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CHAPTER

LAW OF CONTRACTS

1.1 NATURE OF CONTRACT

[Sections 1–2]

◆ INTRODUCTION

We enter into contracts day after day. Taking a seat in a bus amounts to entering into a contract. When you put a coin in the slot of a weighing machine, you have entered into a contract. You go to a restaurant and take snacks, you have entered into a contract. In such cases, we do not even realise that we are making a contract. In the case of people engaged in trade, commerce and industry, they carry on business by entering into contracts. The law relating to contracts is to be found in the Indian Contract Act, 1872.

The law of contracts differs from other branches of law in a very important respect. It does not lay down so many precise rights and duties which the law will protect and enforce; it contains rather a number of limiting principles, subject to which the parties may create rights and duties for themselves, and the law will uphold those rights and duties. Thus, we can say that the parties to a contract, in a sense make the law for themselves. So long as they do not transgress some legal prohibition, they can frame any rules they like in regard to the subject matter of their contract and the law will give effect to their contract.

◆ WHAT IS A CONTRACT?

Section 2(h) of the Indian Contract Act, 1872 defines a contract as an agreement enforceable by law. Section 2(e) defines agreement as "every promise and every set of promises forming consideration for each other." Section 2(b) defines promise in these words: "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise."

From the above definition of promise, it is obvious that an agreement is an accepted proposal. The two elements of an agreement are:

(*i*) offer or a proposal; and

(*ii*) an acceptance of that offer or proposal.

What agreements are contracts? All agreements are not studied under the Indian Contract Act, as some of them are not contracts. Only those agreements which are enforceable at law are contracts. The Contract Act is the law of those agreements which create obligations, and in case of a breach of a promise by one party to the agreement, the other has a legal remedy. Thus, a contract consists of two elements:

(*i*) an agreement; and

(*ii*) legal obligation, i.e., it should be enforceable at law.

However, there are some agreements which are not enforceable in a law court. Such agreements do not give rise to contractual obligations and are not contracts.

Examples

(1) **A** invites **B** for dinner in a restaurant. **B** accepts the invitation. On the appointed day, **B** goes to the restaurant. To his utter surprise **A** is not there. Or **A** is there

but refuses to entertain **B**. **B** has no remedy against **A**. In case **A** is present in the restaurant but **B** fails to turn-up, then **A** has no remedy against **B**.

(2) **A** gives a promise to his son to give him a pocket allowance of Rupees one hundred every month. In case **A** fails or refuses to give his son the promised amount, his son has no remedy against **A**.

In the above examples promises are not enforceable at law as there was no intention to create legal obligations. Such agreements are social agreements which do not give rise to legal consequences. This shows that an agreement is a broader term than a contract. And, therefore, a contract is an agreement but an agreement is not necessarily a contract.

What obligations are contractual in nature? We have seen above that the law of contracts is not the whole law of agreements. Similarly, all legal obligations are not contractual in nature. A legal obligation having its source in an agreement only will give rise to a contract.

Example

A agrees to sell his motor bicycle to **B** for Rs. 5,000. The agreement gives rise to a legal obligation on the part of **A** to deliver the motor bicycle to **B** and on the part of **B** to pay Rs. 5,000 to **A**. The agreement is a contract. If **A** does not deliver the motor bicycle, then **B** can go to a court of law and file a suit against **A** for non-performance of the promise on the part of **A**.

On the other hand, if **A** has already given the delivery of the motor bicycle and **B** refuses to make the payment of price, **A** can go to the court of law and file a suit against **B** for non-performance of promise.

Similarly, agreements to do an unlawful, immoral or illegal act, for example, smuggling or murdering a person, cannot be enforceable at law. Besides, certain agreements have been specifically declared void or unenforceable under the Indian Contract Act. *For instance,* an agreement to bet (Wagering agreement) (S. 30), an agreement in restraint of trade (S. 27), an agreement to do an impossible act (S. 56).

An obligation which does not have its origin in an agreement does not give rise to a contract. Some of such obligations are

1. Torts or civil wrongs;
2. Quasi-contract;
3. Judgements of courts, i.e., Contracts of Records;
4. Relationship between husband and wife, trustee and beneficiary, i.e., status obligations.

These obligations are not contractual in nature, but are enforceable in a court of law. Thus, Salmond has rightly observed: "The law of Contracts is not the whole law of agreements nor is it the whole law of obligations. It is the law of those agreements which create obligations, and those obligations which have, their source in agreements."

Law of Contracts creates rights in *personam* as distinguished from rights in *rem*. Rights in *rem* are generally in regard to some property as for instance to recover land in an action of ejectment. Such rights are available against the whole world. Rights in *personam* are against or in respect of a specific person and not against the world at large.

Examples

(1) **A** owns a plot of land. He has a right to have quiet possession and enjoyment of the same. In other words every member of the public is under obligation not to

disturb his quiet possession and enjoyment. This right of **A** against the whole world is known as right in *rem*.

(2) **A** is indebted to **B** for Rs. 100. It is the right of **B** to recover the amount from **A**. This right of **B** against **A** is known as right in *personam*. It may be noted that no one else (except **B**) has a right to recover the amount from **A**.

The law of contracts is concerned with rights in *personam* only and not with rights in *rem*.

