

FREE CONSENT

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According to **Section 10**, free consent is one of the elements of a valid contract. The consent of the parties means that they understand the same thing in the same sense. There must be no misunderstanding between the parties about the subject matter of the contract. **Section 13** of the Indian Contract Act defines the term 'Consent' as two or more persons are said to consent when they agree upon the same thing in the same sense. Thus, consent involves the identity of minds in respect of the subject matter of the contract. In English Law, this is called '*consensus-ad-idem*'.

Concept of Free Consent

For a contract to be valid it is not enough that the parties have given their consent. The consent should also be free i.e., it has been given by the free will of the parties involving no pressure or use of force. Section 10 of the Contract Act specifically provides that all agreements are contracts if they are made by the free consent of the parties. **Section 14** of the Act states that Consent is said to be free when it is not caused by (i) coercion, or (ii) undue influence, or (iii) fraud, or (iv) misrepresentation, or (v) mistake.

When the consent of any party is not free, the contract is treated as voidable at the option of the party whose consent was not free. If, however, the consent has been caused by mistake on the part of both the parties, the contract is considered void.

1. UNDUE INFLUENCE

When one party is in a position to dominate the will of others and actually misuses the power, then it is a case of undue influence, and the contract becomes voidable.

When all the following three conditions are fulfilled then only the situation is considered as an undue influence:

- i. One person is in a position to dominate the will of others.
- ii. He misuses his position.
- iii. He obtains an unfair advantage.

The word 'undue' means unnecessary, unwarranted, or more than required. 'Influence' means convincing the mind of another through changing his mind or changing his will, but this influence must be undue i.e it is not required.

The dominant position is not defined in the Indian Contract Act but **Section 16(2)** provides certain conditions when a person is in a position to dominate the will of another.

Cases, where a person is in a position to dominate the will of others, are as follows:

- a) Real or apparent authority/relation in which one party can be dominated by the other party.
- b) Fiduciary relation is the relation which is made upon the belief and trust between the parties.

2. Mental or bodily distress means the mental capacity of a person is affected. It can be either permanently or temporarily affected. The reason behind such health condition can be age, illness, mental or bodily distress. Consent under pressure means when consent is obtained forcefully. In this manner, consent is not lawful, so it had no binding effect. Merely a dominant position does not lead to undue influence. It arises only when this position is used for gaining an undue advantage.

Burden of proof

When a person is found to be in a position by which he can dominate the will of the other or a transaction appears to be affected due to dominance, the burden of proof that no undue influence was exercised in the transaction lies on the party who is in a position to dominate the will of others.

In relation to Pardanashin Woman, Bombay High Court made an opinion that a woman becomes Pardanashin because she is totally exempted from ordinary social intercourse not because she is in seclusion of some degree.

3. COERCION

If a person commits or threatens to commit an act forbidden by the Indian Penal Code with a view to obtaining the consent of the other person to an agreement, the consent in such a case is obtained by coercion. In simple words, coercion means "making a person give his consent by force or threat."

Essential Ingredients of Coercion:

- a) Committing or threatening to commit any act forbidden by Indian Penal Code or,
- b) The unlawful detaining or threatening to detain any property to the prejudice of any person whatever.
- c) With the intention of causing any person to enter into an agreement.

Chikkam Ammiraju V. Chikam Seshamma, in this case, the husband by a threat of suicide, induced his wife and son to execute a release deed in favor of his brother in respect of a certain properties claimed as their own by the wife and son. Court held that to commit suicide amounted to coercion within the meaning of Section 15 of the Indian Contract Act and therefore release deed was voidable.

Committing or threatening to commit any act forbidden by IPC Act forbidden by IPC- The word act forbidden by Indian Penal Code makes it necessary for the court to decide in a civil action, whether the alleged act of coercion is such as to amount to an offence. A threat of bringing a false charm with the object of making another do a thing amount, to blackmail or coercion.

