

# JOURNEY FROM PERFORMANCE TO BREACH IN INDIAN CONTRACT

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“The only chains you should wear in your life are the chains of commitment”: As the quote itself states the importance of the commitment towards the performance of contract irrespective of the exceptions provided in the Indian Contract Act, 1872<sup>i</sup>. A simple thing is that if you can't do commitment then don't plan and if you do plan then do commitment. This applies in Indian Contract Act, 1872 (taken from English Common Law<sup>ii</sup>) which includes in chapter-IV sections for the performance of a contract: section 40, 41, 43, 44, 42, 45, 46-50, 51-54, 55-58, 62, 63 and 67, again chapter-IV section 39, for anticipatory breach of a contract followed with section 73 for actual breach. Due to the non-performance of a contract, the consequences (compensation of damages) extend to Chapter-VI section 73 (damages for breach) and section 75 (rescinding<sup>iii</sup> of a contract for compensation) :

1. Chapter- IV: OF THE PERFORMANCE OF CONTRACTS, from (Contracts which must be performed)<sup>iv</sup> specifically, obligation of parties to contract (section- 37) to (Contracts which need not be performed)<sup>v</sup> which ends with Effect of neglect of promisee to afford promisor reasonable facilities for performance (section- 67).
2. Chapter-IV Section-39 which introduces and gives the meaning of anticipatory breach<sup>vi</sup> and their effect upon the right to recover the damage.
3. Chapter-VI extends to the inconvenience caused by non-performance of a contract and remedies given for the same in section-73 to 75<sup>vii</sup> (includes actual breach<sup>viii</sup> in 73<sup>ix</sup> which is unliquidated damages<sup>x</sup> and for liquidated damages<sup>xi</sup> is in 74 and in section 75 is compensation through rescinding of a contract.

## PERFORMANCE OF THE CONTRACT

Contracts which 'must' be performed:

**Section 37: Obligations of parties to contract:** “The parties to a contract must either perform, or offer to perform, their respective promises unless such performance is dispensed with or excuse under the provisions of this Act, or of any other law”. “Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract”<sup>xii</sup>

## INGREDIENTS AND THEIR APPLICATION:

- A. Both the party has to be committed to perform and there should be consensus ad idem<sup>xiii</sup> from both sides.
- B. Promises made (section 2 (b), (c) as a thumb rule or interpreted from here) is binding on both the representatives of the promisors, in case of death, unless an opposite intention appears from the contract, like in case of *Basanti Bai v. Prafulla Kumar Roulal* the Cuttack High Court stated the conclusion that this principle will apply even if the promisors has no legal heirs. If the contract is legal and enforceable, then even if one of the parties to the contract dies leaving no legal heir, the persons, who acquire interest over the subject-matter of the contract through that deceased party would be bound by the contract and specific performance can be enforced against such persons<sup>xiv</sup>.
- C. Right of renewal should fall in the authority of its renewal clause in the case of *Hardesh Ores (P) Ltd v Hede*<sup>xv</sup> judgment by the Supreme Court as there might be a conflict to give the acceptance of renewal or not between two-party. For example,<sup>xvi</sup> A, promises to deliver goods to B on a certain day of payment of Rs.1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs.1,000 to A's representatives.

**Section 38** deals with the offer of performance<sup>xvii</sup> and its effect when the offer is refused to perform by the promisee. If it is refused then the promisee has no responsibility to perform also he does not lose his rights under the contract. All such offer should follow certain conditions:

- A. Offer or tender of performance must be unconditional [S.38(1)]. It should be in consonance with the terms of the contract. For example, the amount of a tender should not be less than

the due amount of a tender. It was similar in the case of Haji Abdul Rahman v Haji Noor Mahomed.