◆ ESSENTIAL ELEMENTS OF A VALID CONTRACT

We have seen above that the two elements of a contract are: (1) an agreement; (2) legal obligation. Section 10 of the Act provides for some more elements which are essential in order to constitute a valid contract. It reads as follows:

"All agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void."

Thus, *the essential elements of a valid contract* can be summed up as follows

1. Agreement.
2. Intention to create legal relationship.
3. Free and genuine consent.
4. Parties competent to contract.
5. Lawful consideration.
6. Lawful object.
7. Agreements not declared void or illegal.
8. Certainty of meaning.
9. Possibility of performance.
10. Necessary Legal Formalities.

These essential elements are explained briefly.

1. Agreement

As already mentioned, to constitute a contract there must be an agreement. An agreement is composed of two elements—offer and acceptance. The party making the offer is known as the offeror, the party to whom the offer is made is known as the offeree. Thus, there are essentially to be two parties to an agreement. They both must be thinking of the same thing in the same sense. In other words, there must be *consensus-ad-idem*.

Thus, where '**A**' who owns 2 cars *x* and *y* wishes to sell car '*x*' for Rs. 30,000. '**B**', an acquaintance of '**A**' does not know that '**A**' owns car '*x*' also. He thinks that '**A**' owns only car '*y*' and is *offering* to *sell the same for the stated price. He gives his acceptance to buy the same. There is no contract* because the contracting parties have not agreed on the same thing at the same time, '**A**' offering to sell his car '*x*' and '**B**' agreeing to buy car '*y*'. There is no *consensus-ad-idem*.

2. Intention to create legal relationship

As already mentioned there should be an intention on the part of the parties to the

agreement to create a legal relationship. An agreement of a purely social or domestic nature is not a contract.

Example

A husband agreed to pay £30 to his wife every month while he was abroad. As he failed to pay the promised amount, his wife sued him for the recovery of the amount.

Held: She could not recover as it was a social agreement and the parties did not intend to create any legal relations [*Balfour* v. *Balfour* (1919)2 K.B.571].

However, even in the case of agreements of purely social or domestic nature, there may be intention of the parties to create legal obligations. In that case, the social agreement is intended to have legal consequences and, therefore, becomes a contract. Whether or not such an agreement is intended to have legal consequences will be determined with reference to the facts of the case. In commercial and business agreements the law will presume that the parties entering into agreement intend those agreements to have legal consequences. However, this presumption may be negatived by express terms to the contrary. Similarly, in the case of agreements of purely domestic and social nature, the presumption is that they do not give rise to legal consequences. However, this presumption is rebuttable by giving evidence to the contrary, i.e., by showing that the intention of the parties was to create legal obligations.

Examples

(1) There was an agreement between Rose Company and Crompton Company, where of the former were appointed selling agents in North America for the latter. One of the clauses included in the agreement was: "This arrangement is not... a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts".

Held that: This agreement was not a legally binding contract as the parties intended not to have legal consequences *[Rose and Frank Co.* v. *J.R. Crompton and Bros. Ltd.* (1925) A.C. 445].

(2) An agreement contained a clause that it "shall not give rise to any legal relationships, or be legally enforceable, but binding in honour only".

Held: The agreement did not give rise to legal relations and, therefore, was not a contract. [*Jones* v. *Vernon's Pools Ltd.* (1938) 2 All E.R. 626].

(3) An aged couple (**C** and his wife) held out a promise by correspondence to their niece and her husband (Mrs. and Mr. **P**.) that **C** would leave them a portion of his estate in his will, if Mrs. and Mr. **P** would sell their cottage and come to live with the aged couple and to share the household and other expenses. The young couple sold their cottage and started living with the aged couple. But the two couples subsequently quaralled and the aged couple repudiated the agreement by requiring the young couple to stay somewhere else. The young couple filed a suit against the aged couple for the breach of promise.

Held: That there was intention to create legal relations and the young couple could recover damages [*Parker* v. *Clark* (1960) 1 W.L.R. 286].

3. Free and genuine consent

The consent of the parties to the agreement must be free and genuine. The consent of the parties should not be obtained by misrepresentation, fraud, undue influence, coercion or mistake. If the consent is obtained by any of these flaws, then the contract is not valid.

4. Parties competent to contract

The parties to a contract should be competent to enter into a contract. According to Section 11, every person is competent to contract if he (*i*) is of the age of majority, (*ii*) is of sound mind, and (*iii*) is not disqualified from contracting by any law to which he is subject. Thus, there may be a flaw in capacity of parties to the contract. The flaw in capacity may be due to minority, lunacy, idiocy, drunkenness or status. If a party to a contract suffers from any of these flaws, the contract is unenforceable except in certain exceptional circumstances.

5. Lawful consideration

The agreement must be supported by consideration on both sides. Each party to the agreement must give or promise something and receive something or a promise in return. Consideration is the price for which the promise of the other is sought. However, this price need not be in terms of money. In case the promise is not supported by consideration, the promise will be *nudum pactum* (a bare promise) and is not enforceable at law.

Moreover, the consideration must be real and lawful.

6. Lawful object

The object of the agreement must be lawful and not one which the law disapproves.

7. Agreements not declared illegal or void

There are certain agreements which have been expressly declared illegal or void by the law. In such cases, even if the agreement possesses all the elements of a valid agreement, the agreement will not be enforceable at law.

