly, but by the nature of the transaction. For *example*, A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the price. A's promise to make over his stock need not be performed, until the security is given by, for the nature of the transaction requires that A should have the security from B before he delivers his stock.

(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.

**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.

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

When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

**Analysis of 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.

**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.

(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".

**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.

### Analysis of Section 55

But ordinarily, from an examination of a contract, it is difficult to ascertain whether time is intended to be of essence by the parties at the time of its formation. In every case, the intention is to be gathered from the terms of the contract.

In a mercantile contract, the general rule in this regard is that stipulations as to time, except as to time for payment of money, are essential conditions, since punctuality is of the utmost importance in the business world. Thus, on a sale of goods that are notoriously subject to rapid fluctuation of market price, e.g. gold, silver, shares having a ready market the time of delivery is of the essence of the contract. But in mortgage bond, the time fixed for the repayment of the mortgage money can by no means be regarded as an essential condition; consequently, the mortgaged property can be regained even after the due date. Similarly, in a contract to sell land any clause limiting the time of completion is not strictly enforced. But even in a contract for the sale of land, time can be made the essence of the contract by express words.

**Contract cannot be avoided where time is not essential:** Where time is not essential, the contract cannot be avoided on the ground that the time for performance has expired, there the promisee is only entitled to compensation from the promisor for any loss caused by the delay. But it must be remembered that even where time is not essential it must be performed within a reasonable time; otherwise it becomes voidable at the option of the promisee.

**Effect of acceptance of performance out of time:** Even where time is essential the promisee may waive his right to repudiate the contract, when the promisor fails to perform the promise within the stipulated time. In that case, he may accept performance at any time other than that agreed. In such an event, he cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of acceptance of the performance he has given a notice to the promisor of his intention to claim compensation.

#### (vi) Agreement to do Impossible Act

Section 56 contemplates various circumstances under which agreement may be void, since it is impossible to carry it out. The Section is reproduced below:

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

**Contract to do act afterwards becoming impossible or unlawful:** 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, unlawful, becomes void when the act becomes impossible or unlawful.

**Compensation for loss through non-performance of act known to be impossible or unlawful:** where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

**Example 27:** A agrees with B to discover treasure by magic. The agreement is void.

### Analysis of Section 56

The impossibility of performance may be of the two types, namely (a) initial impossibility, and (b) subsequent impossibility.

- (1) **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.

**Example 28:** '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.

- (i) **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.

**Example 29:** B promises to pay a sum of ₹ 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.

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

**Example 30:** A contracted B to sell his brown horse for ₹ 50,000 both unaware that the horse was dead a day before the agreement.

- (iii) **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.

- (2) **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.

**Example 31:** '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.

- (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 32:** A and B agree that A will sell a house to B for ₹ 500,000 and also that if B uses it as a gambling house, he will pay a further sum of ₹ 750,000. The first set of reciprocal promises, i.e. to sell the house and to pay ₹ 500,000 for it, constitutes a valid contract. But the object of the second, being unlawful, is void.

- (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 33:** A and B agree that A shall pay B ₹ 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.



## 4.9 APPROPRIATION OF PAYMENTS

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.
- (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.
- (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.



## 4.10 CONTRACTS, WHICH NEED NOT BE PERFORMED – WITH THE CONSENT OF BOTH THE PARTIES

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”

#### 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.

**Example 34:** A owes B ₹ 100,000. A, B and C agree that C will pay B and he will accept ₹ 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.

- (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.
- (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.

**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.

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.
2. 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.

- (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 35:** A owes B ₹5,00,000. A pays to B, and B accepts, in satisfaction of the whole debt, ₹ 2,00,000 paid at the time and place at which the ₹ 5,00,000 were payable. The whole debt is discharged.

- (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”.

#### 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 36:** 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.

- (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.

**Example 37:** A pays B ₹ 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 ₹ 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.

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 ₹ 400,000. B pays to A ₹ 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.

- (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.

**Example 38:** If an apprentice refuses to learn, the teacher cannot be held liable for not teaching.

**Example 39:** 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.



## 4.11 DISCHARGE OF A CONTRACT

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.

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 40:** 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.

