

1(E) Free Consent

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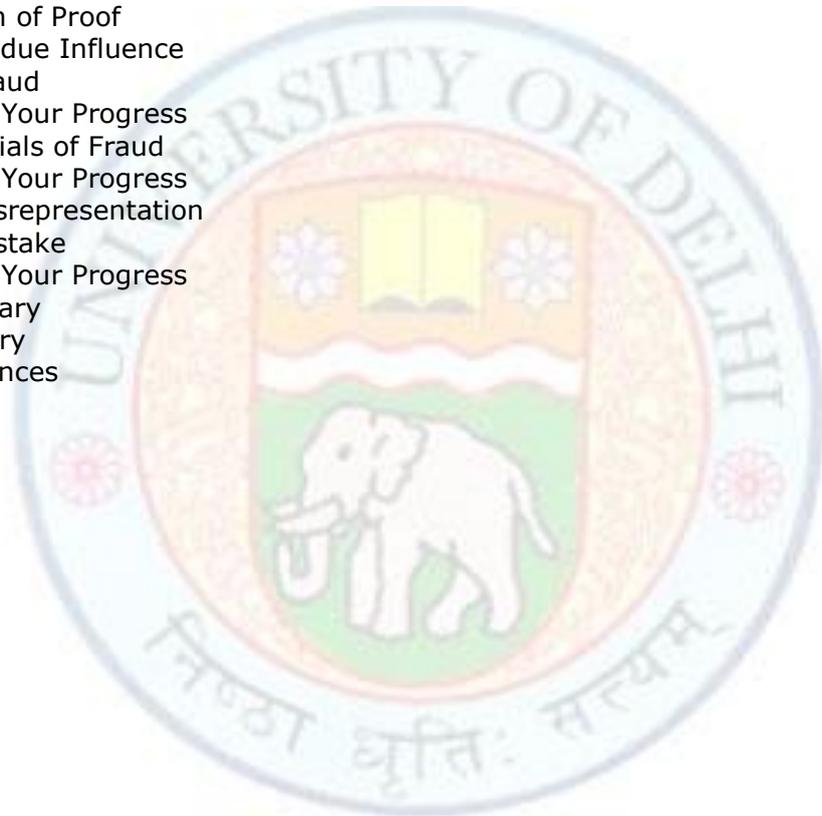
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5.1 Meaning of Consent and Free Consent

Free Consent is one of the essential elements of a valid contract. The essence of this requirement is that a person should enter into an agreement with a free as well as an open mind and without any fear. If any one has not allowed the other party the freedom of expression, the agreement will not be fair. No person under law is compelled to enter into a contract and be bound by any obligations pertaining to it without his / her free consent.



Figure5.1 Free Consent

Consent When two or more persons agree upon something it is said that there is a consensus between them. According to section 13 of the Indian Contract Act this means “that the people agree on the same thing and in the same sense”. It also means that there is consent on the acceptance of an offer. ***When there is no consent, there cannot be a contract.***

Illustration

Braj has two televisions. One is of L.G. make and the other is of Sony make. His friend Ashu offers to buy the L.G. product. Braj thinks he is selling the Sony television. This agreement is void ab initio because there is no consent since both of them have not understood the same thing in the same way. There is no agreement of minds.

Free Consent

Section 10 of the Indian Contract Act states “that a valid contract should have the free consent of both the parties entering into the contract”. This means that in a contract not only should there be consent but it should also be free consent.

“All agreements are contracts if they are made by the free consent of the parties.”

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Figure 5.2 Free Consent Free consent according to section 14 is when a contract is made without coercion, fraud, undue influence, misrepresentation or mistake. Therefore, if a contract is influenced by any of these elements there cannot be free consent. Salmond has described this as an error in consensus. An agreement, which is made by coercion, fraud, undue influence and misrepresentation, is voidable at the option of that party whose consent was not free (Section 19).

Free Consent

04:48:06 

Under..... Section of Indian contract act free consent is defined as a contract is made without coercion, fraud, undue influence, misrepresentation or mistake.

A B C D E F G H I J K L M N O P Q R S T
U V W X Y Z 0 1 2 3 4 5 6 7 8 9

Select the letter and number to answer the question. Alternatively, you can also type the answer in the given box and click the Guess the Answer button.

5.1 Meaning of Consent and Free Consent

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If there is a mistake in an agreement it becomes a void contract. It is not enforceable by law. The reason for this is that a mistake means that there is no consensus between the parties entering into a contract.

When consent is not free it is called error in causa. This makes the contract voidable at the option of that person whose consent in the contract is not free. However, the contract continues to be a valid contract until it is repudiated by the person whose consent is not free.