8. Certainty of meaning

The meaning of the agreement must be certain or capable of being made certain otherwise the agreement will not be enforceable at law. *For instance,* **A** agrees to sell 10 metres of cloth. There is nothing whatever to show what type of cloth was intended. The agreement is not enforceable for want of certainty of meaning. If, on the other hand, the special description of the cloth is expressly stated, say Terrycot (80 : 20), the agreement would be enforceable as there is no uncertainly as to its meaning.

However, an agreement to agree is not a concluded contract *[Punit Beriwala* v. *Suva Sanyal* AIR 1998 Cal. 44].

9. Possibility of performance

The terms of the agreement should be capable of performance. An agreement to do an act impossible in itself cannot be enforced. *For instance,* **A** agrees with **B** to discover treasure by magic. The agreement cannot be enforced.

10. Necessary legal formalities

A contract may be oral or in writing. If, however, a particular type of contract is required by law to be in writing, it must comply with the necessary formalities as to writing, registration and attestation, if necessary. If these legal formalities are not carried out, then the contract is not enforceable at law.

1.2 CLASSIFICATION OF CONTRACTS

Contracts may be classified in terms of their (1) validity or enforceability, (2) mode of formation, or (3) performance.

1. Classification according to validity or enforceability

Contracts may be classified according to their validity as (*i*) valid, (*ii*) voidable, (*iii*) void contracts or agreements, (*iv*) illegal, or (*v*) unenforceable.

A contract to constitute a valid contract must have all the essential elements discussed earlier. If one or more of these elements is/are missing, the contract is voidable, void, illegal or unenforceable.

As per Section 2 (*i*) a voidable contract is one which may be repudiated at the will of one of the parties, but until it is so repudiated it remains valid and binding. It is affected by a flaw (e.g., simple misrepresentation, fraud, coercion, undue influence), and the presence of anyone of these defects enables the party aggrieved to take steps to repudiate the contract. It shows that the consent of the party who has the discretion to repudiate it was not free.

Example

> **A**, a man enfeebled by disease or age, is induced by **B**'s influence over him as his medical attendant to agree to pay **B** an unreasonable sum for his professional services. **B** employs undue influence. **A**'s consent is not free; he can take steps to set the contract aside.

An agreement which is not enforceable by either of the parties to it is void [Section 2(*i*)]. Such an agreement is without any legal effect *ab initio* (from the very beginning). Under the law, an agreement with a minor is void (Section 11).*

A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable [Section 2(*i*)].

Examples

(1) **A** and **B** contract to marry each other. Before the lime fixed for the marriage, **A** goes mad. The contract becomes void.

(2) **A** contracts to take indigo for **B** to a foreign port. **A**'s government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

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* Other instances of void agreements are:

(*a*) Agreements entered into through a mutual mistake of fact between the parties (Section 20).
(*b*) Agreements, the object or consideration of which is unlawful (Section 23).
(*c*) Agreements, part of the consideration or object of which is unlawful (Section 21).
(*d*) Agreements made without consideration (Section 25).
(*e*) Agreements in restraint of marriage (Section 26).
(*f*) Agreements in restraint or trade (Section 27).
(*g*) Agreements in restraint of legal proceedings (Section 28).
(*h*) Uncertain agreements (Section 29).
(*i*) Wagering agreements (Section 30).
(*j*) Impossible agreements (Section 56).
(*k*) An agreement to enter into an agreement in the future.

In the above two examples, the contracts were valid at the time of formation. They became void afterwards. In example (1) the contract became void by *subsequent impossibility.* In example (2) the contract became void by *subsequent illegality.**

It is misnomer to use 'a void contract' as originally entered into. In fact, in that case there is no contract at all. It may be called a void agreement. However, a contract originally valid may become void later.

An *illegal agreement is* one the consideration or object of which (1) is forbidden by law; or (2) defeats the provisions of any law; or (3) is fraudulent; or (4) involves or implies injury to the person or property of another; or (5) the court regards it as immoral, or opposed to public policy.

Examples

(1) **A, B** and **C** enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is illegal.

(2) **A** promises to obtain for **B** an employment in the public service, and **B** promises to pay Rs. 1,000 to **A**. The agreement is illegal.

Every agreement of which the object or consideration is unlawful is not only void as between immediate parties but also taints the collateral transactions with illegality. In Bombay, the wagering agreements have been declared unlawful by statute.

Example

A bets with **B** in Bombay and loses; makes a request to **C** for a loan, who pays **B** in settlement of **A**'s losses. C cannot recover from **A** because this is money paid "under" or "in respect of a wagering transaction which is illegal in Bombay.

An *unenforceable contract* is neither void nor voidable, but it cannot be enforced in the court because it *lacks some item of evidence* such as writing, registration or stamping. *For instance,* an agreement which is required to be stamped will be unenforceable if the same is not stamped at all or is under-stamped. In such a case, if the stamp is required merely for revenue purposes, as in the case of a receipt for payment of cash, the required stamp may be affixed on payment of penalty and the defect is then cured and the contract becomes enforceable. If, however, the technical defect cannot be cured the contract remains unenforceable, e.g., in the case of an unstamped bill of exchange or promissory note.

Contracts which must be in writing. The following must be in writing, a requirement laid down by statute in each case:

(*a*) A negotiable instrument, such as a bill of exchange, cheque, promissory note (The Negotiable Instruments Act, 1881).

(*b*) A Memorandum and Articles of Association of a company, an application for shares in a company; an application for transfer of shares in a company (The Companies Act, 1956).