**Example 41:** 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.

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



**Example 43:** A owes B ₹ 5,00,000. A pays to B ₹ 3,00,000 who accepts it in full satisfaction of the debt. The whole is discharged.

(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).

**Example 44:** A agrees with B to discover a treasure by magic. The agreement is void due to initial impossibility.

**Example 45:** A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

**Example 46:** 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 47:** 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.

(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 48:** 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.

(v) **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.

**Example 49:** A contracted with B to supply 100 kgs of rice on 1<sup>st</sup> June. But A failed to deliver the same on said date. This is actual breach of contract. If time is not essential essence of contract B can give him another date for supply of goods and he will not be liable to claim for any damages if prior notice for the same is not given to A while giving another date.

- (vii) **Promisee may waive or remit performance of promise:** 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. (Section 63)

**Example 50:** A owes B ₹ 5,00,000. C pays to B ₹1,00,000 and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

- (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.

**Example 51:** 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.

## SUMMARY

1. The promisor or his representative must perform unless the nature of contract shows that it may be performed by a third person, but the promisee may accept performance by a third party. (Sections 37, 40 and 41)
2. In case of joint promisors, all must perform, and after the death of any of them, the survivors and the representatives of the deceased must perform. But their liability is joint and several. If the promisee requires any one of them perform the whole promise, he can claim contribution from others. (Sections 42, 43 and 44)
3. Joint promisees have only a joint right to claim performance. (Section 45)
4. The promisor must offer to perform and such offer must be unconditional, and be made at the proper time and place, allowing the promisee a reasonable opportunity of inspection of the things to be delivered. (Sections 38, 46, 47, 48, 49 and 50)
5. If the performance consists of payment of money and there are several debts to be paid, the payment shall be appropriated as per provisions of Sections 59, 60 and 61. The debtor has, at the time of payment, the right of appropriating the payment. In default of debtor, the creditor has option of election and in default of either the law will allow appropriation of debts in order of time.
6. If an offer of performance is not accepted, the promisor is not responsible for non-performance and does not lose his rights under the contract; so also, if the promisee fails to afford reasonable facilities. He may sue for specific performance or he may avoid the contract and claim compensation (Sections 38, 39, 53 and 67).

7. Rescission is communicated and revoked in the same way as a promise. The effect is to dispense with further performance and to render the party rescinding liable to restore any benefit he may have received. (Sections 64 and 66)
8. Parties may agree to cancel the contract or to alter it or to substitute a new contract for it. (Section 62)

## TEST YOUR KNOWLEDGE

### Multiple Choice Questions

1. On the valid performance of the contractual obligations by the parties, the contract
  - (a) Is discharged
  - (b) becomes enforceable
  - (c) becomes void
  - (d) None of these
2. Which of the following person can perform the contract?
  - (a) Promisor alone
  - (b) Legal representatives of promisor
  - (c) Agent of the promisor
  - (d) All of these.
3. A contract is discharged by novation which means the
  - (a) cancellation of the existing contract
  - (b) change in one or more terms of the contract
  - (c) substitution of existing contract for a new one
  - (d) none of these
4. A contract is discharged by rescission which means the
  - (a) change in one or more terms of the contract
  - (b) acceptance of lesser performance
  - (c) abandonment of rights by a party
  - (d) cancellation of the existing contract
5. If a person accepts a lesser sum of money than what was contracted for in discharge of the whole debt, it is known as:
  - (a) Waiver
  - (b) Rescission
  - (c) Alteration
  - (d) Remission
6. Novation discharges a contract
  - (a) No, it means, no new contract comes to existence
  - (b) No, it means, new contract comes to existence, but old contract is not discharged
  - (c) Yes, on novation, old contract is discharged and consequently it need not be performed
  - (d) Yes, but only if parties agreed to discharge.