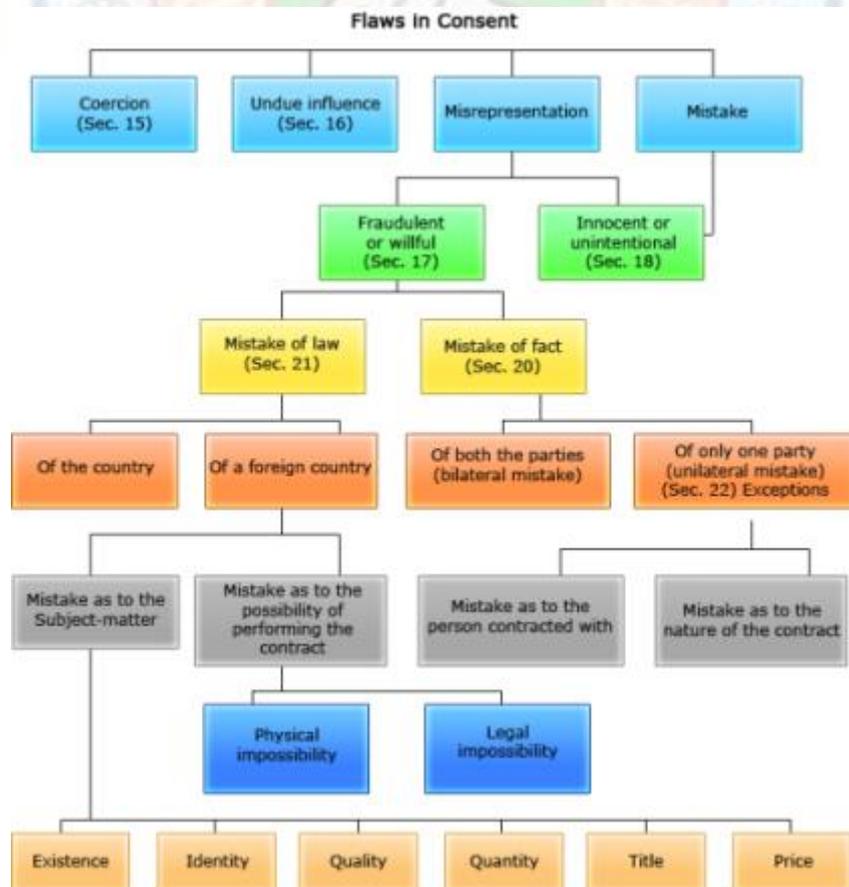
Error in consensus and error in causa can exist together in a contract because the contract can have both the properties of mistake and fraud present in the agreement.

Illustration

Anita had to sign her property papers in favour of her children because of their undue influence on her. They threatened her that they would put her in a lunatic asylum if she did not agree. In this case the consent is not free. The contract is voidable if she repudiates it. Until then it is a valid contract.

Illustration

Jeetendra was suffering from severe pain in his stomach. His family doctor Dr Geetha diagnosed this as due to stones in his gall bladder. She advised Jeetendra to go for an operation. Jeetendra happily gave his consent to get himself operated. This is a case of free consent without undue influence.



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Coercion

According to section 15, coercion means "the use of force to make another person agree to the terms and conditions while entering into a contract". A contract is caused by coercion in the following cases:

1. When any act is done that is forbidden by Indian Penal Code.
2. When there is a threat to commit an act forbidden by Indian Penal Code
3. When property is unlawfully detained by using force or physical pressure on another person.
4. When another person is threatened for detaining the property

Illustration

The gangster made the property owner sign the papers for his ownership at pistol point. This is coercion it is forbidden by Indian Penal Code. The contract is voidable at the option of the property dealer as force was used for obtaining property.

Who exercises coercion and against whom?

Coercion can proceed from any person. It can be directed against another person including a stranger.

Illustration

Manju threatens to kill Munna, who is Rani's son, if Rani does not give the entire property to her. The consent given by Rani is due to coercion by Manju. The coercion is directed against Munna who is a stranger to the contract.

What would be the effect of a threat to file a suit?

The India Penal Code forbids any threat to file a suit against any person under false charges as this amount to coercion.

When a person threatens that he will file a civil / criminal suit it cannot be called coercion. However, if the suit is to be filed on a false charge it will be an act of coercion.



Figure5.3 Threat to File a Suit

Illustration

Hina threatened Beena that she would file a suit against her for not making a payment of Rs. 10,00,000 if she does not give her the rights of her building where she wanted to open an office. As this was a false charge, it was an act of coercion on a false charge and hence it is caused by coercion.

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What would be the effect of a threat to commit suicide?

According to the Indian Penal Code **suicide** and **threat to commit suicide** are not punishable, but if an attempt is made to commit suicide it will become punishable

Case Law 1

In Chikham Ammiraju v Seshamma 1917 41 Madras 33

A man threatened that he would commit suicide if his wife and son did not make a property deed in favour of his brother. The court held that a threat to commit suicide was not punishable under the Indian Penal Code, though it was deemed to be forbidden by it. This threat was considered to be coercion and so it was a voidable contract at the option of the aggrieved party.

