

**Advanced Contracts, Tendering and Public Procurement**  
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**Lecture 22**  
**Discharge of contracts – Part 01**

Discharge of a contract refers to the fact that the contract has been concluded and the obligations between the parties have been discharged. Today the parties themselves decide what the effectuation date of a contract would be, i.e., when the obligations will commence. Obligations need not commence as soon as the parties to a contract have signed the contract or have agreed to the contract. They can actually fix a date which is different from the date of the signature of the contract. Each contract also has an expiry date say, 2 years, 3 years or 5 years which means that the obligation between the parties will come to an end by 2, 3 or 5 years.

**DISCHARGE OF CONTRACTS**

The legal relationship created by a valid contract can be brought to an end only by Discharge of the Contract. Discharge of the contract terminates the *vinculum juris* or legal tie that became binding element between the parties.

The various modes of discharge of a contract are

Different consequences follow the different modes of discharge of contract. There is cessation of legal ties in the natural ways of discharge (by performance). There is nothing more to be done by the parties.

But when discharge takes place in certain other ways, the original rights and obligations no doubt terminate, but other rights and obligations arise between the parties out of the very process of discharge. The Law has to follow the logical consequences of the new rights that have arisen even though the original contract is at end.

- By Performance of Contract
- By Breach of Contract
- By Impossibility of Performance
- By Agreement and Novation
- By Operation of Law

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The Indian Contract Act, 1872, deals with termination of obligations in a contract. The term *vinculum juris* means a legal bond. Contract creates a legal bond which can conclude at some point of time. So that is what we refer to discharge of contract as conclusion of the contract. When does the obligation terminate? In a sale of a property, it comes to an end when the buyer has received the house and the seller has received his price.

There are various modes by which a discharge of a contract can take place. The first and foremost among them is by performance of a contract. For example, a seller has an obligation to perform sale by transferring the possession and ownership of the house. When the seller

performs this obligation, he would be discharged from any further obligations. Similarly, the buyer can be discharged only when he has paid the entire price to the seller.

Second form of discharge from further obligations is breach of contractual obligations. If performance does not happen or if the parties do not fulfil their obligation, the contract would be breached. In other words, breach of a contract is the non-performance of a contract or the non-fulfilment of the promise by the contracting parties. When either of the parties have committed breach, they have contributed to the fault following which the courts are less likely to protect the party's interest or right because a party who has committed breach or fault is not to be entitled to the protection of the courts or the protection of law and equity. This is in accordance with the doctrine of unclean hands.

Third ground of discharge is that of impossibility of performance. Section 56 of the Indian Contract Act states if it is impossible for the contractual obligations to be performed and there can be no such expectation of performance of a promise, the parties must be assumed to have been discharged from their obligation. In India, this is called rule of impossibility whereas in common law, this is broadly brought under the doctrine of frustration. The doctrine of frustration is considered broad and the rule of impossibility is considered narrow.

Fourth form of discharge is by agreement. Parties can lower the extent of performance or the obligation which is expected from the other party. A good example would be parties agreeing to go for settlement outside of the court without suing each other. Another example could be the settlement that is offered by banks when loans are defaulted where they agree to waive off further obligations to pay interest if the principal amount is paid. Discharge by agreement can be any agreement whereby the parties express their wish to not extend or continue with their obligation. It is also sometimes referred to as discharge by alteration. This is because the actual performance which was expected is altered by creating a new scenario because of change of technology, change of expectations, lowering of quantity or the quality expected etc., the fulfilment of which enables the party to claim discharge of the contract.

