# VOID AGREEMENT

Void agreements are those agreements which are not enforced by law courts. Section 2(g) of the Indian Contract Act defines a void agreement as, “an agreement not enforceable by law”. Thus the parties to the contract do not get any legal redress in the case of void agreements.

Void agreements arise due to the non-fulfillment of one or more conditions laid down by Section 10 of the Indian contract Act. Ths Section states as follows:

All agreements are contracts if they are made with free consent of parties competent to contract, for a lawful, consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly replealed, by which any contract is required to be made in writing or in the presence of witness, or any law relating to the registration of documents.

From the above, it is quite clear that non-fulfillment of any of these conditions by one of the parties to a contract shall make an agreement void. These conditions being:-

1. Free consent of the parties;

2. Competency of the parties to contract;

3. Existence of a lawful consideration;

4. Existence of a lawful object;

5. Agreement being not included in the list of those specially declared to be void by the Indian Contract Act by its Section 26, 27, 28, 29, 30, and 56;

6. Completion of certain formalities required by any other law of the country like transfer of Property, Act, Company Act, etc.

**Difference between a Void Agreement and a Void Contract**

Most of the students do not make any distinction between the two terms. They treat them in one and the same sense. But this is wrong. Agreement shall be called a contract only when it fulfills all the conditions laid down

by Section 10 of the Act.

The students can make a distinction between an agreement and a contract on the following basis:-

1. *Definition*: void agreement is defined by Section 2(g) viz., an agreement not enforceable by law is void agreement. Void contract is defined by Section 2(j) viz., a contract which ceases to be enforceable by law is a void contract since the time it ceases to be enforceable.

Thus it is very clear from the two definitions that a void agreement is void from the very beginning and does not create any legal effect, while a void contract is not void from the beginning, it becomes void at a subsequent stage due to the occurrence of an event or change in the original conditions. We may illustrate this with the help of an example. A, an Indian, enters into a contract with B, a Pakistani national, to supply woolen a carpets after three months. After some time war breaks out between India and Pakistan. The contract in between A & B shall become void at the outbreak of war.

2. *Rights*: A void agreement does not create any legal right or obligation upon the parties to the agreement. On the other hand, a void contract does create a right and an obligation upon the parties. A party to the void contract is within his rights to get back the benefit which he had given to the other party in terms of money, goods or services and the other party enjoying such benefit under a void contract is placed under an obligation to return that benefit to him. This is true in many cases but not in all cases e.g., a voidable contract being rescinded shall make, it obligatory on the aggrieved party to return the benefit which he has already derived from the contract. But if a contract becomes void due to supervening impossibility the benefit enjoyed by the promisor shall not be returned to the promisee by him.

3. *Treatment*: void agreements have been specifically stated in Chapter II of the act under Sections 11, 20, 23, to 30, and 56. But no such specific mention is made for void contract in any Chapter of the Act.

**Difference between Illegal and opposed to Public Policy Agreements**

All these three terms are the outcome of Section 23 of the Indian Contract Act which deals with lawful consideration and lawful object. The five cases stated in this section are:-

(a) it is forbidden by law; or

(b) is of such nature that, if permitted, it would defeat the provisions of

laws; or

(c) is fraudulent; or

(d) involves or implies injury to the; person or property of another; or

(e) the court regards it as immoral or opposed to public policy.

The first four acts listed above i.e., from (a) to (d) form part of illegal acts, while the fifth act refers to immoral acts as well as those opposed to public policy. Let us know these acts before we distinguish them.

*Illegal* acts are not supported by Law. "Es turpi causa non oritur actio", which means that no right of action can spring out of an illegal contract, is an old and well-known legal maxim. It is founded on good sense and expresses a clear and well recognized legal principle.

Illegal acts may take any of the following forms:-

(a) Act which is prohibited by law. A is granted a licence to ply a bus on a particular route. The licence is to be used by him only and not to be tranferred in somebody else's name. He forms a partnership with B and transfers the licence in the firm's name. The transfer is illegal since it is prohibited or forbidden by law.

(b) Any act which defeats the provisions of any law.

A agrees to lend B Rs. 1000 for six months provided B does not raise the plea of limitation under the Indian Limitations Act. The agreement is illegal since it defeats the provisions of Limitations Act.

(c) Any act which is Fraudulent.

A, B and C enter into an agreement for the division among them of gains acquired, to be acquired, by them by fraud.

The agreement is illegal since its object is fraudulent.

(d) Any act which involves an injury to the person or property of another.

A enters into an agreement with B, an editor of newspaper, to pay Rs. 500 if he (B) publishes a libellous matter in his paper against C. Here B cannot recover the money from A since the object of the agreement is to injure the person of C and thereby it is illegal.

*Immoral*: The word immoral is very comprehensive and concerns every aspect of personal life and conduct deviating from the standards and norms

of the human life. Normally, acts contrary to sound and positive morality as recognised by law are immoral acts 'Ex dolo malo non oritur actio' is a maxim founded on general principles of policy and the courts are not prepared to help the persons whose action is based upon immoral act. Supreme Court of India in its decision confirmed in the case Cherulal Parekh V. Mahadee Das A.I.R. 1959 has stated that judicial decisions have confirmed the operation of the doctrine to the cases of sexual morality.

On the above basis immoral acts can be divided into the following two categories:-

1. Where the consideration of the agreement forms an act of sexual immorality. This category includes case of illicit cohabitation or prostitution.

2. Where the object of the agreement promotes sexual immorality. Lending money to a prostitute to help her in the furthernace of her vocation forms part of such category.

Cases of immoral acts can be the following examples based on cases decided by the varioius courts, Indian as well as English.

(a) A made gift to a husband and a wife for the consideration that the wife shall maintain immoral relations with him (donor). Held the agreement is unlawful as it is immoral. Kandaswami V. Narayanswami, 1923, 45 Mad.L.J 551.

