

# Performance of Contract

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A contract is performed when the parties to it fulfil their respective obligations arising under it.

## Example:

X contracts with Y to supply 100 litres of coconut oil @ Rs.160 per litre on a specific day. The contract is performed when on the day specified, X delivers 100 litres of coconut oil to Y and Y makes a payment of Rs.16,000.

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 this Act or of any other law’.

## ‘Offer to perform’ or ‘Attempted Performance’ or ‘Tender’

Sometimes, the promisor may offer to perform his obligation under the contract on the due date but the promisee may refuse to accept performance. This is what is known as ‘Attempted Performance’ or ‘Tender’.

According to *Section 38*,

‘Where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance nor does he thereby lose his right under the contract’.

Thus, attempted performance or tender is equivalent to actual performance and the promisor will not be responsible for non-performance. The promisor also does not lose his right to take legal action against the promisee for the breach of contract.

## Example:

In the example give above, if Y refuses to take delivery and pay for the 100 litres of coconut oil as agreed earlier, X can take legal action against him for the breach of contract.

## CONDITIONS OF A VALID OFFER TO PERFORM

Offer of performance or tender, to be valid, must fulfil the following conditions:

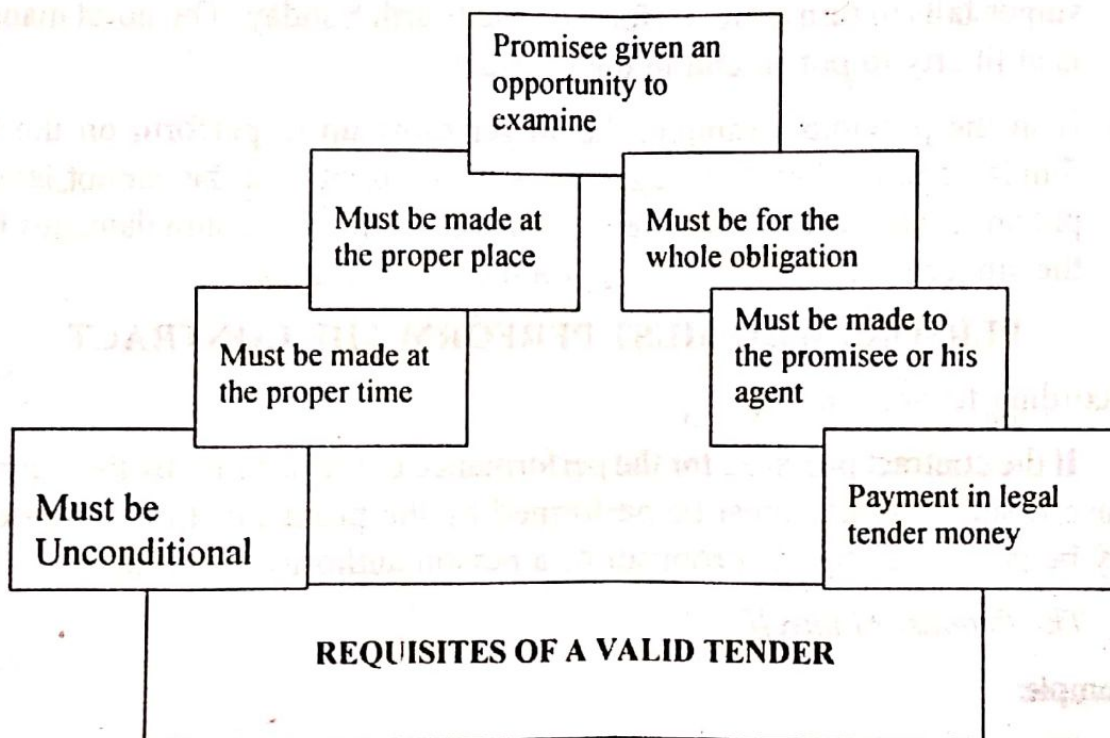
1. *Unconditional* : An offer to perform is unconditional if it is made as per the terms of the contract.



**Example:**

P offers to supply Q the required quantity of butter if Q agrees to buy a certain quantity of ghee also. The offer to perform is conditional and, therefore, invalid.

2. *Proper Time* : An offer to perform must be made within the stipulated time and during business hours on a working day.
3. *Proper Place* : It must be made at the stipulated place. If there is no stipulation as to place, it must be made at the promisee's place of business.
4. *Opportunity to Examine* : If the offer is to deliver certain goods, the promisee must be given a reasonable opportunity to examine the goods to ensure that it is the same as what the promisor is bound to deliver.



**Figure 8.1**

5. *For the Whole Obligation* : The offer to perform must be in respect of the whole obligation of the promisor and not for a part of the whole obligation.

**Example:**

X, who agrees with Y to supply 100 bags of rice on a particular day, supplies 80 bags. The offer to perform is not valid.

6. *To the Proper Person* : To be valid, the offer to perform must be made to the promisee or his duly authorised agent.
7. *Payment in Legal Tender Money* : Where a debtor makes an offer to pay the creditor, it must be for the exact amount due and in the legal tender money.

## PERSONS WHO MUST PERFORM THE CONTRACT

According to *Section 40*,

If the contract provides for the performance of the promise by the promisor himself, such promise must be performed by the promisor. In other cases, it may be performed by the promisor or a person authorised by him.

### 1. *The Promisor himself.*

**Example:**

There is a contract between X, a singer, and Y, an organiser of music concerts by which the former would sing at a concert organised by the latter on a specific day at a particular time. The promise, in this case, must be performed by X only.

### 2. *A person Authorised by the Promisor.*

**Example:**

P promises to pay Q a certain sum of money. The promise may be performed by P or a person authorised by P.

