

Performance of a contract

Contents

- 1 Performance of a contract
- 2 Reciprocal promises
- 3 Appropriation of payment
- 4 Assignment of contracts
- 5 Chapter review

Sir Naeem Baig

INTRODUCTION

Learning outcomes

The overall objective of the syllabus is to give students an understanding of the legal system and commercial laws; and build a knowledge base of corporate laws.

Performance of a contract

LO **On the successful completion of this paper, candidates will be able to demonstrate knowledge of laws relating to performance of a contract.**

- LO 2.10.1 Explain performance and its types i.e. actual and attempted
- LO 2.10.2 Understand rules relating to joint and reciprocal contracts and appropriation of payment
- LO 2.10.3 Identify essentials of a valid tender
- LO 2.10.4 Define tender and explain its types and effects. Describe the essentials of a valid tender
- LO 2.10.5 Identify factors which may affect the performance of a contract
- LO 2.10.6 Understand and apply rules relating to joint and reciprocal promises
- LO 2.10.7 Understand the meaning of appropriation of payment and rules regarding appropriation of payment
- LO 2.10.8 Explain the assignment of contracts.

References to Legal Acts

Section number references embedded in the learning materials refer to the following legal acts unless otherwise stated:

Act	Chapters
Contract Act 1872	3-16
Partnership Act 1932	17
Negotiable Instrument Act 1881	18
Companies Act, 2017	19-27
Securities Act 2015	22

1 PERFORMANCE OF A CONTRACT

Section overview

- Meaning of performance
- Types of performance
- Types of tender
- Essentials of a valid tender
- Effect of refusal to perform
- Persons who can perform and demand performance
- Rules regarding the performance of joint promise
- Time and place of performance
- Time as essence of contract

1.1 Meaning of performance

A contract creates an obligation, which continues till the contract has been discharged by actual performance. Performance of the contract is one of the vital modes of discharge of the contract. A contract is said to have been performed when the parties to a contract either perform or offer to perform their respective promises.

Obligations of parties to contracts

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.

1.2 Types of performance

There are two types of performance as follows:

Actual performance

When the promisor has made the performance in accordance with the terms of the contract and is accepted by the promisee it is called an actual performance. [Section 37]



Example: Actual performance

A contracted to deliver to B at his warehouse on 1st November, 500 bales of cotton of a particular quality. A brought the cotton of requisite quality to the appointed place on the appointed day during the business hours, and B took the delivery of goods. This is an actual performance.

Attempted performance

Although, the promisor has made an offer of performance but the offer of performance of promisor is not accepted by the promisee it is called an attempted performance. Attempted performance is also known as tender. [Section 38]



Example: Attempted performance

A contracted to deliver to B at his warehouse on 1st November, 500 bales of cotton of a particular quality. B refused to take the delivery of goods; it is a case of attempted performance because A has done what he was required to do under the contract.

1.3 Types of tender

There can be two types of tender as follows:

Tender of goods or services

Where the promisor offers to deliver the goods or services but the promisee refuses to accept.

Effects

- Goods or services need not be offered again.
- Promisor may sue the promisee for non-performance and claim damages.
- Promisor is discharged from his liability i.e. he is not liable for non-performance.

