MBA-201

BUSINESS LAWS

DIRECTORATE OF DISTANCE EDUCATION

SWAMI VIVEKANAND

SUBHARTI UNIVERSITY

Meerut (National Capital Region Delhi)

CONTENTS

MBA 2nd Semester 1st year

BUSINESS LAWS

Course Code: MBA 201		
Course Credit: 04	Lecture: 03	Tutorial: 01
Course Type:	Core Course	
Lectures delivered:	40	

End Semester Examination System

Maximum Marks Allotted	Minimum Pass Marks	Time Allowed
70	28	3 Hours

Continuous Comprehensive Assessment (CCA) Pattern

Tests	Assignment/ Tutorial/ Presentation/class test	Attendance	Total
15	5	10	30

Course Objective: The legal context of business is a prerequisite for a business to exist. This course emphasizes the basic understanding of law concepts as applicable to field of management.

UNIT	Course Content	Hours
I	Contract Act, 1872 Definition of a Contract and its essentials, Formation of a valid Contract - Offer and Acceptance, Consideration, Capacity to Contract, Free consent, Legality of object, Discharge of a Contract by performance, Impossibility and Frustration, Breach, Damages for breach of a contract, Quasi contracts, Contract of Indemnity and Guarantee, Bailment and Pledge, Agency.	8
II	Partnership Act, 1932 Definition of Partnership and its essentials, Rights and Duties of Partners : Types of Partners, Minor as a partner, Doctrine of Implied Authority, Registration of Firms, Dissolution of firms. Sale of Good Act, 1930 Definition of a Contract of Sale, Conditions and Warranties, Passing of Property, Right of Unpaid Seller against the Goods, Remedies for Breach.	8
III	Negotiable Instrument Act, 1881 Definition and characteristics, Kinds of negotiable instruments, Promissory Note, Bill of Exchange and Cheques, Holder and Holder in due course, Negotiation, Presentment, Discharge from Liability, Noting and Protest, Presumption, Crossing of Cheques, Bouncing of Cheques. Companies Act, 2013 Nature and Definition of a Company, Registration and Incorporation, Memorandum of Association, Articles of Association, Prospectus, Kinds of Companies, Directors: Their powers and duties, Meetings, Winding up.	10
IV	Consumer Protection Act, 1986 Aims and Objects of the Act, Redressal Machinery under the act, Procedure for complaints under the act, Remedies, Appeals, Enforcement of orders and Penalties.	8
V	The Information Technology Act, 2000 Definition, Digital Signature, Electronic Governance, Attribution, Acknowledgment and Dispatch of Electronic Records, Offences and penalties. Regulation of Certifying Authorities, Digital Signature Certificates.	6

Text and Reference Books

1. Principles of Mercantile law, Author:singh, eastern Book Company
2. Business law, ND Kapoor
3. Business Law, Gulshan, Excel
4. Ready Reckoner on Consumer Protection Act, 1986 by BL Bansal & Rajiv Raheja .
5. Consumer Protection Act, 1986 (latest bene act)
6. Information Technology law & Practice by Vakur Sharma, Universal law Publishing.

UNIT 1: CONTRACT ACT 1872

Structure:

Notes

1.0 OBJECTIVES

After reading this Unit. you will be able to:

- the essential elements of valid contracts;
- explain the offer and acceptance;
- analysis of capacity to contract;

- discuss free consent, legality of object;
- describe the breach, damages for breach of a contract;
- understand the contract of indemnity and guarantee.

Notes

1.1 INTRODUCTION

One should know the law to which he is subject because ignorance of law is no excuse. Mercantile law is not a separate branch of law. Basically, it is a part of civil law which deals with the rights and obligations of mercantile persons arising out of mercantile transactions in respect of mercantile property. It includes laws relating to various contracts, partnerships, companies, negotiable instruments, insurance, carriage of goods, arbitration etc.

Law means a 'set of rules'. It may be defined as the rules of conduct recognised and enforced by the state to control and regulate the conduct of people, to protect their property and contractual rights with a view to securing justice, peaceful living and social security.

The Law of Contract The law of contract is that branch of law which determines the circumstances in which promises made by the parties to a contract shall be legally binding on them. Business law is of particular importance to people engaged in trade, commerce and industry as bulk of their business transactions are based on contracts.

1.2 THE INDIAN CONTRACT ACT, 1872

The law of contract is contained in the Indian Contract Act, 1872 which-

(a) Deals with the general principles of law governing all contracts, (Secs.1 to 75)

(b) Some special contracts only (Secs.124 to 238)

The first six chapters of the Act deal with the different stages in the formation of a contract, its essential elements, its performance or breach and the remedies for breach of contract. The remaining chapters deal with some of the special contracts, namely, Indemnity and Guarantee (Chapter VIII (Secs.124 to 147)), Bailment and Pledge (Chapter IX (Secs.148 to 181)) and Agency (Chapter X (Secs.182 to 238)).

Law of contract creates jus in personam as distinguished from jus in rem:

Jus in rem means a right against or in respect of a thing: jus in personam means a right against or in respect of a specific person. Jus in rem is available against the world at large; jus in personam is available only against particular persons.

Examples :

(a) X owes a certain sum of money to Y. Y has a right to recover this amount from X. This right can be exercised only by Y and by none else against X. This right of Y is a jus in personam.

(b) A is the owner of a house. He has a right to have quiet possession and enjoyment of that house against every member of the public. Similarly every member of the public is under an obligation not to disturb A's possession or enjoyment. This right of A is a jus in rem.

1.2.1 Definition of Contract

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According to Section 2(h) of the Indian Contract Act, 1872, "An agreement enforceable by law is a contract." In other words, an agreement which can be enforced in a court of law is known as a contract. A contract must have the following two elements.

(a) An agreement, and

(b) Its enforceability by law.

Sir William Anson defines a contract as, "a legally binding agreement between two or more persons by which rights are acquired by one or more to acts or forbearances (abstaining from doing something) on the part of the others".

Pollock defines a contract as, "every agreement and promise enforceable at law is a contract". Agreement + Enforceability by law = Contract Agreement

According to Section 2(e) of the Indian Contract Act, 1872, "Every promise and every set of promises forming the consideration for each other is an agreement." A proposal when accepted becomes a promise.

Offer + Acceptance = Agreement

Enforceability of Agreement : An agreement is said to be enforceable by law if it creates some legal obligation. The parties to an agreement must be bound to perform their promises and in case of default by either of them, must intend to sue. Eg., in case of social or domestic agreements, the usual presumption that the parties do not intend to create legal relations.

Consensus ad idem : The essence of an agreement is the meeting of the minds of the parties in full and final agreement: there must, in fact, be consensus ad idem. This means that the parties to the agreement must have agreed about the subject-matter of the agreement in the same sense and at the same time. Unless there is consensus ad idem, there can be no contract.

Obligation : An agreement, to become a contract, must give rise to a legal obligation or duty. The term 'obligation' is defined as a legal tie which imposes upon a definite person or persons the necessity of doing or abstaining from doing a definite act or acts. It may relate to social or legal matters. An agreement which gives rise to a social obligation is not a contract. It must give rise to a legal obligation in order to become a contract.

Agreement is a very wide term : An agreement may be a social agreement or a legal agreement. If A invites B to a dinner and B accepts the invitation, it is a social agreement. A social agreement does not give rise to contractual obligations and is not enforceable in a Court of law. It is only those agreements which are enforceable in a Court of law which are contracts.

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Examples :

(a) A invites his friend B to come and stay with him for a week. B accepts the invitation but when he comes to A, A cannot accommodate him as his wife had died the day before. B cannot claim any compensation from A as the agreement is a social one.

(b) A father promises to pay his son Rs. 500 every month as pocket allowance. Later he refuses to pay. The son cannot recover as it is a domestic agreement and there is no intention on the part of the parties to create legal relations.

To conclude :

Contract = Agreement + Enforceability at law.

Thus all contracts are agreements but all agreements are not necessarily contracts.

1.2.2 Essentials of A Contract Act

Valid Contract : According to Sec. 10, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void. In order to become a contract, an agreement must have the following essential elements :

1. Minimum two persons : There must be at least two persons for a contract to come into existence. One person to make the offer and the other person to accept it.

2. Offer and acceptance : There must be two parties to an agreement, i.e., one party making the offer and other party accepting it. The terms of the offer must be definite and the acceptance of the offer must be absolute and unconditional. The acceptance must also be according to the mode prescribed and must be communicated to the offeror.

3. Intention to create legal relationship : When the two parties enter into an agreement, their intention must be to create legal relationship between them. If there is no such intention on the part of the parties, there is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship, as such they are not contracts.

Example : A husband promised to pay his wife a household allowance of £ 30 every month. Later the parties separated and the husband failed to pay the amount. The wife sued for the allowance. Held, agreements such as these were outside the realm of contract altogether [Balfour vs. Balfour, (1919) 2 K.B. 571].

In commercial and business agreements, the presumption is usually that the parties intended to create legal relations. But this presumption is rebuttable which means that it must be shown that the parties did not intend to be legally bound.

Examples :

(a) There was an agreement between R Company and C Company by means of which the former was appointed as the agent of the latter.

One clause in the agreement was:"This agreement is not entered into ..... as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts." Held, there was no binding contract as there was no intention to create legal relationship [Rose & Frank Co. vs. Crompton Bros., (1925) A.C. 445].

(b) In an agreement, a document contained a condition "that it shall not be attended by or give rise to any legal relationship, rights, duties, consequences whatsoever or be legally enforceable or be the subject of litigation, but all such arrangements, agreements and transactions are binding in honour only." Held, the condition was valid and the agreement was not binding [Jones vs. Vernon's Pools. Ltd. (1938) 2 All E.R. 626].

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4. Lawful consideration : An agreement to be enforceable by law must be enforceable by consideration. 'Consideration' means an advantage or benefit moving from one party to the other. It is the essence of a bargain. In simple words, it means 'something in return'. The agreement is legally enforceable only when both the parties give something and get something in return. A promise to do something, getting nothing in return is usually not enforceable by law. Consideration need not necessarily be in cash or kind. It may be an act or abstinence (abstaining from doing something) or promise to do or not to do something. It may be past, present or future. But it must be real and lawful. [Secs. 2 (d), 23 and 25).

5. Capacity of parties – competency : The parties to the agreement must be capable of entering into a valid contract. Every person is competent to contract if he

(a) is of the age of majority,

(b) is of sound mind, and

(c) is not disqualified from contracting by any law to which he is subject (Secs. 11 and 12).

Flaw in capacity to contract may arise from minority, lunacy, idiocy, drunkenness, etc., and status. If a party suffers from any flaw in capacity, the agreement is not enforceable except in special cases.

6. Free and genuine consent : It is essential to the creation of every contract that there must be free and genuine consent of the parties to the agreement. The consent of the parties is said to be free when they are of the same mind on all the material terms of the contract. The parties are said to be of the same mind when they agree about the subject-matter of the contract in the same sense and at the same time (Sec. 13). There is absence of free consent if the agreement is induced by coercion, undue influence, fraud, misrepresentation, etc. (Sec. 14).

7. Lawful object : The object of the agreement must be lawful. In other words, it means that the object must not be

(a) illegal,

(b) immoral, or

(c) opposed to public policy (Sec. 23).

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If an agreement suffers from any legal flaw, it would not be enforceable by law.

8. Agreement not declared void : The agreement must not have been declared void by law in force in the country (Secs. 24 to 30 and 56).

9. Certainty and possibility of performance : The agreement must be certain and not vague or indefinite (Sec. 29). If it is vague and it is not possible to ascertain its meaning, it cannot be enforced.

Examples :

(a) A agrees to sell to B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) O agreed to purchase a motor van from S "on hire-purchase terms". The hire-purchase price was to be paid over two years. Held, there was no contract as the terms were not certain about rate of interest and mode of payment. No precise meaning could be attributed to the words "on hire-purchase" since there was a wide variety of hire-purchase terms (Scammel vs. Ouston, (1941) A.C. 251].

The terms of the agreement must also be such as are capable of performance. Agreement to do an act impossible in itself cannot be enforced [Sec. 56 (1)].

For example, where A agrees with B to put life into B's dead wife. the agreement is void as it is impossible of performance.

10. Legal formalities : A contract may be made by words spoken or written. As regards the legal effects, there is no difference between a contract in writing and a contract made by word of mouth. It is, however, in the interest of the parties that the contract should be in writing. There are some other formalities also which have to be complied with in order to make an agreement legally enforceable. In some cases, the document in which the contract is incorporated is to be stamped. In some other cases, a contract, besides being a written one, has to be registered. Thus where there is a statutory requirement that a contract should be made in writing or in the presence of witnesses or registered, the required statutory formalities must be complied with (Sec. 10, Para 2).

1.2.3 Classification of Contracts

Contracts may be classified according to their (1) validity, (2) formation, or (3) performance.

1. Classification According to Validity

A contract is based on an agreement. An agreement becomes a contract when all the essential elements referred to above are present. In such a case, the contract is a valid contract. If one or more of these elements is/are missing, the contractt is either voidable, void, illegal or un-enforceable.

1. Voidable contract : An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract [Sec. 2(i)]. This happens when the element of

free consent in a contract is missing. When the consent of a party to a contract is not free, i.e., it is caused by coercion, undue influence, misrepresentation or fraud, the contract is voidable at his option. The party whose consent is not free may either rescind (avoid or repudiate) the contract if he so desires, or elect to be bound by it. A voidable contract continues to be valid till it is avoided by the party entitled to do so.

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Example : A promises to sell his car to B for Rs 2,00,000. His consent is obtained by use of force. The contract is voidable at the option of A. He may avoid the contract or elect to be bound by it.

A contract becomes voidable in the following two cases also :

(i) When a person promises to do something for another person for a consideration but the other person prevents him from performing his promise, the contract becomes voidable at his option (Sec. 53).

Example : 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.

(ii) When a party to a contract promises to perform an obligation within a specified time, any failure on his part to perform his obligation within the specified time makes the contract voidable at the option of the promise (Sec. 55, Para 1).

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. If the party rescinding the contract has received benefit under the contract from another party to such contract he shall restore such benefit, so far as may be, to the person from whom it was received (Sec. 64). The party rightfully rescinding the contract is also entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract (Sec. 65).

2. Void agreement and void contract :

(i) Void agreement : An agreement not enforceable by law is said to be void [Sec. 2 (g)]. A void agreement does not create any legal rights or obligations. It is a nullity and is destitute of legal effects altogether. It is void ab initio. i.e., from the very beginning as, for example, an agreement with a minor or an agreement without consideration.

(ii) Void contract : A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable [Sec. 2 (j)]. A contract, when originally entered into, may be valid and binding on the parties, e.g., a contract to import goods from a foreign country. It may subsequently become void, e.g., when a war breaks out between the importing country and the exporting country.

It is illogical to talk of a void contract originally entered into, for what is supposed to be a contract is no contract at all.

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(iii) Illegal agreement : An illegal agreement is one which transgresses some rule of basic public policy or which is criminal in nature or which is immoral. Such an agreement is a nullity and has much wider import than a void contract. All Illegal agreements are void but all void agreements or contracts are not necessarily illegal. An illegal agreement is not only void as between the immediate parties, but has this further effect that even the collateral transactions to it become tainted with illegality. A collateral transaction is one which is subsidiary, incidental or auxiliary to the principal or original contract.

Example : B borrows Rs. 5,000 from A and enters into a contract with an alien to import prohibited goods. A knows of the purpose of the loan. The transaction between B and A is collateral to the main agreement. It is illegal since the main agreement is illegal.

3. Unenforceable contract : An unenforceable contract is one which cannot be enforced in a Court of law because of some technical defect such as absence of writing or where the remedy has been barred by lapse of time. The contract may be carried out by the parties concerned; but in the event of breach or repudiation of such a contract, the aggrieved party will not be entitled to the legal remedies.

II. Classification According to Formation

A contract may be (a) made in writing or by word of mouth, or (b) inferred from the conduct of the parties or the circumstances of the case. These are the modes of formation of a contract.

Contracts may be classified according to the mode of their formation as follows :

1. Express contract : If the terms of a contract are expressly agreed upon (whether by words spoken or written) at the time of formation of the contract, the contract is said to be an express contract. Where the offer or acceptance of any promise is made in words, the promise is said to be express (Sec. 9). An express promise results in an express contract.

2. Implied contract : An implied contract is one which is inferred from the acts or conduct of the parties or course of dealings between them. It is not the result of any express promises by the parties but of their particular acts. It may also result from a continuing course of conduct of the parties. Where the proposal or acceptance of any promise is made otherwise than in words, the promise is said to be implied (Sec. 9). An implied promise results in an implied contract.

Examples :

(a) there an implied contract when A :

(i) takes a cup of tea in a restaurant,

(ii) gets in to a public bus,

(iii) obtains a ticket form an automatic weighing machine, or

(iv) lifts B's luggage to be carried out of the railway station

(b) A fire broke out in Ps farm. He called upon the Upton Fire Brigade to put out the fire which the latter did. P's farm did not come under the free service zone although he believed to be so. Held, he was liable to pay for the service rendered as the service was rendered on an implied promise to pay [Upton Rural District Council vs. Powell (1942) All E.R. 220].

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3. Quasi-contract : Strictly speaking, a quasi-contract is not a contract at all. A contract is intentionally entered into by the parties. A quasi-contract, on the other hand, is created by law. It resembles a contract in that a legal obligation is imposed on a party who is required to perform it. It rests on the ground of equity that "a person shall not be allowed to enrich himself unjustly at the expense of another."

Example : X, a tradesman, leaves goods at Cs house by mistake. C treats the goods as his own. C is bound to pay for the goods.

4. E-Commerce contract : An E-commerce contract is one which is entered into between two parties via Internet. In Internet, different individuals or companies create networks which are linked to numerous other networks. This expands the area of operation in commercial transactions for any person.

III. Classification According to Performance

To the extent to which the contracts have been performed, these may be classified as :

1. Executed contract : 'Executed' means that which is done. An executed contract is one in which both the parties have performed their respective obligations.

Example : A agrees to paint a picture for B for Rs. 1,000. When A paints the picture and B pays the price, i.e., when both the parties perform their obligations, the contract is said to be executed. In some cases, even though a contract may appear to be completed at once, its effects may still continue. Thus when a person buys a bun containing a stone and subsequently breaks one of his teeth, he has a right to recover damages from the seller [Chaproniere vs. Mason, (1905) 21 T.L.R 633].

2. Executory contract : 'Executory' means that which remains to be carried into effect. An executor contract is one in which both the parties have yet to perform their obligations. Thus, in the example, the contract is executory if A has not yet painted the picture and B has not paid the price. Similarly, if A agrees to engage B as his servant from the next month, the contract is executory.

A contract may sometimes be partly executed and partly executory. Thus, if B has paid the price to A and A has not yet painted the picture, the contract is executed, as to B and executory as to A. Another classification of contracts according to the performance is as follows :

3. Unilateral or one-sided contract : A unilateral or one-sided contract is one in which only one party has to fulfil his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the

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time of the contract or before the contract comes into existence. Such contracts are also known as contracts with executed consideration.

Example : A permits a railway coolie to carry his luggage and place it in a carriage. A contract comes into existence as soon as the luggage is placed in the carriage. But by that time the coolie has already performed his obligation. Now only A has to fulfil his obligation, i.e., pay the reasonable charges to the coolie

4. Bilateral contract : A bilateral contract is one in which the obligations on the part of both the parties to the contract are outstanding at the time of the formation of the contract. In this sense, bilateral contracts are similar to executory contracts and are also known as contracts with executory consideration.

Contingent Contracts :

A contract may be

(i) an absolute contract or

(ii) a contingent contract.

An 'absolute contract' is one in which the promisor binds himself to performance in any event without any conditions.

'Contingent' means that which is dependent on something else.

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 (Sec. 31). Where, for example, goods are sent on approval, the contract is a contingent contract depending on the act of the buyer to accept or reject the goods.

Examples :

(a) A contracts to pay Rs. 10,000 if B's house is burnt. This is a contingent contract.

(b) A agrees to sell a certain piece of land to B, in case he succeeds in his litigation concerning that land. This is a contingent contract.

There are three essential characteristics of a contingent contract :

(i) Its performance depends upon the happening or non-happening in future of some event. It is this dependence on a future event which distinguishes a contingent contract from other contracts.

(ii) The event must be uncertain. If the event is bound to happen, and the contract has got to be performed in any case it is not a contingent contract.

(iii) The event must be collateral, i.e., incidental to the contract. Contracts of insurance, indemnity and guarantee are the commonest instances of a contingent contract.

Rules regarding Contingent contracts :

(i) Contingent contracts dependent on the happening of an uncertain future event cannot be enforced until the event has happened. If the event becomes impossible, such contracts become void (Sec. 32).

(ii) Where a contingent contract is to be performed if a particular event does not happen, its performance can be enforced when the happening of that event becomes impossible (Sec. 33).

(iii) If a contract is contingent upon how a person will act at unspecified time, the- event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under futher contingencies (Sec. 34).

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(iv) Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void if the event does not happen or its happening becomes impossible before the expiry of that time.

(v) Contingent agreements to do or not do anything, if an impossible event happens, are void, whether or not the fact is known to the parties (Sec.36).

Wagering agreements or Wager (Sec. 30)

A wager is an agreement between two parties by which one promises to pay money or money's worth on the happening of some uncertain event in consideration of the other party's promise to pay if the event does not happen. Thus, if A and B enter into an agreement that A shall pay B Rs.1,000 if it rains on Monday, and that B shall pay A the same amount if it does not rain, it is a wagering agreement. The event may be uncertain either because it is to happen in future or if it has already happened, the parties are uncertain and express opposite views.

Essentials of a wagering agreement :

1. **Promise to pay money or money's worth :** The wagering agreement must contain a promise to pay money or money's worth.
2. **Uncertain event :** The promise must be conditional on an event happening or not happening. A wager generally contemplates a future event, but it may also relate to a past event provided the parties are not aware of its result or the time of its happening.
3. **Each party must stand to win or lose :** Upon the determination of the contemplated event, each party should stand to win or lose. An agreement is not a wager if either of the parties may win but cannot lose or may lose but cannot win.
4. **No control over the event :** Neither party should have control over the happening of the event one way or the other. If one of the parties has the event in his own hands, the transaction lacks essential ingredients of a wager.
5. **No other interest in the event :** Lastly, neither party should have any interest in the happening or non-happening of the event other than the sum or stake he will win or lose. Thus an agreement is not a wager if the party to whom money is promised on the occurrence of an event has an 'interest' in its non-occurrence.

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Difference between a wagering agreement and a contingent contract :

(i) A wagering agreement consists of reciprocal promises whereas a contingent contract may not contain reciprocal promises.

(ii) A wagering agreement is essentially of a contingent nature a contingent contract may not be of a wagering nature.

(iii) A wagering agreement is void whereas a contingent contract is valid.

(iv) In a wagering agreement, the parties have no other interest in the subject-matter of the agreement except the winning or losing of the amount of the wager. In other words, a wagering agreement is a game of chance. This is not so in case of a contingent contract.

(v) In a wagering agreement the future event is the sole determining factor while in a contingent contract the future event is only collateral.

1.3 FORMATION OF VALID CONTRACT

Formation :

At common law, the elements of a contract are; offer, acceptance, intention to create legal relations, consideration, and legality of both form and content.

Not all agreements are necessarily contractual, as the parties generally must be deemed to have an intention to be legally bound. A so-called gentlemen's agreement is one which is not intended to be legally enforceable, and "binding in honour only".

The requisites for formation of a legal contract are an offer, an acceptance, competent parties who have the legal capacity to contract, lawful subject matter, mutuality of agreement, consideration, mutuality of obligation, and, if required under the STATUTE OF FRAUD, a writing.

1.3.1 Offer

An offer is a promise that is, by its terms, conditional upon an act, forbearance, or return promise being given in exchange for the promise or its performance. It is a demonstration of willingness to enter into a bargain, made so that another party is justified in understanding that his or her assent to the bargain is invited and will conclude it. Any offer must consist of a statement of present intent to enter a contract; a definite proposal that is certain in its terms; and communication of the offer to the identified, prospective offeree. If any of these elements are missing, there is no offer to form the basis of a contract.

Preliminary negotiations, advertisements, invitations to bid : Preliminary negotiations are clearly distinguished from offers because they contain no demonstration of present intent to form contractual relations. No contract is formed when prospective purchasers respond to such terms, as they are merely invitations or requests for an offer. Unless this interpretation is employed, any person in a position similar to a seller who advertises goods in any medium would be liable for numerous contracts when there is usually a limited quantity of merchandise for sale.

An advertisement, price quotation, or catalogue is customarily viewed as only an invitation to a customer to make an offer and not as an offer itself. The courts reason that an establishment might not have sufficient stock to satisfy potential demand and that it would not be reasonable for a customer to expect to form a binding contract by responding to advertisements that are intended to make consumers aware of a product for sale. In addition, the courts have held that an advertisement is an offer for a unilateral contract that can be revoked at the will of the offeror, the business enterprise, prior to performance of its terms.

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An exception exists, however, to the general rule on advertisements. When the quantity offered for sale is specified and contains words of promise, such as "first come, first served," courts enforce the contract where the store refuses to sell the product when the price is tendered. Where the offer is clear, definite, and explicit, and no matters remain open for negotiation, acceptance of it completes the contract. New conditions may not be imposed on the offer after it has been accepted by the performance of its terms.

An advertisement or request for bids for the sale of particular property or the erection or construction of a particular structure is merely an invitation for offers that cannot be accepted by any particular bid. A submitted bid is, however, an offer, which upon acceptance by the offeree becomes a valid contract.

Mistake in sending offer : If an intermediary, such as a telegraph company, errs in the transmission of an offer, most courts hold that the party who selected that method of communication is bound by the terms of the erroneous message. The same rule applies to acceptances. In reaching this result, courts regard the telegraph company as the agent of the party who selected it. Other courts justify the rule on business convenience. A few courts rule that if there is an error in transmission, there is no contract, on the grounds that either the telegraph company is an INDEPENDENT CONTRACTOR and not the sender›s agent, or there has been no meeting of the minds of the parties. However, an offeree who knows, or should know, of the mistake in the transmission of an offer may not take advantage of the known mistake by accepting the offer; he or she will be bound by the original terms of the offer.

Termination of an offer : An offer remains open until the expiration of its specified time period or, if there is no time limit, until a reasonable time has elapsed. A reasonable time is determined according to what a reasonable person would consider sufficient time to accept the offer.

The death or insanity of either party, before an acceptance is communicated, causes an offer to expire. If the offer has been accepted, the contract is binding, even if one of the parties dies thereafter. The destruction of the subject matter of the contract; conditions that render the contract impossible to perform; or the supervening illegality of the proposed contract results in the termination of the offer.

When the offeror, either verbally or by conduct, clearly demonstrates that the offer is no longer open, the offer is considered revoked when learned by

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the offeree. Where an offer is made to the general public, it can be revoked by furnishing public notice of its termination in the same way in which the offer was publicized.

Irrevocable offers : An option is a right that is purchased by a person in order to have an offer remain open at agreed-upon price and terms, for a specified time, during which it is irrevocable. It constitutes an exception to the general rule that an offer may be withdrawn prior to acceptance. The offeror may not withdraw this offer because that party is bound by the consideration given by the offeree. The offeree is free, however, to decide whether or not to accept the offer.

Most courts hold that an offer for a unilateral contract becomes irrevocable as soon as the offeree starts to perform the requested act, because that action serves as consideration to prevent revocation of the offer. Where it is doubtful whether the offer invites an act (as in the case of a unilateral contract) or a promise (as in the case of a bilateral contract), the presumption is in favor of a promise, and therefore a bilateral contract arises. If an offer to form a unilateral contract requires several acts, it is interpreted as inviting acceptance by completion of the initial act. Performance of the balance constitutes a condition to the offeror's duty of performance. Where such an offer invites only a single act, it includes by implication a subsidiary promise to keep the offer open if the offeree will commence performance. Some courts hold that an offer for a unilateral contract may be revoked at any time prior to completion of the act bargained for, even after the offeree has partially performed it.

Rejection of an offer : An offer is rejected when the offeror is justified in understanding from the words or conduct of the offeree that he or she intends not to accept the offer, or to take it under further advisement. Rejection might come in the form of an express refusal to accept an offer by a counteroffer, which is a new proposal that rejects the offer by implication; or by a conditional acceptance that operates as a counteroffer. The offer may continue, however, if the offeree expressly states that the counteroffer shall not constitute a rejection of the offer.

If an offer is rejected, the party who made the original offer no longer has any liability for that offer. The party who rejected the offer may not subsequently, at his or her own option, convert the same offer into a contract by a subsequent acceptance. In such a case, the consent of the offeror must be obtained for a contract to be formed.

1.3.2 Acceptance

Acceptance of an offer is an expression of assent to its terms. It must be made by the offeree in a manner requested or authorized by the offeror. An acceptance is valid only if the offeree knows of the offer; the offeree manifests an intention to accept; the acceptance is unequivocal and unconditional; and the acceptance is manifested according to the terms of the offer.

The determination of a valid acceptance is governed by whether a promise or an act by the offeree was the bargained-for response. Since the acceptance of a unilateral contract requires an act rather than a promise, it is unnecessary to furnish notice of intended performance unless the offeror requested it. If, however, the offeree has reason to believe that the offeror will not learn of the acceptance with reasonable promptness, the duty of the offeror is discharged unless the offeree makes a reasonable attempt to give notice; the offeror learns of the performance; or the offer indicates that no notice is required.

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In bilateral contracts, the offer is effective when the offeree receives it. The offeree may accept it until the offeree receives notice of revocation from the offeror. Thereafter, an offer is revoked. Under the majority rule, which is known as the "mailbox rule," an acceptance is effective upon dispatch if the offeror explicitly authorizes that method of acceptance to be employed by the offeree, even if the acceptance is lost or destroyed in transit.

The majority rule is inapplicable, however, unless the acceptance is properly addressed and postage prepaid. It has no application to most option contracts, as acceptance of an option contract is effective only when received by the offeror.

If the acceptance mode used by the offeree is implicitly authorized by the offeror, such as the selection by the offeree of the same method used by the offeror, who neglected to designate a method of communication, an acceptance is effective upon dispatch if it is correctly addressed and the expense of its conveyance is prepaid. As with expressly authorized methods, the acceptance need not ever reach the offeror in order to form the contract.

In some jurisdictions, the use of a method not expressly or impliedly authorized by the offeror, even if more rapid in nature, results in a contract only upon receipt of the acceptance. In most jurisdictions, however, if the acceptance mode is inherently faster, it is deemed to be an impliedly authorized means, and acceptance is effective upon dispatch.

If the acceptance is transmitted by an expressly or impliedly authorized method to the wrong address, it is effective only upon receipt by the offeror. A wrong address is any address other than that implicitly authorized, even if the offeror were in a position to receive the acceptance at the substituted address.

An offeror who specifically states that there is no contract until the acceptance is received is entitled to insist upon the condition of receipt or upon any other provision concerning the manner and time of acceptance specified.

Rejection of the offer or revocation of conditional acceptance is effective upon receipt. A late or defective acceptance is treated as a counteroffer, which will not result in a contract unless the offeror accepts it. If offers cross in the mail, there will be no binding contract, as an offer may not be accepted if there is no knowledge of it.

As a general rule, an offer may be accepted only by the offeree or an authorized agent. If, however, the offer is contained in an option contract, it

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may be the subject of an assignment or transfer without the consent of the offeror, unless the option involves a purchase on credit or expressly prohibits an assignment.

In contracts that do not involve the sale of goods, acceptance must comply exactly with the requirements of the offer (this is known as the "mirror-image rule"), and must omit nothing from the promise or performance requested. An offer of a prize in a contest, for example, becomes a binding contract when a contestant successfully complies with the terms of the offer. If a response to an offer purports to accept it, but adds qualifications or conditions, then it is a counteroffer and not an acceptance.

Acceptance may be inferred from the offeree's acts, conduct, or silence; but as a general rule, silence, without more, can never constitute acceptance. The effect of silence accompanied by AMBIGUITY must be ascertained from all the circumstances in the case.

Prior dealings between the parties may create a duty to act. Silence or the failure to take some action under such circumstances might constitute acceptance. For example, if the parties have engaged in a series of business transactions involving the mailing of goods and payment by the recipient, the recipient will not be permitted to retain an article without paying for it within a reasonable time, due to their prior dealings. A recipient who does not intend to accept the goods is under a duty to inform the sender. Silence, where there is a duty to speak, prevents the offeree from rejecting an offer and the offeror from claiming that there is no acceptance. If ownership rights are exercised over an item, this might be deemed an acceptance.

1.3.3 Consideration

Consideration is a legal detriment that is suffered by the promisee and that is requested by the promisor in exchange for his or her promise. A valid contract requires some exchange of consideration. As a general rule, in a bilateral contract, one promise is valid consideration for the other. In a unilateral contract, the agreed performance by the offeree furnishes the necessary consideration and also operates as an acceptance of the offer.

Consideration may consist of a promise; an act other than a promise; a forbearance from suing on a claim that is the subject of an honest and reasonable dispute; or the creation, modification, or destruction of a legal relationship. It signifies that the promisee will relinquish some legal right in the present, or that he or she will restrict his or her legal freedom of action in the future as an inducement for the promise of the other party. It is not substantially concerned with the benefit that accrues to the promisor.

Love and affection are not permissible forms of consideration. A promise to make a gift contains no consideration because it does not entail a legal benefit received by the promisor or a legal detriment suffered by the promisee. Because a promise to give a gift is freely made by the promisor, who is not subject to any legal duty to do so, the promise is not enforceable unless there is

PROMISSORY ESTOPPEL. Promissory estoppel is a doctrine by which a court enforces a promise that the promisor reasonably expects will induce action or forbearance on the part of a promisee, who justifiably relied on the promise and suffered a substantial detriment as a result. Where a court enforces a promise by applying this doctrine, promissory estoppel serves as a substitute for the required consideration.

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At common law, courts refused to inquire into the adequacy or fairness of a bargain, finding that the payment of some price constituted legally sufficient consideration. If one is seeking to prove mistake, misrepresentation, fraud, or duress or to assert a similar defense the inadequacy of the price paid for the promise might represent significant evidence for such defenses, but the law does not require adequacy of consideration in order to find an enforceable contract.

Lawful consideration : According to Section 2(d), Consideration is defined as: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called consideration for the promise". Consideration means 'something in return'.

An agreement must be supported by a lawful consideration on both sides. Essentials of valid consideration must include :

- It must move at the desire of the promisor. An act constituting consideration must have been done at the desire or request of the promiser. If it is done at the instance of a third party or without the desire of the promisor, it will not be good consideration. For example, "A" saves "B"'s goods from fire without being ask him to do so. "A" cannot demand payment for his service.
- Consideration may move from the promisee or any other person. Under Indian law, consideration may be from the promisee of any other person i.e., even a stranger. This means that as long as there is consideration for the promisee, it is immaterial who has furnished it.
- Consideration must be an act, abstinence or forebearance or a returned promise.
- Consideration may be past, present or future. Past consideration is not consideration according to English law. However it is a consideration as per Indian law. Example of past consideration is, "A" renders some service to "B" at latter's desire. After a month "B" promises to compensate "A" for service rendered to him earlier. When consideration is given simultaneously with promise, it is said to be present consideration :. For example, "A" receives Rs.50/- in return for which he promises to deliver certain goods to "B". The money "A" receives is the present consideration. When consideration to one party to other is to pass subsequently to the maker of the contract, is said to be future consideration. For example. "A" promises to deliver certain goods to "B" after a week. "B" promises to pay the price after a fortnight, such consideration is future.

