



**Advanced Contracts, Tendering and Public Procurement**  
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**Lecture 23**  
**Discharge of contracts – Part 02**




### Types of Performance

- 1. Actual/Complete Performance**
  - The promisor actually performs all the obligations under the contract i.e. he has fulfilled every duty required by the contract. On performing the contract in this manner, the contract is discharged and the promisor's liability towards the contract ceases to exist. A completely performing party is entitled to a complete performance by the other party.
- 2. Partial Performance**
  - The promisor or promisee has performed their respective obligations but has not performed it completely. May be due to non-willingness to perform or due to certain unforeseen circumstances. Discharge depends on the willingness of the other party to accept the partly performed obligation.
- 3. Attempted Performance**
  - When the performance has become due, it is sometimes sufficient if the promisor offers to perform his obligations under the contract. It is also called tender of performance – e.g. seller tenders to sell goods on the given date but buyer refuses to buy.
- 4. Vicarious Performance**
  - Ordinary contracts for delivery of goods, payment for them and the like, may be performed by deputy. There is no personal element in the payment of price.



Performance can be actual or complete performance when all the obligations under the contract has been fulfilled and every duty that was expected in the contract has been performed. Generally, when such a contract has been completed in its performance, the contract ceases to exist and a party who completes the performance of the contract can expect the simultaneous or mutual performance from the other party. This is the kind of performance that concludes the contract.


As against this, there is partial performance where for some reason the party may be unwilling to perform due to certain factors, misunderstandings, circumstances. Rule of Quantum Meruit is important in cases of partial performance. Suppose, if in a works contract 30 percent has already been performed and 70 percent is remaining, it would amount to a breach. However, according to the rule of quantum meruit since 30 percent has already been performed, the contractor would have to pay to that extent. In such cases, the doctrine of severability applies so that 30 percent can be severed and it can be separately valued in terms of the merit and the quantum of work that is already being done. If that 30 percent cannot be separated in terms of what has been done and the severability doctrine cannot be applied, then partial performance will not amount to discharge of contract and will amount to breach of contract.




## Types of Performance

### 5. Substantial Performance

- The main essence of the contract is almost fulfilled. It is less than complete performance, but the level of performance is sufficient to avoid a claim of breach of contract.
- The objective behind the doctrine of substantial performance is to avoid the possibility of one party evading his liability by claiming that the contract has not been completely performed.
- Substantial performance is applicable only if the contract is not an entire contract and is severable.
- What is substantial is a **matter of fact** to be decided according to the facts and circumstances of each case.
- Does not apply to sale of goods. Mostly Construction, employment contracts
- Conditions - such a plea is acceptable, when there is no material breach. Failure to fully perform must not be intentional or result of carelessness or negligence.
- The promisor who claims substantial performance is not entitled to complete performance by the promisee. The court may award the contractually agreed price and deduct sums to reflect the amount not performed.
- The opposite of substantial performance is strict compliance.



Substantial performance is considered as complete performance. A claim of substantial performance from one party is much better than the claim of breach from the other party. The justification behind doctrine of substantial performance is to avoid the possibility of one party omitting his liability by claiming that the contract has not been completely performed. It is applicable only if the contract is not an entire contract and is severable. It is decided according to the fact and circumstance of each case and does not mostly apply to sale of goods. It can apply to construction or employment contracts, where substantial performance can be claimed. The opposite of substantial performance is called strict compliance, which means only 100 percent of compliance with the contractual obligations would ensure discharge. Strict rule of performance can be expected in certain types of contracts and substantial performance is not a plea that can be accepted in most circumstances.




## Dakin v. Lee (1916) 1 KB 566

**FACTS:**


The contract was for the repair of a house. The work was not done in accordance with the contract. In particular, the concrete underpinning was only half the contract depth; the columns to support a bay window were of 4 inch diameter solid iron, instead of 5 inch diameter hollow; and the joints over the bay window were not cleated at the angles or bolted to caps and to each other. The official referee found that the plaintiffs had not performed the contract, and therefore could not claim for any payment in respect of it. The plaintiff appealed.

**HELD:**

The Court of Appeal noted that there was a distinction between *failing to complete* and *completing badly*. Here, the contract had been performed, though badly performed, and the plaintiff could recover for the work done, less deductions for the fact that it did not conform to the contract requirements.