Tender of money

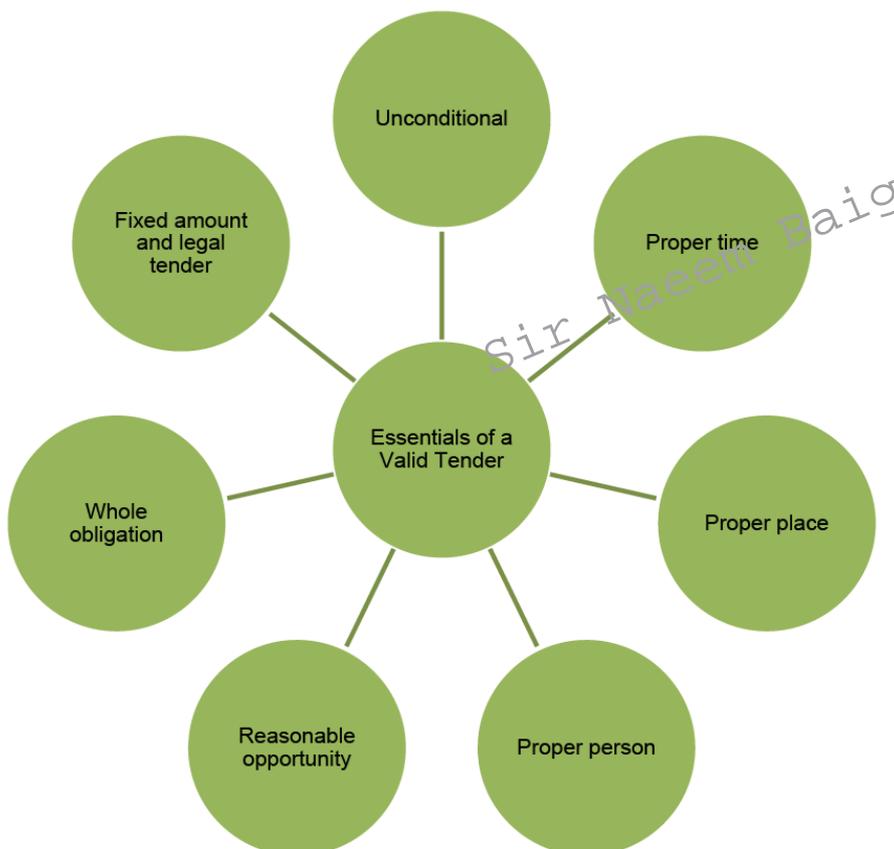
Where the promisor offers to pay the amount but the promisee refuses to accept the same.

Effects

- Promisor is not discharged from his liability to pay the amount
- Promisor will not be liable for interest from the date of a valid tender

1.4 Essentials of a valid tender

The essentials of a valid tender are shown below:



- Unconditional

Tender is said to be unconditional when it is made in accordance with the terms of the contract.

- Proper Time

Tender must be made at the stipulated time or during business hours. Tender of goods or money before the due date is also not a valid tender.

- ❑ Proper Place
Tender must be made at the stipulated place or at business place.
- ❑ Proper Person
It must be made to the promisee or his duly authorized agent. In case of several joint promisees, a tender made to one of them has the same legal consequences as tender to all of them.
- ❑ Reasonable Opportunity
Promisee must have reasonable opportunity for examining that the goods offered are the same as per the terms of the contract.
- ❑ Whole Obligation
A valid tender is for the whole obligation. However, a minor deviation from the terms of the contract may not render the tender invalid.
- ❑ Fixed amount and legal tender
In case of tender of money the amount must be fixed and in legal tender.

1.5 Effect of refusal to perform

When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his willingness in its continuance. [Section 39]