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- Consideration must be real. Consideration must be real, competent and having some value in the eyes of law. For example, "A" promises to put life to "B"'s dead wife, if "B" pay him Rs.1000/-. "A"'s promise is physically impossible of performance hence there is no real consideration.
- Consideration must be something which the promiser is not already bound to do. A promise to do something what one is already bound to do, either by law, is not a good consideration., since it adds nothing to the previous existing legal consideration.
- Consideration need not be adequate. Consideration need not be necessarily be equal to value to something given. So long as consideration exists, the courts are not concerned as to adequacy, provided it is for some value.

The consideration or object of an agreement is lawful, unless and until it is :

1. forbidden by law: If the object or the consideration of an agreement is for doing an act forbidden by law, such agreement are void. for example, "A" promises "B" to obtain an employment in public service and "B" promises to pay Rs one lakh to "A". The agreement is void as the procuring government job through unlawful means is prohibited.
2. If it involves injury to a person or property of another: For example, "A" borrowed rs.100/- from "B" and executed a bond to work for "B" without pay for a period of 2 years. In case of default, "A" owes to pay the principal sum at once and huge amount of interest. This contract was held void as it involved injury to the person.
3. If courts regards it as immoral:An agreement in which consideration ir object of which is immoral is void. For example, An agreement between husband and wife for future separation is void.
4. Is of such nature that, if permitted, it would defeat the provisions of any law:
5. is fraudulent, or involves or implies injury to the person or property of another, or
6. Is opposed to public policy. An agreement which tends to be injurious to the public or against the public good is void. For example, agreements of trading with foreign enemy, agreement to commit crime, agreements which interfere with the administration of justice, agreements which interfere with the course of justice, stifling prosecution, maintenance and champerty.
7. Agreements in restrained of legal proceedings: This deals with two category. One is, agreements restraining enforcement of rights and the other deals with agreements curtailing period of limitation.
8. Trafficking in public offices and titles: agreements for sale or transfer of public offices and title or for procurement of a public recognition

like Padma Vibhushan or Padma Shri etc. for monetary consideration is unlawful, being opposed to public policy.

9. Agreements restricting personal liberty: agreements which unduly restricts the personal liberty of parties to it are void as being opposed by public policy.
10. Marriage brokerage contact:Agreements to procure marriages for rewards are void under the ground that marriage ought to proceed with free and voluntary decisions of parties.
11. Agreements interfering marital duties: Any agreement which interfere with performance of marital duty is void being opposed to public policy. An agreement between husband and wife that the wife will never leave her parental house.
12. consideration may take in any form-money, goods, services, a promise to marry, a promise to forbear etc.

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Contract Opposed to Public Policy can be Repudiated by the Court of law even if that contract is beneficial for all of the parties to the contract- What considerations and objects are lawful and what not Agreement of which object or consideration was opposed to public policy, unlawful and void- – What better and what more can be an admission of the fact that the consideration or object of the compounding agreement was abstention by the board from criminally prosecuting the petitioner-company from offense under Section 39 of the act and that the Board has converted the crime into a source of profit or benefit to itself. This consideration or object is clearly opposed to public policy and hence the compounding agreement is unlawful and void under Section 23 of the Act. It is unenforceable as against the Petitioner-Company.

Mutuality of Obligation

Where promises constitute the consideration in a bilateral contract, they must be mutually binding. This concept is known as mutuality of obligation. If one party's promise does not actually bind him or hers to some performance or forbearance, it is an illusory promise, and there is no enforceable contract.

Where the contract provides one party with the right to cancel, there might be no consideration because of lack of mutuality of obligation. If there is an absolute and unlimited right to cancel the obligation, the promise by the party with the right of cancellation is illusory, and the lack of consideration means that there is no contract. If the power to cancel the contract is restricted in any manner, the contract is usually considered to be binding. Performance of a void promise in a defective bilateral contract may render the other promise legally binding, however. For example, in virtually all states, an oral contract to transfer title to land is not merely unenforceable, it is absolutely void. (See discussion of the statute of frauds, below.) A seller who orally promises to transfer land to a purchaser, for which the purchaser orally promises a designated sum, may sue the purchaser for the price if the purchaser receives title to the land from the seller. The purchaser is not relieved of his or her promise to pay, because of the performance of the void oral promise by the seller.

Notes

A promise to perform an act that one is legally bound to do does not qualify as consideration for another promise.

Past consideration consists of actions that occurred prior to the making of the contractual promise, without any purpose of inducing a promise in exchange. It is not valid, because it is not furnished as the bargained-for exchange of the present promise. There are exceptions to this rule, such as a present promise to pay a debt that has been discharged in BANKRUPTCY, which constitutes valid consideration because it renews a former promise to pay a debt that was supported by consideration.

Most states do not recognize moral obligation as consideration, as there is no acceptable method of setting the parameters of moral duty. Some courts will enforce a moral obligation where there has been a benefit conferred on the promisor.

1.3.4 Capacity to Contract

One of the most essential elements of a valid contract is the competence of the parties to make a contract. Section 11 of the Indian Contract Act, 1872, defines the capacity to contract of a person to be dependent on three aspects; attaining the age of majority, being of sound mind, and not disqualified from entering into a contract by any law that he is subject to. In this article, we will look at all aspects in a detailed manner.

According to Section 11, "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

So, we have three main aspects :

1. Attaining the age of majority
2. Being of sound mind
3. Not disqualified from entering into a contract by any law that he is subject to

1. Attaining the Age of Majority

According to the Indian Majority Act, 1875, the age of majority in India is defined as 18 years. For the purpose of entering into a contract, even a day less than this age disqualifies the person from being a party to the contract. Any person, domiciled in India, who has not attained the age of 18 years is termed as a minor.

Let's look at certain laws governing a minor's agreement :

A Contract made with a Minor is Void : Since any person less than 18 years of age does not have the capacity to contract, any agreement made with a minor is void ab-initio (from the beginning).

Example, Peter is 17 years and 6 months old. He needs some money to go on vacation with his friends. He approached a moneylender and borrows Rs 25,000. As security, he signs some papers mortgaging his laptop and motorcycle.

Six months later, when he attains the age of majority, he files a suit declaring that the mortgage executed by him when he was a minor is void and should be cancelled. The Court agrees and relieves Peter of all liability to repay the loan.

Also, if a minor enters into a contract, then he cannot ratify it even after he attains majority since the contract is void ab-initio. And, a void agreement cannot be ratified.

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A Minor can be a Beneficiary of a Contract : While a minor cannot enter a contract, he can be the beneficiary of one. Section 30 of the Indian Partnership Act, 1932, also specifies that while a minor cannot become a partner in the partnership firm, the benefits of the firm can be extended to him.

Example, Peter lends some money to his neighbour, John and asks him to mortgage his house as security. John agrees and the mortgage deed is made favouring Peter's 10-year-old son – Oliver. John fails to repay the loan and Peter, as the natural guardian of Oliver, files a suit against John to recover his money. The Court holds the case since a minor can be a beneficiary of a contract.

A Minor is always given the Benefit of being a Minor : Even if a minor falsely represents himself as a major and takes a loan or enters into a contract, he can plead minority. The rule of estoppel cannot be applied against a minor. He can plea his minority in defence.

Contract by Guardian : Under certain circumstances, a guardian of a minor can enter into a valid contract on behalf of the minor. Such a contract, which the guardian enters into, for the benefit of the minor, can also be enforced by the minor.

However, guardians cannot bind a minor by a contract for buying immovable property. But, a contract entered into by a certified guardian of a minor, appointed by the Court, with approval from the Court for the sale of a minor's property can be enforced.

Insolvency : A minor cannot be declared insolvent as he cannot avail debts. Also, if some dues are pending from the properties of the minor and he is not personally liable for the same.

Joint contract by a Minor and an Adult : In case of a joint contract between an adult and a minor, executed by the guardian on behalf of the minor, the liability of the contract falls on the adult.

2. Person of Sound Mind

According to Section 12 of the Indian Contract Act, 1872, for the purpose of entering into a contract, a person is said to be of sound mind if he is capable of understanding the contract and being able to assess its effects upon his interests.

It is important to note that a person who is usually of an unsound mind, but occasionally of a sound mind, can enter a contract when he is of sound mind. No person can enter a contract when he is of unsound mind, even if he is so temporarily. A contract made by a person of an unsound mind is void.

Notes

3. Disqualified Persons

Apart from minors and people with unsound minds, there are other people who cannot enter into a contract. i.e. do not have the capacity to contract. The reasons for disqualification can include, political status, legal status, etc. Some such persons are foreign sovereigns and ambassadors, alien enemy, convicts, insolvents, etc.

1.3.5 Free Consent

According to Section 13, " two or more persons are said to be in consent when they agree upon the same thing in the same sense (Consensus-ad-idem). According to Section 14,

Elements Vitiating free Consent

Every day-to-day transaction that is conducted involves the usage of contracts, whether verbal or written. Contracts are an indispensable part of any individual's life and are utilized at every part. Contracts are essentially a bundle of rights and obligations that tend to bind one party with another in exchange for some consideration. In India, the making and enforcement of contracts is governed by the Indian Contracts Act 1872, which extends to the whole of India except Jammu and Kashmir.

This act defines Contracts as an agreement between two or more parties, which is enforceable by law. Thus, it is pertinent to note that only those agreements which are able to be enforced by law can be termed as contracts. The agreement must satisfy certain essential conditions as laid down in Section 10 of the Indian Contract Act in order to be enforceable. These conditions are-

- It is essential to have an agreement between both the parties. In order to have an agreement, there must be a proposal by one party and it should be accepted by the other party.
- The parties entering into the agreement must be competent to contract.
- It is essential to have a lawful consideration and lawful object in the agreement.
- Free consent must be given by both parties while entering into a contract.
- The agreement should not expressly be declared void by the law.

There are 3 types of contracts which are valid contract, which is an agreement enforceable by law; void contract is an agreement which is not enforceable by law and voidable contract which is valid at the option of the party which is aggrieved. In case there is flawed consent, it would amount to voidable contract.

What is free consent?

In order for a valid contract to persist, it is essential to ensure free consent of the parties. There is a concept of consensus-ad-idem which implies that the parties entering into the contract must mean the same thing in the same sense. The understanding about the terms of the contract between both the parties

should be on the same subject matter and footing. The entire structure of law of contract is based on the concept of consent, which is placed on the highest pedestal during any agreement. In order to validate the formation of a contract, the main ingredient would be the obtainment of genuine and free consent of the parties. Thus, the mere acquisition of consent is not enough but the consent must be obtained in a free and voluntary manner.

Notes

According to the Indian Contract Act, consent is said to be achieved in all situations except when it is caused by coercion, undue influence, fraud, misrepresentation or mistake. These methods of obtaining consent render the agreement voidable at the instance of the aggrieved party and can invalidate the contract. However, if mistake was a part in obtaining consent, the agreement is said to be void. The main objective of this aspect is to be fair to both the parties and ensure that the judgment of either of the party was not clouded or influenced before entering into a contract. This doctrine helps in the promotion of individual autonomy and freedom to contract.

Relevant legal provision(s)

Section 13 and 14 of the contract Act define consent and free consent respectively. Consent, under Section 13, is said to be achieved when two or more individuals agree upon the same thing in the same manner. The elements that are said to vitiate consent are also given under the Indian Contract Act and are Coercion (Section 15), Undue Influence (Section 16), Fraud (Section 17), Misrepresentation (Section 18) or Mistake (Sections 20, 21 and 22).

- **Coercion** can be defined as the physical or mental force that is used upon a person to enter into a contract against his will. The consent in such a situation is not free and there is usage of force or threats to obtain consent. Section 15 of the Indian Contract Act defines coercion as committing or threatening to commit any act forbidden by law in the IPC or unlawful detention or threaten to detain any property or person with the aim of causing a person to enter into a contract. Coercion makes a contract voidable at the instance of the aggrieved party. If any consideration is paid or goods are delivered at such a time, it must be returned or delivered if the contract is void. The burden of proof rests on the party who wants to avoid the contract and he must prove that the consent was not given freely.
- **Undue Influence** refers to a situation wherein the relations between the two parties are such that one party is in a position to dominate the other and thus, uses said position to influence the other party and obtain an unfair advantage. This is given under Section 16 of the Act. This situation can occur if the people are in a fiduciary or superior – subordinate relationship. This can also occur when a contract is made with a person whose mental capacity is affected by age, illness or distress. However, for an agreement to become voidable, it must be proved that the dominant party had the objective to take advantage of the other party. The burden of proof, here, rests on the dominant party to prove the absence of influence.

Notes

- **Fraud,** under Section 17, occurs when a person deceits another person by making false statements, thereby compelling him to enter into contracts. This is done with the complete knowledge that the statement is untrue or in a manner that is reckless without checking its validity and thus impairs free consent. According to Section 17, there are certain instances where frauds occur which are suggesting a fact that it is not true and there is no belief of it being true, the active concealment of fact, a promise made without any intention of it being performed. It is essential that the aggravated party suffer from some actual loss due to the fraud and has incurred damages. The false statement must be a fact rather than an opinion to constitute a fraud.
- **Misrepresentation,** as given in Section 18 occurs when a party makes a statement that is false and inaccurate. However, the misrepresentation is supposed to be innocent and non intentional and the party making it must believe it to be true. There can be 3 ways in which misrepresentation occurs and it is that the person makes a positive assertion believing it to be true. However, the breach of duty should lack the intent to deceive and the breach gives the person committing it an advantage by misleading the other. The third way is when one party acts innocently and thus, causes the other party to make any mistake with respect to the subject matter of the agreement. The burden of proof is placed on the party claiming the occurrence of misrepresentation and this becomes voidable.
- **Mistake** occurs when there is a misunderstanding with respect to legal provisions when it comes to obtaining consent. If it weren't for the misunderstanding, the party would not have consented to enter the agreement. There are 2 types of mistake namely mistake of law and mistake of fact. Mistake of law occurs when a party has any misunderstanding with respect to any legal provision, and in most cases the contract cannot be avoided as ignorantia juris non excusat (ignorance of law is no excuse) prevails. However, if the parties have any confusion or misunderstanding with respect to the subject matter or terms of contract, it is said to be mistake of fact. The agreement is valid if there is misunderstanding on the part of one party.

1.3.6 Legality of Object

For a contract to be a valid contract two things are absolutely essential – lawful object and lawful consideration. So the Indian Contract Act gives us the parameters that make up such lawful consideration and objects of a contract. Let us take a look at the legality of object and consideration of a contract.

Lawful Consideration and Lawful Object

Section 23 of the Indian Contract Act clearly states that the consideration and/or object of a contract are considered lawful consideration and/or object unless they are :

- specifically forbidden by law
- of such a nature that they would defeat the purpose of the law
- are fraudulent
- involve injury to any other person or property
- the courts regard them as immoral
- are opposed to public policy.

Notes

So lawful consideration and/or lawful object cannot contain any of the above. Let us take a more in detail look at each of them.

1. Forbidden by Law : When the object of a contract or the consideration of a contract is prohibited by law, then they are not lawful consideration or object anymore. They then become unlawful in nature. And so such a contract cannot be valid anymore.

Unlawful consideration of object includes acts that are specifically punishable by the law. This also includes those that the appropriate authorities prohibit via rules and regulations. But if the rules made by such authorities are not in tandem with the law than these will not apply.

Let us see an example. A received a license from the Forest Department to cut the grass of a certain area. The authorities at the department told him he cannot pass on such interest to another person. But the Forest Act has no such statute. So A sold his interest to B and the contract was held as valid.

2. Consideration or Object Defeats the Provision of the Law : This means if the contract is trying to defeat the intention of the law. If the courts find that the real intention of the parties to the agreement is to defeat the provisions of the law, it will put aside the said contract. Say for example A and B enter into an agreement, where A is the debtor, that B will not plead limitation. This, however, is done to defeat the intention of the Limitation Act, and so the courts can rule the contract as void due to unlawful object.

3. Fraudulent Consideration or Object : Lawful consideration or object can never be fraudulent. Agreements entered into containing unlawful fraudulent consideration or object are void by nature. Say for example A decides to sell goods to B and smuggle them outside the country. This is a fraudulent transaction as so it is void. Now B cannot recover the money under the law if A does not deliver on his promise.

4. Defeats any Rules in Effect : If the consideration or the object is against any rules in effect in the country for the time being, then they will not be lawful consideration or objects. And so the contract thus formed will not be valid.

5. When they involve Injury to another Person or Property : In legal terms, an injury means to a criminal and harmful wrong done to another person. So if the object or the consideration of the contract does harm to another person or property, this will amount to unlawful consideration. Say for example a contract to publish a book that is a violation of another person's copyright would be void. This is because the consideration here is unlawful and injures another person's property, i.e. his copyright.

Notes

6. When Consideration is Immoral : If the object or the consideration are regarded by the court as immoral, then such object and consideration are immoral. Say for example A lent money to B to obtain a divorce from her husband C. It was agreed once B obtains the divorce A would marry her. But the court passed the judgement that A cannot recover money from B since the contract is void on account of unlawful consideration.

7. Consideration is Opposed to Public Policy : For the good of the community, we restrict certain contracts in the name of public policy. But we do not use public policy in a wide sense in this matter. If that was the case it would curtail individual freedom of people to enter into contracts. So for the purpose of lawful consideration and object public policy is used in a limited scope. We only focus on public policy under the law.

So let us look at some agreements that are opposed to public policy,

1. Trading with the Enemy : Entering into an agreement with a person from a country with whom India is at war, void be a void agreement. For example, a trader entering into a contract with a Pakistani national during the Kargil war.
2. Stifling Prosecution : This is a pervasion of the natural course of law, and such contracts are void. For example, A agrees to sell land to B if he does not participate in the criminal proceedings against him.
3. Maintainance and Champerty : Maintainance agreement is when a person promises to maintain a suit in which he has no real interest. And champerty is when a person agrees to assist another party in litigation for a portion of the damages or proceeds.
4. An Agreement to Traffic in Public Offices.
5. Agreements to create Monopolies.
6. An agreement to brokerage marriage for rewards.
7. Interfering with the Courts: An agreement whose object is to induce a judicial or state officials to act corruptly and interfere with legal proceedings.

1.3.7 Discharge of a Contract by Performance

A contract creates certain obligations on one or all parties involved. The discharge of a contract happens when these obligations come to an end. There are many ways in which a contract is discharged. In this article, we will look at various such scenarios.

1. Discharge by Performance : When the parties to a contract fulfil the obligations arising under the contract within the time and manner prescribed, then the contract is discharged by performance.

Example : Peter agrees to sell his cycle to John for an amount of Rs 10,000 to be paid by John on the delivery of the cycle. As soon as it is delivered, John pays the promised amount.

Since both the parties to the contract fulfil their obligation arising under the contract, then it is discharged by performance. Now, discharge by the performance of a contract can be by :

1. Actual performance
2. Attempted performance

Notes

As shown in the example above, actual performance is when all the parties to a contract do what they had agreed for under the contract. On the other hand, it is possible that when the promisor attempts to perform his promise, the promisee refuses to accept it. In such cases, it is called attempted performance or tender.

2. Discharge by Mutual Agreement : If all parties to a contract mutually agree to replace the contract with a new one or annul or remit or alter it, then it leads to a discharge of the original contract due to a mutual agreement.

Example : Peter owes Rs 100,000 to John and agrees to repay it within one year. They document the debt under a contract. Subsequently, he loses his job and requests John to accept Rs 75,000 as a final settlement of the loan. John agrees and they make a contract to that effect. This discharges the original contract due to mutual consent.

3. Discharge by the Impossibility of Performance : If it is impossible for any of the parties to the contract to perform their obligations, then the impossibility of performance leads to a discharge of the contract. If the impossibility exists from the start, then it is impossibility ab-initio. However, the impossibility might also arise later due to:

- An unforeseen change in the law
- Destruction of the subject-matter essential to the performance
- The non-existence or non-occurrence of a particular state of things which was considered a given for the performance of the contract
- A declaration of war

Example : Peter enters into a contract with John to marry his sister Olivia within one year. However, Peter meets with an accident and becomes insane. The impossibility of performance leads to a discharge of the contract.

4. Discharge of a Contract by Lapse of Time : The Limitation Act, 1963 prescribes a specified period for performance of a contract. If the promisor fails to perform and the promisee fails to take action within this specified period, then the latter cannot seek remedy through law. It discharges the contract due to the lapse of time.

Example : Peter takes a loan from John and agrees to pay instalments every month for the next five years. However, he does not pay even a single instalment. John calls him a few times but then gets busy and takes no action. Three years later, he approaches the court to help him recover his money. However, the court rejects his suit since he has crossed the time-limit of three years to recover his debts.

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5. Discharge of a Contract by Operation of Law : A contract can be discharged by operation of law which includes insolvency or death of the promisor.

6. Discharge by Breach of Contract : If a party to a contract fails to perform his obligation according to the time and place specified, then he is said to have committed a breach of contract.

Also, if a party repudiates a contract before the agreed time of performance of a contract, then he is said to have committed an anticipatory breach of contract.

In both cases, the breach discharges the contract. In the case of:

- an actual breach, the promisee retains his right of action for damages.
- an anticipatory breach of contract, the promisee cannot file a suit for damages. It also discharges the promisor from performing his part of the contract.

7. Discharge of a Contract by Remission : A promisee can waive or remit the performance of promise of a contract, wholly or in part. He can also extend the time agreed for the performance of the same.

In example 3 above, Peter only repays a part of the money he owes to John. However, John agrees to accept it as a final settlement of the debt. John's act of remission discharges the contract.

8. Discharge by Non-Provisioning of Facilities : In many contracts, the promisee agrees to offer reasonable facilities to the promisor for the performance of the contract. If the promisee fails to do so, then the promisor is discharged of all liabilities arising due to non-performance of the contract.

Example : Peter agrees to fix John's garage floor provided he keeps his car out for at least 6 hours. Peter approaches him a few times but John is reluctant to get his car out. John fails to provide reasonable facilities to Peter (an empty floor). This discharges him of all obligations arising under the contract.

9. Discharge of a Contract due to the Merger of Rights : In some situations, it is possible that inferior and superior right coincides in the same person. In such cases, both the rights combine leading to a discharge of the contract governing the inferior rights.

Example : Peter rents John's apartment for two years. One year into the contract, he offers to buy the property from John, who agrees. The enter a sale contract and Peter becomes the owner of the apartment. Here Peter has two rights; one accorded by the lease agreement making him the renter and second by the sale agreement making him the owner. The former being an inferior right merges with the superior one and discharges the lease contract

1.3.8 Impossibility and Frustration

Section 56 of the Indian Contract Act, 18721 talks about the impossibility of performance of contract. The provisions contained in Section 56 are closely related with the English "doctrine of frustration of contract." The first paragraph of Section 56 lays down the simple principle that "an agreement to do an act

impossible in itself is void (initial impossibility)." For example, an agreement to discover a treasure by magic, being impossible of performance, is void [Illustration (a), Section 56]. The second paragraph lays down the effect of subsequent impossibility of performance. By virtue of Section 56, paragraph 2, "a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful (supervening impossibility)." For example, A and B contract to marry each other and before the time fixed for the marriage, A goes mad. The contract becomes void [Illustration (b), Section 56]. The third paragraph of Section 56 says that if one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non- performance of the b.

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The Indian law on the impossibility of performance of contract is wider than the English "doctrine of frustration" because it covers both the initial impossibility and subsequent impossibility. On the other hand the "doctrine of frustration" applies where the performance of the contract is initially possible, but it becomes frustrated due to some extraordinary event. In fact, the frustration of contract is identical to the subsequent impossibility mentioned under paragraph 2 of Section 56. This principle is not only confined to the physical impossibilities. It extends to the cases where the performance of the contract is physically possible, but the object of the parties had in mind has failed to materialized. In Krell v. Henry[(1903) 2 KB 740], a flat was hired only for viewing a coronation procession but the procession having been cancelled due to King's illness, it was held the object of the contract was frustrated by the non-happening of the coronation.

Specific Grounds of Frustration

There is not any exhaustive list of situations in which the doctrine is going to be applied. But, the following grounds of frustration have become well established.

1. Destruction of Subject-Matter : The doctrine of impossibility applies with full force "where the actual and specific subject-matter of the contract has ceased to exist". Taylor v. Caldwell [(1863) 3 B&S 826] is the best example of this class. There, a promise to let out a music hall was held to have frustrated on the destruction of the hall. Similarly, in Howell v. Coupland [(1876) 1 QBD 258], the defendant contracted to sell a specified quantity of potatoes to be grown on his farms, but failed to supply them as the crop was destroyed by a disease, it was held that performance had become impossible.

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2. Unusual Change of Circumstances : A contract will frustrate "where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated." This happens when the change of circumstances has affected the performance of the contract to such an extent as to make it virtually impossible or even extremely difficult or hazardous.

The Supreme Court laid down this principle in Alopi Prashad v. Union of India [AIR 1960 SC 588]. In this case, the plaintiffs were acting as the agents to the Government of India for purchasing ghee for the use of army personnel. They were to be paid on cost basis for different items of work involved. The performance was in progress when the Second World War intervened and the rates fixed in peace time were entirely superseded by the totally altered conditions obtaining in war time. The agents demanded revision of rates but received no replies. They kept up the supplies. The Government terminated the contract in 1945 and the agents claimed payment on enhanced rates. They could not succeed. The contract was held not frustrated.

In Tarapore & Co. v. Cochin Shipyard Ltd. [(1984)2 SCC 680], the Supreme Court observed that "the law has to adapt itself to economic changes. Marginal price rise may be ignored. But when prices escalate out of all proportion, then it cannot be said that it could not be reasonably expected by the parties and make performance so crushing to the contractor as to border virtually on impossibility, the law would have to offer relief to the contractor in terms of price revision in such a situation."

3. Non-occurrence of Contemplated : Event Sometimes the performance of a contract remains entirely possible, but owing to the nonoccurrence of an event contemplated by both parties as the reason for the contract, the value of the performance is destroyed. Krell v. Henry [(1903) 2 KB 740] involved a situation of this kind. There, a contract to hire a room to view a proposed coronation procession was held to have frustrated when the procession was postponed. For this result to follow it is necessary that the happening of the event should be the foundation of the contract. This is shown by Berne Bay Steam Boat Co v. Hutton [(1903) 2 KB 683 (CA)], which also arose from the postponement of the coronation. The Royal Naval Review was proposed to be held on the occasion. The defendant chartered a steamboat for two days "to take out a party of paying passengers for the purpose of viewing the naval review and for a day's cruise round the fleet". But the review was cancelled and the defendant had no use of the ship. Yet he was held liable to pay the unpaid balance of the hire less the profit which the plaintiff had made by the use of the ship in the ordinary course.

4. Death or Incapacity of Party : "A party to a contract is excused from performance if it depends upon the existence of a given person, if that person perishes" or becomes too ill to perform. Robinson v. Davison [(1871) LR 6 Exch 269] is the well-known illustration. There was a contract between the plaintiff and the defendant's wife (who was an eminent pianist) that she should play the piano at a concert to be given by the plaintiff on a specified day. On the morning of the day in question she informed the plaintiff that she was too ill to attend the concert. The court said that the contract has become frustrated.

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5. Government, administrative or legislative intervention : A contract will be dissolved when legislative or administrative intervention has so directly operated upon the fullfillment of the contract for a specific work as to transform the contemplated conditions for a specific work as to transform the contemplated conditions of performance.

In **Man Singh v. Khajan Singh** [AIR 1961Raj 277], a contract between certain parties for the sale of the trees of a forest was discharged when the state of Rajasthan forbade the cutting of trees in the area.

In case an intervention is not of permanent character which does not uproot the foundation of the contract, it will be having no such effect of frustration. In the Satyabrata Ghose v. Mugneeram Bangur & Co. [AIR 1954 SC 44], the construction of housing colony was started by the defendant. The plaintiff paid the advance for the same purpose. The defendant asked for the balance of amount and comedian of conveyance as the work was completed. Meanwhile, second World War began and the Government requisitioned a considerable portion of the land for military purposes. The company contended that the contract be cancelled by reason of the supervening events, Mukherjea J., held that the contract was not frustrated. He observed :

"Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and commercial object which the parties had in view? The requisition orders, it must be remembered, were, by their very nature, of a temporary character and the requisitioning authority could, in law occupy the position of a licensee in regard to the requisitioned property. The order might continue during the whole period of the war and even for sometime after that or it could have been withdrawn before that was terminated. If there was a definite time limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the performance of the contract impossible within the specified time and this would seriously affect the object and purpose for the venture. But where there is no time limit whatsoever in the contract, nor even an understanding between the parties could naturally anticipate restrictions of various kind which would make the carrying out of these operations more tardy and difficult, than in times of peace, we do not think that the order of requisition affected the fundamental basis upon which the 'agreement rested or struck at the roots of the adventure."

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If parties have undertaken the absolute liability in terms of contract, regardless of executive changes, the parties cannot claim the liability to be discharged yet. In Naihati Jute Mills Ltd. v. Khyaliram Jagamnath [AIR 1968, SC 522], raw jute was to be imported from East Pakistan. The Jute Mill undertook to procure the necessary licence for importing jute from Pakistan and to handover the same to the importer. The Mill stipulated to pay damages to the importer if it failed to procure the licence on or before a particular date. The Mill did not procure licence as a result of change in the policy of the Govermnent of issuing licence for importing Jute. The Mill was held liable as the contention of doctrine of frustration was rejected against the Mill because it took upon itself the burden to pay damages if it fails to procure licence from Jute Commissioner.

6. Intervention of War : War or War like situations has often raised difficult questions for the courts. In Tsakiroglou & Co. Ltd. v. Noblee Thorl G. m. b. H, [(1961) 2 All ER 179], appellants had agreed to sell to the respondents three hundred tons of groundnuts. The usual route at the date of the contract was via Suez Canal. The shipment was to be in November/December, but due to certain geopolitical development the canal was closed until April next year. It was stated that the appellants could have shipped through the alternate route which was Cape of Good Hope. Appellants refused to ship goods via Cape. The appellant's argument was that it was a tacit understanding between the parties in the contract that the shipment should be via Suez. It was held that such an understanding was wrong. What the appellants could have done was shipped the shipment through Cape route, and they were bound by law (Sale of Goods Act, 1893) to do this. Although this would have been more expensive for the appellants, but it didn't render the contract fundamentally or radically different, hence there was no frustration of contract.

1.4 BREACH OF CONTRACT

A breach of contract occurs if any party refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. In case of breach, the aggrieved party (i.e., the party not at fault) is relieved from performing his obligation and gets a right to proceed against the party at fault. A contract terminates by breach of contract. Breach of contract may arise in two ways (a) Anticipatory Breach, and (b) Actual Breach.

Anticipatory Breach of Contract (Sec. 39)

Anticipatory breach of contract occurs, when a party repudiates it before the time fixed for performance has arrived or when a party by his own act disables himself from performing the contract.

Examples :

1. A contracts to marry B. Before the agreed date of marriage he married C. B is entitled to sue A for breach of promise.
2. A promised to marry B as soon as his (A's) father would die. During the father's life time. A absolutely refused to marry B. Although the

time for performance had not arrived, B was held entitled to sue for breach of promise.

3. A contract to supply B with certain articles on 1st of August. On 20th July, he informs B that he will not be able to supply the goods. B is entitled to sue A for breach of promise.

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Consequences of Anticipatory Breach : Where a party to a contract refuses to perform his part of the contract before the actual time arrives the promisee may either: (a) rescind the contract and treat the contract as at an end, and at once sue for damages, or (b) he may elect not to rescind but to treat the contract operative and wait for the time of performance and then hold the other party liable for the consequences of non-performance. In the latter case, the party who has repudiated may still perform if he can.

Thus, from the above discussion it follows that 'anticipatory breach' of contract does not by itself discharge the contract. The contract is discharged only when the aggrieved party accepts the repudiation of the contract, i.e., elects to rescind the contract. Notice that if the repudiation is nor accepted and subsequently an event happens, discharging the contract legally, the aggrieved party shall lose his right to sue for damages.

Example : A agreed 10 load a cargo of wheal on B' s ship at Odessa by a particular date but when the ship arrived A refused to load the cargo. B did not accept the refusal and continued to demand the cargo. Before the last date of loading had expired the Crimean War broke out, rendering the performance of the contract illegal. Held, the contract was discharged and B could not sue for damag.

Section 39 of the Contract Act deals with anticipatory breach of contract and provides as "when a party to 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 works or conduct, his acquiescence in its continuance".

Actual Breach of Contract

The actual breach may take place (a) at the time when performance is due, or (b) during the performance of the contract.

Actual breach of Contract, at the time when performance is due. If a person does not perform his part of the contract at the stipulated time, he will be liable for its breach.

Example : A seller offers to execute a deed of sale only on payment by the buyer of a sum higher than is payable under the contract for sale, the vendor shall be liable for the breach.

Time as Essence of Contract

But if the promisor offers to perform his promise subsequently, the question arises whether it should be accepted, or whether the promisee can refuse such acceptance and hold the promisor liable for the breach. The answer depends

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upon whether time was considered by the parties to be of the essence of the contract or not. Section 55, in this respect, lays down as follows :

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract". If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed unless, at the time of such acceptance he gives notice to the promisor of his intention to do so. According to the above provisions, if performance beyond the stipulated time is accepted, the promisee must give notice of his intention to claim compensation. If he fails to give such notice, he will be deemed to have waived that right. In England, however, no such notice is necessary, and the promisee, can even after accepting the belated performance, claim compensation.

Breach during the Performance of the Contract. Actual breach of contract also occurs when during the performance of the contract one party fails or refuses to perform his obligation under the contract.

Example : A contracted with a Railway Company to supply it certain quantity of railway chairs at a certain price. The delivery was to be made in installments. After a few instaments had been supplied, the Railway Company asked A to deliver no more. Held, A could sue for breach of contract.

1.4.1 Damages for Breach of A Contract

Remedies For Breach of Contract : A remedy is the course of action available to an aggrieved party (i.e. the party not at default) for the enforcement of a right under a contract. Whenever there is breach of a contract, the injured party becomes entitled to any one or more of the following remedies against the guilty party :

1. Rescission of the contract
2. Restitution
3. Suit for specified performance of the contract.
4. Suit for an injuction
5. Suit for damages.
6. Suit upon quantum meruit

As regard the last two remedies stated above, the law is regulated by the Specific Relief Act.

Rescission of the Contract : When there is a breach of contract by one party, the other party may rescind the contract and need not perform his party of obligations under the contract and may sit quietly at home if he decides not to take any legal action against the guilty party. But in case the aggrieved party intends to sue the guilty party for damages for breach of contract, he has to file a suit for rescission of the contract. When the court grants rescission, the aggrieved party is freed from all his obligations under the contract; and becomes entitled to compensation for any damage which he has sustained through the nonfulfilment of the contract (Sec. 75).

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Example : A contacts to supply 100 kg of tea leaves for Rs. 8000 to B on 15 April. If A does not supply the tea leaves on the appointed day, B need not pay the price, B may treat the contract as rescind and may sit quietly at home. B may also file a suit for 'rescission' and claim damages.

When is rescission granted? Under Section 39 of Indian Contract Act, the court may grant rescission in the following two cases :

1. Where the contract is voidable at the option of the plaintiff, the court grants rescission to the plaintiff.
2. Where the contract is unlawful for causes not apparent on its face and defendant is more to blame than the plaintiff, the court may grant rescission.