- B. The offer of performance must be made at the proper time and place (extended in S.46-50). In the case of Startup v Macdonald the defendant refused to accept the tender (delivering ten tons of linseed oil) as it was delivered late at 9:00 PM night, not on the beginning of the 14th day of delivery or 13th post-12:00 am. But in the case of Afovos Shipping Co v R. Pagnan court held that before repudiating the contract the defendant should have waited up to midnight of the 14th<sup>xviii</sup>.
- C. The tender goods should be the same as mentioned in the contract otherwise the tender will be invalid. Also, there should be a reasonable opportunity given to the receiver or promisee to see that the thing offered is the thing which the promisor bound by his promise to deliver (offeror). An offer that is made to one of the joint promisors (extended in S. 42-44) has a similar legal effect as to all of them.

**Section 39, 53, and 55** are contrary to all this and will deal further in subsequent voidable contracts due to the prevention of the performance of the contract and section 39 is excused from performance. Now, the question is who should perform the contract? It is clear in sections: 40, 41, 43, and 44 deal with joint promisors, and 42 and 45 states the joint liabilities.

**Section 40 deals with two cases of performance.** One can perform by itself that is promisors and in other cases may employ a representative who is competent to perform. For example, A promises to pay B a sum of money. Now, A may perform in either way: by himself or through a representative to pay to B. And in case if A dies before the appointed time for payment, his representatives must perform the promise, or he can employ a proper person to perform.

**Section 41** has a later condition that as the promisee accepts the performance from a third person, then he himself cannot afterward enforce the contract against the promisor as observed in the case of Kapurchand Godha v Mir Nawab Himayatalikhan Azamjah<sup>xix</sup> This was applied from the English law for the discharge of a contract from a third party only if authorized or ratified by the debtor or A, first-party who promises to pay a sum of money (See S. 63 for the wholly performed contract by the third party). Joint and Several<sup>xx</sup>

### **Section 43:**

- A. In para 1: When there is a joint promise between two or more persons, and there is no express agreement<sup>xxi</sup> to the contrary, then one or more parties can be compelled to perform the whole of the promise.
- B. In para 2: joint promisors may compel other joint promisors to contribute equally to perform the whole of the promise unless an opposite intention appears from the contract.
- C. In para 3<sup>xxii</sup>: If any one of two or more of the joint promisors makes default in such contributions then, the loss due to the default should be taken from the remaining joint promisors. It is in accordance with the English law as laid down in *R.v Hoare*<sup>xxiii</sup> but not applicable in India as Indian Law doctrine of joint debtors<sup>xxiv</sup> has been excluded in section 43 and later same rule adopted in *Kendall v Hamilton*<sup>xxv</sup>

**Section 44** When two or more persons in a joint promise have released one of its joint promisors that do not discharge the other joint promisor or joint promisors also it not free the joint promisor so released from responsibility to the other joint promisor or joint promisors<sup>xxvi</sup>.

### **DEVOLUTION OF LIABILITIES<sup>xxvii</sup>**

**Section 42: Devolution of joint liabilities<sup>xxviii</sup>.** Joint promisors must fulfill the promise during their joint lives and if any one of them dies, his representatives must fulfill the promise jointly with their surviving promisors. On the death of the last surviving promisors, the representatives of all of them must fulfill the promise. But there can be private arrangements on the representatives' end that they may expressly or impliedly prescribe a different rule.

**Section 45: Devolution of joint rights:** When a person has made a promise to two or more jointly, then unless a contrary intention appears from the contract the performance is held on the promisor and promisee during their joint lives if anyone dies, then remains on the representatives of such deceased person jointly with the survivor or survivors and after the last survivor dies, then rests with the representatives of all jointly. Devolution cannot be compelled

by a court to become a legal heir of a party said in the case of *Johar Roy v Premji Mansata*<sup>xxix</sup>  
For example, if there is no legal heir of B then C will get the full amount and the court will publish suo motu publication<sup>xxx</sup>

## **TIME AND PLACE FOR THE PERFORMANCE OF A CONTRACT DEALS (S. 46-50)**

**Section 48:** It is the duty of the promisee to apply for performance at a proper place and time in the usual business hours if the promisor has not undertaken to perform a promise without application and question arises what is proper time and place that is in accordance with the particular case. And this can also connect with section 55 deals with time as the essence of a contract, this has to be read with 46-50.