### 3. *Legal Representative.*

In the event of the death of the promisor before fulfilling his promise, the legal representative of the deceased is bound to fulfil it (*Section 37, Paragraph 2*).



#### 4. *Third Person.*

Where a promisee accepts performance of the promise from a third person, he cannot, afterwards, enforce it against the promisor (*Section 41*).

#### 5. *Joint Promisors.*

When there are joint promisors for a promise, all such persons must jointly fulfil their promise unless a contrary intention appears from the contract. If any of them dies, his legal representative must, jointly with the surviving promisors, fulfil the promise. If all the joint promisors die, their legal representatives must fulfil the promise jointly (*Section 42*).

### DEVOLUTION OF JOINT LIABILITIES

'Devolution' means transfer or passing over from one person to another. According to *Section 42*, when a joint promisor dies, his legal representative must fulfil the promise jointly with the surviving promisors.

*Section 43* explains the performance of joint promises as follows:

- (a) 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.

#### **Example:**

P, Q and R jointly promise to pay S Rs.3, 000. S may compel either P or Q or R or all or any of the joint promisors to pay him the whole amount promised.

- (a) When one of the joint promisors alone performs the whole of the promise, he may claim an equal contribution from the other joint promisors.

#### **Example:**



## DEVOLUTION OF JOINT RIGHTS

According to *Section 45*,

When a person makes a promise to many joint promisees, unless a contrary intention appears from the contract, all such joint promisees can claim performance. If any of the joint promisees dies, his legal representative along with the surviving joint promisees can claim performance.

If all the joint promisees die, all their legal representatives can jointly claim performance from the promisor.

### Example:

X and Y jointly lend Rs. 10, 000 to Z. If X dies, the legal representative of X along with Y can jointly claim repayment of the loan by Z. In case both X and Y die, their legal representatives can jointly claim repayment by Z.

## TIME AND PLACE OF PERFORMANCE

*Sections 46 to 50* lay down the rules in respect of time and place of performance of a contract. These are stated below.

1. Where by the contract, a promisor is to perform his promise without application by the promisee and no time for performance is specified, the promise must be performed within a reasonable time (*Section 46*).

The question "what is reasonable time" is, in each particular case, a question of fact (*Explanation to Section 46*).

2. Where 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 at the place at which the promise ought to be performed (*Section 47*).

### Example:

X promises to deliver certain goods at Y's warehouse on 15<sup>th</sup> June. On that day, X brings the goods to Y's warehouse but after the usual hours of business and the goods, therefore, are not received. X has not performed his promise.

3. 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 (*Section 48*).



intention to the contrary.

## ASSIGNMENT OF CONTRACTS

Assignment of a contract refers to transferring one's contractual rights and liabilities under a contract to a third person. It may take place –

I By the act of parties or

II By operation of law

### Assignment by the act of parties

This again may be discussed under:

(a) Assignment of Contractual Obligations and

(b) Assignment of Contractual Rights

### Assignment of Contractual Obligations

The following are the important rules in respect of assignment of liabilities or obligations by a party to a contract:

1. Contractual obligations involving personal skill or ability cannot be assigned

#### Example:

A film actor or a sportsman cannot assign his contractual obligation to anybody else.

2. The promisor cannot compel the promisee to accept any other person as being liable on the promise

#### Example:

X owes Y Rs.5, 000 and Z owes X a similar amount. X cannot ask Y to recover the amount from Z unless Y accepts performance by Z.

### Assignment of Contractual Rights

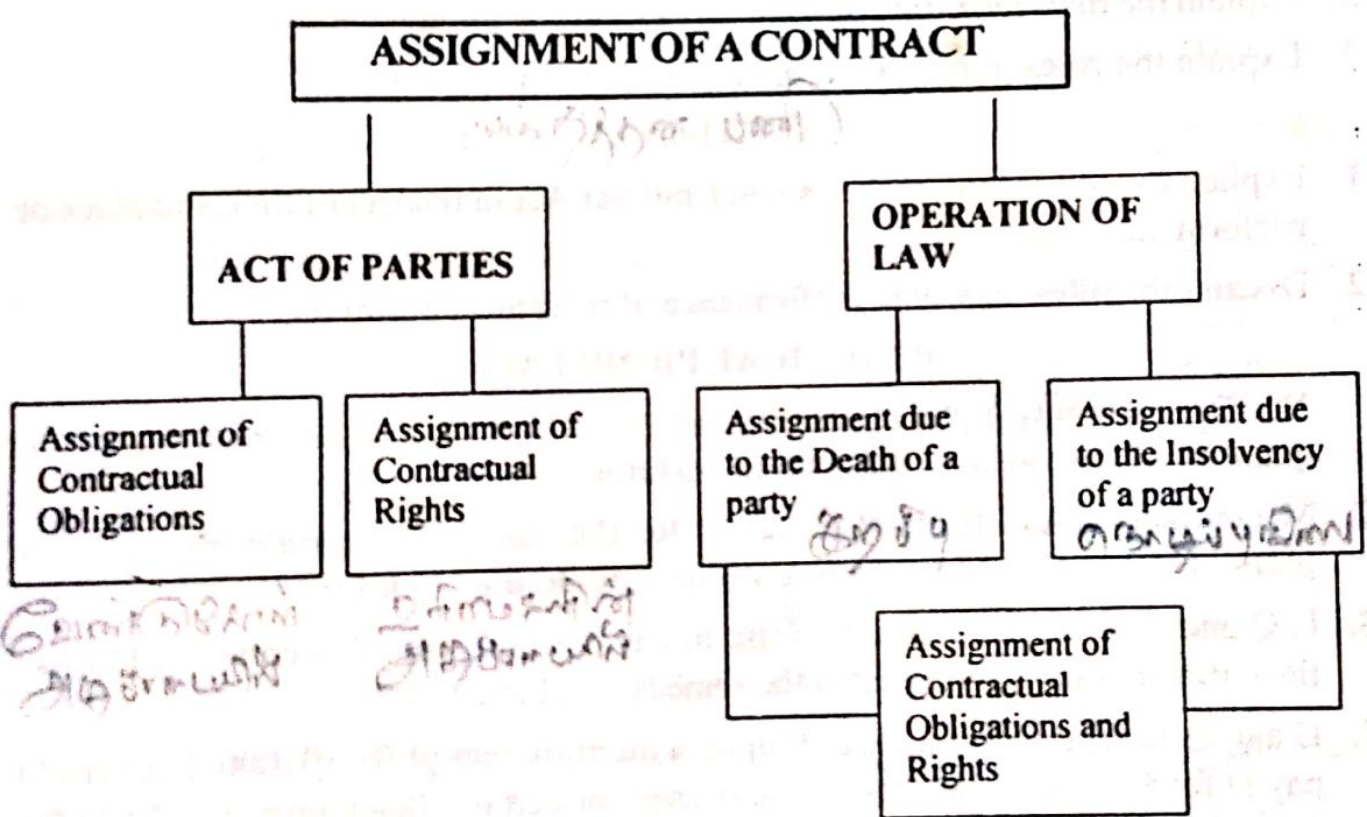
The rules regarding assignment of contractual rights and benefits are as follows:

1. The rights and benefits under a contract not involving personal skill may be assigned subject to all equities between the original parties.

**Example:**

P sells certain goods worth Rs.5, 000 to Q on credit. Q finds the goods to be defective and, therefore, wants to return the same. P refuses to take back the goods and also assigns the amount due by Q to R. Q can set up the defective nature of goods as a defence against R.

2. An actionable claim, e.g., shares in a company can be assigned. But such an assignment must be effected by an instrument in writing.



**Figure 8. 2**

**Assignment by operation of law**

Assignment by operation of law takes place under the following two circumstances:

1. *Death of a party to a contract* : The rights and liabilities of a party to a contract, upon his death, pass on to his legal heirs.)
2. *Insolvency of a party* : The rights and liabilities of a party to a contract, upon his insolvency, pass on to the Official Assignee or Receiver.

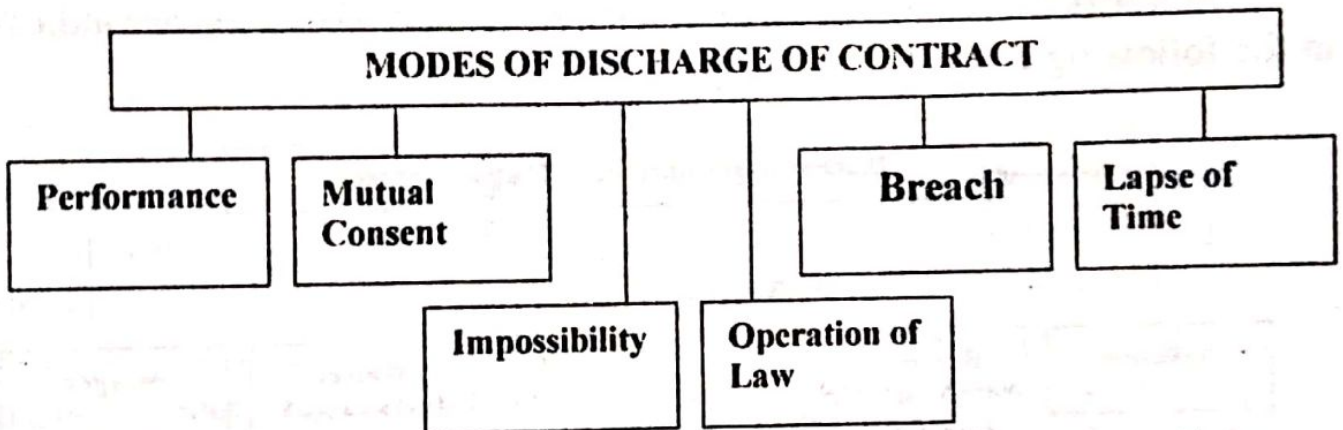


# Discharge of Contract

Discharge of contract takes place when the rights and obligations created by it come to an end. It results in the termination of the contractual relationship between the parties to a contract.

## Modes or Methods of Discharge of Contract

Discharge of contract may take place by any of the modes indicated in the chart below:



**Figure 9.1 – Various modes of Discharge of Contract**

These various modes of discharge of contract have been dealt with in this Chapter.

## DISCHARGE BY PERFORMANCE

Discharge of contract by performance may fall under the following two categories:

- (a) Actual Performance and
- (b) Attempted Performance or Tender

### Actual Performance

The usual manner in which a contract is discharged is by the parties to it fulfilling their respective obligations arising under it.

### Example:

There is a contract between X and Y by which the former is to sell his bike to the latter for Rs. 25, 000. The contract gets discharged upon X delivering the bike to Y and Y paying the agreed sum to X.



## Attempted Performance or Tender

When the promisor offers to perform his obligation as per the terms of the contract but the promisee does not accept the performance, it is known as 'attempted performance' or 'tender'. According to **Section 38**,

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

Tender of performance, thus, is equivalent to actual performance. It does not make the promisor responsible for non-performance and at the same time gives him the rights to sue the promisee for the breach of contract.