When may rescission be refused?

That court may, however, refuse to rescind the contract

(a) Where the plaintiff has expressly or impliedly ratified the contract; or

(b) Where owing to the change of circumstances, the parties cannot be restored to their original positions; or

(c) Where third parties have, during the subsistence of the contract acquired rights in good faith and for value; or

(d) Where only a part of the contract is sought to be rescinded and such part is not servable from the rest of the contract.

Restitution : It means return of the benefit received by one party to the contract from the other under a void contract. When a contract becomes void it need not be performed by either party. Section 65 provides that when an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it.

This section applies to contracts 'discovered to be void' and contracts which become void. It does not apply to contracts which are known to be void. Thus, if A pays Rs 200 to B to beat C, the money is not recoverable.

Example : A pays B Rs. 1000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of promise. The agreement is void but B must repay A Rs. 1000.

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Specific Performance : Under certain circumstances a person aggrieved by the breach of the contract can file a suit for specific performance i.e. for an order by the court upon the party guilty of breach of contract directing him to perform what he promised to do. Specific performance is a discretionary remedy which is allowed only in a limited number of cases. Rules regarding the granting of this relief are contained in the Specific Relief Act.

Example : A agrees to sell two rare China vases to B. B may compel A to perform the contract specifically, because there is no standard for ascertaining the actual damage which would be caused by the non-performance of the promise. A is looking for a house. For his residence he finds one. He make a contract with the owner of that house 'B' to buy the house. Later, 'B' refuses to sell the house to 'A'.

In this case, damages from 'B' for such breach of contract are not adequate remedy for 'A' because he does not get that type of house which he want in the locality. In this situation, A can appeal to the court for the specific performance of the contract.

Some of the case in which specific performance of the contract may be enforced are as follows :

(a) Where monetary consideration is not an adequate remedy for the breach of a contract.

(b) When there exist no standard for ascertaining the actual damage caused by the non-performance of the act.

(c) When it is probable that compensation in money on non-performance of the contract cannot be obtained.

In the following cases however specific performance shall not be granted :

1. Where the contract is of a personal nature.
2. Where damages are an adequate remedy.
3. Where the court cannot supervise the execution of the contract.
4. Where the contract is made by the trustee in breach of their trust.
5. Where the contract is inequitable to either party. It is discretionary remedy which is allowed only in a limited number of cases.

Injuction : An aggrieved party can sue for an injuction i.e. an order, of the court restraining the wrong does from doing or continuing the wrongful act complained of. Injuctions are usually granted to enforce negative stipulations in cases where damages are not adequate relief. Injuctions is a preventive relief. It is particularly appropriate in cases of anticipatory breach of contract.

Example : G agreed to buy the whole of the electric energy required for his house from a certain company. This was interpreted as a promise not to buy electricity from any other company. He was therefore restrained by an injuction from any other company.

Suit for Damages : Damages are a monetary compensation allowed to the injured party for the loss or injury suffered by him as a result of the breach of

contract. The fundamental principleunderlying damages is not punishment but compensation. By awarding damages the court aims to put the injured party into the position in which he would have been, had there been performance and not breach, and not to punish the defaulter party. As a general rule, "compensation must be commensurate with the injury or loss sustained, arising naturally from the breach." "If actual loss is not proved, no damages will be awarded."

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Assessment of damages : We will now consider the extent to which a plaintiff is entitled to demand damages for breach of contract. The rules in this regard have been laid down by Section 73 and 74 of Indian Contract Act, 1872. Accordingly, an injured party is entitled to receive from the defaulter party :

(a) Such damages which naturally arose in the usual course of things from such breach. No compensation is to be given generally for any remote or indirect loss sustained by reason of the breach (Ordinary Damages).

(b) Such damages which the parties knew, when the entered into the contract, as likely to result from the breach (Special Damages).

(c) In estimating the loss or damage caused to a party by breach, the means which existed of remedying the inconvenience caused by the breach must also be taken into account (Explanation Sec. 73). (Duty to mitigate damage suffered).

(d) If the terms of contract defines the amount of damages to be paid in case of breach of contract the aggrieved party is entitled only to a reasonable amount f damages which does not exceeds the amount mentioned in the contract. The amount of reasonable damages is decided by the court.

Different kinds of damages : Damages may be of four kinds :

1. Ordinary or General or Compensatory damages (i.e. damages arising naturally from the breach).
2. Special damages (i.e., damages in contemplation of the parties at the time of contract).
3. Exemplary, Punitive or Vindictive damages.
4. Nominal damages.

1. Ordinary Damages : When a contract has been broken, the injured party can, as a rule always recover from the guilty party ordinary or general damages. These are such damages as may fairly and reasonably be considered as arising naturally and directly in the usual course of things from the breach of contract itself. In other words, ordinary damages are restricted to the "direct or proximate consequences" of the breach of contract and remote of indirect losses, which are not the natural and probable consequence of the breach of contract, are generally not regarded.

Example : The leading case of (Hodley vs Baxendale) which is said to be the foundation of modem law of damages in England and India (as Sec. 73 is almost based on the rules laid down ill this case); is an authority on the point In that case:

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He's mill was stopped by a breakage of the crankshaft. H delivered the shaft to B, a common carrier, to take it to the manufacturers at Greenwich as a pattern for a new one. The only information given to B was that the article to be carried was the broken shaft of the mill. It was not made known to B that delay would result in loss of profits. By some neglect on the part of B the delivery of the shaft was delayed beyond a reasonable time. In consequence the mill remained idle for a longer period than should have been necessary. H brought an action against B claiming damages for loss of profits which would have been made during the period of delay. Held that B was not liable for loss of profits caused by the delay because it was a remote consequence, and only nominal damages were awarded. The Court pointed out that B, the defendant, was never told that the delay in the delivery of the shaft would entail loss of profits of the mill; the plaintiffs might have had another shaft, or there might have been some other defect in the machinery to cause the stoppage, or for any other reason there might have been loss actually. Accordingly it was not a direct consequence of the breach and hence not recoverable.

In the case of a contract for 'sale and purchase' the general rule as regards measure of damages is that the damages would be assessed on the difference between the contract price and the market price at the date of breach and any subsequent increase or decrease in the market price would not be taken note of. If there is no market price for the subject matter of the contract, the rule is to take the market price of the nearest substitute. If there is no nearest substitute, the market price is to be ascertained by adding to the price at the place of purchase, the conveyance charge to the place of delivery plus the usual profit of the importer . If the delivery is to be made in instalments, then the due date of each instalment is taken as the date of breach and the measure of damages is the sum of the difference of the market value at the several dates of delivery.

Example : A agrees to sell to B 5 bags of rice at Rs. 500 per bag, delivery to be given after two months. On the date of delivery the price of rice goes up and the rate is Rs. 550 per bag. A refuses to deliver the bags to B. B can claim from A Rs. 250, as ordinary damages arising directly from the breach, being the difference between the contract price (i.e. Rs. 500 per bag) and the market price (i.e. Rs. 550 per bag) on the date of delivery of 5 bags . Notice that if Rs. 250 are paid to B by way of damages, then he will be in the same position as if the contract has been performed.

Under a contract of 'sale of goods' if there is as breach of 'warranty' the seller is liable to pay all damages which the purchaser has to pay to the person to whom the goods are sold by him, whether the seller is aware of such a sale or not. In order that the purchaser should be able to claim such damages and costs it is an overriding requirement that the sub-contracts should have been made on the same terms and conditions as the first contract.

Example : A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a

similar warranty. The goods prove to be not according to the warranty and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A..

2. Special Damages : Special damages are those which arise on account of the special or unusual circumstances affecting the plaintiff. In other words, they are such remote losses which are not the natural and probable consequence of the breach of contract. Unlike ordinary damages, special damages cannot be claimed as a matter of right. These can be claimed only if the special circumstances which would result in a special loss in case of breach of contract are brought to the notice of the other party. It is important that such damages must be in contemplation of the parties at the time when the contract is entered into. Subsequent knowledge of the special circumstances will not create any special liability on the guilty party.

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Example : A, having contracted with B to supply 1,000 tons of iron at Rs.100 a ton, to be delivered at a stated time, B contracts with C for the purchase of 1,000 tons of iron at Rs. 80 a ton, telling C that he does so for the purpose of performing his contract with B.C fails to perform his contract with A, and A could not procure other iron, and B, in consequence rescinds the contract. C must pay to A Rs.20,000 being the profit which A would have made by the performance of his contract with B. (Illustration (i) to Section 73). (If C was not told of B's contract then only the difference in contract price and market price, if any, could be claimed).

3. Exemplary or Vindictive or Punitive Damages : These are such damages which are awarded with a view to punishing the guilty party for the breach and not by way of compensation for the loss suffered by the aggrieved party. The cardinal principle of law of damages for a breach of contract is to compensate the injured party for the loss suffered and not to punish the guilty party Hence, obviously, exemplary damages have not place in the law of contract and are not recoverable for a breach of contract.

There are, however, two exceptions to this rule :

(a) Breach of a contract to marry. In this case the amount of the damages will depend upon the extent of injury to the party's feelings. One may be ruined, other may not mind so much.

(b) Dishonour of a cheque by a banker when there are sufficient funds to the credit of the customer. In this case the rule of ascertaining damages is, "the smaller the cheque, the greater the damages." Of course, the actual amount of damages will differ according to the status of the party.

4. Nominal Damages : Nominal damages are those which are awarded only for the name sake. These are neither awarded by way of compensation to the aggrieved party nor by way of punishment to the guilty party. These are awarded to establish the right to decree for breach of contract when the injured party has not actually suffered any real damage and consist of a very small sum

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of money, say, a rupee or two. For example, where in a contract of sale of goods, if the contract price and the market price is almost the same at the date of breach of the contract, then the aggrieved party is entitled only to nominal damages.

Duty to Mitigate Damage Suffered : It is the duty of the injured party to mitigate damage suffered as a result of the breach of contract by the other party. He must use all reasonable means of mitigating the damage, just as a prudent man would, under similar circumstances in his own case. He cannot recover any part of the damage, traceable to his own neglect to mitigate. The onus of proof, however, is on the defendant to show that the plaintiff has failed in his duty of mitigation and the plaintiff is free from the burden of proving that he tried his best to mitigate the loss.

The rule in regard to mitigation must be applied with discretion and a man who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party. Courts should take care to see that they have put the plaintiff in the same position as if the contract had been performed, and have not been overgenerous to the contract-breaker by too severe an application of the rule that the plaintiff must take reasonable steps to mitigate damages.

Example : Where a servant is dismissed, even though wrongfully, it is his duty to mitigate the damages by seeking other employment. He can recover only nominal damages if he refuses a reasonable offer of fresh employment. But if it cannot be proved that he has failed in his duty of mitigation, he will be entitled to the full salary for the whole of the unexpired period of service, if the contract of employment was for a fixed period. If the contract of employment was not for a fixed term, then the principle of awarding damages for a reasonable period of notice comes into play.

Liquidated Damages and Penalty : 'Liquidated damages' means a sum fixed up in advance, which is a fair and genuine pre-estimate of the probable loss that is likely to result from the breach. 'Penalty' means a sum fixed up in advance, which is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. Thus the essence of a penalty is a payment of money stipulated as in terroem of the offending party.

Sometimes the parties fix up at the time of the contract the sum payable as damages in case of breach. In such a case, a distinction is made in English Law as to whether the provision amounts to 'liquidated damages' or a 'penalty'. Courts in England usually allow 'liquidated damages' as stipulated in the contract, without any regard to the actual loss sustained. 'Penalty' clauses, however, are treated as invalid and the courts in that case calculate damages according to the ordinary principles and allow only reasonable compensation.

Under the Indian Law Section 74 does away with the distinction between 'liquidated damages' and 'penalty'. This Section lays down that the Courts are not bound to treat the sum mentioned in the contract, either by way of liquidated damages or penalty, as the sum payable as damages for the breach. Instead the courts are required to allow reasonable compensation so as to cover the

actual loss sustained, not exceeding the amount so named in the contract. Thus, according to the Section, the named sum, regardless whether it is a penalty or not, determines only the maximum limit of liability in case of breach of contract. The Section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.

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Exception : There is, however, one exception provided for by Section 74 to the above rule. When any person enters into any bailbond, recognizance or other instrument of the same nature, or under the provisions of any law or under the orders of the Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable to pay the whole sum mentioned therein upon breach of the condition of any such instrument.

Examples :

(a) A contracts with B to pay Rs.1,000 if he fails to pay B Rs.500 on a given day. A fails to pay B Rs.500 on that day. B is entitled to recover from A such compensation, not exceeding Rs.1,000 as the court considers reasonable. (Illustration (a) to Section 74).

(b) A undertakes to repay B a loan of Rs.1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty and the contract may be enforced according to its terms. (Illustration (f) to Section 74).

(c) A borrows Rs.100 from B, and gives him a bond for Rs.200 payable by five yearly instalments of Rs.40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty. (Illustration (g) to Section 74).

Stipulation regarding payment of interest. The explanation added to Section 74 states, "a stipulation for increased interest from the date of default may be a stipulation by way of penalty." It implies that such a stipulation may be considered a penalty clause and disallowed by the courts, if the enhanced rate is exorbitant.

Example : A gives B a bond for the repayment of Rs.1,000 with interest at 12 per cent per annum at the end of six months, with a stipulation that in case of default interest shall be payable at the rate of 75 per cent p.a. from the date of default. This is a stipulation by way of penalty and B is only entitled to recover from A such compensation as the court considers reasonable.

The following rules must also be noted in connection with payment of interest :

(a) Unless the parties have made a stipulation for the payment of interest, or there is a usage to that effect, interest cannot be recovered legally as damages, generally speaking (Mahabir Prasad vs. Durga Datta).

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(b) Where a contract provides that the amount should be paid without interest by a particular date and on default it will be payable with interest, such a stipulation may be allowed if the interest is reasonable. If the interest is exorbitant, the courts will give relief.

(c) Payment of compound interest on default, is allowed, only if it is not at an enhanced rate.

Earnest Money : Money deposited as security for the due performance of a contract is known as earnest money. Forfeiture of earnest money is allowed if the amount is reasonable. But where it is in the nature of penalty, the court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount so agreed.

The proportion the amount bears to the total sale price, the nature of the contract and other circumstances have to be taken into account in ascertaining the reasonableness of the amount. Cost of Suit The aggrieved party is entitled, in addition to the damages, to get the costs of getting the decree for damages from the defaulter party. The cost of suit for damages is in the discretion of the court.

Summary of the Rules Regarding the Measure of Damages The principles governing the measure may be summarized as under :

1. The damages are awarded by way of compensation for the loss suffered by the aggrieved party and not for the purpose of punishing the guilty party for the breach.
2. The injured party is to be placed in the same position, so far as money can do, as if the contract had been performed.
3. The aggrieved party can recover by way of compensation only the actual loss suffered by him, arising naturally in the usual course of things from the breach itself.
4. Special or remote damages, i.e. damages which are not the natural and probable consequence of the breach are usually not allowed until they are in the knowledge of both the parties at the time of entering into the contract.
5. The fact that damages are difficult to assess does not prevent the injured party from recovering them.
6. When no real loss arises from the breach of contract, only nominal damages are awarded.
7. If the parties fix up in advance the sum payable as damages in case of breach of contract, the court will allow only reasonable compensation so as to cover the actual loss sustained, not exceeding the amount so named in the contract.
8. Exemplary damages cannot be awarded for breach of contract except in case of breach of contract of marriage or wrongful refusal by the bank to honour the customer's cheque.
9. It is the duty of the injured party to minimize the damage suffered.

10. The injured party is entitled to get the costs of getting the decree for damages from the defaulter party.

Suit upon Quantum Meruit (Sections 65 and 70)

Another remedy for a breach of contract available to an injured party against the guilty party is to file a suit upon quantum meruit. The phrase quantum meruit literally means "as much as is earned" or "in proportion to the work done." A right to sue upon quantum meruit arises where a contract, partly performed by one party, has been discharged by breach of contract by the other party or, is discovered void or becomes void. This remedy may be availed of either without claiming damages (i.e., claiming reasonable compensation only for the work done) or in addition to claiming damages for breach (i.e., claiming reasonable compensation for part performance and damages for the remaining unperformed part).

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The aggrieved party may file a suit upon quantum meruit and may claim payment in proportion to work done or goods supplied in the following cases :

1. Where work has been done in pursuance of a contract, which has been discharged by the default of the defendant.

Example : P agreed to write a volume on ancient armour to be published in a magazine owned by C. For this he was to receive $ 100 on completion. When he had completed part, but not the whole, of his volume, C abandoned the magazine. P was held entitled to get damages for breach of contract and payment quantum meruit for the part already completed . Notice that in the above case the contract was wrongfully terminated by the defendant, and both damages as well as payment quantum meruit have been allowed. It is important that in the case of a wrongful breach of contract the injured party can always claim payment quantum meruit, whether the contract is divisible or indivisible.

2. Where work has been done in pursuance of a contract which is discovered void' or becomes void,' provided the contract is divisible.

Example : C was appointed as managing director of a company by the board of directors under a written contract which provided for his remuneration. The contract was found void because the directors who constituted the 'Board' were not qualified to make the appointment. C nevertheless, purporting to act under the agreement, rendered services to the company and sued for the sums specified in the agreement, or alternatively, for a reasonable remuneration on a quantum meruit. Held, C could recover on a quantum meruit.

3. When a person enjoys benefit of non-gratuitous act although there exists no express agreement between the parties. One of such cases is provided in Section 70. Section 70 lays down that when services are rendered or goods are supplied by a person,

(i) without any intention of doing so gratuitously, and

(ii) the benefit of the same is enjoyed by the other party, the latter must compensate the former or restore the thing so delivered.

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Example : A, a trader, leaves certain goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them. (Illustration (a) to Section 70). 4. A party who is guilty of breach of contract may also sue on a quantum meruit provided both the following conditions are fulfilled

(a) the contract must be divisible, and

(b) the other party must have enjoyed the benefit of the part which has been performed, although he had an option of declining it.

Example : Where a common carrier fails to take a complete consignment to the agreed destination, he may recover pro-rata freight. (He will, of course, be liable for breach of the contract).

1.4.2 Quasi-Contract

Meaning of Quasi-Contract : A quasi-contract is a kind of contract by which one party is bound to pay money in consideration of something done or suffered by the other party. Though no contractual relation exists between the parties, law makes out a contract for them and such a contract is called a quasi-contract. The basis of quasi-contract is to prevent unjust enrichment or unjust benefit, i.e., no one should grow rich out of another person's loss.

Cases Deemed As Quasi-Contracts

The Indian Contract Act recognises such types of contracts and section 68-72 deal with such contracts. They are as follows :

1. Claims for necessaries supplied (Section 68) : If a person incapable of entering into a contract or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the supplier is entitled to recover the price from the property of the incapable person.

Example : A supplies to B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

A contract by a minor is wholly void and unenforceable. He cannot even ratify it on attaining majority. But section 68 of the Act provides an exception to this rule and makes the estate of the minor liable for necessaries supplied to him. In order to make an infant liable for necessaries supplied, the plaintiff must prove, (1) that the goods supplied were reasonable necessary for supporting a person in his position, and (2) that the infant had not already a sufficient supply of these necessaries.

The things supplied must come within the category of necessaries. Facts of individual cases will help in deciding as to what are necessaries. Necessaries are those things without which an individual cannot reasonably exist. The same thing may be necessary to one person under certain circumstances and unnecessary to another person under other circumstances. The standard varies according to the class of society to which the infant belongs. The term necessaries is not confined to goods. It can include other things such as good teaching and instruction. House given to a minor for the purpose of living and continuing his studies is a necessity and the person so giving is entitled to recover the price.

It may, however, be noted that the remedy is not personal but against the estate only. The minor cannot even be made personally liable where necessaries supplied exceed the value of the estate itself. The obligation under section 68 is to pay a reasonable and not the agreed price for the goods. The creditor is entitled to the value of the necessaries but not the interest thereon.

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2. Payment by an interested person (Section 69) : This section provides that a person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be reimbursed by the other.

Example : B holds land in Bengal on a lease granted by A, the Zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B to prevent the sale and the consequent annulment of his own lease pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

In order that section 69 may apply, the following conditions must be satisfied.

1. A person must by law be bound to pay some money.
2. Another person must be interested in the payment of that money.
3. The other person must have paid the money because of such interest.

A person who is interested in the payment of money which another is bound by law to pay, pays it, he is entitled to be reimbursed by the other. If he has no interest in paying, he cannot claim protection. An action is not maintainable under this section, unless the person from whom it is sought to be recovered was bound by law to pay it. Thus, where a seller had to pay all encumbrances, on the property and the purchaser pays such encumbrances, the purchaser is entitled to be reimbursed by the seller.

Examples :

(a) A's goods were wrongfully attached to realise the arrears of Government revenue due by B. A pays the dues to save his property. He is entitled to recover the amount from B.

(b) The consignee suffered loss due to fire in the wagon during transit. The insurer made good the loss. The insurer claimed the money from the railway. The claim was allowed under section 69.

(c) In a case E left his carriage at P's house. P's landlord seized the carriage as distress for rent. E paid the rent to obtain the release of his carriage. It was held that E could recover the amount from P.

3. Obligation of a person enjoying benefit of non-gratuitous act (Section 70) : Where a person lawfully does anything for another person or delivers, anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered.

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Examples :

(a) A, a tradesman leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

Where irrespective of any agreement or contract, a person lawfully does something for another person which was never intended to be gratuitous, and the other person enjoys the benefit of the thing done the latter is bound to pay compensation to the former in respect of the thing done. For the application of this section, the following conditions must be fulfilled.

1. The thing must have been done lawfully.
2. It must have been done by a person not intending to act gratuitously.
3. The person for whom the act is done must have enjoyed the benefit of it.

If these conditions are satisfied the person enjoying the benefit of the act is put under an obligation to make compensation to the person doing the act or to restore the thing so done or delivered. The leading case on the point is Damadar Mudaliar V. Secretary for State for India.

The facts of the case are : The Government carried out repairs to an irrigation tank, owned by the Government jointly with a zamindar and sued the zamindar for contribution in respect of expenses incurred for the repairs, it was held that Government in carrying out the repairs had acted lawfully and had not intended to carry them out gratuitously and that the zamindar who enjoyed the benefit of the repairs was liable to pay compensation.

Examples : (a) The provincial Government in the wrongful exercise of their authority asked the railway company to widen the culvert for the benefit of private owner of property in the neighbourhood. The railway company agreed to widen the culvert of its own cost. On completion of the work a suit was filed by the railway company against the municipality. It was held that although the railway company did not intend to do the work gratuitously, the municipality did not benefit from it and therefore section 70 could not be applied.

(b) A contractor on the request of an officer of the state of West Bengal constructed a katcha road, office, kitchen, storage sheds for the use of the civil supplies department of the Government. The State accepted the works but tried to evade liability because no contract had been concluded according to the formalities of the Government of India Act. Since the State had enjoyed the benefit of the works, the Supreme Court held the State Government liable.

Section 70 is not based on contract but embodies the equitable principles of restitution and prevention of unjust enrichment. It has no application to persons incompetent to contract (such as minor) and as such they are under no obligation to compensate the other person for any benefit received by them. But the position of the State cannot be compared with that of a minor. Section 70 applies as much to Corporations and Government as to individuals.

Example : X supplied spare motor parts to the Poona Municipal Corporation. The Corporation tried to escape liability on the ground that the contract was not made in accordance with the Bombay Municipal Corporation Act. It was held that the Corporation was liable under Section 70.

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4. Responsibility of finder of goods (Section 71) : A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

A finder of goods is bound to take as much care of the goods found as a man of ordinary prudence would take of his own goods under similar circumstances.

He cannot appropriate the goods without taking proper steps to find out the owner and should keep them for a reasonable time so that the owner may turn up and take them. The finder of the goods is entitled to retain the goods against the owner until he receives compensation from him. He is also entitled to the possession of the goods as against the whole world except the true owner.

The finder, however, can retain the goods in the following cases :

(i) Where the thing found is in danger;

(ii) Where the owner cannot with reasonable diligence by found out;

(iii) Where the owner is found out, but refuses to pay lawful charges of the finder;

(iv) Where the lawful charges of the finder, in respect of the thing found, amount to two-thirds of the value of thing found.

Example : H picked up a diamond from the floor of F's shop and handed over to F to keep it till the owner is found. Inspite of best efforts the true owner could not be reached. After some time H tendered to F the lawful expenses incurred by him for finding the true owner and asked him (F) to hand over the diamond to him (H). F refused. It was held that F must return the diamond to H as H was entitled to retain it against the whole world except the true owner.

5. Money paid by mistake or under coercion (Section72) : A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it.

Examples : (a) A and B jointly owe 100 rupees to C. A alone pays the amount to C and B not knowing of this fact, pay 100 rupees over again to C. C is bound to repay the amount to B. (b) A railway company refuses to deliver certain goods to the consignee, except upon the payment of illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charges as was illegally excessive. Payment by mistake under this section must refer to a payment which was not legally due. The mistake is thinking that the money paid was due when in fact it was not due. Thus, if money is sent to a wrong person by money order due to bonafide mistake of fact, the sender can recover it. Similarly a debtor can recover the amount of over payment to a creditor paid under a mistake.

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Examples : (a) A lessee in a mining lease paid higher rates though he was bound to pay royalties at a lower rate. The money was paid under the belief that it was legally due. The Privy Council held that money paid under mistake of law can be recovered under Section 72. (Sir Shiba Prasad v. Maharajah Srish Chandra. AIR 1949 PC. 297).

(b) A person purchased a car at a price which it was represented by the seller to be controlled price, but afterwards the vendee came to know that he paid more than the controlled price, upon the false representation of the seller. It was held that the excess payment was a payment made by mistake and the vendee could recover it.

Mistake must as to the existence of the obligation and not merely as to some collateral matter which may form a motive for the payment. Mistake may be either of a fact or law. But it must be of fundamental importance.

In the case of Sales Tax Officer, Banares v. Kanhaiya Lal Mukand Lal Saraf, the point decided is : If a person pays money to another by mistake, then money must be repaid to him.

Facts of the case are : A certain amount of sales tax was paid by a firm under the U.P. Sales Tax Law on its forward transactions. Subsequently the court ruled the levy of sales tax on such transactions to be ultra vires. The firm was allowed to recover back the tax.

Payment made under coercion can be recovered like payment made under a mistake. Thus, money paid as income tax under threat of attachment can be recovered. Similarly where a consumer of electricity pays money to the electric company under protest on being threatened with disconnection in case of default, the case is one of coercion under Section 72.

Example : A had obtained a decree against B but obtained an attachment against C's property and took possession of it to obtain satisfaction for the amount of the decree. C on being ousted from the property paid the sum under protest – C then sued for refund of the money. It was held that C having paid the money under coercion within the meaning of Section 72.

Compensation for failure to discharge obligation created by quasi-contracts (Sec. 73)

When an obligation created by a quasi-contract is not discharged the injured party is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Quantum Meruit : In addition to the above types of quasi-contracts a claim can also be made on the basis of Quantum Meruit. Where one person has rendered service to another in circumstances which indicate an understanding between them that it is to be paid for although no particular remuneration has been fixed the law will infer a promise to pay Quantum Meruit i.e., as much as the party doing the service has deserved. It covers a case where the party injured by the breach had at time of breach done part but not all of the work which he is

bound to do under the contract and seeks to be compensated for the value of the work done. For the application of this doctrine two conditions must be fulfilled :

1. It is only available if the original contract has been discharged.
2. The claim must be brought by a party not in default.

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The object of allowing a claim on quantum meruit is to recompensate the party or person for value of work which he has done. Damages are compensatory in nature while quantum meruit is restitutory. It is but reasonable compensation awarded on implication of a contract to remunerate. Where a person orders from a wine merchant 12 bottles of whisky and he sends 10 bottles of whiskey and 2 of brandy, and the purchaser accepts them, the purchaser must pay a reasonable price for the brandy.

The claim for quantum meruit arises in the following cases :

1. Where work has been done in pursuance of a contract, which has been discharged by the default of the defendant.

Examples : (a) P agreed to write a volume on ancient armour to be published in a magazine owned by C. For this he was to receive $ 100 on completion. When he had completed part, but not the whole, of his volume, C abandoned the magazine. P was held entitled to get damages for breach of contract and payment quantum meruit for the part already completed.

(b) A, engages B, a contractor, to build a three storied house. After a part is constructed A prevents B from working any more. B, the contractor, is entitled to get reasonable compensation for work done under the doctrine of quantum meruit in addition to the damages for breach of contract. Notice that in both the above cases the contract was wrongfully terminated by the defendant, and both damages as well as payment quantum meruit have been allowed. It is important that in the case of a wrongful breach of contract the injured party can always claim payment quantum meruit, whether the contract is divisible or indivisible.

2. Where work has been done in pursuance of a contract which is 'discovered void' or 'becomes void', provided the contract is divisible.

Examples : (a) C was appointed as managing director of a company by the board of directors under a written contract which provided for his remuneration. The contract was found void because the directors who constituted the Board were not qualified to make the appointment. C nevertheless, purporting to act under the agreement, rendered services to the company and sued for the sums specified in the agreement, or, alternatively, for a reasonable remuneration on a quantum meruit. Held, C could recover on a quantum meruit. (Craven-Ellis vs. Canons Ltd.)

(b) A contracts with B to repair his house at a piece rate. After a part of the repairs were carried out, the house is destroyed by lightning. Although the contract becomes void and stands discharged because of destruction of the house, A can claim payment for the work done on quantum meruit. Note that if under the contract a lump sum is to be paid for the repair job as a whole, them A

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cannot claim quantum meruit because no money due till the whole job is done.

3. When a person enjoys benefit of non gratuitous act although there exists no express agreement between the parties. One of such cases is provided in Section 70.

Section 70 lays down that when service are rendered or goods are supplied by a person,

(i) without any intention of doing so gratuitously, and

(ii) the benefit of the same is enjoyed by the other party, the latter must compensate the former or restore the thing so delivered.

Examples : (a) A, a trader, leaves certain goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them. (illustration (a) to Section 70)

(b) Where A ploughed the field of B with a tractor to the satisfaction of B in B's presence, it was held that A was entitled to payment as the work was not intended to be gratuitous and the other party has enjoyed the benefit of the same. (Ram Krishna vs Rangoobet).

4. A party who is guilty of breach of contract may also sue on a quantum meruit provided both the following conditions are fulfilled :

(a) the contract must be divisible, and

(b) the other party must have enjoyed the benefit of the part which has been performed, although he had an option of declining it.

Examples : (a) Where a common carrier fails to take a complete consignment to the agreed destination, he may recover pro-rata freight. (He will, of course, be liable for breach of the contract).

(b) S had agreed to erect upon H's land two houses and stables for $ 565. S did part of the work and then abandoned the contract. H himself completed the buildings using some materials left on his land by S. In an action by S for the value of work done and of the materials used by H, it was held that S could recover the value of the materials (for H had the option to accept or to reject these) but he could not recover the value of the work done (for H had no option with regard to the partly erected building, but to accept that).

The court observed, " The mere fact that a defendant is in possession of what he cannot held keeping or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land.

5. When an indivisible contract for a lump sum is completely performed but badly, the person who has performed the contract can claim the lump sum; but the other party can make a deduction for bad work.

Difference Between Quantum Meruit and Damages

The points of distinction between quantum meruit and damages are as under :

1. Original Contract : The claim for quantum meruit is not a claim upon the original contract, while the claim for damages rests on the original contract.

The claim for quantum meruit is based upon a new implied contract created by the offer of what the plaintiff has done and its acceptance by the defendant, while the remedy for claiming damages is to sue on the original contract.

2. Purpose : The purpose of damages is to place the injured party in a position where he would have been, if the other party had not broken the original contract, whereas the purpose of quantum meruit is to restore him to the position he would have been, if this new implied contract had not been made.

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3. Principle of Assessment : The law in quantum meruit is proceeding on a principle of assessment which differs from that which is applied in assessing damages for breach of contract.

Specific Performance

When damage is not an adequate remedy, the court may at its discretion grant the specific performance of the contract i.e. compel a party to do what he promised to do. In other words, it is an order by the court upon the party guilty of breach of contract directing him to perform what he promised to do. But unlike damages, specific performance cannot be claimed as a matter of right. It is a discretionary remedy which is allowed in a limited number of cases. Generally speaking, specific performance is directed only in those cases where there exists no standard for ascertaining the actual damage caused by the non – performance of the act agreed to have been done. In other words, specific performance is granted in cases where monetary compensation is found to be an inadequate remedy.

For example A agrees to sell two rare China vases to B. B may compel A to perform the contract specifically, because there is no standard for ascertaining the actual damage which would be caused by the non –performance of the promise. But the following contracts cannot be specifically enforced :

(a) A contract for the non –performance of which money is an adequate relief. The courts refuse specific performance of a contract to lend or to borrow money or where the contract is for the sale of goods easily procurable elsewhere.

(b) Where the execution of the contract requires supervision, e.g. a building construction contract, order for specific performance is not issued.

(c) Where the contract is for personal services, e.g., a contract to sing or to paint a picture. In such contracts injunction (i.e. an order which forbids the defendant to perform a like personal service for other persons) is granted in place of specific performance.

1.5 CONTRACT OF INDEMNITY AND GUARANTEE

Contract of Indemnity "Contract of Indemnity" defined (Section 124) : A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity." There are two parties in this form of

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contract. The party who promises to indemnify/ save the other party from loss is known as 'indemnifier', where as the party who is promised to be saved against the loss is known as 'indemnified' or indemnity holder.

Example 1 : A may contract to indemnify B against the consequences of any proceedings which C may take against B in respect of a sum of ₹ 5000/- advanced by C to B. In consequence, when B who is called upon to pay the sum of money to C fails to do so, C would be able to recover the amount from A as provided in Section 124.

Example 2 : X, a shareholder of a company lost his share certificate. He applied for the duplicate. The company agreed to issue the same on the term that X will compensate the company against the loss where any holder produces the original certificate. Here, there is contract of indemnity between X and the company.

Explanation : To indemnify means to compensate or make good the loss. Thus, under a contract of indemnity the "existence of loss" is essential. Unless the promisee has suffered a loss, he cannot hold the promisor liable on the contract of indemnity. However, the above definition of indemnity restricts the scope of contracts of indemnity in as much as it covers only the loss caused :

(i) By the conduct of the promisor himself, or

(ii) By the conduct of any other person.

Thus, loss occasioned by the conduct of the promise, or accident, or an act of God is not covered. A contract of indemnity like any other contract may be express or implied. A contract of indemnity is like any other contract and must fulfill all the essentials of a valid contract like consideration, free consent, competency of contract, lawful object etc.

Example : A asks B to beat C promising to indemnify him against the consequences. The promise of A cannot be enforced. Suppose, B beats C and is fined Rs. 1000, B cannot claim this amount from A because the object of the agreement is unlawful. A contract of Fire Insurance or Marine Insurance is always a contract of indemnity. But there is no contract of indemnity in case of contract of Life Insurance.

Rights of Indemnity : holder when sued (Section 125) : The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor/indemnifier :

1. All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
2. All costs which he may be compelled to pay in any such suit if, in bringing or defending it.
3. All sums which he may have paid under the terms of any compromise of any such suit.