Illustration

Reema threatens her sister Leena that she would commit suicide if she was not given her mother's jewels. Leena gives her the entire collection. Is Reema's act punishable? Although threatening to commit suicide is not punishable, it is deemed to be punishable as it amounts to coercion. The contract is voidable at the option of Leena.

5.2 Duress

In English Law, Duress is used to mean the same thing as coercion. Duress has a limited scope. It includes within its purview the threat to cause or the act of causing bodily injury or imprisonment. It extends to the life of the other party or to the family members of the parties or their agents to the contract. It does not extend to threats to detain or destroy property.



Figure 5.4 Imprisonment

Duress v Coercion

Duress is the word used by English law for coercion but the two terms have different meanings.

1. Duress can be used only by a person who is party to a contract. His agents can also be part of duress.

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2. Duress does not have within its purview the detaining of property or any threat to detain property.
3. Coercion is a comprehensive term. It includes unlawful detention of goods as well as physical violence and imprisonment. Duress on the other hand includes only physical violence and imprisonment, it does not include unlawful detention of goods within its scope.

However, in India Economic Duress arises in cases where a person is forced to render labour or service to another due to compulsion arising from hunger or poverty.

Burden of Proof

The aggrieved party has to prove that the consent to the contract was obtained by coercion and he / she would not be part of the contract if coercion was not applied on them.

Case Law 2

**In Kishan Lal Kalra v NDMC
A.I.R. 2001 Delhi 402, 407**

The Court ruled that as the plaintiff had been dispossessed of the premises where he had been running an open air restaurant in a central place in Delhi by threats of arrest and detention under MISA, the act of the NDMC amounted to coercion.

Effects of Coercion

Section 19 and 72 of the Indian Contract Act, deal with the effects of coercion. According to Section 19 'when consent to an agreement is caused by coercion the agreement is a contract voidable at the option of the party whose consent was so caused'.

However, the burden of giving a proof of consent obtained by coercion is on the aggrieved party. Section 72 specifically states that if money has been paid or any item has been delivered because of coercion, it has to be repaid to the aggrieved party whose consent was obtained by coercion, but the party must restore any benefit received by it.

Illustration

Summy gave Rs. 1,00,000 to Teena under a threat of murder. If Summy sues her in the court Teena has to repay the amount to Summy.

The effects of coercion can be summarized as follows:

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- The aggrieved party can rescind the contract as it is voidable at his / her option. (Section 19)
- The aggrieved party should be restored the benefits by the person who had used coercion.(Section 64)
- If money has been paid on account of coercion the aggrieved party should be returned the money by the person who had used coercion for taking it.
- The aggrieved party has to prove that coercion had been exercised and the consent was not freely made by him / her.

5.3 Undue Influence

Undue influence means using superior power for obtaining the consent of the person who is weak in position and physical ability.

Section 16 (1) of the Contract Act defines undue influence as



Figure 5.5 Undue Influence

- The relation between parties where one of the parties is in a dominating position over the will of the others.
- Using the dominating position to take an unfair advantage over the other ¹⁴.

Section 16 (2) of the Contract Act defines the position to dominate the will of the other in the following manner.

Real or apparent authority: Where a person holds some real or apparent authority over the other. This means that he / she is in a position where he / she has the power to dominate over the will of another person.

Example:

- 1 Relationship of Employer and Employee
- 2 Relationship of Officer and Peon.

Fiduciary Relationship: Where a person is in a fiduciary relation to another. This means that there is a relationship of mutual trust and confidence amongst the people making the agreement.

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Example:

- (1) Relationship of doctor with his patient.
- (2) Relationship of mother and daughter.
- (3) Relationship of father and son.
- (4) Relationship of trustee and beneficiary.



Figure5.6 Fiduciary Relationship

Agreement with someone with mental incapacity: Where a person makes a contract with another, whose mental capacity is affected because of his age, illness, mental or physical distress temporarily or permanently.



Figure5.7 Old & Young

Example:

- Relationship of normal person with a person temporarily in depression.
- Relationship of a young man with an old and sick person who suffers from dementia.

From the above it can be summarized that undue influence can be exerted in the following cases:

- Where one party is in a position to dominate the will of another person.
- Where the dominating party is able to have an unfair advantage over another person.
- Where the dominating party uses his position to get an unfair advantage in the contract.

Illustration

- Mr. Balram used his parental influence by making his son a party to the dowry taken by him at his wedding from the son's father-in-law. This is a case of undue influence exerted by a father because of his fiduciary relationship with his son.
- Mr. Shammi an old man is influenced by his son Pummy to sign his property

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papers in his name or else he would stop paying the medical bills of his father. This is a case of undue influence of a normal person in a dominating position over an old sick man.

The relationships in which undue influence can be exerted over another are the following.

- Teacher and student.
- Employer and employee.
- Doctor and patient.
- Mother and daughter.
- Father and son.
- Guardian and ward.
- Trustee and beneficiary.
- Solicitor and his client.

