UNIT 3: PERFORMANCE, DISCHARGE AND REMEDIES OF BREACH OF CONTRACT

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3.1 LEARNING OBJECTIVES

After going through this unit you will be able to

- discuss the provisions regarding performance of a contract
- explain the different ways of performing a contract

- describe the essentials of a valid tender of performance
- discuss the meaning and modes of discharge of a contract
- explain the remedies available for breach of a contract.

3.2 INTRODUCTION

After forming the contract, the stage of fulfillment of the object of the contract comes. The object of a contract is fulfilled when the parties to the contract do what they had agreed to do. This is called performance of respective obligations by the parties to the contract. In this unit we will discuss various provisions of Contract Act relating to performance of contract, discharge of contract and remedies of breach of contract.

3.3 MEANING OF PERFORMANCE OF CONTRACT

Regarding the performance of contract, Section 37 of the Act states that "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." There are mainly two ways of performing a contract such as –

i. Actual performance

ii. Attempted performance or tender of performance

When the parties to the contract fulfill all his obligations under the contract, the contract is said to have been actually performed. Actual performance brings the contract to an end.

It is clearly stated in Sec-37 that the parties to a contract must either perform or offer to perform their respective promises. When the party who is bound to perform a promise under a contract is ready and willing to perform it at the proper time and place, but is unable to do so because the other party does not accept the performance. This willingness of the party is known as 'Attempted performance' or 'Offer to perform' or 'Tender'.



CHECK YOUR PROGRESS

Q.1: State the meaning of performance of a contract.

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3.4 ESSENTIALS OF A VALID TENDER OF PERFORMANCE

Under Section 38, a tender must have the following essentials to be valid:

i) It must be unconditional

ii) It must be for the whole obligation. It must not be installments, if the contract requires it in full.

iii) It must be by a person who is in a position and is willing to perform the promise.

iv) It must be at the proper time and place. A tender of goods after the business house or before the done date will not be valid.

v) It must be in proper form.

vi) It must be made to a proper person i.e. to the promisee or his authorized agent.

vii) In case of the tender of goods the promisee must be given a reasonable opportunity to inspect the goods.

viii) It may be made to one of the several joint promisees.

3.4.1 By whom contract must be performed

According to Sec-40 of the Indian Contract Act, “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 representative may employ a competent person to perform it.”

A contract can be performed by the following persons: –

i) **Promisor himself*:*** It is the nature of the contract which determines the person by whom it should be performed. If it appears from the nature that the intention of the parties was that promise should be performed by the promisor himself, then it should be performed by him. Such contracts are usually those where the personal skill of the promisor is vital. Such contracts come to an end if the promisor dies.

Example: X promises to sketch a site map of Y's house. X will have to perform this promise himself. Because it requires the skill of X.

ii) **Agent:** According to Para 2 of the Section 40, the promisor may employ a competent person such as agent to perform the promise, if the contract is not formed on personal condition.

iii) **Representative:** The contracts which do not involve any personal skill of the promisor may be performed by legal representatives of the promisor if he dies before performance, unless a contrary intention appears from the contract. The promisee can compel the legal representative to perform.

Example: M promises to sell his car for Rs. 1, 00,000/- to N after a week. But, M dies after 5 days of the contract. M's representative will be liable to sell the car to N and N will be liable to pay Rs. 1, 00,000/- to M's representative.

iv) **Third Parties:** According to the section 41, if a promisee accepts the performance of the promise by a third person he cannot afterwards enforce it against the promisor. In such a case the contract comes to an end and the promisor is discharged from further liability.

3.4.2 Persons Entitled to Demand Performance

i) **Promisee:** Performance of a contract can be demanded only by a person to whom the promise is made. It is only the promisee for whom the contract is performed. Only the promisee can demand the performance of the promise under

a contract.

Example: X promises Y to pay Z Rs. 10,000/- . X does not pay the sum to Z Here Z cannot bind X for the payment. It is only promisee Y who can enforce the promise against the promisor X.

ii) **Legal Representative:** In case of death of the promisee his legal representatives can demand performance unless a contrary intention appears from the contract. The promisor can compel the legal representative to perform.

Example: A agrees to marry B. But, before marriage take place B dies. The legal representative of B cannot demand performance of the promise from A.