Contract of Guarantee : "Contract of guarantee", "surety", "principal debtor" and "creditor" [Section 126] Contract of guarantee : A contract of

guarantee is a contract to perform the promise made or discharge the liability, of a third person in case of his default. Three parties are involved in a contract of guarantee Surety - Person who gives the guarantee, Principal debtor - Person in respect of whose default the guarantee is given, Creditor- Person to whom the guarantee is given.

Notes

Example 1 : When A requests B to lend ₹10,000 to C and guarantees that C will repay the amount within the agreed time and that on C falling to do so, he will himself pay to B, there is a contract of guarantee. Here, B is the creditor, C the principal debtor and A the surety.

Example 2 : Where 'A' obtains housing loan from LIC Housing and if 'B' promises to pay LIC Housing in the event of 'A' failing to repay, it is a contract of guarantee.

Example 3 : X and Y go into a car showroom where X says to the dealer to supply latest model of Wagon R to Y. In case of Y's failure to pay, X will be paying for it. This is a contract of guarantee because X promises to discharge the liability of Y in case of his defaults.

Explanation : Guarantee is a promise to pay a debt owed by a third person in case the latter does not pay. Any guarantee given may be oral or written. From the above definition, it is clear that in a contract of guarantee there are, in effect three contracts

(i) A principal contract between the principal debtor and the creditor.

(ii) A secondary contract between the creditor ad the surety.

(iii) A implied contract between the surety and the principal debtor whereby principal debtor is under an obligation to indemnify the surety; if the surety is made to pay or perform. The right of surety is not affected by the fact that the creditor has refused to sue the principal debtor or that he has not demanded the sum due from him.

Consideration for guarantee [Section 127] : What constitutes consideration in a case of guarantee is an important issue and is laid down in Section 127 of the Act. As per Section 127 of the Act, "anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

Example 1 : B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

Example 2 : A sell and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

Example 3 : A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void. Essentials of a valid Guarantee

Notes

1. Existence of a principal debt.
2. Benefit to principal debtor is sufficient consideration, but past consideration is no consideration for a contract of guarantee.
3. Consent of surety should not be obtained by misrepresentation or concealment of a material fact.
4. Can be oral or written.
5. Surety can proceeded against without proceeding against the principal debtor first.
6. If the co-surety does not join, the contract of guarantee is not valid.

Distinction between a Contract a Indemnity and a Contract of Guarantee

Point of distinction	Contract of Indemnity	Contract of Guarantee
Number of parties/ Parties to the contract	There are only two parties namely the indemnifier [promisor] and the indemnified [promisee]	There are three parties creditor, principal debtor and surety.
Nature of liability	The liability of the indemnifier is primary and independent	The liability of the surety is secondary as the primary liability is that of the principal debtor.
Time of liability	The liability of the indemnifier arises only on the happening of a contingency.	Liability is already in existence but specifically crystallizes when principal debtor fails.
Time to Act	The indemnifier need not necessarily act at the request of indemnified.	Surety must act by extending gurantee at the request of debtor.
Right to sue third party	Indemnifier cannot sue a third party for loss in his own name as there is no privity of contract. Such a right would arise only if there is an assignment in his favour.	Surety can proceed against principal debtor in his own right because he gets all the right of a creditor after discharging the debts.
Purpose	Reimbursement of loss	For the security of the creditor.
Competency to contract	All parties must be competent to contract.	In the case of a contract of guarantee, where a minor is a principal debtor, the contract is still valid.
Number of Contracts	Only one original and independent contract between indemnifier and indemnified.	There are 3 contracts made between: • Creditor and principal debtor • Creditor and Surety • Surety and Principal debtor

Nature of surety's liability [Section 128]

The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

Explanation :

(i) The term "co-extensive with that of principal debtor" means that the surety is liable for what the principal debtor is liable.

(ii) The liability of a surety arises only on default by the principal debtor. But as soon as the principal debtor defaults, the liability of the surety begins and runs co-extensive with the liability of the principal debtor, in the sense that the surety will be liable for all those sums for which the principal debtor is liable.

(iii) Where a debtor cannot be held liable on account of any defect in the document, the liability of the surety also ceases.

(iv) Surety's liability continues even if the principal debtor has not been sued or is omitted from being sued. In other words, a creditor may choose to proceed against a surety first, unless there is an agreement to the contrary.

Notes

Example : A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Nature of Surety's liability can be summed up as

(a) Liability of surety is of secondary nature as he is liable only on default of principal debtor.

(b) his liability arises immediately on the default by the principal debtor

(c) The Creditor has a right to sue the surety directly without first proceeding against principal debtor.

Continuing Guarantee Continuing guarantee (Section 129) : A guarantee which extends to a series of transactions is called a "continuing guarantee". The essence of continuing guarantee is that it applies not to a specific number of transactions but to any number of transactions and makes the surety liable for the unpaid balance at the end of the guarantee.

Example 1 : A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B to be responsible, to the amount of `5,000 rupees, for due collection and payment by C of those rents. This is a continuing guarantee.

Example 2 : A guarantees payment to B, a tea-dealer, to the amount of $ 100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of $ 100, and C pays B for it. Afterwards B supplies C with tea to the value of $ 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of $100.

Example 3 : A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to

Notes

C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks. In the continuing guarantee, the liability of surety continues till the performance or the discharge of all the transactions entered into or the guarantee is withdrawn.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.

Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence. (Section 132)

Example : A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

Discharge of a surety

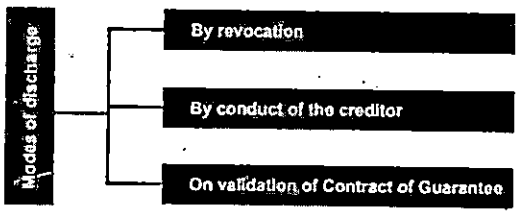
A surety is discharged from liability on a guarantee under the following circumstances :

(i) By revocation of the contract of guarantee

(ii) By the conduct of the creditor, or

(iii) By the invalidation of the contract of guarantee.

Modes of discharge



By revocation of the Contract of Guarantee

(a) Revocation of continuing guarantee (Section 130) : The continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditors.

Example 1 : A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 50,000 rupees. B discounts bills for C to the extent of 20,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 20,000 rupees, on default of C.

Example 2 : A guarantees to B, to the extent of 100,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the

bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

(b) Revocation of continuing guarantee by surety's death (Section 131) : The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions. The estate of deceased surety is, however, liable for those transactions which had already taken place during the lifetime of the deceased. Surety's estate will not be liable for the transactions taking place after the death of surety even if the creditor had no knowledge of surety's death. By conduct of the creditor.

Notes

(c) By variance in terms of contract (Section 133) : Where there is any variance in the terms of contract between the principal debtor and creditor without surety's consent, it would discharge the surety in respect of all transactions taking place subsequent to such variance.

Example 1 : A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

Example 2 : A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

Example 3 : C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

Example 4 : A gives to C a continuing guarantee to the extent of 3,00,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

Example 5 : C contracts to lend B 5,00,000 rupees on the 1st March. A guarantees repayment. C pays the 5,00,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied, in as much as C might sue B for the money before the 1st March.

(d) By release or discharge of principal debtor (Section 134) : The surety is discharged by any contract between the creditor and the principal debtor; by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Notes

Example : A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

(e) Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor [Sector 135] : A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

(f) Surety not discharged when agreement made with third person to give time to principal debtor [Section 136] : Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged. Example : C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

(g) Creditor's forbearance to sue does not discharge surety [Section 137] : Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not in the absence of any provision in the guarantee to the contrary, discharge the surety. Example : B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

(h) Discharge of surety by creditor's act or omission impairing surety's eventual remedy [Section 139] : If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Example 1 : B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.

Example 2 : A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see that M make up the cash. B omits to see this done as promised, and M embezzles.

A is not liable to B on his guarantee. By the invalidation of the contract of guarantee :

(a) Guarantee obtained by misrepresentation invalid [Section 142] : Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

(b) Guarantee obtained by concealment invalid [Section 143] : Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Example 1 : A engages B as a clerk to collect money for him, B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

Example 2 : A guarantees to C payment for iron to be supplied by him to B for the amount of ₹ 2,00,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Notes

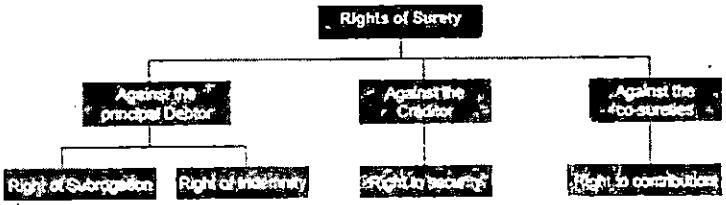
(c) Guarantee on contract that creditor shall not act on it until co-surety joins (Section 144) : Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Rights of a Surety Rights of a surety may be classified as under :

(a) Rights against the creditor,

(b) Rights against the principal debtor,

(c) Rights against co-sureties.



Right against the principal debtor :

(a) Rights of subrogation [Section 140] : Where, a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. This right is known as right of subrogation. It means that on payment of the guaranteed debt, or performance of the guaranteed duty, the surety steps into the shoes of the creditor.

(b) Implied promise to indemnify surety [Section 145] : In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. The surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Example 1 : B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

Notes

Example 2 : C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

Example 3 : A guarantees to C, to the extent of 2,00,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,00,000 rupees, but obtains from A payment of the sum of 2,00,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Right against the Creditor Surety's right to benefit of creditor's securities [Section 141] : A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Example 1 : C advances to B, his tenant, 2,00,000 rupees on the guarantee of A. C has also a further security for the 2,00,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

Example 2 : C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

Example 3 : A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives the up the further security, A is not discharged.

Rights against co-sureties :

(a) Co-sureties liable to contribute equally (Section 146) : Equality of burden is the basis of Co-suretyship. This is contained in section 146 which states that "when two or more persons are co-sureties for the same debt, or duty, either jointly, or severally and whether under the same or different contracts and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor".

Example 1 : A, B and C are sureties to D for the sum of 3,00,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,00,000 rupees each.

Example 2 : A, B and C are sureties to D for the sum of 1,00,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one- half. E makes default in payment. As between the sureties, A is liable to pay 25,000 rupees, B 25,000 rupees, and C 50,000 rupees.

Notes

(b) Liability of co-sureties bound in different sums (Section 147) : The principal of equal contribution is, however, subject to the maximum limit fixed by a surety to his liability. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Example 1 : A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 3,00,000 rupees. A, B and C are each liable to pay 1,00,000 rupees.

Example 2 : A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 4,00,000 rupees; A is liable to pay 1,00,000 rupees, and B and C 1,50,000 rupees each.

Example 3 : A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 7,00,000 rupees. A, B and C have to pay each the full penalty of his bond.

1.6 BAILMENT AND PLEDGE

Meaning of bailment : Section 148 of the Indian Contract Act reads: A bailment is the delivery of goods through one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned, or otherwise disposed of just as to the directions of the person delivering them. The person delivering the goods is described the "bailor". The person to whom they are delivered is described the "bailee".

For instance, you deliver some gold to a jeweler B to create bangles for your sister. In this case you are bailor and B is bailee and through delivering gold to B, a connection of bailment is created flanked by you and the jeweler.

1.6.1 Types of Bailment

Bailment may be classified on two bases, i.e., reward and benefit.

On the Foundation of Reward

Bailment can be classified as gratuitous and non-gratuitous .When there is no consideration involved in the contract of bailment it is described a gratuitous bailment. A contract of bailment which involves consideration passing by bailor and bailee is described a nongratuitous bailment.

Notes

On the Foundation of Benefit

On the foundation of the benefits accruing to the parties, the contract of bailment may be divided into the following kinds :

- Bailment for the exclusive benefit of the bailor
- Bailment for the exclusive benefit of the bailee
- Bailment for the mutual benefit of bailor and bailee

1.6.2 Duties of Bailor

A bailor has the following duties

Duty to disclose defects : The law of bailment imposes a duty on bailor to disclose the defects in the goods balled. Bailment of goods may he either gratuitous or nongratuitous or non-gratuitous. In case of gratuitous bailment, the law imposes a duty on the bailor to reveal all the defects recognized to him, which would interfere with the use of goods bailed. For instance, A the owner of a scooter allows B, his friend, to take his scooter for a joy ride. A knows that the brakes of the scooter were not working well. A does not discloses this information to B. Consequently, B meets with an accident. A is liable to compensatc B for damages. In case of Non-gratuitous bailment the bailor is responsible for all defects in the goods whether he knows the defects or not is immaterial.

- **Duty to bear expenses :** The bailor should bear the usual expenses in keeping the goods. The bailor should repay to the bailee all the necessary expenses which the bailee has already incurred for the purpose of bailment.
- **Duty to indemnify the bailee :** It is the duty of the bailor to indemnify the bailee, for any loss which the bailee may suffer because of the bailor's title being defective.
- **Duty to bear risks :** It is the duty of bailor to bear the risk of loss of the things bailed, provided the bailee has taken reasonable care to protect the goods from loss.
- **Duty to receive back the goods :** It is the duty that when the bailee returns the goods, the bailor should receive them.

1.6.3 Duties of Bailee

- **Duty to take Reasonable Care of the Goods Bailed :** The bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence.
- **Not to Create Any Unauthorized Use of Goods :** The bailee is under a duty to use the bailed goods in accordance with the conditions of bailment. If bailee does any act with regard to the goods bailed, which is not in accordance with the conditions of bailment, the contract is voidable at the option of the bailor.
- **Duty not to Mix Bailor's Goods with his Own Goods :** If the bailee, with the consent of the bailor, mixes the goods of the bailor with his

own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture therefore produced (Section 155.).

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his goods, and the goods can be a separated or divided, but the bailee is bound to bear the expense of separation or division, and any damages arising from the mixture (Section 156).

Notes

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated through the bailee for the loss of the goods (Section 157).

- **Duty not to Set up Adverse Title :** The bailee is duty bound not to do any act which is inconsistent which the title of the bailor. He should not set up his own title or the title of a third party on the goods bailed to him.
- **Duty to Return the Goods :** It is the duty of the bailee to return or to deliver the goods just as to the directions of bailor, without demand, on the expiry of the time fixed or when the purpose is accomplished.
- **Duty to Return Accretions to the Goods :** In the absence of any contract to the contrary, the bailee need to deliver the bailor, any profit which have accrued from the goods bailed. For instance, A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Rights of Bailor

A bailor has the following rights :

- **Enforcement of bailee's duties :** The bailor can enforce by suit all the duties of the bailee as his rights.
- **Right to avoid the contract :** If the bailee does any act, which is inconsistent with the conditions of bailment, the bailor has a right to avoid the contract.
- **Right to claim compensation :** If any damage is 'caused to the goods bailed because of the unauthorized use of the goods, the bailor has a right to claim compensation from the bailee.
- **Right to demand return of goods :** It is a right of the bailor to compel the bailee, to return the goods bailed, when the time of bailment has expired or when that purpose for which the goods were bailed has been accomplished.

1.6.4 Termination of Bailment

A contract of bailment comes to an end under the following cases :

- **On the expiry of fixed era :** If the goods are bailed for a fixed time, the bailment is terminated at the end of that era.

Notes

- **On the fulfillment of the substance :** If the goods are bailed for some specific purpose or purposes, the bailment is terminated on fulfilling the substance.
- **Inconsistent use of goods bailed :** If the bailee uses the goods in contravention of the conditions of bailment, the bailor may terminate the bailment even before the term of bailment.
- **Destruction of the subject matter :** A bailment is terminated if the subject matter of the bailment is destroyed or because of some change in the nature of goods bailed if the goods become incapable of being used for bailment.
- **Termination of gratuitous bailment :** A gratuitous bailment can be terminated through the bailor at any time even though the bailment was for a fixed era or purpose.
- **Death :** A gratuitous bailment is terminated through the death of either the bailor or the baile.

1.6.5 Pawn or Pledge

Meaning of pawn or pledge : Pawn or Pledge is a special type of bailment where a movable thing is bailed as security for the repayment of a debt or for the performance of a promise. The person taking the loan is described the pledger or pawnor and the person with whom goods are pledged is described the pawnee.

Difference between pawn and bailment :

- Pawn differs from bailment in the sense that pawn is bailment of goods for a specific purpose i.e., repayment of a debt or performance of a duty. Whereas, the bailment is for a purpose of any type.
- The pawnee cannot use the goods pawned, but in bailment the bailee use the goads bailed if the conditions of bailment so give. Pawnee has a right to sell the goods, pledged with him after giving notice to pawnor, in case of default through the pawnor to repay the debt, whereas bailee may either retain the goods or sue bailor for his dues.

1.6.6 Rights of Pawnee

Right of Retainer : The pawnee has right to retain the pledged goods till his payments are made (Sections 173 and 174). He can retain the goods for the following payments :

- For the payment of the debt or performance of the promise, Interest on the debt, and
- For all necessary expenses incurred through him in respect of the possession or for the preservation of the pledged goods.

Right to Extraordinary Expenses (Sec. 175) : The pawnee is entitled to receive from the pawnor extraordinary expenses incurred through him for the preservation of the goods pledged. Right to against the True Owner of Goods (Sec. 178 A) When the pawnor has acquired, possession of pledged goods, under avoidable contract, but the contract has not been rescinded, at the time of pledge, the pawnee acquires a good title to the goods, even against the true.

Right to Sale (Sec. 176) : The pawnee may bring a suit against the pawnor for the recovery of the due amount and in addition to it he may retain the goods as a collateral security. He may sell the goods pledged but only after giving reasonable notice of the sale, to the pawnor. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance, If the proceeds of the sale are greater than the amount so due, the pawnee shall pay in excess of the surplus, to the pawnor.

Notes

Rights of Pawnor :

- Right to get back goods
- Right to redeem debt
- Preservation and maintenance of the goods.

Duties of Pawnee :

A pawnee has the following duties :

- Duty to take reasonable care of the pledged goods.
- Duty not to create unauthorized use of goods pledged.
- Duty to return the goods when the debt has been repaid or the promise has been performed.
- Duty not to mix his own goods with the goods pledged.
- Duty not to do any act which is inconsistent with the conditions of pledge.
- Duty to deliver augment (if any); to the goods pledged Duties of Pawnor.
- It is the duty of pawnor to comply with the conditions of pledge and repay the debt on the stipulated date or to perform the promise at the stipulated time.
- It is the duty of pawnor to compensate the pawnee for any extraordinary expenses incurred through him for preserving the goods pawned.

Pledge Through Non-Owners

As you know that normally only the owner of goods can pledge them and that no one can pass a better title to the goods than what he himself has. But in order. to facilitate mercantile transactions, the law has recognized sure exceptions. These exceptions are for. bonafide pledges made through those persons who are not the actual owners of the goods, but in whose possession the goods have been left.

Pledge through a Mercantile Agent : Where a mercantile agent is, with the consent of the owner, in possession of goods or, the documents of title to goods, any pledge made through him, when acting in the ordinary course of business of a mercantile agent, shall be valid, provided that the pawnee acts in good faith and has, at the time of pledge, no notice of the information that the agent has no power to pledge.

Notes

Pledge through Person in Possession under Voidable Contract : Section 178 A of the Contract Act gives that where goods are pledged through a person who has obtained their possession under a voidable contract, the pledge is valid, provided that the contract has not been rescinded at the time of the pledge and the pledgee has acted in good faith and without notice of the pledger's defect of title.

Pledge where Pledger has only a Limited Interest : Where the pawnor is not the absolute owner of the goods, but has only a limited interest and he pawns it, the pledge is valid to the extent of that interest.

Pledge through a Co-owner in Possession : Where the goods are owned through several persons and with the consent of other owners, the goods are left in the possession of one of the co owners. Such a co-owner may create a valid pledge of the goods in his possession.

Pledge through Seller or Buyer in Possession : A seller, in whose possession, the goods have been left after sale or a buyer who with the consent of the seller, obtains possession of the goods, before sale, can create a valid pledge, provided the pawnee acts in good faith and he has no knowledge of the defect in title of the pawnor.

For instance, A buys a cycle from B. But leaves the cycle with the seller. B then pledges the cycle with C, who does not know of sale to B, and acted in good faith. This is valid pledge.

1.7 AGENCY

What is contract of agency ?

Just as to Section 182 of the Contract Act An 'agent' is a person employed to do any act for another or to symbolize another in dealings with third persons. The person for whom such act is done, or who is so represented, is described the 'principal'. Therefore, it is clear from the definition, that an agent is a connecting link flanked by his principal and third parties. A person employed through another to invest money on his behalf and to symbolize him with debtors is an agent within the meaning of Section 182.

Who can appoint an Agent ?

Section 183 gives as follows : Any person who is of the age of majority and who is of sound mind, may employ an agent. Therefore a minor, or a person of unsound mind cannot act as a principal.

Who may be an Agent ?

According to Section 184 of the Act any person may become an agent. Therefore even a minor or a person of unsound mind can act as an agent.

Consideration for Agency : According to Section 185, no consideration is necessary to make an agency.

Classification of agents : Agents may be classified into many as follows :

- **Broker :** Broker is an agent who is employed to buy or sell goods on behalf of another. He is employed primarily to bring about a contractual relations between the principal and the third parties. He is not entrusted with the possession of the goods in which he deals. He cannot act or sue in his own name. And as he has no possession, he has no right of lien.
- **Factor :** A factor, usually, sells goods in his own name, he has a common lien on the goods as he has entrusted with the possession of goods.
- **Auctioneer :** An auctioneer is an agent who is entrusted with the possession of goods for sale to the highest bidder at a public auction. He has the power to deliver the goods on receipt of the price. He can sue for the price in his own name, Though, unlike a factor, he has only a scrupulous on the goods for his charges.
- **Del Credere Agent :** A del credere agent is one, who in consideration of an extra remuneration described the Del Credere Commission, guarantees to his principal that the third person with whom he enters into contracts shall perform their obligations. Therefore such an agent guarantees to his principal the payment of the price.
- **Commission Agent :** A mercantile agent who buys and sells goods on behalf of his principal and receives commission for his services. Actually, it is not a dissimilar category agent because brokers, factors may also act as commission, agent.
- **Banker :** Usually, the connection flanked by a banker and customer is that of a creditor anti debtor, Though, when he collects cheques or buys or sells securities on behalf of his client, he acts as an agent of the customer. A banker has the right of common lien in respect of the common balance of explanation.

Notes

Sub-agency : Where an agent having power expressly or impliedly to delegate his power appoints another person to act in the matter of the agency, such other person is described a 'sub-agent', provided he acts under the control of the original agent; and a 'substituted agent, if the original agent drops out of the transaction and the newly appointed person carries on the business of the agency.

Sub agent and substituted agent : A sub-agent has been defined through Section 191 of the Indian Contract Act :

"A sub-agent is a person employed through and acting under the control of the original agent in the business of the agency".

A substituted agent is defined through Section 194 therefore "Where an agent, holding an express or implied power to name another person to act for the principal in the business of agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him".

Notes

Rights of an agent :

- **Right to Receive Remuneration :** An agent is a person employed to do any act for another, and for his services, he is entitled to receive remuneration. The amount of remuneration shall be such as may be fixed through the conditions of agency. In case the remuneration has not been fixed, the agent is entitled to receive a reasonable remuneration. In the absence of a contract to the contrary, agent's tight to receive remuneration would accrue only on the completion of the work. An agent is entitled for his remuneration when he has done what he had undertaken to do, even though the contract is not completed.
- **Right of Retainer :** Section 217 of the Contract Act empowers the agent to retain, out of any sums received on explanation of the principal in the business of the agency for the following payments: o all moneys due to himself in respect of advance made, o in respect of expenses properly incurred through him conducting such business, and o such remuneration as may be payable to him For acting as agent.
- **Right of Lien :** Agent may retain principal's money until his proper payments have been made. Agent has another right i.e., right to retain his principal's goods, papers and other movable or immovable properties received through him until he is paid or accounted for his commission, disbursements and service charges.
- **Right to be Indemnified :** Sections 222 and 223 grant right to indemnify to an agent against his principal for the consequences of all lawful acts done through the agent in performing his obligations. Section 222 gives, the employer of an agent is bound, to indemnify him against the consequences of all lawful acts done through such agent in exercise of the power conferred upon him.
- **Right to Compensation :** The agent has the right to receive compensation for the injuries or losses suffered due to the principal's neglect or want of ability (Section 225). Duties of an agent Following are the statutory duties of the agent.
- **Duty to Act Just as to the Instructions or Custom of Deal :** Section 211 lays down that it is the duty of an agent to conduct the business of the agency strictly just as to the directions given through the principal
- **Duty to Act with Reasonable Care and Ability :** It is the duty of an agent to conduct the business of the agency with reasonable care and ability. The degree of care and ability required from the agent depends upon the nature of business and circumstances of each case.
- **Duty to Render Accounts :** An agent is bound to render proper accounts to his principal on demand and to pay overall sums received on principal's behalf subject to any lawful deduction for remuneration or expenses properly incurred through him.

- **Duty to Communicate with the Principal :** Section 214 enjoins an agent, in case of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.
- **Not to Deal on His Own Account :** An agent is not to deal on his own account in the business of agency, as no agent is permitted to put himself in the location where his interest conflicts with his duty.
- **Not to Use Information Obtained in the Course of the Agency against the Principal :** Where an agent has obtained information throughout the course of the agency, it is the duty of the agent not to use the similar prejudicially to the interests of the principal.
- **Not to Set Up Adverse Title :** Where an agent has obtained goods or property from the principal as an agent, it is his duty not to set up his own title or the title of a third person. In other words, the agent should not dispute the ownership of the principal.
- **Not to Create Secret Profits :** It is the agent's duty not to create any secret profits in the business of agency.
- **Duty on the Death or Insanity of the Principal :** Section 209 requires that when an agency is terminated through the principal dying or becoming of unsound mind. An agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him. Personal liability of an agent: The following are circumstances when the agent becomes personally liable :
- **When the Agent Expressly Agrees :** Sometimes the third party when contracting with an agent may specifically stipulate that the agent will be personally liable if the contract is not performed, in such a situation the agent will be personally liable.
- **When Acting for a Foreign Principal :** Where an agent enters into a contract for a foreign principal, the presumption is that the agent is personally liable for such contracts.
- **When Acting for an Undisclosed Principal :** When a contract is made through an agent for an undisclosed principal, the agent is personally liable.
- When the promoters of a company enter into any contract on behalf of a company not yet incorporated, the promoters are personally liable for the obligation they make through any contract with anyone.
- Where an agent has a special interest in the subject-matter of the contract, his power is said to be coupled with interest, he is personally liable.
- An agent may be held personally liable on contract entered through him, if there is some deal usage or custom, provided there is no contract to the contrary.

Notes

Notes

- If an agent enters into contract with the third party in his own name i.e., without disclosing that he is contracting as an agent, , he is personally liable.

Case laws :

- **Chikkam Ammiraju v. Chikkam Seshama (1917) 32 MLJ 494 :** This is a case involving coercion wherein the question before the Court was whether coercion could be caused by a threat to commit suicide. In this case, a husband threatened to commit suicide and thus induced his wife and son to execute a release deed in favor of his brother in respect if certain properties that they claimed to be their own. It was held that a threat to commit suicide amounted to coercion and the deed was voidable.
- **Wajid Khan v. Raja Ewaz Ali Khan, (1891) ILR 18 CAL 545 :** In this case, an old and illiterate woman conferred a high monetary benefit onto her manager without any valuable consideration and it was held that undue influence was applied. The burden of proof was on the manager to show that it was a bonafide transaction and no undue influence was exercised.
- **Shri Krishan v. Kurukshetra University, 1976 AIR 376 :** The plaintiff was a candidate for the LLB exam. The candidate was short of attendance and failed to mention it in the admission form of the exam. Neither the head of the department not University authorities bothered to conduct a check and discover the truth. The Court held that the candidate had not committed any fraud and there was no power in the University to withdraw the candidature of the candidate.
- **Long v. Lloyd, [1958] 1 WLR 753 :** The defendant, in this case, sold his lorry to the plaintiff by making a representation which was false that the lorry was in excellent condition. However, after buying it the plaintiff discovered serious defects in the lorry and instead of rescinding the contract, accepted the defendants offer of half the cost of repairs. Subsequently, the lorry broke completely and the plaintiff wanted to rescind the contract however the court held that this right did not exist any more as the plaintiff had affirmed the contract by accepting to share costs.

Critical analysis : The concept of free consent is a very important one in the law of contracts and provides the basis in making contracts. However, it becomes hard to prove consent in cases and thus proper scrutiny is required. It is essential that there be meeting of minds, i.e., both the parties must agree on the same thing in the same manner. Only then will consent be fulfilled. In order for there to be informed consent, it is essential to embody volition, information and comprehension. In order to be able to exercise ones own free will, there must not be any undue influence or coercion. Coercion occurs when a person threatens to do something to harm the other party or his property if consent is not given.

Undue influence consists of the exercise of power or dominance from a person who is in a fiduciary relationship with the other party or a person with authority. Another aspect of consent is the requirement of information and to achieve this, it is pertinent that there is no fraud or misrepresentation. Comprehension would occur when there is no mistake on the part of either of the parties in understanding the terms of the agreement. Contracts are the most intricate part of any transaction and must be handled delicately so. A contract is voidable when there is absence of free will.

Notes

1.8 SUMMARY

They are various forms of contracts such as contract of indemnity, contract of guarantee, agency etc. The contract act illustrates elements that need to be fulfilled for a valid contract along with exception and after wards it deals with the sections that illustrates the remedies for both parties in case the contract has been breached or has been considered to be void in case of any of the elements not being fulfilled. It is very important for a normal day to day trading and regular dealing to have a valid and effective contract and it need to be made affective under the Contract act.

1.9 EXERCISE

1. What are quasi-contract ? Explain briefly the quasi-contracts provided for by the Indian Contract Act.
2. What is legality of object in a contract ?
3. What is the different contact of indemnity and gurantee ?
4. Define the term 'contract'. What are the essentials of a valid contract.
5. Explain of the free consent.

Notes

UNIT 2: INDIAN PARTNERSHIP ACT 1932

Structure:

2.0 OBJECTIVES

After reading this Unit. you will be able to :

- discuss the definition of partnership and essential elements of partnership;
- minor's as a partner describe;
- understand the doctrine of implied authority;
- analysis the registration of firms;
- explain the sale of good act 1930.

2.1 INTRODUCTION

The Indian Partnership Act was enacted in 1932 and it came into force on 1st day of October, 1932. The present Act superseded the earlier law relating to

Partnership, which was contained in Chapter XI of the Indian Contract Act,1872. The Act is not exhaustive. It purports to define and amend the law relating to Partnership.

A Partnership arises from a contract, and therefore, such a contract is governed not only by the provisions of the Partnership Act in that regard, but also by the general law of contract in such matters, where the Partnership Act does not specifically make any provision. It has been expressly provided in the Partnership Act that un repealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply. Thus, the rules relating to offer and acceptance, consideration, free consent, legality of object, etc., as contained in the Indian Contract Act are applicable to a contract of Partnership also. On the other hand, regarding the position of minor, since there is specific provision contained in Section 30 of the Indian Partnership Act, the minor's position is governed by the provision of the Partnership Act.

Notes

2.2 INDIAN PARTNERSHIP ACT 1932

2.2.1 Definition of Partnership

Partnership Firms in India are governed by the Indian Partnership Act, 1932. As per Section 4 of the Indian Partnership Act :

"Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all"

Thus as per the above definition, there are 5 elements which constitute of a partnership namely: (1) There must be a contract; (2) between two or more persons; (3) who agree to carry on a business; (4) with the object of sharing profits and (5) the business must be carried on by all or any of them acting for all.

Partner& Firm

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the 'firm name".

2.2.2 Essential Elements of Partnership

Therefore, the essential elements of the relationship of partnership may be stated as follows :

1. There must be an association of two or more persons.
2. There must be an agreement.
3. There must be a business.
4. There must be an agreement to share the profits of a business, and
5. There must be an element of 'agency' i.e. the business must be carried on by all or any of them acting for all.

Notes

Thus, essential elements of relationship of partnership are:

1. There must be two or more persons :

- There must be at least two persons to form a partnership. Maximum number of partners, partnership act is silent. But Section 464 0f The Companies Act 2013 specifies it as 50. If number of partners fall below it ceases to be partnership. If it goes beyond 50, it will become an illegal association.
- The persons can be natural or artificial. Hence 2 companies can be partners. But a firm cannot enter into a contract for partnership though their partners can become partners.
- All such persons must be competent to contract. According to Indian Contract Act every person except the following :
  - (i) Minor
  - (ii) Person of unsound mind
  - (iii) Person disqualified by any law to which they are subject (alien, insolvents etc.)

2. There must be an agreement :

- A partnership arises only as a result of an agreement. Such an agreement may be express or implied. Implied in the sense that it may be a voluntary act by the persons. Agreement can be oral or in writing but partnership deed must be in writing
- Partnership is thus created by contract; it does not arise by operation of law or from status
- Agreement must be valid Partnership agreement like any other contract, so it must satisfy all the essentials of a valid contract. In other words, the parties must be 'competent', i.e. capable of entering into an agreement, their consent must be free and there should be a lawful consideration and object.

3. There must be a business :

- The existence of a business is essential in a partnership. "Business" includes every trade, occupation and profession. If two or more persons join together to form a 'dramatic club' it is not a partnership because there is no business in this case. Similarly, if A and Bare coowners of a building and let it to a tenant for rent and divide the net rents between themselves. A and B are not partners because letting a house is not a business. But if A and B agree to convert the building into a hotel and to share the profits equally, there is a "business" here and hence A and B are partners in respect of such business.
- The business must be lawful.
- The business may consist of a single adventure or a single undertaking. Section 8 of the Indian Partnership Act provides : "A person may become a partner with another person in particular adventures or undertakings." e.g. Two solicitors are engaged for a single case and they agree to share the profits. They would be partners.

4. Sharing of profits :

- The element draws out the most essential feature and basis of partnership. The object of partnership undoubtedly is to earn "profit".
- Sharing of losses :

  The agreement to share profit is essential, but it should be noted that an agreement to share the losses is not essential. Where nothing is said as to the sharing of losses, it is implied in a partnership deed.

  It may, however, be agreed that as between the partners anyone or more of them shall not be liable for losses. But the reverse is not just possible. So where persons agree to share the profits of a moneylending business, they become partners, but where one of them, so called partner is not to receive profits, he is not a partner. E.g. A and B agree to work together as carpenters, but that A shall receive all profits and shall pay wages to B, A and B are not partners. When profit is made, it must be distributed (in absence of any agreement) equally, or in the agreed ratio.
- A person, who receives the profits of a business, is not necessarily a partner.

Notes

The persons who receive the profits but are not the partners are referred as under :

1. **Retired partner :** After retirement if the settlement of accounts is not done then the retired partner may get share in profits. But he is not treated as partner.
2. **Money-lenders receiving profits :** A money-lender is a person who lends money on interest. Sometimes, a money-lender receives, in addition to or in place of his interest, a portion of the profits of a business. In such cases, he cannot be said to be a partner only on the ground that he receives the profits of the business.
3. **Employee or agent receiving profits :** Sometimes, an employee or an agent of a business agrees to receive, in addition to or in place of his regular remuneration, a portion of the profits of the business. In such cases, he cannot be said to be a partner only on the ground that he receives the profits of the business.
4. **Widow or child of a deceased partner :** Sometimes, the widow or a child of deceased partner receives a portion of profits as annuity. In such cases, they cannot be said to be the partners of the firm only on the ground that they receive the profits of the business.
5. **Seller of goodwill :** Sometimes, a person who sells his business along with its goodwill, is given a share in the profits of the business he has sold. In such cases, that person does not become a partner in the business only on the ground that he receives the profits of the business.
6. **Minor :** Minor receives share in profits but is not considered as partner.
   - Just because a person is sharing profits, he is not a partner. But if a person is a partner, he will definitely get share in profits.