**Section 46:** Where there is no specified time but reasonable time to perform and also when the contract, a promisor is to perform without application by the promisee. Illustration:

**Section 47:** Promisor may be performed at a certain place and time in usual business hours on such day at which the promise should be performed and a promisor has not undertaken to perform it without application by the promisee.

**Section 49:** It deals with the appointment of the reasonable time for the performance of the promise if the promise is to be performed without application by the promisee with no place fixed for the performance.

**Section 50:** Performance to its time and manner is based on the sanction or as prescribed by the promisee.

When there are reciprocal promises then how it should be performed is given from S. 51-54.

**Section 51:** It deals with the will of the promisee to perform his reciprocal promise until then the promisor is not bound to perform. For, A and B enter into a contract, A need not deliver the goods to B, unless B is willing to perform his reciprocal promise that is to pay to the promisor.

**Section 52:** It deals with the order or sequence of the performance, that if the order of performance is not expressly fixed then it should be performed as the nature of the transaction requires it to perform. On the contrary, if the reciprocal promise order of performance is fixed then it shall be performed in that order. For example, In the case of K. Abdul Khader v state, the government on the defendant side failed to pay for the completed work to the plaintiff Abdul Khader as there was a delay on the part of the work of the contractor.

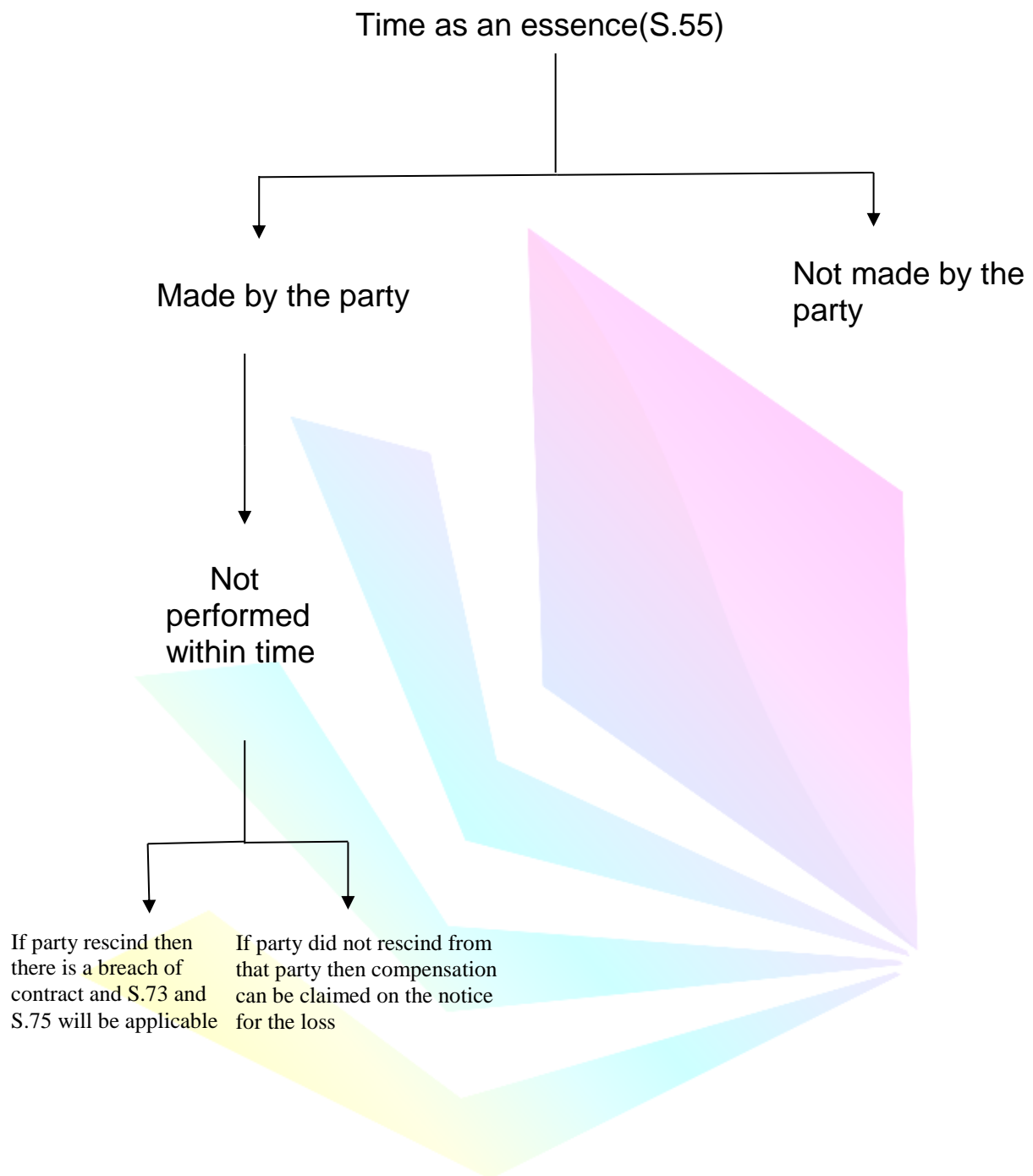
**Section 53:** It comes under the subsequent voidable contract<sup>xxxvi</sup>. It says where a contract has reciprocal promise, and one party prevents another to perform his promise, then the contract is voidable at the option of the party so prevented and he is entitled to the compensation from another party who caused the non-performance of the promise. For example, in the case of Kleinert v Abosso Gold Mining<sup>xxxvii</sup> before Privy council<sup>xxxviii</sup>, The inadequate supply of the crusher by the defendant to the plaintiff which had been used to clear the rocks in mines caused obstruction in the performance.

