PERFORMANCE OF CONTRACT

1. INTRODUCTION

Definition

A contract is an agreement enforceable by law. It creates legal obligations.

→

A contract is settled when it is:

- Performed
- Dispensed with
- Remitted
- Accepted instead of it

→

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.

2. OFFER TO PERFORM-TENDER

Definition

- “The offer to perform” the contract is called “tender”.
- Also known as ‘attempted performance’.
- Promisor is ready and willing, but the other party does not accept.

Sec. 38 Para 1

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 a contract.

(A) Requisites of a valid tender

Sec. 38 (Para : 2). Equivalent to actual performance. Excuses the promisor from further obligation.

1. It must be unconditional:

The tender must be in accordance with the terms of the contract. Accompanied by a condition prevents it being a perfect tender.

Case Example

A offers a lesser amount than what is due. Not a valid tender.

(A) Requisites of a valid tender

2. Tender must be at a proper time and place.

Gathered from the intention of the parties, circumstances, or custom (Secs. 46 to 50).

Case Example

Delivery of goods after working hours is not a valid tender.

3. Tender must be by a person ready, able and willing to perform.

Must give reasonable opportunity to ascertain ability.

Case Example

A offers by post to pay B. Not a valid tender. Actual production of money is necessary.

(A) Requisites of a valid tender

4. Tender must give reasonable opportunity for inspection.

Promisee must have the opportunity of seeing that the thing offered is the thing bound by promise.

5. Tender to one is tender to all.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

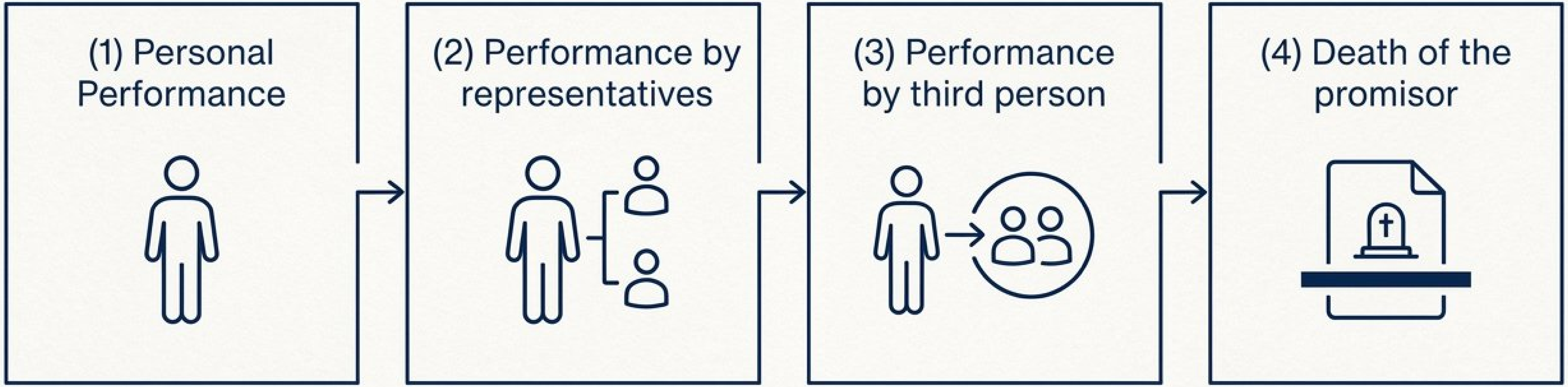
(B) Effect of refusal of party to perform promise wholly

Sec. 39

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 that contract unless he has signified by words or conduct his acquiescence in its continuance.

Case Example: A (singer) contracts with B (manager) to sing two nights a week. On the sixth night, A wilfuly absents herself. B is at liberty to put an end to the contract.

3. BY WHOM CONTRACTS MUST BE PERFORMED



(1) Personal Performance

Sec. 40, para 1

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

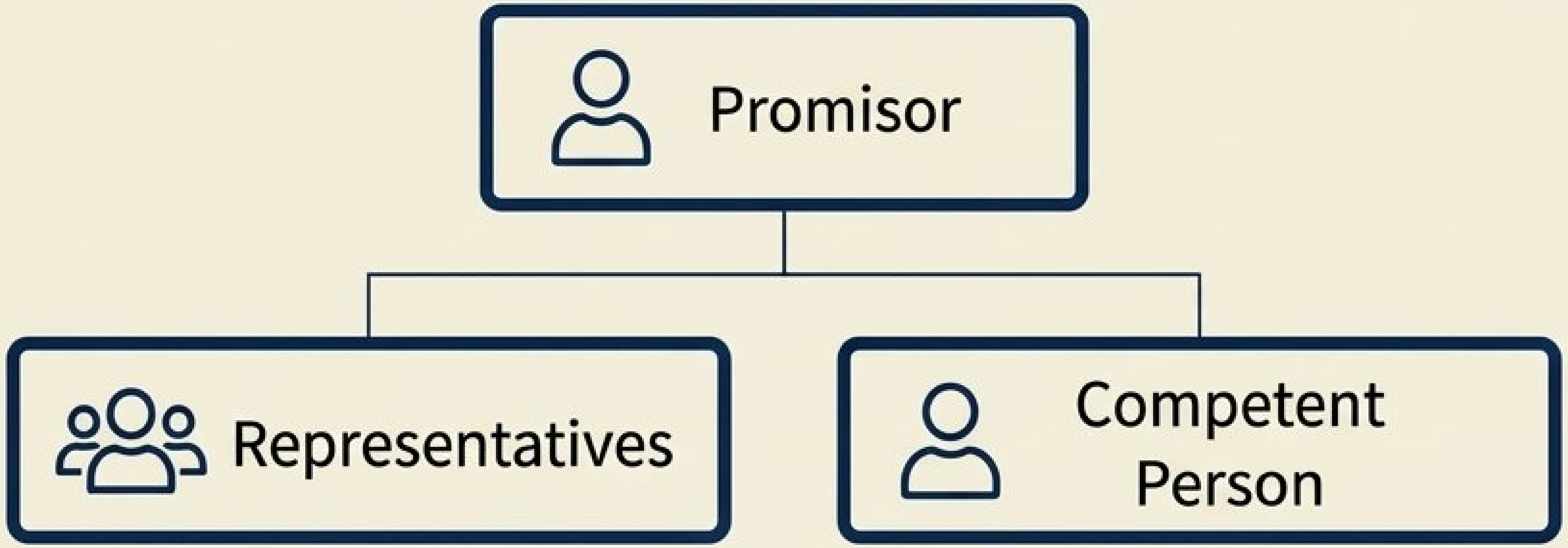
Exception: Involving personal skill / personality.

A agrees to paint a picture for B.
A must perform personally.

A agrees to sing at Town Hall.
A must perform personally.

(2) Performance by representatives

"In other cases, the promisor or his representatives may employ a competent person to perform it." (Sec. 40 para 2)



CASE EXAMPLE

A promises to pay B a sum of money. A or representatives may pay, or employ some person to do so.

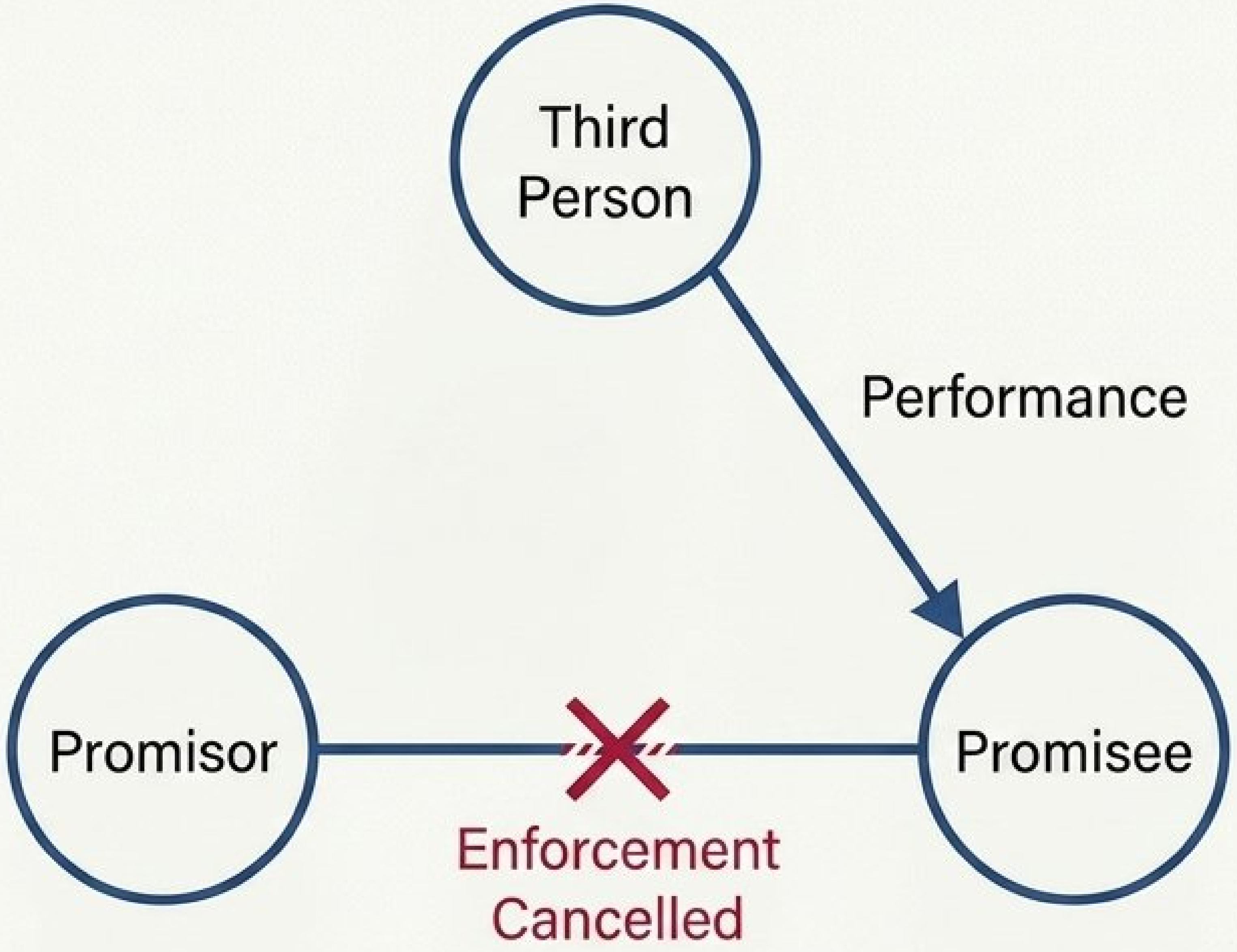
he who does anything through another is deemed to have done it himself

Quid facit per alium facit per se.

(3) Performance by third person

Sec. 41

When a promisee accepts a performance of the promise from a third person he cannot afterwards enforce it against the promisor



Actual performance is necessary before the section can be invoked.

(4) Death of the promisor

	Contracts involving personal skill	Other contracts
Effect	Implied condition that death dissolves the contract.	Not dissolved by death. Legal representatives bound to perform.
Liability / Maxim	'Actio personalis moritur cum persona'	Liable to the extent of assets inherited from the deceased.
Case Example	A promises to marry B. A dies. Contract comes to an end, cannot be enforced.	A promises to deliver goods for Rs. 1,000. A dies. A's representatives bound to deliver goods, B bound to pay Rs. 1,000.