Notes

5. Agency :

- Again this last element is most crucial of partnership. The business of a firm is 'carried on by all or by anyone of them acting for all'. The underlying and fundamental principle herein which constitutes partnership is the idea of 'agency'. The other partners are bound by the acts of one of them only on the principle of agency. This is the cardinal principle of partnership law.
- It means every partner is a Agent of the firm Principal for other partners acts That is to say, each partner is an agent binding the other partners who are his principals and each partner is again a principal, who in turn, is bound by the acts of the other partners. An act of one partner in the course of business of the firm is in fact an act of all partners.
- **Example :** A, Band C are partners in a business. D an outsider, deals with the firm through A. As between A and D, A is the principal. But as between A, Band C, A is the agent of Band C. As such A, B and C can all sue D. D can also sue A, Band C. Furthermore, A is accountable to Band C because he is, in this transaction, an agent of Band C.

Partnership Distinguished

A. Partnership and Joint Hindu Family Firm (Hindu Undivided Family) :

	Partnership		HUF
1.	It arises from agreement	1	It arises by status.
2.	Governed by Indian Partnership Act, 1932.	2.	It is governed by Hindu Law.
3.	Maximum partners can be 50.	3.	No such limit is applicable here.
4.	A person can be admitted by the consent of the other existing partners.	4.	A male person becomes a member merely by his birth.
5.	A Minor can be admitted only to the benefits of the firm.	5.	A male minor becomes a member merely by his birth.
6.	Each partner is implied authority to bind the firm for the actions done by him in the daily course of business.	6.	Only Karta has such authority.
7.	Unlimited liability.	7.	Karta's liability is unlimited and the coparcencer's liability is limited to their share in the family property.
8.	Each partner has the right to ask for the books of accounts and also for the profits and losses.	8.	The copaprceners have no such right.
9.	In case of death of a partner, partnership is dissolved unless otherwise agreed.	9.	HUF continues to operate even after death of a coparcener.

B. Partnership and Co-ownership : Co-ownership means joint ownership X and Y jointly purchase a plot. They are co-owners but not necessarily partners. The distinction between the two is as under :

	Partnership		Co-ownership
1.	It arises from an agreement.	1.	It may arise from agreement or operation of low.
2.	It is formed to carry on business.	2.	It may or may not involve carrying on a business.
3.	It involves profit or loss.	3.	It may or may not involve profit or loss.
4.	Partners have a mutual agency relationship.	4.	Co-owners do not have a mutual agency agreement.
5.	Maximum partners can be 50.	5.	No such limit is applicable here.
6.	A partner cannot transfer his share to a stranger without the consent of any other business.	6.	A co-owner can transfer his share to a stranger without the consent of other owners.
7.	A partner has no right to claim partition of property.	7.	A co-owner has the right to claim partition of property.

C. Partnership and Joint Stock Company :

	Partnership		Company
1.	A firm does not enjoy separate legal entity i.e., separate legal existence.	1.	It has a separate legal existence.
2.	The liability of the partner is unlimited.	2.	Limited to the value of shares held by the members.
3.	It does not enjoy a long lease of life because of dissolution due to different reasons.	3.	It enjoys a perpetual existence.
4.	Maximum partners can be 50.	4.	In case of private limited company, minimum members-2, maximum members-200 In case of public limited company, Minimum members-7, maximum members - no limit In case of One Person Company (OPC)- only 1.
5.	A partner cannot transfer his share without the consent of other partners.	5.	A member can transfer his share as and when he wishes to.
6.	There is mutual agency amongst the partners.	6.	There is no mutual agency amongst the members.

Notes

Notes

7.	Distribution of profits is compulsory as per the partnership deed.	7.	No such compulsion of distributing the profits.
8.	The ownership & management lies with all the partners.	8.	Ownership is with shareholders and the management is with board of directors.
9.	Property of the firm is the joint property of all the partners.	9.	The property of company is not the joint property of the members.
10.	The creditors of the firm can proceed against the partners jointly and severally.	10.	The creditors of a company can proceed only against the company.
11.	No compulsory Audit	11.	Its compulsory

D. A Partnership and Club : A club is an 'association of persons' formed for social purpose and not for the purpose of any 'gain' or 'profit'. It differs from the partnership in the following respects :

Partnership		Club	
1.	Business oriented objects	1.	Not aimed at making profits entirely.
2.	Maximum partners can be 50.	2.	No such limit is applicable here.
3.	Does not enjoy long lease of life.	3.	Enjoys a long lease of life.
4.	There is mutual agency amongst the partners.	4.	There is no mutual agency amongst the members.

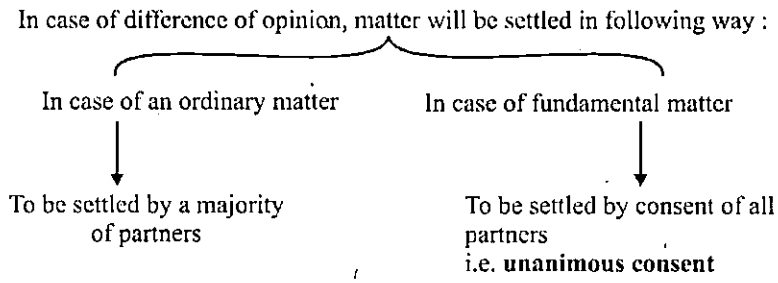
2.3 RIGHTS AND DUTIES OF PARTNERS

2.3.1 Rights of Partners

The mutual rights of partners depend upon the provisions of the partnership agreement. However, subject to an agreement between the partners; the law confers the following rights upon all the partners :

1. Right to take part in business : It is the right of every partner to take part in the management of the business. This right is available to all the partners. This is, however, subject to contract between the partners i.e., the partners may provide, by a contract, that this right shall not be available to some partners.

2. Right to be consulted : It is also the right of every partner to be consulted in all matters affecting the business of the firm. Moreover, every partner also has the right to express his opinion before any decision is taken by the other partners.



Notes

3. Right to have access to books : Every partner has the right to examine all the records, books and accounts of the firm. Moreover, he can also have the copy of such accounts etc. This right is, however, subject to a contract between the partners i.e., the partner may agree, by a contract that this right shall not be available to some of the partners.

4. Right to share profits : Every partner has the right to have equal share in the profits of the firm. However, the partners may also agree to share the profits in different proportions.No agreement between the partners can restrict this right.

5. Right to interest on capital and on advance : Right to interest on capital: Ordinarily, the partners have no right to receive any interest on their contribution towards the capital. However, the partnership agreement may provide that the partners shall be entitled to interest on capital at a certain rate. It may, however, be noted that where such interest is to be paid, it shall be paid only out of profit. Right to interest on advances: Where in addition to the contribution towards the capital, a partner also advances a sum of money for the purpose of the business of the firm; he is entitled to interest on such advance at the rate of 6% per annum. Such interest on advance is payable even if the firm suffers loss.

6. Right to indemnity : The partner of a firm has a right to be indemnified i.e., the right to recover expenses incurred and payments made by him in the following two circumstances.

(a) **Expenses incurred in the ordinary course of business :** A partner has a right to recover from the firm any expenses incurred by him 'in the ordinary course of partnership business'.

(b) **Expenses incurred in an emergency :** A partner has a right to recover from the firm any expenses incurred by him in order to protect the property of the firm from a loss threatened by an emergency. No agreement between the partners can restrict this right.

7. Right to use the partnership property : It is the right of every partner to use the partnership property. It may, however, be noted that the partnership property should be used exclusively for the purpose of the partnership business.

8. Right to be consulted at the time of admission of a new partner : It is the right of every partner to be consulted at the time of admitting a new partner in the firm.

Notes

9. Right to retire from the firm : It is the right of every partner to retire from firm, if he finds it difficult adjust with the other partners.

10. Rights of retiring partner : To be covered later

11. Right not to be expelled : Every partner has the right to continue in the firm and he cannot be expelled from it by the other partners. However, the partners may enter into a contract providing for the expulsion of a partner by majority of the partners. But the power of expulsion must be exercised in good faith.

12. Right to remuneration : Generally, the partners are not entitled to receive any remuneration for taking part in the conduct of the business of the firm. However, the partnership agreement may expressly provide for the payment of remuneration to working partners.

Note : The payment of remuneration to a working partner does not make partner an employee of the firm. The reason being that the firm and its partners are one and the same thing, and the firm is not a separate legal entity.

13. Right to dissolve the firm : A partner has the right to dissolve the partnership with the consent of all partners. But where the partnership is at will the firm may be dissolved by any partner giving notice in writing to all other partners of his intention to dissolve the firm.

2.3.2 Duties of Partners

Following are the duties of partners towards one another :

1. Duty of good faith : It is the foremost and important general duty of the partners. Every partner should act in good faith, and he should be just and faithful in his dealings with the other partners. Good faith requires that a partner should not deceive the other partners by concealment of material facts e.g. a partner should not try to make secret profits, for himself, at the expense of the firm.

2. Duty to carry on the firm business to the greatest common advantage : Every partner is bound to carry on the business of the firm to the greatest common advantage. He must use his knowledge and skill for the common benefit of the firm. And he should not make any personal or private profits.

3. Duty to render true accounts : It is another duty of every partner that he should keep proper accounts, and render correct and true accounts of partnership.

4. Duty to give full information : It is also the duty of every partner that he should give full information of all things affecting the firm, to his co-partners. Thus, if a partner is in possession of more information about the affairs and assets of the firm, he should not conceal that from the other partners.

5. Duty to indemnify for loss caused by fraud : It is the duty of every partner to make good the loss suffered by the firm due to his fraud. Thus, if some loss is caused to the firm due to the fraud of a particular partner, the firm has the

right to recover the loss from the same partner. It is an absolute duty and cannot be excluded by an agreement to the contrary. However, the firm shall remain liable to the third parties for fraud of its partners.

6. Duty to attend diligently : It is the duty of every partner that he should diligently (i.e., carefully) attend to the affairs of the business of the firm. If a partner does not attend diligently the business of the firm, and the firm suffers a loss due to his 'willful neglect', then he is bound to make compensation to the firm.

Notes

7. Duty to share losses : It is the duty of every partner to share equally the losses suffered by the firm. However, this duty is subject to an agreement to the contrary i.e., the partners may agree to share the losses in different proportions. However this duty might be restricted by way of an agreement.

8. Duty to account for personal profits : This duty is based on the principle of good faith, which requires that a partner shall not make personal profits at the expense of the firm. If a partner makes personal profits in any of the following ways, he must give account of those profits and pay back the same to the firm :

(a) Personal profits from any transaction of the firm.

(b) Personal profits from the use of the property of the firm.

(c) Personal profits from the business connection of the firm.

(d) Personal profits from the use of the name of the firm.

However, the above duty is subject to a contract between the partners i.e., by a contract, the partners may allow/all or any of them to earn personal profits by using firm name, property etc. However, the above duty is subject to a contract between the partners i.e., by a contract, the partners may allow all or any of them to carry on any business whether or not competing with the business of the firm.

9. Duty to use firm property exclusively for firm : It is the duty of every partner to use the partnership property exclusively for the business of the firm. Thus, the partners should use the partnership property for the firm's business only. This duty is also subject to an agreement to the contrary.

11. Duty to act within authority : It is the duty of every partner that he should act within the scope of actual or implied authority.

2.3.3 Types of Partners

Partners can be classified as shown below :

1. Active/Actual Partner :

- A partner who is actively engaged in the conduct of the business of the partnership is known as 'active partner'.
- When an active partner retires from the firm, he has to give a public notice. Otherwise, he will be liable on the principle of 'holding out'.
- He is liable for acts of firm.

Notes

2. Sleeping or Dormant Partner :

- A 'Sleeping partner' is one who does not take any active part in the business.
- Such partner joins the firm by agreement and invests capital and shares in the profit of the business like the other partners.
- A sleeping partner need not give public notice of his retirement from the firm.
- He is liable for acts of firm.

3. Nominal Partner :

- A partner, who simply lends his name to the firm, without having any real interest in it, is called a nominal partner.
- He neither invests nor shares in the profits or takes part in the management of the business.
- He, along with other partners, is liable to outsiders for all the debts of the firm.
- Difference between sleeping and nominal partner: A nominal partner is known to the outside world as a partner of the firm but in reality does not share in the profit of the firm. A dormant partner on the other land, even though not known as a partner to the world at large but in fact shares in the profits of the business.

4. Partner for profits only :

- Partners may agree that a particular partner shall get a share of the profits only but he will not be called upon to contribute towards the losses. Such a partner is known as 'partner for profits only'.
- This is simply an, inter-se agreement binding the partners only. Hence,he continues to be liable to third parties for all acts of the firm.

5. Sub-Partner :

- When a partner agrees to share his profits divided from the firm with a third person, that third person is known as 'sub-partner'. Such a subpartner is in no way connected with the firm.
- He cannot represent the firm and bind the firm by his acts. He has no right against the firm nor is he liable for the acts of the firm.

6. Partner by Holding Out or by Estoppel :

- To hold a person liable as a partner by holding out, it is necessary to establish the following :
  1. He represented himself or knowingly permitted himself to be represented as a partner.
  2. Such representation occurred by words spoken or written or by conduct.

3. The other party on the faith of that representation gave credit to the firm.

- Once he poses himself as a partner, though he is not a partner, he is estopped from saying that he is not a partner in a firm.
- Example : X carried on business as RS. & Co. employed a person named RS. to act as manager of the business. It was held that RS. is a partner by the principal of estoppel.

Notes

7. Incoming Partner : A person who is admitted as a partner into an already existing firm with the consent of all the existing partners is called as "incoming partner".

8. Outgoing Partner : A partner who leaves a firm in which the rest of the partners continue to carry on business is called an outgoing partner.

2.3.4 Classes of Partnership

Partnership can be classified as under :

1. Particular Partnership :

- When a partnership is started for a particular purpose or period, it ends only when the purpose or period is completed.
- If the partnership is carried even after the completion of the target then it is deemed to be partnership at will.

2. Partnership at will :

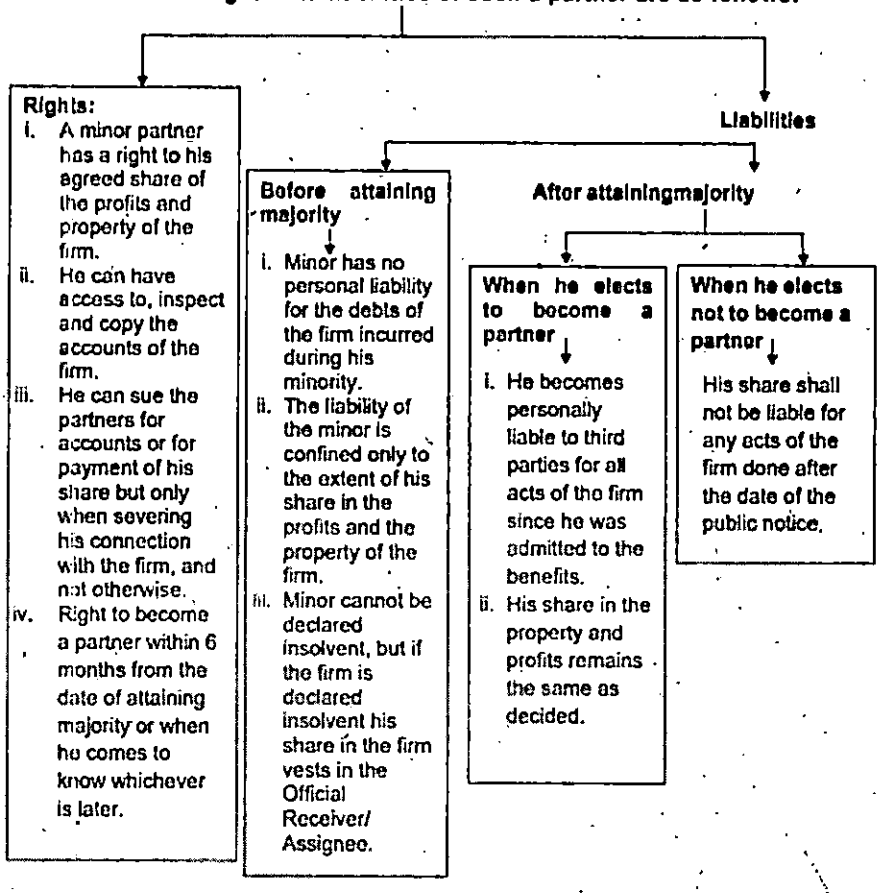
- When no provision is made by contract between the partners for the duration of their partnership, or for the determination (termination) of their partnership, the partnership is "Partnership at will".
- Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.
- The firm is dissolved as from the date mentioned in the notice as the date of dissolution or if no date is mentioned, then from the date of the communication of the notice. The notice must be served on all other partners. The notice once given cannot be withdrawn unless all the other partners consent. The fact that one of the partners receiving the notice is of unsound mind does not affect the validity of the notice.

2.3.5 Minor's As A Partner

- A minor cannot become a partner in a firm because partnership is founded on a contract and contract with a minor is void-ab-initio. Though a minor cannot be a partner in a firm, he can be admitted to the benefits of partnership with the consent of all the partners.

Notes

❖ The rights and liabilities of such a partner are as follows:



Property of The Firm :

Definition : Section 14 of the Partnership Act provides : Subject to contract between the partners, the property of the firm includes :

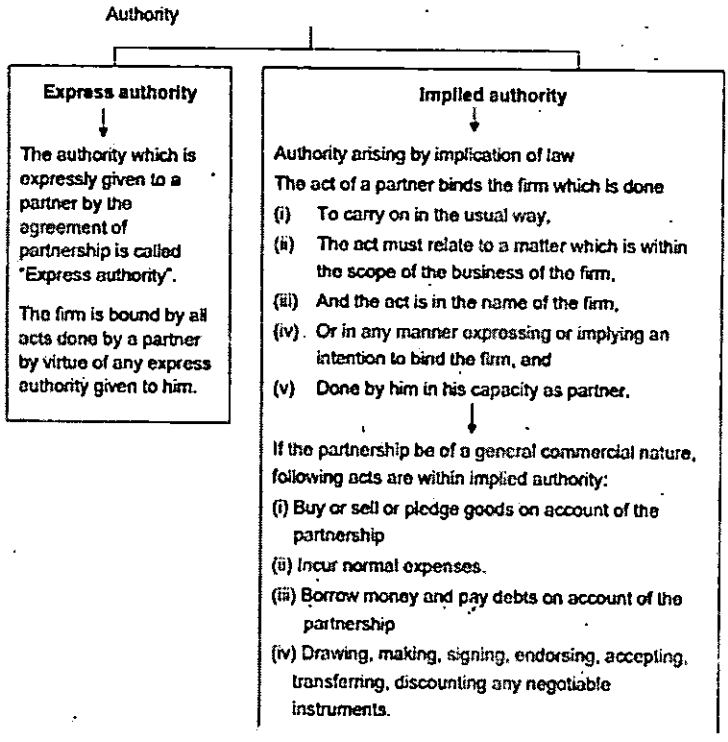
1. All property and rights and interest in property
   - Originally brought into the stock of the firm, or
   - Acquired, by purchase or otherwise, by or for the firm,
   - Or for the purposes and in the course of the business of the firm, and

(2) Includes also the goodwill of the business.

2.3.6 Doctrine of Implied Authority

The Authority of A Partner :

- **Partner to be agent of the firm :** "Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm."
- **Authority :** Authority means the right of a partner to bind the firm by his own acts. The authority of a partner to act on behalf of the firm can be divided into two categories :

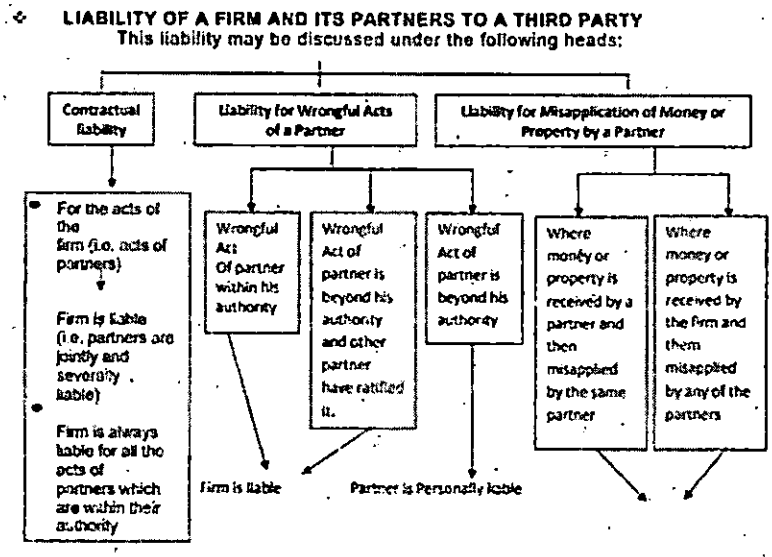


Notes

- **Limitations of Partner's Implied Authority :** In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to :
  (a) Submit a dispute relating to the business of the firm to arbitration,
  (b) Open a banking account on behalf of the firm in his own name,
  (c) Compromise or relinquish any claim or portion of a claim by the firm,
  (d) Withdraw a suit or proceeding filed on behalf of the firm,.
  (e) Admit any liability in a suit or proceeding against the firm,
  (f) Acquire immovable property on behalf of the firm.
  (g) Transfer immovable property belonging to the firm, or
  (h) Enter into partnership on behalf the firm.
- **Alteration of Authority :** The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.
- **Authority in an emergency :** A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.
- **Admission/Representation by a partner :** An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary of course of business.

Notes

- **Notice to the Acting Partner :** Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent, of that partner.



2.3.7 Reconstitution of A Firm

The reconstitution of a firm means a change in the constitution i.e., composition of the firm and it takes place in the following cases :

1. Admission of a new partner.
2. Retirement of a partner.
3. Expulsion of a partner.
4. Insolvency of a partner.
5. Death of a partner.
6. Transfer of a partner's interest.
7. Revocation of continuing guarantee.

1. Admission of a Partner :

- A newly admitted partner is known as 'incoming partner'.
- A new partner can be admitted into an existing firm in any of the following ways :
  (a) With the consent of all the partners.
  (b) In accordance with a contract already entered into between the partners for the admission of a new partner.
- The liability of an incoming partner may be discussed as under :
  1. Liability for the acts of the firm done before admission: An incoming partner is not liable for the acts of the firm done before his admission into the firm. Thus, he is not liable for the past debts of the firm.
  2. Liability for the acts of the firm done after admission : As a matter of fact, the liability of an incoming partner starts from the date of

his admission into the firm. Thus, he is liable for all the acts of the firm done after he became a partner in the firm.

3. If the incoming partner agrees to bear the past liabilities, then for past liabilities he shall not be liable to third parties as he is a stranger to contract but he shall be liable to other partners.

2. Retirement of a Partner :

Notes

- A partner may also retire from an existing firm. The partner who retires from an existing firm is known as a 'retiring partner' or an 'outgoing partner'.
- A partner may retire from the firm in anyone of the following three modes :
  (a) By consent. A partner may retire, at any time with the consent of all other partners.
  (b) By agreement. The partners may enter into an express agreement about the retirement of a partner. In such cases, a partner may retire according to the terms of the agreement.
  (c) By notice. In case of partnership at will, a partner may retire by given a written notice of retirement to all other partners.
- The liability of a retiring partner may be discuss as under :
  1. Liability for the acts of the firm done before retirement: A retiring partner continues to be liable to third parties for the acts of the firm done before his retirement.
  2. Liability for the acts of the firm done after retirement: A retiring partner also continues to be liable to third parties for the acts of the firm done even after his retirement until a public notice of his retirement is given This liability of a retiring partner is based on the principle of 'holding out'.

3. Expulsion of a Partner :

- A partner cannot be ordinarily expelled from the firm.
- However, in certain exceptional cases, he can be expelled by following a prescribed procedure. He can be expelled only if the following conditions are satisfied :
  (a) The power of expulsion should be given to the partners by an express contract between them.
  (b) The power of expulsion should be exercised by majority of partners.
  (c) The power of expulsion should be exercised in absolute good faith.

  The test of good faith includes three things :
  1. That the expulsion must be in the interest of the partnership
  2. That the partner to be expelled is given a notice to that effect
  3. That he was given an opportunity of being heard.

Notes

- It these conditions are not fulfilled the expulsion is null and voidand the expelled partner can demand re-instatement in the firm
- An expelledpartner continues to be liable to third parties for the acts of the firm done even after his retirement until a public notice of hisretirement is given.
- The public notice can be given either by the expelled partner himself or by the firm.

Rights of An Outgoing Partner :

The rights of an outgoing partner are as follows :

1. To carry on competing business : An outgoing partner may carry on a business, but it can be restricted by an agreement (below mentioned). However he cannot :

(a) Use the firm name.

(b) Represent himself as carrying on the business of the firm, or

(c) Solicit the customers of the old firm.

Restraint of tradeagreement : A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits, such agreement shall be valid if the restrictions imposed are reasonable (Section 27 of the Indian Contract Act, 1872).

2. To share subsequent profits :

If settlement of accounts is not yet done, then,

Right of outgoing partner to share subsequent profits — Or — Right to claim interest @ 6%

3. Insolvency of a Partner :

- The partner declared an insolvent, ceases to be a partner on the date on which the order of adjudication is made.
- The firm is dissolved on the date of the order of insolvency unless there is a contract to the contrary.
- The estate of the insolvent is not liable for any act of the firm after the (date of the order of insolvency.
- The firm cannot be held liable for any acts of the insolvent partner after the date of the order of insolvency.

4. Death of a Partner :

- The firm is automatically dissolved on the death of a partner. However, the partners may specifically provide in their agreement that the firm shall not be dissolved, and the remaining partners shall continue the firm's business.
- Where the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any acts of the firm which are done after his death.

5. Transfer of Partner's Interest :

- A partner can transfer his share only with the consent of other partners.
- The transferee thereby does not become a partner of the firm,
- A transferee of a partner's interest cannot do the following, during the continuance of the partnership :
  (i) Interfere in the conduct of the business; or
  (ii) Inspect or take a copy of accounts
- On the dissolution of the firm, the transferee will be entitled,
  (i) To receive the share of the assets of the firm to which the transferring partner was entitled, and
  (ii) For the purpose of ascertaining the share, he is entitled to an account as from the date of the dissolution.

Notes

7. Revocation of continuing guarantee : A continuing guarantee given to a firm, or to a third party in respect of the transaction of a firm, is in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

2.4 REGISTRATION OF FIRMS

The registration of a firm is not compulsory. It is optional for the firm either to get itself registered or not. There is no penalty for non-registration of a firm. The registration can be done anytime, either in the beginning or during the continuance of business.

Procedure :

1. Step 1- Obtain a statement in the form from the office of the Registrar.
2. Step 2- State the following information :
   - Name of the firm
   - Principal place of the firm
   - Name of the other places where the firm carries its business
   - Date when each partner joined
   - Name in full and permanent address of each partner
   - Duration of the firm.
3. Step 3- Get the statement of duly verified and signed by all the partners or their agents.
4. Step4- File the statement along with prescribed fees
5. Step 5- Obtain a certificate or registration from the Registrar.

The registration becomes effective from date of filing of duly signed and verified documents and not from the date of issue since the act of the Registrar in recording an entry of the statement in the firm is only a clerical act.

Notes

Consequences of non-registration:

1. The partners cannot file a suit against the firm or other partners : A partner of an unregistered firm cannot file a suit against the firm or his other present or past partners, for the enforcement of any right arising from a contract or conferred by the Indian Partnership Act. However, this disability may be removed by getting the firm registered before filing the suit.

2. The firm cannot file a suit against third parties : An unregistered firm cannot file a suit against any third party for the enforcement of any right arising from some contract. This disability of an unregistered firm can be removed by getting the firm registered before filing the suit.

3. The partner of the firm cannot claim a set-off : The term 'set-off' means the adjustment of debts by one party due to him from the other party who files a suit against him. The partners of an unregistered firm or the firm itself cannot claim a set-off, in a suit filed against them or the firm. But the right of set-off is not affected if the claim for setoff does not exceed Rs 100 in value.

Following are not the disabilities of an unregistered firm :

1. The third party can file a suit against the firm whether the firm is registered or not. And the firm cannot take the plea of its nonregistration.
2. The partners of an unregistered firm can file a suit for the enforcement of the three things, namely,
   (a) for the dissolution of the firm,
   (b) for the accounts of the dissolved firm, and
   (c) for realization of the property of the dissolved firm.
3. The right of an unregistered firm to enforce a right which arises otherwise than out of a contract.

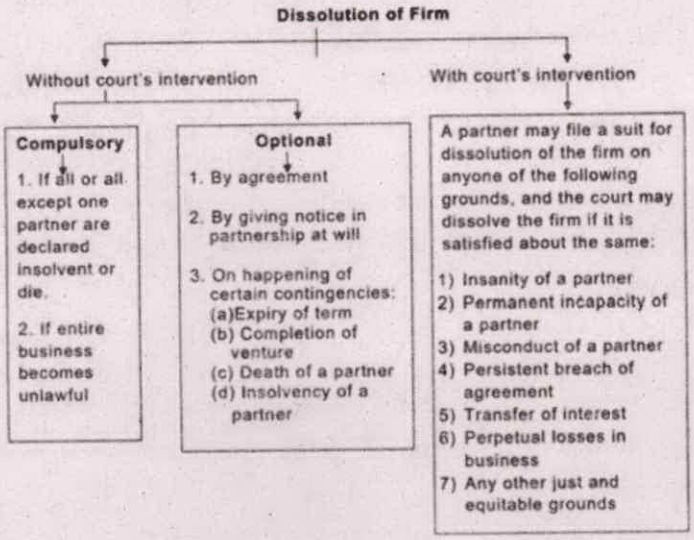
As a matter of fact, firm's disability is to enforce the contractual rights, and not the others.

2.4.1 Dissolution of Firms

Dissolution of Partnership : The term 'dissolution of partnership' may be defined as a change in the relations of partners, and not the extinction of relationship. In this case, the firm as a whole is not closed down. But only the relations between some of the partners come to an end, and the remaining partners continue to carry on the business of the firm. Thus, the 'dissolution of firm' is different from 'dissolution of partnership.'

Example : A, B and C were partners in a firm. A retires. Only the partnership between A, B and C is dissolved and a new partnership between B and C comes into existence. The new firm is called the 'reconstituted firm'. Thus, only the relations between the partners are changed on A's retirement.

Dissolution of Firm : When the firm as a whole is closed down, it is called the dissolution of the firm. Thus, in case of dissolution of the firm, the business of the firm is stopped and the relations between all the partners come to an end.



Notes

A. Dissolution Without The Intervention of Court

A firm may be dissolved without the intervention of the court i.e., without going to the Court of Law. The dissolution without the intervention of the court may take place in any of the following ways :

1. Compulsory dissolution : In the following cases, the firm is compulsorily dissolved even if there is a contrary contract between the partners i.e., even if the partners agree that the firm shall not be dissolved in such cases.

(a) Insolvency/death of all the partners : Where all the partners of the firm become insolvent/death, the firm is dissolved. The firm is also dissolved when all the partners except one have become insolvent/ died. The reason for the same is that when a partner is declared as insolvent by the court, he ceases to be a partner from the date of the order of insolvency.

(b) Business of the firm becoming unlawful : Where an event happens which makes the business of the firm unlawful, the firm is also dissolved. This includes the cases where the business of the firm is rendered unlawful by the outbreak of war, or where the object for which the firm was formed becomes unlawful or illegal, or where the business remains lawful but it is forbidden to be carried on in partnership.

2. Optional dissolution :

(a) Dissolution by agreementbetween the partners : A firm may also be dissolved in accordance with a contract between the partners in the same way as a firm is formed with the contract between the partners. There may be a separate contract for the dissolution of the firm, or it may also be contained in the partnership deed itself.

(b) Dissolution by notice : A firm can also be dissolved by any partner by giving a notice of dissolution to the other partnerswhere the partnership firm is 'at will '.

Notes

(c) **Dissolution on the happening of certain contingencies :** On the happening of anyone of the following contingencies (i.e., events), the firm is automatically dissolved.

(i) **Expiry of fixed term :** Where the firm is constituted for a fixed term, the firm is dissolved on the expiry of that term. This is, however, subject to a contract to the contrary i.e., if the contract provides that the firm shall not be dissolved, then it will not be dissolved.

(ii) **Completion of the adventure or undertaking :** Where the firm is constituted to carry out one or more adventure or undertaking, the firm is dissolved on the completion of such adventure or undertaking. This is also subject to a contract to the contrary.

(iii) **Death of a partner :** Sometimes, one of the partners of a firm dies during the continuance of the firm. In such cases, the firm is dissolved on the death of the partner. This is subject to a contract to the contrary.

(iv) **Insolvency of a partner :** Sometimes, one of the partners of a firm is declared as insolvent by the court. In such cases the firm is dissolved from the date of the order of insolvency. This is also subject to a contract to the contrary.

B. Dissolution With The Intervention of Court

Sometimes, a partner wants that the firm should be dissolved. But the other partners may not agree to the dissolution. In such cases, he can go to Court of Law, and file a suit for dissolution of the firm. A partner may like to have the firm dissolved for various reasons. It may, however, be noted that the court has the discretion to pass an order of dissolution i.e., the court mayor may not allow the dissolution of the firm. A partner may file a suit for dissolution of the firm on anyone of the following grounds, and the court may dissolve the firm if it is satisfied about the same :

1. Insanity of a partner : Sometimes, a partner becomes insane i.e., of unsound mind. In such cases, the court may allow the dissolution of the firm. The suit for dissolution of the firm may be filed by anyone of the partners other than the partner who has become insane. The suit may also be filed by the next friend (i.e., legal representative) of the insane partner.

2. Permanent incapacity of a partner : Sometimes, a partner becomes permanently incapable of performing his duties. In such cases also, the court may allow the dissolution of the firm. The suit for dissolution of the firm may be filed by anyone of the partners other than the partner who has become incapable.

3. Misconduct of a partner : Where a partner is guilty of misconduct, the court may allow the dissolution of the firm. The suit for dissolution of the firm may be filed by anyone of the partners other than the partner who is guilty of misconduct.

Notes

4. Persistent breach of agreement : Sometimes, a partner willfully or persistently (i.e., frequently) commits a breach of agreements relating to the management of the affairs of the firm, or conducts the partnership business in such a way that the other partners find it difficult to carry on the partnership business with him. In such cases, the court may allow the dissolution of the firm. The suit for dissolution of the firm may be filed by anyone of the partners other than the partner who commits the breach of agreements. Keeping erroneous accounts and not entering receipts, continuing quarrelling between the partners, refusal to meet on matters of business, taking away books of the firm, and misappropriations of income etc., are held to be sufficient ground for dissolution of a firm.

5. Transfer of interest : Where a partner transfers the whole of his interest or share to a third party, the court may allow the dissolution of the firm. The court may also allow the dissolution when the entire share of a partner is attached or sold by an order of the court. The suit fordissolution of the firm may be filed by anyone of the partners other than the partner who has transferred his interest or share.