CHECK YOUR PROGRESS

Q. 2: State the parties who must perform a contract.

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Q. 3: State the parties who can demand performance of a contract.

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3.5 PERFORMANCE OF JOINT PROMISES

When a promise is made by two or more persons jointly, it is called a joint promise. Following are the provisions of Contract Act regarding performance of joint contract:

i. **The joint promisors or their representatives must jointly perform the promise**: When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons must jointly fulfill the promise. When any one of the joint promisors dies, his legal representatives must, jointly with the surviving promisors, fulfill the promise. On the death of all the original promisors, the legal representatives of all of them jointly must fulfill the promise

(Sec. 42).

ii. **Any one of the joint promisors may be compelled to perform:** In case of a joint promise, the promisee is entitled to compel any one or more of such joint promisors to fulfill the whole of the promise, in the absence of express agreement to the contrary.

iii. **Each promisor may compel contribution:** For performance of the promise each of the joint promisors may compel other joint promisors to contribute equally with him. i.e. if any one of the joint promisor has been compelled to perform the whole of the promise, he can require other joint promisors to make equal contribution to the performance of the promise.

iv. **Sharing of loss by default in contribution:** If any one of the joint promisors makes a default in making contribution, if any, the remaining joint promisors must bear the loss arising from such default in equal shares

v. **The promisee may release any one joint promisors:** Sometimes the promise may release one of the joint promisors. But this does not release other promisors. This release does not free the joint promisor so released from responsibility to contribute to the other promisors.

3.6 LEGAL PROVISIONS REGARDING THE TIME, PLACE AND MANNER OF PERFORMANCE OF A CONTRACT

Various legal provisions are laid down under Section 46 to 50 regarding the time, place and manner of performance of a contract. So, as far as the time, place and manner of performance of a contract are concerned, it must be agreed upon by the parties to the contract themselves. The legal provisions regarding these are given below –

1. *Under Section 46, performance within a reasonable time:* According to Section *46*, a promisor is to perform his promise within a reasonable time. On the other hand, reasonable time will depend upon the circumstance of the case, the usage of trade or on the intention of the parties entering into the contract.

Example: A has given an order of supplying of books in July which should be performed within 4 to 5 days of the month of July.

2. *Under Section 47, specified time and place for performance:* If the promise is to be performed on a certain day, the promisor may undertake to perform it without application of the promisee. According to the Section 47, "In such a case the promisor may perform the promise at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.
3. *Under Section 48, performance on a certain day:* If the promise is to be performed on a certain day the promisor may undertake to perform it after the application by the promisee to that effect.
4. *Under Section 49, performance of promise when no place is fixed and without application:* If the promise is to be performed without application by the promisee and where no place is mentioned to be performed of the contract then it is the duty of the promisor to apply to the promisee to provide a reasonable place for the performance of the promise and to perform it at such place.

   Example: M takes to deliver 2,000 kilos of rice to N on a fixed day. M must apply to appoint a reasonable place for the purpose of receiving it and must deliver it to him at such place.

5) *Under Section 50, performance as prescribed by the promisee:* According to Section 50, the performance of any promise may be made in any manner or at any time, which the promisee prescribes.

   Example: T owes S Rs. 20,000/- to accept T's car value of Rs. 10,000/- in reduction of the debt. The delivery of the car will amount to a part payment of the debt.

3.7 CONTRACTS WHICH NEED NOT BE PERFORMED

Following are the circumstances under which contracts need not be performed:

a. According to Section 62, if parties to a contract agree to Novation, Rescission, or Alteration, the original contract need not be performed.

In such a case the original contract is substituted by a new contract.

b. According to Section 63, if parties to a contract agree to dispense with or remit performance of promise either wholly or in part, the original contract stands discharged.

c. According to Section 64, when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform his promise.

d. According to Section 67, if any promisee neglects or refuse to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused for the non-performance of the contract.

3.8 MEANING OF DISCHARGE OF CONTRACT

Discharge of contract implies termination of the contractual relationship between the parties. A contract is discharged if it ceases to operate and when the rights and obligations created by it come to an end. Sometimes, other rights and obligations may arise as a result of discharge of the contract. These are independent of the original contract.