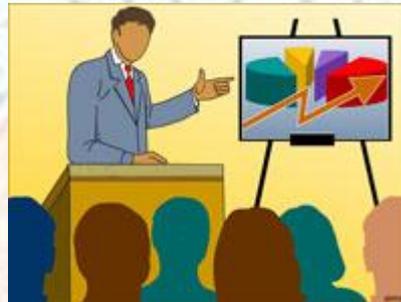


Figure 5.8 Relationship

According to law in the following cases there is no presumption of undue influence. Therefore if someone has exerted undue influence it will have to be proved.

- Creditor and debtor.
- Landlord and Tenant.
- Husband and wife (when wife is not parda-nashin).

Presumptions of Undue Influence 16 (3)

In some cases it is presumed that there is undue influence. These are discussed below:

1. Unconscionable transactions: When it can be proved that the dominating party entered into an unfair contract with a weaker party, it is assumed by law that undue influence has been used to enter into a contract. Unfair transactions between superior and weaker party are called unconscionable transactions. An example of such contracts is when a person makes an unusually high profit and the other party suffers because of the contract. In such cases, when on the face of it the agreement appears unconscionable, it has to be proved that consent was taken by fair means by the superior party.

2. Contracts with Parda-Nashin Women: Women who wear a burkha or cover themselves and are in complete seclusion from the rest of the world are a separate category in the eyes of the law. If a contract is made with a parda-nashin women, it is presumed that undue influence is used. The court grants relief to any unreasonable demands of the party using undue influence through its discretionary powers.

3. Money Lending Transactions: Unfair agreements are often made in money

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lending transactions. Sometimes undue advantages are taken from people who have taken loans. A high rate of interest charged shows unfair transaction. Also, when a money lender executes a property in his favour when the borrower cannot repay is also or transaction of undue influence.

In all the above cases the court presumes that undue influence has been used and using its discretionary powers it can grant relief to the weaker parties.

Effects of Undue Influence

Under Section 19A, if a person has given his consent due to undue influence exerted by another person the contract is voidable at the option of that party who had to give consent under undue influence. Further, the court may also take the decision that a refund has to be made to a person who is the aggrieved party. The court may also take a decision to allow the aggrieved party to rescind a part of the contract or the whole contract as the case may be.



Figure 5.9 Undue Influence

Burden of proof

The burden of proof of undue influence will be on the person who is aggrieved and wants relief from the court. The court also states that there is a difference between persuasion and undue influence. A person can be persuaded to do a certain act but this does not necessarily mean that undue influence has been used. Therefore, the aggrieved party will have to prove that the superior party was able to influence him due to his position to dominate his will.

Rebuttal of Presumption

When the weaker party makes a plea in the court that it did not use undue influence it has to prove the following.

- That full disclosure was made to the weaker party before getting consent and entering into a contract.
- That the price paid in the contract was in accordance with the requirement and was adequate.
- That the weaker party took advice from a competent person before finalizing the contract with the so called superior party

Table 5.3.1 Comparison between Coercion and Undue Influence

Particulars	Coercion	Undue Influence
1. Relationship of parties	Relationship of parties making the contract may or may not be	Relationship of parties to the contract must exist.

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	there.	
2. Type of force	Consent is taken through physical or violent threat.	Consent is taken through mental or moral pressure.
3. Position of stranger to the contract	The contract can be exercised by a stranger to the contract.	Only a party to the contract can exercise it and not a stranger to the contract.
4. Liability	The party using coercion commits a crime that is punishable and the contract can be rescinded as it is a voidable contract.	There is no criminal liability of people involved in the contract.
5. Burden of proof	The party withdrawing the contract has to prove that coercion has been exercised.	It is assumed by law that undue influence has been exercised due to superior relationship.
6. Effect of contract	The contract is voidable but the benefits have to be restore under Section 64s.	The contract can be set aside by the weaker party.

5.4 Fraud

Fraud is false representation of facts made willfully to deceive another person.

Definition of Fraud

Section 17 of the Indian Contract Act states that "if any of the following acts are committed by any party to a contract or with his agent's connivance, willfully with intent to deceive or induce another person or his agent to enter into the contract it will result in fraud".



Figure5.10 Fraud

1. It is a suggestion of a fact which is not true by a person who does not believe that it is true.
2. It is an active concealment of facts by a person who has knowledge or belief of the facts.
3. It is a promise in which there is no intention of performance of the contract.
4. Any other action which has the intent of deceiving the other person.

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5. Any act or omission which is declared fraudulent by law.

Case Law 3

Shireen v John
AIR (1952) Punj227

In this case a man and woman got married. The man had no intention to continue with the marriage and hence he obtained consent from his wife by fraud.

Essentials of Fraud

The above description of definition of fraud can be explained through the essentials of fraud.