6. Perpetual losses in business : Where the business of a firm cannot be carried on, except at a loss, the court may allow the dissolution of the firm. The suit for dissolution of the firm may be filed by anyone of the partner. When the court is satisfied that the business of a firm cannot be carried on, except at a loss, it may pass an order of dissolution of the firm.

7. Other just and equitable grounds : A firm may also be dissolved by the court on any 'other just and equitable ground. A 'just and equitable ground', is a ground which is fair and reasonable according to the opinion of the court.

Consequences of Dissolution :

1. Liabilities for the acts done after dissolution : On the dissolution of a firm, partners have to give a public notice of the dissolution. If it is not given, the partners shall remain liable to the third party for their acts done even after the dissolution of the firm

2. Continuing Authority for Winding Up : On the dissolution of a firm, the authority of each partner to bind the firm continues for the following purpose:

(a) If it is necessary to wind up the affairs of the firm, and

(b) If it is necessary to complete the transactions started but not completed at the time of dissolution.

3. Partner's Right for Utilisation of Assets : On the dissolution of the firm, each partner is entitled to the following rights :

(a) He is entitled to have the property of the firm utilised in payment of its debts and liabilities.

(b) He is entitled to have the surplus distributed among all the partners according to their rights. The surplus here means the surplus amount left after the payment of all the debts and liabilities of the firm.

Notes

4. Mode of Settlement of Accounts : After the dissolution of a firm, the accounts of the firm are settled according to the terms of partnership. If there is no specific agreement, then the accounts are settled according to the following fundamental rules contained in the Indian Partnership Act.

A. Payment of losses : The losses of the firm, including the deficiencies of capitals shall be paid in the following manner and order :

(a) First of all, the losses shall be paid out of the profits.

(b) If the profits, are not sufficient to pay the losses, then the balance of loss shall be paid out of capital, and

(c) If still some balance of losses remains, it shall be paid by the partners individually in the proportion in which they were entitled to share profits.

B. Utilization of assets : The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be utilised in the following manner and order:

(a) First of all, the assets shall be utilized in paying the debts of the firm to the third parties.

(b) If there is any surplus, the same shall be utilized in paying each partner the amount of loan advanced to the firm other than the capital. This is done in proportion to the advances made by the partners.

(c) If there is still any surplus, the same shall be utilized in paying each partner towards the amount of his capital. This is done in proportion to the amount of capital contributed by the partners.

(d) If there is still any surplus, the same shall be divided among all the partners in proportion to their share in the profits of firm.

5. Payment of firm's debts and Partner's Private Debts :

1. Firm's property shall be applied first in payment of firm's debts then the surplus, if any, shall be applied for payment of partner's private debts to the extent in which the concerned partner is entitled to the surplus.
2. Partner's private property shall be applied first in the payment of his debts and the surplus, if any, shall be used in payment of firm's debts.

6. Return on premium of partnership's premature dissolution :

- In the case of dissolution of partnership earlier than the period fixed for it, the partner paying the premium is entitled to the return of the premium of such part thereof as may be reasonable except when the partnership is dissolved :
  - (i) By the death of one of the partners;
  - (ii) When the dissolution is mainly due to the misconduct of the partner who paid the premium
  - (iii) The dissolution is according to an agreement which had no provision for the return of premium or any part thereof.

7. Treatment of Loss Arising due to Insolvency of a Partner :

Unless otherwise agreed it requires that :

1. The solvent partners should bring in cash equal to their shares of the loss on realization.
2. The solvent partners should bear the loss arising due to the insolvency of a partner in the ration of their Last Agreed Capitals.

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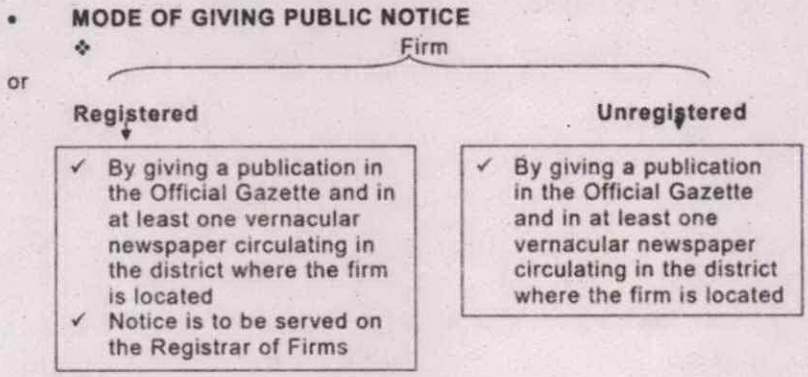
8. Rights of a partner in case of Dissolution on Account of Fraud and Misrepresentation :

1. He has a right of lien on the surplus assets after the payment of firm's debts, for any sum paid by him for purchase of a share in the firm.
2. He is entitled to rank as a creditor of the firm in respect of any payment made by him towards firm's debts.
3. He is entitled to be indemnified by the partner guilty of fraud or misrepresentation against all the debts of the firm.

- **MODE OF GIVING PUBLIC NOTICE**



- **When public notice is required to be given**
  (a) On retirement or expulsion of a partner
  (b) On the dissolution of the firm
  (c) On the election to become or not to become a partner by a minor on attaining his majority.
- **When a public notice is not required**
  (a) On the death of a partner
  (b) On the insolvency of partner

2.5 SALE OF GOODS ACT 1930

2.5.1 Definition of Contract of Sale

The sale or purchase of goods is the most recurring transaction in almost every kind of business. Every now and then, businessmen get involved in the sale & purchase of goods and enter into the contract of sale. These contracts are governed by the Sale of Goods Act,1930. It is important for every individual, be it a legal professional or a common man who deals in the transaction of sales on a regular basis, to have an understanding of the important terms in the Sale of Goods Act,1930. In this article, we will discuss some common yet important

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terms in the Sale of Goods Act,1930. Give a quick reading to this article to have comprehension about the terms related sale of goods.

2.5.2 Conditions and Warranties

Definition : Certain provisions need to be fulfilled as demanded in the contract of sale or any other contract. The condition is a fundamental precondition on the basis of which the whole contract is based upon, on the other hand, warranty is the written guarantee wherein the seller commits to repair or replace the product in case of any fault in the product. Section 11 to 17 of the Sale of Goods Act enlightens the provisions relating to Conditions and Warranties.

Section 12 of the Act draws a demarcation between a condition and a warranty. The determination of condition or warranty depends upon the interpretation of the stipulation. The interpretation should be based on its function rather than the form of the word used.

Condition : In the context of the Sale of Goods Act, 1930, a condition is a foundation of the entire contract and integral part for performing the contract. The breach of the conditions gives the right to the aggrieved party to treat the contract as repudiated. In other words, if the seller fails to fulfil a condition, the buyer has the option to repudiate the contract or refuse to accept the goods. If the buyer has already paid, he can recover the prices and also claim the damages for the breach of the contract.

For example, Sohan wants to purchase a horse from Ravi, which can run at a speed of 50 km per hour. Ravi shows a horse and says that this horse is well suited for you. Sohan buys the horse. Later on, he finds that the horse can run only at a speed of 30 km/hour. This is the breach of condition as the requirement of the buyer is not fulfilled. The conditions can be further classified as follows.

Kinds of conditions

Expressed Condition : The dictionary meaning of the term is defined as a statement in a legal agreement that says something must be done or exist in the contract. The conditions which are imperative to the functioning of the contract and are inserted into the contract at the will of both the parties are said to be expressed conditions.

Implied Condition : There are several implied conditions which are assumed by the parties in different kinds of contracts of sale. Say for example the assumption during sale by description or sale by sample. Implied conditions are described in Section 14 to 17 of the Sale of Goods Act, 1930. Unless otherwise agreed, these implied conditions are assumed by the parties as if it is incorporated in the contract itself. Let's study these conditions briefly:

- **Implied condition as to title**

In every contract of sale, the basic yet essential implied conditions on the part of the seller are that :

1. Firstly, he has the title to sell the goods.
2. Secondly, in case of an agreement to sell, he will have the right to sell the goods at the time of performing the contract.

Consequently, if the seller has no title to sell the given goods, the buyer may refuse or reject those goods. He is also entitled to recover the full price paid by him.

In Rowland v. Divall (1923), the party bought a second-hand motor car from the former and paid for the same. After six months, he was deprived of it as the seller had no title to sell the car. It was held that the aggrieved party is entitled to recover the money.

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- **Implied condition as to the description**

Moving to Section 15 of the Act, In the contract of sale, there is an implied condition that the goods should be in conformity with the description. The buyer has the option to either accept or reject the goods which do not conform with the description of the good. Say for example: Where Ram buys a new car which he thinks to be new from "B" and the car is not new. Ram' can reject the car.

Referring to Section 16(2) of the given Act, goods must be of merchantable quality. In other words, the goods are of such quality that would be accepted by a reasonable person. For eg: A purchased sugar sack from B which was damaged by ants. The condition of merchantability is broken here and it is unfit for use. It must be noted from this section that the buyer has the right to examine the goods before accepting it. But a mere opportunity without an actual examination would not suffice to deprive the buyer of his rights. If however, the examination does not reveal the defect but within a reasonable time period the goods are found to be defective, He may repudiate the contract even if he approves the goods.

The implied conditions especially in case of eatables must be wholesome and sound and reasonably fit for the purpose for which they are purchased. For eg: Amit purchases milk that contains typhoid germs and because of its consumption he dies. His wife can claim damages.

- **Implied condition as to sale by sample**

In the light of Section 17 of the Act, in a contract of sale by sample, there may be following implied conditions :

1. That the actual products would correspond with the sample with respect to the quality, size, colour etc.
2. That the buyer gets a reasonable opportunity to compare the goods with the sample.
3. Further, the goods are free from any defect rendering them unmerchantable.

For example, A company sold certain shoes made of a special kind of sole by sample sale for the French Army. Later when the bulk was delivered it was found that they were not made from the same sole. The buyer was entitled to the refund of the price and damages.

- **Implied condition as to Sale by sample as well as a description**

Referring to Section 15 of the Sale of Goods Act, 1930, in a sale by sample as well as description, the goods supplied must be in accordance with both the

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sample as well as the description. In Nichol v. Godis(1854), there was a sale of foreign refined rape-oil. The delivered oil was the same as the sample but it was having a mixture of other oil too. It was held in this case that the seller was liable to refund the amount paid.

Warranty : Warranty is the additional stipulation and a written guarantee that is collateral to the main purpose of the contract. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the whole contract however, can claim for the damages. Unlike in the case of breach of condition, in the breach of warranty, the buyer cannot treat the goods as repudiated.

Kinds of Warranty

Expressed Warranty : The warranties which are generally agreed by both the parties and are inserted in the contract, it is said to be expressed warranties.

Implied Warranty : Implied warranties are those warranties which the parties assumed to have been incorporated in the contract of sale despite the fact that the parties have not specifically included them in the contract. Subject to the contract, the following are the implied warranties in the contract of sale :

- **Warranty as to undisturbed possession**

Section 14(2) of the given Act provides that there is an implied warranty that the buyer shall enjoy the uninterrupted possession of goods. As a matter of fact, if the buyer having got possession of the goods, is later disturbed at any point, he can sue the seller for the breach of warranty.

For eg : 'X' purchased a second-hand bike from 'Y'. Unknown to the fact that the bike was a stolen one, he used the bike. Later, he was compelled to return the same. X is entitled to sue Y for the breach of warranty.

- **Warranty as to freedom from Encumbrances**

In Section 14(3), there is an implied warranty that the goods shall be free from any charge or encumbrances that are in favour of any third party not known to the buyer. But if it is proved that the buyer is known to the fact at the time of entering into the contract, he will not be entitled to any claim.

For eg: A pledges his goods with C for a loan of Rs. 20000 and promises him to give the possession. Later on, A sells those goods to B. B is entitled to claim the damages if he suffers any.

- **Implied warranty to disclose Dangerous nature of the goods sold**

If the goods sold are inherently dangerous or likely to be dangerous and the buyer is not aware of the fact, it is the duty of the seller to warn the buyer for the probable danger. If there would be a breach of this warranty, the seller will be liable.

For eg: A purchases a horse from B if the horse is violent and then It is the duty of the seller to inform A about the probable danger. While riding the horse, A was inflicted with serious injuries. A is entitled to claim damages from B.

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Difference between Condition and Warranty

Basis For Comparison	Condition	Warranty
Meaning	It is a stipulation which forms the very basis of the contract.	It is additional stipulation complementary to the main purpose of the contract.
Provision	Section 12(2) of the Sale of Goods Act, 1930 defines Condition.	Section 12(3) of the Sale of Goods Act, 1930 defines Condition.
Purpose	Condition is basic for the formulation of the contract.	It is a written guarantee for assuring the party.
Result of Breach of Contract	The whole contract may be treated as repudiated.	Only damages can be claimed in case of a breach.
Remedies available to the aggrieved party	Repudiation, as well as damages, can be claimed.	Only damages can be claimed.

When does Condition sink to the level of Warranty?

Section 13 of the Act specifies the cases wherein a breach of Condition sink to the level of breach of Warranty. In the first two following points, it depends upon the will of the buyer, but the last one is compulsory and acts as estoppel against him :

1. When the buyer waives the condition, the condition is considered a warranty.
2. A condition would sink to the level of warranty where the buyer on his own will treat the breach of condition as a breach of warranty.
3. Wherein the contract is indivisible and the buyer has accepted the whole or part of goods, the condition is treated as a warranty. Consequently, the contract cannot be repudiated. However, the damages can be claimed.

2.5.3 Passing of Property

A sale of goods or property implies a transfer or passing of ownership to the buyer. The passing of property is an important aspect to help determine the liabilities and rights of both the buyer and the seller. Once a property is passed to the buyer, then the risk in the goods sold is that of the buyer and not the seller. This is true even if the goods are in the possession of the seller. Let us learn more about the passing of property in the Sale of Goods Act.

There are four primary rules that govern the passing of property :

- Specific or Ascertained Goods
- Passing of Unascertained Goods
- Goods sent on approval or "on sale or return"
- Transfer of property in case of reservation of the right to disposal

In this article, we will be looking at the first two rules.

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Passing of Ascertained Goods

Section 19 : This is the first rule of the passing of property. It deals with the passing of specified goods and states that –Specific or ascertained goods pass when intended to pass. Section 19 of The Sale of Goods Act, 1930, has three sub-sections as follows :

- **Sub-section (1) :** Imagine a contract for the sale of specific or ascertained goods with a clear mention of the time when the parties to the contract intend to transfer the property. In such cases, the property is transferred at the time mentioned in the contract.
- **Sub-section (2) :** To understand the intention of the parties, the terms of the contract, the conduct of the parties, and the circumstances of the case are considered.
- **Sub-section (3) :** Sections 20 to 24 of The Sale of Goods Act, 1930, contain rules to ascertain the intention of the parties. This intention is about the time at which the property in the goods will pass to the buyer. Let's look at these sections.

Section 20 : Section 20 relates to Specific goods in a deliverable state. It states that if the contract is unconditional for the sale of specific goods in a deliverable state, then the property in the goods passes to the buyer the moment the contract is made. This rule holds true even if the time of payment of price or delivery of the goods or both is postponed.

Example : Peter goes to an electronics store and buys a television set. He asks the shopkeeper to deliver it to his house. The shopkeeper agrees. The television immediately becomes the property of Peter.

Section 21 : Specific goods to be put into a deliverable state (Section 21) – Imagine a contract for the sale of goods where the seller has to do something before the goods are ready for delivery. In such cases, the passing of property happens only after the seller does the things and informs the buyer.

Example : Peter buys a laptop from an electronics store and asks for a home delivery. The shopkeeper agrees to it. However, the laptop does not have a Windows operating system installed. The shopkeeper promises to install it and call Peter before making the delivery. In this case, the property transfers to Peter only after the shopkeeper has installed the OS making the laptop ready for delivery.

Section 22 : Specific goods are in a deliverable state but the seller has to do something to ascertain the price – Imagine a contract of sale of goods which are in a deliverable state but the seller has to do something like weight, measure, test, or perform any other act on the goods to ascertain the price. In such cases, the property does not pass until the seller does the act and informs the seller.

Example : Peter sells a carpet to John and agrees to lay it in John's house as a part of the contract. He delivers the carpet and informs John that he will lay it the next day. That night the carpet gets stolen from John's premises. In this case, John is not liable for the loss since the property had not passed to him.

According to the terms of the contract, the carpet would be in a deliverable state only after it is laid.

If there is a contract for the sale of unascertained goods, then the passing of the property of the goods to the buyer cannot happen unless the goods are ascertained. This is specified under Section 18 of The Sale of Goods Act, 1930.

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Section 23 : Further Section 23 lists two important rules for the passing of property of unascertained goods :

- **Sale of unascertained goods by description :** Imagine a contract for the sale of unascertained or future goods by description. If any goods of that description are appropriated to the contract either by the buyer or the seller with the consent of the other party, then the property of the goods passes to the buyer. The consent can be express or implied and given before or after the appropriation is made.
- **Delivery to the carrier :** If the seller delivers the goods to the buyer or a carrier or a bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, but does not reserve the right of disposal, then he is deemed to have unconditionally appropriated the goods to the contract.

Some Points to Remember about the Appropriation of Goods :

If goods are selected with the intention of using them in performing the contract, with the mutual consent of the buyer and the seller, then it is called appropriation of goods. Here are some essentials :

- A contract for the sale of unascertained or future goods exists
- The goods conform to the quality and description stated in the contract
- They are in a deliverable state
- The goods are unconditionally appropriated to the contract either by delivery to the buyer of his agent or the carrier.
- The appropriation is made by the buyer with the assent of the seller or the seller with the assent of the buyer.
- The assent can be express or implied.
- The assent can be given before or after the appropriation.

2.5.4 Rights of Unpaid Seller Against The Goods

As per Section 2(f) of the Indian Contract Act, the seller must transfer the goods sold, and the buyer must pay the required amount in return, under the contract of sale by them. This is known as Reciprocal Promise. In other words, any set of promises made which forms the consideration or part of the consideration for each other are called reciprocal promises and every contract of sale of goods consists of reciprocal promises.

Three important rights of an unpaid seller against the goods

- Right of lien
- Right of stoppage of products in transit
- Right of resale

Notes

Rights of lien (Section 47) : "Lien" is the right to keep possession of products and refuse to give purchaser until the fee is paid by the purchaser. An unpaid seller, in possession of products, is entitled to work out his lien on the products within the following instances:

1. In which the goods were sold without any requirement as to credit score.
2. Where the goods were sold on credit however the term of credit has expired.
3. In which the buyer will become insolvent even though the period of credit began to expire.

In the case of the purchaser's insolvency, the lien exists even though goods were offered on credit and the duration of credit has not expired till the time. When the products are offered on credit, the presumption is that the customer shall preserve his credit suitable.

If before payment the buyer turns insolvent, the seller is entitled to exceed his rights and hold the products as security for the charge.

The unpaid seller's lien is a possessory lien, the lien may be exercised so long as the seller stays in ownership of the products. He may exercise his rights of lien but he is holding the ownership of the goods as agent for the customer [Section 47(2)].

Any property in the transfer of files, identify that the products which are not affecting these rights, supplied goods should stay inside the real possession of the seller. In truth, when a belonging has passed to the consumer then the most effective maintenance of products is technically known as "lien".

In which the belonging goods have not exceeded the customer possession and the same remains with the seller, then it will be very difficult to maintain that the seller has a lien towards his own goods.

The seller's lien when an asset has not exceeded the purchaser is called as a right of withholding shipping. For that reason, Section 46(2) states in which the belonging goods have not handed over to the customer, the unpaid seller has a right to withhold the transfer.

The seller may additionally incur from storing the products inside the exercise of his lien for the charge. This right of lien extends to the entire product on his own despite the fact that the part price for the one's items has already been made. In other phrases, the consumer is not entitled to claim delivery of a part of the products.

In addition, wherein an unpaid seller has made component shipping of the goods, he may also exercise his rights of lien on the rest, except such element shipping has been made under such instances as to reveal an agreement to waive the lien (Section 48).

Also, the lien can be exercised even though the seller has received a 'decree' for the rate of the products.[Section 49(2)].

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When is lien lost ?

As already discovered, lien relies upon physical ownership of products. As soon as the possession is misplaced, the lien is also misplaced. The unpaid dealer of goods loses his lien thereon inside the following instances :

1. When he provides the products to a carrier or other bailee for the motive of transmission to the customer without reserving the rights of possession of the products.
2. When the buyer lawfully obtains ownership of the goods.
3. When the seller expressly or impliedly waives his rights of lien. An implied waiver takes place while the seller offers a fresh time period of credit or allows the customer to just accept an invoice of trade payable at a particular date to a sub-sale which the purchaser may additionally have made.

Accordingly, when a refrigerator after being bought, will be delivered to the purchaser and if it no longer functions well, the buyer takes it again to the seller for repairs, here we can say that the seller could not exercise his lien over the fridge.

Rights of Stoppage of Goods in Transit : The right of stoppage in transit method is the right of stopping the transit of the goods even if they may be with a carrier for the cause of transmission to the buyer; resuming the ownership of the customer and retaining possession until they made the payment of the good.

Hence, this right is an extension of the right of lien because it entitles the seller to regain ownership even if the seller has parted with the possession of the products.

When can this right be exercised? (Section 50)

An unpaid seller can exercise this right in the simplest way when:

- **The purchaser becomes insolvent :** The buyer is said to be bankrupt when he has denied paying his debts inside the normal route of business, or if he cannot pay his money then it will be due. [Section 2(8)]
- **The property has exceeded the buyer :** If assets have not surpassed the buyer then this right is called the "right of withholding shipping". [Section 46(2)]
- **The products are within the route of transit :** This means that goods should be neither with the seller nor with the buyer nor with their agent. The product has to be within the custody of a carrier as an intermediary. At that time, the carrier needs not to be either a seller's agent or customer's agent. Because, if he is the seller's agent then the products are still in the arms of seller in the eye of regulation and consequently there may be no transit, and if he is the customer's agent, the consumer gets transport in the attention of law and hence query of stoppage does now not rise up.

Notes

Duration of transit (Section 51) : Since the right of stoppage in transit can be exercised simply as long as the goods are inside the route of transit, it becomes important for the seller to recognize the transit route where it starts and where it comes to the destination. When the transit involves a stop, the right of stoppage can't be exercised.

Items are deemed to be in course of transit from the time when they're added to a service or other bailee for the motive of transmission to the buyer till the purchaser or his agent takes transport of them.

Thus, the transit continues as long as the products aren't delivered to the customer or his agent, irrespective of whether or not they should be mandatory at the destination with the service expecting transmission or are in real transit.

When the transit is deemed to be at near the destination, then the seller can't exercise his right of stoppage in the following instances :

1. When the customer or his agent takes shipping after the products have reached the destination.
2. When the buyer or his agent obtain delivery of the goods before their arrival at the appointed destination.
3. While the products have arrived at their destination and the seller acknowledges to the consumer or his agent that he holds the products on his behalf.
4. When the products have arrived at their destination then the customer in preference to shipping requests the seller to hold the products to some further destination then the seller agrees to take them to the new destination.
5. When the service wrongfully refuses to supply the goods to the consumer's agent.
6. When some part of shipping of the goods has been made to the customer with the intention of handing over the whole of the products, transit can be at a quit for the rest of the products.

How is the right stoppage exercised? (Section 52)

The unpaid seller may additionally exercise his right of stoppage in transit both :

1. Through taking real possession of the goods.
2. By means of giving a declaration to the seller in whose possession the products are.

Such words can be given to the person in real ownership of the goods. Within the latter case, the word must accept well in advance to permit the superior to talk together with his agent or servant in time, for transport to the customer.

If with the addition of a mistake he offers the products to the purchaser, he may be responsible for the conversion. The fees of redelivered are to be tolerated by the seller.

Difference between the right of lien and right of stoppage in Transit?

The principal points of difference among these rights of an unpaid seller are as follows :

1. The seller's lien attaches when the purchaser is in default, whether or not he is solvent or bankrupt. The right of stoppage in transit arises best while the customer is bankrupt.
2. Lien is to be held only when the goods are in actual possession of the seller at the same time as the right of stoppage is available, when the seller has half part with his own and the products are within the custody of an independent service.
3. The right of lien comes as soon as the seller has possession over the products to the carrier for the motive of transmission to the purchaser.

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On the other hand, the right of stoppage in transit starts after the seller has introduced the goods to a carrier for the purposes of transmission to the buyer and maintains until the customer has acquired the ownership. The right of lien includes preserving the possession of the goods when the right of stoppage includes regaining ownership of the goods.

Right of resale

The right of resale is a completely valuable right given to an unpaid seller. Within the absence of this right, the unpaid seller's other rights in opposition to the goods, specifically, "lien" and "stoppage" in transit could no longer have been used due to the fact, this rights only entitle the unpaid dealer to keep the products until paid with the aid of the buyer.

If the customer maintains to stay in default, should the predicted price maintained in order to retain the goods indefinitely, especially while the products are perishable?

Largely, this cannot be the aim of the regulation. Section 54, therefore, offers to the unpaid supplier a confined right to resell the goods inside the following lines :

1. In which the goods are of a perishable nature.
2. In which this type of right is expressly reserved inside the settlement in case the buyer needs to make default.
3. In which the seller has given a promise to the buyer of his purpose to resell and the customer does not pay the price within an affordable time.

If on a resale there is a loss to the seller, he can get better from the defaulting customer. However, if there is a surplus at the resale, the seller can preserve it with him because the customer cannot be allowed to take advantage of his personal identity. But, no word of resale [as required in 3 above] is given to the customer, the right of the seller to assert loss and maintain a surplus, if any, is reversed.

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In different words, if the unpaid seller fails to present the observation of resale to the buyer, he can not recover the loss from the customer. For this reason, it'll be visible that giving of observing to the purchaser, when so required that very necessary to make him responsible for the breach of settlement.

It's so due to the fact this kind of observation gives an opportunity to the purchaser that pays the charge and has the products.

It is vital that the absence of observation when so required affects the rights of the unpaid supplier himself best as mentioned above and it does not have an effect on the name of the following customer who gathers an excellent title to the goods.

Section 54(3) particularly announces- "Where an unpaid seller has exercised his right of lien or stoppage in transit in transit resells the products, the customer acquires a terrific identify thereto as in opposition to the unique purchaser, however, that no note of the resale has been given to the original customer"

2.5.5 Remedies For Breach

A remedy is the course of action available to an aggrieved party (i.e. the party not at default) for the enforcement of a right under a contract. Whenever there is breach of a contract, the injured party becomes entitled to any one or more of the following remedies against the guilty party :

1. Rescission of the contract
2. Restitution
3. Suit for specified performance of the contract.
4. Suit for an injuction
5. Suit for damages.
6. Suit upon quantum meruit

As regard the last two remedies stated above, the law is regulated by the Specific Relief Act.

Rescission of the Contract : When there is a breach of contract by one party, the other party may rescind the contract and need not perform his party of obligations under the contract and may sit quietly at home if he decides not to take any legal action against the guilty party. But in case the aggrieved party intends to sue the guilty party for damages for breach of contract, he has to file a suit for rescission of the contract. When the court grants rescission, the aggrieved party is freed from all his obligations under the contract; and becomes entitled to compensation for any damage which he has sustained through the non fulfilment of the contract (Sec. 75).

Example : A contacts to supply 100 kg of tea leaves for Rs. 8000 to B on 15 April. If A does not supply the tea leaves on the appointed day, B need not pay the price, B may treat the contract as rescind and may sit quietly at home. B may also file a suit for 'rescission' and claim damages.

Notes

When is rescission granted ?

Under Section 39 of Indian Contract Act, the court may grant rescission in the following two cases : 1. Where the contract is voidable at the option of the plaintiff, the court grants rescission to the plaintiff. 2. Where the contract is unlawful for causes not apparent on its face and defendant is more to blame than the plaintiff, the court may grant rescission.

When may rescission be refused ?

That court may, however, refuse to rescind the contract

(a) Where the plaintiff has expressly or impliedly ratified the contract; or

(b) Where owing to the change of circumstances, the parties cannot be restored to their original positions; or

(c) Where third parties have, during the subsistence of the contract acquired rights in good faith and for value; or

(d) Where only a part of the contract is sought to be rescinded and such part is not servable from the rest of the contract.

Restitution : It means return of the benefit received by one party to the contract from the other under a void contract. When a contract becomes void it need not be performed by either party. Section 65 provides that when an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. This section applies to contracts 'discovered to be void' and contracts which become void. It does not apply to contracts which are known to be void. Thus, if A pays Rs 200 to B to beat C, the money is not recoverable.

Example:A pays B Rs. 1000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of promise. The agreement is void but B must repay A Rs. 1000.

Specific Performance : Under certain circumstances a person aggrieved by the breach of the contract can file a suit for specific performance i.e. for an order by the court upon the party guilty of breach of contract directing him to perform what he promised to do. Specific performance is a discretionary remedy which is allowed only in a limited number of cases. Rules regarding the granting of this relief are contained in the Specific Relief Act.

Example : A agrees to sell two rare China vases to B. B may compel A to perform the contract specifically, because there is no standard for ascertaining the actual damage which would be caused by the non-performance of the promise.

A is looking for a house. For his residence he finds one. He make a contract with the owner of that house 'B' to buy the house. Later, 'B' refuses to sell the house to 'A'. In this case, damages from 'B' for such breach of contract are not adequate remedy for 'A' because he does not get that type of house which he want in the locality. In this situation, A can appeal to the court for the specific performance of the contract.

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Some of the case in which specific performance of the contract may be enforced are as follows :

(a) Where monetary consideration is not an adequate remedy for the breach of a contract.

(b) When there exist no standard for ascertaining the actual damage caused by the non-performance of the act.

(c) When it is probable that compensation in money on non-performance of the contract cannot be obtained.

In the following cases however specific performance shall not be granted :

1. Where the contract is of a personal nature.
2. Where damages are an adequate remedy.
3. Where the court cannot supervise the execution of the contract.
4. Where the contract is made by the trustee in breach of their trust.
5. Where the contract is inequitable to either party. It is discretionary remedy which is allowed only in a limited number of cases.

Injuction : An aggrieved party can sue for an injuction i.e. an order, of the court restraining the wrong does from doing or continuing the wrongful act complained of. Injuctions are usually granted to enforce negative stipulations in cases where damages are not adequate relief. Injuctions is a preventive relief. It is particularly appropriate in cases of anticipatory breach of contract.

Example : G agreed to buy the whole of the electric energy required for his house from a certain company. This was interpreted as a promise not to buy electricity from any other company. He was therefore restrained by an injuction from any other company.

Case Study Topic

1. Mr. Rahim, a retired officer of the government, has accumulated a little amount of money and wants to invest in some sort of business.
2. Mr. Karim has accumulated an amount of money but wants to start a business together with Mr. Rahim.
3. Both Mr. Rahim and Mr. Karim did business together and in last few years both of them made a huge amount of profit and now they want to invest that money in new venture with huge liabilities. M/S Bulu Private Ltd. wants to join them as well in their new business ventures.

Fact One : Mr. Rahim, a retired officer of the government, has accumulated a little amount of money and wants to invest in some sort of business.

Advice : Mr. Rahim can start a proprietorship concern with his little amount of money. In this case all risk and liability will be his own. He will enjoy that profit and bear the loss of his own account.

Proprietorship business has very little formalities. He can obtain a Trade License submitting his Tin certificate and Bank statement.

Fact Two : Mr. Karim has accumulated an amount of money but wants to start a business together with Mr. Rahim.

Advice : Mr. Karim and Mr. Rahim can start a business in partnership if they come into a contract which is necessary for starting a partnership business.

What is Partnership Business?

Notes

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

In this case if Mr. Karim and Mr. Rahim of agreed the share profits of a business and enter into a contract in this regards, then we can say that they have entered into partnership with one another who are called individually, "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm-name".

Section 239-266 of the Contract Act, 1872 has been repealed by the Partnership Act, 1932 (IX OF 1932), SEC. 73 and Schedule. II. The Contract Act, 1932 was repealed by section 73 of Partnership Act, 1932. Section 73 of Partnership Act, 1932 was in its turn later repealed by Act I of 1938.

Case Law :

- The three essential elements of partnership :
  - i. an agreement between the persons concerned;
  - ii. this agreement should be for sharing profits of a business, and
  - iii. the business should earlier be a carried on by all o any one of them on behalf of all: AIR 1985 Ori 8, 10

Requirement, Conduct and Liabilities : It should be mentioned here that in partnership business contract between the partners is very important. In partnership business contract prevails unless and until it conflicts with law.

For this purpose they have to abide by following conduct

Subject to contract between the partners :

(a) Every partner has a right to take part in the conduct of the business;

(b) Every partner is bound to attend diligently to his duties in the conduct of the business;

(c) Any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners;

(d) Every partner has a right to have access to and to inspect and copy any of the books of the firm;

(e) In the event of the death of a partner, his heirs or legal representatives or their duly authorised agents shall have a right of access to and to inspect and copy any of the books of the firm.

Notes

Mutual Right and Liabilities

Subject to contract between the partners :

(a) A partner is not entitled to receive remuneration for taking part in the conduct of the business;

(b) The partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;

(c) Where a partner is entitled to interest on the capital subscribed by him, such interest shall be payable only out of profits;

(d) A partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent. per annum;

(e) The firm shall indemnify a partner in respect of payments made and liabilities incurred by him

(i) In the ordinary and proper conduct of the business; and

(ii) In doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and

(f) A partner shall indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm.

Every partner is liable jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Following the above-mentioned guideline they should sign a contract to start a partnership business, a Firm.

Fact three : Both Mr. Rahim and Mr. Karim did business together and in last few years both of them made a huge amount of profit and now they want to invest that money in new venture with huge liabilities. M/S Bulu Private Ltd. wants to join them as well in their new business ventures.

Advice :

Here considerable fact is that :

1. Mr. Rahim and Mr. Karim together doing business for last few years
2. They made a huge amount of profit, which they want to invest with huge liabilities
3. M/s Bulu Private Ltd. wants to join them

From considerable fact we know that Mr. Rahim and Mr. Karim together doing a partnership business for last few years. In this year, they made a huge profit which increased their liabilities. In Partnership business, partners are personally liable for profit and loss of the Firm, which are divided between themselves as per their share.

When this venture becomes huge, the personal liabilities of the partners becomes so mammoth that it is better to convert the venture into a company. Company itself has it legal entity and personal liabilities of the share-holders perishes for the legal position of company.

Moreover, M/s Bulu Private Limited wants to join with Mr. Rahim and Mr. Karim. M/s Bulu Private Limited can issue share in favour of Mr. Rahim and Mr. Karim, which can be transferred in their favour against the huge capital they want to invest. Or Mr. Rahim and Karim can setup a company where M/s Bulu Private Limited can invest through purchasing share of the company. As a legal entity, M/s Bulu Private Limited, a company, can purchase share of other company.

Notes

Case law

A sole trader of boot and shoe incorporated his sole proprietorship concern as company under the name and style of Salomon & Co. Ltd. For the purpose of incorporation 7 subscriber of the Memorandum was he himself, his wife, his daughter and four sons and they remained the only members of the Salomon & Co Ltd. Mr. Salomon and his two sons remained the Board of Directors of the said company. The proprietorship concern was transferred for £40,000. Mr. Salomon took 20,000 shares £1 each share and debentures worth £10,000. And the rest share was distributed among the other family members. All the requirements of the Companies Act 1862 were complied with. Bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors :

Court of Appeal : The decisions of Vaughan Williams J. in the CA is that the company was merely acting as a nominee and agent of Mr. Solamon, therefore Salomon as principal had to indimnify the company's creditors himself.