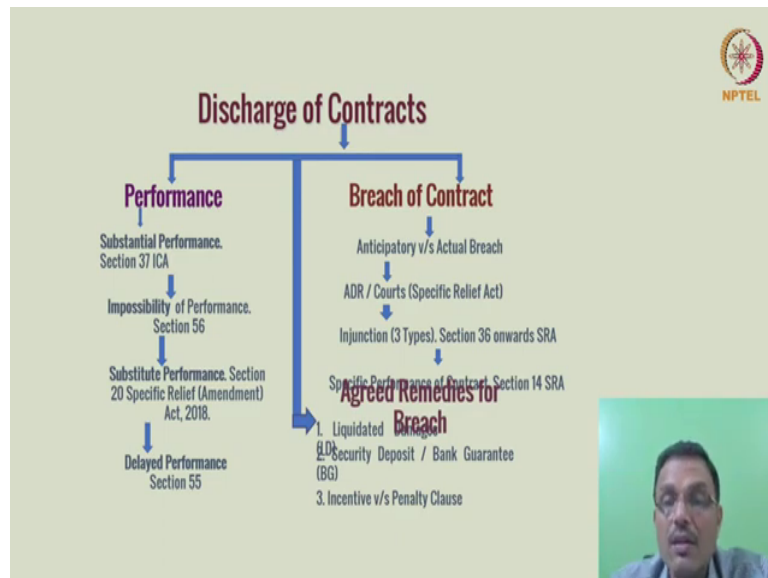
Contracts are not sacrosanct in the sense that once it is entered into, the same contract has to be existent at the stage of performance of the contract. The parties on their mutual agreement can make adjustments. A typical example of this is the price adjustment clause. A new kind price adjustment can be agreed upon and the parties can claim discharge of contract.

Discharge of contract can also happen by novation. If A and B agree to make a contract and later on B wants C to perform the obligations in the contract to which A agrees, this is a case of novation. B is discharged from the contract as it has been mutually agreed that A is ready to accept the performance from C as well.

Lastly, discharge of a contract can happen by operation of law. This usually happens in the case of insolvency, bankruptcy of companies or death or unsoundness of individuals. For example, if a doctor who has agreed to perform a surgery dies before it, the contract is terminated by operation of law as it is a contract of personal service. When a doctor, artist, or a lawyer, who have agreed to offer services which are based on their skill, labour and qualification, their death would operate as a discharge from personal liability to perform the contractual obligation.

Soundness of mind is an important prerequisite to enter into a contract. It could also be that the person who has agreed to perform a service has intervals where he is unsound. Now, the Mental Health Care Act of 2016, perceives depression as a mental illness. A doctor who suffers from bouts of depression may be discharged from the contract to perform surgeries.

These are circumstances where there can be a discharge of a contract without liability. Discharge can have two consequences, either there is a complete exemption from performing obligations or even after discharge, some obligations have to be performed. For instance, if the doctor has already accepted an advance money for the surgery, even after discharge of contract, he would have to pay the money back to the patient. The consequence of discharge is that the legal relationship between the parties ceases to be in place and nothing more is to be done between both the parties; In other words, it is the termination of the rights and obligation that arises between the parties.



The law has divided performance of a contract in terms of the challenges of performance that usually are visualized, which can be foreseen or which are in reality. Performance of a contract should lead to satisfaction. This becomes challenging due to mismatch of expectations. In product contracts, performance happens when the product is sold. Yet, from a consumer perspective, might not be any satisfaction which could lead to the performance being not up to the expectation. In service contracts, performance is on a day-to-day basis and is based on certain kinds of expectations from the other party.

In case of performance in contracts with educational coaching centres or educational software, defining performance of the kind of services that have been procured is difficult. Can it be based on the marks that has been scored as this is also dependent upon learning abilities and the student's performance in the examination? On the other hand, the coaching institute may promise that they assure certain results and would have performed its obligations in a substantial manner. This might not be up to the expectations of the parents, who are parties to the contract. This is a typical defence against non-performance or lack of performance or deficient performance. The word deficient performance assumes significance as it is based on that kind of mismatch of expectations.

This brings us to the question of whether there can be discharge of contract if performance has been done but it is not as per the expectations. Section 37 of the Indian Contract Act is a allows parties to claim discharge of contract based on substantial performance as per industry standards.