Devolution of joint liabilities :

BASE RULE

"When two or more persons have made a joint promise, then..." (Sec. 42)

During Life

(1) unless a contrary intention appears by the contract,
(2) all such persons, during their joint lives and

Death of One

(3) after the death of any of them, his representative jointly with the survivor or survivors and

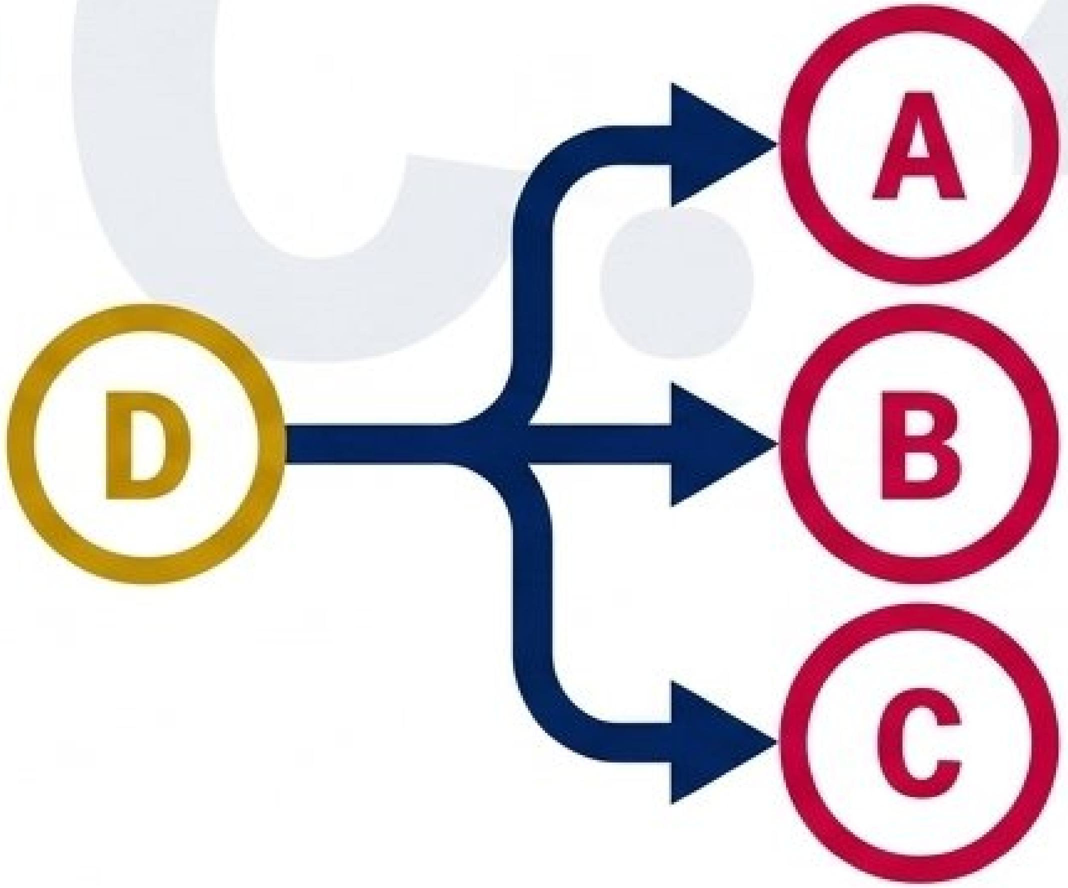
Death of All

(4) after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Any one of joint promisors may be compelled to perform :

"When two or more persons make a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise." (Sec. 43 : Para 1).

Agreement: A, B, and C jointly promise to pay D Rs. 3,000/-.



Result: D may compel either A or B or C to pay him Rs. 3,000/-.

Right of Contribution & Sharing of losses by default in contribution :

RULES

Each promisor may compel contribution

"Each of two or more promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, **unless** a contrary intention appears, from the contract." (Sec. 43 : Para 2).

Sharing of losses

"If any one of two or more joint promisors make default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal sums." (Sec. 43 : Para 3)

MATH BREAKDOWN

Example 1: A, B and C jointly promised to pay D Rs. 3,000/-. C is compelled to pay the whole. A is an is insolvent but his assets are sufficient to pay half of his debts.

→ C is entitled to receive Rs. 500/- from A's estate.

→ C is entitled to receive half of the balance Rs. 2,500 that is, Rs. 1250/- from B.

Example 2: A, B and C are under a joint promise to pay D Rs. 3,000/-. C is unable to pay anything and A is compelled to pay the whole.

→ A is entitled to receive Rs. 1,500/- from B.

Effect of release of one joint promisor : promisor :

"Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor or joint promisors." (Sec. 44)

Devolution of joint rights :

"When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with representatives of all jointly." (Sec. 45)

Agreement: **A** in consideration of Rs. 5,000 lent to him by **B** and **C**, promises **B** and **C** jointly to repay them that sum with interest on a day specified.

Event: **B** dies.

Result: The right to claim performance rests with **B's representatives jointly** with **C** during **C's life time** and after the death of **C** with the **representatives** of **B** and **C** jointly.

RECIPROCAL PROMISES : Definition

"Promises which form the consideration or part of the consideration for each other are called 'Reciprocal Promises'." (Sec. 2(f)

Promisor not bound to perform unless reciprocal promise is ready and willing to perform :

"When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise." (Sec. 51)

Contract: A and B contract that A shall deliver goods to B to be paid for by B on delivery.

Rule Applied: A need not deliver the goods unless B is ready and willing to pay on delivery.

Order of performance of reciprocal promises :

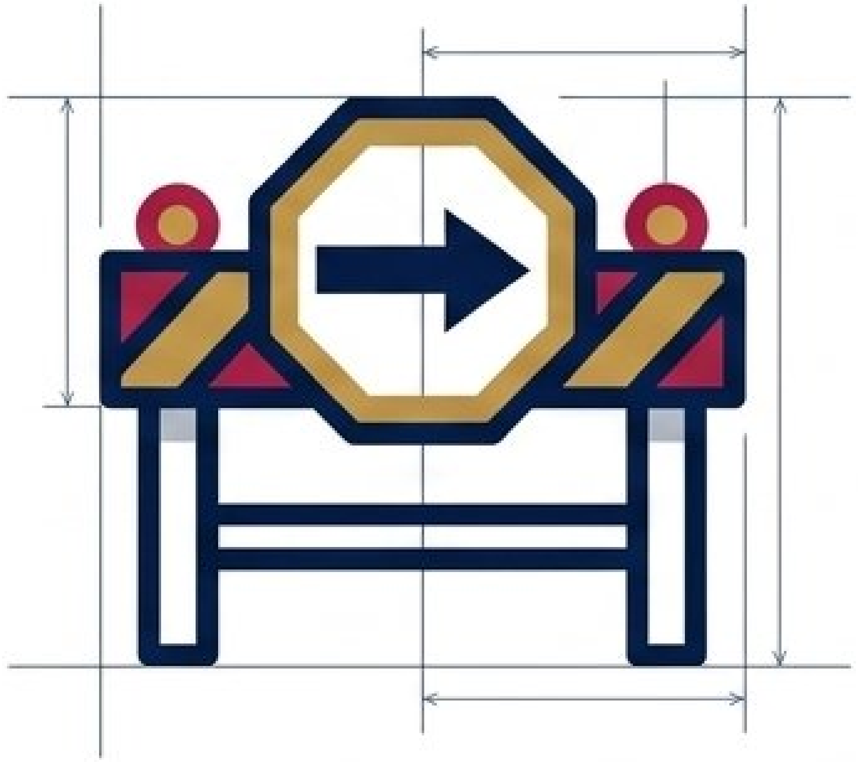
"Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires." (Sec. 52)

Contract: A and B (gold) contract that A shall build a house for B at a fixed price.

Rule Applied: A's promise to build the house must be performed before B's promise to pay it.

Liability of party preventing event on which the contract is to take effect :

"When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, **the contract becomes voidable at the option of the party so prevented**; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract." **(Sec. 53)**



Sec. 53

Contract:

A and B contract that B shall execute certain work for A for Rs. 1,000.

Event:

B is ready and willing to execute the work accordingly, but A prevents him from doing so.

Effect:

The contract is voidable at the option of B; and if B elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises :

"When a contract consists of reciprocal promises, such that one of them cannot be performed or that the performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract." (Sec. 54)

Contract: A hired B's ship to take in and convey, from Calcutta to Mauritius a cargo to be provided by A, B receiving a certain freight for its conveyance.

Default: A does not provide any cargo for the ship.

Effect: A cannot claim performance of B's promise, and must make compensation to B for the loss which B sustains by non-performance of the contract.

Reciprocal promise to do things legal, and also other things illegal :

"Where persons reciprocally promised, firstly, to do certain things which are legal and secondly, under specified circumstances, to do certain things which are illegal, the **first set of promises** is a contract but the second is a void agreement." (Sec. 57)

Premise:

A and **B** agree that **A** shall sell **B** a house for Rs. 10,000/- but that if **B** uses it as a gambling house he shall pay **A** Rs. 50,000/- for it.

Legal/Valid

The first set of reciprocal promises, viz. to sell the house and pay Rs. 10,000/- for it, is a contract.

Illegal/Void

The second set is for an unlawful object, viz. that **B** may use the house as a gambling house and is void agreement.

TIME AND PLACE OF PERFORMANCE & TIME IS THE ESSENCE OF A CONTRACT

Statutory Breakdown of Sections 46 to 50 & 55
of the Indian Contract Act

TIME AND PLACE OF PERFORMANCE

Time and place of performance of a contract ordinarily are matters to be determined by agreement between the parties themselves.

Determined by agreement.

In the absence of such an agreement between the parties the question is determined according to the provisions mentioned in Secs. 46 to 50 of the Indian Contract Act.

(1) Time for performance of promise where no application is to be made and no time is specified

Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time performance is specified, the the agreement must be performed within a reasonable time.

(Sec. 46)

The question 'what is reasonable time' is, in each particular case, a question of fact.

(Explanation to Sec. 46)

(2) Time and place for performance of promise where time is specified and no application to be made

> …the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.
>
> *(Sec. 47)*

Result: A has not performed his promise.

(3) Application for performance on certain day to be at proper time and place

Where a promise is to be performed on a certain day, and promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

(Sec. 48)

The question 'what is a proper time and place' is in each particular case, a question of fact.

(Explanation to Sec. 48)

(4) Place for performance of promise where no application is to be made and no place fixed for performance

When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place.

(Sec. 49)

(5) Performance in manner or at time prescribed or sanctioned by the promisee

The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions.

(Sec. 50)

1. B owes A Rs. 2,000/-.
2. A desires B to pay the amount to A's account with C, a Banker.
3. B who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C.
4. Afterwards, and before A knows of the transfer, C fails.

Result: There has been a good payment by B.

TIME IS THE ESSENCE OF A CONTRACT

The parties to a contract may stipulate that the contract is to be performed within a certain period or within a certain time.

If the party fails to perform his obligation on that day or within that stipulated time the question may arise :

Can the other party to the contract rescind the contract on that ground?

The answer to such a question will depend upon whether ‘the time was the essence of the contract’.

Whether time is of the essence of the contract or not depends upon :

(i)	The terms of the contract.
(ii)	The intention of the parties-which can be gathered from : (a) Surrounding circumstances (b) nature of the property (c) construction of the contract
(iii)	The object which the parties had in mind in entering it.

As a general rule

Immovable Property	Commercial Transaction
• In contract for sale of immovable property, time is NOT deemed to be the essence of the contract.	• In commercial transaction, the time of delivery of the goods IS of the essence of contract. • Especially in case of goods, subject to great fluctuations in price, the time of delivery is deemed to be the essence of the contract.

Effect of Failure : Rules :

Section 55 of the Act lays down certain rules to this effect as under :

(1) Effect of failure to perform at fixed time any contract in which time is essential.

Where a party to a contract promises to do a certain thing at or before a specified time, and fails to do any such thing at or before the specified time... if the intention of the parties was that time should be of the essence of the contract.

The contract, or so much of it as has not been performed, becomes voidable at the option of the promisee.

(Sec. 55, Para I).

(2) Effect of such failure when time is not essential :

If it was not the intention of the parties that time should be of the essence of the contract…

The contract **does not become voidable** by the failure to do such thing at or before the specified time; but the promisee is **entitled to compensation** from the promisor for any loss occasioned to him by such failure.

(Sec. 55, para II).

(3) Effect of acceptance of performance at time other than that agreed upon :

If in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed

UNLESS

At the time of such acceptance, he gives notice to the promisor of his intention to do so.

(Sec. 55, Para III).

Subsequent notice :

Time may be made the essence of the contract by subsequent notice.

It was held both in India as well as in England that the subsequent notice, specifying time ought to fix a reasonable long time requiring the other party to the contract an opportunity to perform his contract.