1. False Suggestions: Fraud must state facts which are false and the person making the suggestion knows that he is making a false representation or false statement of facts. The false suggestion is made intentionally to induce or deceive the other party to enter into a contract. This is supported by the following case law:



Figure5.11 False Suggestions

Case Law 4

In Peek v Gurney
1873

The prospectus of the company did not disclose the existence of liabilities. This showed the company as a prosperous one. The court held that non disclosure of facts amounted to fraud. Any person purchasing shares on the basis of the prospectus could avoid the contract.

2. Active Concealment of a Fact: Active concealment occurs when a person has the knowledge or belief of a fact and he / she hides it from others. Such cocealmnt amounts to fraud. Passive concealment is when a person makes an incorrect statement thinking that the statement is correct.

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Figure5.12 Active Concealment

Illustration

Mr. Bahri sells his old television to his friend for Rs. 5,000. He conceals the fact that the television is not completely in working order. His friend inspects it and pays for it and takes it home. When he wants to see a program after 15 minutes the color begins to fade away.

This amounts to fraud as Mr. Bahri knew that the television was not in working order and he did not let his friend know the defect that it only works effectively for a short while.

Case Law 5

B. R. Chaudhary v Indian Oil Corporation Ltd (2004) 2 Section 177

In this case the respondent Indian Oil Corporation terminated the contract of the dealership of the appellant on the ground of not furnishing his status of occupation in the relevant column of the application. The court held that it amounts to suppression of the material information, hence the recession of the contract is proper.

3. Making a Promise without Intention of fulfilling it: If a person makes a promise but he does not intend to keep it. It is a clear case of fraud because at the outset the intention was to make a false promise.



Figure5.13 Promise without Intention

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Illustration

Harish purchases perfumes of over Rs. 1,00,000 with a promise to pay within a week. He has no intention to make the payment. This contract is induced by fraud.

4. **Any other act fitted to deceive:** An act used to trick or cheat someone by unfair means is considered to be fraud. This is an act which is done with the intention of committing a fraud.

Case Law 6

Horsefall v Thomas

1862

In this case a person bought a cannon from another person who knew that the cannon was defective and in order to conceal the defect he had put a metal plug. When the purchaser used it, it burst. This was not a fraud because the purchaser was not deceived. He would have bought the product even without the defective plug.

5. Any other act considered by law to be fraudulent: According to the law it is obligatory that all material facts are disclosed while selling an immovable property. Otherwise it amounts to fraud.**6. The Party that is misled by fraud should have suffered some loss:** There cannot be fraud without any damage. The loss must be in terms of money or money's worth, or loss of some tangible assets. Fraud without damage does not give rise to any deceit.

Is Silence Fraud?

A Silence about facts which is intended to affect the willingness of a person to enter into a contract is not fraud except in some cases. As a general rule of law, both parties have the right to maximize their gains and the law does not expect anyone to voluntarily reveal the weak points to the other parties even if it causes some disadvantage to the party.

Situations where Silence Amounts to FraudIn the following cases, silence amounts to fraud:**Duty to Speak:** When it is a duty to speak and the person is silent, silence will be fraudulent. The duty to speak arises when a person in the contract has trust and confidence and is in a fiduciary relationship with another person in the contract. For example father and son, teacher and student. The duty to speak also arises when one party depends on the other to discover the truth in utmost good faith. For example, insurance is a contract in which the insurer requires full knowledge before he can make a contract. The duty to speak arises in the following situations:

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Figure 5.14 Contracts of Insurance Contracts relating to family settlements.

Contracts of insurance.
Allotment of shares of a company.
Contracts of guarantee.
Contracts of partnership
Contracts of fiduciary relationships.
Contracts for sale of immovable property and,
Contracts of marriage. **Silence is Equivalent to Speech:** In some situations silence is considered to be equivalent to speech.

Illustration

If Sunita says to Rekha, "if you do not speak I will assume that the car you are selling is in good order". Rekha remains silent. Here Rekha's silence is equivalent to speech.

Half Truths: When a person speaks a half truth, it means disclosing some portions of relevant material leaving the other portion undisclosed. According to law a half truth is worse than full falsehood as it misleads the other person. Therefore if a person speaks he must give all the facts and not just half truth. Otherwise silence amounts to fraud.

Change in Situation: Sometimes when a statement is made it is the truth but circumstances bring a change in the situation and when it is actually acted upon, it becomes false. It becomes the duty of the person to immediately communicate the change in situation. This is supported by the following case.

Case Law 7

Rajgopala Iyer V The South Indian Rubber Works

1862

In this case the prospectus of the company gave the names of the directors. This was a true list but after allotment due to certain changes the directors changed because of retirement. This should have been communicated to the applicants of the shares. Since these changes were not communicated to share applicants, they could avoid the allotment

Remedies of Fraud

According to Section 19, when consent is taken by fraud from another person he has the following remedies available to him.