In 2018 the Specific Relief Act was amended to introduce a different kind of performance called substitute tip or substitute performance. This can be used to substitute the services of a party to the contract if the other party fails to have faith in the performance of the contract by the former. In government contracts, this is called the risk and cost purchase clause. If a contractor has agreed to make a project or an infrastructure work and is unable to or delays performance, then the government reserves the right to replace or substitute him with some other party. Before this was brought under Specific Relief Act, this used to be a typical clause in government contracts.

While remedies are claimed, more often than not the performance of the contract is postponed. Damages or monetary compensation may be received, but the work may get stalled, which affects the citizens ultimately. Substitute performance is a good way to ensure that work gets completed while the dispute gets resolved. This is a remedy that can be sought by anyone under Section 20 of the Specific Relief Act

Performance is important but time is the essence of every contract. Therefore, performance has to be within a reasonable time, failing which discharge of contract cannot be claimed. Delayed performance is no performance. The other party has a right to either reject your performance or affirm that delayed performance. There can also be no displaced performance; the performance must be at a place where the other party expects the performance to be done.

A breach occurs when the time of performance has come and no performance has been done.


It is an actual breach if the party either communicates his inability or fails to perform his obligations in the contract at the time and place where it was expected to be performed. It is an anticipatory breach when there is reason to believe that the party would not be able to perform his obligations on the stipulated time or place.

A suit can be filed for anticipatory breach which is recognised under the Code of Civil Procedure as well as in the Indian Contract Act. The party need not wait for the actual breach to happen and can approach the court as and when he is anticipating the breach. One of the important remedies given in anticipatory breach is an injunction, where a seller can be stopped from dealing with a third party or offering the house for sale to some third party or even accepting any consideration from that third party.

Under Section 36 of the Specific Relief Act, there are three types of injunctions; temporary injunction, a permanent injunction and mandatory injunction. Temporary injunction helps you to obtain a stay order at a preliminary stage when the party does not want things to go worse. Once the case has been heard on merits, it can be converted into a permanent injunction. Mandatory injunction is a direction of the court to a party to do something. It is like an order of specific performance. Earlier it was a discretion of the court to grant specific performance, but now under the 2018 amendment to the Specific Relief Act, specific performance has become a rule. If parties have agreed to do a particular obligation it must be performed. No other remedy is going to be equivalent or is going to be adequate enough. This enables law to compel a party to complete his obligations in the contract. He cannot be allowed to escape by merely paying the monetary compensation or loss.

Even though specific performance is the rule, there would be exceptions to it as a reluctant party cannot be forced to commit the performance of the contract. In the first place, a breach has been committed which indicates that it is a reluctant party Secondly, a suit in the court of law, may create animosity between the parties. so there is no point in forcing him to perform the contract. This is a challenge while ordering for specific performance. There may be issues with the quality of performance that is being given and the courts may not be able to constantly monitor and supervise the performance.

It is also important to ask who can seek specific performance of a contract. Generally, only the other party to the contract can seek specific performance of a contract in a court of law. People who succeed to contractual rights also can seek specific performance of contract. Promoters of a company can seek specific performance of a contract. Because he is a person who has some interest in the contract, he is a beneficiary of the contract in some sense and can claim specific performance.




## DISCHARGE BY PERFORMANCE

**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 under the provisions of this Act, or of any other law.”

“Promises bind the representatives of the promisors in case of death of such promisors, unless a contrary intention appears from the contract.”

- The legal consequence of performance is a discharge from the obligations created by mutual promises.
- Each party to the contract is bound to perform the promise made by him. After the parties have made due performance, their liability under the contract comes to an end. In such a case, the contract is said to be **discharged by performance**.
- In order that a party could enforce the promises made to him, he should perform his promise or offer to perform his promise and it is after he has so performed, or offered to perform, his promise that he could ask the other party to carry out his promise. It is this principle which is embodied in this section.
- Either performance or readiness and willingness to perform the contract is the basic requirement.
- Legal Representatives (LRs) are also bound to perform in case of death of promisor. E.g. A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representative are bound to deliver the goods to B, and B is bound to pay Rs. 1,000 to A's representative.
- However, where the contract depends on personal skill, such as painting or singing, the LRs of the promisor are not bound by the obligation.
- Non-performance would amount to a breach of contract, unless such performance is **dispensed with or excused** by law. Such as -proper performance.