**Section 54:** I Will explain this section first through illustration as in the case of Nathulal v Phoolchand<sup>xxxix</sup> Defendant defaulted in the payment of half of the money to buy the ginning factory whose owner was the plaintiff and so the seller rescinds the contract and brought an action to put possession with him which was earlier given to the defendant.

When a contract is formed containing reciprocal promise and one of them cannot perform, such promisor cannot itself claim the performance, and must make compensation to the party who suffered a loss due to the non-performance of a contract.<sup>xxxv</sup>

**Section 55:** In concise where time is an essence for the performance (flowchart):





For example, a construction contract is likely to be an essence as it is a commercial service that is a shipment, movable property but that can be rebuttable.

## IMPOSSIBLE TO PERFORM THE CONTRACT AND DOCTRINE OF FRUSTRATION<sup>xxxvi</sup>

**Section 56** An agreement to an impossible act is per se<sup>xxxvii</sup> void. Two impossibility: contract to do any act which afterward becomes impossible or unlawful due to some event and the contract through non-performance of an act which is known (reasonable diligence) to be impossible or unlawful<sup>xxxviii</sup>

**Section 57 and 58:** deals with the reciprocal promise in former to do things which are legal is a contract and things that are illegal are void. In the latter, a branch in law that is legal will be a contract, not a branch that is illegal.

A contract which needs 'not' be performed (S.62. 63 and 67):

**Section 62:** "If the parties agree to substitute a new contract or rescind, alter it, the original contract need not be performed"<sup>xxxix</sup>

These can be done in three ways:

- A. Novation: In case of *Scarf v Jardine*<sup>xl</sup> novation can be of two kinds: novation which involves change of parties and other which involves substitution of a new contract in place of the old.
- B. Rescission: It allows to cancel the contract because of other party's breach, more in S.67.
- C. Alteration: In case of *Manohar Koyal v Thakur Naskar*<sup>xli</sup> the plaintiff sued to recover Rs 1173 due on the bond in two ways: installment of Rs 700 and 400 in cash but the defendant followed neither ways. Plaintiff sued him on the original bond as it was breach done not by novation. Substitution was not possible after there has been a breach of the original contract.