7. Novation and alteration are same
- True, both result in discharging old contract.
  - False, novation discharges old contract, in alteration, the obligation remains.
  - False, however, both may have the effect of substituting a new contract for the old one
  - None of the above
8. A, B and C jointly promised to pay ₹ 60,000 to D. before performance of the contract, C dies. Here, the contract
- Becomes void on C's death
  - Should be performed by A and B along with C's legal representatives
  - Should be performed by A and B alone
  - Should be renewed between A, B and D.
9. Vivaan lives on rent in a house owned by Swasti. Later he purchases the house from Swasti. The rent agreement is discharged due to:
- Waiver of rights
  - Novation of contract
  - Merger of rights
  - Remission of contract
10. When prior to the due date of performance, the promisor refuses to perform the contract, it is known as:
- Novation of the contract
  - Anticipatory breach of contract
  - Actual breach of contract
  - waiver of contract
11. A owes ₹ 15000 to B. A die leaving his estate of ₹ 12000. Legal representatives of A are:
- liable to pay ₹ 12000 to B
  - liable to pay ₹ 15000 to B
  - not liable to pay B
  - liable to pay ₹ 3000 to B
12. Rani contracted to teach dance to Shruti. Shruti paid an advance of ₹ 5000 for the same. Rani met with an accident and will not be able to dance. She has a daughter as her legal representative. Shruti can
- force her daughter to teach her dance
  - rescind the contract and ask for refund of money
  - rescind the contract but cannot ask for refund
  - can sue Rani for non-performance of contract

### Answers to MCQs

1.	(a)	2.	(d)	3.	(c)	4.	(d)	5.	(d)
6.	(c)	7.	(c)	8.	(b)	9.	(c)	10.	(b)
11.	(a)	12.	(b)						

## Descriptive Questions

1. X, Y and Z jointly borrowed ₹ 50,000 from A. The whole amount was repaid to A by Y. Decide in the light of the Indian Contract Act, 1872 whether:
  - (i) Y can recover the contribution from X and Z,
  - (ii) Legal representatives of X are liable in case of death of X,
  - (iii) Y can recover the contribution from the assets, in case Z becomes insolvent.
  
2. Mr. Rich aspired to get a self-portrait made by an artist. He went to the workshop of Mr. C an artist and asked whether he could sketch the former's portrait on oil painting canvass. Mr. C agreed to the offer and asked for ₹ 50,000 as full advance payment for the above creative work. Mr. C clarified that the painting shall be completed in 10 sittings and shall take 3 months.

On reaching to the workshop for the 6th sitting, Mr. Rich was informed that Mr. C became paralyzed and would not be able to paint for near future. Mr. C had a son Mr. K who was still pursuing his studies and had not taken up his father's profession yet?

Discuss in light of the Indian Contract Act, 1872?

  - (i) Can Mr. Rich ask Mr. K to complete the artistic work in lieu of his father?
  - (ii) Could Mr. Rich ask Mr. K for refund of money paid in advance to his father?
  
3. Mr. JHUTH entered into an agreement with Mr. SUCH to purchase his (Mr. SUCH's) motor car for ₹ 5,00,000/- within a period of three months. A security amount of ₹ 20,000/- was also paid by Mr. JHUTH to Mr. SUCH in terms of the agreement. After completion of three months of entering into the agreement, Mr. SUCH tried to contract Mr. JHUTH to purchase the car in terms of the agreement. Even after lapse of another three month period, Mr. JHUTH neither responded to Mr. SUCH, nor to his phone calls. After lapse of another period of six months. Mr. JHUTH contracted Mr. SUCH and denied to purchase the motor car. He also demanded back the security amount of ₹ 20,000/- from Mr. SUCH. Referring to the provisions of the Indian Contract Act, 1872, state whether Mr. SUCH is required to refund the security amount to Mr. JHUTH.

Also examine the validity of the claim made by Mr. JHUTH, if the motor car would have destroyed by an accident within the three month's agreement period.
  
4. Mr. Murari owes payment of 3 bills to Mr. Girdhari as on 31<sup>st</sup> March, 2020. (i) ₹ 12,120 which was due in May 2016. (ii) ₹ 5,650 which was due in August 2018 (iii) ₹ 9,680 which was due in May 2019. Mr. Murari made payment on 1<sup>st</sup> April 2020 as below without any notice of how to appropriate them:
  - (i) A cheque of ₹ 9,680
  - (ii) A cheque of ₹ 15,000

Advice under the provisions of the Indian Contract Act, 1872.
  