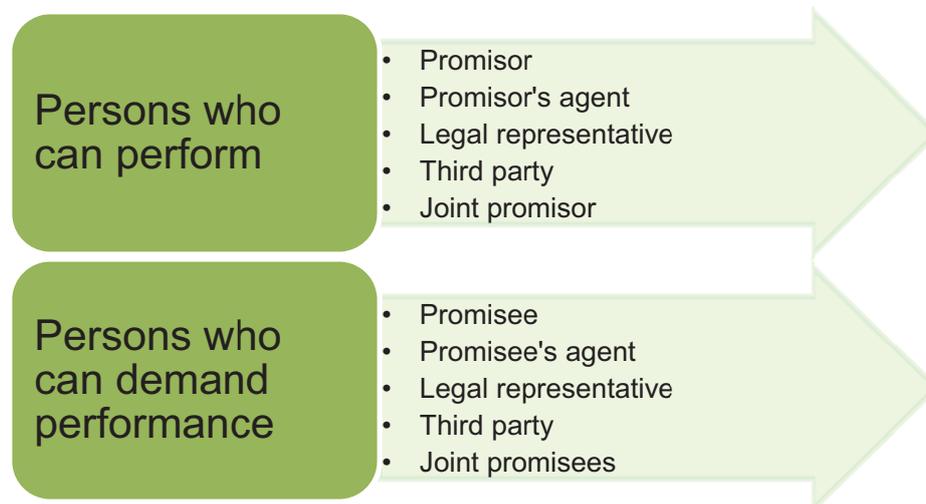


Example: Effect of refusal to perform

- ❑ A, a singer enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her Rs.100 for each night's performance. On the sixth night, A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.
- ❑ A, a singer enters into a contract with B, the manager of a theatre, to sing at his theatre two nights every week during the next two months and B engages to pay her at the rate of Rs.100 for each night. On the sixth night, A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for damage sustained by him through A's failure to sing on the sixth night.

1.6 Persons who can perform and demand performance

Persons who can perform and demand performance are shown below [Section 40 to 42]:



Persons who can perform Promisor

If a contract is of personal nature or it was agreed that promise will be performed by the promisor himself then such promise must be performed by the promisor.

**Example: Promisor**

A promises to marry B, A must perform this promise personally.

A promises to paint a picture for B, A must perform the promise personally.

 Promisor's agent

If the intention of parties is that the promise can either be performed by the promisor himself or any person employed by him then such contracts can be performed by the promisor himself or an agent employed by him.

**Example: Promisor's agent**

A promises to pay B a sum of money. A may perform this promise either by personally paying the money to B, or by causing it to be paid B by another, and if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

 Legal representatives

Unless a contrary intention appears or the contract is of personal nature on death of promisor, his legal representative can perform the contract.

**Example: Legal representatives**

A promises to marry B, A dies. A's legal representatives cannot perform this promises.

 Third party

With the consent of the promisee a contract can be performed by a third party. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

 Joint promisor

Unless a contrary intention appears, in case of several promisor the following persons must perform the promise:

- All the promisors jointly in case of all the promisors are alive
- Representatives of the deceased promisor jointly with the surviving promisor(s) in case of death of any of the joint promisors
- Representatives of all of them jointly in case of death of all joint promisors

**Example: Joint promisor**

A and B jointly promise to repay a loan of Rs.10,000 on a specified day. A dies before that specified day. A's representative jointly with B must perform the promise on the specified day.

Persons who can demand performance Promisee

Under a contract only a promisee can demand the performance of the promise.

**Example: Promisee**

A promises B to pay Rs.10,000 to C. It is only B who can demand performance and not C.

 Promisee's agent:

If the intention of parties is that performance can be demanded from any person authorised by the promisee then performance can be demanded by promisee's agent.

 Legal representative

Unless a contrary intention appears from the contract or the contract is of a personal nature on death of the promisee, his legal representative can demand performance.

**Example: Legal representative**

A promise to marry to B on the specified day. B dies before the specified day. The legal representatives of B cannot demand performance of the promise from A because the contract is of personal nature.

Third party

A third party can also demand the performance of the contract in some exceptional cases like beneficiary in case of trust or the person for whose benefit the provision is made in family arrangements.

Joint promisees

In case of several promisees, unless a contrary intention appears, the performance can be demanded by the following persons:

- All the promises jointly in case all the promisees are alive
- Representatives of deceased promisee jointly with the surviving promisees in case of death of any of joint promisees
- Representatives of all of them jointly in case of death of all joint promisees

**Example: Joint promisees**

A promises B and C jointly to repay loan of Rs.10,000 on a specified day. B dies before that specified day. B's representative jointly with C can demand the performance from A on specified day. If B and C die before that specified day, the representatives of B and C jointly can demand the performance from A on the specified day.