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- The party whose consent was received by fraud has the right to avoid the contract because it is voidable at the option of the person defrauded. **Rescinding the Contract:**
- The person defrauded can ask for completion of the contract but with restitution which means that he would like to be put in that position in which he would actually be in if the representations were true. **Performance of Contract:**
- The defrauded party has the right to demand compensation for the loss that is caused to him by fraud. He has the right to claim damages even if he opts to continue with the contract. **Compensation:**

Limits to Rescinding of a Contract

In the following cases a person does not have a right to rescind the contract.

1. **Affirmation:** When a person has a right to rescind but he / she affirms the contract either expressly or in an implied manner. The right to rescind is lost.
2. **Lapse of Time:** The right to rescind a contract can be claimed within a reasonable period of time after fraud has been discovered. Reasonable time is determined according to the situation of the contract.
3. **Rights of Third Party:** When the rights of third party have been acquired with due consideration and in good faith without any knowledge of the fraud between the other two parties the defrauded party loses the right to rescind the contract.

Restitution

Section 64 of the Contract Act, states that the defrauded party which rescinds the contract has to return the benefits from wherever he has received it.

5.5 Misrepresentation

Misrepresentation is a false or misleading statement that a person honestly believes to be true. He makes this statement without any intention to cheat or mislead another person. The false statement is serious but not as serious as fraud.



Figure 5.16 Misrepresentation

According to Section 18 of the Contract Act the meaning of misrepresentation "is as follows:

1. It is a positive assertion of information by a person which is not true but the person believes it to be true.

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2. It is a breach of duty without any intention to deceive. However, the person gains an advantage by misleading another person.
3. The statement innocently causes a party to an agreement to make a mistake to the subject of the agreement”.

Misrepresentation occurs in the following cases:

- 1. Unwarranted Statements:** When a party makes a positive assertion that the information on the basis of which he is making a statement is trustworthy he means that he is making a warranted statement. Unwarranted statement means information from an untrustworthy source. Therefore, when a person believes that the information is true but it is incorrect, it is misrepresentation. This is supported by the case

Case Law 8

In Oceanic Steam Navigation Company V Soonderdas (1980) 14 ILR Bomb 241

The plaintiff from whom a person chartered a ship stated that the ship was of 2800 tonnage register. However, the ship was of 3000 tonnage register. The plaintiff did not have any basis to believe the fact stated by. The contract was cancelled due to misrepresentation.

- 2. Breach of Duty:** When a party does not intend to cheat another person but the circumstances show that he has not done his duty correctly because of nondisclosure of essential information. He has used the situation to his advantage thus bringing himself certain benefits. This type of situation is called constructive fraud. The party making such statements will be guilty of misrepresentation. This is supported by the following case.

Case Law 9

Bannerman v White 1861

The plaintiff wanted to sell the defendant hops on the understanding that sulphur was not used in their growth. The defendant was clear that he was not interested in sulfa usage in the cultivation of Hops. Sulfa had been used in 5 out of 300 acres, but the plaintiff had forgotten this fact. The court held that the contract could be avoided on the ground of misrepresentation although representation was no

- 3. Innocent Mistake:** If one party leads the other to make a mistake regarding the quality or subject matter of the good it is a case of misrepresentation. This clause includes cases where vital facts are suppressed and a mistake has been made.

Essentials of Misrepresentation

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Misrepresentation as already stated is a false representation of facts which the person makes without knowing that it is false. He makes the statements believing them to be true. The following essentials elements represent misrepresentation.



Figure5.17 Misrepresentation

1. **Material Facts:** Misrepresentation must be of those facts which are important in the formation of a contract. Some expressions or passing statements that are not relevant will not be enough for avoiding a contract.
2. **Statement prior to executing the contract:** The misrepresentation of facts must have occurred before the contract is executed by the parties to the contract.
3. **Misrepresentation by a party to the contract:** The misrepresentation of facts has to be made by a party or his agent to the contract. A statement made by a stranger to the contract does not have any effect on the validity of the contract.
4. **Objective of misrepresentation:** The statements made by misrepresentation of facts should be of the intention to deceive the other party and to induce him to enter the contract.
5. **Reaction of other party:** As a result of the misrepresentation the other party in the contract should have acted on the faith of the facts represented.

Effect of Misrepresentation

According to Section 19 of the Indian Contract Act if on the misrepresentation of statements a person to the contract has been affected, he can avoid the contract because it becomes a voidable contract at his option.



Figure5.18 Time Period

- A person whose consent has been taken by misrepresentation has the right to rescind to the contract.
- He has a right to ask for completion of the performance of the contract and
- He can also ask for being given the position which he would have if the representation of facts was true at the time of asking for performance of the contract.

The right to rescind the contract is in the following three cases.

