

it was cancelled. Further, the moneylender's request for the repayment of the amount advanced to the minor as part of the consideration for the mortgage was also not accepted.⁷

a. Contract made by or with a minor becomes void:

A minor person is regarded as incompetent party of contract and any contract made by or with minor is void. It has not legal value and do not enforce through formal court.

b. Contract for the benefit of minor is valid:

Although a contract with a minor is void but he can promise of a contract which is made for his benefit. The beneficial contract to minor is regarded valid for his benefit and it is enforced at his option, but not the option of the other party.

c. No ratification on attaining the age of majority:

If any contract is made by a minor party, it cannot be ratified by him after attaining his majority. If he wants to provide validity such contract he has to formulate fresh contract.

d. The minor can not become a partner but he may be beneficiary:

The partnership among the partners is result of their contract. A minor can not become a partner in the firm but he may be admitted to the beneficiary of an existing firm with consent of the other parties. In the other words, the minor can share the profit but not share losses. He does not become personally liable for any obligation of the firm.

e. The minor can be an agent but does not liable for his act:

A minor can be appointed as an agent because an agent performs only a contracting role between the principal and third party as per his assigned role. The minor does not liable for his acts. Such liability goes to the principal. He is free from the personal responsibility.

f. Parents can be made a necessary contract on behalf of minor:

To preserve the interest of minor his parents or any other third person may be become a guardian and such guardian can enter in to necessary contract on behalf of minor.

g. Contract by minor and major jointly:

If any contract is made by a minor jointly with a major person, the minor is not liable under such contract but the adult person is fully liable and the contract can be enforced against him.

h. The rule of estoppel does not apply to minor:

Estoppel is a principle that under which a person does not go against his prior statement. If a person expressed a particular statement on any matter or fact he is bound to obey it in future. In the case of minor this rule is not applicable.

⁷ Mohiri Bibi vs. Dharmodas Canose

- The guardian of unsound minded person can make contract with other person for the interest or benefit of such person. Sec. 3(3) of NCA 2056
- In case of necessities supplied to such person or any his dependents is deemed to have been enforceable. Sec.11(a) of NCA 2056

2.4.4 Person Disqualified by Law

The person disqualified by laws also incompetent to enter into contract as minor and person of unsound mind. Section 3(2) of the Nepal Contract Act, 2056 has made the provisions that person lacking of qualifications to conclude a contract under current law shall be disqualified for the purpose of formulating contract. Their legal status is the cause of disqualification by which they are regarded as incompetent for making contract. If such disqualified person enters in to contract that contract does not amount the status of valid contract. The certain legal status of person makes him incapable to do contract. Persons who are disqualified by laws to enter into a valid contract are discussed given below.

a. Alien enemy:

Alien is a person of foreign country. When the war is declared with that country, which belongs with nationality of such alien person, in this situation that alien person is regarded as alien enemy. In such situation no local person permitted to contract with such alien enemy. If any contract was signed before the war, it is either repudiated (reject) or suspended up to the period of war. After the termination of war, the previously held contract is revived if it has not crossed the duration according to law. If there is no war between the countries as mentioned above, the alien and local person can make a contract.

b. Convict or Criminal:

A person, punished by the court in the case of criminal charge, is known as convict or convicted criminal. Such person loses their legal capacity to perform certain work. The convicted person does not enter in to a contract during the period of punishment.

c. Foreign sovereigns:

Ambassador, Representative, Delegates can not enter into contracts. Because, they are free from civil liability, which are created by the law of residential country. That is why; individual cannot enter into contract with such person because there is no legal remedy against them.

d. Insolvent:

When a person unable to pay of borrowing money and whose property is divided among the creditors is known as insolvent. Such person has no right to sell his property and has no right to make contract.

1.1.52 e. Company/ Corporation:

Company is also a person in the eyes of law. It is the creation of law for performing certain works. Such person has less significant capacity in comparison to natural person to make a contract. It is empowered by its memorandum. Corporation or Company can involve in to a contract within the jurisdiction of the memorandum and article of association if they cross the jurisdiction of memorandum and article of association that would be void.

f. Professional person:

Professional person means such persons who are engaged in particular profession having with specific rules and code of conduct like; doctor, professor, Judge, lawyer etc. Due to their high and reputed professional career they are also disqualified by law to make certain contract in particular sector. Barrister can not contract directly to his client in England due to their code of conduct. Similarly, retired Justice of Supreme Court of Nepal can not make representation on behalf of his client. Nepalese lawyers are also prohibited to make contract with their client for fees.