However, there has been a controversy about the past cohabitation. Allahabad and Madras. High Courts have treated an agreement to give woman sum of money in consideration of past cohabitation asgood consideration as being a reward for past services under S. 25(2), but Bombay High Court and Mysore High Court have taken the view that gift made for past-co-habitation is void.

(b) A makes an agreement with B for hire of his house to be used by B for promoting prostitution. The agreement is void since the object is to promote immorality. All Baksh v. Chunia 1877 Punjab.

Hiring, sale of a house or property or giving ornaments for adopting vocation of prostitution or running a brothels declared immoral by the various Indian as well as English Courts. However, if money is borrowed by a dancing girl to teach singing or dancing to her own daughters, the agreement is not void because singing is not acquired with a view to practise prostitution. Khubchand v Beram (1889, 13 Bombay 150).

(c) A firm of coach-builder shired out a carriage to a prostitute, knowing

that it was to be used by the prostitute to attract men. Held, the coach-builders coult not recover the hire as the agreement was based on immorality. (Peace v Brooks 1866. L.R. 1 Ex. 213).

*Opposed to Public Policy*: agreement harmful to the public welfare said to be opposed to public policy. Lord Truro in Egerton v Brownlow (1953; 4 H...Cas. 1) has stated that Public Policy is that principal of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good-which may be termed the policy of the law, or public policy in relation to the law.

No precise definition can be given of term. Certain classes of acts are said to be against public policy or against the policy of the law when the law refuses to recognize it on the plea that they have a mischievous tendency and shall be injurious to the interests of the state or the Public. Agreements may not be in the interest of the Country and the are therefore not to be enforced. During the war, trading with enemies is one such example, pollutioin in the society or adversely affect the character of the youth. All such cases are to be dealth with under the head 'Opposed to Public Policy'. There is no limit to such acts which can be included under jurisdiction of this head, and therefore, Lord Halsbury in Nanson v Driefontein consolidated Mines (1902, A.C. 484, 491) very rightly stated "no court can invest a new head of public policy". Lord Davey in 1902 said in the House of Lord's that 'Public Policy is always an unsafe and treacherous ground for legal decision'. All those statements were made on account of reason that there is every scope of providing a judge with an excuse for invalidating any contract which is violently disliked. Burrough J. was excited to say that (public policy was a very unruly horse, and when you once get astride it you never know where it will carry you." (Richardson v Mallish, 1824, Bing 229, 252).

However, the jurisdiction of the head 'agreements opposed to public policy' has been restricted by the Supreme Court's decision in Gherulal Prakh v Mahadeodas Mariya & Ors., (1959, S.C.A.,342) by the words, "it is advisable in the interest of stability of the society not to make any attempt to discover new heads in these days". It does not mean that the doors have been closed, but caution is given and the courts are permitted to evolve a new head but only under extraordinary circumstances which give rise to incontestable harm to the society.

The Indian Contract Act has tried to restrict the scope of agreements opposed to Public policy. The following heads usually cover the agreements/opposed to public policy:

1. Agreements for trading with enemy countries;

2. Agreements for stifling prosecutions.

3. Agreements included under “Champerty and Maintenance” under the English Law. Such agreements relate to the promotion of litigation. However, these are not declared void in India.

4. Agreement creating interference with course of justice, e.g., agreements to use any kind of pressure of influence on judges or officers of justice shall be void.

5. Marriage brockerage contracts e.g., agreement to pay brockerage for getting a spouse shall be void.

6. Agreements tending to create interest against duty e.g., agreement by agents to deal in their own name instead in the name of their principals, without principal’s knowledge.

7. Agreements for sale of public offices e.g. agreement to pay some money in return of getting a job in an office, shall be declared void.

8. Agreements to create monopolies.

9. Agreements not to bid in an action sale.

10. Agreements in restraint of trades.

The above discussion, on agreements opposed to public policy, clearly states the grounds and explains that all such agreements which are contrary to the welfare of the state by interfering with the civil or judicial administration or with the individual freedom of the citizens shall be unlawful as opposed to public policy.

**Agreements under Mistake of Law**

Indian Contract Act has nowhere defined mistake. However, it can be defined as an erroneous belief about something. Mistake is of two broad types. (1) Mistake as to fact, and (2) Mistake as to Law.

Sec. 21 of the Act deals with the effect of Mistake as to Law, but is silent over other issues relating to such types of mistake.

A contract is not voidable because it was caused by a mistake as to any law in force in India but a mistake as to law not in force in India has the same effect as a mistake of fact.

**Illustration**

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. The Contract is not voidable.

A a widow, is entitled to certain occupancy rights. A remarries and believing that she has lost her occupancy rights by reason of her second marriage agrees to take the land from B, her Zamindar, on an increased rate of rent. Both A and B honestly believe that A has lost her occupancy rights. The contract is not voidable.

Now first of all we should see what a Mistake of Law pertains to ignorance of some Law of the land. It is expected from every citizen of a country to be conversant with the Law of the land. If he violates any law, he cannot be excused on the plea that he had no knowledge about the law, e.g., if a motorist crosses the road without carrying for the red-light signal is a punishable offence. He is to be prosecuted for the offence and is to be fined by the magistrate if challaned. Thus the maxim.

'Ignorantia jusrisdon excusalt', meaning "Ignorance of Law is no excuse", holds good in every country.

It has been stated by many jursits without some arbitrary rule, imposing upon each citizen the duty of well considering and understanding the consequences of his own acts and contracts there would be no limit to the excuse of ignorance and there shall be no security in any contract. Of course in some individual cases this maxim may put severe hardships, but it brings stability and certainty to the general transactions of Commerce. In the absence of such a rule such transaction shall become fluctuating and insecure.

However, Mistake of Law is again classified into two- (1) Mistake as to Indian Law;

(2) Mistake as to Foreign Law;

Mistake as to Foreign Law is treated as Mistake as to Facts and therefore, an agreement based upon Mistake as to Foreign Law is declared void by the Indian Law Courts.