3.9 MODE OF DISCHARGE OF CONTRACT

Different modes of discharge of contract have been provided under different sections of the Act. These are:

3.9.1 Discharge by Performance

Each party to the contract is bound to perform his part of the obligation. After the parties to the contract made due performance of the contract, their liabilities under the contract come to an end. In such a case, the contract is said to be discharged by performance. Performance must be completed according to the real intentions of the agreement. Performance must be done according to time and manner prescribed.

Performance of contract may be of two types. Such as –

1) Actual performance:- When all parties to the contract perform

their respective promises, the contract is said to be discharged and the contract comes to an end. Performance done by the parties must be according to time and terms of contract.

2) *Attempted performance:-* When the promisor offers to perform his obligation under the contract, but is unable to do so because the promisee does not accept the performance, it is called attempted performance or tender. Tender is not an actual performance. It is only an offer to perform.

3.9.2 By Agreement on Consent

The rights and obligations created by an agreement can be discharged without performance by means of another agreement between the parties. In such a case original contract need to be performed. Section 62 and 63 deal with this subject and provide for the following methods of discharging a contract by mutual agreement:

(i) Novation: Substitution of a new contract in place of the old existing one is known as 'novation of contract'. New contract may be either between the same parties or between different parties, the consideration being mutually the discharge of the old contract.

(a) Substitution of a contract with new terms for an old contract between the same parties.

(b) Substitution of a new party for an old one, the contract remaining the same. Promisee will now look to the third party for the performance of the contract. Original promisor is released of the obligations under the old contract.

(ii) Alteration: Alteration means change in one or more terms of the contract. In alteration original contract is not wholly rescinded. Only some terms of the original contract are varied and made inoperative. The alteration must be made with the consent of all the parties. A valid alteration discharges the

original contract and parties become bound by a new contract.

(iii) Rescission: Rescission means cancellation of the contract. A contract can be rescinded by any of the following ways:

By mutual consent: Parties may enter into a simple agreement to rescind the contract before it's breach.

By the aggrieved party : Where a party has committed a breach of the contract, the aggrieved party can rescind the contract without in any way effecting his right of getting compensation for the breach of contract.

By the party whose consent is not free: In case of a voidable contract, one of the parties has the option to rescind it.

A contract may also be taken to be impliedly rescinded. This happens when the parties do not perform their promises and remain silent without complaining of non-performance for a long period.

(iv) Remission: Remission means acceptance of a lesser sum than what was contracted for or a lesser fulfillment of the promise made. *Example:*A owes B Rs. 5,000. A pays to B and B accepts in satisfaction of whole debt Rs. 2,000 paid at the time and place where Rs. 5,000 were payable. The whole debt is discharged.

(v) Waiver: Waiver means the deliberate abandonment of a right which a party is entitled to under a contract, where upon the other party to the contract is released from his obligation.

Example: A promises to paint a picture for B.B afterwards forbids him to do so. A is no longer bound to perform the promise.

3.9.3 By Impossibility of Performance

A contract may be discharged if its performance becomes impossible. The rule of impossibility of performance is based on the following maxims. Such as i) the law does not recognize what is impossible and ii) what is impossible does not create an obligation.

According to the Section 56 of the Act, "an agreement to do an act impossible in itself is void."

There are two types of impossibility of performance such as –

i) Impossibility existing at the time of contract.

ii) Impossibility arising subsequent to the formation of contract.

i) Impossibility existing at the time of contract: There is no question of discharge of a contract which is entered into to perform something that is obviously impossible. Such impossibility may be either known or unknown to the parties at the time of entering in to the agreement. Example: A agreed to sell his horse to B. But unknown to both the parties that the horse had already died. The contract is void on the ground of impossibility.

ii) Impossibility arising subsequent to the formation of contract: In some cases it may so happen that the performance of a contract may become impossible subsequent to the formation of a contract. This is called subsequent impossibility of performance. The contract becomes void on the ground of subsequent impossibility only if the following conditions are fulfilled:

   a) The act should have become impossible,

   b) The impossibility should have been caused by circumstance beyond the control of the parties,

   c) The impossibility should not be result of the act of the parties.