Unlawful Detaining of Property: A consent can be said to be caused by

coercion, if it is caused because of unlawful confining or detaining of a property, or a risk to do as such.

Coercion and Duress:

Under the English law, actual or threatened violence to the victim's person has long been recognized to amount to duress. Duress is a term applied under English Contract Law & Coercion is a term applied under Indian Contract Law. In coercion even a third party can perform the act but in duress only the party to contract should perform the act. In Duress, it is only applied for persons and cannot detain property. Also coercion can be seen as the practice of putting someone under duress (i.e almost like stress.) Coercion is the act of forcing, while duress is more the consequence (or stressful feeling) that happens as a result of coercion. In this way the extent of coercion is more extensive than duress.

FRAUD

According to Section 17 of the Indian Contract Act, 1872 "FRAUD" means and includes any of the following acts committed by a party to a contract, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

Essentials of Fraud:

- There should be a false statement of fact by a person who himself does not believe the statement to be true.
- The statement should be made with a wrongful intention of deceiving another party thereto and
 - inducing him to enter into the contract on that basis.

False statement of fact:

In order to constitute fraud, it is necessary that there should be a statement of fact which is not true. Mere expression of opinion is not enough to constitute

fraud.

For example – A person, who is aged over 60 years and thus beyond insurable age, deliberately makes a false statement that his age is 48 years in order to take out an insurance policy, it amounts to fraud, and the insurer is entitled to avoid the policy.

Mere silence is no fraud. : It has been noted above that to constitute fraud; there should be a representation as to be certain untrue facts. Mere silence is no fraud, unless there is duty to speak, or his silence is, in itself, equivalent to speech.

In *Keates v Lord Cadogan*, A let his house to B which he knew was in ruinous condition. He also knew that the house was going to be occupied by B immediately. A didn't disclose the condition of the house to B. It was held that he had committed no fraud.

In *Shri Krishan v. Kurukshetra University*, Shri Krishan, a candidate for the L.L.B. exam, who was short of attendance, did not mention that fact himself in the admission form for the examination. Neither the head of the law department nor the university authorities made proper scrutiny to discover the truth.

It was held by SC that there was no fraud by the candidate and the university had no power to withdraw the candidate on that account.

Exceptions:

- When there is a duty to speak, keeping silence is fraud.

- When silence is, in itself, equivalent to speech, such silence is a fraud.

Duty to speak (Contracts of uberrimae fide) : When the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, keeping silence in such a case amounts to fraud. When there is a duty to disclose facts, one should do so rather than to remain silent.

There are certain contracts which are contracts of *uberrimae fide* meaning contracts of utmost good faith. In such a type of contract it is supposed that the party in whom good faith is reposed, would make full disclosure of it and not keep silent.

When in the case of a contract of insurance, where there exists a duty to disclose, then non disclosure of facts that are non-material to and having no bearing on the risk undertaken by the insured, it does not render the contract voidable.

Silence being equivalent to speech: Sometimes keeping silent as to certain facts may be capable of creating an impression as to the existence of a certain situation. In such a case, silence amounts to fraud. Means of discovering the truth “If such consent was caused by misrepresentation or by silence fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence”

Active Concealment [Section 17(2)] When there is an active concealment of a fact by one having knowledge or belief of the fact, that can also be considered to be equivalent to a statement of fact, that can also be considered to be equivalent to a statement of fact and amount to fraud. By active concealment of certain facts, there is an effort to see that the other party is not able to know the truth and he is made to believe as true which is in fact not so.

Active concealment of a fact has also been considered as amounting to fraud because in that case there is a positive effort to conceal the truth from the other party. He is made to believe as true that fact which is false. This is what is known as *suppressio veri* –But if he merely keeps silence it will not constitute fraud subject to certain exceptions.