Mistake as to Indian Law does not universally or generally invalidate the transactions which are based upon it. It is due to the simple reason that the maxim Ignorantial juris non excusat is restricted in its operation to ignorance of the general law of the country. Sec. 21, as has been stated above, does not give any relief to the aggrieved party in respect of Mistake of Indian Law. It has been argued that when the mistake is so fundamental as to prevent any real agreement upon the same thing in the same sense for

being formed, it is immateral of what kind of mistake was and how it was brought about. Therefore Sec. 21, does not grant any validity to such apparent agreement which do not satisfy the conditions of Free and real Consent. These conditons have have been stated by the provisions of sections 10-13 of the Indian Contract Act. Such a decision has been given in *Balaji Ganoba v Annapuranabai* (A.I.R. Nag 1952) also. Thus mistake of Indian Law does not vitaite the contract of the parties. They have to perform their part of promise otherwise shall face the consequences of the Breach of Contract.

You should remember one thing in this context. *Private rights of property are usually treated to be matter of facts*. If any party to the contract does not have knowledge of his private rights of property and enters into a contract which forms part of the same subject matter, certainly the contract shall be avoided as soon as the aggrieved party comes to realise mistake on his part. This shall all the more be clear from the following illustration.

A agrees to purchase a house from B who is distant relation of his father, never knowing that he is the actual owner of the house. After getting registration of transfer deed in his favour he comes to know of his ownership of the said house but could not get back the consideration money from B.

**Agreements by Way of Wager**

Agreements by way of wager are void and no suit be bought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event of which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or towards any place, prize or sum of money of the value of amount of five hundred rupees or upwards, to be awarded to the inner or winners of any horse race.

Nothing in this section shall be deemed to legalise any transaction connected with horse racing to which the provisions or section 294-A of the Indian Penal Code apply. (sec.30).

Section 30 of the Indian Contract Act states “agreements by way of wager are *void quo no watt”* for the recovery of the amount won shall not be tenable. The section does not define Wager. What is Wager?

William Anson has defined Wager as a contract by A to pay money to B on

the happening of a given event in consideration of B paying to him money on the event not happening. (*Hampden v Wash*, 1876 1 A.B.D. 189, 192). According to Justice Hawkins, a wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event mutually agree that, dependant on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake, neither or the contracting parties having any other interest in that contract then the sum of stake he will win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to wagering contract that each party may under it either win or lose, whether he will win or lose being dependant on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties win and cannot lose, or may lose but cannot win, it is not a wagering contract (*Carlil v Carbolic Smoke Bail Co.*, 1892, 2 Q.B. 484) Jenkins C.J. has stated in *Sasson v Tokersy* (1904, 28 Bom. 616, 621). "It is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event, in reference to which the chance or risk is taken."

**Characteristics**

From the above, we can state that a Wager must have the following characteristics:

a. It is a promise to pay money or money's worth.

b. The promise depends upon the happening or not happening of an event.

c. The event upon which the promise is to depend is uncertain, the parties do not know the occurrence of the event.

d. None of the parties has a control on the occurrence of the uncertain event.

e. None of the parties has an interest in the occurrence or non-occurrence of the event. We can explain our point with the help of the following examples:-

1. On a cloudy day A bets Rs. 10 with B that it will rain, B being of the view that it shall not rain. A says to B, if it rains he will receive Rs. 10 from B, but it is does not rain A shall pay Rs. 10 to B. It is a Wager.

2. A lottery is also a wager since it is a game of chance. An agreement to buy a ticket for a lottery is also a wagering agreement. When the lottery is authorised by the state, the person conducting the lottery is not punished,

but that does not make the lottery a valid one, it remains a wagering transaction.

A wager may have all other requisities of a legal contract. It may have two or more parties consideration, subject matter and the identity of minds of the parties. But the peculiarity lies in its performance. Its performance is in the alternative, i.e., one party has to pay the amount to the other. Only one party is to gain and the other is to lose.

There is no difference between the expression 'gaming and wagering' used in the English Statute and repealed by Indian Contract Act XXI of 1848, and the expression 'by way of wager' used in this section. (*Kong Yee Lone & Co. v Lowjee Nanjee* 1901, 29 Cal 461, L.R. 28 I.A. 239).

**Transactions which are not Wager**

1. Prize competitions, according to the Prize Competition Act, 1955 in games of skill, if the prize does not exceed Rs. 100. Crossword puzzle is such an example, since it depends upon the skill.

2. Games of skill like athletic competition, wrestling bouts.

3. Subscription or contribution or an agreement to subscribe or contribute, towards any prize, plate or sum of money to be awarded to the winners of the horse race.

4. Tezi Mandir transactions or deals in shares and stocks, where the party's intention is to deliver the goods or securities.

5. Insurance contracts.

**Distinction of wager with a conditional promise and a guarantee**

The main distinction the wager and the valid conditional is that of intention and interest. In the wager either of the parties has no interest in the agreement except of again or loss. If the event goes in favour of one party he is to gain, if vice-versa he is to lose and one of the parties is to lose, the other to gain. But in valid conditional contracts, both the parties have proprietary interest. This proprietary interest in the language of Insurance is called Insurable Interest. The insurable interest only makes a difference between a wager and the insurance, contracts, whether of life, fire or marine the parties having an insurance policy have an insurable interest which is a pecuniary interest. An insurance policy wherein the insured has no insurable interest shall be treated as Wager.

Secondly, in wager the parties bet. They depend upon the chance. The

uncertain future event may be in their favour or against, they do not know. They have to gain or lose depending upon the result of the uncertain event. But in conditional contracts, like insurance contracts, the insured pays the consideration i.e., premium to the Insurance Company, whether there is loss or not. In the event of the loss sustaned by the Insured (policy holder), the Insurance Company is to make good the loss. Thus the party taking an insurance policy in no case is to bet or take an advantage of the position of the other party.