**Section 63 and Section 67:** Former deals with the promise can be relaxed, as in a part or whole, also the performance time may be extended and latter deals with cooperation between parties as in to provide reasonable facilities for performance it is based upon the case of *Ellon v Topp*<sup>xlii</sup> in which the court decided in the favour of the plaintiff as the reasonable facility was subsequently given up by the defendant. Also, the rescission and restoration is allowed depending on the circumstances. Latter deals with extension of the 63 in such that if reasonable



facilities are not given to promisee then he can neglect or refuse as any non-performance caused.

**Breach of contract:** Breach means non-performance of your part of contract without legal justification. There are two types: anticipatory<sup>xliv</sup> and actual breach<sup>xlv</sup> which is in section S.39 and S.73 (actual breach damages)

**Section 39:** As it deals with the immediate compensation through express or implied in an objective approach (acquiescence) it is anticipatory for the upcoming loss to recover. But In the case of a *Hochester v De La Tour*<sup>xlv</sup> in which Lord Campbell gave a decision to no action can be brought before the date of performing the contract. It should be compensated for actual that is why S.65 and S.75 has to be extended after this.

**Section 65:** When an agreement later on becomes void, then a plaintiff is bound to restore it or take compensation from the person causing disadvantage to him.

**Section 73 and Section 75:** First one is the claim for compensation of direct and central to loss or damage due to the breach in the usual course of things. 75 deals with only rescission and no other option to be entitled to compensation for any damage due to the breach of the contract. For example In the case of *Raharman Prodhan v State of W.B.*<sup>xlvi</sup> A work was issued to repair the bank of a river to complete in 45 days. After long 10 months<sup>xlvii</sup> the proper position for work was given which was wrong, correct was given when a substantial portion of the work was done. Due to the wrong alignment the place was washed away from devastating floods. Plaintiff claim was to compensate for the already work done. Judgment was given to compensate the plaintiff with 18% interest rate from the suit filed till the date of decision.<sup>xlviii</sup>

## CONCLUSION

Performance of the contract (S.37-67) till the Breach of the contract and their consequences (S.39, 72-75) journey is not limited. As we study in S.39 about anticipatory breach we connect to the S.31 (contingent contracts) which are further applicable by anticipatory breach.

Performance happens from the events and their enforceability and breach also depends on the certain event either natural or man-made.

## ENDNOTES

<sup>i</sup> It is the law relating to the contracts in India which have been passed by the Legislature and received its assent on 25th April, 1872 (Act 9 of 1872) and enforced on 1st September, 1872.

<sup>ii</sup> It is the unwritten common law which comprises civil and criminal law, each having its own branch of court and procedure and is applicable in England.

<sup>iii</sup> To take back a contract from performing.

<sup>iv</sup> in THE INDIAN CONTRACT ACT, 1872 - BARE ACT (2020).

<sup>v</sup> Id at 29.

<sup>vi</sup> Avatar Singh, in CONTRACT AND SPECIFIC RELIEF (2020).

<sup>vii</sup> *Supra* note 3, at 34.

<sup>viii</sup> It is a breach during the scheduled performance of the contract either it is due or ongoing.

<sup>ix</sup> Janhavi Arakeri, Liquidated and Unliquidated Damages (iPLEaders Intelligent Legal Solutions 27th May, 2019).

<sup>x</sup> Damages that are claimed on the actual losses and which is unforeseeable or not known. It is after the performance of a contract.