APPROPRIATION OF PAYMENTS & ASSIGNMENT OF CONTRACTS

Indian Contract Act: Secs. 59-61 & Sec. 40

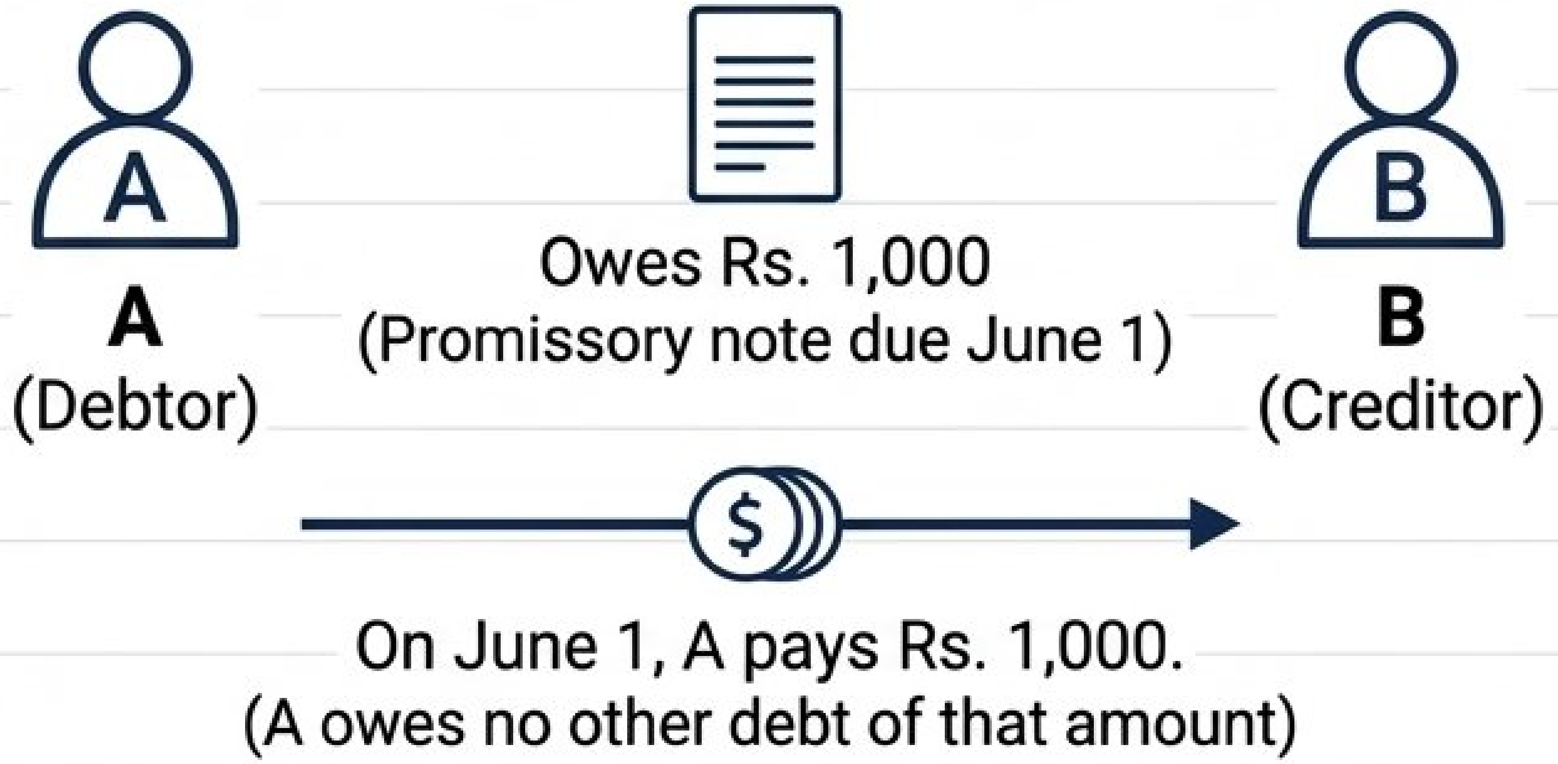
7. APPROPRIATION OF PAYMENTS* (Clayton's Case) :

Where a **debtor** owes **several distinct debts** to the one and the same creditor and makes a payment to the creditor towards those debts, the question may arise as to which of this particular debt this payment is to be appropriated.

- Derived from Secs. 59 to 61 of the Contract Act.
- Rule of English law: Clayton's case ((1861) 1 Mer. 572).

(1) Debtor's right to appropriate :

Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation or under circumstance implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly. (Sec. 59)



Result: Payment is to be applied to discharge the promissory note.

! If creditor does not agree, he must refuse to receive the payment. He cannot receive it under protest.

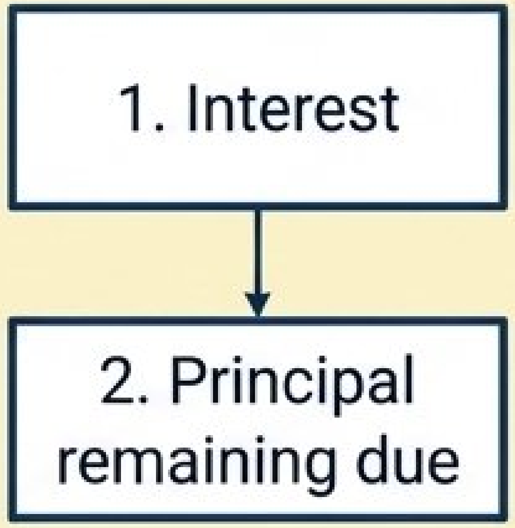
(2) Creditor’s right to appropriate :

“Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits. (Sec. 60)

Key Rules

- 

  Can apply to a debt barred by the Law of Limitation.

- 

  Payment applied first to interest, then principal remaining due (*Harishchandra v. Kailaschandra* A.I.R. (1975) Raj. 14.)

(3) Order of appropriation :

Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time whether they are or are not barred by the Law in force for the time being as to the limitation of suits. If the debts are of nebts are of equal standing, the payment shall be applied in discharge of each proportionately. (Sec. 61)

Application Rules (Default Order)

1. Interest First

If debt carries interest, apply first in payment of interest.

2. Order of Time

Applied to debts in order of time/date.

3. Equal Standing

If debts are of same date, applied in discharge of each proportionately.

8. ASSIGNMENT OF CONTRACTS* :

(1) Assignment means transfer of contractual rights and liabilities under the contract to the third party by the act of assignor.

Assignment of contract may occur:

-> (a) by act of parties

-> (b) by operation of law

I. Assignment by the act of parties :

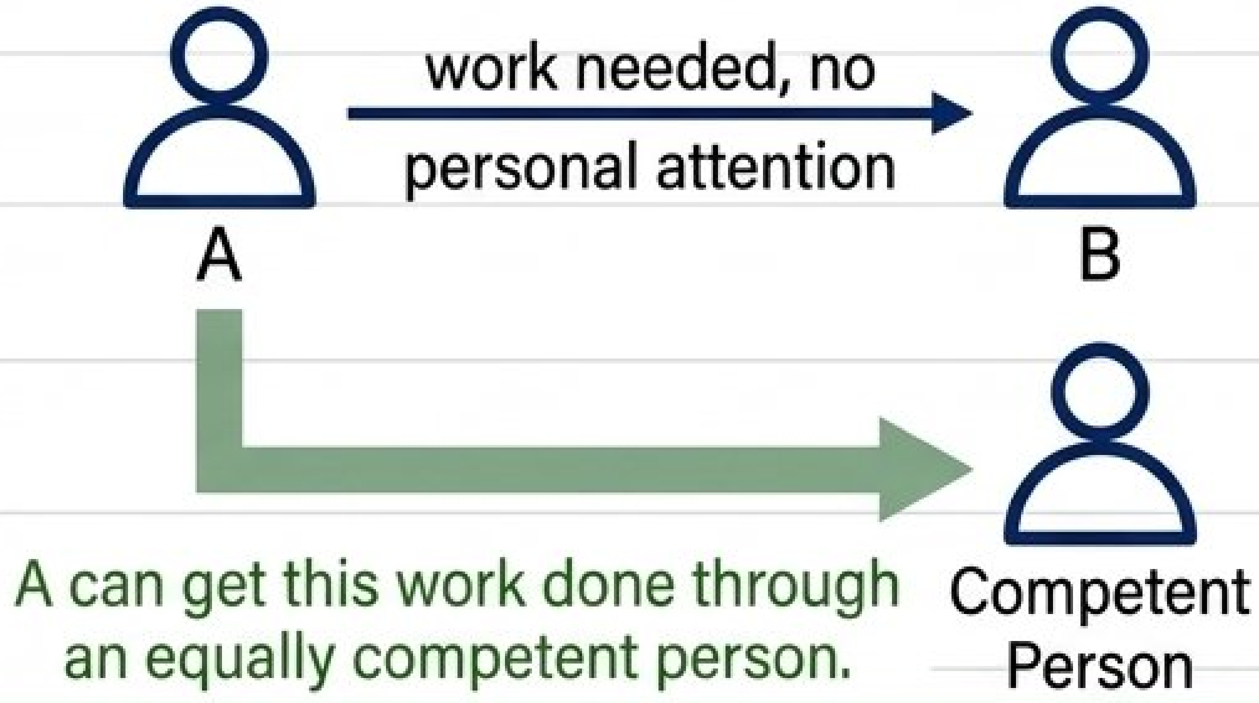
Restrictions on Assignment

Rule (1): Contracts involving **personal skill, ability, credit** or their personal qualifications cannot be assigned. (Sec. 40)

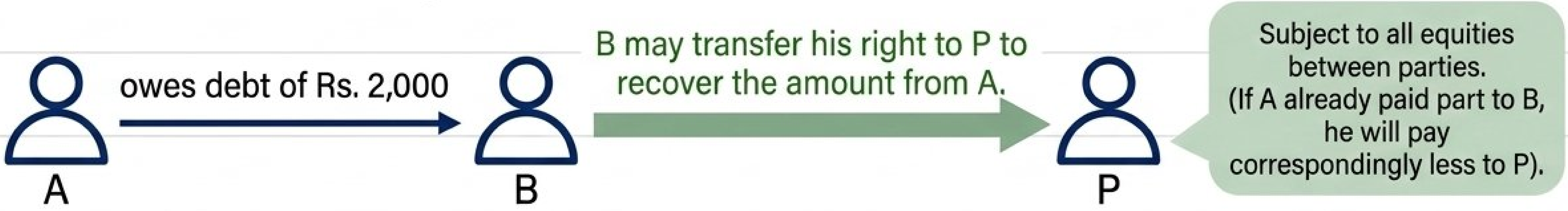
Rule (2): A **promisor** cannot **assign liabilities** or **obligations** under a contract.

I. Assignment by the act of parties :

Rule (3): The general rule is that the promisor should perform his promise as per the contract. However, it is open to party to have contract performed through the agency of a competent person unless the contract is personal in its nature.



Rule (4): The rights and benefits under a contract (not involving the personal skill etc.) can be assigned.



I. Assignment by the act of parties :

Rule (5): An 'actionable claim' can always be assigned.

Legal Requirements Checklist

- Assignment must be complete and effectual.
- Must be evidenced by instruments in writing.
- Notice of such assignment must be given to the debtor.

Definition

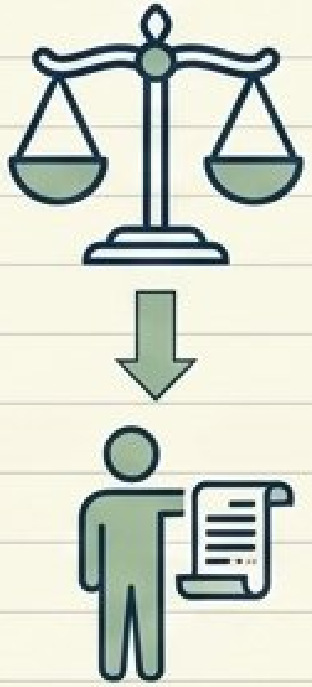
A claim to any debt (except a secured debt) or to any beneficial interest... (Section 3 of Transfer of Property Act).

Examples:		
A money debt	Shares in company	Right of action arising out of contract
	Book debts	Option to repurchase property sold

II. Assignment by operation of law :

Assignment by operation of law occurs (a) by death, or (b) by insolvency.

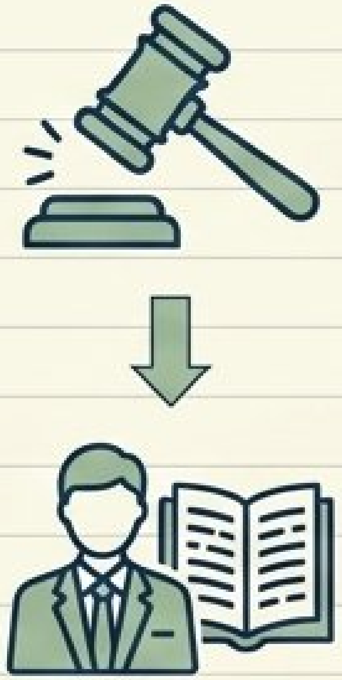
(a) Death



Upon death of party, rights and liabilities under contract (other than for personal services) pass to his heirs and legal representatives.