In *Dakin v. Lee*, a contractor was hired for the repair of a house. The requirement was for a 5-inch diameter of a concrete underpinning. But the contractor only constructed 4-inch diameter solid, concrete wall. One of the referees of the dispute review board found that the contractor had not performed the contract as he constructed 4-inch diameter where he was supposed to do 5 inch. Hence, it was held that he could not claim the payment at all. However, the court also observed that there was a distinction between failing to complete and completing it badly. Bad completion definitely does affect the structure and safety of the house and cannot be considered as performance. However, it can be considered performance in terms of quantifying the merit of the performance and in the quantifying the work that has already been completed, the contractor has to be paid.




## FW Moore & Co Ltd v. Landauer & Co, [1921] 2 KB 519

Sale of goods by description – Rejection of delivery

**FACTS:**  
Launauer & Co. (buyers) purchased 3,100 tins of peaches from the FW Moore & Co. Ltd (sellers). The contract between the parties stipulated that the consignment is required to be packed in cases of 30 tins. However, when the consignment arrived the tins were packed in cases of 24 tins, although the agreed overall number of tins was supplied. It was not suggested that there was anything wrong with the fruit or that it made any significant difference whether the fruit was in cases of 30 or 24 tins. Nevertheless, the buyers refused to take the delivery.

**ISSUE**  
Whether the buyers were entitled to reject the delivery?

**HELD:**  
There was a sale of goods by description. The goods delivered did not correspond to the description. Despite an express requirement, the sellers delivered goods in different description. The purchaser was entitled to reject the goods as they were not as described.



In *FW Moore and Company v. Landauer & Co.*, an order was placed for 3100 tins of peaches from FW Moore and Company. The contract between the parties stipulated that the consignment is required to be packed in cases of 30 tins each. When the goods were delivered, in each of the packed cases there were only 24 tins. However, the total number of 3100 tins was met with this arrangement. The buyer refused to take delivery. The question in this case was whether the buyer was entitled to reject the delivery.

Strict compliance is usually a requirement in sale of goods, especially when sale of goods by description is made. The court said that this was a typical sale of goods by description and if the goods that the delivery do not correspond to the description, then the sellers who has delivered these goods in a different description will have to face rejection. Is this harsh on the seller because 3100 tins were delivered irrespective of whether it was delivered in case of 30 tins or 24 tins? Notably, in many of these instances, the buyers may actually have planned to receive the consignment as 30 tins in one case and not 24 tins because it consumes lesser storage space. Moreover, every description that has been stated by the seller becomes material fact in the sale of goods and hence a strict compliance is required. In this case the plea of substantial performance was not accepted by the court.

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## Bolton v. Mahadeva, [1972] 2 All ER 1322

Defective installation – payment – whether the contract has been substantially performed

**FACTS:**  
Bolton was contracted by Mahadeva to install a boiler system (central heating) in Mahadeva's house at a cost of £560. Upon completion, when the system was turned on, the rooms were not hot and were uncomfortable, the heat came unevenly and it all gave off fumes. Mahadeva refused to pay any money at all on the ground that consideration for the contract has wholly failed. The trial court ordered payment of £385.50 after deducting £174.50 required for repairing the system. Mahadeva appealed.


**ISSUE**  
Whether there was substantial performance

**HELD:**  
Bolton was entitled to nothing because there had been no substantial performance at all. **Cairns, LJ:** "The contract was a contract to install a central heating system. If a central heating system when installed is such that it does not heat the house adequately and is such, further, that fumes are given out, so as to make living rooms uncomfortable, and if the putting right of those defect is not something which can be done by some slight amendment of the system, then I think that the contract is not substantially performed". Per **Sachs, LJ:** "It is not merely that so very much of the work was shoddy, but it is the general ineffectiveness of it for its primary purpose that leads me to that conclusion"



In *Bolton v. Mahadeva*, the owner of a house contracted Mahadeva to install a central heating system for 560 pounds. When the system was turned on, the owner found that the rooms were not hot and were very uncomfortable. Although there was heating, it was uneven, though it which was giving rise to fumes. The owner of the house refused to be pay as the central heating system had completely failed. The court evaluated this performance; a central heating system when it is installed should heat the house adequately and fumes would make living in the house uncomfortable. This was held to be not amounting to substantial performance. If the contract does not fulfil the material objective of the contract, then to that extent the substantial performance will not be accepted and the breach would definitely be established.