**Wager and collateral Transaction**

Section 30 of the Indian Contract has stated in clear terms that an agreement by way of wager is void. It does not speak that the agreement is illegal. Many cases arise in the law courts of such nature. The decision given by various courts in cases of such nature have proved that wager does not taint Collateral Transactions and therefore, the collateral transactions can be enforced. For example, a suit can be brought to recover a loan to help the payment of gambling debt (Beni Madho Das v Kaunsal, 1900, 22 All 452) or to enable a man to continue speculation or to recover brokerage.

Wager is void but not forbidden by law. Except in Maharastra Wager is neither immoral or opposed to public policy under section 23 of the Indian Contract Act. Therefore the object of an agreement collateral to a wager is not unlawful (except in Maharashtra). A partnership to carry on wagering transactions with third parties has not been declared unlawful (*Gherulal Parakh v Mahadedoas*, A.I.R. 1959, S.C. 781). The courts have decided similarly in many cases. In one case Bridgerv Savage (1885, Q.E.D. 363) (it was held) that an action would lie against commission agent who had recovered moneys on account of bets made for the plaintiff. Madras decision in *Muthuswami v Veeraswami* A.I.R. 1936, and allahabad decision in *Bhola Nath v Mulchand* in 1903 also testify this rule. A betting agent or a broker, after the bets were lost, paid for the bets, could also recover the same from the defendant. (Read v Anderson).

To conclude, an agreement by way of wager though is void a contract collateral to it or in repect of a wagering agreement is not void except in the Maharashtra State. To bring in uniformity the Contract act may be reviewed to inorporate the the provisions of the Bombay Act. The Bombay Act (Act III of 1865) has declared wagering transactions as illegal and so is the rule in England. (Gaming Acts of 1835, 1845 and 1892). The collateral transactions, in Bombay as well as in England are also regarded illegal but in the rest of India (except Maharashtra) the collateral transactions to wagering agreements are valid ones, although wagering agreements are decided void.

**Wager and a Contingent Contract**

Before we distinguish a wager and a contingent contract, we must know what a contingent may be said a conditional contract. The performance of the Contract is dependent upon the happening or not happening of some event. Thus certain contracts are dependent upon the occurence of an event, while others are dependent upon the non-occurence of the event.

Section 31 of the Indian Contract Act has defined a Contingent Contract, as a contract to do or not to do something if some event, collateral to such contract, does or does not happen.

**Characteristics**

A contingent contract has got the following characteristics:

a. A contingent contract is to be performed upon the happening or not happening of some event in future. On the basis of this characteristics this contract is distinguished from other types of contracts.

b. The future event is uncertain. Where the event is bound to happen, the contract is to be fulfilled and therefore, there does not remain any contingency.

c. The future event upon which the performance of the contract depends is incidental or collateral to the contract. It is not the main part of the Contract.

Examples of Contingent contracts can be found in the Contracts of Insurance, Indemnity and Guarantee.

Contingent Contracts are of two types: 1 those depending upon happenings of an event; and 2 those depending upon the non-happening of an event. Examples of such contracts are as follows:

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract, here if B's is burnt A shall be liable to pay B Rs. 10,000. If B's house is not burnt, A is discharged from his liability.

We may take another example. A promises to pay B Rs. 2,000 if B does not marry C. If B marries C, A discharged from his liability. But if B does not marry C but marries D, A is liable to pay Rs.2,000.

Rules regarding Continent Contracts are given in sections 32 to 36 of the Indian Contract Act.

Section 32 states about the enforcement of contracts contingent on an event happening e.g. A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced in law unless and until C dies in life time.

Section 33 states about the enforcement of contract contingent on an event not happening e.g. A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

Section 35 states about the performance of a contingent contract within a fixed period, otherwise it shall become void. This section states about both the types of the contracts. Example being.

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt, within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year or is burnt within the year.

Sec. 36 states that the agreement contingent on impossible events are void. Example relating to this are:

(i) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(ii) A agrees to pay B 1,000 ruppes if B will marry A's daughter.

(iiii) C was dead at the time of the agreement. The agrrement is void.

**Distinction between a Wagering and a Contingent Contract**

After knowing about a wager and a contingent contract we can easily distinguish between these two. The distinction can be made on the following basis.

1. *Definition*: The Indian Contract Act does not define a wager. Sec.30 of the act states the effect only i.e. wagering agreement is void. But the Act by Sec. 31 defines a Contingent Contract as the very name suggests is a contract.

2. *Nature*: A wager is an agreement only but a contingent contract as the very name suggests is a contract.

3. *Promise*: In a wagering agreement both the parties of the agreement promise to each other i.e. A shall pay B if the event favours B and B shall pay A if the event favours A. But in a contingent contract the promisor only makes a promise and not the promisee.

4. *Result*: In wagering agreement the loss of one is gain for the other party and vice-versa. But in a contingent contract it is not necessary that one party must lose and the other must gain.

5. *Enforceability*: A wagering agreement is void. It is not enforceable by law. But a contingent contract is valid and can be enforced on the happening or not happening of a future uncertain event collateral to the contract.

So far, You have read that the Indian Contract Act has specifically declared certain agreements void. Till now you have known about the following void agreements:

(1) Agreements made by parties not possessing capacity to contract.--$ 11

(2) Agreements made under Mistake of Facts—S.23

(3) Agreements having unlawful objects and consideration-S.23

(4) Agreements having unlawful objects and consideration in part-S.24. Some other agreements declared void are:

(5) Agreement made without considered as S.25

(6) Agreement in restraint of marriage. S.26

(7) Agreement in restraint of trade. S.27

(8) Agreement in restraint of legal proceedings S.28.

(9) Agreements to do impossible acts.-S.56.

These four types of agreements are being discussed here.

I. **Agreements in restraint of marriage-(S.26)**

Agreements in restraint of marriage have been declared void u/s 26 of the Indian Contract Act since they are illegal. Sec. 26 states, “Every agreement in restraint of the marriage of any person, other than a minor, is void. This is because of the fact that every person has got a right as well as freedom of choice to marry. If an agreement is made interfering in this right, that is unlawful.