Exception Cases:
The act provides that the contract shall end with promisor's death in cases of: indemnity, gratuitous bailment, agency.

(b) Insolvency



In case of insolvency of a person, his rights and liabilities pass to an official assignee or official receiver as the case may be.

DISCHARGE OF CONTRACTS

Focus on Modes, Performance & Mutual Consent

1. INTRODUCTION

The Concept

- We have considered how a contract is formed, and how the vinculum juris (legal tie) is created between parties.
- This nexus has to be unfastened and parties become once again free.
- This is known as the "discharge" or "dissolution of contracts".

The Outcome

- A contract puts an end to the contract.
- Parties subsequently are freed from their mutual obligations.
- Most prevalent mode: To perform one's part of the promise at the proper time and proper place.

2. MODES OF DISCHARGE

A contract may be discharged in any one of the following ways:

(1) By performance

(2) By mutual consent or agreement

(3) By subsequent impossibility

(4) By lapse of time

(5) By operation of law

(6) By breach of contract

3. DISCHARGE BY PERFORMANCE

The obvious mode of dissolution originally contemplated by parties. Expectations are fulfilled. Parties must perform or offer to perform their respective promises (Sec. 37).

(1) Actual Performance

- Obligations undertaken are actually performed.
- Contract is properly discharged.

(2) Attempted Performance (Tender)

- Satisfies all requirements of performance, but falls short solely because of wrongful refusal by the other contractual party.
- Party offering performance is discharged and gets a right of action against the guilty party (Sec. 38).
- Note: Valid tender must possess all features of proper performance.

4. DISCHARGE BY MUTUAL CONSENT

The performance of contract, by mutual consent or agreement, may discharge a contract.

Section 62

"If the parties to a contract agree to substitute a new agreement for it, or to rescind or alter it, the original contract need not be performed."

- (i) Novation
- (ii) Alteration
- (iii) Rescission

Section 63

"Every promisee may dispense with or remit, wholly or in part the performance... or may extend the time... or may accept instead of it in satisfaction which he thinks fit."

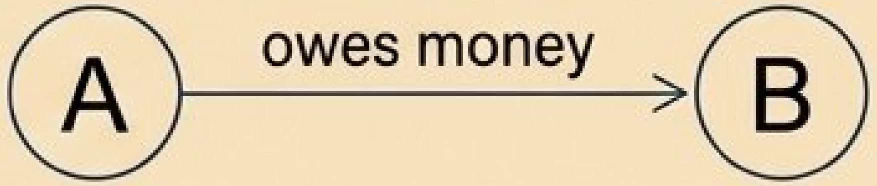
- (1) Remission
- (2) Waiver
- (3) Extension

(1) Novation

- Also known as *novatio*.
- Takes place when a new contract is substituted for an existing one.
- Can be between the same parties or between new parties.
- Must be an immediate or present substitution.
- Essential feature: Right under original contract is relinquished and new rights referable to a new contract are created.

Example Box

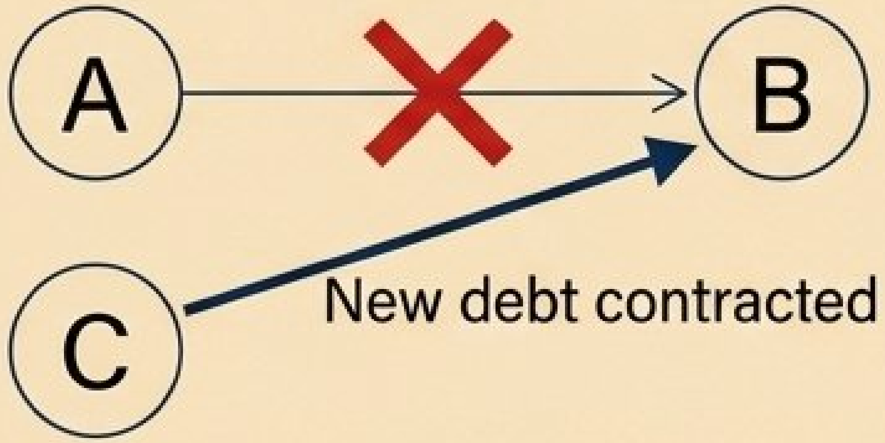
Old Contract:



Agreement:

A, B, and C agree that B will accept C as his debtor instead of A.

Result:



Points to be noted for Novation

1. It may be between the same parties and with new terms or with new parties and old terms.
2. Consideration for the new contract is the discharge of the old contract.
3. Novation cannot be compulsory, but is the result of an agreement (must be mutual or tripartite consent).
4. To effect novation, there must be a valid enforceable substituted new contract.
5. Intention of substitution of a new contract can be gathered from the circumstances.
6. Novation should take place before the breach (before expiry of time of performance).
7. If the new agreement is not enforceable, the old contract is revived and becomes binding.

Example (Point 7)

Original: A agrees to supply rice to B.
Novation Attempt: Before that date, they agree to sell opium instead.
Result: Agreement to sell opium is void/illegal. Novation does not take place. Old contract (rice) is valid and subsisting.

(2) Alteration

Means change in one or more of the terms of a contract by mutual consent of the parties.

Example Box
Original: A enters into a contract with B to supply timber at a stipulated price and given place.

Alteration: A and B mutually agree upon any change in above terms (price/place).

Points to be noted:

(1) Original terms are deemed to be part and parcel of the contract, with such changes as are mutually agreed upon.

(2) Change is in terms of the contract, but no change of the parties. (Unlike 'novation' where parties may change).

(3) The new agreement with the change in terms must be performed and the original agreement comes to an end.

Material alteration

Material Alteration

- Document becomes void and unenforceable.
- It is one which changes the legal character or identity of the instrument.
- It is one which alters its legal effect.
- Note: It is irrelevant whether any benefit accrues to the party making the alteration.

Immaterial Alteration

- Does not affect the validity of the instrument.
- Examples: Merely correction of clerical errors, or making explicit what was already expressed (though not completely) in the document.

(3) Rescission

Means cancellation of all or some of the terms of the contract. (May be expressed or inferred from circumstances/conduct).

Total rescission: Discharge of the entire contract.

Partial rescission: Variation in the original contract by deleting some terms.

Rescission may occur by:

1. **Mutual agreement:** Between the parties to a contract (Sec 62).
2. **Failure in performance:** Where one party fails in performance; the other party may rescind without prejudice to right to claim compensation for breach.

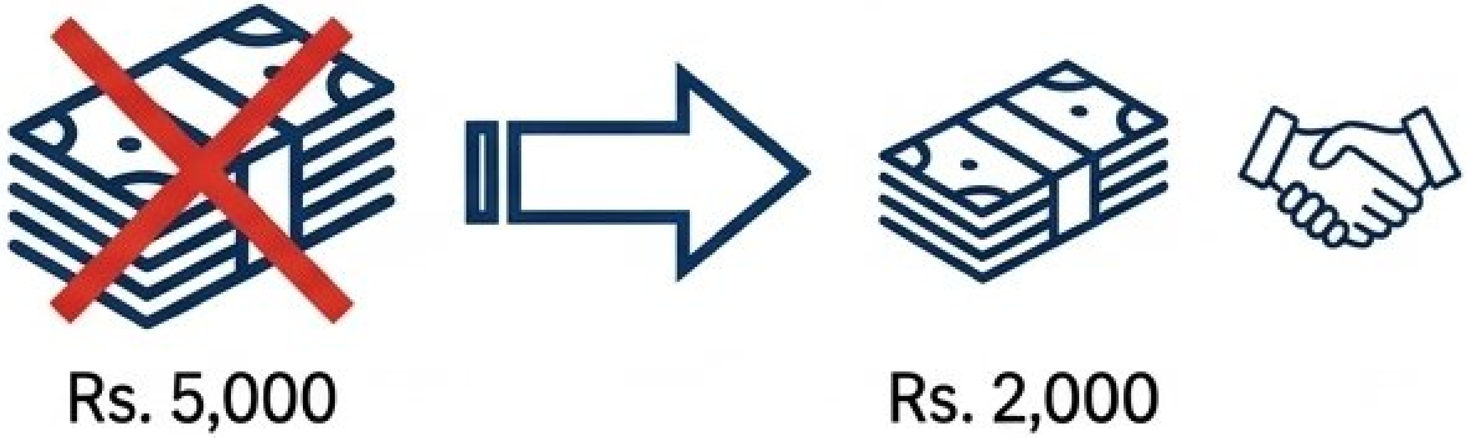
   A agrees to supply goods to B on 15th June and B shall pay 10th July. A fails to supply. B may rescind the contract and need not pay the price.
3. **Voidable option:** Where a person at whose option a contract is voidable rescinds it.

   A induces B to enter into a contract under 'undue influence'. Contract is voidable at the option of B. He may rescind the contract.

(4) Remission

- Remission means acceptance of lesser amount than what was contracted for in the discharge of whole of the debt.
- Refers to a state of things prior to the date of performance.
- Where the promisee chooses to dispense with performance, such dispensation will be enough to discharge the promisor.

Example



A owes B Rs. 5,000. A pays B Rs. 2,000 paid at the time and place at which Rs. 5,000 were payable. B accepts in satisfaction of the whole debt. The whole debt is discharged.

Points to be noted (Remission)

- 1. It refers to a state of things prior to the date of performance.
- 2. Remission (waiver of performance) may be express or implied from conduct which is inconsistent with continuance of original right.
- 3. It may be conditional. Promisor is effectively released only on fulfillment of the condition. If condition is not fulfilled, creditor may enforce all his rights.
- 4. A remission once made is irrevocable, and it is not open to the promisee to recover the amount remitted.

ACCORD AND SATISFACTION (English Law counterpart)

- Under English law, a promise to accept less requires consideration.
- Accord: The agreement by which the smaller obligation is accepted.
- Satisfaction: The actual payment or performance.
- Rule: Accord is not binding; Accord followed by satisfaction is what discharges the pre-existing obligations.

(5) Waiver & (6) Extension of time

(5) Waiver

Means the abandonment of a right. Mutual abandonment of rights by parties to the contract releases them from contractual obligations. May be expressed or implied from conduct.

Example: A had 1/100th share in one property. This property was put to sale. A did not press for his right. A is said to have waived his right.

(6) Extension of time

When parties to the contract agree to extend the time of performance. Parties must perform within such extended period (they need not perform the contract as per the original terms of time).

Example: A promised B to return the money on 1.4.98. However, B extended the time to repay till 1.6.98. A is discharged from payment on 1.4.98 but shall have to pay on 1.6.98.

SYNTHESIS: Mutual Consent Matrix

Feature	(1) Novation	(2) Alteration	(3) Rescission
Meaning	Substituting a completely new contract	Changing specific terms of the contract	Cancelling terms of the contract
Parties	Can be same or **new** parties	Strictly between the **same** parties	Strictly between the **same** parties
Terms	New terms replacing old	Modifying existing original terms	Deleting/cancelling existing terms
Result	New contract is born	Original contract ends, altered one begins	Entire or partial contract ends

DISCHARGE BY SUBSEQUENT IMPOSSIBILITY

FOUNDATION

Impossibility of performance is one of the modes of discharge of contract.

Initial Impossibility

Impossibility existing at the time of formation of contract (Sec 56 Para 1). “An agreement to do an act impossible in itself is void.”

Agreement to discover treasure by magic.

Subsequent Impossibility

Impossibility arising subsequent to the formation of the contract (Sec 56 Para 2).

A promises to paint B’s portrait. A is struck with paralysis.

DOCTRINE OF FRUSTRATION

Destruction of the subject-matter

Music hall let out for a series of concerts.
Burnt down before the date of the first concert.
Held: Contract was void. (Taylor v. Caldwell)

Non-existence of a set of things

Flat hired for witnessing a Coronation procession.
Coronation cancelled due to illness of the King.
Held: Cancellation discharged the contract. (Krell v. Henry)

DOCTRINE OF FRUSTRATION

Death or personal incapacity of the promisor

= DISCHARGED

Artist undertook to perform at a concert. Owing to serious illness, she could not do so.
Held: Discharged.
(Robinson v. Davison)

Change of Law

= VOID

A promises to marry C. Special Marriage Act is passed prohibiting polygamy. Contract becomes void.

Outbreak of War

= VOID / SUSPENDED

Prohibits trading with the enemy. Rights under contracts are suspended or become void.