## DISCHARGE BY MUTUAL CONSENT

A contract comes into existence by the mutual consent of the parties. In the same manner, the parties may agree mutually to terminate it.

The various ways of discharge of contract by mutual consent are indicated in the following chart:

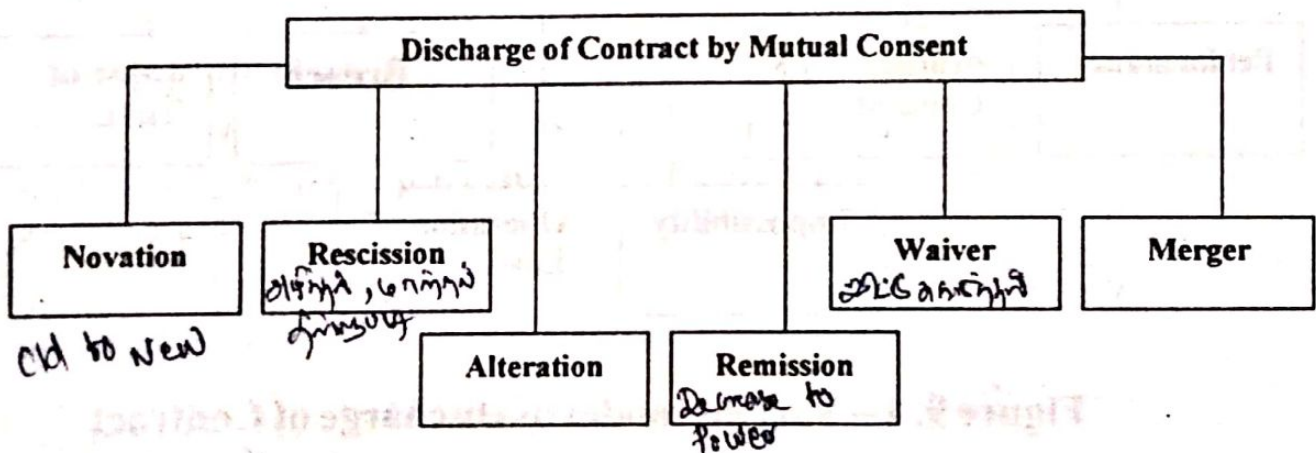


Figure 9.2

Let us now discuss these.

### Novation

'Novation' refers to substitution of a new contract for the original contract. The new contract may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the old contract.



## Rescission

It refers to cancellation of the contract. It may take place by the mutual consent of the parties or by the failure of one of the parties to perform his promise.

### Examples:

- (a) R, an actor, and K, a producer enter into a contract to make a film. After sometime, both find the story outdated. They may rescind the contract by mutual consent.
- (b) P agrees to make a showcase for Q at the latter's residence on a specific day and Q agrees to pay for it upon the completion of the work. P does not turn up for work. Q may rescind the contract.

## Alteration

Alteration of a contract takes place when, with the mutual consent of the parties, the terms of the contract are varied or changed. The old contract, in such a case, is discharged.

### Example:

M enters into a contract with N in April to let out his flat to the latter with effect from June upon a monthly rent of Rs.5, 000. Later, M tells N that the flat will be ready for occupation only with effect from August. N too requests M to reduce the monthly rent to Rs.4, 500. Both M and N decide to give effect to these changes in the contract made earlier. The net result is that the old contract gets discharged by reason of the alteration of terms.

**Section 62** deals with the effect of novation, rescission and alteration of contract. According to it, 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.

## Remission

Acceptance of a lesser fulfilment of the promise is what is called 'remission'. Under **Section 63**, the promisee may dispense with or remit the performance of the promise by the promisor. The promisee may also extend the time for performance or accept instead of it any satisfaction which he thinks fit.

### Example:

X owes Y Rs. 5, 000. He pays Rs.3, 000 and Y accepts it in full settlement of his claim. The whole debt is discharged.

## Waiver

'To waive' means not to insist on a certain obligations of a person arising under a contract under certain circumstances.



## **Merger**

Merger takes place when an inferior right of a person arising under a contract combines with a superior right arising under the same or a different contract.

### **Example:**

R is a tenant, occupying the flat of S under a contract. Later, R agrees to buy the flat and enters into a contract with S. R's inferior right as a tenant, thus, merges with his superior right as the purchaser of the flat.

## **DISCHARGE BY IMPOSSIBILITY**

The provisions in respect of 'an agreement to do an impossible act' are contained in **Section 56**. According to Section 56, paragraph 1,

'An agreement to do an act impossible in itself is void'. The existence of the impossibility may or may not be known to both the parties.

- (a) When both the parties to the agreement know the existence of the impossibility – In this case, the agreement is void ab initio.

### **Example:**

X agrees with Y to discover treasure by magic. The agreement is void.

- (a) When both the parties to the agreement do not know the existence of the impossibility – In this case, the agreement is void on the ground of mutual mistake.

### **Example:**

M agrees to sell his dog to N. Unknown to both the parties, the dog was dead at the time of making the agreement. The agreement is void.

- (a) When the promisor alone knows the existence of impossibility – In this case, the promisor must compensate the promisee for any loss that the latter may sustain due to the non-performance of the promise (Section 56, paragraph 3).

**Supervening Impossibility**

Impossibility that arises subsequent to the formation of the contract is known as 'Supervening Impossibility'. In such a case, the contract becomes void.