Section 37 of the Indian Contract Act says that the parties to the contract must either perform, or offer to perform, their respective promises at the time when the performance of the promise is expected, unless such performance is dispensed with, dispensed means the other party does not wish to take a performance or is excused under the provisions of this Act. Notably, in Section 56 it is stated that a party may be excused from performance of a contractual promise or of any other law. There could also be special legislations due to which the performance of the contract has become illegal or is restricted or prohibited.


For a party to claim discharge, it is important that he tenders his part of the performance. If after the performance is tendered, the other party does not accept the tender or does not provide a place for performance or has dispensed or excused that performance then to that extent discharge of contract can be claimed.

When contracts are made and promises are exchanged between the parties, they bind the representatives of the contracting parties, i.e., the promisor and the promisee. In certain instances, the legal heirs or the next of kin of the family members of those who have actually made contracts may be responsible for performance of a contract unless there is a contrary intention that appears either from the contract or from the kind and type of contract.

As was discussed earlier, a contract of personal service will not bind the representatives of the promisor at all. But in other contracts performance may be expected from the legal heirs, and hence, they may be responsible to tender performance or perform unless it is dispensed or excused with.

If a party to a contract has to do something, the other person may have to pay the consideration or the price for the same. So performance is mutual and the parties in normal circumstances can expect mutual performance. Therefore, readiness and willingness to perform is critical. This is important for the court to judge whether the party has come with clean hands and whether he can be given the remedies for breach in case breach happens at later point of time.

Most contractual performance will depend upon the skill of the parties. Unless the skill can be acceptable from any other individual, the party who has agreed for the performance must perform and he cannot delegate the performance to anybody else. So, delegation of performance is not possible. However, the Indian Contract Act, stipulates that a competent person can be employed to perform the contract. It should also be convincing for the other party that the delegation has been to a competent person and that it will not compromise the expectations of performance from the contract.



### CONDITIONS OF PERFORMANCE


**Essentials of valid Performance –**

- i. It must be unconditional (s.38)
- ii. It must be by promisor or by his representatives (s.40)
- iii. It must be made at a proper time (s. 46-47)
- iv. It must be made at a proper place (s.49)
- v. Promisee must have a reasonable opportunity to ascertain
  - a. The thing offered
  - b. Whether the performance is of the whole or of a part (s.36)

**Startup v. MacDonald, 1843 64 RR 810**  
Startup contracted to supply ten tons of Linseed oil to MacDonald to be delivered within the last 14 days of the month of March. Startup tendered on the last of the fourteen days at 9 O'clock at night. MacDonald refused to accept owing to the lateness of the hour.  
**Held:** Though the hour was late and unreasonable, yet there was sufficient time for MacDonald (who was at the warehouse) to have taken in and weighed the goods before midnight. He was held liable for breach of contract.

**Afovos Shipping Co. v. R Paganan, (1982) 1 Lloyd's**  
A ship (Afovos) was chartered by the defendants from the appellants. The due date of payment was 14th June, 1978. The defendants instructed their bank to make the payment by telex to the appellants. On 13th June, the bank sent the telex, accidentally, to a wrong address. The error was not discovered till 19th June. On 14th June itself, the appellants issued a notice of default to the defendants.  
**Held:** The court regarded the notice as bad as the debtor had to pay before or after midnight on June 14. Notice of default should have been issued after June 14.

**Navin Chandra v. Yogendra Nath Bhargava, AIR 1967**  
Navin Chandra was a tenant of the house of which Yogendra Nath was the owner. To pay rent Navin Chandra sent two cheques which were returned by Yogendra Nath, who said that he was not prepared to accept payment by cheque.  
**Held:** For business-men payment by cheque will ordinarily be treated as good payment. However, in this case, the parties are not business-men and thus, appellant can not insist on acceptance of payment by cheque. The defendant was entitled to refuse acceptance of payment by cheque.