Promise Made Without Any Intention to Perform It [Section 17(3)] When a person makes a promise, there is deemed to be an undertaking by him to perform it. If there is no such intention when the contract is being made, it

amounts to fraud. Thus, if a man takes a loan without any intention to repay, or when he is insolvent, or purchases goods on credit without any intention to pay for them, there is fraud. If there is no such bad intention at the time of making the contract, but the promise doesn't fulfil the contract, it doesn't amount to fraud.

Any act or omission which any other act fitted to deceive'[Section 17(4)]

Clause (4) provides that 'any other act fitted to deceive' will also amount to fraud. This clause is general and is intended to include such cases of fraud which would otherwise not come within the purview of the earlier three clauses. Any act or omission which the law declares as fraudulent [Section 17(5)]

According to this Section 17(5), fraud also includes any such act or omission as the law specially declares to be fraudulent. In such cases, the law requires certain duties to be performed, failure to do which is expressly declared as a fraud.

MISREPRESENTATION

The word representation means a statement of fact made by one party to the other, either before or at the time of making the contract, with regard to some matter essential for the contract, with an intention to induce the other party to enter into the contract. A representation, when wrongly made, either innocently or intentionally, is called 'misrepresentation'. When the wrong representation is made willfully with the intention to deceive the other party, it is called fraud. But, when it is made innocently i.e., without any intention to deceive the other party, it is termed as 'misrepresentation'. In such a situation, the party making the wrong representation honestly believes it to be true.

Section 18 of the contract Act classifies acts of misrepresentation into the following three groups:

Positive assertion: When a person makes a positive statement of material facts

honestly believing it to be true though it is false, such act amounts to misrepresentation.

Breach of Duty: Section 18(2) : When there is no intention to deceive, but the party representing commits a breach of duty which he owes to the other party. A breach of duty would also exist where a party bound to disclose certain information does not do so. Such non-disclosure would also amount to misrepresentation.

Inducing mistake about subject-matter: The subject matter of every agreement must clearly be understood by the concerned parties. If one of the parties, leads the other, even innocently, to commit a mistake regarding the nature or quality of the subject-matter, it is considered misrepresentation.

Essentials of Misrepresentation

1. The representation should be made innocently, honestly believing it to be true and without the intention of deceiving the other party.
2. Misrepresentation should be of facts material to the contract. A mere expression of one's opinion is not a statement of facts.
3. The representation must be untrue, but the person making it should honestly believe it to be true.
4. The representation must be made with a view to inducing the other party to enter into contract and the other party must have acted on the faith of the! representation. A party cannot complain of misrepresentation if he had the means of discovering the truth with ordinary diligence.
5. The false representation must have been made by one party to the contract to the other who is misled. If it is not addressed to the party who is misled, then it is not misrepresentation.

Effect of Misrepresentation:

Section 19 of Contract Act provides that when consent to an agreement is caused by misrepresentation, the agreement is voidable at the option of the party whose consent was so caused.

Thus, the aggrieved party has the following two rights: a) He can rescind the contract. This right is available only in such cases where he was not in a position to discover the truth with ordinary diligence.

b) If the aggrieved party thinks it proper, he may accept the contract and insist upon its performance. He may compel the other party to pay damages. You have seen that the party whose consent was caused by misrepresentation can avoid or rescind the contract.

However, this right is lost in the following cases:

- i) If he could discover the truth with ordinary diligence.
- ii) If his consent is not induced by misrepresentation.
- iii) If he, after coming to know about the misrepresentation, expressly affirms the contract or acts in such a manner which shows that he has accepted it.
- iv) If, before the contract is rescinded, the third party acquires some right in the subject-matter in good faith and for some consideration.
- v) If the parties cannot be restored to their original position.

MISTAKE:

Mistake may be defined as the erroneous belief concerning something. Whenever an agreement is made under a mistake, there is no consent, and the agreement is not valid.

Broadly speaking, Mistake may be of two types-mistake of law and mistake of

fact.

Mistake of law can be further classified into

- (a) mistake of Indian law, and
- (b) mistake of foreign law.

Similarly, a mistake of fact can be (a) bilateral mistake or (b) unilateral mistake.