(*c*) A promise to pay a time-barred debt (Section 25 of the Indian Contract Act, 1872).

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* Other examples of contracts becoming void are:

(*a*) A contingent contract to do or not to do anything if an uncertain future event happens becomes void if the event becomes impossible (Section 32).

(*b*) A contract voidable at the option of the promisee, becomes void when the promisee exercises his option by avoiding the contract. (Sections 19; 19A).

(*d*) A lease, gift, sale or mortgage of immovable property (The Transfer of Property Act, 1882).

Some of the contracts and documents evidencing contracts are, in addition to be in writing, required to be registered also. These are:

1. Documents coming within the purview of Section 17 of the Registration Act, 1908.
2. Transfer of immovable property under the Transfer of Property Act, 1882.
3. Contracts without consideration but made on account of natural love and affection between parties standing in a near relation to each other (Section 25, The Indian Contract Act, 1872).
4. Memorandum of Association, and Articles of Association of a Company, Mortgages and Charges (The Companies Act, 1956).

2. Classification according to mode of formation

There are different modes of formation of a contract. The terms of a contract may be stated in words (written or spoken). This is an *express contract.* Also the terms of a contract may be inferred from the conduct of the parties or from the circumstances of the case. This is **an implied contract** (Section 9).

Example

If A enters into a bus for going to his destination and takes a seat, the law will imply a contract from the very nature of the circumstances, and the commuter will be obliged to pay for the journey.

We have seen that the essence of a valid contract is that it is based on agreement of the parties. Sometimes, however, obligations are created by law (regardless of agreement) whereby an obligation is imposed on a party and an action is allowed to be brought by another party. These obligations are known as quasi-contracts. The Indian Contract Act, 1872 (Chapter V Sections 68–72) describes them as "certain relations resembling those created by contract".

Examples

(1) **A** supplies **B**, a minor, with necessaries suitable to his condition in life. **A** is entitled to be reimbursed from **B**'s property.

(2) **A** supplies the wife and children of **B**, a minor, with necessaries suitable to their condition in life. **A** is entitled to be reimbursed from **B**'s property.

(3) **A**, a tradesman, leaves goods at **B**'s house by mistake. **B** treats the goods as his own. **B** is bound to pay **A** for them.

In all the above cases, the law implies a contract and a person who has got benefit is under an obligation to reimburse the other.

3. Classification according to performance

Another method of classifying contracts is in terms of the extent to which they have been performed. Accordingly, contracts are: (1) executed, and (2) executory or (1) unilateral, and (2) bilateral.

An *executed contract* is one wholly performed. Nothing remains to be done in terms of the contract.

Example

A contracts to buy a bicycle from **B** for cash. **A** pays cash. **B** delivers the bicycle.

An *executory contract* is one which is wholly unperformed, or in which there remains something further to be done.

Example

On June 1, **A** agrees to buy a bicycle from **B**. The contract is to be performed on June 15.

The executory contract becomes an executed one when completely performed. *For instance*, in the above example, if both **A** and **B** perform their obligations on June 15, the contract becomes executed. However, if in terms of the contract performance of promise by one party is to precede performance by another party then the contract is still executory, though it has been performed by one party.

Example

On June 1, **A** agrees to buy a bicycle from **B**. **B** has to deliver the bicycle on June 15 and **A** has to pay price on July 1. **B** delivers the bicycle on June 15. The contract is executory as something remains to be done in terms of the contract.

A *Unilateral Contract* is one wherein at the time the contract is concluded there is an obligation to perform on the part of one party only.

Example

A makes payment for bus fare for his journey from Bombay to Pune. He has performed his promise. It is now for the transport company to perform the promise.

A *Bilateral Contract is* one wherein there is an obligation on the part of both to do or to refrain from doing a particular thing. In this sense, Bilateral contracts are similar to executory contracts.

An important corollary can be deduced from the distinction between Executed and Executory Contracts and between Unilateral and Bilateral contracts. It is that a contract is a contract from the time it is made and not from the time its performance is due. The performance of the contract can be made at the time when the contract is made or it can be postponed also. See examples above under Executory Contract.

Classification/Types of Contracts

1. **From the point of view of enforceability**
   - (*a*) Valid contracts
   - (*b*) Voidable contracts
   - (*c*) Void contracts or agreements
   - (*d*) Illegal agreements
   - (*e*) Unenforceable Agreements (Certain contracts must be in writing)
2. **According to Mode of Formation**
   - (*a*) Express contract
   - (*b*) Implied contract
   - (*c*) Quasi-contracts
3. **According to Performance**
   - (*a*) Executed
   - (*b*) Executory
   - (*c*) Uni-lateral
   - (*d*) Bi-lateral

Classification of Contracts in the English Law

In English Law, contracts are classified into (*a*) Formal Contracts and (*b*) Simple Contracts.

Formal contracts are those whose validity or legal force is based upon form alone. Formal Contracts can be either (*a*) contracts of record or (*b*) contracts under seal or by (deed or speciality contracts. No consideration is necessary in the case of Formal Contracts. Such contracts do not find any place under Indian Law as consideration is necessary under Section 25 (of course there are some exceptions to the principle that a contract without consideration is void).

Contracts of Record are not contracts in the real sense as the *consensus-ad-idem is* lacking. They are only obligations imposed by the court upon a party to do or refrain from doing something.