<sup>xi</sup> According to the Black's Law Dictionary definition 'Liquidated damages' as, "An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches the contract; also if the parties to a contract have agreed on Liquidated Damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages." In short, it is foreseeable and for which a contract is to pay for a certain amount on the breach. It is prior performance of a contract.

<sup>xii</sup> *Supra* note 3, at 21.

<sup>xiii</sup> When there is a common understanding or similar will to give and take between two parties in formation of the contract.

<sup>xiv</sup> Raviteja P.A.N.V, *Discharge by Performance & Contingent contracts*  
, ACADEMIKE ( 2014 ).

<sup>xv</sup> *Supra* note 5, at 361.

<sup>xvi</sup> CHAPTER IV (37-67) – PERFORMANCE OF CONTRACT IN: INDIAN CONTRACT ACT, 1872, available at <https://www.writinglaw.com/37-67-chapter-iv-indian-contract-act>

<sup>xvii</sup> This offer is equal to tender of performance. It is the offer made by the offeror to offeree to perform his obligation. It is upto the discretion of the promisee to whether accept the offer or not.

<sup>xviii</sup> *Supra* note 5, at 362.

<sup>xix</sup> *Supra* note 5, at 363.

<sup>xx</sup> It means sum of all. In a contract all and each one of them b,c,d and e will be equally liable to A.

<sup>xxi</sup> It is entered voluntarily between two or more people either verbally or in writing.

<sup>xxii</sup> *Supra* note 3, at 23.

<sup>xxiii</sup> (1844) 13 M & W 494: 67 RR 664; from a joint and several promise, is this: that in case of death the of either promisee so there could be only one cause of action which would be a joint one and not joint and several as different promisee are liable for different remedies to the obligee; *Supra* note 5, at 365.

<sup>xxiv</sup> It is when two or more people join together to make one and the same promise under the contract.

<sup>xxv</sup> Only Lord Penzance dissenting (1879).

<sup>xxvi</sup> *Supra* note 15, at 44.

<sup>xxvii</sup> Devolution means which right is going to whom due to death or other matters of personal laws. It is the transfer of liability from the promisor to their representative, in case the promisor die.

<sup>xxviii</sup> *Supra* note 3, at 22.

<sup>xxix</sup> *Supra* note 5, at 367.

<sup>xxx</sup> In its own motion.

<sup>xxxi</sup> Sections in subsequent voidable contract: 39, 53 and 55.

<sup>xxxii</sup> *Supra* note 5, at 373.

<sup>xxxiii</sup> Privy Council of the United Kingdom is a formal body to advise the sovereign (rulers) at UK.

<sup>xxxiv</sup> *Supra* note 5, at 374.

<sup>xxxv</sup> *Supra* note 3, at 26.

<sup>xxxvi</sup> It means when after the contract is impossible to perform or becomes void in the eyes of law.

<sup>xxxvii</sup> In itself.

<sup>xxxviii</sup> *Supra* note 3, at 27.

<sup>xxxix</sup> *Supra* note 3, at 29.

<sup>xl</sup> Avatar Singh, *Discharge by Agreement in CONTRACT AND SPECIFIC RELIEF*, 433.

<sup>xli</sup> *Id* at 435.

<sup>xlii</sup> *Supra* note 38, at 438.

<sup>xliii</sup> Based on doctrine of anticipatory repudiation in which before the performance of promise, the promisor completely refuses the contract.

<sup>xliv</sup> It is a present breach that has already occurred.

<sup>xlvi</sup> *Supra* note 38, at 451.

<sup>xlii</sup> *Supra* note 38, at 557.

<sup>xlvii</sup> *Raharman Prodhan v/s State of West Bengal* , Legal services available at <https://www.lawyerservices.in/Raharman-Prodhan-Versus-State-of-West-Bengal-2008-08-28>.

<sup>xlviii</sup> *Sri Raharman Prodhan vs State Of West Bengal & Anr* (28th August, 2008 ), available at <https://indiankanoon.org/doc/179412829/>.