

PERFORMANCE & BREACH OF CONTRACT

Performance of the Contract

The term 'performance' in its literal sense means the performance of a task or action. In its legal sense "performance" means the fulfilment or the completion of the obligations which they have towards the other party by virtue of the contract entered by them.

For example, 'A' and 'B' enter a contract, the terms of the contract state that A must deliver a book to B on payment of the consideration of five hundred rupees. Here, B pays five hundred rupees to A and as stipulated in the contract, A delivers him the book.

Definition

According to Section 37 of the Indian Contract Act, 1872 "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 the act, or any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears in the contract. Thus, it is the primary duty of each contracting party to either perform or offer to perform its promise.

Types of Performance

1. Actual performance:

When a promisor has made an offer of performance to the promisee and the offer has been accepted by the promisee, it is called an actual promisee. The contractual obligations are actually performed whereby the liability of a party under the contract comes to an end.

2. **Attempted performance or tender of performance:**

Where the promisor has made an offer of performance to the promisee, and the offer has not been accepted by the promisee, it is called an attempted performance [Section 38]. Such refusal to accept offer of performance by promisee discharges the party from its liability and from its performance.

Types of Tenders:

- a. ***Tender of goods and services:*** The discharge of the contract to deliver goods and services is completed when the goods are tendered for acceptance in accordance with the terms of the contract. If the goods and services so tendered are not accepted, they are to be taken back by the offeror and he is discharged from his liability.
- b. ***Tender of money:*** Where the debtor tenders the money, which is to be paid to the creditor, but the creditor refuses to accept the money. The debtor is not discharged from the liability to pay back the money. Therefore, a tender of money can never result in the discharge of debt.

Offer of Performance/Tender

The essentials of a valid offer of performance are stated under Section 38 of the Indian Contract Act, 1872:

- a) The offer should be unconditional.
- b) It must be made at a proper time and place so as to allow the party to have a reasonable time to ascertain that the person who is making the offer to him is competent to enter into a contract.
- c) If the offer to the offeree is such as to deliver some goods addressed to the offeree, then it is the duty of the offeror to provide reasonable time to the offeree in which he can ascertain that

the goods offered to him is the same by which the offeror is bound under the terms of the contract.

Discharge of Contract- Meaning

The term discharge of contract means ending of the contractual relationship between the parties. A contract is said to have been discharged when it ceases to operate i.e. when the rights and obligations created by the parties came to an end. A contract can be discharged if the parties mutually agree to terminate the contract. Also there are different methods through which contracts can be discharged. In this article, we will discuss the different methods of disc

Methods of discharge of contract:

- Discharge by Performance
- Discharge by Agreement or Consent
- Discharge by Impossibility of Performance
- Discharge by Lapse of Time
- Discharge by Operation of Law
- Discharge by Breach of Contract

1. Discharge by Performance

Performing means doing all those things which are required by a contract. Discharge of performance occurs when the parties to the contract fulfill their obligations set out under the contract within the specified time and in the manner prescribed. In such a case, parties are discharged and contracts come to an end. But if only one of the party performs, he alone is discharged. Such a party gets the right of action against the other party who is guilty. Discharge of Performance may be:

- a. Actual Performance
- b. Attempted Performance

a. Actual Performance

When both the parties perform their performance, then the contract is said to be discharged. Performance should be complete and precise according to the terms of the agreement. Majority of the contracts are discharged by performance in this manner.

b. Attempted Performance

Attempted performance is only an offer to perform the obligation under the contract. When the promisor agrees to perform the contract but the promisee refuses to accept the performance, then in such case, it is termed as discharge of contract by attempted performance or tender.

2. Discharge by Agreement or mutual consent

a. Novation

The term novation means the substitution of the new contract by the original one. The new agreement may be with the same parties or with the new parties. For a contract to be valid and effective, the consent of all the parties including the new one if any is necessary. Moreover, the second party must be capable of enforcement of law, the consideration for which is the exchange of promise not to carry out the original contract.

b. Alteration

This refers to change in one or more terms of a contract with the consent of all the parties entered in the contract. Alteration leads to formation of new contracts but the parties to it remain the same.

c. Remission

This means the acceptance by the promisee of a lesser sum than what was mentioned in the contract, or a lesser fulfillment of the promise made.

d. Rescission

The term rescission refers to cancellation of all or some of the material terms of the contract. If the parties entered into the contract, mutually agreed to do so, then in such case the respective contractual agreement of the parties gets terminated.

e. Waiver

The term waiver means abandonment of rights. When one party deliberately abandons his right under the contract, the other party is released of his obligations, else binding upon it.

3. Discharge by Impossibility of Performance

If it is impossible for any of the parties entered in the contract to perform their obligations, then the impossibility of performance of contract leads to discharge of contract. If the impossibility of performing the contract exists from the start, then it is termed as impossibility by ab-initio. However, impossibility of performing the contract may also arise later due to:

- An unforeseen change in the law
- Destruction of subject-matter of the contract
- Non-existence or Non-occurrence of a particular state of things.
- Outbreak of War

Example:

John enters into the contract with his friend Tom to marry his sister within 6 months. However, John met with an accident and became insane. This impossibility of performance leads to discharge of contract.