Although a person is not bound by law to marry, but an agreement whereby a person is bound not to marry or whereby his freedom of choice is hindered, is opposed to public policy and illegal. This is the reason, why the act has specifically declared such agreements as void. In Rao Ram Vs Gulab, (A.I.R., 1942, Alld. 351) the Allahabad High Court expressed doubt on the question whether partial or indirect restraint on marriage can be brought under the jurisdiction and purview of this section. Now it has also been decided that partial or Indirect restraint on marriage shall also be covered by this section. Indian law of contract differs with the English law over this point. Under English Law partial or Indirect restraint on marriage is not covered by this section. Such agreements shall not be declared void. Only agreements with total restraint shall be declared void.

However, agreement in restraint of marriage is not declared void under the following cases:-

1. Where a Hindu husband at the time of the marriage enters into an agreement with his first wife not to marry a second wife, till she (the first wife) is alive.

2. Where a husband under strained relations with his wife enters into an agreement with her to pay her maintenance allowance during separation.

3. Where an agreement is made to pay a woman certain annuity, until death or marriage or during widowhood.

4. Where a Muslim husband enters into an agreement with her first wife that she can divorce him if he marries a second wife. Under these circumstances the divorce shall be valid and the wife who divorces her husband shall be entitled to get maintenance allowances for the period of iddat. Babu v. Badaraumesa (1919 29 CIJ.230)

**II. Agreements in Restraint of Trade: (Sec.27)**

Every person has a lawful right to do or adopt any lawful profession, trade or business. If any agreement is made to put restriction over this right, that shall be an infringement of his fundamental right and shall also be against Public Policy. This is why the Indian Contract Act has specifically declared such agreements void.

Section 27 states:

Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1-One who sells the goodwill of a business may agree with the

buyer to refrain from carrying in a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Exception 2.--Repealed

Exception 3.--Repealed

Exception 2 and 3 have been repealed by the Partnership Act. These exceptions have been included in the Act under the provisions of Secs. 11(2), 36 (2), 54 and 55 (3).

In India trade has been in its infacny and it is desirable to develop trade. Therefore, through the stringent provisions of Sec. 27 every agreement interfering with the right to trade has been specifically declared void. Public policy required that every citizen be allowed freedom to work for himself and should get the benefit of labour to himself or to the State. He should not enter into any agreement by which he may not be able to utilise his skill or talent for his benefit or to the benefit of his country. If he does so by an agreement, he shall not be allowed to do so. Jankins, C.J. has given such decision in Fraser & Co. V. The Bombay Ice Manufacturing Co. (1904, 29 Bombay 107 at P. 120). The objective of this section thus has been to protect trade. To cite Kindraley J. in Oakes & Co. V. Jackson (1976, 1, Madras, 134, 145), the legislature may have desired to make the smallest number of exceptions to the rule of agreements where trade may be restrained.

Indian law is very stringent on this point. It has invalidated many agreements on this around although they could have been allowed by the English Common Law. English Law has waivered from time to time with the changing conditions of the trade. Till some time Past it considered agreements in total restraint of trade to be valid, but in Nordenfalt V. Maxim Guns Co. it has been decided in 1894 that when restraint is reasonable it should be allowed and the agreement be not declared void on the plea of opposed to public Policy. In Madhub Chunder V. Raj Coomar, (14 Bengal L.R. 76), Couch, C J, has decided that, whether the restraint is general or partial, qualified or unqualified, if it is in the nature of a restraint of trade it is void and the fact that the restraint is limited inpoint of time or place is impartial. Thus in India the courts have not been allowed to consider the degree of reasonableness or otherwise of the restraint.

The words, “To that extent”, included in the provisions of Sec.27 are very important. These words clarify the position of a situation where the agreement can be broken up into parts. If the agreement can be broken

into parts and some of these parts are not affected by the provisions of this section, i.e. are not vitiated as being in restraint of trade, the agreement pertaining to these parts shall be held valid. However, where the agreement is not divisible, the whole of the agreement shall be declared void.

Let us now think over the cases where agreements in restraint of trade are not treated as void, by the courts in India also. The courts take the plea of reasonableness of limits as also their degree. The cases are covered under the head Exceptions.

**Exception**

The rule enunciated under section 27, i.e., agreement in restraint of trade are void, shall not hold good under the following cases:

1. *Trade Combinations*: Persons engaged in the same trade or Industry may from a combine to protect themselves from the uneconimic competition. If they enter into some agreement not to produce more than a certain quantity, or sell below a certain price, or to pay profits into a common fund, i.e. to pool the profits and divide it in certain proportion, then all such agreements shall be valid ones. They shall not be treated by the courts in India, also as against Public Policy. Sir Lawrence Jenkins, C.J. expressed a decided opinion in Fraser & Co. V. The Bombay Ice Manufacturing Co., (1904, Bombay) that a stipulation restraining the parties to a combination agreement from selling ice manufactured by them at a rate lower than the rate fixed in the agreement was not void unde the provisions of this section. Can you forsee Why? The simple reason is, that such agreements do not restrain the parties from carrying out their business activities. They are simply to observe certain terms in carrying out business. In Kuber Nath V. Mahali Ram (1912, 34 Alld., 587) the Allahabad High Court has decided that such agreements, do neither restrain the trade not are opposed to public policy.

The following two cases also serve as a good illustration under the above head, although they have been decided by the English Courts. In one case, Palmolive Co. V. Freedman (1928, Ch. 163, CA) a manufacturer of goods sold them to the wholesalers by a contract whereby the purchases (wholesalers) were not to sell these goods to the retailers below a certain price. The wholesalers sold some of the goods to the retailers without getting the required undertaking. It was decided that the wholesalers made a breach of the agreement.

