

Text

1.1 Introduction

Discharge of a contract means termination of contractual relations between the parties to a contract. In other words a contract is discharged when the rights and obligations created by it are extinguished (i.e. comes to an end).

1.2 Various modes Of Discharge of a Contract

The various modes of discharge of a contract are as follows:

1. Discharge by Performance
2. Discharge by Mutual Agreement
3. Discharge by Lapse of Time
4. By Operation of law
5. Discharge by Breach
6. Discharge by Impossibility

1.2.1. Discharge by performance

A contract can be discharged by performance in any of the following ways:

(a) Actual performance – No party remains liable under the contract. Both the parties perform their obligations under the contract.

Example: -Mr. Ahmed agrees to sell a piece of land to Mr. Ram for Rs. One lac. Mr. Ahmed delivers the plot and Mr. Ram makes the payment. The contract is discharged by performance.

(b) Attempted performance or tender: -Promisor offers to perform his obligation

under the contract but the promisee refuses to accept the performance. It is

called attempted performance or tender of performance. This is covered by Section 38 of the Indian Contract Act and is dealt with later.

1.2.2. Discharge by Mutual Agreement

(a) Novation [Sec 62] – Novation means the substitution of a new contract for the original contract. The consideration for the new contract is the discharge of the original contract. The new contract may be.

- Between the same parties (by change in the terms and conditions)
- Between different parties (the term and condition remains same or changed)

Following conditions must be satisfied: -

- (1) All the parties must consent to novation
- (2) The novation must take place before the breach of original contract.
- (3) The new contract must be valid and enforceable.

Example:

- A owes B Rs.50, 000. A enters into an agreement with B and gives B a mortgage of his estate for Rs.40, 000 in place of the debt of Rs.50,000. (Between same parties)
- A owes money Rs.50, 000 to B under a contract. It is agreed between A, B & C that B shall henceforth accept C as his debtor instead of A for the same amount. Old debt of A is discharged, and a new debt from C to B is contracted. (Among different parties)

(b) Rescission [S.62]: - Rescission means cancellation of the contract by any party or all the parties to a contract. X promises Y to sell and deliver 100 bales of carpets on 1st May and Y promises to pay for the goods on 1st June. X does not supply the goods. Y may rescind the contract.

(c) Alteration [S.62]: - Alteration means a change in one or more of the terms of a contract with mutual consent of parties. The parties of the new contract remain the same.

➤ X Promises to sell and delivers 100 bales of cotton on 1st Oct. and Y promises to pay for goods on 1st Nov. Afterwards X and Y mutually decide that the goods shall be delivered in five equal installments at his godown. Here original contract has been discharged and a new contract has come into effect.

(d) Remission [S.63]: - Remission means accepting a lesser consideration than agreed in the contract. No consideration is necessary for remission. Remission takes place when a promisee-

- (i) Dispenses with (wholly or part) the performance of a promise made to him.
- (ii) Extends the time for performance due by the promisor
- (iii) Accepts a lesser sum instead of the sum due under the contract
- (iv) Accepts any other consideration than that agreed in the contract

(e) Waiver: - It means the intentional relinquishment of a right under the contract.

1.2.3. Discharge by Lapse of Time

A contract is discharged if it is not performed or enforced within a specified period, called the period of limitation. The Limitation Act, 1963 has prescribed different periods for different contracts, e.g. period of limitation for exercising a right to recover a debt is 3 years, and to recover an immovable property is 12 years. The contractual parties cannot exercise their rights after the expiry of period of limitation.

1.2.4. By Operation of law

A contract may be discharged by operation of law in the following cases:

(a) **By Death of the Promisor:** A contract involving the personal skill or ability of the promisor is discharged on the death of the promisor.

(b) **By Insolvency:** When a person is declared insolvent, he is discharged from his liability up to the date of his insolvency.

(c) **By Unauthorised Material Alteration:** If any party makes any material alteration in the terms of the contract without the approval of the other party, the contract comes to an end.

(d) **By the Identity of Promisor and Promisee or Merger:** When the promisor becomes the promisee, the other parties are discharged.

1.2.5. Discharge by Breach

A contract is said to be discharged by breach of contract if any party to the contract refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. This has been elaborately dealt with in a separate chapter.

1.2.6 Discharge by Impossibility

Impossibility discharges the parties. Following are categories of impossibility.

(i) Initial Impossibility

Sometimes an agreement may be impossible to perform. The impossibility of performance of the contract may be there from the very beginning, such an impossibility, which exists from the very beginning, is known as initial impossibility.

Section 56 of the Indian Contract Act deals with cases of initial impossibility and provides that an agreement to do an act impossible in itself is void. For example, if Ali enters into an agreement with Ahmed to discover a treasure by magic, such an agreement does not amount to a contract because it is impossible to perform.

(ii) Subsequent Impossibility

Sometimes a contract may be possible to perform when it is made. But afterwards something happens which makes the performance of the contract impossible or unlawful. Such an impossibility, which arises later, is known as subsequent impossibility. Cases of subsequent impossibility are also covered by Section 56, which declares that a contract to do an act, which, after the contract is made becomes impossible or unlawful to perform is void.

1.3 Obligations of Parties to Contract(Section 37)

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provision of this Act, or of any other law. Promises bind the representative of the promisor in case of the death of such promisor before performance, unless a contrary intention appears from the contract.

Illustrations

- A promises to deliver goods to B on a certain day on payment of Rs.1000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay Rs. 1,000 to A's representatives.
- A promises to paint a picture for B by a certain day at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

1.4 Effect of refusal to accept offer of performance(Section 38)

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

Every such offer must fulfill the following conditions -

- (1) It must be unconditional;

(2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is been made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing, which the promisor is bound by his promise to deliver. An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to B at his warehouse, on the 1st March, 2016, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

1.5 Person by Whom Promise Is To Be Performed (Section 40)

If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor.