3.9.4 By lapse of Time

According to the Limitation Act, 1963 a contract must be performed within a specified time. If it is not performed within this specific time limit and against which if no action is taken by the promisee in the Court of Law within specified time, then the promisee is debarred from instituting a suit in a court of law. In such cases, the contract is discharged. Thus, in certain situations lapse of time

may also lead to discharge of a contract.

3.9.5 By operation of law

A contract can be discharged by the operation of law. The operation of law by which contract can be discharged are as following –

i) *By death:-* If the contracts depend on the personal skill or ability then such contract may be discharged on the death of the promisor.

ii) *By insolvency:-* A person, after being adjudged insolvent, is released from all his liability incurred prior to his adjudication. A contract is discharged by the insolvency of one of the parties to it when an Insolvency Court passes an 'order of discharge'.

iii) *Merger:-* When an inferior right contract merges with into a superior right contract, the inferior right contract stands discharged automatically. E.g. when a part-time lecturer is made full-time lecturer, the contract of part-time lectureship is discharged by merger.

iv) *Unauthorized alteration of the terms of a contract:-* If one party makes any material alteration in the contract without the consent of the other party, then the other party can avoid the contract.



CHECK YOUR PROGRESS

Q. 4: What is mean by attempted performance?

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Q. 5: State the meaning of impossibility of performance of a contract.

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3.10 BREACH OF CONTRACT AND ITS REMEDIES

All parties to a contract are expected to perform their promises. Breach of contract takes place when one party to the contract, without lawful excuse, does not fulfill his contractual obligation or by his own act makes it

impossible that he should perform his obligation under it. The other party or parties are called aggrieved or injured party or parties. There are various types of remedies for the injured parties. Such as –

i) Rescission of the contract.
ii) Suit for specific performance.
iii) Suit for injunction
iv) Suit for quantum merit and
v) Suit for damages.

1) Rescission of the contract: - If there is breach of contract by one party, then the other party may rescind the contract and thereby he is absolved from his all obligations under the contract.

Example:- M promises N to deliver him a motor car on 1st January 2017, and N promises to pay for the motor car on 1st January 2017. M does not deliver the car on that date. N is discharged from the liability to pay the price.

The court may grant rescission:

a) Where the contract is voidable by the plaintiff; or
b) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

2) Suit for specific performance: - In some specific cases if the damages are not an adequate remedy, then the court can direct the party in breach for the specific performance of the contract. In such case, the promise is carried out as per terms and conditions of the contract. This is a direction by the court for specific performance of the contract at the suit of the party not in breach.

Generally in the following cases, the *court grants specific performance*:

i) When the act agreed to be done is such that compensation in money for its non performance of the act agreed to be done is not measurable.
ii) When it is probable that compensation in money is an inqdequate relief got for the non performance of the act agreed to be done.
iii) When there is no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done.

On the other hand, *the court does not grant specific performance* in the following cases:

i) Damages are an adequate remedy.

ii) The contract is not certain.

iii) The contract is inequitable to either party.

iv) The contract is of revocable nature.

v) The contract is made by the trustee in breach of trust.

vi) The contract is of personal nature i.e. contract to marry.

vii) The contract made by a company beyond its power (ultra-vires of its memorandum of association).

viii) The court cannot supervise its carrying out.

3) Suit for injunction: - Injunction is an order passed by a competent court restraining a person from doing some act. Injunction can be defined as a mode of securing the specific performance of the negative terms of a contract. Negative terms of contract imply doing something, which a party has promised not to do. Injunction is an order which is granted by the court restraining the person to do what he had promised not to do.

The court may order injunction in the following cases –

i) if the contract is voidable.

ii) if the contract becomes void or

iii) on discovering the contract as void.

4) Suit for quantum meruit:- The claim for quantum meruit may be arise if a contract performed by one party has become discharged by breach of the other party. The meaning of the phrase “quantum meruit” is ‘as much as earned’. The claim is not for the original contract that has been discharged or void, but on an implied promise by the other party to pay for what he has done.

Quantum meruit arises in the following circumstances.

a) If a contract is found to be void.

b) If something is done without any intention to do so gratuitously.

c) If one party abandons or refuses to perform the contract.

d) If a contract is divisible.

e) If a contract is performed badly.