In the other case, Rawlings V. General Trading Co. (1921, I.K.B. 635 C-A.) two merchants entered into an agreement according to the terms of which one of them was to bid in an auction sale and the goods so purchased to be

divided between them. This agreement was entered into with the objective to avoid competition. Held the agreement was valid, and enforceable.

2. *Contracts of Service*: Where an agreement is entered into between the employer and the employee that during service contract, the employee shall not undertake any or the service, the agreement shall be valid one and be enforceable by the employer in case the employee makes a breach of the contract. In many cases the English and Indian Law Courts have decided likewise. An important case over the point is of *Charelesworth V. Macdonald* (1899, 23, Bombay 103)

However, where the employee is wrongfully dismissed by the employer then, he (employee) is within his rights to treat the dismissal as a repudiation of the contract by the employer and then shall be free from the terms imposing upon him such restrictions. The tests regarding validity of restraints between employees and employees or servants are fully discussed in the Gopal Paper Mills V. Surendra (A.I.R., 1962 Calcutta, 61)

But where the restriction included in the terms of serivce agreement seem to be unreasonable, the agreements shall be delcared void. This point can be illustrated with the help of the following example:

A medical assitant and two general practitioners entered into an agreement that the assistant shall not, during the service period, serve at any other place and for a period of five years after leaving the service shall not serve in any dispensary or department of medicientor surgey or midwifery within a radius of ten miles from the dispensary of the medical parctitioners. It was decided that the restrictions placed were unreasonable. Such decision was given in Routh v. J. Jones (1947, I Alld. E.R. 758). All agreements containing unreasonable restrictions or trade are declared void, unless there are special circumstances to justify them. In such circumstances the onus of proving such special circumstances lies on the party alleging them.

An agreement by which a person is even partially restrained from competing with his former employer after the expiry of the period of his employment shall also be declared void.

3. *Sale of Goodwl* : Exception 1 to Section 27 states about the sale of Goodwill. Goodwill is the benefit or advantage which a business has in its connection with its customers. It is believed that old customers shall keep their contracts with the old firm and therefore the purchaser of the firm shall get the benefit of these customers. “Goodwill represents business reputation which is a complex of personal reputation, local reputation and objective reputation and of the products of business. While one of these elements will predominate others will depend on the facts and circumstances of each case.”

Thus a person who purchases the goodwill of a firm can enter into an agreement with the seller not to carry on the same trade or business within a local limit and upto a certain period. But these restrictions of time and place should be reasonable. What is reasonable restriction is a question of fact and is to be decided on the merits of the individual cases. However, in Nordenfelt v Maxim etc. Co., (1894, A.C. 535) the meeting of the word reasonable was explained. The word resonable means such as would afford a fair protection to the interests of the party concerned and not so large as to interfere with the interests of the public.

Thus a seller of goodwill of a business may be asked to carry on (a) the same trade or business, (b) within specified local limits (c) so long as the purchaser or his rerpesentative in the title carried on a like business, But such restrictions shall be reasonable as to time and space.

4. *Partner's agreements*: Exceptions 2 and 3 of Section 27 have been repealed by the Partnership Act since they related to certain agreements between partners. The provisions of these exceptions have now been contained in Sections 11 (2), 36 (2), 54 and 55 (3) of the India Partnership Act.

Sec. 11 (2) states that a partner shall not carry on any other business other than the business of the firm.

Sec. 36 (2) states that a retiring partner may agree with the existing partner of the firm not to carry on a competing business within a specified period and specified local limits.

Sec. 54 states that in anticipation of a dissolution of the firm all partners may agree not to carry on a business carried by the firm within a specified area and a specified period.

Sec 55 (3) states that any partner of a firm upon the sale of a firm enter into an agreement with the buyer not to carry on a similar business upto a specified perioid and specified limits.

However, the restrictions concerning and area limits should be reasonable, otherwise such agreements shall be declared void as per the provisions of Sec. 27.

**III Agreements in restraint of Legal Proceedings. (Sec. 28)**

Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1: This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2: Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or effect any provision of any law in force for the time being as to arbitration.

Section 28 of the Indian Contract Act, as is evident from the above, clearly states agreements retraining legal proceedings to be void. In India, as also in England, agreements perverting the course of justice are declared void, because their object is illegal. Neither the Law favours an agreement the object of which is to change the jurisdiction of a court of law nor it permits an agreement the object between the parties to invest a court which has no Jurisdiction, with authority to try the disputes arising out of a contract. But when two courts have jurisdiction to try a case, and the parties by an agreement limit the jurisdiction to one court only, then such an agreement shall not be declared as void.

**Illustration**

R of Ratlam sells out some good to M of Madras. R & M both agree that all disputes arising of transactions between them shall be settled only at Ratlam. Here the agreement limits the jurisdiction of Madras Court. Although Madras court can also try the case but the agreement between the parties has ousted the jurisdicton of Madras court as the parties have decided to go to Ratlam Court only and the Law does not take it bad, hence such an agreement is not declared void. By such an agreement none of the parties loses the right to go to the court of law to rederes its grievances.

But when the rights of the parties to go to the court of law for getting their grievances redressed are lost or limited, then surely, the agreement shall be termed as an agreement in restraint of legal proceedings, and shall form the subject matter of Sec. 28. Where an agreement restricts the rights of the parties from going to the court of law but to refer all their disputes to arbitration, then too the agreement shall not be treated as an agreement in restraint of legal proceedings. Such an agreement is not intended to oust the jurisdiction of a court because an arbitrator himself acts as a Judge of a court and the award given by him can be modified revised, remitted or set aside under certain circumstances.

The provisions of the above section were also held good in cases where an agreement provides that a suit should be brought for the breach of any

terms of the agreement within a time shorter than the period of limitation, prescribed by the Law of Limitation. The agreement under such circumstances shall be declared void. This is so because the effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation.