2.5 Meaning and Importance of Free Consent

2.5.1 Meaning and Definition of Free Consent

People who enter into contract must give their free consent. It is the most important and essential element of valid contract. In the absence of free consent or without the free consent valid contract is completely impossible. It is essential to create a valid contract that the parties have consensus or meeting of the mind. They must agree up on something in the same sense at the same time. It gives continuous power till the entire performance of the contract.

Mutual understanding between the parties results agreement on the same thing in the same sense. Such agreements represent the real consent from the inner part of the parties which gives positive impression to performance of the liabilities created from the contract. It is easily performed and enforced. Free consent provides for a contract:

- Meeting of the mind of parties,
- Enforceability,
- Legal remedy for aggrieved party.

Famous Jurist Salmond states that: If there is any error in consensus or meeting of the mind of the parties then there is no contract.

Nepal Contract Act, 2056 Sections 2(c) defines 'Consent' as the consent given by the person to whom a proposal has been presented in the same meaning of that offer but there is no any definition about the free consent. Nepal Contract Act only mentions about the void and voidable contract under section 13 and 14 respectively. In Indian Contract Act, 1872 Section 13 defines '*Consent*' as *two or more persons said to consent when they agree up on the something in the same sense*. In conclusion, we can say consent given by a person voluntarily out of his own desire and conscience is called the free consent.

Thus consent involves identity of minds of "consensus-ad-idem". (Agreeing upon the same thing in the same sense)

If, for whatever reason, there is no consensus ad-idem among the contracting parties, there is no real consent and hence no valid contract. Similarly Section 14 of the Indian Contract Act, 1872 defines free consent: Consent is said to be free when it is not caused by;

- Coercion
- Undue influence
- Fraud
- Misrepresentation
- Mistake.

These five elements are called vitiating (to spoil or reduce the effect) factors of free consent.

2.5.6 Fraud

It is a willful misrepresentation with intent to deceive another person to believe that a thing is true which is untrue or false. It means fraud is misrepresentation with bad intention. It is made knowingly by a party to deceive another. Fraud is a one of the factors which always hamper the free consent of contractual party. The Nepal Contract Act, Section 14.1(c) has made the definition of the term fraud. According to this section it includes following things under fraud if committed by a party to the contract or his agent with a view to deceiving another party or his agent. Example, 'A' sells, by auction, to 'B' a horse which 'A' knows to be unsound. 'A' says nothing to 'B' about the horse's unsoundness. This is not fraud in 'A'.

In R.C. Thakkar v. Gujrat Housing Board, court held that a mere false statement is not fraud. Fraud is committed wherever one man causes another to act on a false belief by a representation, which he doesn't himself believe to be true.⁸

- To induce a party to believe a false act as true one,
- To conceal (hide) actively any factual truth,
- To do any act by which the party believes false as true, and
- To do some such acts which are declared to be fraudulent by other Nepalese laws.

According to section 17 of Indian Contract Act, 1872 defines that; fraud means acts committed by a party to a contract with intention to deceive another party or his agent or to induce him to enter into the contract with the active concealment of a fact by one having knowledge of belief of the fact. Thus, where there is dishonesty, recklessness, bad intention to induce others to wrong way, to harm others and having self benefit are the distinct characteristics of fraud. It turns the contract to voidable class.

It is also a voidable contract. It may be void at the option of aggrieved party. The aggrieved party has right to take legal action to avoid the contract where his consent was obtained through fraud and the party has right to claim damages for his loses from the other party who commit fraud against him. The burden of proof in such case lies upon the aggrieved party it means who claims the fraud, he has to prove it.

1.1.54 2.5.6.1 Difference between the Fraud and Misrepresentation:

The term fraud and misrepresentation is similar in some respect except the intention to deceive other party. Some major differences between fraud and misrepresentation are as below:

Fraud	Misrepresentation
1. It includes the intention to deceive the other party or it is willful action.	1. It does not include the intention to deceive the other party or it is not willful action.
2. The party, who makes false statement, knows the truth very well.	2. The party who makes the false statement is unknown and innocent about the truth.
3. Under this, the aggrieved party can claim the damage because there was intention to deceive to him	3. Under this, the aggrieved party can not claim the damage because there was no intention to deceive him.