A Contract of Record is either (*i*) a judgement of a court or (*ii*) recognizance. An obligation imposed by the judgement of a court and entered upon its records is often called a Contract of Record.

Example

> **A** is indebted to **B** for Rs. 500 under a contract, **A** fails to pay. **B** sues **A** and gets a judgement in his favour. The previous right of **B** to obtain Rs. 500 from **A** is replaced by the judgement in his favour and execution may be levied upon **A** to enforce payment, if need be.

A **Recognizance** is a written acknowledgement to the crown by a criminal that on default by him to appear in the court or to keep peace or to be of good conduct, he is bound to pay to the crown a certain sum of money. This is also an obligation imposed upon him by the court.

A contract with the following characteristics is known as a *contract under seal or by deed or a contract of speciality; (i) It is in writing, (ii) It is signed, (iii) It is sealed, and (iv) It is delivered by the parties to the contract.*

These contracts are used in English Law for various transactions such as conveyances of land, a lease of property for more than three years, contracts made by corporations, contracts made without consideration. Under the Indian Contract Act also, a speciality contract is recognised if the following conditions are satisfied: (1) the contract must be in writing (2) it must be registered according to the law of registration of documents, (3) it must be between parties standing in near relation to each other, and (4) it should proceed out of natural love and affection between the parties (Section 25 of the Indian Contract Act, 1872).

All contracts other than the formal contracts are called simple or parol contracts. They may be made: (*i*) orally, (*ii*) in writing, or (*iii*) implied by conduct.

1.3 OFFER AND ACCEPTANCE

[Sections 3–9 of the Indian Contract Act, 1872]

◆ OFFER/PROPOSAL

A proposal is defined as "when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or

abstinence, he is said to make a proposal." [Section 2 (a)]. An offer is synonymous with proposal. The offeror or proposer expresses his willingness "to do" or "not to do" (i.e., abstain from doing) something with a view to obtain acceptance of the other party to such act or abstinence. Thus, there may be "positive" or "negative" acts which the proposer is willing to do.

Examples

(1) **A** offers to sell his book to **B**. **A** is making an offer to do something, i.e., to sell his book. It is a positive act on the part of the proposer.

(2) **A** offers not to file a suit against **B**, if the latter pays **A** the amount of Rs. 200 outstanding. Here the act of **A** is a negative one, i.e., he is offering to abstain from filing a suit.

◆ HOW AN OFFER IS MADE?

An offer can be made by (*a*) any act or (*b*) omission of the party proposing by which he intends to communicate such proposal or which has the effect of communicating it to the other (Section 3). An offer can be made *by an act* in the following ways:

(*a*) *by words* (whether written or oral). The written offer can be made by letters, telegrams, telex messages, advertisements, etc. The oral offer can be made either in person or over telephone.

(*b*) *by conduct*. The offer may be made by positive acts or signs so that the person acting or making signs means to say or convey. However silence of a party can in no case amount to offer by conduct.

An offer can also be made by a party *by omission* (to do something). This includes such conduct or forbearance on one's part that the other person takes it as his willingness or assent.

An offer implied from the conduct of the parties or from the circumstances of the case is known as **implied offer.**

Examples

(1) **A** proposes, by letter, to sell a house to **B** at a certain price. This is an offer by an act by written words (i.e., letter). This is also an express offer.

(2) **A** proposes, over telephone, to sell a house to **B** at a certain price. This is an offer by act (by oral words). This is an express offer.

(3) **A** owns a motor boat for taking people from Bombay to Goa. The boat is in the waters at the Gateway of India. This is an offer by conduct to take passengers from Bombay to Goa. He need not speak or call the passengers. The very fact that his motor boat is in the waters near Gateway of India signifies his willingness to do an act with a view to obtaining the assent of the other. This is an example of an implied offer.

(4) **A** offers not to file a suit against **B**, if the latter pays **A** the amount of Rs. 200 outstanding. This is an offer by abstinence or omission to do something.

Specific and General Offer

An offer can be made either:

1. to a definite person or a group of persons, or
2. to the public at large.

The first mode of making offer is known as specific offer and the second is known as a general offer. In case of the specific offer, it may be accepted by that person or group of persons to whom the same has been made. The general offer may be accepted by any one by complying with the terms of the offer.

The celebrated case of Carlill v. *Carbolic Smoke Ball Co.,* (1813) 1 Q.B. 256 is an excellent example of a general offer and is explained below.

Examples

(1) **A** offers to sell his house to **B** at a certain price. The offer has been made to a definite person, i.e., **B**. It is only **B** who can accept it [*Boulton* v. *Jones* (1857) 2H. and N. 564].*

(2) *In Carbolic Smoke Ball Co.'s case (supra),* the patent-medicine company advertised that it would give a reward of £100 to anyone who contracted influenza after using the smoke balls of the company for a certain period according to the printed directions. Mrs. Carlill purchased the advertised smoke ball and contracted influenza in spite of using the smoke ball according to the printed instructions. She claimed the reward of £100. The claim was resisted by the company on the ground that offer was not made to her and that in any case she had not communicated her acceptance of the offer. She filed a suit for the recovery of the reward.

Held: She could recover the reward as she had accepted the offer by complying with the terms of the offer.