EXCEPTIONS TO THE DOCTRINE

Impossibility of performance, is, as a rule, not an excuse from performance.

Difficult of performance → = **CONTRACT VALID**

A sold Finland Timber to B. War broke out; transport was disorganized.
Held: Impossibility of getting timber from Finland did not excuse performance.
(Blackburn Bobbin Co.)

Commercial impossibility → = **CONTRACT VALID**

A bought tapestry from B to resell in Australia. Imports to Australia prohibited.
Held: Commercial impossibility (loss of expected profit) is no ground for frustration.

EXCEPTIONS TO THE DOCTRINE

Impossibility due to a failure of a third person on whose work the promisor relied

A contracts with B for goods to be produced by C. C does not manufacture them. A is liable to B.

Strike, Lock-outs and Civil Disturbances

Lessee of salt pans failed to repair them due to a strike. Held: Lessee was liable for rent and repairs.

Failure of one of the objects

Boat hired to view naval exercise AND sail round the fleet. Exercise abandoned, but fleet could be sailed around. Contract not discharged.

Leases

Leases are not subject to frustration.

THE EFFECTS OF SUPERVENING IMPOSSIBILITY

The contract becomes void (Sec. 56, Para 2)

When the act, after the contract is made, becomes impossible or unlawful.

Example: A and B contract to marry. Before the time fixed, C goes mad. The contract becomes void.

Compensation for non-performance (Sec. 56, Para 3)

Promisor promised something they knew/might have known was impossible, and promisee did not know. Promisor must compensate.

Example: A contracts to marry B, being already married to C (law forbids polygamy). A must make compensation to B.

Restoration of advantage (Sec. 65)

When a contract becomes void, any person who received any advantage is bound to **restore it**, or make compensation.

SUMMARY CHART

	DOCTRINE OF FRUSTRATION (Contract becomes Void)		EXCEPTIONS TO THE DOCTRINE (Party is Liable)
✓	Destruction of the subject-matter	✗	Difficult of performance
✓	Non-existence of a set of things	✗	Commercial impossibility
✓	Death or personal incapacity of the promisor	✗	Impossibility due to a failure of a third person
✓	Change of Law	✗	Strike, Lock-outs and Civil Disturbances
✓	Outbreak of War	✗	Failure of one of the objects
		✗	Leases

6. DISCHARGE BY LAPSE OF TIME :

Every contract must be performed within the stipulated period (period of limitation).

Contract unperformed
Contract is not performed within the specified period.

No action taken
No action is taken by the promisee in a Law Court.

Deprived of remedy
Promisee is deprived of his remedy at Law.

Contract Terminated
Discharged by barring the right to bring an action under the Limitation Act.

Example: Lapse of Time

Example Box

The Rule: It has to be paid for within three years of the delivery.

Point A: A sells goods to B (without any stipulation as to credit).

Point B (3 Years Later): Price is not paid AND creditor does not file a suit against the buyer.

Result: The debt becomes time-barred.

7. DISCHARGE BY OPERATION OF LAW* :

A contract may be discharged by operation of law, i.e., independently of the wishes of the parties, in the following cases :

(i) Death

(ii) Insolvency

(iii) Merger

(iv) Material Alteration

(v) Re-negotiation

(i) Death :

Contracts involving personal skill or ability → Death terminates the contract.

Other types of contracts → The rights and obligations of a deceased person pass on to the legal representatives of the deceased person.

(ii) Insolvency :

Person is adjudged insolvent.

↓

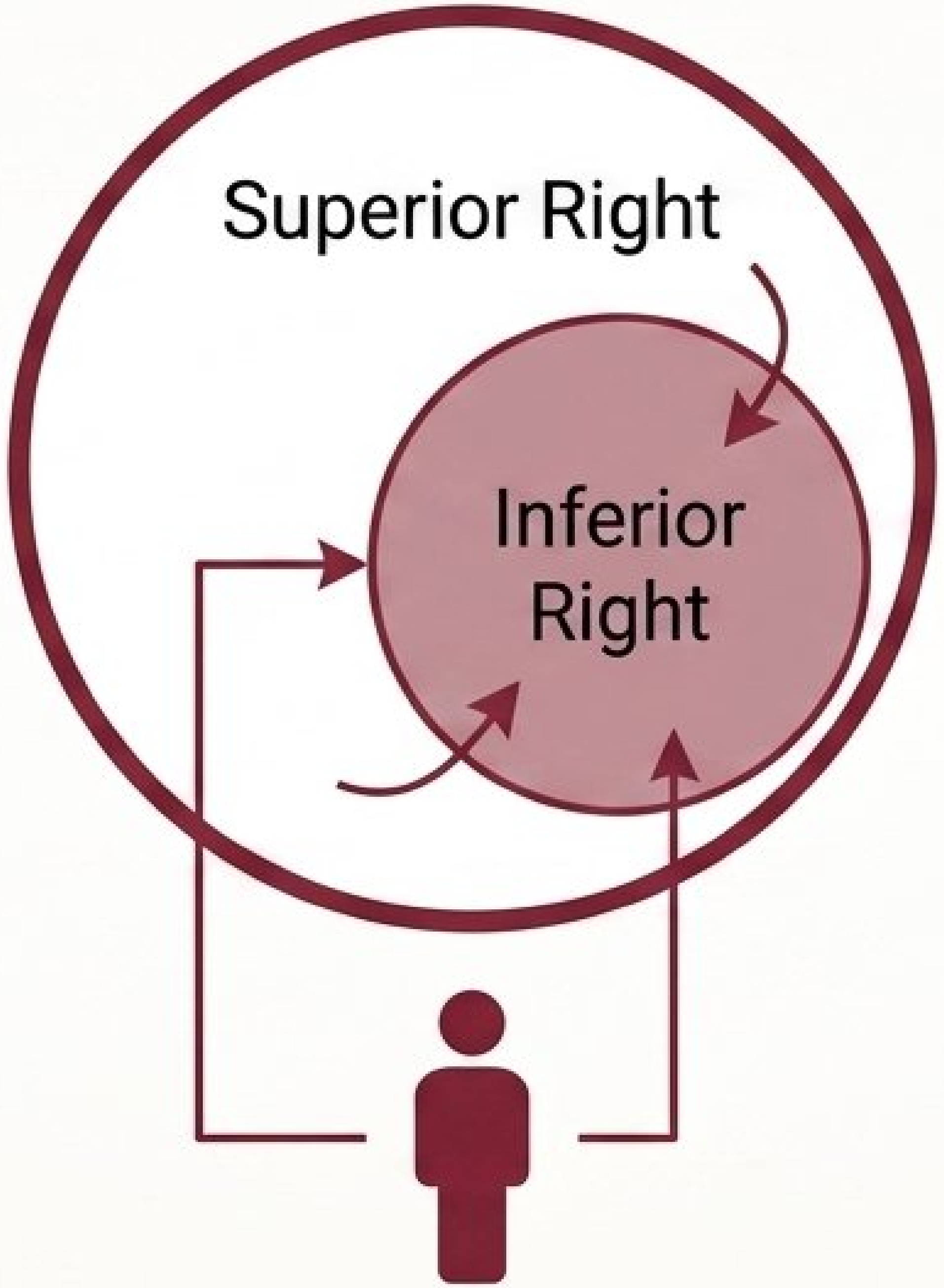
Rights and liabilities are transferred to Official Receiver or Official Assignee appointed by the Court (with certain exceptions).

↓

Order of discharge releases him from performing his part of the contract. He is discharged from all liabilities incurred prior to adjudication.

(iii) Merger :

When a superior right and an inferior right coincide and meet in one and the same person...



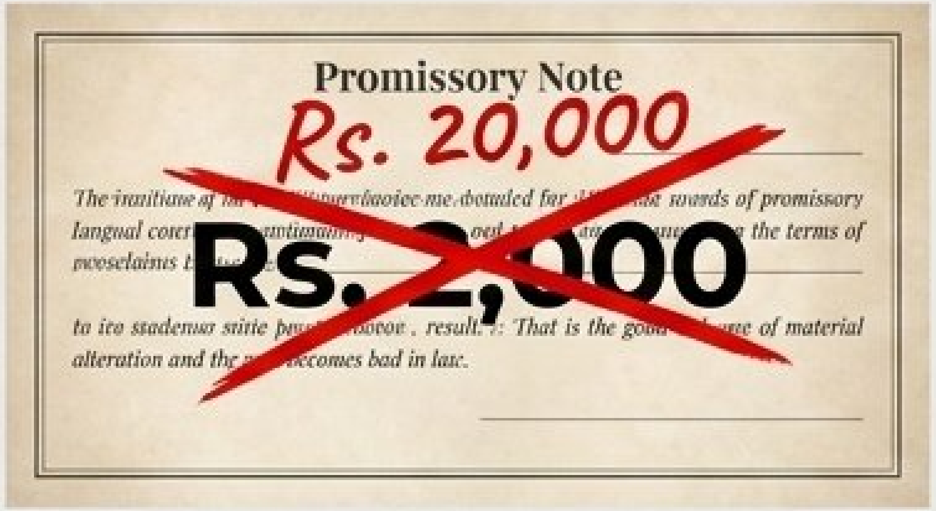
...the inferior right merges into the superior right by operation of law.

(iv) Material Alteration :

The Definition	The Rule
A material alteration is one which changes, in a significant manner, the legal identity or character of the contract or the rights and liabilities of the parties.	If the terms of the contract, written on a document are materially altered by the party without the consent of the other party, the contract is discharged and cannot be enforced.

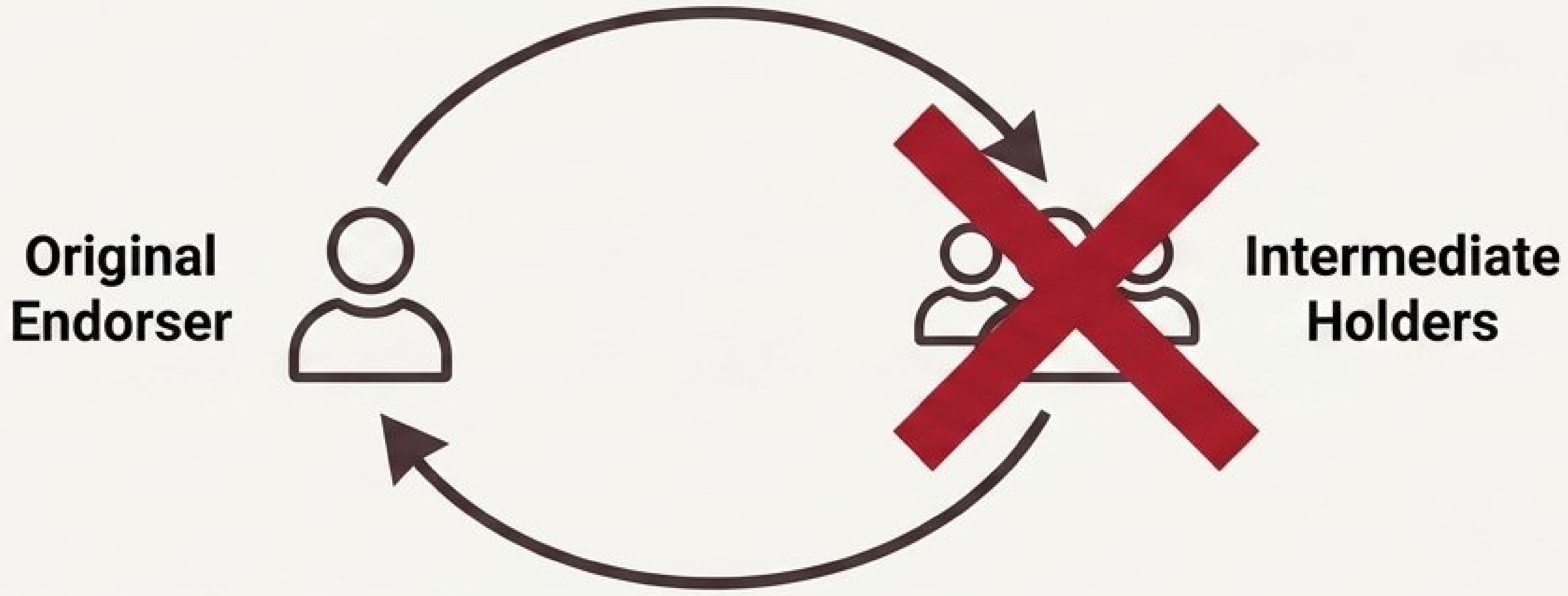
(v) Example: Material Alteration

Example Box



- **Original State:** A promissory note for Rs. 2,000.
- **Action:** Has been changed to Rs. 20,000.
- **Result:** That is the good case of material alteration and the note becomes bad in law.