In other cases, the promisor or his representative may employ a competent person to perform it.

Illustrations

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

(b) Promises to paint a picture for B. A must perform this promise personally.

1.6 Effects of Failure to Perform at a Time Fixed in a Contract in which Time is Essential (Section 55)

Section 55 of the Act regulates the position of performance of a contract where time is of essence. In terms of this Section, where it is understood between parties that time is an essential element, and where one party is unable to perform his part of the promise either in full or in part within the time specified, then the contract is voidable at the option of the party either in full or in part to the extent of non performance of the contract within the time. In these cases the contract is not voidable if time is not of essence of the contract, but the promisee is entitled for compensation for loss if any suffered on account of such failure.

In a contract where time is of essence and the promisor is unable to perform his part within the time, as already stated the contract becomes voidable at the option of the other party. However, if the other party agrees that the promisor would perform his part subsequently after the time fixed, the promisee cannot claim any compensation for loss or damage or injury unless he gives any notice to the promisor of his intention to do so.

The next question for consideration is how to determine whether time is essence of a contract?

Ordinarily from a plain examination of a contract it would be difficult to ascertain from the terms of the contract whether time is of essence in the contract. A promisee may have failed to perform his contract within the specified time. Yet time may not be treated as essence of the contract in that case. Whether time is of essence in a contract has to be decided from the terms of the contract.

The general principles that are followed can be enunciated as under:

(i) In a transaction on sale of gold, silver, blue chip shares, time of delivery is of essence. Here time will be treated as essence of a contract.

(ii) In a transaction-involving sale of land, redemption of mortgages, though certain time frame is fixed, any delay is not valued seriously provided justice can be done to the parties. Of course, even in sale of land, time can be made as an essence of contract by express words.

Contract cannot be avoided where time is not of essence: When there is delay in performing a promise on executing a contract where the time is not of essence, parties concerned cannot avoid the contract. However, in such cases promises must be performed within a reasonable time otherwise it becomes voidable at the option of the promisee.

Effect of acceptance of performance out of time: Even where time is of essence, the party who is entitled to avoid the contract can waive the condition relating to “performance within time”; but in such cases he cannot claim any compensation for loss if any suffered unless he has put the other party on notice.

1.7 Discharge by Breach

Where the promisor neither performs his contract nor does he tender performance, or where the performance is defective, there is a breach of contract. The breach of contract may be of two types (i) actual or present (ii) anticipatory.

1.7.1 Actual Breach

The actual breach may take place either at the time when the performance is due, or when actually performing the contract. The anticipatory breach is a breach before the time for the performance has arrived. This may also take place in two ways, by the promisor doing an act, which makes the performance of his promise impossible, or by the promisor in some other way showing his intention of not performing it.

1.7.2 Anticipatory Breach of Contract

Breach of contract may occur, before the time for performance is due. This may happen where one of the parties definitely renounces the contract and shows his intention not to perform it or does some act which makes performance impossible. The other party, on such a breach being committed, has a right of action for damages.

He may either sue for breach of contract immediately after repudiation or wait till the arrival of the actual date when performance is due and then sue for breach. If the promisee adopts the latter course, i.e., waits till the date when performance is due he keeps the contract alive for the benefit of the promisor as well as for his own. He remains liable under it and enables the promisor not only to complete the contract in spite of previous repudiation, but also to avail himself of any excuse for non-performance which may have come into existence before the time fixed for performance.

In *Hochester v.s De La Tour*¹, A hired B in April to act as a courier commencing employment from 1st June, but wrote to B in May repudiating the agreement. B sued A for breach of contract immediately after repudiation. A contended that there could not be breach of contract before June 1. It was held that, B was immediately entitled to sue and need not wait till the 1st June, for his right of action to accrue.

In *Avery v. Bowden*², A hired B's ship to carry a cargo from Russia. Later on, B repudiated the contract. A delayed taking action hoping B would change his mind before the performance date. War broke out between Russia and Britain before the performance date, frustrating the contract. It was held that, A lost his right to sue B for damages by his delay as the contract was discharged by frustration.

¹ (1853) E.R. 922

² (1856) 116 E.R. 1122

In *Frost v. Knight*³, the law on the subject of "anticipatory breach" was summed up as follows:

"The promisee if he pleases may treat the notice of intention as inoperative and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it."

The principal with regard to breach is incorporated in Section 38 of the Contract Act. It states:

Effect of refusal of party to perform promise wholly

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

Illustrations

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A

³ (1872) L.R. 7 Ex. 111

willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

In the State of AP v. T.V. Krishna Reddy⁴, the court reconfirmed the earlier principle that a suit, for damages can be filed where the notice communicating termination of contract by the defendant was received by the plaintiff as it can be said that a part of cause of action has arisen at that place.

1.8 Conclusion

Performance of contract leads to discharge of contract. There are other alternative methods of discharge where a contract would not require performance. These circumstances are (i) novation, (ii) rescission, (iii) alteration and (iv) remission. A contract may also be discharged by agreement of the parties or by lapse of time for performance or by operation of law, or impossibility of performance or by breach of contract.

Breach of contract means failure or refusal of any one party to perform his contractual obligations under the contract. It is either actual or anticipatory breach of contract.

1. Actual Breach-Failure/refusal of any one party to perform his contractual obligations under the contract when it is due. Here the contract is voidable.
2. Anticipatory breach of contract- Where the promisor refuses to perform his obligation even before the specified time for performance and signifies his unwillingness, then there is an anticipatory breach. Here the aggrieved party may immediately treat the contract as voidable or wait till the time when the performance is due.

⁴ AIR 2009 (NOC) 647 (AP),