The general offer creates for the offeror liability in favour of any person who happens to fulfil the conditions of the offer. It is not at all necessary for the offeree to be known to the offeror at the time when the offer is made. He may be a stranger, but by complying with the conditions of the offer, he is deemed to have accepted the offer.

Essential requirements of a valid offer

An offer must have certain essentials in order to constitute it a valid offer. These are:

1. The offer must be made with a view to obtain acceptance [Section 2(a)].
2. The offer must be made with the intention of creating legal relations. *[Balfour* v. *Balfour* (1919) 2 K.B. 571.]**
3. The terms of offer must be definite, unambiguous and certain or capable of being made certain (Section 29). The terms of the offer must not be loose, vague or ambiguous.

Examples

(1) **A** offers to sell to **B** "a hundred quintals of oil". There is nothing whatever to show what kind of oil was intended. The offer is not capable of being accepted for want of certainty.

(2) **A** who is a dealer in coconut oil only, offers to sell to **B** "one hundred quintals of oil". The nature of **A**'s trade affords an indication of the meaning of the words, and there is a valid offer.

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* For facts or this case, please refer to page 21.

** See page 5.

4. An offer must be distinguished from (*a*) a mere declaration of intention or (*b*) an invitation to offer or to treat.

Offer vis-a-vis declaration of intention to offer

A person may make a statement without any intention of creating a binding obligation. It may amount to a mere declaration of intention and not to a proposal.

Examples

(1) An auctioneer, **N** advertised that a sale of office furniture would take place at a particular place. **H** travelled down about 100 Km to attend the sale but found the furniture was withdrawn from the sale. **H** sued the auctioneer for his loss of time and expenses.

Held: **N** was not liable [*Harris* v. *Lickerson*. (1875) L.R.S. Q.B. 286.].

(2) A father wrote to his would-be son-in-law that his daughter would have a share of what he would leave at the time of his death. At the time of death, the son-in-law staked his claim in the property left by the deceased.

Held: The son-in-law's claim must fail as there was no offer from his father-in-law creating a binding obligation. It was just a declaration of intention and nothing more [*Re Ficus* (1900) 1. Ch. 331.].

Offer vis-a-vis invitation to offer

An offer must be distinguished from invitation to offer. A prospectus issued by a college for admission to various courses is not an offer. It is only an invitation to offer. A prospective student by filling up an application form attached to the prospectus is making the offer.

An auctioneer, at the time of auction, invites offers from the would-be-bidders. He is not making a proposal.

A display of goods with a price on them in a shop window is construed an invitation to offer and not an offer to sell.

Example

In a departmental store, there is a self-service. The customers picking up articles and take them to the cashier's desk to pay. The customers action in picking up particular goods is an offer to buy. As soon as the cashier accepts the payment a contract is entered into [*Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd. (*1953) 1 Q.B. 401].

Likewise, prospectus issued by a company for subscription of its shares by the members of the public, the price lists, catalogues and quotations are mere invitations to offer.

On the basis of the above, we may say that an offer is the final expression of willingness by the offeror to be bound by his offer should the other party choose to accept it. Where a party, without expressing his final willingness, proposes certain terms on which he is willing to negotiate, he does not make an offer, he only invites the other party to make an offer on those terms. This is perhaps the basic distinction between an offer and an invitation to offer.

In *Harvey* v. *Facie,* the plaintiffs (Harvey) telegraphed to the defendants (Facie), writing: "Will you sell us Bumper Hall Pen?* Telegraph lowest cash price." The defendants replied also

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* Bumper Hall Pen' was the name of the real estate.

by a telegram, "Lowest price for Bumper Hall Pen £900". The plaintiffs immediately sent their last telegram stating: "We agree to buy Bumper Hall Pen for £900 asked by you". The defendants refused to sell the plot of land (Bumper Hall Pen) at that price. The plaintiffs contention that by quoting their minimum price in response to the inquiry, the defendants had made an offer to sell at that price, was turned down by the Judicial Committee. Their Lordship pointed out that in their first telegram, the plaintiffs had asked two questions, *first* as to the willingness to sell and *second*, as to the lowest price. They reserved their answer as to the willingness to sell. Thus, they had made no offer. The last telegram of the plaintiffs was an offer to buy, but that was never accepted by the defendants.

5. The **offer must be communicated** to the offeree. An offer must be communicated to the offeree before it can be accepted. This is true of specific as well as general offer.

Example

G sent **S**, his servant, to trace his missing nephew. Subsequently, **G** announced a reward for information relating to the boy. **S**, traced the boy in ignorance of the announcement regarding reward and informed **G**. Later, when **S** came to know of the reward, he claimed it. Held, he was not entitled to the reward on the ground that he could not accept the offer unless he had knowledge of it [*Lalman Shukla* v. *Gauri Dutt*, II, A.L.J. 489].

6. The offer must not contain a term the non-compliance of which may be assumed to amount to acceptance. Thus, the offeror cannot say that if the offeree does not accept the offer within two days, the offer would be deemed to have been accepted.

Example

A tells **B** 'I offer to sell my dog to you for Rs. 45. If you do not send in your reply, I shall assume that you have accepted my offer'. The offer is not a valid one.

7. A **tender** is an offer as it is in response to an invitation to offer. Tenders commonly arise where, for example, a hospital invites offers to supply eatables or medicines. The persons filling up the tenders are giving offers. However, a tender may be either:
   (*a*) specific or definite; where the offer is to supply a definite quantity of goods, or
   (*b*) standing; where the offer is to supply goods periodically or in accordance with the requirements of the offeree.