The various circumstances under which a contract is discharged due to supervening impossibility are shown in the following chart:

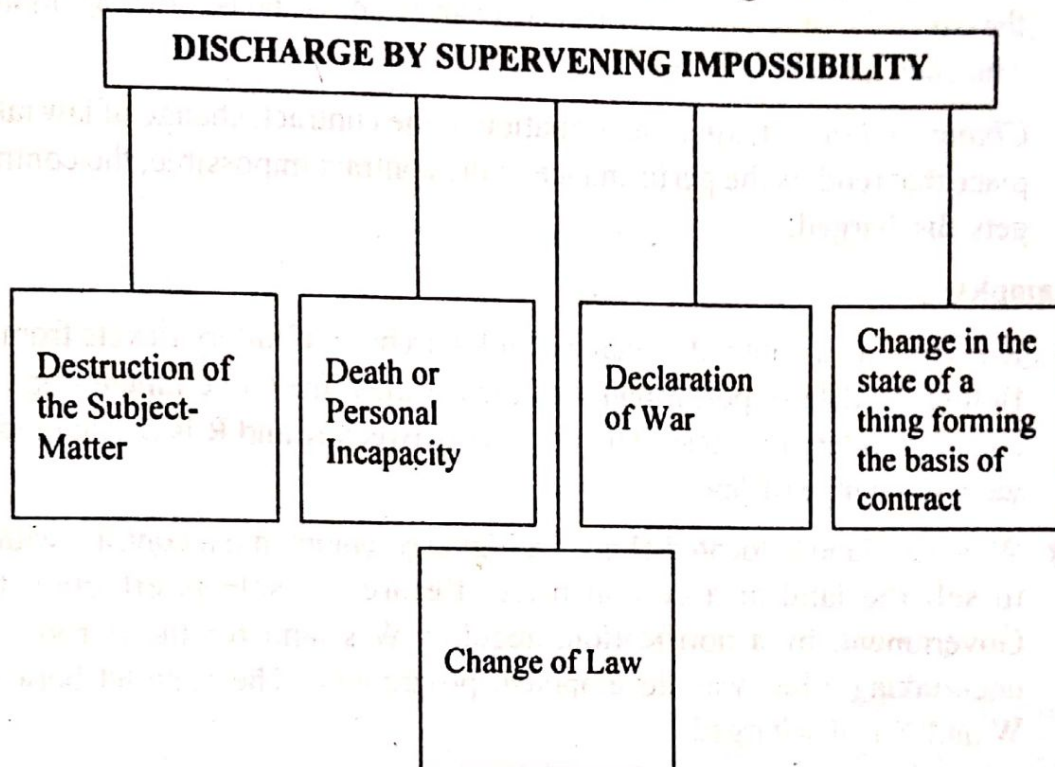


Figure 9.3

Each of these has been explained below.

1. *Destruction of the Subject Matter* : If, after the formation of the contract, its subject matter is destroyed without any fault of the parties, the contract gets discharged.

**Examples:**

- (a) X agrees to sell 100 bales of cotton to Y at a certain price. Before delivery, the entire stock of cotton lying in X's godown is destroyed in a fire accident. The contract between X and Y is discharged.
  - (b) P enters into a contract with Q to sell his house at a certain price. Before the sale is effected, the house is completely damaged in an earthquake. The contract between P and Q is discharged on the ground of supervening impossibility.
2. *Death or Personal Incapacity* : If the performance of the contract depends on the personal skill or-ability of a party to the contract, the death or incapacity of such a party will result in the discharge of contract.



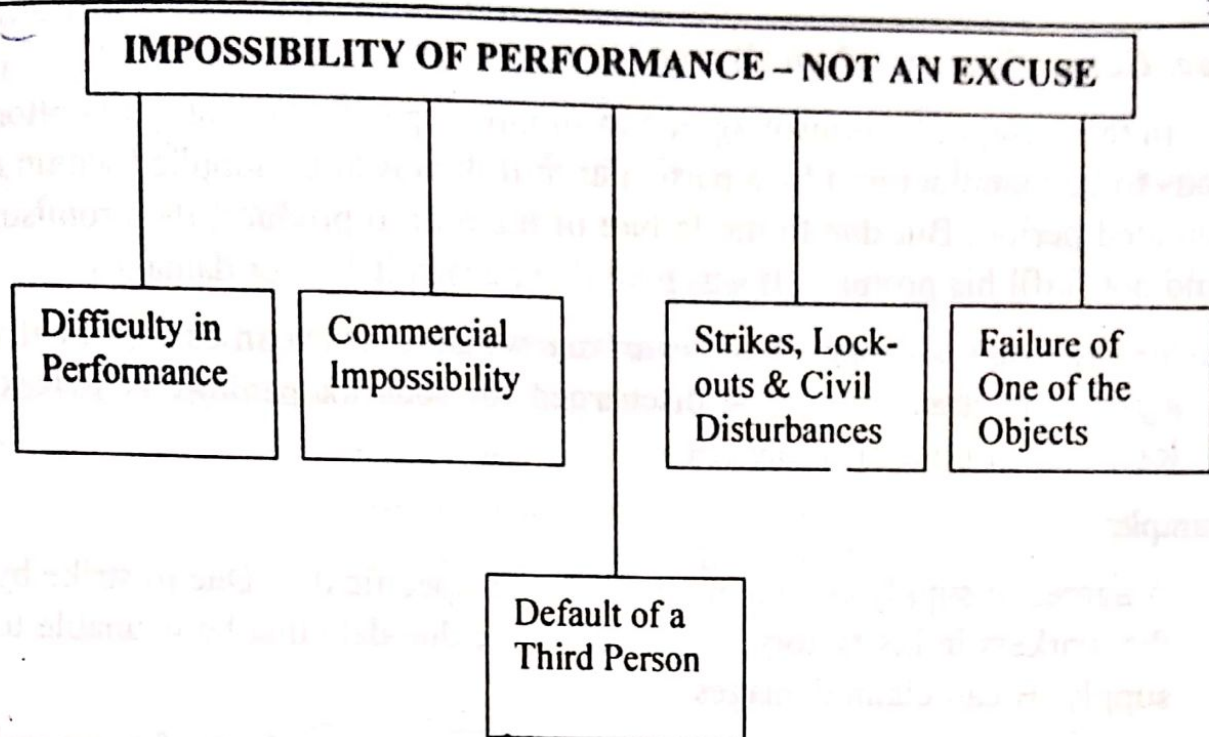


Figure 9.4

Let us discuss these now.