5. What will be rights with the promisor in following cases? Explain with reasons:
  - (a) Mr. X promised to bring back Mr. Y to life again.

- (b) A agreed to sell 50 kgs of apple to B. The loaded truck left for delivery on 15<sup>th</sup> March but due to riots in between reached A on 19<sup>th</sup> March.
- (c) An artist promised to paint on the fixed date for a fixed amount of remuneration but met with an accident and lost his both hands.
- (d) Abhishek entered into contract of import of toys from China. But due to disturbance in the relation of both the countries, the imports from China were banned.

### Answer to the Descriptive Question

1. Section 42 of the Indian Contract Act, 1872 requires that when two or more persons have made a joint promise, then, unless a contrary intention appears from the contract, all such persons jointly must fulfill the promise. In the event of the death of any of them, his representative jointly with the survivors and in case of the death of all promisors, the representatives of all jointly must fulfill the promise.

Section 43 allows the promisee to seek performance from any of the joint promisors. The liability of the joint promisors has thus been made not only joint but “joint and several”. Section 43 provides that in the absence of express agreement to the contrary, the promisee may compel any one or more of the joint promisors to perform the whole of the promise.

Section 43 deals with the contribution among joint promisors. The promisors, may compel every joint promisor to contribute equally to the performance of the promise (unless a contrary intention appears from the contract). If any one of the joint promisors makes default in such contribution the remaining joint promisors must bear the loss arising from such default in equal shares.

As per the provisions of above sections,

- (i) Y can recover the contribution from X and Z because X, Y and Z are joint promisors.
  - (ii) Legal representative of X are liable to pay the contribution to Y. However, a legal representative is liable only to the extent of property of the deceased received by him.
  - (iii) Y also can recover the contribution from Z's assets.
2. 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 of the Indian Contract Act, 1872). But their liability under a contract is limited to the value of the property they inherit from the deceased.
- (i) In the instant case, since painting involves the use of personal skill and on becoming Mr. C paralyzed, Mr. Rich cannot ask Mr. K to complete the artistic work in lieu of his father Mr. C.
  - (ii) According to section 65 of the Indian Contract Act, 1872, 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.

Hence, in the instant case, the agreement between Mr. Rich and Mr. C has become void because of paralysis to Mr. C. So, Mr. Rich can ask Mr. K for refund of money paid in advance to his father, Mr. C.

3. In terms of the provisions of Section 65 of the Indian Contract Act, 1872, 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.

Referring to the above provision, we can analyse the situation as under.

The contract is not a void contract. Mr. SUCH is not responsible for Mr. JHUTH's negligence. Therefore, Mr. SUCH can rescind the contract and retain the security amount since the security 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 Motor Car.

Regarding the second situation given in the question, the agreement becomes void due to the destruction of the Motor car, which is the subject matter of the agreement here. Therefore, the security amount received by Mr. SUCH is required to be refunded back to Mr. JHUTH.

4. If the performance consists of payment of money and there are several debts to be paid, the payment shall be appropriated as per provisions of Sections 59, 60 and 61. The debtor has, at the time of payment, the right of appropriating the payment. In default of debtor, the creditor has option of election and in default of either the law will allow appropriation of debts in order of time.

In the present case, Mr. Murari had made two payments by way of two cheques. One cheque was exactly the amount of the bill drawn. It would be understood even though not specifically appropriated by Mr. Murari that it will be against the bill of exact amount. Hence cheque of ₹ 9,680 will be appropriated against the bill of ₹ 9,680 which was due in May 2019.

Cheque of ₹ 15000 can be appropriated against any lawful debt which is due even though the same is time-barred.

Hence, Mr. Girdhari can appropriate the same against the debt of ₹ 12,120 which was due in 2016 and balance against ₹ 5650 which was due in August 2018.

5. (a) The contract is void because of its initial impossibility of performance.
- (b) Time is essence of this contract. As by the time apples reached B they were already rotten. The contract is discharged due to destruction of subject matter of contract.
- (c) Such contract is of personal nature and hence cannot be performed due to occurrence of an event resulting in impossibility of performance of contract.
- (d) Such contract is discharged without performance because of subsequent illegality nature of the contract.