House of Lords : Mr. Salomon appealed in the House of Lords and House of Lords ruled out the Court Of Appeal's decision and says :

1. An one-man company is not an abuse of the company Act;
2. All the relevant formalities have been complied with and
3. The beneficial interests and control was silent in the act.

Thus Salomon and Co Ltd. is different from Mr. Salomon as an individual and Mr. Salomon is not personally liable to creditors.

Benefits of my advice about joining with a company or setting a new company in favour of my clients :

- Members do not owe such duties either to other members or the company and ownership on a share of company is in general seen a s property right.
- Because of the Company's artificial legal personality, its property and rights are vested in the company and not the members.
- A registered company continues to exist until it is wound up, either solvent or insolvent, regardless of the death, bankruptcy, mental disorder or retirement of any of its directors or members.
- Unless the article of a company restrict transfer of its share, shares in a registered company can be freely transferred and the transferee becomes the new member of the company upon registration of those shares in his/her name. Shares may also be mortgaged.

Notes

- Members of a company share the distributed profits of the company in proportion of the nominal value of their shares known as debentures.
- Private company must have at least 2 members and not more than 50 and Public company must have at least 7 members and can have unlimited members, exception Banking companies minimum 7 members and maximum 20 members.
- The affairs of the registered company are managed by its directors and other officers to the extent they are empowered to do so by the company's articles.
- Management by the directors is distinct from ownership as to the share of the company by the members.
- Member of company is not agent for it and therefore cannot bind Company by his/her acts.
- Expenses: Company expenses are greater on formation, throughout life and on dissolution.

2.6 SUMMARY

In my opinion Partnership is very important because in day to day activities we enter into partnership agreements and by making partners big goals are achieved with the help of joint and more number of people. The joint efforts of all the member results in successful accomplishment of tasks and that task or job can be easily afforded. Division of work leads to increase in efficiency at work among different partners.

When some job is done by consent of all the members and if some profit is earned then it is shared among the different partners. And similar is the case when some loss occurs then that is also beard among all the members and its not that only one has to take responsibility or give compensation. So in my view Partnership is a good form of doing business than a company which is owned by a single person.

Partnership is one of the oldest forms of business relationships. Though limited liability companies have replaced partnership firms in complex businesses, partnerships are still preferred by professionals and small trading and business enterprises in India and abroad.

The Indian partnership act of 1932 provides for a general form of partnership which is the most prevalent form in India, but, over time the general form of partnership has lost its charm because of the inherent disadvantages in it, the most important is the unlimited liability of all partners for business debts and legal consequences, regardless of their holding, as the firm is not a legal entity.

General partners are also jointly and severally liable for tortuous acts of co-partners. Each partner has the exposure of their personal assets being appropriated and liquidated to meet partnership dues. These are statutory position, which

cannot be altered by contract inter-se, though at times subterfuges are resorted to by unscrupulous partners to avoid personal liability.

General partnership holdings are not easy to transfer; typically all other partners have to agree. Yet partnership is preferred in India, because of the ease of formation and lack of compliances involved.

At the time of selling or purchasing goods, both the buyer and seller put forth some preconditions with regards to the mode of payment, delivery, quality, quantity and other things necessary. These stipulations are either considered as condition or warranty differing from case to case. These concepts are necessary to be understood as it protects the rights of parties in case of breach of the contract.

Any set of promises made to form the consideration or part of the consideration for each other are called reciprocal promises and every contract of sale of goods consists of reciprocal promises. The seller's remedy, in this case, is a suit for damages rather than an action for the full price of the goods.

Notes

2.7 EXERCISE

1. What is a contract of sale of goods ? Discuss the essential features of a contract of sale goods ?
2. What is passing property ?
3. Explain of the types of partners ?
4. Discuss of the Registration of Firm.
5. Which of the following rights can be exercised by an unpaid seller when the property in goods has passed to the buyer under sale of Good Act 1930 ?

Notes

UNIT 3: NEGOTIABLE INSTRUMENT ACT 1881

Structure:

3.0 OBJECTIVES

After reading this lesson, you should be able to :

- understand meaning, essential characteristics and types of negotiable instruments;
- describe the meaning and marketing of cheques, crossing of cheques and cancellation of crossing of a cheque;
- explain capacity and liability parties to a negotiable instruments; and
- companies act 2013 : registration in corporation memorandum of association etc.

(a) define negotiable instrument and discuss the characteristics of negotiable instruments.

(b) describe the various types of negotiable instruments.

(c) discuss the parties to negotiable instruments.

Notes

3.1 INTRODUCTION

The law relating to Negotiable Instruments is laid down in Negotiable Instruments Act, 1881, which came into force from March 1,1882. It extends to the whole of India except the State of Jammu and Kashmir. The Act operates subject to the provisions of Sections 31 and 32 of the Reserve Bank of India Act, 1934.

Section 31 of the Reserve Bank of India Act provides that no person in ,India other than the Bank or as expressly authorised by this Act, the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand. This Section further provides that no one except the RBI or the Central Government can make or issue a promissory note expressed to be payable or demand or after a certain time.

Section 32 of the Reserve Bank of India Act makes issue of such bills or notes punishable with fine which may extend to the amount of the instrument. The effect or the consequences of these provisions are :

1. A promissory note cannot be made payable to the bearer, no matter whether it is payable on demand or after a certain time.
2. A bill of exchange cannot be made payable to the bearer on demand though it can be made payable to the bearer after a certain time.
3. But a cheque {though a bill of exchange} payable to bearer or demand can be drawn on a person's account with a banker.

3.2 NEGOTIBLE INSTRUMENT ACT 1881

3.2.1 Definition of Negotiable Instruments

According to Section 13 (a) of the Act, "Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer, whether the word "order" or " bearer" appear on the instrument or not."

Notes

In the words of Justice, Willis, "A negotiable instrument is one, the property in which is acquired by anyone who takes it bonafide and for value notwithstanding any defects of the title in the person from whom he took it".

Thus, the term, negotiable instrument means a written document which creates a right in favour of some person and which is freely transferable. Although the Act mentions only these three instruments (such as a promissory note, a bill of exchange and cheque), it does not exclude the possibility of adding any other instrument which satisfies the following two conditions of negotiability :

1. the instrument should be freely transferable (by delivery or by endorsement. and delivery) by the custom of the trade; and
2. the person who obtains it in good faith and for value should get it free from all defects, and be entitled to recover the money of the instrument in his own name.

As such, documents like share warrants payable to bearer, debentures payable to bearer and dividend warrants are negotiable instruments. But the money orders and postal orders, deposit receipts, share certificates, bill of lading, dock warrant, etc. are not negotiable instruments. Although they are transferable by delivery and endorsements, yet they are not able to give better title to the bonafide transferee for value than what the transferor has.

3.2.2 Characteristics of A Negotiable Instruments

A negotiable instrument has the following characteristics :

1. Property : The possessor of the negotiable instrument is presumed to be the owner of the property contained therein. A negotiable instrument does not merely give possession of the instrument but right to property also. The property in a negotiable instrument can be transferred without any formality. In the case of bearer instrument, the property passes by mere delivery to the transferee. In the case of an order instrument, endorsement and delivery are required for the transfer of property.

2. Title : The transferee of a negotiable instrument is known as 'holder in due course.' A bona fide transferee for value is not affected by any defect of title on the part of the transferor or of any of the previous holders of the instrument.

3. Rights : The transferee of the negotiable instrument can sue in his own name, in case of dishonour A negotiable instrument can be transferred any number of times till it is at maturity. The holder of the instrument need not give notice of transfer to the party liable on the instrument to pay.

4. Presumptions : Certain presumptions apply to all negotiable instruments e.g., a presumption that consideration has been paid under it. It is not necessary to write in a promissory note the words 'for value received' or similar expressions because the payment of consideration is presumed. The words are usually included to create additional evidence of consideration.

5. Prompt payment : A negotiable instrument enables the holder to expect prompt payment because a dishonour means the ruin of the credit of all persons who are parties to the instrument.

3.3 KINDS OF NEGOTIABLE INSTRUMENTS

Notes

(a) Negotiable instruments recognised by statute are :
  (i) Promissory notes
  (ii) Bills of exchange
  (iii) Cheques

(b) Negotiable instruments recognised by usage or custom are :
  (i) Hundis
  (ii) Share warrants
  (iii) Dividend warrants
  (iv) Bankers draft
  (v) Circular notes
  (vi) Bearer debentures
  (vii) Debentures of Bombay Port Trust
  (viii) Railway receipts
  (ix) Delivery orders.

This list of negotiable instrument is not a closed chapter. With the growth of commerce, new kinds of securities may claim recognition as negotiable instruments. The courts in India usually follow the practice of English courts in according the character of negotiability to other instruments.

3.3.1 Promissory Notes

Section 4 of the Act defines, "A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments." Essential elements An instrument to be a promissory note must possess the following elements :

1. It must be in writing : A mere verbal promise to pay is not a promissory note. The method of writing (either in ink or pencil or printing, etc.) is unimportant, but it must be in any form that cannot be altered easily.

2. It must certainly an express promise or clear understanding to pay : There must be an express undertaking to pay. A mere acknowledgment is not enough. The following are not promissory notes as there is no promise to pay.

If A writes :

(a) "Mr. B, I.O.U. (I owe you) Rs. 500"

(b) "I am liable to pay you Rs. 500".

(c) "I have taken from you Rs. 100, whenever you ask for it have to pay".

The following will be taken as promissory notes because there is an express promise to pay :

If A writes:

(a) "I promise to pay B or order Rs. 500"

Notes

(b) "I acknowledge myself to be indebted to B in Rs. 1000 to be paid on demand, for the value received".

3. Promise to pay must be unconditional : A conditional undertaking destroys the negotiable character of an otherwise negotiable instrument. Therefore, the promise to pay must not depend upon the happening of some outside contingency or event. It must be payable absolutely.

4. It should be signed by the maker : The person who promise to pay must sign the instrument even though it might have been written by the promisor himself. There are no restrictions regarding the form or place of signatures in the instrument. It may be in any part of the instrument. It may be in pencil or ink, a thumb mark or initials. The pronote can be signed by the authorised agent of the maker, but the agent must expressly state as to on whose behalf he is signing, otherwise he himself may be held liable as a maker. The only legal requirement is that it should indicate with certainty the identity of the person and his intention to be bound by the terms of the agreement.

5. The maker must be certain : The note self must show clearly who is the person agreeing to undertake the liability to pay the amount. In case a person signs in an assumed name, he is liable as a maker because a maker is taken as certain if from his description sufficient indication follows about his identity. In case two or more persons promise to pay, they may bind themselves jointly or jointly and severally, but their liability cannot be in the alternative.

6. The payee must be certain : The instrument must point out with certainty the person to whom the promise has been made. The payee may be ascertained by name or by designation. A note payable to the maker himself is not pronate unless it is indorsed by him. In case, there is a mistake in the name of the payee or his designation; the note is valid, if the payee can be ascertained by evidence. Even where the name of a dead person is entered as payee in ignorance of his death, his legal representative can enforce payment.

7. The promise should be to pay money and money only : Money means legal tender money and not old and rare coins. A promise to deliver paddy either in the alternative or in addition to money does not constitute a promissory note.

8. The amount should be certain : One of the important characteristics of a promissory note is certainty not only regarding the person to whom or by whom payment is to be made but also regarding the amount. However, paragraph 3 of Section 5 provides that the sum does not become indefinite merely because

(a) there is a promise to pay amount with interest at a specified rate.

(b) the amount is to be paid at an indicated rate of exchange.

(c) the amount is payable by installments with a condition that the whole balance shall fall due for payment on a default being committed in the payment of anyone installment.

9. Other formalities : The other formalities regarding number, place, date, consideration etc. though usually found given in the promissory notes but

are not essential in law. The date of instrument is not material unless the amount is made payable at a certain time after date. Even in such a case, omission of date does not invalidate the instrument and the date of execution can be independently ascertained and proved.

Specimen of Promissory Notes

Rs. 1000	Delhi August 30, 2003
On demand (or six month after date) I promise to pay Peter or order the sum of rupees one thousand with interest at 8 per cent per annum until payment.	
Drucker is the maker and Peter is the Payee	Stamp Sd. by Drucker

Notes

3.3.2 Bill of Exchange

Section 5 of the Act defines, "A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument".

A bill of exchange, therefore, is a written acknowledgement of the debt, written by the creditor and accepted by the debtor. There are usually three parties to a bill of exchange drawer, acceptor or drawee and payee. Drawer himself may be the payee.

Essential conditions of a bill of exchange :

1. It must be in writing.
2. It must be signed by the drawer.
3. The drawer, drawee and payee must be certain.
4. The sum payable must also be certain.
5. It should be properly stamped.
6. It must contain an express order to pay money and money alone.

For example, In the following cases, there is no order to pay, but only a request to pay. Therefore, none can be considered as a bill of exchange:

(a) "I shall be highly obliged if you make it convenient to pay Rs. 1000 to Suresh".

(b) "Mr. Ramesh, please let the bearer have one thousand rupees, and place it to my account and oblige".

However, there is an order to pay, though it is politely made, in the following examples :

(a) "Please pay Rs. 500 to the order of 'A'.

(b) 'Mr. A will oblige Mr. C, by paying to the order of' P".

7. The order must be unconditional.

Notes

Distinction Between Bill of Exchange and Promissory Note :

1. Number of parties : In a promissory note there are only two parties – the maker (debtor) and the payee (creditor). In a bill of exchange, there are three parties; drawer, drawee and payee; although any two out of the three may be filled by one and the same person.

2. Payment to the maker : A promissory note cannot be made payable the maker himself, while in a bill of exchange to the drawer and payee or drawee and payee may be same person.

3. Unconditional promise : A promissory note contains an unconditional promise by the maker to pay to the payee or his order, whereas in a bill of exchange, there is an unconditional order to the drawee to pay according to the direction of the drawer.

4. Prior acceptance : A note is presented for payment without any prior acceptance by the maker. A bill of exchange is payable after sight must be accepted by the drawee or someone else on his behalf, before it can be presented for payment.

5. Primary or absolute liability : The liability of the maker of a promissory note is primary and absolute, but the liability of the drawer of a bill of exchange is secondary and conditional.

6. Relation : The maker of the promissory note stands in immediate relation with the payee, while the maker or drawer of an accepted bill stands in immediate relations with the acceptor and not the payee.

7. Protest for dishonour : Foreign bill of exchange must be protested for dishonour when such protest is required to be made by the law of the country where they are drawn, but no such protest is needed in the case of a promissory note.

8. Notice of dishonour : When a bill is dishonoured, due notice of dishonour is to be given by the holder to the drawer and the intermediate indorsers, but no such notice need be given in the case of a note.

Classification of Bills

Bills can be classified as :

1. Inland and foreign bills.
2. Time and demand bills.
3. Trade and accommodation bills.

1. Inland and Foreign Bills Inland bill : A bill is, named as an inland bill if :

(a) it is drawn in India on a person residing in India, whether payable in or outside India, or

(b) it is drawn in India on a person residing outside India but payable in India.

The following are the Inland bills :

(i) A bill is drawn by a merchant in Delhi on a merchant in Madras. It is payable in Bombay. The bill is an inland bill.

(ii) A bill is drawn by a Delhi merchant on a person in London, but is made payable in India. This is an inland bill.

(iii) A bill is drawn by a merchant in Delhi on a merchant in Madras. It is accepted for payment in Japan. The bill is an inland bill. Specimen of Inland Bill of is :

Rs. 1000 Delhi
August 30,2003

Stamp

Three months after date pay William or order the sum of one thousand rupees only for value received.

To.

R.C. Patel

Park Street

Bombay Simon

(Here Simon is the drawer, William is the payee and R.K. Gupta the drawee who, on testifying his willingness to pay by 'accepting" the bill, becomes acceptor.)

Foreign Bill : A bill which is not an inland bill is a foreign bill. The following are the foreign bills :

1. A bill drawn outside India and made payable in India.
2. A bill drawn outside India on any person residing outside India.
3. A bill drawn in India on a person residing outside India and made payable outside India.
4. A bill drawn outside India on a person residing in India.
5. A bill drawn outside India and made payable outside India.

Specimen of foreign bills

London
August 30,2003

Stamp

Sixty days after sight of the first of Exchange (second and third of same tenor and date unpaid) pay to the order of Messers Hindustan Liver Ltd. Mumbai, the sum of Rupees Five thousand only, value received Rs. 5000

Messers Willian Jack & Co.

Lamigton Road

Mumbai Hindu

Bills in sets (Secs. 132 and 133) : The foreign bills are generally drawn in sets of three, and each sets is termed as a 'via'.

Notes

As soon as anyone of the set is paid, the others becomes inoperative. These bills are drawn in different parts. They are drawn in order to avoid their loss or miscarriage during transit. Each part is despatched separately. To avoid delay, all the parts are sent on the same day; by different mode of conveyance.

Rules : Sections 132 and 133 provide for the following rules :

(i) A bill of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the others remain unpaid. All parts make one bill and the entire bill is extinguished, i.e. when payment is made on one part- the other parts will become inoperative (Section 132).

(ii) The drawer should sign and deliver all the parts but the acceptance is to be conveyed only on one of the parts. In case a person accepts or endorses different parts of the bill in favour of different persons, he and the subsequent endorsers of each part are liable on such part as if it were a separate bill (Sec. 132).

(iii) As between holders in due course of the different parts of the same bill, he who first acquired title to anyone part is entitled to the other parts and is also entitled to claim the money represented by bill (Sec. 133).

Specimen of a Bill in Sets (First Copy)

2. Time and Demand Bill

Rs. 10000	London August 30,2003
Sixty days after sight of the first of Exchange (second and third of same tenor and date unpaid) pay to the order of Ms Whiteway & Co. Mumbai, the sum of Rupees ten thousand only, value received	
To M/s Henry Flint & Brothers Church gate Mumbai	

Time bill : A bill payable after a fixed time is termed as a time bill. In other words, bill payable "after date" is a time bill.

Demand bill : A bill payable at sight or on demand is termed as a demand bill.

3. Trade and Accommodation Bill Trade bill : A bill drawn and accepted for a genuine trade transaction is termed as a "trade bill".

Accommodation bill : A bill drawn and accepted not for a genuine trade transaction but only to provide financial help to some party is termed as an "accommodation bill".

Example : A, is need of money for three months. He induces his friend B to accept a bill of exchange drawn on him for Rs. 1,000 for three months. The bill is drawn and accepted. The bill is an "accommodation bill". A may get the

bill discounted from his bankers immediately, paying a small sum as discount. Thus, he can use the funds for three months and then just before maturity he may remit the money to B, who will meet the bill on maturity.

In the above example A is the "accommodated party" while B is the "accommodating party".

It is to be noted that an recommendation bill may be for accommodation of both the drawer arid acceptor.

Notes

In such a case, they share the proceeds of the discounted bill. Rules regarding accommodation bills are :

(i) In case the patty accommodated continues to hold the bill till maturity, the accommodating party shall not be liable to him for payment of, the bill since the contract between them is not based on any consideration (Section 43).

(ii) But the accommodating party shall be liable to any subsequent holder for value who may be knowing the exact position that the bill is an accommodation bill and that the full consideration has not been received by the acceptor. The accommodating party can, in turn, claim compensation from the accommodated party for the amount it has been asked to pay the holder for value.

(iii) An accommodation bill may be negotiated after maturity. The holder or such a bill after maturity is in the same position as a holder before maturity, provided he takes it in good faith and for value (Sec. 59)

In form and all other respects an accommodation bill is quite similar to an ordinary bill of exchange. There is nothing on the face of the accommodation bill to distinguish it from an ordinary trade bill.

3.3.3 Cheques

Section 6 of the Act defines "A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand".

A cheque is bill of exchange with two more qualifications, namely, (i) it is always drawn on a specified banker, and (ii) it is always payable on demand. Consequently, all cheque are bill of exchange, but all bills are not cheque. A cheque must satisfy all the requirements of a bill of exchange; that is, it must be signed by the drawer, and must contain an unconditional order on a specified banker to pay a certain sum of money to or to the order of a certain person or to the bearer of the cheque. It does not require acceptance.

Distinction Between Bills of Exchange and Cheque

1. A bill of exchange is usually drawn on some person or firm, while a cheque is always drawn on a bank.
2. It is essential that a bill of exchange must be accepted before its payment can be claimed A cheque does not require any such acceptance.
3. A cheque can only be drawn payable on demand, a bill may be also drawn payable on demand, or on the expiry of a certain period after date or sight.

Notes

4. A grace of three days is allowed in the case of time bills while no grace is given in the case of a cheque.
5. The drawer of the bill is discharged from his liability, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presenting the cheque for payment.
6. Notice of dishonour of a bill is necessary, but no such notice is necessary in the case of cheque.
7. A cheque may be crossed, but not needed in the case of bill.
8. A bill of exchange must be properly stamped, while a cheque does not require any stamp.
9. A cheque drawn to bearer payable on demand shall be valid but a bill payable on demand can never be drawn to bearer.
10. Unlike cheques, the payment of a bill cannot be countermanded by the drawer.

Hundis : A "Hundi" is a negotiable instrument written in an oriental language. The term hundi includes all indigenous negotiable instrument whether they be in the form of notes or bills. The word 'hundi' is said to be derived from the Sanskrit word 'hundi', which means "to collect".

They are quite popular among the Indian merchants from very old days. They are used to finance trade and commerce and provide a fascile and sound medium of currency and credit.

Hundis are governed by the custom and usage of the locality in which they are intended to be used and not by the provision of the Negotiable Instruments Act. In case there is no customary rule known as to a certain point, the court may apply the provisions of the Negotiable Instruments Act. It is also open to the parties to expressly exclude the applicability of any custom relating to hundis by agreement.

Parties To Negotiable Instruments

Parties to Bill of Exchange :

1. **Drawer :** The maker of a bill of exchange is called the 'drawer'.
2. **Drawee :** The person directed to pay the money by the drawer is called the "drawee',.
3. **Acceptor :** After a drawee of a bill has signed his assent upon the bill, or if there are more parts than one, upon one of such pares and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the ' acceptor'.
4. **Payee :** The person named in the instrument, to whom or to whose order the money is directed to be paid by the instrument is called the 'payee'. He is the real beneficiary under the instrument. Where he signs his name and makes the instrument payable to some other person, that other person does not become the payee.
5. **Indorser :** When the holder transfers or indorses the instrument to anyone else, the holder becomes the 'indorser'.

6. **Indorsee :** The person to whom the bill is indorsed is called an 'indorsee'.
7. **Holder :** A person who is legally entitled to the possession of the negotiable instrument in his own name and to receive the amount thereof, is called a 'holder'. He is either the original payee, or the indorsee. In case the bill is payable to the bearer, the person in possession of the negotiable instrument is called the 'holder'.
8. **Drawee in case of need :** When in the bill or in any endorsement, the name of any person is given, in addition to the drawee, to be resorted to in case of need, such a person is called 'drawee in case of need'. In such a case it is obligatory on the part of the holder to present the bill to such a drawee in case the original drawee refuses to accept the bill. The bill is taken to be dishonoured by non-acceptance or for nonpayment, only when such a drawee refuses to accept or pay the bill.
9. **Acceptor for honour :** In case the original drawee refuses to accept the bill or to furnish better security when demanded by the notary, any person who is not liable on the bill, may accept it with the consent of the holder, for the honour of any party liable on the bill. Such an acceptor is called 'acceptor for honour.

Parties to a Promissory Note :

1. Maker. He is the person who promises to pay the amount stated in the note. He is the debtor.
2. Payee. He is the person to whom the amount is payable i.e. the creditor.
3. Holder. He is the payee or the person to whom the note might have been indorsed.
4. The indorser and indorsee (the same as in the case of a bill).

Parties to a Cheque :

1. Drawer. He is the person who draws the cheque, i.e., the depositor of money in the bank.
2. Drawee. It is the drawer's banker on whom the cheque has been drawn.
3. Payee. He is the person who is entitled to receive the payment of the cheque.
4. The holder, indorser and indorsee (the same as in the case of a bill or note)

3.3.4 Holder In Due Course

Holder : The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

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Section 9 of the Act defines 'holder in due course' as any person who (i) for valuable consideration, (ii) becomes the possessor of a negotiable instrument payable to bearer or the indorsee or payee thereof, (iii) before the amount mentioned in the document becomes payable, and (iv) without having sufficient cause to believe that any defect existed in the title of the person from whom he derives his title. (English law does not regard payee as a holder in due course).

The essential qualification of a holder in due course may, therefore, be summed up as follows :

1. He must be a holder for valuable consideration. Consideration must not be void or illegal, e.g. a debt due on a wagering agreement. It may, however, be inadequate. A donee, who acquired title to the instrument by way of gift, is not a holder in due course, since there is no consideration to the contract. He cannot maintain any action against the debtor on the instrument. Similarly, money due on a promissory note executed in consideration of the balance of the security deposit for the lease of a house taken for immoral purposes cannot be recovered by a suit.

2. He must have become a holder (passessor) before the date of maturity of the negotiable instrument. Therefore, a person who takes a bill or promissory note on the day on which it becomes payable cannot claim rights of a holder in due course because he takes it after it becomes payable, as the bill or note can be discharged at any time on that day.

3. He must have become holder of the negotiable instrument in good faith. Good faith implies that he should not have accepted the negotiable instrument after knowing about any defect in the title to the instrument. But, notice of defect in the title received subsequent to the acquisition of the title will not affect the rights of a holder in due course. Besides good faith, the Indian Law also requires reasonable care on the part of the holder before he acquires title of the negotiable instrument. He should take the instrument without any negligence on his part.

Reasonable care and due caution will be the proper test of his bona fides. It will not be enough to show that the holder acquired the instrument honestly, if in fact, he was negligent or careless. Under conditions of sufficient indications showing the existence of a defect in the title of the transferor, the holder will not become a holder in due course even though he might have taken the instrument without any suspicion or knowledge.

Example : (i) A bill made out by pasting together pieces of a tom bill taken without enquiry will not make the holder, a holder in due course. It was sufficient to show the intention to cancel the bill. A bill should not be taken without enquiry if suspicion has been aroused.

(ii) A post-dated cheque is not irregular. It will not preclude a bonafide purchase instrument from claiming the rights of a holder in due course. It is to be noted that it is the notice of the defect in the title of his immediate transferor which deprives a person from claiming the right of a holder in due course. Notice of defect in the title of any prior party does not affect the title of the holder.

4. A holder in due course must take the negotiable instrument complete and regular on the face of it.

Privileges of a holder in due course :

1. Instrument purged of all defects : A holder in due course who gets the instrument in good faith in the course of its currency is not only himself protected against all defects of title of the person from whom he has received it, but also serves, as a channel to protect all subsequent holders. A holder in due course can recover the amount of the instrument from all previous parties although, as a matter of fact, no consideration was paid by some of the previous parties to instrument or there was a defect of title in the party from whom he took it. Once an instrument passes through the hands of a holder in due course, it is purged of all defects.

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It is like a current coin. Who-so-ever takes it can recover the amount from all parties previous to such holder (Sec. 53). It is to be noted that a holder in due course can purify a defective title but cannot create any title unless the instrument happens to be a bearer one.

Examples :

(i) A obtains Bs acceptance to a bill by fraud. A indorses it to C who takes it as a holder in due course. The instrument is purged of its defects and C gets a good title to it. In case C indorses it to some other person he will also get a good title to it except when he is also a party to the fraud played by A.

(ii) A bill is payable to "A or order". It is stolen from A and the thief forges A's signatures and indorses it to B who takes it as a holder in due course. B cannot recover the money. It is not a case of defective title but a case where title is absolutely absent. The thief does not get any title therefore, cannot transfer any title to it.

(iii) A bill of exchange payable to bearer is stolen. The thief delivers it to B, a holder in due course. B can recover the money of the bill.

2. Rights not affected in case of an inchoate instrument : Right of a holder in due course to recover money is not at all affected even though the instrument was originally an inchoate stamped instrument and the transferor completed the instrument for a sum greater than what was intended by the maker. (Sec. 20)

3. All prior parties liable : All prior parties to the instrument (the maker or drawer, acceptor and intervening indorers) continue to remain liable to the holder in due course until the instrument is duty satisfied. The holder in due course can file a suit against the parties liable to pay, in his own name (Sec. 36)

4. Can enforce payment of a fictitious bill : Where both drawer and payee of a bill are fictitious persons, the acceptor is liable on the bill to a holder in due course. If the latter can show that the signature of the supposed drawer and the first indorser are in the same hand, for the bill being payable to the drawer's order the fictitious drawer must indorse the bill before he can negotiate it. (Sec. 42).

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5. No effect of conditional delivery : Where negotiable instrument is delivered conditionally or for a special purpose and is negotiated to a holder in due course, a valid delivery of it is conclusively presumed and he acquired good title to it. (Sec. 46).

Example : A, the holder of a bill indorses it "B or order" for the express purpose that B may get it discounted. B does not do so and negotiates it to C, a holder in due course. D acquires a good title to the bill and can sue all the parties on it.

6. No effect of absence of consideration or presence of an unlawful consideration : The plea of absence of or unlawful consideration is not available against the holder in due course. The party responsible will have to make payment (Sec. 58).

7. Estoppel against denying original validity of instrument : The plea of original invalidity of the instrument cannot be put forth, against the holder in due course by the drawer of a bill of exchange or cheque or by an acceptor for the honour of the drawer. But where the instrument is void on the face of it e.g. promissory note made payable to "bearer", even the holder in due course cannot recover the money. Similarly, a minor cannot be prevented from taking the defence of minority. Also, there is no liability if the signatures are forged. (Sec. 120).

8. Estoppel against denying capacity of the payee to indorsee : No maker of promissory note and no acceptor of a bill of exchange payable to order shall, in a suit therein by a holder in due course, be permitted to resist the claim of the holder in due course on the plea that the payee had not the capacity to indorse the instrument on the date of the note as he was a minor or insane or that he had no legal existence (Sec 121)

9. Estoppel against indorser to deny capacity of parties : An indorser of the bill by his endorsement guarantees that all previous endorsements are genuine and that all prior parties had capacity to enter into valid contracts. Therefore, he on a suit thereon by the subsequent holder, cannot deny the signature or capacity to contract of any prior party to the instrument.

Dishonour of A Negotiable Instrument

When a negotiable instrument is dishonoured, the holder must give a notice of dishonour to all the previous parties in order to make them liable. A negotiable instrument can be dishonoured either by nonacceptance or by non-payment. A cheque and a promissory note can only be dishonoured by non-payment but a bill of exchange can be dishohoured either by non-acceptance or by non-payment.

Dishonour by non-acceptance (Section 91) : A bill of exchange can be dishonoured by non-acceptance in the following ways :

1. If a bill is presented to the drawee for acceptance and he does not accept it within 48 hours from the time of presentment for acceptance. When there are several drawees even if one of them makes a default in

acceptance, the bill is deemed to be dishonoured unless these several drawees are partners. Ordinarily when there are a number of drawees all of them must accept the same, but when the drawees are partners acceptance by one of them means acceptance by all.

2. When the drawee is a fictitious person or if he cannot be traced after reasonable search.
3. When the drawee is incompetent to contract, the bill is treated as dishonoured.
4. When a bill is accepted with a qualified acceptance, the holder may treat the bill of exchange having been dishonoured.
5. When the drawee has either become insolvent or is dead.
6. When presentment for acceptance is excused and the bill is not accepted. Where a drawee in case of need is named in a bill or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

Dishonour by non-payment (Section 92)

A bill after being accepted has got to be presented for payment on the date of its maturity. If the acceptor fails to make payment when it is due, the bill is dishonoured by non-payment. In the case of a promissory note if the maker fails to make payment on the due date the note is dishonoured by non-payment. A cheque is dishonoured by non-payment as soon as a banker refuses to pay.

An instrument is also dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid (Sec 76).

Effect of dishonour : When a negotiable instrument is dishonoured either by non acceptance or by non-payment, the other parties thereto can be charged with liability. For example if the acceptor of a bill dishonours the bill, the holder may bring an action against the drawer and the indorsers. There is a duty cast upon the holder towards those whom he wants to make liable to give notice of dishonour to them.

Notice of dishonour : Notice of dishonour means the actual notification of the dishonour of the instrument by non-acceptance or by non-payment. When a negotiable instrument is refused acceptance or payment notice of such refusal must immediately be given to parties to whom the holder wishes to make liable. Failure to give notice of the dishonour by the holder would discharge all parties other than the maker or the acceptor (Sec. 93).

Notice by whom : Where a negotiable instrument is dishonoured either by non- acceptance or by non-payment, the holder of the instrument or some party to it who is liable thereon must give a notice of dishonour to all the prior parties whom he wants to make liable on the instrument (Section 93). The agent of any such party may also be given notice of dishonour. A notice given by a stranger is not valid. Each party receiving notice of dishonour must, in order to render any prior party liable give notice of dishonour to such party within a reasonable time after he has received it. (Sec. 95).

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When an instrument is deposited with an agent for presentment and is dishonoured, he may either himself give notice to the parties liable on the instrument or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder. The principal, too, in his turn has the same time for giving notice as if the agent is an independent holder. (Sec. 96)

Notice to whom ?

Notice of dishonour must be given to all parties to whom the holder seeks to make liable. No notice need be given to a maker, acceptor or drawee, who are the principal debtors (Section 93). Notice of dishonour may be given to an endorser. Notice of dishonour may be given to a duly authorised agent of the person to whom it is required to be given. In case of the death of such a person, it may be given to his legal representative. Where he has been declared insolvent the notice may be given to him or to his official assignee (Section 94). Where a party entitled to a notice of dishonour is dead, and notice is given to him in ignorance of his death, it is sufficient (Section 97).

Mode of notice : The notice of dishonour may be oral or written or partly oral and partly written. It may be sent by post. It may be in any form but it must inform the party to whom it is given either in express terms or by reasonable intendment that the instrument has been dishonoured and in what way it has been dishonoured and that the person served with the notice will be held liable thereon.

What is reasonable time ?

It is not possible to lay down any hard and fast rule for determining what is reasonable time. In determining what is reasonable time, regard shall be had to the nature of the instrument, the usual course the dealings with respect to similar instrument, the distance between the parties and the nature of communication between them. In calculating reasonable time, public holidays shall be excluded (Section 105)

Section 106 lays down two different rules for determining reasonable time in connection with the notice of disnonour

(a) when the holder and the party to whom notice is due carry on business or live in different places,

(b) when the parties live or carry on business in the same place. In the first case the notice of dishonour must be dispatched by the next post or on the day next after the day of dishonour. In the second case the notice of dishonour should reach its destination on the day next after dishonour.

Place of notice : The place of business or (in case such party has no place of business) at the residence of the party for whom it is intended, is the place where the notice is to given. If the person who is to give the notice does not know the address of the person to whom the notice is to be given, he must make reasonable efforts to find the latter's address. But if the party entitled to the notice cannot after due search be found, notice of dishonour is dispensed with.

Duties of the holder upon dishonour :

1. Notice of dishonour : When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment the holder must give notice of dishonour to all the parties to the instrument whom he seeks to make liable thereon. (Sec. 93)

2. Noting and protesting : When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument or upon a paper attached thereto or partly upon each (Sec. 99). The holder may also within a reasonable time of the dishonour of the note or bill, get the instrument protested by notary public (Sec. 100).

