

## Free Consent

### Meaning of consent

- According to [Section 13 of the Indian Contract Act, 1872](#) consent means when both parties agree to a thing in the same sense of mind or unison of mind.
- The principle of *consensus-ad-idem*
- Illustration

**“A” and “B” are the two parties in a contract. It was seen that there was some crisis and “A” had put a plan forward to solve it. “B” after being made aware of this fact and analyzed that it was the perfect solution, agreed to it. In this case, both parties showed their consent.**

### Elements of free consent

- Consent is considered to be free consent when the following factors are satisfied:
- It should be free from coercion.
- The contract should not be done under the pressure of undue influence.
- The contract should be done without fraud.
- The contract should not be made through misrepresentation.
- The contract should not be made by mistake.

### Importance of free consent

- The contract made out of free consent protects the validity and enforceability of an agreement.
- It provides a protecting shield to the parties from coercion, undue influence, misrepresentation, fraud, and mistake
- It provides the parties to withstand their autonomous power to frame their running policy or principle.
- The principle of consensus-ad-idem is followed.

## Difference between consent and free consent

<b>Basis</b>	<b>Consent</b>	<b>Free consent</b>
<b>Meaning</b>	When both the parties agree to a thing in the same sense of mind or unison of mind, then the agreement is considered to be done with consent.	When an agreement is done with consent and is free from coercion, fraud, misrepresentation, undue influence, and mistake. Then the agreement is considered to be done with free consent.
<b>Essentials</b>	<p>Both parties must be entering into the agreement in the same sense of mind.</p> <p>Both parties must be entering into the agreement should be agreeing to the same thing.</p>	<p>Consent should be free from:</p> <ul style="list-style-type: none"><li>• Coercion</li><li>• fraud</li><li>• misrepresentation</li><li>• undue influence</li><li>• mistake</li></ul>
<b>Voidability</b>	When there is a lack of consent, the contract would be void.	When there is no free consent, then the voidability of the contract depends on the option of the aggrieved party.

## **Mistake in the free consent**

A mistake is described as an element, which when occurs in a contract makes it void. There are two types of mistakes, which occurs in a contract

### **Unilateral Mistake**

A mistake is said to be unilateral when one party is mistaken in the agreement.

### **Bilateral Mistake**

#### ***Mutual mistake***

A mistake is said to be mutual when both parties misunderstood each other. Thus it shows that there is a breach in the **principle of consensus-ad-idem** in the contracts and the contract is to be considered as void.

Illustration, “A” made an offer to “B” to sell his scooter. “A” intended to sell his 3G scooter but “B” believed that “A” would sell his 4G scooter. Thus there was no proper communication and the fact was mistaken. It would amount to an effective agreement.

#### ***Common mistake***

[Section 20 of the Indian Contract Act](#), 1872 lays down the provision for common mistakes. A contract arising out of common mistake is considered to be void. This type of mistake is possessed by both the parties but this mistake is not the result of mutual mistake, it arises individually.

### **Free consent examples**

#### ***Illustration***

1. “A” agrees to sell his land to “B”. “A” has 10 lands in different places and he wanted to sell the land in the west direction but “B” wanted the

land in the east part. In this case, it is seen that there is no meeting of minds and the principle of consensus-ad-idem is violated. Thus the agreement would be considered void.

2. “A” an old man who stays with “B”, his nephew and he takes care of him. “B” demanded to get the property of “A” as he was taking care of him and forces him to sign the papers. In this case, “A” is under undue influence.

### ***Case laws***

In the case of [Solle v Butcher](#)[1], it was seen that both the parties entered into the contract of lease of Flat. Both the parties believed that the identity of the flat has changed thus the maximum rent which was GBP 140 per annum has also changed. But later the court held that there was no change of identity thus, it was held that there was a mutual mistake of fact and thus the contract was declared to be void.

### **Elements Vitiating Free consent**

#### **Coercion**

- When a person commits or threatens to commit an act which is forbidden under the Indian Penal Code, or detains an object unlawfully or threatens to do so with the intention to force a person to enter into a contract, then it is said to be coercion.
- Illustration:

“A” cause “B” to enter into an agreement which is forbidden under the Indian Penal Code. “A” had done the act when an English ship was on the high seas. The “A” sues “B” for breach of contract in Mumbai.

This agreement was considered to be void as “A” had employed coercion, though Indian Penal Code was not in force at the place where the act was done.