⁸ R.C. Thakkar v. Gujrat Housing Board

2.5.7 Mistake

2.5.7.1 Meaning and definition of Mistake

Mistake is 'misconception'. The party of a contract intending to do anything but does something else is a mistake. Mistake is another factor, which hampers free consent. In order to make a valid contract the parties to contract must agree upon the something in the same sense where the contract is entered in to under mistake consent cannot be said to be free. Mistake is an erroneous belief relating to the subject matter of the contract.

According to Black's Law Dictionary, Mistake means an error, misconceptions or misunderstanding and erroneous belief. Section 20 of Indian Contract Act, 1872 clearly defines that where both the parties to an agreement are under mistake as to the matter of fact essential to the agreement, the agreement is void. In this regard, Nepal Contract Act, 2056 Section 13 has prescribed as a matter under the void contract. It states in the section 13(g) that a contract can not be performed because the subject matter of the contract is not clearly known to the contracting parties. Mistake may be defined as an erroneous belief about something.

When one or both parties of contract commit mistake to the contract or when both the parties misunderstand about the subject matter of the contract, it is said to be fundamental error. On this condition the contract turns into void.

2.5.7.2 Types of mistake:

a. Mistake of law: 'Ignorance of Law is no Excuse'. It is well set rule. No one can ignore the law. Everyone must know the law of the country. All the citizens are presumed to be known the prevailing laws. A party can not be allowed to get any relief on the ground that it had done a particular act in ignorance of law. A mistake of law does not give the right to the parties to avoid the contract.

b. Mistake of fact: Mistake of fact is related to the subject matter of the contract. It is also a cause to turn the contract void. If factual mistake is of serious nature like formation or essential factor that is responsible to void the contract. Negligible mistake occurs that is excusable. Fundamental error is relating to the subject matter and it is taken as serious mistake.

- **Bilateral mistake:** Where both the parties to an agreement are under a mistake as to a mater of fact, essential to the agreement, the agreement is void.
- **Unilateral mistake:** If mistake is committed by one of the party of the contract is called the unilateral mistake. Generally, a contract by unilaterally mistake is not void. A unilaterally mistake does not affect the validity of the contract. If the unilateral mistake caused by fraud or misrepresentation there is possibility to avoidance of the contract.

2.6 Legality of Object and Consideration

2.6.1 Meaning and importance of legality of Object and Consideration (Lawful Object)

Legality of object is an important essential element for valid contract. It means if the object and consideration of an agreement is not legal, the agreement never be converted in to valid contract. The legal object provides validity of legal status to an agreement. Legality denotes legal conformity or validity so as to legality of object refers that the object of a particular agreement is in accordance with law or legal. The object means propose or something return, for which the concern agreement is formulated. To be regarded as valid contract, the subject, object,

process, design, motive and all aspects of contract must be valid and lawful. Otherwise it can not bear the status of valid contract. The Contract or an agreement is void if its object and consideration is not legal.

There are several provisions have been incorporated under the Indian Contract Act, 1872 and Nepal Contract Act, 2056 which make such contract of agreement void. No contract is valid without its legal object and lawful consideration. Therefore the legality of object and consideration is one of the major prerequisites to form a valid contract.

Nepal Contract Act, 2056; Section 13 has declared the contract to be void if it has an illegal objective. Section 13(f) declares the contract which has the objective against the morality or public welfare or public policy to be void. Section 13(k) states the contract which has an illegal object and consideration will be void.

Indian Contract Act, 1872 names creation considerations and objectives as illegal and they are declared void, except that other consideration and object are legal. The contracts which have either illegal or unlawful objectives are void. Unlawful means not permitted by law and illegal means prohibited by law.

2.6.2 Importance of Lawful Object

The agreement which is made for a lawful consideration and lawful objective is enforceable by law. If the objective and consideration of contract is unlawful it is impossible to enforce in real practice that's why lawful objective and consideration is too much important for the valid contract. Some major importances are as below:

- To protect business from unfair competition and unfair business practice.
- To discourage socially undesirable conduct and in appropriate judicial practice.
- To enforce contract and maintain law and order in business field.
- Not to give an opportunity to carryout illegal act through the legal agreement.