Let us test whether the following is substantial performance. In a contract wherein one party must supply 100 pumps, only 95 were delivered. Can this be considered substantial performance for which payment needs to be done? If the party starts using the 95 pumps, rule of unjust enrichment would mandate him to pay for it. If the number 100 was material and important and without 100 pumps the party cannot go forward, based on the facts circumstances and subjective character of the contract, the number or the figure in a sale of goods can be considered to be under the strict rule and there can be a right to reject the consignment.




## TIME OF PERFORMANCE

Contracts may stipulate that certain things should be done at or before a specified time. In this regard one question arises is what will be consequences if the thing is not done within the time limit prescribed by the contract. This depends on whether time was "essence of the contract" – **Section 55**

1. If the intention of the parties was that time should be essence of contract – contract becomes **voidable**.
2. If the intention of the parties was that time should not be essence of contract – not voidable but promisee is entitled to compensation from the promisor for any loss
3. If the contract is voidable on ground of "time as essence", and the promisee accepts performance after the stipulated time, he cannot claim compensation afterwards for any loss caused due to non-performance on time – **unless** at the time of acceptance of performance, he **gives notice** to the promisor of his intention to claim compensation.


### When Time is Essence of Contract?

- Depends on intention of the parties – Question of fact – can be ascertained on the basis of:
  - Words used in the contract
  - The nature of contract (commercial or otherwise)
  - Nature of property (sale of immovable property – presumption – time is not the essence)
  - Surrounding circumstances
- An express stipulation of timeline in the contract cannot be concluded as the intention of the parties. If a contractual term provides that time is essence, but other terms indicate and show that parties do not intend time to be of the essence, the courts have held that time is not the essence.
- The question whether time is the essence of the contract may arise either with reference to the contract as a whole or with reference to a particular term or condition which is breached.



It has already been discussed that time is the essence of performance. When time stipulated, it is expected that the performance of the contract be done either before the time or at the time when it is expected. So, time is critical because that is the basis on which the expectation of contract and commercial matters take place. It can be inferred from the intention of the parties whether time has been specified to be the essence of the contract. How do you look at the intention of the parties? Words used in the contract, the nature of the contract, the nature of property and the surrounding circumstances needs to be looked into. These are four critical factors through which time is judged by the courts of law.

Nature of property is to be looked into because normally under the Transfer of Property Act there is a presumption in case of sale of immovable property that time is not the essence of contract unless the contrary intention appears from the contract itself. Time is not considered critical here because sale of immovable property involves a lot of documentation and due diligence. Hence, the intention of the parties would matter if the parties have clearly mentioned that it is of essence.




## Govind Prasad Chaturvedi v. Hari Dutt Shastri, AIR, 1977 SC 1005

**Facts:**  
Govind Prasad entered into an agreement with Hari Dutt on March 24, 1964, for purchasing the property belonging to Hari Dutt, of which Govind Prasad was a tenant. In pursuance of the agreement, Govind Prasad handed over Rs. 4,000 as earnest money to Hari Dutt. The terms of the agreement provided that the Govind Prasad would get the deed executed within two months i.e. before May 24, 1964, and in case of his failure to do, the earnest money paid by him to Hari Dutt would stand forfeited. The sale deed was not executed within the prescribed time. Govind Prasad filed a suit against Hari Dutt for breach of contract. The trial court granted him the relief of specific performance of the contract. Hari Dutt appealed before the High Court which set aside the order of trial court on the ground that time of the essence of the contract and therefore relief of specific performance could not be granted.

**Issue:**  
Sale of Immovable property - whether time was of the essence of contract?

**Held:**  
Fixation of the period within which the contract has to be performed does not make the stipulation as to time, the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. The intention to treat time as the essence may be evidenced by circumstances which are sufficiently strong to displace the normal presumptions. The judgement of the High Court was set aside.


Further – In the absence of specific pleadings or issues raised before the trial court, the question whether the time is of the essence of the contract or not cannot be raised for the first time before the High Court in appeal.



In *Govind Prasad Chaturvedi v. Union of India*, Govind Prasad entered into an agreement with Hari Dutt on March 24, 1964. Govind Prasad was a tenant who wanted to purchase the property from Hari Dutt his landlord. Govind Prasad handed over 4000 rupees as earnest money, and the terms of the agreement stipulated that Govind Prasad would get the sale deal executed within two months. He was given two months' time and it was fixed on May 24, 1964. In case he fails to do so, the earnest money paid by him to Hari Dutt would stand forfeited. This is usual in most immovable property transactions. Unfortunately, Govind Prasad could not conclude the sale deal within that given time. When Govind Prasad filed a suit against Hari Dutt for breach of contract, the trial court granted the relief of specific performance of the contract. Hari Dutt appealed to the High Court which agreed with the order of the trial court on the ground that time was of the essence of the contract and therefore relief of specific performance cannot be granted.