1. *Difficulty in Performance* : A contract is not discharged merely because it has become more difficult to perform due to certain unforeseen events or delays.

**Case: Blackburn Bobbin Co. vs. Allen & Sons**

In this case, a supplier of timber agreed to supply a certain quantity of Finland timber between July and September. In the month of August, war broke out and as a result procurement of timber from Finland became difficult. It was held in the Court that the supplier could not be relieved of his obligation to supply under the contract.

2. *Commercial Impossibility* : A contract is not discharged because it has become unprofitable.

**Example:**

X contracts to build a house for Y for an agreed sum. When the work is in progress, the Government hikes the excise levy on steel and cement as a result of which there is a significant increase in the price of these items. X cannot be relieved of his obligation on the ground that the contract will not be commercially viable.

3. *Default of a Third Person* : Sometimes the promisor may rely on the work of a third person for the performance of the contract. If due to the default of such a third person, the contract is not performed, it cannot be discharged.

#### 4. *By liabilities and rights accruing to the same person:*

A situation like this may arise when, for example, a bill accepted by a debtor is endorsed to him.

### DISCHARGE BY BREACH

A breach of contract takes place when a party to a contract fails to fulfil his obligations arising under it. The way in which breach of contract may occur may be shown as follows:

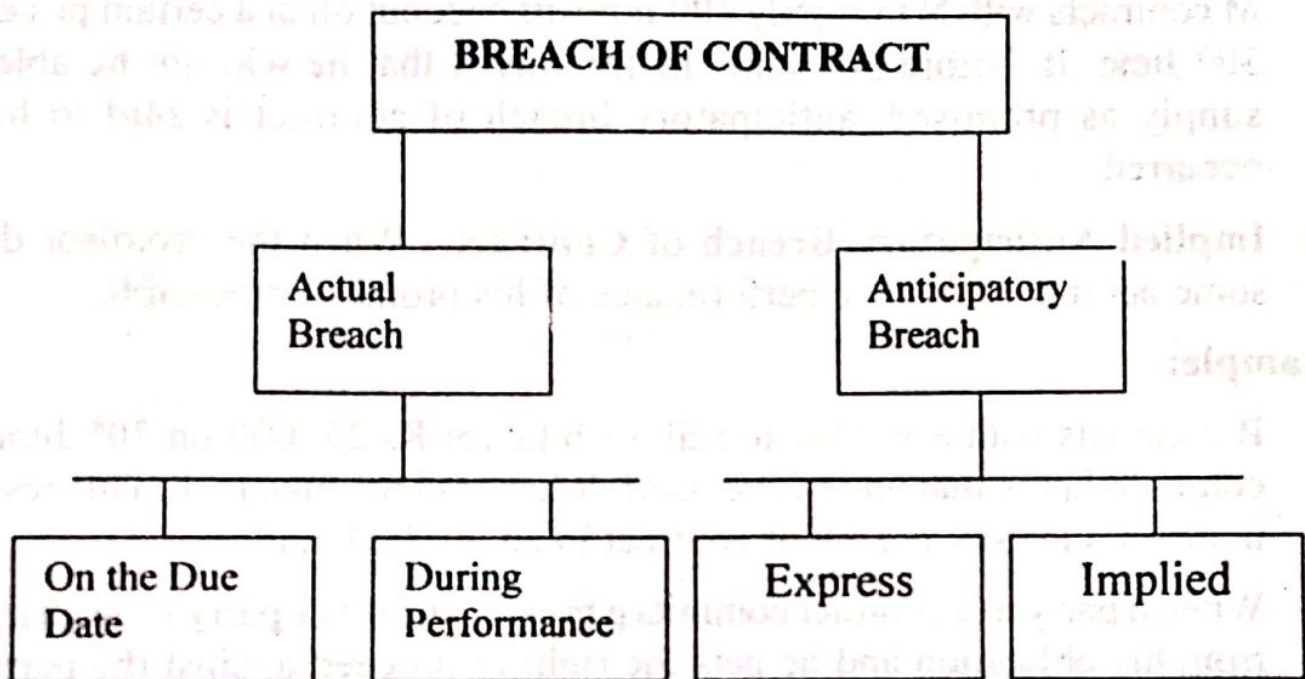


Figure 9.5

#### Actual breach of contract

It may take place in two ways:

- (a) **On the Due Date** : When one party to a contract fails to perform his obligation on the due date, actual breach of contract occurs.

#### Example:

X contracts with Y to sell and deliver 10 bags of rice @ Rs.1, 000 per bag on 1<sup>st</sup> June 2005. X fails to deliver as promised. A breach of contract occurs and Y can initiate legal action.

- (a) **During Performance** : Actual breach of contract also occurs when a party, after having performed a part of the contract, refuses to perform further.



# Remedies for Breach of Contract

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A contract imposes upon the parties certain obligations. When the parties fulfil their respective obligations, the contract is said to be performed or executed. But sometimes, a party to a contract may not fulfil his promise or obligation arising under it. In such a case, he is said to be committing a breach of contract.