2.6.3 Effect of Unlawful Agreements

Unlawful agreement means such agreement which is not made in accordance with law. It is made by the parties lacking of its essentials either one or more than one, such agreement is not enforceable by the court of justice and it has no legal remedy in case of breach of such agreement. If its contents illegal or prohibited object and consideration, it may be punishable by law. If it is made lacking only its essentials then it is regarded as void. There is no question of remedy and recovery. Section 13(a) to (k) of Nepal Contract Act, 2056 has provided the provisions of unlawful agreement.

There are two types of agreement in Nepal Contract Act, 2056:

- (i) Void agreement (Section 13)
- (ii) Voidable agreement (Section 14)

(i) Void agreement: The agreement which is illegal is void. It means no legal effect no legal remedy to the agreed party. Illegal agreement forbidden by law Section 23 of Indian Contract Act, 1872 declared void agreement that is why it is not enforceable by the court of law. According to section 13 of Nepal Contract Act, following are the void agreement.

- (1) Agreement in restraint of trade.
- (2) Agreement in restraint of marriage.
- (3) Agreement in restraint of public facilities.

- (4) Agreement in restraint of legal proceeding.
- (5) Agreement which unlawful object and consideration.
- (6) Agreement by mutual mistake.
- (7) Agreement to do impossible work.
- (8) Agreement having uncertain meaning.
- (9) Agreement by incompetent party.
- (10) Agreement without consideration.
- (11) Agreement contingent on impossible events.

2.7 Contingent Contract

2.7.1 Meaning of Contingent Contract

The word 'Contingent' means uncertain and conditional event. It means there is no certainty about something which may or may not happen. Thus, it is a contract, the performance of which is dependent upon, the happening or non happening of an uncertain event. The contingent contract contains a conditional promise. It is different from absolute contract that one in which the promise has to be performed independently or without any condition.

Contract of insurance, guarantee and indemnity are examples of contingent contract. In simple words, the performance of a contingent contract becomes due only upon happening of some future uncertain event. It is a conditional contract.

According to Black's Law Dictionary; *Contingent contract means a contract part of performance of which at least is dependent on the happening of a contingency.*

Section 31 of the Indian Contract Act, defines a contingent contract as; *A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.*

Example, 'A' promises to give a loan of Rs. 1000 to 'B', if he elected the president of particular association.

In Nepalese context, it is new concept and the Nepal Contract Act is silent on this regard. But section 12(1) makes clarity that; *in case a contract has been concluded to performing or not to perform any work if any event happens in the future, the contract shall not create any liability until such event happens.*

The performance of contingent contract always depends on the future uncertain event. The promise is conditional. The performance is entirely related with such events, which must or must not happen on the basis of terms of contract. In this sense, the contract in which obligations and rights arise only after the happening or non happening of an uncertain event at a future time is known as a contingent contract. e.g. A concluded a contract with B to pay Rs. 10 lakhs if B's factory is burnt. This is the contingent contract.

2.7.2 Features of a Contingent Contract

- There must be a contract to do or not to do something.
- The performance of contract must depend upon the happening or non happening of a future uncertain event.
- The event must be possible but uncertain.
- The event must be collateral to the subject matter of a contract.
- The event not depending on the will of the promisor.
- The contingent contract regards possible events it never regards impossible events.

2.7.3 Rules Regarding to Contingent Contract

Rules regarding performance of Contingent contract are mentioned in section 32-36 of the Indian Contract Act and Section 12 of Nepal Contract Act, 2056. These are given below:-

a. On the happening of an uncertain future event:

Contingent contract depends on the happening of an uncertain future event. It can not be enforced until the event has happened. If the event becomes impossible, such contract becomes void. e.g. 'A' concludes a contract to pay 'B' a sum of money when 'B' married to 'C'. If 'B' married with 'C' 'A' liable to pay a sum of money to 'B'. This is a contingent contract but If 'C' dies without married with B. Such contract becomes void.

b. On the non-happening of an uncertain future event:

The contract can be enforced when the happening of an event becomes impossible to happen, the contingent contract dependent on non- happening of an uncertain future event can be enforced by law only after the happening impossible. e.g., A agrees to sell his bicycle to B If C dies. The Contract can not be enforced so long as C is alive.

c. Happening of an uncertain event within specified time:

A contingent contract can be enforced with a specified event happening within a fixed time. In other words, there is happening an uncertain event before the expiry of that prescribed time the contract becomes valid.

e.g., 'A' promises to pay B Rs. 10 lakhs if a certain ship returns with in a year. The contract may be enforced if the ship returns within a year and contract becomes void if the ship is burnt with in the year.

d. On a specific event not happening with in a fixed time:

A contract to do or not to do any thing if specified uncertain event does not happen with in a fixed time. Such event must be happen or it must become certain that such event will not happen before the prescribed time e.g., 'A' promise to pay 'B' a sum of money (as insurance claim) if a certain ship does not return with in a year. The contract may be enforced if the ship does not return within the year.

e. Event must not be impossible:

If Contingency in an agreement is an impossible event, the agreement is void. A contingent contract considers only uncertain event but not the impossible event. e.g., 'A' agreed to pay 'B' Rs. 1000/- if two straight lien should enclose a space the agreement is void.