1.7 Rules regarding the performance of joint promise

The rules regarding the performance of joint promises are as follows [Section 43 to 44]:

Joint and several liability of joint promisors

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel anyone or more of such joint promisors to perform the whole of the promise.

**Example: Joint and several liability of joint promisors**

A, B and C jointly promise to pay DRs.3,000. D may compel either A or B or C to pay him Rs.3,000.

Right to claim contribution

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

**Example: Right to claim contribution**

A, B and C jointly promise to pay D a sum of Rs.3,000. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive Rs.500 from A's estate and Rs.1,250 from B.

Sharing of loss in contribution

If anyone of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

**Example: Sharing of loss in contribution**

A, B and C are under a joint promise to pay D Rs.3,000. C is unable to pay anything and A is compelled to pay the whole. A is entitled to receive Rs.1,500 from B.

Release of one joint promisor

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee, does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.


Example: Release of one joint promisor

A, B and C jointly promise to pay D Rs.3,000. D releases A from his liability and sues B and C for payment. Here, neither B and C are released from their liability to D nor is A released from his liability to B and C for contribution.

Devolution of joint rights

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


Example: Devolution of joint rights

A, in consideration of Rs.5,000 lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and, after the death of C, with the representatives of B and C jointly.

1.8 Time and place of performance

The various rules regarding the time and place of performance are given below:

Time for performance is not specified

Where the time for performance is not specified in a contract and the promisor has undertaken to perform without application by the promisee then the contract must be performed within a reasonable time. The question 'What is reasonable time' is a question of fact. [Section 46]

Time for performance is specified

Where the time for performance is specified in a contract and the promisor has undertaken to perform it without application by the promisee then the promisor must perform his promise on that particular day during the usual hours of business and at a place where the promise ought to be performed. [Section 47]

Place for performance is specified

Where the place for performance is specified in a contract and the promisor has not undertaken to perform it without application by the promisee then the promisee must apply for performance at a proper place and within usual hours of business. [Section 48]

Place for performance is not specified

Where the place for performance is not specified in a contract and the promise is to be performed without application by the promisee then the promisor must apply to the promisee to appoint a reasonable place for the performance and to perform the promise at such place. [Section 49]

Promisee prescribes the manner or time

Where the promisee prescribes the manner or time for performance then the promise must be performed in the manner and at the time prescribed by the promise. [Section 50]


Example: Promisee prescribes manner or time of performance

- B owes A Rs.2,000. A desires B to pay the amount to A's account with C, a banker. B who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.
- A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to payment by A and B, respectively, of the sums which they owed to each other.
- A owes B Rs.2,000. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.
- A desires B, who owes him Rs.100, to send him a note for Rs.100 by post. The debt is discharged as soon as B posts a letter containing the note duly addressed to A.

1.9 Time as essence of contract

Time is essence of a contract means that it is necessary for the parties to a contract to perform their respective promises within the specified time. But if the promisor fails to do so, can the promisee rescind the contract? This question can be answered by deciding whether in such a case time was or was not the essence of the contract. [Section 55]

Cases where time is essence

In the following cases, time is usually considered to be the essence of contract:

- Where the parties have expressly agreed to treat the time as the essence of the contract.
- Where the non-performance at the specified time operates as an injury to the party.
- Where the nature and necessity of the contract requires the performance of the contract within the specified time.

Consequences where time is essence

In case the performance is not made where time is essence the breach will have following consequences:

- Voidable at the option of promisee.
- Promisee is entitled to claim compensation for any loss arising to him due to non-performance of the promise at agreed time where performance beyond the stipulated time is not accepted.
- Promisee is not entitled to claim compensation for any loss arising to him due to non-performance of the promise at agreed time where performance beyond the stipulated time is accepted, unless the promisee gives notice to the promisor of his intention to claim compensation.