In the case of a definite tender, the suppliers submit their offers for the supply of specified goods and services. The offeree may accept any tender (generally the lowest one). This will result in a contract.

Example

A invites tenders for the supply of 10 quintals of sugar. **B, C,** and **D** submit their tenders. **B**'s tender is accepted. The contract is formed immediately the tender is accepted.

In the case of standing offers, the offeror gives an open offer whereby he offers to supply goods or services as required by the offeree. A separate acceptance is made each time an order is placed. Thus, there are as many contracts as are the acts of acceptance.

Example

The G.N. Railway Co. invited tenders for the supply of stores. **W** made a tender and the terms of the tender were as follows: "To supply the company for 12 months with such quantities of specified articles as the company may order from time to time. The

company accepted the tender and placed the orders. **W** executed the orders as placed from time to time but later refused to execute a particular order.

Held: **W** was bound to supply goods within the terms of the tender [Great *Northern Railway* v. *Witham* (1873) L.R. 9 C.P. 16].

The Supreme Court of India in this regard has observed: As soon as an order was placed a contract arose and until then there was no contract. Also each separate order and acceptance constituted a different and distinct contract *[Chatturbhuj Vithaldas* v. *Moreshover Parashram* AIR 1954 SC 326].

It is to be noted that if the offeree gives no order or fails to order the full quantity of goods set out in a tender there is no breach of contract.

Revocation or Withdrawal of a tender. A tenderer can withdraw his tender before its final acceptance by a work or supply order. This right of withdrawal shall not be affected even if there is a clause in the tender restricting his right to withdraw. A tender will, however, be irrevocable where the tenderer has, on some consideration, promised not to withdraw it or where there is a statutory prohibition against withdrawal [*The Secretary of State for India* v. *Bhaskar Krishnaji Samani* AIR 1925 Bom 485].

Special terms in a contract. The *special terms,* forming part of the offer, must be duly brought to the notice of the offeree at the time the offer is made. If it is not done, then there is no valid offer and if offer is accepted, and the contract is formed, the offeree is not bound by the special terms which were not brought to his notice. The terms may be brought to his notice either:

(*a*) by drawing his attention to them specifically, or

(*b*) by inferring that a man of ordinary prudence could find them by exercising ordinary intelligence.

(*a*) the examples of the first case are where certain conditions are written on the back of a ticket for a journey or deposit of luggage in a cloak room and the words. "For conditions see back" are printed on the face of it. In such a case, the person buying the ticket is bound by whatever conditions are written on the back of the ticket *whether he has read them or not.*

Examples

(1) **P**, a passenger deposited a bag in the cloakroom at a Railway Station. The acknowledgement receipt given to him bore, on the face of it, the words "See back". One of the conditions printed on the back limited the liability of the Railways for any package to £10. The bag was lost, and **P** claimed £24. 10s, its value, pleading that he had not read the conditions on the back of the receipt.

Held : **P** was bound by the conditions printed on the back as the company gave reasonable notice on the face of the receipt as to the conditions at the back of the document [*Parker* v. *South Eastern Rly. Co.* (1877) 2 C.P.D. 416].

(2) A lady, **L**, the owner of a cafe, agreed to purchase a machine and signed the agreement without reading its terms. There was an exemption clause excluding liability of the seller under certain circumstances. The machine proved faulty and she purported to terminate the contract.

Held : That she could not do so, as the exemption clause protected the seller from the liability [*L'Estrange* v. *Grancob Ltd.* (1934) 2 R.B. 394].

(3) **T** purchased a railway ticket, on the face of which the words: "For conditions see back" were written. One of the conditions excluded liability for injury, however caused. **T** was illiterate and could not read. She was injured and sued for damages.

Held : That the railway company had properly communicated the conditions to her who had constructive notice of the conditions whether she read them or not. The company was not bound to pay any damages [*Thompson* v. *LM. and L. Rly.* (1930) 1 KB. 417].

(*b*) The same rule holds good even where the conditions forming part of the offer are printed in a language not understood by the acceptor provided his attention has been drawn to them in a reasonable manner. In such a situation, it is his duty to ask for the translation, of the conditions and if he does not do so, *he will be presumed to have a constructive notice of the terms of the conditions* [*Mackillingan* v. *Campagine de Massangeres Maritimes* (1897) 6 Cal. 227 **J**].

If conditions limiting or defining the rights of the acceptor are not brought to his notice, then they will not become part of the offer and he is not bound by them.

Example

A passenger was travelling with luggage from Dublin to Whitehaven on a ticket, on the back of which there was a term which exempted the shipping company from liability for the loss of luggage. He never looked at the back of the ticket and there was nothing on the face of it to draw his attention to the terms on its back. He lost his luggage and sued for damages.

Held : He was entitled to damages as he was not bound by something which was not communicated to him [*Henderson* v. *Stevenson* (1875) 2 H.L.S.C. 470].

Also, if the conditions are contained in a document which is delivered after the contract is complete, then the offeree is not bound by them. Such a document is considered a non-contractual document as it is not supposed to contain the conditions of the contract. *For instance,* if a tourist driving into Mussoorie, receives a ticket upon paying toll-tax, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other toll-tax barrier, and might put in his pocket without reading the same. The ticket is just a receipt or a voucher.