2.9.1.2 Discharged by mutual agreement or consent:

In *Rastriya Bima Sansthan vs. Shreeram Sharma*, court held that contract could be amended through the consent of both parties.⁹

The contracting parties may come to an understanding to end the contract. This kind of termination may occur in any of the following ways:

a. Novation: Where a new contract is agreed by all the parties to replace an existing contract, that is a novation.

In *Madan Bahadur Thapa vs. Khindra Bahadur Thapa*, court held that, where there are two transaction between the same parties and nothing is mentioned about the previous transaction between the same parties, it will be presumed that the parties have settled the previous transaction and it will have no effect.¹⁰

b. Alteration: An agreement reached between the parties that change some terms and conditions to obtain the original objective may also terminate the contract. The alteration is a change in terms of a legal document. In this situation a contract is needed.

c. Remission: An agreement, between the parties to accept a less sum of money or a less significant fulfillment of the liability, also terminates the contract. It is a unilateral act of a contracting party to discharge the other at his will with happiness and pleasure the other.

d. Rescission: 'Rescission' means a cancellation.' The parties to a contract can rescind before the performance, on the basis of mutual consent and consideration. It is dissolution of contract. In this situation the contract is terminate.

e. waiver: A waiver means a 'voluntary giving up' of right or claim, which a person is entitled. If a waiver provision is made in the contract, any of the parties can terminate it in this way. Consideration is not necessary in this kind of termination.

f. Merger: A merger that takes place, when an inferior right acquired by a contract is merged into a superior right acquired by the same party under the same or other contract, termination of a contract. Example, 'X' holds a house under a lease. Subsequently if he buys the same, he becomes the owner of the house. His rights as a lessee merger into his rights as an owners. This is a case of merger.

2.9.1.3 Discharge by subsequent or supervening impossibility of illegality:

In *Manju Kumari Gyawali vs. Tilak Raj Thapa*, court held that; contractual obligation need not be fulfilled when there is fundamental change in the situation.¹¹

Possibility to perform is one of the significant elements of a valid contract. It was possible to perform at the time of formulation but later on it becomes impossible to perform the work under the contract, this is called subsequent or supervening impossibility. The contract becomes void from the time of its impossibility or when the work becomes impossible to perform. This principle is known as 'Doctrine of supervening impossibility' or Doctrine of frustration. This doctrine is based on the Maxim "impossibilium nulla obligatoest" which denotes "what is impossible does not create legal obligation." It means the law does not compel to do impossible work.

The conditions of supervening or subsequent impossibility are as below:

⁹ *Rastriya Bima Sansthan vs. Shreeram Sharma*

¹⁰ *Madan Bahadur Thapa vs. Khindra Bahadur Thapa*

¹¹ *Manju Kumari Gyawali vs. Tilak Raj Thapa*

- Destruction of the subject matter: When the subject matter of a contract, subsequent to its formation, is destroyed, without the fault of the promisor or promisee in this situation the contract is discharged.
- Death or permanent incapacity of parties.
- Failure of ultimate purpose: Where the ultimate purpose for which the contract was entered into fails, the contract is discharged.
- Change of law: Example, 'A' sold to 'B' 100 bags of wheat at Rs. 1000/- per gage. But before delivery the government rendered the sell and purchase of wheat by private traders illegal under the Nepalese law. In this situation the contract is terminated due to the change of law.
- Declaration of war and natural calamities.

Non applicability of the Doctrine of Supervening impossibility:

First, the contract must be performed by its parties for its happy ending. In the course of performance, it subsequently becomes impossible to perform, the parties become free from the contractual liability on the ground of supervening impossibility. This is the general rule but it is not an absolute and it is followed by exceptions. Some of these exceptions are also recognized by the Nepal Contract Act, 2056. In the following cases a contract is not discharged on the ground of supervening or subsequent impossibility.