(v) Re-negotiation :



The Trigger:
When an endorser after he has negotiated an instrument again becomes its holder before its maturity ('negotiated back').

The Rule:
Rights and liabilities under a contract vest in the same person.

The Result:
Intermediate holders are discharged and none of them is liable to him.

Summary Matrix: Discharge by Operation of Law

Mode	Triggering Event	Legal Result
(i) Death	Demise of promisor	Terminates (if personal skill) OR passes to legal reps.
(ii) Insolvency	Adjudged insolvent	Rights pass to Official Receiver; order of discharge releases liability.
(iii) Merger	Rights meet in the same person	Inferior right merges into superior right.
(iv) Material Alteration	Significant change without consent	Contract discharged, becomes bad in law.
(v) Re-negotiation	Instrument negotiated back to endorser	Intermediate holders are discharged.

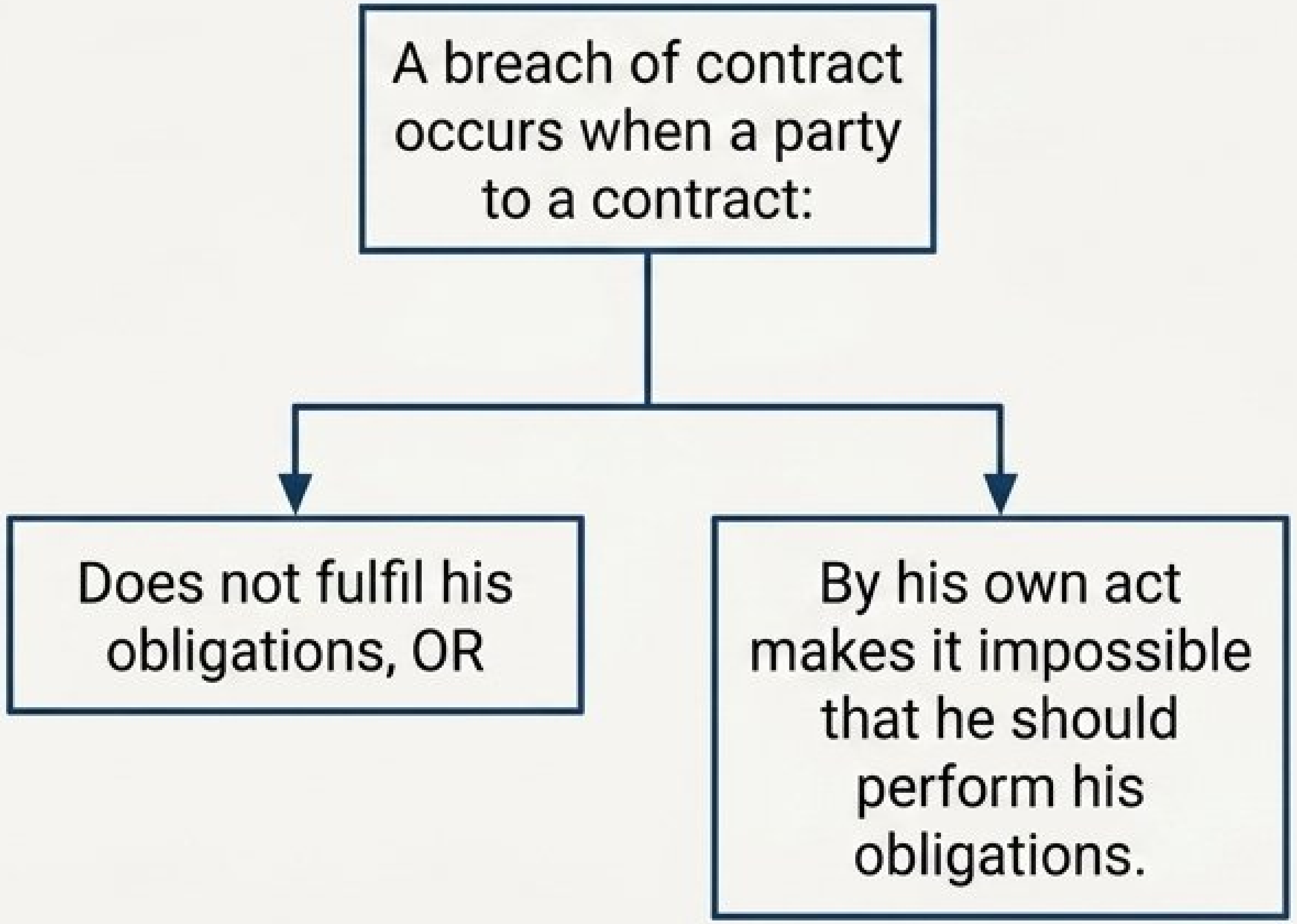
8. DISCHARGE BY BREACH OF CONTRACT

(2) INDIAN LAW

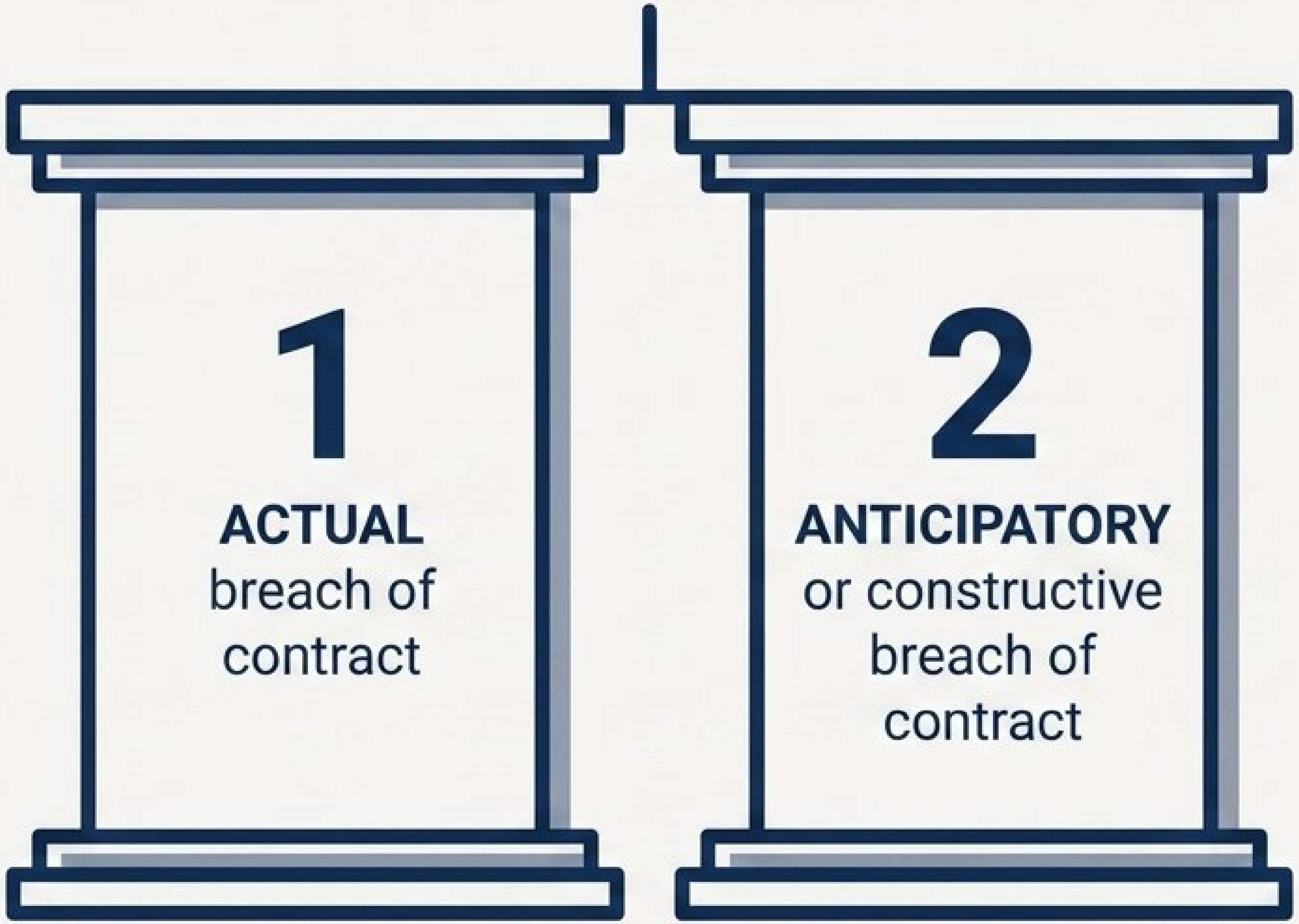
(2) INDIAN LAW

When a contract is broken by one party, **the other party or parties are freed from the obligations of performing the contract.**

The parties thereto are entitled to take the **remedial measures** as provided in the Act.



The breach of contract may arise in two ways:



1. ACTUAL BREACH OF CONTRACT

(I) At the time when the Performance is due :	**Example**: A agrees to supply B with 50 bags of rice on 15/1/98. He fails to do so on 15/1/98. There is an actual breach of contract.
(II) During the performance of the contract :	**Example**: C agreed to supply a Railway Company 3,900 tons of railway chairs. After 1,989 tons were delivered, the Company told C that no more would be required. There is an express breach of contract by the Company. (Cort v. Ambergate Railway Company)

2. ANTICIPATORY BREACH OF CONTRACT :

Section 39 of the Act

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.

Anticipatory breach of contract occurs :

(i) By express repudiation :

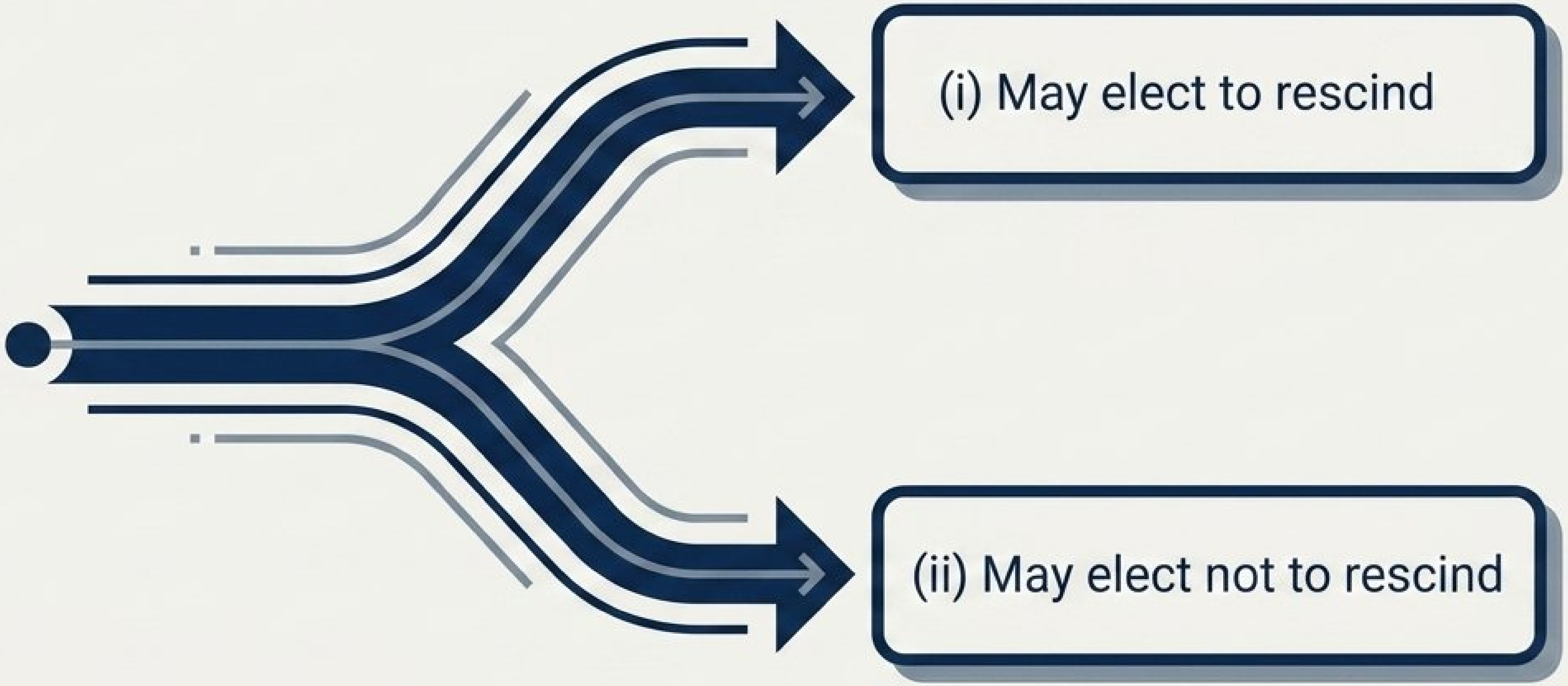
Example: Singer A enters a contract with Theatre Manager B to sing two nights a week for two months (Rs. 100/night). On the sixth night, A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(ii) By Implied repudiation :

Example: Singer A agrees to sing at B's theatre from a given date. Before that date, A enters into a long-term agreement to sing at a different theatre from the same date. There is an implied repudiation of contract by A.