Mistake of Law (Section 21) Mistake of law can be further classified into (a) mistake of Indian law, and (b) mistake of foreign law.

Mistake of Indian Law : The general rule is that a mistake of law of the land is no excuse. Section 21 lays down that a contract is not voidable because it was caused by a mistake as to any law in force in India. It is because everyone is supposed to know the law of the country and if a person does not know the law of his country, then he must suffer the consequences.

Mistake of Foreign Law A person is supposed to know the laws of his country but he cannot be expected to know the laws of other countries. Therefore, the rule that 'ignorance of law is no excuse' cannot be applied to foreign law. A mistake of foreign law is treated as a mistake of fact.

Mistake of Fact (Section 20) Mistake of fact may be classified into two groups.viz.,

(a) Bilateral mistake, and

(b) Unilateral mistake.

Bilateral Mistake: When both the parties to an agreement are under a mistake of fact essential to the agreement, the mistake is known as bilateral mistake of fact. In such a situation, there is no agreement at all because there is complete absence of consent. Section 20 of the Act provides where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Thus, for declaring an agreement void under this Section, the following three

conditions must be satisfied. Both the parties must be under a mistake: The mistake must be mutual. For example, A, having two cars, one Fiat and another Maruti, offers to sell his Fiat car to B and B not knowing that A has two cars, thinks of the Maruti car and - agrees to buy it. In this case, there is no consent whatsoever. Therefore, the agreement shall be void.

Mistake must be of fact and not of law:

a. Mistakes must relate to an essential fact: The mistake must relate to a matter of fact which is essential to the agreement. In other words, only such a mistake of fact that goes to the root of the agreement, renders the agreement void. For example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void, because the mistake relates to something i.e., the horse, which is essential to the contract.

A bilateral mistake may be:

- (a) Mistake as to the subject-matter, or
- (b) Mistake as to the possibility of performance.

Mistake as to the subject-matter of the contract: Where both the parties to an agreement are under a mistake relating to the subject-matter of the contract, the agreement is void. A mistake as to the subject-matter may take the following forms.

a. Mistake as to an existence of the subject-matter: When both the parties are under a mistake regarding the existence of the subject-matter, the agreement is void.

b. Mistake as to the identity of subject-matter: Where the parties to a contract have different subject-matter in their minds i.e., one party had one thing in mind and the other party had another, the agreement is void because there is no consensus-ad-idem.

c. Mistake as to the title of the subject-matter: Sometimes the buyer already owns the property which a person wants to sell to him, but the concerned parties are not aware of this fact. In such a case, the agreement is void as there is a mistake about the title of the subject-matter .

d. Mistake as to the quantity of the subject-matter: Where both the seller and the buyer make a mistake regarding the quantity of the subject matter, the agreement is void.

e. Mistake as to the quality of the subject-matter: If the subject-matter is something essentially different from what the parties thought it to be, the agreement is void.

f. Mistake as to the price of the subject-matter: Where there is a mutual mistake as to the price of the subject-matter, the agreement is void.

According to Section 22, a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. If a man due to his own negligence or lack of reasonable care does not ascertain what he is contracting about, he must bear the consequences.

Mistake as to the nature of the contract: A contract is void when one of the parties, without any fault of his own, makes a mistake as to the very nature of the contract. Thus, when a person is induced to sign a written document containing a contract fundamentally different in nature from what he thinks he is signing, the contract shall be void.

Effect of Mistake

While discussing various types of mistakes, the effect of each type of mistake

has been clearly stated. It can now be summarized as follows:

- 1) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.
- 2) In most cases of unilateral mistake, the contract is not void. But, where unilateral mistake defeats the true consent of the parties, the agreement is treated as void.
- 3) Any person who has received any advantage under such agreement, he is bound to restore it, or to make compensation for it, to the person from whom he had received it.
- 4) A person to whom money has been paid or anything delivered by mistake must repay or return it.