The Supreme Court in this case came to the conclusion that in a sale of immovable property, time is usually not the essence of the contract and hence, in such kinds of contracts, it will normally be assumed that the parties should try and close the agreement as soon as possible considering time being important, but it is not very critical.

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**R.K. Saxena v. Delhi Development Authority, AIR 2002 SC 2340**

Plot auction, Deposit of EMD and final payment, Extension of time sought, Payment accepted, Later final allotment of plot was denied, Deemed Extension

**Facts:**

DDA held an auction sale on Nov. 28, 1995. At this auction sale R.K. Saxena was the highest bidder. As per the conditions of the auction sale, R.K. Saxena deposited a sum of Rs. 6,54,500 on the same day and the balance 75% of the amount had to be paid within 60 days from the issue of demand letter. However, if sufficient cause was shown, the Chairman could extend time up to 180 days, subject to payment of interest @ 18%. The demand letter was issued on Jan. 3, 1996. The balance of Rs. 19,63,545 had to be paid within 60 days. Saxena deposited a sum of Rs. 5,50,00 on 19<sup>th</sup> Feb, 1996. On 29<sup>th</sup> March, 1996 he sought extension which was granted subject to payment of interest. He again sought extensions on 2<sup>nd</sup> July, 1996, which was granted. Then on 2<sup>nd</sup> Sept, 1996, he again sought extension. To this letter of seeking extension there was no reply by DDA. R.K. Saxena thereafter paid sums in installments on multiple dates which were accepted by DDA, even though they were made beyond time. The total amount and the interest was paid by R.K. Saxena, beyond the stipulated and extended time, and were accepted by DDA also. However, in spite of having accepted delayed payment the plot was not delivered to the R.K. Saxena. He sent legal notices to DDA. On receipt of legal notices, DDA vide a letter cancelled the allotment and forfeited the earnest money. R.K. Saxena filed writ petition before the High Court which held that payments after the extended date were not valid without further extension being given and demand letter being issued. He could not have deposited the balance amount unilaterally and without any demand being issued to him.

**Held:**

Supreme Court set aside the order of the High Court. The letter of the cancellation of allotment was quashed. The Apex Court held that R.K. Saxena has paid the entire amount and the interest as well. Both the delayed payments and the interest amount have been accepted by DDA. The moment those payments were accepted there was "deemed extension of time".



In *RK Saxena versus DDA*, was a case of a plot auction and the deposit of EMD. RK Saxena was the highest bidder for the purchase of this site or plot in the auction sale. RK Saxena won this auction and as per the terms of auction he was supposed to deposit 6,54,500. He deposited the money on the same day and the balance 75 percent of the amount of that auction price that was bided was agreed to be given within 60 days. One of the clauses in the auction advertisement by the DDA was that in certain extraordinary circumstances if sufficient cause was shown, the chairman of the DDA could extend the time from 60 days to 180 days. However, the extension of time would have a penalty of interest of 18 percent.

Saxena sought the extension of time and he was reminded to pay the interest. After the extension was granted, he sought another extension of time to which the DDA chairperson did not respond to. It was argued in this case that once an extension has been given, it shows that time was not intended to be the essence of the contract. DDA had cancelled the letter of allotment and they forfeited the earnest money. Saxena was willing to perform the contract and these guys have unilaterally forfeited the earnest money and they had actually cancelled his allotment as well. The Supreme Court accepted the argument that once a provision for extension of 180 days has been provided with interest, it clearly shows that the DDA was amenable to request for extension of time. Moreover, in spite of the fact that the second request for extension was not formally granted, RK Saxena continued to pay the remaining amount of 75 percent of the site which was accepted by the DDA. An acceptance of payment beyond the stipulated time is an affirmation or ratification of the fact that the delay has been condoned.



Thus, if time is to be treated as the essence of the contract, there should be no affirmation, ratification or condonement of delay in time in any manner, failing which, there would be a waiver of their right to treat time as the essence of a contract.