The law says that performance should be unconditional. No new condition or pre-conditions can be imposed for performance. If this is done, it would be conditional performance subject to the acceptance of the other party. So, performance has to be unconditional, it must be as it was agreed in the contract and nothing new can be added at some point of time. Conditional performances or any additional conditional performances or imposition of pre-conditional performances may amount to a breach if the other party does not accept the same.



As has been discussed earlier, the promisor himself may perform or expect some of his representatives to complete the performance. Moreover, performance must be made at the proper time and the proper place. No law can stipulate the proper place or time. Proper place usually means the place of the buyer. It is the duty of the seller to see that the goods are in a deliverable state and it has to be placed at the buyer's disposal. It should be delivered at a time when the buyer requires those goods. Therefore, when it comes to proper time and proper place it is viewed from a buyer's perspective, which the seller has to meet. This is an implied rule unless there is anything contrary expressed in the contract.

It is also important is that the promisee must have a reasonable opportunity to ascertain the thing that is offered and whether performance is of a whole or a part. This means that the buyer or the promisee should have a reasonable opportunity to inspect the goods.

Performance is not going to be completed unless the person is able to open the packaging material, see the product, test it and view whether it is as per the performance as promised or not. Mere delivery of a packed material or the delivery of things where the promisee does not have a reasonable opportunity to inspect or ascertain whether the performance is completed or not, will not discharge the obligations under the contract.

In Startup versus MacDonald's case, the seller Startup agreed to supply 10 tons of Linseed oil to McDonald. It was stated that the delivery must be done within the last 14 days of the month of March. Startup delivered these 10 tons of Linseed oil on the 14th day of the March month at 9 o'clock in the night. 9 o'clock is still falling within the 14th day as the day would end only at 12 o'clock in the night. McDonald's refused to accept it owing to the lateness of hour. The Court was confronted with whether 9 o'clock was an appropriate time for performance or tendering of performance. Court took note of the fact that Startup knew that McDonald operates his warehouse quite late in the night and that he was always there in his warehouse even at those late hours. However, despite the warehouse being open, it was found that McDonald's did not have the opportunity to take in the goods, weigh, ascertain and then certify whether the performance is done or not. Hence, it was held that Startup did not actually perform at the appropriate time though it was at the appropriate place.

Afovos Shipping versus Paganan is another interesting case in which a ship Afovos was supposed to be chartered by the defendants and the due date for payment was 14th June 1978. The defendants who had taken this ship instructed their bank to make payment by telex to the

appellants because they had hired the ship. The payment instruction was given to the bank and on 13th June it sent the telex. Unfortunately, it was accidentally sent to a wrong address which was discovered only by 19th June. On 14th June itself the ship owners issued the notice of default to the defendants. The Court observed that sending of notice on 14<sup>th</sup> June was not appropriate as there was time to tender the payment till midnight of 14<sup>th</sup> June. Time is the essence of a contract.

In Navin Chandra versus Yogendra Nath Bhargava, Navin had rented a premises from Yogendra Nath Bhargava. Navin sent two cheques to pay his recent which was rejected by Yogendra Nath on the grounds that he would not accept cheques. Although, ordinarily cheque is a good medium of payment, in this case the parties had clearly agreed that payment through cheque was not acceptable and that only cash would be acceptable. Hence, the tenant had actually defaulted by not making the payment as per the agreed mode, though he was ready to make the payment. The court agreed with the landlord because that was the terms of the conditions of the contract and once a mode of payment has been agreed within the parties any other mode cannot be used. A conditional performance is subject to rejection or acceptance as the case may be and that is the basis on which the court said that the defendant was entitled to refuse acceptance of the payment of the check. Therefore, parties must perform at the proper place, time, unconditionally and they must tender the performance failing which they shall be liable for breach of contract.