5) Suit for damages: Damages are a monetary compensation awarded by the court to the injured party for the loss or injury suffered by him. As per contract, one party can claim damages if other party breach the contract. The main purpose of awarding the damages is to make good the loss suffered by him. It is known as doctrine of restitution. The Section 73 of the Indian Contract Act, 1872 deals with the compensation for loss or damages caused by a party for breach of contract. There are mainly four types of damages, such as-

i) Ordinary damages
ii) Special damages
iii) Vindictive or exemplary damages and
iv) Nominal damages.

i) Ordinary damages: When a contract has been broken, the injured party can, as a rule, always recover from the guilty party ordinary or general damages. Ordinary damages are such damages as may fairly and reasonably be considered as arising naturally and directly in the usual course of things from the breach of the contract itself.

ii) Special Damages: Special damages are such damages which occur due to some special or unusual reasons affecting the plaintiff. Such damages cannot be claimed as a matter of right. These can be claimed only in the special circumstances which would results in a special loss in case of a breach of a contract are brought to the notice of the other party.

iii) Vindictive or exemplary damages: Damages which are awarded with a view to punishing the guilty party for the breach and not by way of compensation for the loss suffered by the aggrieved party. But the cardinal principle of the law of damages for the breach of a contract are given by way of compensation for loss suffered, and not by way of punishment for wrong inflicted. Hence, vindictive or exemplary damages have no place in the law of contract as they are punitive in nature. However, there are two exceptions to this rule i.e.

the court may award exemplary damages:

a) Breach of a contract to marry,

b) Dishonour of a cheque by a banker when there are sufficient funds to the credit of the customer.

iv) Nominal damages: Nominal damages are awarded only for the name sake, where the injured party has not actually suffered any loss by reason of the breach of a contract. The damage recoverable by the injured party is nominal, i.e. very small. This merely signifies that the plaintiff has won the case.



CHECK YOUR PROGRESS

Q. 6: State the meaning of breach of a contract.

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Q. 7: When the court may order for injunction.

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3.11 LET US SUM UP

In this unit we have discussed the following aspects –

- A contract may be performed by actual performance or attempted performance or tender of performance.
- The essentials of a valid tender of performance are – it must be unconditional; it must be for the whole obligation; It must be by a person who is in a position and is willing to perform the promise; it must be at the proper time and place etc.
- The parties who can perform a contract
- The parties who can claim performance of a contract.
- The legal provisions regarding the time, place and manner of performance of a contract.

- Discharge of contract means termination of the contractual relationship between the parties.
- The different remedies available for discharge of a contract are- rescission of the contract, claim for specific performance, claim for injunction, claim for quantum merit and claim for damages.



3.12 FURTHER READINGS

1) Kuchhal, M.C. & Prakash, D., 3rd ed. “Business legislation for Management”, Vikas Publishinng House Pvt. Ltd.
2) Kapoor, N.D. “Mercantile Law” Sultan Chand & Sons, New Delhi
3) Maheshwari, R.P. & Maheswari, S.N. “Principles of Mercantile Law”, Vikas Publushing House Pvd. Ltd.



3.13 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: When the parties to the contract fulfill all his obligations under the contract, the contract is said to have been actually performed.

Ans. to Q. No. 2: A contract can be performed by the promissory, agent, representatives and third party.

Ans. to Q. No. 3: Persons Entitled to Demand Performance are promisee and his legal representative.

Ans. to Q. No. 4: When the promisor offers to perform his obligation under the contract, but is unable to do so because the promisee does not accept the performance, it is called attempted performance or tender.

Ans. to Q. No. 5: A contract may be discharged if its performance becomes

impossible. The rule of impossibility of performance is based on the following maxims. Such as i) the law does not recognize what is impossible and ii) what is impossible does not create an obligation.

Ans. to Q. No. 6: Breach of contract takes place When one party to the contract, without lawful excuse, does not fulfill his contractual obligation or by his own act makes it impossible that he should perform his obligation under it.

Ans. to Q. No. 7: The court may order injunction in the following cases –

i) if the contract is voidable.

ii) if the contract becomes void or

iii) on discovering the contract as void.



3.14 MODEL QUESTIONS

Q. 1: Define performance of contract.

Q. 2: State the essential conditions of a valid tender of performance

Q. 3: State the legal provisions regarding the time, place and manner of performance of a contract.

Q. 4: Discuss the different modes of discharge of a contract.

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