Breach of contract, thus, takes place *when a party to a contract fails to fulfil his obligations arising under it.*

When a breach of contract takes place, the plaintiff or the affected party becomes entitled to certain remedies. These are:

1. Rescission
2. Damages
3. Quantum Meruit
4. Specific Performance and
5. Injunction

Each of these has been dealt with in this Chapter.

## RESCISSION

The right of a party to a contract to avoid his obligations arising under it is what is called 'rescission'. When one party to a contract commits a breach, the other party may treat the contract as rescinded or cancelled and thereby relieve himself of his obligations.

### Example:

S agrees to supply a bag of rice to B on a specific date and B agrees to pay for it upon delivery. S fails to supply. B is relieved of his obligation to pay.

The right of rescission is available to the plaintiff in case of a *voidable contract*. He, however, will lose his right to rescind under certain circumstances as mentioned below:

- (a) If, after becoming aware of his right to rescind, the affected party takes a benefit under the contract.
- (b) If the subject matter of the contract has been consumed or destroyed.
- (c) If a third party has acquired rights in the subject matter of the contract in good faith and for value.



These have already been dealt with in the Chapter titled 'Free Consent'.

According to Section 64, a party rescinding a voidable contract has to restore any benefit that he has received under the contract, to the party who has provided it.

Section 75 makes it clear that if a person rightfully rescinds a contract, he is entitled to compensation for any damage that he has sustained through the non-fulfilment of the obligation by the other party.

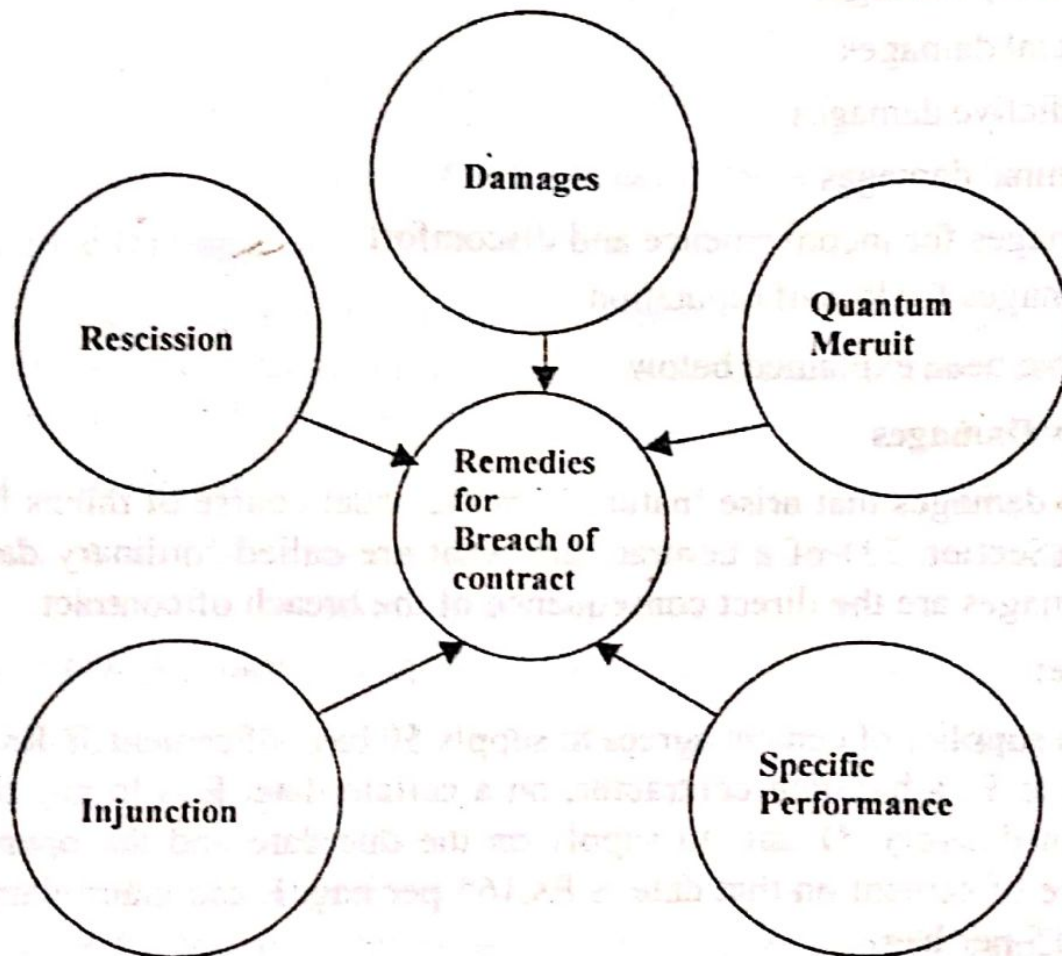


Figure 10. 1– Remedies for Breach of contract

### DAMAGES

'Damages' are nothing but the monetary compensation awarded to the affected party by the Court for the loss suffered by him in view of the breach of a contract. The object of awarding damages is to put the affected party, to a certain extent, in the position in which he would have been had the contract been performed. Damages, however, may not provide the affected party complete relief in all cases and in all matters.

The judgement delivered in the famous case 'Hadley vs. Baxendale has provided the basis for awarding damages – both in India and England.

Case: HADLEY vs. BAXENDALE



# Quasi - Contracts

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A quasi-contract is not a contract entered into intentionally by the parties. *It is an obligation created by law on a person in the absence of any agreement.*

A quasi-contractual obligation arises automatically under the following circumstances:

- (a) A person receives a certain benefit that another, by law, is better entitled to receive.
- (b) A person receiving a certain benefit from another without paying for it.