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1. **Time Period:** The contract has to be rescinded within a reasonable time otherwise the right to rescind the contract will be lost.
2. **Affirmation:** The aggrieved party should not make an affirmation to the contract otherwise he will lose the right to rescind.
3. **Third Party Rights:** The aggrieved party should be careful to find out that third party rights are not acquired while he asks for rescission of the contract.

Exceptions to the Right to Rescind the Contract

In the following cases the party whose consent was received by misrepresentation cannot get the relief of rescinding the contract.



Figure5.19 Exceptions to the Right to Rescind

1. Where the affected person had the possibility of finding out the truth with ordinary diligence.
2. Where the affected party is ignorant that he gave his consent due to misrepresentation of facts.
3. Where the affected party becomes aware of misrepresentation but still decides to receive the benefits under the contract.
4. Where a third party innocently enters into benefits of the contract before the contract was rescinded.
5. Where it is difficult to restore the rights of the affected party to the original position.

Difference between Fraud and Misrepresentation

Particulars	Fraud	Misrepresentation
Intention	The Intention of the person misrepresenting facts is to deceive the other person to the contract.	The intention of the person is not to deceive. He honestly believes in the statement. He innocently deceives the other party.
Damages	The aggrieved party can get damages for the losses on account of fraud	The aggrieved party cannot claim damages due to misrepresentation of facts
Consequences	The aggrieved party has the right of rescinding the contract except when silence creates fraud.	The contract cannot be avoided if the aggrieved party has the means to find the truth in normal circumstances.



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5.6 Mistake

Mistake can be defined as an incorrect statement which creates misunderstanding between the parties. Such mistakes take place when the parties to the contract are not aware of the terms of the contract in agreement with each other. An agreement between two parties according to the Indian Contract Act is valid only when both the parties agree upon the same thing and in the same sense. According to section 20 the agreement becomes void when there is a mistake in agreement.



Figure5.20 Unawareness of the Terms

In normal circumstances law does not give the right to anyone to avoid a contract because he was mistaken about some fact in the contract. However, some mistakes are fundamental to the contract in such a manner that the very basis of the formation of the contract becomes faulty and there is no contract at all. In such cases the agreement is considered to be void due to consensus ad idem.

Types of Mistake

Mistake can be of two types. These are mistake of facts and mistake of law. (1) mistake of fact can be bilateral or unilateral and (2) mistake of law can be mistake of law in India and mistake as to foreign law.

1. Mistake of Fact

A mistake of fact can occur when both the parties to the agreement are under a mistake or only one of the parties is under a mistake to the essential elements of the contract. When both parties are under a mistake it is called bilateral mistake and when only one party to the contract is under a mistake it is called a unilateral mistake.



Figure5.21 Mistake of Fact

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- A bilateral mistake is made in the following cases: **Bilateral Mistake:**
 1. **Mistake of existence of subject matter:** The agreement is void if it is agreed upon a subject matter which does not exist and the parties to the agreement do not have any knowledge about it. This is a bilateral mistake because both parties did not know this material fact at the time of making the agreement.
 2. **Mistake of identity of subject matter:** The agreement is void if two parties to the contract have confusion about the identity of the subject matter. The agreement is void due to want of consensus.
 3. **Mistake regarding quality / description of subject matter:** When two parties make an agreement they should understand the quality of the product. If both parties make a mutual mistake about the description of the product, it is bilateral mistake and the agreement is void.
 4. **Mistake regarding title of the product:** An agreement of sale is void if there is a mistake or mistake over the entitlement of goods.

Case Law 10

Cooper v Phibbs (1867) LR2HL149

A person believed that her father had give her rights of a fishery. Her cousin brother also believed in her rights of title and agreed to take the fishery on lease. However, the actual title of the fishery was the cousin brother's. Due to the mistaken title the agreement was void.

1. **Mistake regarding substance of subject matter:** If both parties to an agreement make a mutual mistake of facts which is an essential part of the subject matter the agreement is void.

Case Law 11

Sheikh Bros v Ochener (1957) AC136

A person granted a license to process and manufacture sisal in a forest to another person. That person was to give in return 50 tons of sisal fiber every month. However, when manufacturing began, the growth of sisal was not productive. The person went to court. It was decided that both the parties were mistaken about a substantive part of the subject matter so the agreement was void.

1. **Mistake regarding quantity of subject matter:** If two parties are mistaken about the quantity of subject matter to be supplied, then the agreement is void. Quantity is an essential fact of an agreement; if it is not correct the agreement to buy / sell can not be held.

Case Law 12

Henkel v Pepe (1870) 6Ex7

A person enquired from another the price of 50 rifles. He sent a telegram to send 3 rifles. The telegraph office sent the message as 'send the rifles'. The party dispatched 50

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rifles. The contract is void as the quantity was incorrect.

1. **Mistake regarding price of the subject matter:** Price is an essential feature in the sale of a product. If there is a genuine mistake regarding price the agreement is void.
2. **Mistake about possibility of performance:** If there is a bilateral mistake regarding the possibility of performance the agreement is void. Impossibility of performance can be due to physical reasons or legal impossibility.