Consequences where time is not essence

In case the performance is not made where time is not essence the breach will have the following consequences:

- Not voidable at the option of promisee.
- Promisee is entitled to claim compensation for any loss arising to him due to non-performance of the promise at agreed time where performance beyond the stipulated time is not accepted.
- Promisee is not entitled to claim compensation for any loss arising to him due to non-performance of the promise at agreed time where performance beyond the stipulated time is accepted, unless the promisee gives notice to the promisor of his intention to do so.

Example: Consequences where time is essence

A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week for the next two months. B agrees to pay her Rs 100 for each performance. On the sixth night, A willfully absents herself from the Theatre.

In this case, B has the following two options:

- B may rescind the contract and claim compensation for the loss occasioned to him by A's failure to sing on the sixth night.
- B may permit A to sing on the seventh night and claim compensation for loss from A by giving a notice to A of his intention to do so.

2 RECIPROCAL PROMISES

Section overview

- Meaning of reciprocal promises
- Types of reciprocal promises
- Rules regarding performance of reciprocal promises

2.1 Meaning of reciprocal promises

Promises which form the consideration or part of the consideration for each other are called 'reciprocal promises'. [Section 2(f)]



Example: Meaning of reciprocal promises

In a contract for sale, A promises to deliver the goods to B at a fixed price and B promises to give promise for the payment of the price. Such promises are called reciprocal promises.

2.2 Types of reciprocal promises

The reciprocal promises have following types:

Mutual and independent

When the promises are to be performed by each party independently, without waiting for the other party to perform is called **Mutual and independent**.

Mutual and dependent

When the performance of one party depends on the prior performance of the other party it is called **Mutual and dependent**.

Mutual and concurrent

When the promises are to be performed simultaneously i.e. at the same time it is called **Mutual and concurrent**.

2.3 Rules regarding performance of reciprocal promises

The rules regarding the performance of reciprocal promises are as follows:

Simultaneous performance

When a contract consists of reciprocal promises to be simultaneously performed, the promisor need not perform his promise unless the promisee is ready and willing to perform his reciprocal promise. [Section 51]



Example: Simultaneous performance

- A and B contract that A shall deliver goods to B to be paid for by B on delivery A need not deliver the goods unless B is ready and willing to pay for the goods on delivery B need not pay for the goods, unless A is ready and willing to deliver them on payment.
- A and B contract that A shall deliver goods to B at a price to be paid in instalments, the first instalment to be paid on delivery. A need not deliver unless B is ready and willing to pay the first instalment on delivery. B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

Order of performance

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must be performed in that order, and where the order is not expressly fixed by the contract, they must be performed in the order which the nature of the transaction requires. [Section 52]



Example: Order of performance

- ❑ A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.
- ❑ A and B contract that A shall make delivery of his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, because the nature of the transaction requires that A should have security before he delivers up his stock.

Preventing the performance

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



Example: Preventing the performance

A and B contract that B shall execute certain work for A, for Rs.1,000. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

Non-performance in case of mutual and dependent reciprocal promises

Where the performance of one party depends on the prior performance of the other party and the party who is liable to perform first, fails to perform it, then such party cannot claim the performance from the other party and must make compensation to the other party for any loss which the other party may sustain by the non-performance of the contract. [Section 54]



Example: Non-performance in case of mutual and dependent reciprocal promises

- ❑ A contracts with B to execute certain builder's work for a fixed price, B supplying the timber necessary for the work. B refuses to furnish any timber. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.
- ❑ A contracts with B to deliver to him, at a specified price, certain merchandise on board of a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.
- ❑ A promises B to sell him 1000 bales of merchandise to be delivered next day, and B promises A to pay them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

Promise to do legal and illegal things

Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement. [Section 57]



Example: Promise to do legal and illegal things

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

The first set for reciprocal promises, namely to sell the house and to pay Rs.10,000 for it, is a contract. The second set is for an unlawful object, namely, that B may use the house as a gambling house and is a void agreement.