- Difficult of the performance of contract: Example, 'A' agreed with 'B' to supply goods from Pokhara to Bhairahawa. Short old road is closed due to landslide. Performance of contract will not be excused because there is another route via Mugling.
- Commercial hardship or impossibility: A contract is not discharged merely because expectation of higher profit is not realized, or the necessary raw material is available at the higher price because of the outbreak of war or there is a sudden devaluation of money.
- Impossibility due to conduct of the third party: The doctrine of supervening impossibility does not cover cases where the contract could not be performed because of the impossibility created by the failure of a third person on whose work the promisor relied.
- Strikes, lockouts and civil disturbance: A strike by the workmen or a lock-out by the employer also does not excuse performance because the former is manageable (as labor is available otherwise) and latter is self-induced. Where the impossibility is not absolute or where it is due to the default of the promisor himself. As such this event also does not discharge a contract.
- Additional tax, revenue: In a contract of any additional taxes or fees have to be paid afterwards, then the contract will not be terminated because of additional tax, revenue.
- Partial impossibility (Failure of some of the objects): When a contract is entered into for several objects, the failure of one of them does not discharge the contract.
- Self-induced impossibility: A strike by the workmen or a lock-out by the employer also does not excuse performance because the former is manageable (as labor is available otherwise) and latter is self-induced. Where the impossibility is not absolute or where it is due to the default of the promisor himself. As such this event also does not discharge a contract.

2.9.1.4 By lapse of time:

Every contract must be performed within a fixed or reasonable time. If any one does not perform the contract within the prescribed time limitation, he loses his remedy under the contract. In case of contract, the period of

limitation is two years, if a party does not file a suit to enforce his right within the prescribed period the courts will not enforce the contract.

2.9.1.5 By operation of law:

Sometimes a law itself becomes influenced by some incidents and the law is activated. It can be cause of the termination of the contract. In some cases the contract terminated by operation of law and the rights and liabilities arising out of the contract. It means the law regards the contract as discharged. The following cases are those in which a law becomes active to discharge the contractual liability:-

- Death of the Promisor
- Insolvency
- Merger.

2.9.1.6 Termination of contract by the breach:

In contract each of the parties must perform his promise, when one party fails to perform it. The contract is deemed to have been violated and it comes to end. In the case of breach of contract, the contract goes termination. In case the breach of contract, non-breaching party or innocent party can received the contract from his part and claim the compensation against the breaching party. In this situation, the whole contract is terminated.

2.10 Remedy for Breach of contract

2.10.1 Meaning and Definition

Breach of contract means non fulfillment of obligations which a contract imposes. Every contract is formulated with intention to perform it or for the fulfillment of the obligations. When the party fails to fulfill the obligations under contract as prescribed or reasonable time and manner it is called breach of the contract. A breach of the contract is just opposite to a performance of contract and it can be said non-performance of the contract. When the one party breaks the contract, the other party may become victim. On such case he has two options either "free from the contractual obligations by the notification to termination of the contract from the very moment of the breaching of contract" or "to seek remedy for specific performance of contract as well as compensation for loss".

Where a party to a contract fails to fulfill obligations under the contract within the fixed time or within a reasonable time or expressed his intention not to fulfill obligations under the contract, is called breach of contract.

Whenever a party breaks the contract, the other innocent party will be relieved from performing the contract and he can rescind (cancel) the contract by sending a notice to the other party. When the contract is breached aggrieved party can sue for his loss. Sec. 82(2) of NCA 2056

A breach of a contract includes the following elements:

- If the party fails to fulfill obligations under the contract.
- If the party gives information to the other party that he will not perform the work as mentioned in the contract.

- If by action and conduct the party seems to be incapable of performing the work as mentioned in the contract.
- If a breach of contract may be committed by words spoken or written or by conduct.