Example

C hired a chair from the Municipal Council in order to sit on the beach. He paid the rent and received a ticket from an attendant. On the back of the ticket, there was a clause exempting the Council "for any accident or damage arising from hire of chairs." **C** sustained personal injuries as the chair broke down while he was sitting therein. He sued for damages.

Held : That the Council was liable [*Chapleton* v. *Barry* U.D.C. (1940) 1 K.B. 532].

From the illustrations given it may be concluded that whether the offeree will be bound by the special conditions or not will depend on whether or not he had or could have had notice by exercising ordinary diligence.

Detailed observations with respect to printed conditions on a receipt were made by the Bombay High Court in *R.S. Deboo* v. *M. V. Hindlekar,* AIR 1995 Bom. 68. These observations are:

1. Terms and conditions printed on the reverse of a receipt issued by the owner of the laundry or any other bailee do not necessarily form part of the contract of

bailment in the absence of the signature of the bailor (customer) on the document relied upon. The onus is on the bailee to prove that the attention of the bailor was drawn to the special conditions before contract was concluded and the bailor had consented to them as contractual terms.

2. It cannot be just assumed that the printed conditions appearing on the reverse of the receipt automatically become contractual terms or part of the contract of bailment.
3. In certain situations, the receipt cannot be considered as a contractual document as such, it is a mere acknowledgement of entrustment of certain articles.

Cross Offers

Where two parties make identical offers to each other, in ignorance of each other's offer, the offers are known as cross-offers and neither of the two can be called an acceptance of the other and, therefore, there is no contract.

Example

H wrote to **T** offering to sell him 800 tons of iron at 69s. per ton. On the same day **T** wrote to **H** offering to buy 800 tons at 69s. Their letters crossed in the post. **T** contended that there was a good contract.

Held: that there was no contract. [*Tinn* v. *Hoffman & Co.* (1873) 29 L.T. Exa. 271.].

Termination or Lapse of an Offer

An offer is made with a view to obtain assent thereto. As soon as the offer is accepted it becomes a contract. But before it is accepted, it may lapse, or may be revoked. Also, the offeree may reject the offer. In these cases, the offer will come to an end.

Essential Requirements of a Valid Offer

1. Must be made with a view to obtain acceptance.
2. Must be made with the intention of creating legal relations.
3. Terms of offer must be definite, unambigous and certain or capable of being made certain.
4. It must be distinguished from mere declaration of intention or an invitation to offer.
5. It must be communicated to the offeree.
6. The offer must not contain a term the non-compliance of which may be assumed to amount to acceptance.
7. A tender is an offer as it is in response to an invitation to offer.
8. The **Special terms**, forming part of the offer, must be duly brought to the notice of the offeree at the time the offer is made.
9. Two identical cross-offers do not make a contract.

(1) **The offer lapses after stipulated or reasonable time.** [Section 6(2)] The offer must be accepted by the offeree within the time mentioned in the offer and if no time is mentioned, then within a reasonable time. The offer lapses after the time

stipulated in the offer expires if by that time offer has not been accepted. If no time is specified, then the offer lapses within a reasonable time. What is a reasonable time is a question of fact and would depend upon the circumstances of each case.

Example

M offered to purchase shares in a company by writing a letter on June 8. The company allotted the shares on 23rd November. **M** refused the shares.

Held : That the offer lapsed as it was not accepted within a reasonable time [*Ramsgate Victoria Hotel Co.* v. *Montefiore* (1860) L.R.I. Ex. 109].

2. **An offer lapses by the death or insanity of the offerer or the offeree before acceptance.** Section 6(4) provides that a proposal is revoked by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance. Therefore, if the acceptance is made in ignorance of the death, or insanity of offerer, there would be a valid contract. Similarly, in the case of the death of offeree before acceptance, the offer is terminated.
3. An offer terminates when rejected by the offeree.
4. An offer terminates when revoked by the offerer before acceptance.
5. An offer terminates by not being accepted in the mode prescribed, or if no mode is prescribed, in some usual and reasonable manner.
6. A conditional offer terminates when the condition is not accepted by the offeree.

Example

A proposes to **B** "I can sell my house to you for Rs. 12,000 provided you lease out your land to me." If **B** refuses to lease out the land, the offer would be terminated.

7. **Counter offer.** An offer terminates by counter-offer by the offeree.

When in place of accepting the terms of an offer as they are, the offeree accepts the same subject to certain condition or qualification, he is said to make a counter-offer. The following have been held to be counter-offers:

(*i*) Where an offer to purchase a house with a condition that possession shall be given on a particular day was accepted varying the date for possession [*Routledge* v. *Grant* (1828) 130 E.R. 920].

(*ii*) An offer to buy a property was accepted upon a condition that the buyer signed an agreement which contained special terms as to payment of deposit, making out title completion date, the agreement having been returned unsigned by the buyer [*Jones* v. *Daniel* (1894) 2 Ch. 332].

(*iii*) An offer to sell rice was accepted with an endorsement on the sold and bought note that yellow and wet grain will not be accepted [*All Shain* v. *Moothia Chetty*, 2 Bom L.R. 556].

(*iv*) Where an acceptance of a proposal for insurance was accepted in all its terms subject to the condition that there shall be no assurance till the first premium was paid [*Sir Mohamed Yusuf* v. *S. of S. for India* 22 Bom. L.R. 872].