4. Discharge of Contract by a Lapse of a Time

According to The Limitation Act, 1963, there is a specific time period for the performance of a contract. If the promisor failed to perform his duties and the promisee failed to take action within this specified period, then the promisee in such a case cannot be deprived of his remedy through law. Here, the contract is said to be discharged due to the lapse of time. For example: John takes a loan from one of his friends and agrees to pay him installments every month for the next five years. However, he does not pay even a single installment. His friend calls him several times but then gets busy and takes no action. After three years, he approaches the

court to help him recover his money. However, the court rejects his complaint because he has crossed the time-limit of three years to recover his debts.

5. Discharge of Contract By Operation of Law

A contract can be discharged by the operation of law in the following circumstance:

- a. Unauthorized Material Alteration of Written Document: A party can discharge the contract i.e from his side if the other party changes the terms such as price or quantity of contract without taking any permission from the former.
- b. By Insolvency
- c. By Death

6. Discharge by Breach of Contract

A contract is obliged to perform according to its terms. But when a promisor fails to perform a contract according to the terms of the contract, then he is said to have committed a breach of contract. The breach of contract is of two types

- a. Actual Breach
- b. Anticipated Breach

Actual Breach: Actual breach of contract refers to failure to perform the obligation when the performance is due. For example, if a seller fails to deliver the goods by the appointed time, or the goods are delivered but not upto the mark in terms of quality or quantity specified in the contract.

Anticipatory Breach: Anticipatory Breach, also known as Breach by Contradiction, takes place when one party before the arrival of the fixed date for performance states that it cannot or will not able to perform material part of the contractual obligation on the specified date or it aims to perform the contract in a way that is inconsistent with the deeds specified in the contract at the initiation.

Remedies for Breach of Contract:

When one among the party commits a Breach of the Contract, the opposite party becomes entitled to any of the subsequent reliefs:

- Rescission of the Contract
- Damages for the loss suffered
- Suit for the specific (precise) performance
- Suit for the injunction
- Suit upon quantum meruit

1. Rescission of the Contract

When one among the parties commits a Breach of Contract, another party shall additionally treat the Contract as void or cancel. Once the Contract is cancelled, the affected party is mechanically discharged from all the commitments beneath the Contract. Section 64 of the Act provides that the party cancel the Contract if he has received any profit under it from the

opposite party; restore such profit to the person from whom it had been received. Further, the one that truly cancels the Contract is entitled to compensation for any loss that he faced from the non-fulfilment of the Contract.

2. Damages for the Loss Suffered

The term “Damages” means that financial compensation collectable by the defaulting party to the affected party for the loss suffered by him once the Contract was broken. Therefore, the aggrieved party could bring associate action for damages against the party who are guilty of the Breach of Contract. The party is guilty of the Breach and is vulnerable to pay damages to the aggrieved party.

Types of Damages

A. Normal Damages or General Damages

Damages that arise within the normal course of events from the Breach of Contract are referred to as normal damages.

B. Special Damages

Special damages are those damages that are collectable for the loss arising on account of some special or uncommon circumstances. That is, they undue the natural and probable consequences of the Breach of the Contract.

C. Exemplary or Vindictive Damages

These damages are awarded against the party who has committed a Breach of the Contract with the thing of gruelling the fallible as a defaulting party and to compensate the aggrieved party. Generally, these damages are awarded just in case of action on loss

D. Nominal Damages

These damages are in little quantity. They're awarded merely to acknowledge the correctness of the party to say damages for the Breach of the Contract. Sometimes, the damages aren't associated with an adequate remedy for Breach of the Contract. In such cases, the Court could, at the suit of the party not in Breach, direct the party in Breach to hold out his promise as per the terms of the Contract. This can be referred to as the precise performance of the Contract.

3. Sue for Specific Performance

This means the party in breach will actually have to carry out his duties according to the contract. In certain cases, the courts may insist that the party carry out the agreement.

So if any of the parties fails to perform the contract, the court may order them to do so. This is a decree of specific performance and is granted instead of damages.

In certain cases, the court cannot order specific performance. Such cases are,

- i. when monetary compensation is a sufficient redressal.
- ii. where the court cannot oversee the performance or execution of the contract
- iii. when the contract entered into is of personal services
- iv. one of the parties of a contract is a minor

4. Injunction

An injunction is basically like a decree for specific performance but for a negative contract. An injunction is a court order restraining a person from doing a particular act.

So a court may grant an injunction to stop a party of a contract from doing something he promised not to do. In a prohibitory injunction, the court stops the commission of an act and in a mandatory injunction, it will stop the continuance of an act that is unlawful.

5. Quantum Meruit

Quantum meruit literally translates to "as much is earned". At times when one party of the contract is prevented from finishing his performance of the contract by the other party, he can claim quantum meruit.

So he must be paid a reasonable remuneration for the part of the contract he has already performed. This could be the remuneration of the services he has provided or the value of the work he has already done.