## Effect of coercion

When the agreement made is found to be made out of coercion, then the contract would be rescinded or cancelled, due to which both parties are released from their obligation to perform their duties as per the contract.

## Coercion and duress distinguished

Basis	Coercion	Duress
Meaning	When a person commits or threatens to commit an act which is forbidden under the Indian Penal Code, or detains an object unlawfully or threatens to do so with the intention to force a person to enter into a contract, it is said to be coercion.	When a person is subjected to actual violence or threat of violence, it is said to be duress under Common Law.
Effect on contract	When the agreement made is found to be made out of coercion, then the contract would be rescinded or cancelled, due to which both the parties are released from their obligation to perform their duty as per the contract.	When the agreement is done by the means of duress, the chances of contract been void is less.  But if the party voluntarily acted to it, then he is bound to contract.
Detention	Unlawful detention of object amounts to coercion.	Unlawful detention of an object does not amount to duress.

<b>Conviction</b>	A person who is not in the contract or is a stranger, coercion can be employed against him also.	But in duress, it is mandatory to be the party of the contract.
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### Is a threat to commit suicide coercion?

- No, a threat to commit suicide does not amount to coercion.
- In the case of [Ammiraju v Seshamma](#),[2] it was seen that there was a threat by the husband to commit suicide, and he demanded his wife to release the property. It was seen that the wife was prejudiced and it can't be forbidden by law. So here the threat to commit suicide by the husband amounts to coercion on the wife.
- But this [Section 15 of the Indian Contract Act](#) can't provide relief in this matter in mere prejudice that a person is subjected to.

### Undue influence

- When a contract is made between two parties and one of them is in the position to dominate the will of the other party and takes unfair advantage of the position, then the contract is said to be made out of undue influence.
- Illustration

“A” an old person appoints “B” as his attendant and “B” is his nephew as well. “B” demands a share of his property and “A” agrees to pay him. In this situation, “A” is under the undue influence of “B”.

- The principle of undue influence is based on **the doctrine of equity**.

### Salient features

- Either of the parties should be in a state to dominate over other

- The party who dominates should have taken undue advantage of his position

### **Parties that can be affected by undue influence**

- Real and apparent authority
- Fiduciary relationship
- Parent and child
- Adult child and parent
- Husband and wife
- Lawyer and client
- Doctor and patient
- Trustee and beneficiary
- Creditor and debtor
- Landlord and tenant
- A person whose mental capacity is low
- Old age
- Tender age

### **Effect of undue Influence**

- When an agreement is caused due to the impact of undue influence, can be considered void at the opinion of the party whose consent was so caused, according to [Section 19A of the Indian Contract Act.](#)

### **Burden of proof**

- It is required to prove that the person dominating actually took undue advantage of the person and it should be proved that the person was in such position to dominate.
- Mere transfer of gift from one relative to others would not amount to undue influence.

## A transaction with parda-nashin women

- When a woman can be viewed from the screen or is placed behind the screen i.e, veiled is called pardanashin women.
- The protection for pardanashin women is been rooted in **the principle of equity and good conscience**.
- Special laws are made for pardanashin women because they are subjected to ignorance, infirmity, illiteracy, etc and are thus easily influenced.
- The burden of proof should be provided against the person who is transacting with pardanashin women. He has to prove that the transaction had taken place with the free will of the women and her decision was taken by her without any enforcement and she was made aware of the provisions mentioned in the document of transaction.
- The explanation of the whole transaction won't be enough to establish the burden of proof.
- In the case of [Tara Kumari v Chandra Mauleshwar Prasad Singh](#),[3] it was delivered that the essential to establish the burden of proof is that the party executing them should be a free agent and the woman should be informed, through what she is going through.
- In the case of Kuna Dei v Md Abdul Latif[4], it was delivered that showing of the document to the pardanashin women won't be enough to establish the burden of proof. Thus, he has to show that the women was explained clearly the facts in the document of the transaction.