3. Remedies in case of anticipatory breach :

Law provides two remedies :



(i) May elect to rescind :

The Rule:

He may thus elect to rescind and even though the time of performance has not arrived, may treat the contract as terminated and at once sue for damages.

Example:

- K promised to marry B after the death of K's father.
- While the father is still living, K announces his intention to not fulfill the promise and breaks off the engagement.
- B, without waiting for K's father's death, at once brought action for breach.

Result: B was entitled to sue for breach of promise to marry, even though the time for performance had not arrived. (Frost v Knight)

(ii) May elect not to rescind :

The Rule:

He may thus elect not to rescind but to treat the contract as still alive and operative and wait for the time of performance and then hold the other party responsible for the consequences of non-performance.

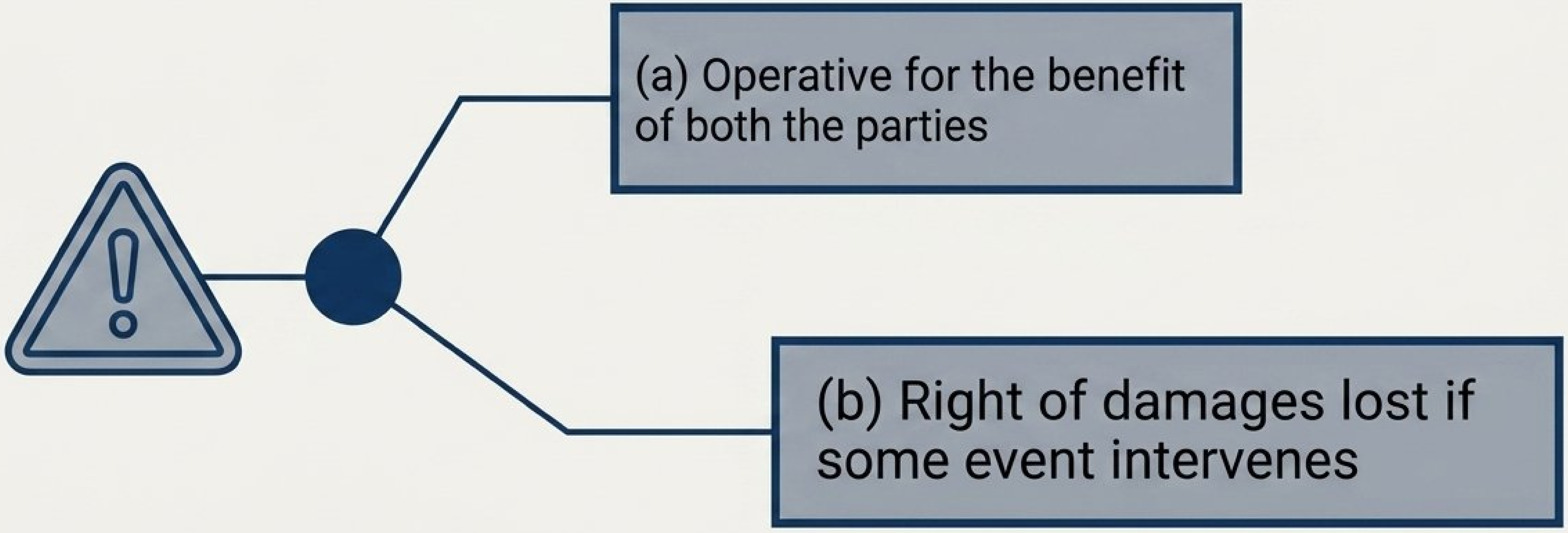
Example:

- Singer A enters a contract with Theatre Manager B to sing two nights a week for two months.
- On the sixth night, A wilfully absents herself.

Result: B is at liberty to put an end to the contract, OR B may choose to treat the contract as still alive and wait to hold A responsible.

Consequences : if elected not to rescind :

If the promisee elects not to rescind the contract but to treat the contract as still alive and operative and wait for the time of performance, the consequences are as under :



(a) Operative for the benefit of both the parties :

- A agrees to sell goods to B, delivery at the end of the month.
- Immediately, A writes to B that he will not deliver.
- B does not accept this refusal and informs A.
- At the stipulated time, A actually delivers the goods, but B refuses to accept them (claiming A had earlier repudiated).
- A sues B for breach of contract.

Result:
A will win. Because B ignored A's repudiation and elected to treat the contract as operative, the contract is binding to both. Hence, B is liable to perform his part.

(b) Right of damages lost if some event intervenes :

- A agrees to sell a horse to B on 15-7-1998.
- Before the date, A informs B he will not sell the horse.
- B disregards this and elects to wait until 15-7-1998.
- In the meantime, the horse dies.

Result:
B cannot recover any damages from A. The contract is dissolved by the death of the horse, and A can take advantage of this intervening event.

5. Measure of Damages :

How are damages calculated based on the promisee's choice?

- (a) When repudiation accepted
- (b) When repudiation not accepted

(a) When repudiation accepted :

The Rule:
If the promisee elects to accept repudiation and treat the contract as discharged, he may sue the promisor at once for damages.

The Calculation:
Quantum of damages = (Price prevailing on the date of the breach) minus (Contract price)

Example Breakdown:

- A agrees to supply 100 tons of iron to B on 1st July at Rs. 50/ton.
- On 1st May, the price shoots up to Rs. 80/ton. A informs B he will not deliver.
- B treats this as a breach and at once sues.

Result: B is entitled to Rs. 3,000/- [100 tons x Rs. 30 difference (Rs. 80 - Rs. 50)].

(b) When repudiation not accepted :

The Rule:
If the contract is kept alive till the date of performance of the contract, the measure of damages will be different.

The Calculation:
Quantum of damages = (Price prevailing on the date of performance) minus (Contract price)

Example Breakdown:
- From the previous illustration: The contract price of iron was Rs. 50/ton.
- B treats the contract as alive until the date of performance. On this date, the price of iron is fixed at Rs. 60/ton.

Result: The amount of damages would work out to Rs. 1,000/- [100 tons x Rs. 10 difference (Rs. 60 - Rs. 50)].

REMEDIES FOR BREACH OF CONTRACT

Summary
& Case
Guidelines

DIFFERENT RELIEFS :

When one of the parties to the contract refuses to carry out his part of the promise, he is said to have breached the contract. In that the aggrieved party can claim compensation (Section 73).

When a breach of contract occurs, the injured or the aggrieved party becomes entitled to the following reliefs:

1. Rescission of the contract.
2. Suit for damages.
3. Suit upon quantum meruit.
4. Suit for specific performance of the contract.
5. Suit for injunction.
6. Suit for rectification & cancellation.

RESCISSION :

Rescission means termination and cancellation of the terms of the contract.

Mode 1

If the parties to a contract agree to rescind the contract, the original contract need not be performed. (Sec. 62)

Mode 2

When a contract is broken by one party, the other party may sue him and treat the contract as rescinded and refuse further performance.

Mode 3

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained. (Sec. 64)

CONSEQUENCES OF RESCISSION :

Rules

1. Absolved from all his obligations under the contract.
2. Any person who has received any advantage is bound to restore it or make compensation. (Sec. 65)
3. Party rescinding a voidable contract shall restore benefit received to the person from whom it was received. (Sec. 64)
4. Person rightfully rescinding is entitled to compensation for any damage sustained. (Sec. 75)

Application

Example 1 (Void Agreement)

A pays B Rs. 1,000/- for B's promise to marry A's daughter, C. C is dead at the time of promise. Agreement is void. B must repay A Rs. 1,000/-.

Example 2 (Compensation)

Singer A contracts with Theatre Manager B to sing 2 nights/week. B pays Rs. 100/night. On 6th night, A wilfully absents herself. B rescinds contract. B is entitled to claim compensation for damages.

DAMAGES :

> **"The governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights have been observed."**

Principle		Example
Damages are given by way of compensation for the loss suffered by the injured person and NOT for the purpose of punishing the wrong-doer.	→	D agreed to grant a lease of a certain property to P, but refuses to do so. The Court allowed P expenses incurred on preliminary legal work AND profits he would have earned if lease was granted.

TYPES OF DAMAGES :

(a) Ordinary or Compensatory Damages

Damages which arise in the ordinary course of events from the breach. Restricted to proximate consequences. Remote consequences are not generally regarded.

(b) Special Damages

Court shall award such damages that arise in the ordinary course of events. But under special circumstances, Court may allow damages not arising entirely from the breach provided parties knew or must have known them as a probable result.

(c) Vindictive or Exemplary damages

Generally not awarded in ordinary cases (injured feelings of disappointment are not taken into account).

Exceptions (Examples)

1. Breach of promise to marry (Court considers injured feelings).
2. Banker refuses to honour cheque of a customer having having money in account, causing business reputation loss.

(d) Nominal or token damages

Party suffered no pecuniary loss or breach is too insignificant/paltry. Awarded in view of the right of the aggrieved party to claim damages.

Example

Means a sum of money with no existence in point of quantity (e.g. shilling or a rupee).

5. RULES REGARDING THE AMOUNT OF DAMAGES :*

The foundation of modern law of damages both in India and England, is to be found in the celebrated judgement in the case of Hadely v. Baxendale : (1854)

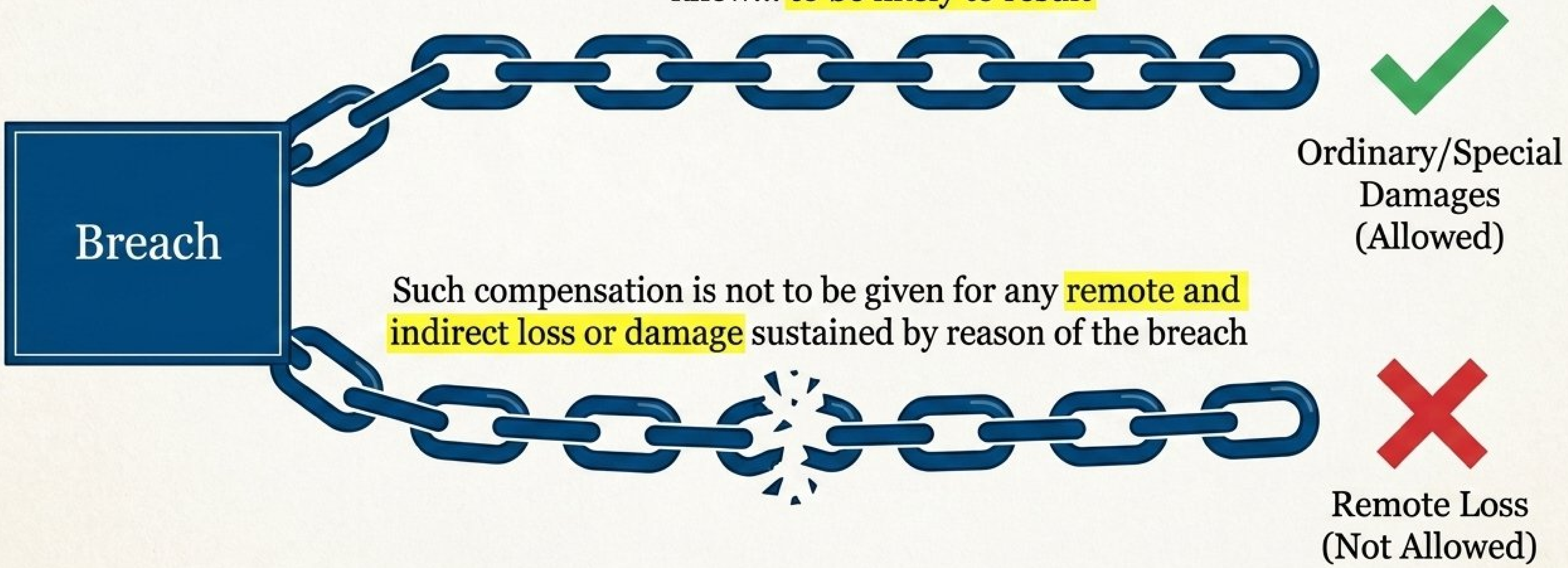
X (Carrier) entrusted with machine part delivery to Y (Manufacturer). → Delivery was delayed. → Y's factory was idle. → Y claims compensation for: Wages of workers, Depreciation charges, Loss of profits.