In both the cases there is no contract between the parties. But law creates one in order to put the parties in the position in which they would have been had there been a contract. This is what a quasi-contract is all about.

The basic philosophy of quasi-contracts is that a person shall not be allowed to flourish unjustly at the cost of another.

The necessary provisions regarding quasi-contractual obligations are contained in Sections 68 to 72. These have been discussed in this Chapter.

## 1. *Claim for necessities supplied to a person incapable of contracting (Section 68):*

If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

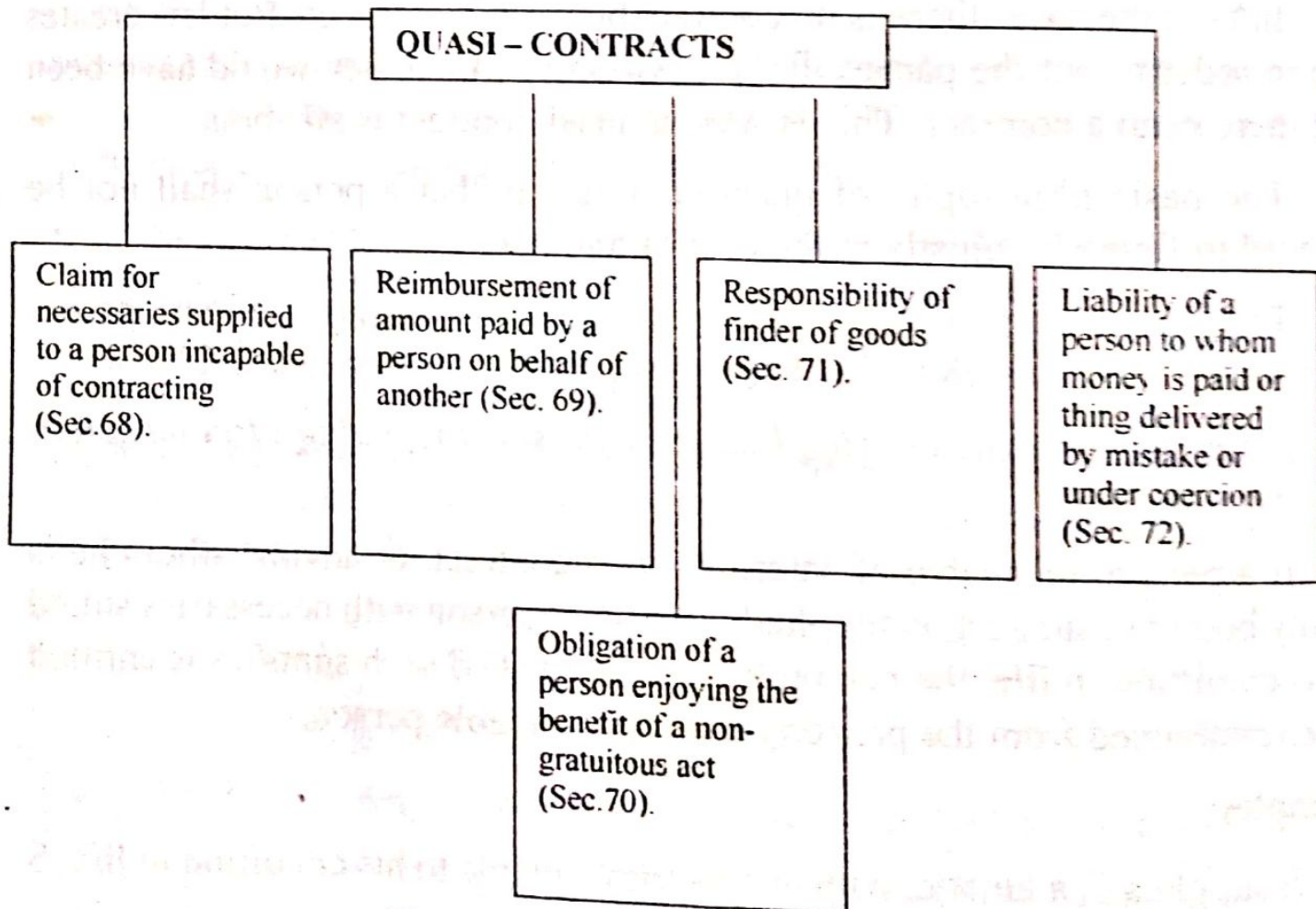
### **Examples:**

- (a) S supplies T, a lunatic, with necessities suitable to his condition in life. S is entitled to get reimbursement from T's property.
- (b) X supplies the wife and children of Y, a lunatic, with necessities suitable to their condition in life. X is entitled to be reimbursed from Y's property.

## 2. *Reimbursement of amount paid by a person on behalf of another (Section 69):*

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





**Figure 11. 1 – Quasi Contracts**

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

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



#### 4. *Responsibility of finder of goods (Section 71):*

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee. A bailee is a person to whom certain goods have delivered for a certain purpose, e.g., safe custody.

The finder of goods must take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value. It is also his duty to take all the necessary steps to trace out the owner.

Under the following circumstances, the finder gets the right to sell the goods:

- (a) If the goods are in a state of perishing;
- (b) If the owner cannot, with reasonable diligence, be found out;
- (c) If the owner, when traced, refuses to pay the lawful charges of the finder; and
- (d) If the lawful charges of the finder amount to two-thirds of the value of the thing found (Section 169).

#### **Example:**

X finds a diamond ring on the road. He gives a newspaper advertisement to trace out the owner. The owner, on being found, cannot refuse to reimburse the amount spent by X to trace him out. X need not handover the ring until his lawful charges are reimbursed.