## The distinction between coercion and undue influence

	<b>Coercion</b>	<b>Undue influence</b>
<b>Definition</b>	When a person commits or threatens to commit an act which is forbidden under the Indian Penal Code, or detains an object	When a contract is made between two parties and one of them is in the position to dominate the will of the other



	unlawfully or threatens to do so with the intention to force a person to enter into a contract, it is said to be coercion.	party and takes unfair advantage of the position, then the contract is said to be made out of undue influence.
<b>Relationship</b>	Relationship between both the party is not required.	The relationship between parties helps in establishing the burden of proof under this section.
<b>Objective</b>	To force a person to enter into an unlawful contract.	To misuse the power and dominate people, taking their advantage and dominate them.
<b>Nature of offence</b>	Criminal offence	Not a criminal offence
<b>Illustration</b>	<p>“A” cause “B” to enter into an agreement which is forbidden under the Indian Penal Code. “A” had done the act when an English ship was on the high seas. The “A” sues “B” for breach of contract in Mumbai.</p> <p>This agreement was considered to be void as “A” had employed coercion, though the Indian Penal Code was not in force at the place where the act was done.</p>	<p>“A” an old person appoints “B” as his attendant and “B” is his nephew as well. “B” demands a share of his property and “A” agrees to pay him. In this situation, “A” is under the undue influence of “B”.</p>

## Fraud

- Fraud means an action that includes the false assertion of facts, concealment of facts and any promise with the intention to deceive a person.
- According to [Section 17 of the Indian Contract Act, 1872](#) when a party contracts with the other party with the intention to deceive amounts to fraud. The party may directly make the contract with the other party or it can be done with the help of an agent even.
- illustration

“A” agrees to sell his horse to “B”. “A” had the knowledge that the horse is of unsound mind and did not inform it to “B”. “B”, asked “A” if he does not deny the fact then “B” would consider the horse to be sound and “A” kept silence to it. In this case, mere silence amounts to the agreement, thus “A” performed a fraudulent act.

### **Characteristics**

- When a party conceals the fact from the other party
- When a party promises to perform an act for the other party but has no real intention to fulfil the promise.
- The false representation of facts has been made to enter into the contract.
- The omission of any act which is considered to be fraudulent in the eyes of law.

### **Does silence amount to fraud?**

- Mere silence does not amount to fraud. But when there is a duty to speak and silence is equivalent to speech then it amounts to fraud.
- When two parties made an agreement, the parties are not compelled to disclose every fact to the other party. It is the duty of the other party to enquire about things rather than expecting the party to come and disclose the fact.
- When a person keeps silencing on the facts which would deceive the other person, then the person can be convicted of fraud.

- In the case of [Jaswant Rai v Abnash Kaur](#)[5], it was found that the vendor concealed the fact that the material to be sold was defective. Then it was held that the disclosure of the facts amounted to fraudulent activity of the vendor.
- In the case of *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd*[6], it was delivered in the context of negotiation, the party is not obliged to speak.

## **Effects of fraud**

- The contract raised out of fraud is a voidable contract.
- The party deceived has the right to revoke the contract.
- The party is liable to recover the damages due to the fraudulent contract

## **Misrepresentation**

- Misrepresentation means a false representation of the fact.
- According to [Section 18 of the Indian Contract](#), Act Misrepresentation is the stating of deceiving information which results in the assertion of the other party into entering into a contract and subsequently undergoing loss. The information, however, presented by the guilty party is a result of genuine belief about the matter. Misrepresentation is said to be committed Firstly when the person deceiving positively asserts not warranted information to another misleading them somehow. Secondly, there is a breach of duty which has caused the prejudice of one or another to be at stake. Lastly, a mistake has been committed by another because of the act or information of the one misrepresenting them.

## **Characteristics**

- It should be mentioned that the false statement was of material fact and not mere words.
- When a party makes a misrepresentation to the other party, it should be proved that at the party believed the fact to be true.

- The party should have misrepresented the facts to induce the other party to enter into a contract.

## Kinds

There are two kinds of misrepresentation.

### *Negligent misrepresentation*

- When misrepresentation occurs due to lack of any reasonable ground and carelessness then it is known to be a negligent misrepresentation.
- Negligent misrepresentation is established only when the representative owed a duty to the represented to handle carefully.
- A person would be liable only when he had neglected the duty mentioned in particular.
- The responsibility exists between the two parties even when there is no fiduciary relationship.

### *Innocent misrepresentation*

- When the representation is based on good grounds to believe and it lacks negligence and fraudulent intention, then it is said to be an innocent misrepresentation.
- When a person enters into a contract with innocent misrepresentation has the right to revoke the contract but is not entitled to damages suffered.
- A contract won't be void unless reasonable grounds are provided. Proving innocence in misrepresentation would be enough to establish the fact.

## Effect of misrepresentation

When the party who has suffered due to the misrepresentation while entering into a contract, can opt to cease the contract. There are two remedies provided to the party either to rescind the contract or claim damages.