2.10.2 Types or Mode of Breach of Contract

A breach of contract may be expressed or implied. It may be caused by the act of either party of contract. The nature of breach of contract may be Anticipatory or Actual. Basically the breach of contract can be categories into two types:-

a. Actual breach (Present breach): It is known as a fundamental breach of contract. When the party to a contract does not perform his obligations under the contract at the time when it is due, it is an actual breach of contract. Sometimes, a party performs the liability of his part, but the other party alleges that it is not a proper performance, in accordance with the terms of the contract. It is known as a breach during the performance of contract. It is a failure to performance the contract. (Section 83.1 of Nepal Contract Act, 2056) Actual breach of contract may happen on the following two categories:

- **Breach on due date of performance:** If one party fails or refuses to perform or seems to be incapable of performing his obligations at the time fixed for performance, is called an actual breach of contract on due date of performance. Example, 'A' agrees to deliver to 'B' 10 bags of rice on 5th February. He does not deliver the rice on that day there is a actual breach of contract.
- **Breach on during the performance:** In case where one party has performed a part of his obligation under the contract, but fails or refuses to perform the remaining part of obligation under the contract, is called an actual breach of contract during the performance.

b. Anticipatory breach of contract:

If the time for performance of contract is fixed in the contract and one party repudiates his obligation or gives pre-information to the other party that he will not perform his obligation before the time for performance arrives, is said to be an anticipatory breach of contract. It is also known as a constructive or an anticipatory breach of contract. Example, 'A' undertakes to supply certain goods to 'B' on 11th March before this date (or 10th March) he informs 'B' that he is not going to supply the goods this is an anticipatory breach of contract.

An anticipatory breach of contract may happen on the following condition:

- **By Renunciation:** It occurs when a party to an executory contract renounces his liability under the contract expressly, before the performance is due.
- **By Creating some impossibility:** It occurs when a promisor to an executory contract, before the time when for performance arrives, by doing some acts makes performance of his promises impossible.

2.10.3 Remedies for Breach of Contract

The contract is itself a law made and applicable to its parties. It must be made in accordance with law and enforced by court. When a party breaches a contract the injured party becomes entitled to legal remedies. A remedy means a right which is given by law for enforcement of a prescribed right under an agreement of contract. Such remedy is known as legal treatment, provided by the court of law or other formal agency formed under law, to the aggrieved party.

There are different kinds of remedy may be available to the aggrieved party in the breaching of contract. The remedy for breach of contract depends on the basis of nature of breaching. The aggrieved party may claim one or

more remedies as per the law. When a contract is broken, the injured party can use one or more of the following remedies: (Section 82-87 of Nepal Contract Act, 2056)

- Right to rescind (Cancel) the contract
- Rights to claim damages
- Suit for specific performance of contract
- Suit for injunction
- Suit upon quantum merit

a. Right to rescind the contract: When a contract is broken by one party the other party will also be relieved from his contractual liability and he may rescind (cancel) the contract by sending a notice to the former party. The injured party is freed from all of his obligations under such Contract. (Section 82.2 of Nepal Contract Act, 2056) The injured party is to be restored any benefit received by the breaching party. The injured has the right to demand compensation for the loss. But the court can refuse a rescission of the contract in the following circumstances. (Section 87 of Nepal Contract Act, 2056)

- Where the parties cannot restore the contract due to the change of circumstances.
- Where a third party has, during the substance to the contract, acquired right in good faith and for value.
- Where only a part is sought to be rescinded that is not separate.

b. Rights to claim damages: Claim for damages refers the right to claim compensation to the aggrieved party against the former party. The Nepal Contract Act, 2056 has made provisions in this respect. According to the Act the injured party can claim the following compensation.

- **Compensation for actual loss:** Where a contract has been broken under section 82 of Nepal Contract Act, 2056 the injured party may recover the actual loss from the breaching party of contract. (Section 83.1)
- **Compensation for anticipated loss:** Where loss or damage is anticipated at the time of entering in to the contract (due to the breach) such a loss or damage can be compensated by the breaching party
- **Amount if mentioned, claim certain amount as contract:** Where the amount for damage mentioned in the contract, the injured party is compensated not exceeding the amount in the basis of quantum meruit.

c. Suit for special performance of contract: The injured party is entitled to sue for specific performance of the contract. The specific performance means an order by the court to the breaching party to perform his contractual obligation. Such an order is made by the court when other types of compensation do not seem to be adequate. However, in the following circumstances, the claim for a specific performance is not applicable. (Section 86.2 of Nepal Contract Act, 2056)

- Where compensation for the breach of contract is adequate.
- Where the liability of contract lies upon personal nature. (Personal skill or knowledge)
- Where a specific performance is not applicable due to the change of circumstances.
- Where the breaching party itself has claimed for a specific performance against the injured party.

d. Suit for injunction: Where a party is in breach of a negative term of contract (Where he is doing something which he promised not to do) the court may by issuing an order, restrain him from doing what he promised not to