Case Law 13

Griffuth v Brymer (1903) 19TLR434

A person hired a room to watch the procession of King Edward VII at the time of his coronation. However, the procession had been cancelled. Both the parties did not have this information. Their agreement is void.

Effect of Bilateral Mistake: When there is a bilateral mistake in understanding the essential facts of the agreement, the contract becomes **void ab initio**. This agreement is void from the beginning and does not have any legal significance. It cannot be enforced at the option of any of the parties to the contract.



Figure 5.23 Bilateral Mistake

- **Unilateral Mistake:** According to section 22, a unilateral mistake occurs when one party to the agreement makes a mistake. The contract is not voidable because one of the parties to it is under a mistake. However, there are certain exceptions to the rule. These are due to the following reasons:
- **Mistake of identity of a party:** A very fundamental mistake occurs if an agreement is made with a wrong person. When a party desires to deal with a certain person and he does not do so due to false representation of another person it is an error in consensus.
- **Mistake about the nature of transaction:** If a person makes a transaction without understanding the nature of the transaction, it cannot be executed. This mistake is possible when a person does not disclose to the other the true nature of the document and induces the other person to sign the document which is not correct. The agreement is null and void. Case law to support this

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Case Law 14

Raja Singh v Chaichoo Singh (AIR 1940) PAT201

A person appointed another to look after his farm cultivation and other affairs because he had become old. Later, he gave the land on lease to the same person. Although he thought that he was signing a lease deed the other person fraudulently made him sign a gift deed. This is a void agreement.

Effect of Unilateral Mistake: In the case of a unilateral mistake the contract becomes void. Under Section 65 a person who has received benefits of the contract has to restore it by compensating the person from whom the advantages was received. If a person has received money or if any item has been delivered by mistake, then, according to Section 72, he has to repay or return it.

2. Mistake of Law

A mistake of law can be a mistake about of the law of the land or a mistake about foreign law.

- **Mistake of law of the land:** A person is bound to know the law of the country in which his making a contract. The contract is not voidable because people should know the law of their country.
- **Mistake of foreign law:** A mistake that occurs in foreign law is considered to be a mistake of fact and the contract is void because the logic is that one can make a mistake as he not expected to know the laws of a foreign country.

Consent and Free Consent

- When two people enter into a contract, they should agree upon the same thing in the same sense. This understanding by both parties is called consent.
- In addition to consent, both the parties entering into a contract should have made the agreement by free consent.
- A valid agreement according to Section 14 of the Indian Contract Act should have free consent. Consent is free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

Coercion

- Coercion is committing or threatening to commit any act forbidden by the Indian Penal code. It also includes unlawful detaining or threatening to detain any property with the intention of causing another person to enter into an agreement.
- When consent in an agreement is made due to coercion it is voidable at the option of the party whose consent was so derived but he must return any benefits received.

Undue Influence

- Undue influence is to obtain an unfair advantage over another person through a

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- dominating position. For Example, Master and servant, father and son.
- The contract is voidable but the aggrieved party has to prove that the consent was made by undue influence.

Fraud

- Fraud is willful misrepresentation of facts material for the formation of the contract
- Silence that is likely to affect the willingness of a person to a contract is not called fraud unless it is the duty of the person keeping silence to speak or unless silence itself is considered to be equivalent to speech.

Misrepresentation

- Misrepresentation is an untrue statement made by a party to a contract that induces another person to act upon the statement and enter into the contract.
- The contract is voidable at the option of the aggrieved party either for rescinding it or asking for its completion after restitution of his rights. In some exceptional cases there is a right to claim damages as well.

Mistake

- A mistake is not intentional. It is an error, believing something that creates a misunderstanding between people.
- Law does not give recourse to the parties because they make a mistake except in the case of fundamental mistakes material to the contract
- Mistake can be unilateral or bilateral. It can also be a mistake of fact or mistake of law.
- Bilateral mistakes can be about the existence, title, identity, quality, price or quantity of the subject matter.
- Unilateral mistakes can be due to the mistaken identity of parties and mistakes about the nature of the agreement.
- A contract made by mistake is void and the person receiving any advantage under it has to restore or compensate the person from whom the benefit was taken. If money has been taken it has to be returned.

References

Chadda P. R. & Bagrial A. K. (2007): *Business & Industrial Laws*, Second Edition, Chapter 5, Pragati Publications, New Delhi,

Kapoor N. D. (2004): *Business Law, Chapter 5. Pages 49-68, Sultan chand & Sons Publications*, New Delhi.

Prasad U & Indu (2006): *Systematic Approach to Business & Corporate Laws*, Chapter 1. Bharat Law House Publishers, New Delhi.

Websites

<http://www.blurtit.com/q684580.html>

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http://en.wikipedia.org/wiki/Undue_influence