Alternative promise being illegal

In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced. [Section 58]



Example: Alternative promise being illegal

A and B agree that A shall pay B Rs.1,000 for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Sir Naeem Baig

3 APPROPRIATION OF PAYMENT

Section overview

- Meaning of appropriation of payment
- Rules regarding appropriation of payment

3.1 Meaning of appropriation of payment

Appropriation of payment means allocation of payment to a particular debt.

3.2 Rules regarding appropriation of payment

The various rules regarding appropriation of payments are given below:

Debt to be discharged is indicated

The payment, if accepted must be applied accordingly. [Section 59]



Example: Debt to be discharged is indicated

- A owes B, among other debts, Rs.1,000 upon a promissory note, which falls due on the first June. He owes B one other debt of that amount. On the first June, A pays to B Rs.1,000. The payment is to be applied to the discharge of the promissory note.
- A owes to B, among other debts; the sum of Rs.567. B writes to A and demands payment of this sum. A sends to BRs.567. This payment is to be applied to the discharge of the debt of which B had demanded payment.

Debt to be discharged is not indicated

The creditor has option to apply the payment to any lawful debt due from the debtor even if it is a time barred debt but he cannot apply to a disputed debt. [Section 60]

Neither party makes an appropriation

The payment shall be applied in discharge of the debts in order of time whether or not they are time barred. In other words, all payments shall be applied towards the payment of first debt till it gets extinguished. Similarly, all subsequent payments applied towards second debt till it gets fully paid and so on and so forth. If the debts are of equal standing, the payment shall be applied in discharge of each, proportionately. [Section 61]

If principal amount and markup both are due, then mark-up is settled first and then principal amount is settled.

4 ASSIGNMENT OF CONTRACTS

Section overview

- Meaning of assignment of contracts
- Modes of assignment of contracts

4.1 Meaning of assignment of contracts

Assignment of a contract means transfer of contractual rights and liabilities to a third party.

4.2 Modes of assignment of contracts

Assignment of a contract may take place in the following ways:

- Assignment by act of parties
- Assignment by operation of law

Assignment by act of parties

Assignment by act of parties takes place when the parties to a contract themselves make the assignment. Such an assignment is subject to the following rules:

- If it is a contractual obligation/right involving personal skill or ability then it cannot be assigned.
- If the contract expressly or impliedly provides that the contract shall be performed by the promisor only then such obligation cannot be assigned
- If the contract does not expressly or impliedly provides that the contract shall be performed by the promisor only then the promisor or his representative may employ a competent person to perform such obligation but even then the promisor remains liable to the promisee for proper performance.
- By Novation the promisor may transfer his liability to a third party with the consent of the promisee and the transferee.
- Actionable claims i.e. claim to any debt or to any beneficial interest in movable property can always be assigned by an instrument in writing. Notice of such assignment is also required to be given by the debtor.

Assignment by operation of law

Assignment by operation of law takes place when the law intervenes. Such assignment takes place in the following cases:

- In case of death of any party the rights and obligation (other than those of personal nature) of the deceased party pass on to his legal representatives.
- In case of insolvency of any party the rights and obligations (other than those of personal nature) of the insolvent party pass on to the Official Receiver or Assignee.



Example: Assignment

- A promises to marry B. Here, neither A can assign their obligation nor B can assign their right because the contract is of personal nature.
- A owes B Rs.100,000 and C owes A Rs.100,000. Here A cannot compel B to recover the amount from C. However, he can transfer his liability to C with the consent of B and C. B can also transfer his right to a third party to recover the amount from A.

5 CHAPTER REVIEW

Chapter review

Before moving on to the next chapter check that you now know how to:

- Understand the meaning of performance of a contract
- Explain the term tender and effect of refusal to accept a tender
- State who can perform and demand performance
- State briefly provisions of act relating to the time and place of performance
- Explain reciprocal promises and rules regarding their performance
- Summarize the rules laid down in the act as to the appropriation of payments
- Understand the meaning and modes of assignment of contract

Sir Naeem Baig