Held:

Allowed: Wages & Depreciation (natural consequences).
Disallowed: Loss of profit (remote consequence).

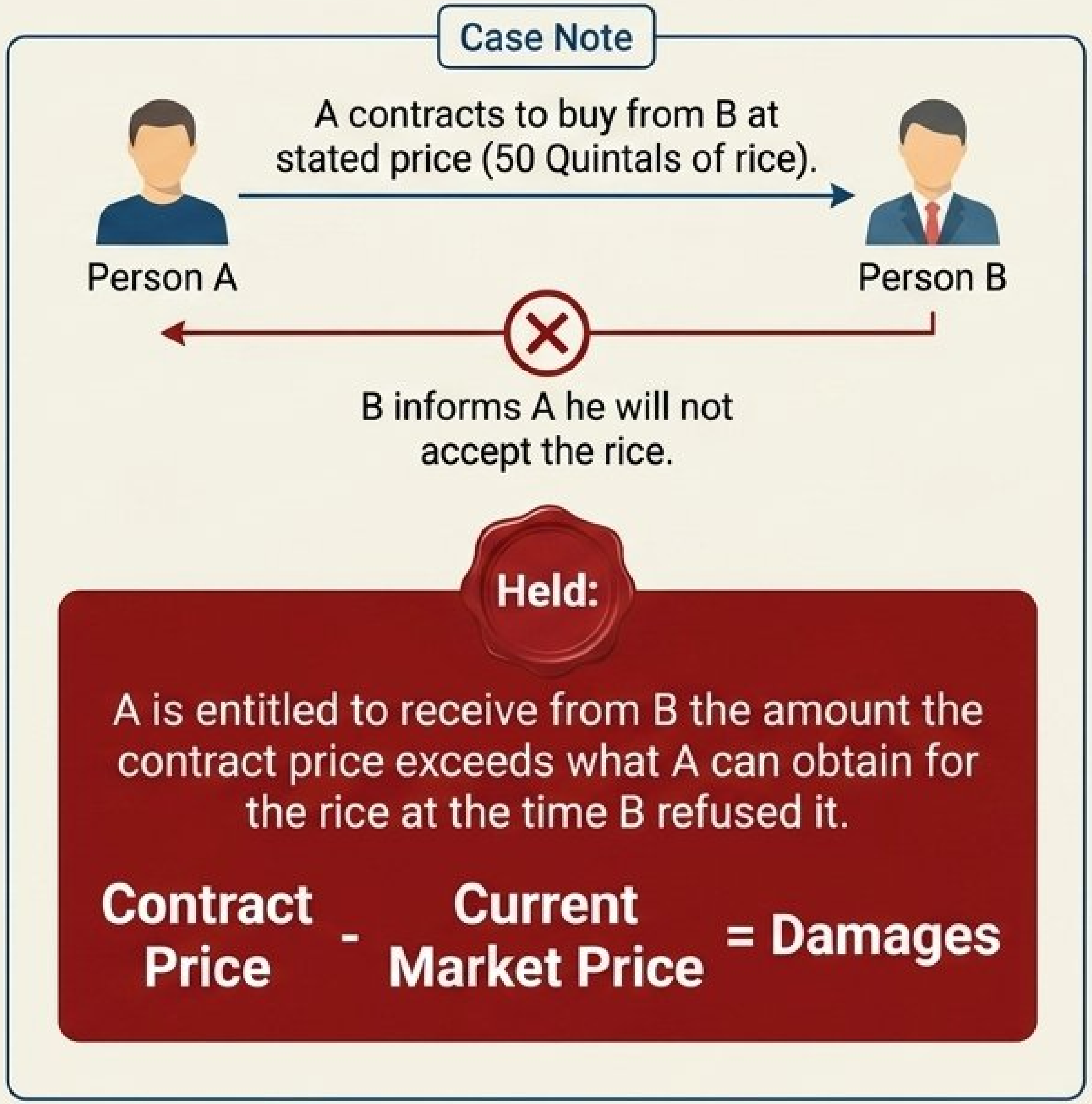
(a) Indian law : Sec. 73

...compensation for any loss or damage... which naturally arose in the usual course of things... or which the parties knew... to be likely to result



1. Actual loss : Ordinary damages

Ordinarily, the injured party is entitled to recover by way of damages only the **actual loss** suffered by the party.



2. Special loss : Special damages

The Court may allow remote or special damages... which the parties knew or must have been in contemplation of the parties as the probable result of the breach...

A contracts to pay a sum of money to B on day specified. A does not pay.

B, in consequence of not receiving money, is unable to pay his debt and is totally ruined.

Held: A is NOT liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the date of payment.

(i) Duty to mitigate damages suffered / (ii) Should not be remote

Case Note

Duty to Mitigate

A party to a contract is bound to use all reasonable means of mitigating the damages...

A took a shop on lease

↓

gave advance to B

↓

could not give possession

↓

A did no business for eight months (didn't try to mitigate)

Held:
A was entitled only to a refund of his advance.

Case Note

Should not be remote

Under Sec. 73, compensation is not to be given for any remote or indirect loss or damage.

(iv) Damages for mental pain, inconvenience and discomfort / (iii) Damages for loss of reputation

Case Note

(iv) Damages for mental pain, inconvenience and discomfort

Train pulls passengers to wrong direction → Walk home at midnight → Wife catches cold

Held:
£8 awarded for inconvenience of walking.
£0 for wife's cold (too remote).

Case Note

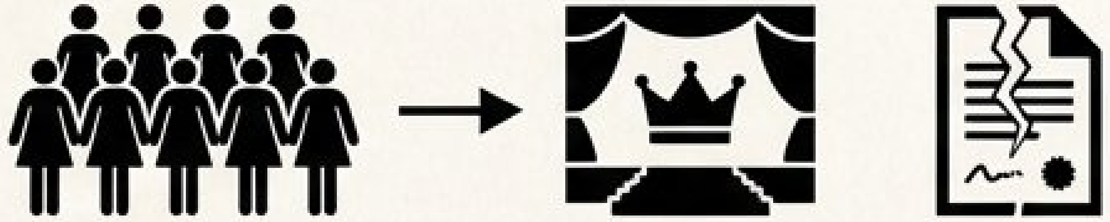
(iii) Damages for loss of reputation

'Loss of reputation' is normally not accepted as a valid ground... exception has been recognised in case of customer-tradesman whose cheque has been dishonoured wrongfully by a banker.

Held:
The smaller the amount of cheque dishonoured, the larger the amount of damages awarded.

(ii) Difficulty of Assessment
Vindictive or Exemplary damages
Nominal or token damages

Beauty competition. H selects 50 ladies. C is one of the 50. H breaches contract.



Held:
C is entitled to damages even though the calculation is difficult.

Vindictive or Exemplary damages	Not awarded in ordinary cases.	**Exceptions:** (1) Breach of promise to marry (injured feelings). (2) Banker wrongfully refuses to honour cheque.
Nominal or token damages	Awarded where party has suffered no pecuniary loss or breach is insignificant.	**Example:** a shilling or a rupee.

STIPULATION FOR INTEREST

Primary Rule (Sec. 74): "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach... the party complaining is entitled, whether or not actual damage or loss is proved... to receive reasonable compensation not exceeding the amount so named, or the penalty stipulated for."

Explanation: "A stipulation for increased interest from the date of default may be a stipulation by way of penalty."

→ Example Spotlight

A contracts with B to pay Rs. 1,000 on a given day. A fails to pay. B is entitled to recover compensation not exceeding Rs. 1,000 as Court considers reasonable.

Exception: Any person entering a bail-bond or bond for performance of public duty under Central/State Gov is liable to pay the whole sum mentioned upon breach.

STIPULATION FOR INTEREST (RULES)

Rules for Interest

1. Enhanced rate of interest

- **(a)** From the date of the bond: Always in the nature of a penalty. Court will award only reasonable compensation.
- **(b)** From the date of the default: May be a stipulation by way of penalty.

2. Compound interest

- **(a)** At the same rate as simple interest: NOT a penalty.
- **(b)** At a rate higher than simple interest: IS a penalty and would be relieved against.

3. Payment of interest at reduced rate

A covenant to accept interest at reduced rate if paid punctually does not make the original rate of interest a penalty.

→ Example Spotlight

A borrows Rs. 100 from B in yearly installments of Rs. 40. Stipulation that default makes whole sum due. This **IS a penalty**.

6. LIQUIDATED DAMAGES AND PENALTY

Liquidated damages	Penalty
A sum agreed on by the parties to the contract as an assessment of the damage or loss which will result from a breach of contract.	...stipulated by the parties in terrorem i.e. for the purpose of penalizing the party for not performing the contract.
...fair and genuine pre-estimation...	**...disproportionate to the damages likely to accrue...**

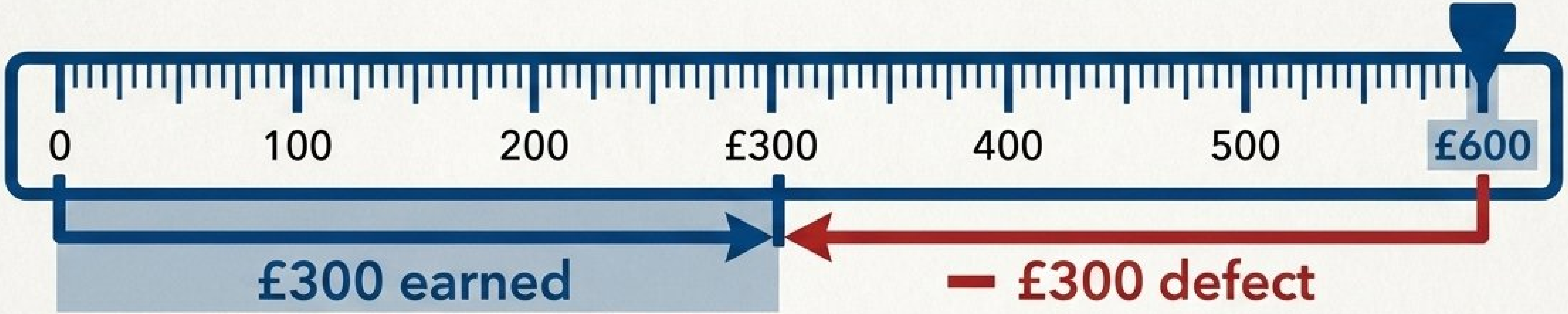
Note: In India, the distinction is not recognized (Sec 74 allows only 'reasonable compensation').

§ Distinction between ‘Liquidated damages’ and ‘Penalty’

Aspect	Liquidated damages	Penalty
1. Basis	is a pre-estimation of a genuine loss is likely to accrue in case of breach	is an arbitrary figure
2. Purpose	is to ascertain probable loss	is to create terror in the mind of the other party
3. Nexus	There is a link between the stated sum & loss that is likely to accrue	There is no such nexus
4. English law	Entire sum mentioned is ordered to be paid by the court.	Only a reasonable sum will be awarded by the court.
5. Indian law	Court will determine the actual loss & will not award the entire sum so stipulated	Court will determine a reasonable sum in view of the loss the aggrieved party may suffer.

7. QUANTUM MERUIT

Means ‘as much as earned’ or ‘as much as merited.’ In case of breach, aggrieved party entitled to claim reasonable compensation for what he has done.



A agrees to decorate B’s flat for a lump sum of £600. → Work done but defective. → B rectifies by spending £300.

Held:
A could recover £300 from B.

£600 contract - £300 defect = £300 earned

8. SPECIFIC PERFORMANCE / 9. INJUNCTION

Specific Performance

Compelling a party to perform his promise in specie.

Granted under very special circumstances, usually when mandatory compensation is not an adequate remedy.

Injunction

...an order of the court, restraining a person from doing some act.

Usually of a negative character; granted to compel a party to refrain from doing an act.