The claim of damages means that the contract is left intact and the party is to be subjected to money damages during the suit.

Suit for rescission is to cease the performance of the contract that is to restore the party to the original position.

The distinction between fraud and misrepresentation

	Fraud	Misrepresentation
Meaning	Fraud means an action that includes the false assertion of facts, concealment of facts and any promise with the intention to deceive a person.	Misrepresentation means a false representation of the fact.
Definition	According to <a href="#">Section 17 of the Indian Contract Act</a> , when a party contracts with the other party with the intention to deceive amounts to fraud. The party may directly make the contract with the other party or it can be done with the help of an agent.	According to <a href="#">Section 18 of the Indian Contract, Act</a> Misrepresentation is the starting of deceiving information which results in the assertion of the other party into entering into a contract and subsequently undergoing loss. The information, however, presented by the guilty party is a result of genuine belief about the matter. Misrepresentation is said to be committed. Firstly when the person deceiving positively asserts not warranted information to another misleading them somehow. Secondly, there is a breach of duty which has caused the prejudice of one or another to be at stake. Lastly, a mistake has been

		committed by another because of the act or information of the one misrepresenting them.
Intention	Deliberate intention to deceive the other party	Bonafide intention while representing a false fact believing it to be true, with no intention to deceive
Claim of damages	In the case of fraud, the aggrieved party has the right to claim for damage	But in the case of misrepresentation, the aggrieved party has no right to claim for damage

## Mistake

According to [Section 20 of the Indian Contract Act](#), a contract is declared void when a mistake is caused by both the parties that bilateral mistake, which violates the essentials to an agreement.

### *Illustration*

“A” made agreement with “B” to sell the goods and the agreement was done. “A” was not aware of the fact that the goods are perished due to some reason. In this case, the contract would be void because the basis on which the contract was made does not exist.

## Mistake of law

People should have minimum knowledge about the law, they should be aware of the fact that which act they should restrain from doing and which they are ought to do. And there would be no remedy provided or excused under the fact of mistake of law in these circumstances.

In the case of [Ram Chandra v Ganesh Chandra](#)[7], it was seen that the complainant entered into an agreement of lease of coal mining with the respondent. As per the agreement, the complainant made payment in advance to the respondent. But the Privy Council and the decision of the Calcutta High Court questioned the understanding of the law between the parties. Thus the complainant refused to continue the contract and sued the respondent for the refund. Taking precedent of Cooper v Phibbs, it was held that the complainant would be entitled with the refund paid by him.

### Mistake of fact

When there is a bilateral mistake causing a contract void, it is subjected to a mistake of fact and not to mistake of law. When there is a misunderstanding between the parties or omission of facts which leads to the mistake, is said to be a mistake of fact.

### Bilateral

When both parties commit a mistake in the contract under the mistake of facts, the mistake is considered as a bilateral mistake. This happens due to the lack of meeting of minds, which is an essential element to constitute free consent. Thus the contract is made void.

There are two types of bilateral mistake

1. Mutual mistake
2. Common mistake

### Illustration

“A” agrees to sell his car to “B”. but it was found that his car was stolen and he was not aware of the fact while making the agreement. Thus this contract would be considered void.

## Bilateral mistake as to the subject matter

### *Existence of subject matter*

When both parties have made an agreement on a subject matter which does not exist, then the contract would be considered void.

### *Quality of the subject matter*

When both parties have made an agreement on a subject matter and it is found that the quality differs from the one which was mentioned. But in the case of bilateral mistake, the contract would be considered void.

### *Identity of subject matter*

When both parties have made an agreement on the identity of a subject matter and it differs than the contract ceases to be void.

## Mistake as to the possibility of performing the contract

### Physical impossibility

When an agreement is made and it is found that the subject matter is not available anymore, then it becomes impossible for the parties to execute their part of the obligation. This is considered to be a physical impossibility to perform, thus the contract becomes void.

### Illustration

“A” made agreement with “B” to sell the goods and the agreement was done. “A” was not aware of the fact that the goods are perished due to some reason. In this case, the contract would be void because the basis on which the contract was made does not exist.



## Legal impossibility

When an agreement is done between two countries, but it is seen that war arises between the countries. Thus the contract between the countries becomes legally impossible to be carried out.

## Illustration

“A” one country enters into a contract with “B” another country to export petroleum with an agreement for 20 years. But after 10 years it was seen that there was a situation of war arising, thus all the internal export was stopped. In this case, “A” is legally bound to end the contract with “B”.