There are cases which do not limit the time within which the party is required to enforce his rights, but which provide for release or forfeiture of rights if no suit is brought within the stipulated period, stated in the agreement. Such cases do not fall under the purview of Sec. 28 cases are binding upon the parties. They are valid agreements. Usually the Insurance Companies insert such clauses in their agreements with the insured. Let us take an example.

Suppose an insurance policy is taken by X Co., against fire for goods storted in the godown. The Insurance Company inserts a clause in the policy, which reads as follows:

"If the claim is made and rejected, and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be forfeited."

The policy shall not be treated void, because the clause so inserted operates as a release or forfeiture of the rights of the assured if the condition be not complied with and the party shall not be able to maintain a suit after the expiry of three months from the date of rejection of the claim preferred by the insured. The High Court of Bombay gave such a decision in Baroda Spg & Wvg. Co. Ltd. v Satyanarayana Marine & Fire insurance Co. Ltd. (1914, 38 Bom. 544).

*Exception* 1: This exceptionn applies only to a clause of contracts, where as in Scott v Avery (1885, 5 H.L. 811)the parites have agreed that no action shall be brought until some question has first been decided by a reference, as for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Court; it only stays the plaintiff's hand till some particular amount of money has been ascertained by reference." Such decision was given by Garh C.J. In Corings Oil Co. Ltd. v. Koegler (1876, 1 Cal. 466, 469).

**Illustration**

A conductor of a tramway company agreed to be bound by the manager of the company as regards a deposit and wage of the current month in case of any breach by him of the rules. The agreement was held valid. Such decision was given in Aghore Nauth v Calcutta Tramway Company (1885 11,

Calcutta 232).

*Exception 2*: This exception relates to those agreements whcih refrain the parties going to the Law Courts but in the event of disputes they shall refer them to the Arbitration. Such agreement shall not be declared void. The Courts shall recognise the agreements and give effect to them by staying proceedings in the Court. Mulji v Rans (1910, 34 Bom. 13) is such case where the decision has been given on similar lines.

**IV. An agreement to do an act impossible in itself is void (S.56)**

Impossibility of performance of an act does not give or creat any obligation upon the parties to a contract. Section 56 of the Act, declared such contract as void. This section states as follow:

An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisor did not know to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promise sustains through the non-performance of the promise.

**Illustrations**

(a) A agrees with B to discover treasure by magic. The agreement is void. (b) A and b contract to marry each other. Before the time fixed for the marriage. A goes mad. The contract becomes void. (c) A contracts to marry B, being already married to C, and being forbidden by law to which he is subject to practice polygamy. A must make compensation to B for the loss. (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared. (c) A contracts to act a theater for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

After going through the provisions of S.56 as stated above we find that impossibility is of two types (1) Impossibility at the time of entering into a contract, and (2) Subsequent impossibility, i.e. after the contract has taken place. We should like to know in detail about these tow types of impossibilities.

1. Impossibility from the very beginning, i.e. at the time of entering the contract. Agreements which are based upon acts the performance of which is impossible are declared void since the Law does not recognise impossible acts.

Impossible act from the very beginning may further be divided into two categories:

(a) WHERE SUCH ACTS ARE KNOWN TO THE PARTIES:- Such impossibility is termed as Absolute Impossibility and in such cases the agreement is delcared void ab initio. If a tantric promises B to put life in the dead body of C for a consideration of Rs. 5,000 the promise forming this agreement shall be void ab initio, since it is a hard fact that life cannot be put in a dead body again.

(b) WHERE SUCH ACTS ARE NOT KNOWN TO THE PARTIES:- There may be cases where the parties to the contract do not know about the reality of the fact at the time of entering into contract but after a certain time they come to know that the performance of such act is impossible. Soon the parties come to know about the impossibility of performance, the agreement becomes void. Such agreements are covered under the provisions of S.20 dealing with Mistake. In majority of cases such agreements relate to the non-existence of the subject matter of the contract at the time of entering into an agreement. Therefore, the agreement is vitiated by Mistake as to the existence of the subject matter of the contract. The following example will make the point all the more clear.

A agrees to sell out to B the timber lying in his Meerut godown for Rs. 2,000. He did not know that timber was already destroyed by fire. The contract is void under the provisions of S.20, i.e. Mistake as to the existence of subject matter of contract.

One important point in this connection is to be remembered. If one of the parties knows about the impossibility of performance, even then enters into an agreement with the other party, then the other party gets a right to be compensated for the loss or damage which he has suffered. Such an agreement tantamounts to Fraud as discussed by S. 17 of the Act. For example of A knew that the timber for which he is making an agreement to sell to B, has already been destroyed by fire, then his agreement with B shall not be covered by this section but by S.17 of the Act. Another good example is example (c) of S.56 wherein A contracts to marry B being already married to C, and being forbidden by the law to which he is subject to practice poligamy. A must make compensation to B for the loss caused to her by the non-performance of promise.

**2. Impossibility which arises after the formation of the contract**

A second category of Impossibility relates to such contracts which are valid in the beginning but becomes void subsequnetly because of some act or happening beyond the control of the parties. Such Impossibility is termed as *Supervening Impossibility*. The effect of such impossibility is also to make a contract void. Paragraph 2 of S.56 has stated about such impossibility. The common Law of England fixes responsibility upon a person to perform his promise without any qualification. Where the parties to the contract feel that there may be any hindrance in the performance of the contract thus in order to limit their obligation or to qualify the agreement they may impose such terms and condition which they deem fit. But a condition need not always be expressed in words. Conditions are implied also, which are to be fulfilled for a valid performance of the contract. If an event takes place which is beyond the control of the parties to the contract, and the performance of the contract is made impossible by such event, the parties shall be excused from performing their obligations. Many important decisions have been given in such cases by various English as well as Indian Court. *Krell v Henry* (1903, 2 K.B. 750 C.A.) and Taylor V. Caldwell (1863, 3 B, & S. 826), are important among the English decided *Satyabrata Ghose v* Mungeeram Bangur (1954, SCR 310: A.I.R. 1954S.C. 44); *Sushila Devi v.* Harishing 1971, A.S.C. 1756; India/Pakistan Partition), are some important Indian cases relating to Superveing Impossibility.

A contract is declared void on the principle of Supervening Impossibility, if without promisor's fault, any one of the following positions has arisen:

(a) Performance is rendered impossble by Law. The Law of the land, after the agreement is entered into, may also take a change and thereby make the promisor helpless in meeting out his obligation. Under the circumstnaces he shall be excused for non-performance of his part of the promise.

A agrees to sell the product of his field to B on 1st November 1977. On 1st October, 1977, the state government makes a Law to purchase all the crops from the producers. Here in spite of the desire to sell the producer to B, A is rendered helpless and performance is made impossble by law.

(b) A specific subject-matter assumed by the parties to exist or continue in existence is accidentally destryoed or fails to be produced, or an event or set of things assumed as the foundation of the contract does not happen or fails to exist, although performance of the contract according to its terms may be literally possible.

In this second case, where the subject matter of the contract is destroyed by the act of God, the parties to the contract shall not be able to perform

the promise. Therefore, they are excused for non- performance.

A music shall is taken on rent for several nights for arranging a series of concert. The hall is burnt down before the date of the first concert. The contract shall be declared void on the ground of supervening impossibility. A similar decision was given in *Taylor Cadwell* (1963, 3 B. & S. 826).

In the case of non-existence or non-occurence of a particular state of things also the contract shall be discharged on the plea of supervening impossibility since the non-occurence or non-existence of a particular state is on account of some act beyond the power of parties.

A agrees to marry B. Before the time fixed for such marriage B goes and mad. A shall not marry B and he shall be relieved of his obligatioin. Here B's mental state has made the contract void.

Similarly, where a room in a hotel is taken for witnessing a procession on a particular date, and the specific purpose, is made known the to the other party of the contract also, the change in the route of the procession shall make the contract void. Krell v. Henry is an interesting case over the point. Failure of the object of such nature is also termed as 'Frustration of the contract.'

(c) The promise was to perform something in person and the promisor dies or is disabled by sickness or misadventure. Such cases are usually seen in the practical seen in the practical world. The contract is to be performed by the promisor only and not by his agent or any third party since the performance of the contract is based upon the personal skill or qualities. In such cases the contract shall be declared void, if the promisor becomes sick or is disabled or even dies. The case of *Robinson v Davision* (1871, L.R. 6 Ex. 269) is an important case over this point. A, an artist, entered into an agreement to paint a picture for B in 15 days time. A fell ill and could not paint the picture and deliver the same to B within the agreed time. Held A was discharged from his liability on account of Supervening Imposibility.

(d) Outbreak of War. Alien enemy does not have capacity to contract and an enemy country during the war, it shall not be enforceable on the ground of trading with an enemy. Where a contract is made with a country and after some time due to war the country is declared an enemy country, the contract shall be suspended till the war is over may be revived later on.

A, an Indian, entered into a contract with P of Lahore to supply some cloth. Before the performance of the contract war broke out with the Pakistan. The contract was suspended till the war was over.

Is impossibility of performance an excuse? This is a very important quesiton.

Ordinarily a person is expected to perform his obligation, unless its performance becomes absolutely impossible due to any of these causes stated above. To quote Scrutton L. "Impossibility of performance is, as a rule, not an excuse from performance."

A contract shall not be discharged on the ground of Impossibility under the following cases-

1. The promisor feels difficulty in performing it, due to some unexpected events or delays.

A entered into a contract with B to supply some goods to be brought by a ship via Suez Canal. The canal was closed for traffic and the shipowner refused to bring the goods through the route of Cape of Good Hope since it was a longer route. A took the plea of Supervening Impossibility to be exonerated from his liability. Held A had to compensate B for breach of the contract. This decision was given in Tsakiroglon & Co. Ltd. v. Noble Thorl G.M.B.H. (1962, A.C.93).

2. Commercial impossibility. Where a party is unable to perform his part of the promise due to the unfavourable market, then he can not escape his liabilities for breach of the contract.

A agreed to supply 100 bales of Egyptain Cotton to B on 15th November, 1977. Due to lesser supply the price of the cotton rose in the market and A did not purchase it and delivered it to B. A shall not be allowed to take the plea of supervening impossibility.

3. Failure on account of third person's inability to do the work upon which the promisor relied upon, also shall not allow the promisor to plead supervening impossibility.

A agreed to supply B 1000 pieces of shawls to be manufactured by Lal Imli Mills. The mills did not go for production due to lock out. A cannot be allowed to plead supervening impossibility. He has to pay damages to B.

4. Strikes, lock-outs and civil disturbances also do not exonerate the promisor from his responsibility of performance. If the parties want a relief from such events, they should specify in the terms of contract specifically.

A agreed to supply 100 quintals of Burma rice to B upto 20th December, 1977. Due to Port strike the rice could not be loaded at Singapore and did not arrive in the market. A was not allowed to plead supervening impossibility. *Jacobs v Credit Lyonnais* (1884, 12 Q.B.D. 589) is a good case where a similar decision was given.

5. Failure of one object, where a contract is based on several objects, shall also not discharge the contract on this ground.

A agreed to let out a boat to D for (i) viewing a naval review on the occasion of the Coronation of Edward VII and (ii) to sail round the fleet. The king fell ill and the naval review was abandoned but fleet was assembled. The boat therefore, could be used to sail round the fleet. Held the contrct was not discharged. This decision was given in Herne Bay Steamboat Co., v Hutton (1903) 2 K.B. 683.

**Effects of Supervening Impossibility**

(1) The contract is declared void as per the provisions of Sec. 56 para 2.

(2) The promise is entitled for compensation, if the promisor knows about the impossibility of the performance at the time of entering into the contract, (Sec. 56, para 3).

(3) The parties receving any benefit shall have to restore back or to make compensation to the other party in case the contract is declared void.