3. Suit for money : After the formality of noting and protesting is gone through, the holder may bring a suit against the parties liable for the recovery of the amount due on the instrument. Instrument acquired after dishonour: The holder for value of a negotiable instrument as a rule, is not affected by the defect of title in his transferor. But this rule is subject to two important exceptions (i) when the holder acquires it after maturity and (ii) when he acquires it with notice of dishonour.

The holder of a negotiable instrument who acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transfer. (Sec. 59).

3.4 NEGOTIATION

Negotiation may be defined as the process by which a third party is constituted the holder of the instrument so as to entitle him to the possession of the same and to receive the amount due thereon in his own name. According to section 14 of the Act, 'when a promissory note, bill of exchange or cheque is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated.' The main purpose and essence of negotiation is to make the transferee of a promissory note, a bill of exchange or a cheque the holder there of.

Negotiation thus requires two conditions to be fulfilled, namely :

1. There must be a transfer of the instrument to another person; and
2. The transfer must be made in such a manner as to constitute the transferee the holder of the instrument. Handing over a negotiable instrument to a servant for safe custody is not negotiation; there must be a transfer with an intention to pass title.

3.4.1 Modes of Negotiation

Negotiation may be effected in the following two ways :

1. Negotiation by delivery (Sec. 47) : Where a promissory note or a bill of exchange or a cheque is payable to a bearer, it may be negotiated by delivery

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thereof. Example: A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep it for B. The instrument has been negotiated.

2. Negotiation by endorsement and delivery (Sec. 48) : A promissory note, a cheque or a bill of exchange payable to order can be negotiated only be endorsement and delivery. Unless the holder signs his endorsement on the instrument and delivers it, the transferee does not become a holder. If there are more payees than one, all must endorse it.

3.4.2 Importance of Delivery in Negotiation

Delivery is a voluntary transfer of possession from one person to another. Delivery is essential to complete any contract on a negotiable instrument whether it be contract of making endorsement or acceptance. The property in the instrument does not pass unless the delivery is fully completed. Section 46 of the Act provides that a negotiable instrument is not made or accepted or endorsed unless it is delivered to a proper person. For instance, if a person signs a promissory note and keeps it with himself, he cannot be said to have made a promissory note; only when it is delivered to the payee that the promissory note is made.

Delivery may be actual or constructive. Delivery is actual when it is accompanied by actual change of possession of the instrument. Constructive delivery is effected without any change of actual possession.

3.5 PRESENTMENT

Presentment for acceptance : A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day.

In default of such presentment, no party thereto is liable thereon to the person making such default. If the drawee cannot, after reasonable search, be found, the bill is dishonoured. If the bill is directed to the drawee at a particular place, it must be presented at that place; and if at the due date for presentment he cannot, after reasonable search be found there, the till is dishonoured.

[Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.]

Presentment of promissory note for sight : A promissory note, payable at a certain period after sight, must be presented to the maker thereof for sight (if he can after reasonable search be found) by a person entitled to demand payment, within a reasonable time after it is made and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

Drawee's time for deliberation : The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee

[forty-eight] hours (exclusive of public holidays) to consider whether he will accept it.

Presentment for payment : Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties there to are not liable thereon to such holder.

Notes

[Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.]

Exception : Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof. Notwithstanding anything contained in section 6, where an electronic image of a truncated cheque is presented for payment, the drawee bank is entitled to demand any further information regarding the truncated cheque from the bank holding the truncated cheque in case of any reasonable suspicion about the genuineness of the apparent tenor of instrument, and if the suspicion is that of any fraud, forgery, tampering or destruction of the instrument, it is entitled to further demand the presentment of the truncated cheque itself for verification: Provided that the truncated cheque so demanded by the drawee bank shall be retained by it, if the payment is made accordingly.

Hours for presentment : Presentment for payment must be made during the usual hours of business, and, if at a banker's within banking hours.

Presentment for payment of instrument payable after date or sight : A promissory note or bill of exchange, made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

Presentment for payment of promissory note payable by instalments : A promissory note payable by instalments must be presented for payment on the third day after the date fixed for payment of each instalment; and non-payment on such presentment has the same effect as non-payment of a note at maturity.

Presentment for payment of instrument payable at specified place and not elsewhere : A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place.

Instrument payable at specified place : A promissory note or bill of exchange made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place.

Presentment where no exclusive place specified : A promissory note or bill of exchange, not made payable as mentioned in sections 68 and 69, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be.

Presentment when maker, etc., has no known place of business or residence : If the maker, drawee or acceptor of a negotiable instrument has no known place of business or fixed residence, and no place is specified in the

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instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found.

Presentment of cheque to charge drawer : [Subject to the provisions of section 84,] a cheque must, in order to charge the drawer be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer.

Presentment of cheque to charge any other person : A cheque must, in order to charge any person except the drawer, be presented within a reasonable time after delivery thereof by such person.

Presentment of instrument payable on demand : Subject to the provisions of section 31, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder.

Presentment by or to agent, representative of deceased, or assignee of insolvent : Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker or acceptor, as the case may be, or, where the drawee, maker or acceptor has died, to his legal representative, or, where he has been declared an insolvent, to his assignee.

[75A. Excuse for delay in presentment for acceptance or payment : Delay in presentment [for acceptance or payment] is excused if the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made within a reasonable time.]

When presentment unnecessary : No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases :

(a) if the maker, drawee or acceptor intentionally prevents the presentment of the instrument, or, if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or, if the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours, or, if the instrument not being payable at any specified place, he cannot after due search be found;

(b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment;

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented he makes a part payment on account of the amount due on the instrument, or promises to pay the amount due thereon in whole or in part, or otherwise waives his right to take advantage of any default in presentment for payment;

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

Liability of banker for negligently dealing with bill presented for payment : When a bill of exchange, accepted payable at a specified bank, has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss.

3.6 DISCHARGE FROM LIABILITY

Notes

The maker, acceptor or indorser respectively of a negotiable instrument is discharged from liability thereon :

1. by cancellation; to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder;
2. by release; to a holder thereof who otherwise discharges such maker, acceptor or indorser, and to all parties deriving title under such holder after notice of such discharge;
3. by payment ,to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor or indorser makes payment in due course of the amount due thereon.

(Section 83) Discharge by allowing drawee more than forty-eight hours to accept : If the holder of a bill of exchange allows the drawee more than forty-eight hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

(Section 84) When cheque not duly presented and drawer damaged thereby : Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. The holder of the cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him.

Illustrations

1. A draws a cheque for Rs. 1,000 and, when the cheque ought to be presented, has funds at the bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque.
2. A draws a cheque at Ambala on a bank in Calcutta. The bank fails before the cheque could be presented in ordinary course. A is not discharged, for he has not suffered actual damage through any delay in presenting the cheque.

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(Section 85) Cheque payable to order : Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course. Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

(Section 85A)– Drafts drawn by one branch of a bank on another payable to order : Where any draft, that is, an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course.

(Section 86) Parties not consenting discharged by qualified or limited acceptance : If the holder of a bill of exchange acquiesces in a qualified acceptance, or one limited to part of the sum mentioned in the bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance.

Explanations :

An acceptance is qualified :

1. where it is conditional, declaring the payment to be dependent on the happening, of an event therein stated;
2. where it undertakes the payment of part only of the sum ordered to be paid;
3. where no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere;
4. where it undertakes the payment at a time other than that at which under the order it would be legally due.

(Section 87) Effect of material alteration : Alteration by indorsee. Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties.

Alteration by indorsee. And any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86 and 125.

(Section 88) Acceptor or indorser bound notwithstanding previous alteration : An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument.

(Section 89) Payment of instrument on which alteration is not apparent :

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1. Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon; and such payment shall not be questioned by reason of the instrument having been altered or the cheque crossed.
2. Where the cheque is an electronic image of a truncated cheque, any difference in apparent tenor of such electronic image and the truncated cheque shall be a material alteration and it shall be the duty of the bank or the clearing house, as the case may be, to ensure the exactness of the apparent tenor of electronic image of the truncated cheque while truncating and transmitting the image.
3. Any bank or a clearing house which receives a transmitted electronic image of a truncated cheque, shall verify from the party who transmitted the image to it, that the image so transmitted to it and received by it, is exactly the same.

(Section 90) Extinguishment of rights of action on bill in acceptor's hands : If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.

3.7 NOTING AND PROTEST

When a negotiable instrument is dishonoured the holder may sue his prior parties i.e the drawer and the indorsers after he has given a notice of dishonour to them. The holder may need an authentic evidence of the fact that a negotiable instrument has been dishonoured. When a cheque is dishonoured generally the bank who refuses payment returns back the cheque giving reasons in writing for the dishonour of the cheque. Sections 99 and 100 provide convenient methods of authenticating the fact of dishonour of a bill of exchange and a promissory note by means of 'noting' and 'protest'.

3.7.1 Noting

As soon as a bill of exchange or a promissory note is dishonoured, the holder can after giving the parties due notice of dishonour, sue the parties liable thereon. Section 99 provides a mode of authenticating the fact of the bill having

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been dishonoured. Such mode is by noting the instrument. Noting is a minute recorded by a notary public on the dishonoured instrument or on a paper attached to such instrument. When a bill is to be noted, the bill is taken to a notary public who represents it for acceptance or payment as the case may be and if the drawee or acceptor still refuses to accept or pay the bill, the bill is noted as stated above.

Noting should specify in the instrument, (a) the fact of dishonour, (b) the date of dishonour, (c) the reason for such dishonour, if any (d) the notary's charges, (e) a reference to the notary's register and (f) the notary's initials.

Noting should be made by the notary within a reasonable time after dishonour. Noting and protesting is not compulsory but foreign bills must be protested for dishonour when such protest is required by the law of the place where they are drawn. Cheques do not require noting and protesting. Noting by itself has no legal effect. Still it has some advantages. If noting is done within a reasonable time protest may be drawn later on. Noting without protest is sufficient to allow a bill to be accepted for honour.

3.7.2 Protest

Protest is a formal certificate of the notary public attesting the dishonour of the bill by non-acceptance or by non-payment. After noting, the next step for notary is to draw a certificate of protest, which is a formal declaration on the bill or a copy thereof. The chief advantage of protest is that the court on proof of the protest shall presume the fact of dishonour.

Besides the protest for non-acceptance and for non-payment the holder may protest the bill for better security. When the acceptor of a bill becomes insolvent or suspends payment before the date of maturity, or when he absconds the holder may protest it in order to obtain better security for the amount due. For this purpose the holder may employ a notary public to make the demand on the acceptor and if refused, protest may be made. Notice of protest may be given to prior parties. When promissory notes and bills of exchange are required to be protested, notice of protest must be given instead of notice of dishonour. (Sec. 102)

Inland bills may or may not be protested. But foreign bills must be protested for dishonour when such protest is required by the law of the place where they are drawn (Sec. 104).

Where a bill is required to be protested under the Act within a specified time, it is sufficient if it is 'noted for protest' within such time. The formal protest may be given at anytime after the noting (Sec. 104A)

3.7.3 Contents of Protest

Section 101 of the Act lays down the contents of a regular and perfect protest which are as follows :

1. The instrument itself or a literal transcript of the instrument; and of everything written or printed thereupon.

2. The name of the person for whom and against whom the instrument has been protested.
3. The fact of and reasons for dishonour i.e. a statement that payment or acceptance or better security, as the case may be, has been demanded of such person by the notary public from the person concerned and he refused to give it or did not answer or that he could not be found.
4. The time and place of demand and dishonour.
5. The signature of the notary public.
6. In the case of acceptance for honour or payment for honour the person by whom or for whom such acceptance or payment was offered and effected.

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3.8 PRESUMPTIONS

Sections 118 and 119 of the Negotiable Instrument Act lay down certain presumptions which the court presumes in regard to negotiable instruments. In other words these presumptions need not be proved as they are presumed to exist in every negotiable instrument. Until the contrary is proved the following presumptions shall be made in case of all negotiable instruments :

1. Consideration : It shall be presumed that every negotiable instrument was made drawn, accepted or endorsed for consideration. It is presumed that, consideration is present in every negotiable instrument until the contrary is presumed. The presumption of consideration, however may be rebutted by proof that the instrument had been obtained from, its lawful owner by means of fraud or undue influence.

2. Date : Where a negotiable instrument is dated, the presumption is that it has been made or drawn on such date, unless the contrary is proved.

3. Time of acceptance : Unless the contrary is proved, every accepted bill of exchange is presumed to have been accepted within a reasonable time after its issue and before its maturity. This presumption only applies when the acceptance is not dated; if the acceptance bears a date, it will prima facie be taken as evidence of the date on which it was made.

4. Time of transfer : Unless the contrary is presumed it shall be presumed that every transfer of a negotiable instrument was made before its maturity.

5. Order of endorsement : Until the contrary is proved it shall be presumed that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.

6. Stamp : Unless the contrary is proved, it shall be presumed that a lost promissory note, bill of exchange or cheque was duly stamped.

7. Holder in due course : Until the contrary is proved, it shall be presumed that the holder of a negotiable instrument is the holder in due course. Every holder of a negotiable instrument is presumed to have paid consideration for it and to have taken it in good faith. But if the instrument was obtained from its

lawful owner by means of an offence or fraud, the holder has to prove that he is a holder in due course.

8. Proof of protest : Section 119 lays down that in a suit upon an instrument which has been dishonoured, the court shall on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

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3.9 CROSSING OF CHEQUE

There are serious risks associated with payments to the wrong person. These risks can be avoided by giving the paying banker a clear direction about the person to whom the cheque is to be paid by specifying certain words on the cheque itself. This is crossing of a cheque. "Crossing is an instruction given to the paying banker to pay the amount of the cheque through a banker only and not directly to the person presenting it at the counter." The Negotiable Instruments Act, 1881, sets out in Section 123 – 131 the provisions concerning the crossing of cheques.

Section 6 of the Negotiable Instruments Act, 1881 : The term cheque is defined as "A bill of exchange drawn on a banker specified and not expressed to be payable other than on request." To understand this definition clearly, however, it is important that we also consider how an exchange bill was defined in accordance with the Act.

Section 5 of the Negotiable Instruments Act, 1881 : "Bill of exchange is a written instrument containing an unconditional order signed by the manufacturer that directs a certain person to pay a certain amount of money only to, or to, a certain person or to the instrument holder."

What is Crossing of Cheques ?

- Cheque crossing is recognized in the Negotiable Instruments Act of 1881.
- Crossing a cheque means drawing two parallel transverse lines between the lines on the cheque with or without additional words such as "& CO." or "Account Payee" or "Not Negotiable."

Why Cross a Cheque ?

- **Minimizing the risk :** The crossing of the cheque gives the paying banker instructions to pay the amount only through the banker and not directly to the payee or holder presenting the amount at the counter. It is an effective way to minimize the risk of loss or falsification.
- **Paying instructions :** Crossing is a way for the paying banker to generally pay the money to a bank or to a particular bank, as applicable.
- **Payment through the bank :** Only a banker can secure the payment of a crossed cheque, which makes it easy for the holder to present it with a quarter of the respectability and credit that is known. By using a crossed cheque, you can ensure that the specified amount cannot be cashed but can only be credited to the bank account of the payee.

- **The receiver of the amount :** As only a banker secures the payment of a crossed cheque, the money received can easily be traced for whose use.
- **Negotiability :** Merely a cheque crossing does not affect its negotiability.

Who is authorized to Cross a Cheque ?

Notes

In accordance with the Sec. 125 of the Negotiable Instruments Act, the following persons are authorized to cross the cheque, apart from the drawer :

The Holder

- The holder of a cheque is authorized to cross a cheque, either in general or in particular if the cheque is not crossed.
- He is also entitled to cross a cheque, especially if the same is generally crossed.
- He can also add the words "non- negotiable" to crossed cheques in general and in particular.

The Banker

- The banker in whose favour a cheque is crossed in particular can also cross it in favour of another banker or his agent for collection purposes. Such a crossing is called Special Double-crossing.

Different Types of Crossing of Cheque

A crossing of cheques is basically of 2 types :

- General Crossing
- Special Crossing of cheques.

General Crossing : Section 123 of the Negotiable Instruments Act deals with the general crossing of cheque, In the following cases, a cheque is generally considered to be crossed :

- If two parallel transverse lines are marked across the cheque face.
- If the cheque has an abbreviation "& C" between the two parallel transverse lines.
- If the cheque is written between the two parallel lines, the words "Not Negotiable".
- When the cheque comes with the words "A / C. Payee" between the two parallel transverse lines.

Implications of General Crossing

- The effect of the general crossing is that any other banker must submit such a cheque to the paying banker.
- Payment can only be made by bank account and should not be made at the bank's payment counter.
- The banker then credits the cheque amount to either the owner of the cheque or the payee 's account.

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Special Crossing

According to section 124 of the Negotiable instruments Act,

- For a cheque to be deemed to have been crossed, the banker's name had to be added across the face of the cheque.
- In case of a special crossing, a cheque must not be crossed by drawing two parallel lines.

Section 124 of The Negotiable Instruments Act, 1881 defines Special Crossing as : "Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that in addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially and to be crossed to that banker."

- Also known as Restricted Crossing.
- Two transverse lines must not necessarily be drawn.
- The banker's name is added across the face of the cheque.
- The banker's name may or may not carry the abbreviated word' & Co.
- Payment can only be made through the bank of the crossing. The banker mentioned at the crossing can appoint another banker to collect such cheques as his agent. Therefore, it is safer than 'generally'. crossed cheques.
- Specially Crossed Cheques are not convertible into General Crossing.

Implications of Special Crossing : The bank pays the banker with his name between the crossing lines.

General Crossing v. Special Crossing

There are also substantial differences between the special and general crossing of cheques. Whereas the inclusion of the banker's name is a must in the case of a special crossing, the need for a general crossing is to draw two parallel lines. The special crossing of a cheque indicates that the paying banker must only honour the cheque if it is presented to him by the bank mentioned at the crossing. No other person can receive the cheque.

Double Crossing

Section 127 of The Negotiable Instruments Act, 1881 : "Where a cheque is crossed specially to more than one banker except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof."

- A double-crossed cheque shall be paid by the banker if the second banker acts only as of the agent of the first collecting banker and this is clearly stated on the cheque. i.e., Crossing must specify that the banker to whom it was particularly crossed again acts as the first banker's agent for the purpose of collecting the cheque.

Why Double Crossing a Cheque ?

- In the case that the banker to whom a cheque is crossed, has no branch at the place of the paying banker,

- Or if he feels the need otherwise, he can cross the cheque to another banker (specifying clearly).

Non-Negotiable Crossing

- Although the non- negotiable crossing does not result in the cheque becoming non- transferable, it still loses much of the negotiability of the cheques.
- This prevents anyone other than the cheque transferor from holding a better title than the one he has.
- However, if such a cheque is transferred for consideration and if such a transfer does not lead to a defect in the transferor 's title, the validity of such a non- negotiable crossing is still not removed from the cheque.

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Section 130 of the Negotiable Instrument Act which deals with Non-Negotiable crossing states that "a person taking a cheque crossed generally or especially, bearing in either case the words 'not negotiable' shall not have and shall not be capable of giving a better title to the cheque than that which person from whom he took it had."

A/C Payee Crossing

In order to ensure that a cheque will not be able to be encashed by anyone but the rightful owner of the cheque, the words "account payee" are often added to the crossing ensuring that the bank receiving such a cheque is to collect the amount only for the purposes of the payee's account.

The Advantages of A/C Payee Crossing

- The same does not lead to a reduction in the cheque 's negotiability or transferability. The Court held that this was also the case in various matters like **National Bank v. Lilke** and also in the case of **A.Z. Underwood Ltd. v. Bank of Liverpool & Martins Ltd.**
- Checking with an account payee crossing does not affect the paying banker in any way since it only has to ensure that even if the cheque cannot be collected by the payee himself, the proceeds of the payee are credited to the account of the payee.

Usage of A/C Payee : A Custom

Although the words ' account payee' is not mentioned in the Negotiable Instrument Act, they are still considered to be part of the law because of their widespread practice and use.

Non-Negotiable A/C Payee Crossing

It has often been observed that both non- negotiable crossing and crossing of accounts payee help to ensure that cheques are extremely secure. Sometimes, a type of crossing is referred to as a' non- negotiable account payee crossing.'

Advantages of Non-Negotiable Account Payee Crossing for the Payee :

- The non- negotiable element of the crossing makes the cheque non-negotiable and therefore removes the more insecure element of the cheque's negotiability;

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- The crossing of the' account payee' element serves as a direction for the payee banker to collect the cheque from the payee only, serving as a warning of the banker's responsibility if he does not do the same.

The Implication of Non-Negotiable Account Payee Crossing : Payment will be credited to the payee account named in the cheque.

Paying Banker Accountability

Paying banker is also accountable to :

1. The true owner of the cheque;
2. The drawer of such a cheque.

Reasons for such Accountability :

- If the paying banker pays for a cross-cheque that does not comply with the wishes of the drawer that is transmitted through the cheque, Then the banker in question shall be held liable for any loss suffered by him as a result of such payment to the true owner of the crossed cheque.
- Similarly, if the paying banker fails to make the payment in accordance with the provisions of **Sec. 126 of the Negotiable Instrument Act,** the law considers it to be a payment not made in accordance with the instructions of the drawer. This law prevents such a banker from debiting the check amount on his customer's account, as such payment is considered to have been made to the wrong person.

Duties of a paying banker as to crossed cheques

1. **For general Crossing : Sec. 126 of the Negotiable Instruments Act** states that crossed cheques are usually only paid to a banker.
2. **For Special Crossing :** A cheque crossed in particular should only be paid to the banker to whom it is crossed or who is a collection agent.
3. **For Second Special Crossing : Sec. 127 of the Negotiable Instruments Act, 1881,** allows the banker who would act as the agent of the first banker to collect a second special crossing. In the second special crossing, it is, therefore, necessary to specify that the banker in whose favour he is made is the collection agent on behalf of the first banker.
4. **Care and Attention :** A banker must not pay a cheque by ignoring the crossing since it is not legally justified to pay the payee in cash over the counter.

Duties of a Collecting Banker

1. **Drafts Collection :** The collecting banker's duty is to collect and place the proceeds of both cheques and drafts for his customer's account, since 85-A of the Negotiable Instruments Act, 1881, defined drafts as "an order to pay money, drawn from one bank office to another bank office".
2. **Checking Account Holder bona-fides :** Establish the Bona- fides of the Account Holder : the banker must ask to determine the Bona- fides of the person who wishes to become a customer. If the banker fails to

do so or fails to make a proper introduction or a reliable reference from the proposed customer, he will commit a breach of duty in accordance with section 131 of the Negotiable Instruments Act, 1881.

3. **Crossings Examination :** The collecting banker must carefully examine all the crossings and cheques he receives for collection. If the customer gives him a cheque crossed to any banker, in particular, he should not accept it for collection. Likewise, a cheque crossed "Account Payee Only" should only be collected for the payee named in the cheque and nobody else.
4. **Indorsements Examination :** While paying, the paying banker usually relies on the discharge of the collecting banker. It is, therefore, a very important duty of the collecting banker to examine all approvals and other material parts of all cheques and drafts before submitting them for collection and discharge on the instruments.
5. **Dishonour Notice :** If a cheque is dishonoured upon presentation, the collecting banker is responsible for informing his client accordingly. In addition, the banker has the right to debit a dishonoured cheque to the account of his customer if he has already credited the cheque.

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In accordance with Sec. 126 of the Negotiable Instrument Act, the paying banker is obliged to make the payment in accordance with the terms of the crossing on a crossed cheque. This was also laid down in Sec. 126 of the Negotiable Instrument Act, according to which :

"Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker and where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed or his agent for collection."

- Therefore, only a banker is allowed to receive a crossed cheque.
- The paying banker is not authorized to send the proceeds of a crossed cheque to the payer or the cheque holder.
- Any failure by the paying banker to pay a crossed cheque shall be punishable by liability as defined in Sec. 129 of the Negotiable Instrument Act.

3.9.1 Bouncing of Cheque

A cheque is an unconditional order addressed to a banker, signed by a person who has deposited money with a banker, demanding a certain amount of money to be paid on request only by order of that person or by order of the instrument bearer.

(Or)

A cheque is a document that orders a bank to pay the individual on whose behalf the cheque has been issued a certain sum of money. The cheque is used to make a safe and convenient payment.

The cheque is a financial and a negotiable instrument which can be transferred to another party by simply endorsing it.

Notes

The four main items on a cheque are :

- Drawer, the person or entity who makes the cheque
- Payee, the recipient of the money
- Drawee, the bank or other financial institution where the cheque can be presented for payment
- Amount, the currency amount

The cheque was introduced in India by the Bank of Hindustan. In 1881, the Negotiable Instruments Act was enacted in India. The NI Act has established a legal structure for non-cash paper payment instruments in India. The Calcutta Clearing Banks' Association, which at that time was the largest bankers' association, implemented the clearing-house in 1938.

Till 1st April 2012, cheques in India were valid for six months from the date of its issue. After that, the Reserve Bank of India reduced its validity to three months from the date of issue.

Cheques continue to be used till date in different settings, and business transactions on a large scale do take place through the medium of cheques. However, in recent years "cheque bouncing" have become very common. Though cheques continue to be a reliable instrument of payment, cheques have been dishonoured in recent years. Cheque bouncing has been termed a legal offence within the country to protect the interests of the holder. The Negotiable Instruments Act, 1881 is the legal instrument which states that cheque bouncing is a crime. Section 138 of the Negotiable Instruments Act is applicable for the dishonour of the cheque. However, if the drawer makes payment of the cheque amount within fifteen days from the date of receipt of the notice, then the drawer does not commit any offence. If the drawer does not pay until the expiry of the 15 days' time, the payee has the right to file a complaint in the court of law.

Causes of Cheque Bouncing

There are several reasons for cheque bouncing :

1. **Insufficient Funds or Exceeds Arrangements :** If your account lacked funds when the cheque was issued, then the cheque may bounce. If the amount held in the account is less than the stipulated amount, then the cheque can bounce in such a situation.
2. **Date Mentioned on Cheques :** It is a vital part of the cheque, and any discrepancy on that front could lead to the cheque being bounced.
3. **Signature Mismatch & Overwriting :** This is a very common reason for bouncing cheques in India. Disfigured cheques with overwriting are not entertained.
4. **Drawer Stopped Payment :** This is also a common reason for cheque bouncing.

Possible Solutions to Cheque Bouncing : Bloomberg Quint has enthusiastically opined that "a commercial problem needs a commercial solution" because this topic passionately divides the masses and classes alike.

In lieu of this fact, a perfect solution to this enduring problem would require skill and ingenuity. Legal remedies are available to all. For example, a complaint has to be filed within thirty days from the receipt of a reply to the cheque bouncing notice or from the lapse of 15 days of statutory notice. It needs to be recalled in this context that a cheque expires three months after its issuance.

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Interestingly, cheque bouncing offences are common but tend to drag on in courts for years. Earlier, filing a civil suit was the only available option. Still, since these courts are unable to resolve the issue within a specified time frame, new amendments were made to the Negotiable Instruments Act in the year 1989. With the insertion of Chapter XVII in the Negotiable Instruments Act, 1881, the person issuing the dishonoured cheque can be punished with imprisonment up to 2 years or with fine, which may extend to twice the amount of the cheque or with both. The legislative intent behind this move was to ensure faith in the efficacy of banking operations and improve the credibility of cheques as a mode of payment. It was to provide a strong criminal remedy to deter people from issuing cheques that will be eventually dishonoured and also to ensure compensation to the complainant.

The newly inserted S. 143-A also provides for interim compensation to the complainant. Time is an essential factor here that often dissuades parties from moving ahead with the legal options available. Now the courts' enquiring complaint under Negotiable Instrument Act was made into Fast Track Courts to expedite the process of trial.

Furthermore, Section 139 of the Negotiable Instruments Act, 1881 requires that, unless it is proven otherwise, it is to be assumed that the issuer of a cheque received the cheque of nature referred to in Section 138 of the Act above for the discharge, in whole or in part, of any liability or liability whatsoever. This assumption is refutable by the accused by providing convincing proof that there was no debt or liability.

Now the Government of India is proposed to decriminalize the offences under the Negotiable Instruments Act 1881 to boost the economy of the country which has gone to a downfall in the recent covid-19 pandemic. If it is done so, then the flood gate for civil disputes will be opened, and it would be another burden upon the courts in India.

3.10 COMPANIES ACT 2013

3.10.1 Nature and Definition of A Company

A company is a business entity registered under the Companies Act. It is a legal entity with a separate identity from those who are its members or operate it. Therefore it can be considered as an artificial person created by the law.In terms of the Companies Act, 2013 (Act No. 18 of 2013) a "company" means a company incorporated under the Act [i.e Companies Act, 2013] or under any previous company law [Section 2(20)].

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According to Chief Justice Marshall of USA, "A company is a person, artificial, invisible, intangible, and existing only in the contemplation of the law. Being a mere creature of law, it possesses only those properties which the character of its creation confers upon it either expressly or as incidental to its very existence".

Another comprehensive and clear definition of a company is given by Lord Justice Lindley, "A company is meant as an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business, and who share the profit and loss (as the case may be) arising there from. The common stock contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his share. Shares are always transferable although the right to transfer them is often more or less restricted".

According to Haney, "Joint Stock Company is a voluntary association of individuals for profit, having a capital divided into transferable shares. The ownership of which is the condition of membership" The advantages of incorporating a company (i.e registering a company under the Companies Act) are as under :

1. Separate Legal Entity : A company is perceived to be a distinct legal entity. Once incorporated under the Act, the company is vested with a corporate personality which does not depend on its members. The money credited by the creditors of the company can be recovered only from the company and the properties owned by the company. Individual members cannot be sued. Similarly, the company in any way is not liable for the individual debts of the members.

The company bears its own name, acts under its own name, has a seal of its own and its assets are separate and distinct from those of its members. It is a different 'person' from the members who compose it. Therefore it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not the agents of the company and so they cannot bind it by their acts.

The company does not hold its property as an agent or trustee for its members and they cannot sue to enforce its rights, nor can they be sued in respect of its liabilities. Thus, 'incorporation' is the act of forming a legal corporation as a juristic person. A juristic person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law.

The principal of separate of legal entity was explained and emphasized in the famous case of Solomon v Solomon & Co. Ltd. The facts of the case are as follows :

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Mr. Soloman, the owner of a very prosperous shoe business, sold his business for the sum of $ 39,000 to Soloman and Co. Ltd. which consisted of Soloman himself,his wife, his daughter and his four sons. The purchase consideration was paid by the company by allotment of & 20,000 shares and $ 10,000 debentures and the balance in cash to Mr. Soloman. The debentures carried a floating charge on the assets of the company. One share of $ 1 each was subscribed by the remaining six members of his family. Soloman and his two sons became the directors of this company. Soloman was the managing director. After a short duration, the company went into liquidation. At that time the statement of affairs' was like this: Assets: $ 6000, liabilities: Soloman as debenture holder $ 10,000 and unsecured creditors : $ 7,000. Thus, its assets were running short of its liabilities by $11,000.

The unsecured creditors claimed a priority over the debenture holder on the ground that company and Soloman were one and the same person. But the House of Lords held that the existence of a company is quite independent and distinct from its members and that the assets of the company must be utilized in payment of the debentures first in priority to unsecured creditors. Soloman's case established beyond doubt that in law a registered company is an entity distinct from its members, even if the person holds all the shares in the company.

2. Limited liability : Limited liability means the company's debts are its own and members are protected from personal liability unless they are negligent or gave personal guarantees. A company may be limited by shares or by guarantee. In a company limited by shares, the liability of members is limited to the unpaid value of the shares. If the shares are fully paid i.e if the amount has already been fully paid to the company, then the member need not contribute any more towards the company's debts. If the amount has not been fully paid, then the member's liability is limited to the unpaid amount. For example, if X holds shares of the total nominal value of Rs.10,000 and has already paid Rs.5000/- (or 50% of the value) as part payment at the time of allotment, he cannot be called upon to pay more than Rs.5000/-, the amount remaining unpaid on his shares. If he holds fully-paid shares, he has no further liability to pay even if the company is declared insolvent.

In the case of a company limited by guarantee, the liability of members is limited to a specified amount of the guarantee mentioned in the memorandum.

3. Perpetual Existence : Perpetual succession means that the membership of a company may keep changing from time to time, but that shall not affect its continuity. Its life does not depend upon the death, insolvency or retirement of any or all shareholder (s) or director (s). Law creates it and law alone can dissolve it. Professor L.C.B. Gower rightly mentions, "Members may come and go, but the company can go on forever. During the war all the members of one private company, while in general meeting, were killed by a bomb, but the company survived not even a hydrogen bomb could have destroyed it".

4. Separate Property : As a company is a legal person distinct from its members, it is capable of owning, enjoying and disposing of property in its own

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name. Although its capital and assets are contributed by its shareholders, they are not the private and joint owners of its property. The company is the juristic person in which all its property is vested and by which it is controlled, managed and disposed of.

5. Shares : In a public company, the shares are freely transferable. The right to transfer shares is a statutory right and it cannot be taken away by a provision in the articles. However, the articles shall prescribe the manner in which such transfer of shares shall be made and it may also contain bona fide and reasonable restrictions on the right of members to transfer their shares. But absolute restrictions on the rights of members to transfer their shares shall be ultra vires. However, the law allows, in the case of a private company to have such articles which restrict the right of member to transfer his shares in company.

6. Capacity to Sue and Be Sued : A company being a body corporate can sue and be sued in its own name. All legal proceedings against the company are to be instituted in its name. Similarly, the company may bring an action against anyone in its own name. A company's right to sue arises when some loss is caused to the company, i.e. to the property or the personality of the company. Hence, the company is entitled to sue for damages in libel or slander as the case may be.A company, as a person distinct from its members, may even sue one of its own members.

7. Common Seal : A company cannot sign documents by itself. It acts through natural persons who are called its directors. A common seal is used with the name of the company engraved on it as a substitute of its signature. To be legally binding on the company, a document has to carry the company seal on it.

Definition of Company

According to Black law's dictionary, the definition of company is "a voluntary association of a certain number of people having some common interests united by some commercial or industrial undertaking to carry out legitimate business."

The Companies Act of 2013 in India defines company in the Section 2(20) as "a company incorporated under this actor under any previous company law". This means that any corporation which is incorporated and registered under this Act or under other previous company Act will be called as a company.

A company is considered to be an artificial legal person according to Indian Constitution which have an independent legal entity and a common legal seal for its signatures.

3.10.2 Registration and Incorporation

The Section 7 of the Companies Act, 2013 explains to us the "incorporation of company". The word 'registration' and 'incorporation' is often confused. The main difference between these two words is that when the company is incorporated, only those assets are taken into account which have been invested but in the registration, even the personal assets will be taken into consideration if the company runs into losses.

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Procedure of incorporation of the company

- The company shall have to register itself with the Registrar within its jurisdiction with the following documents and information of registration :
  1. The memorandum and articles of the company shall be signed by all the members ascertaining the memorandum.
  2. A declaration shall be prescribed by the Chartered Accountant, Advocate, Cost Accountant or Company Secretary, whoever is involved in the process. This declaration paper shall have a name of a person who may be a director, manager or secretary confirming that the rules made under the registration are complied with.
  3. The correspondence address will be provided until the registered office is established.
  4. An affidavit shall be signed by all the members for the promotion, formation and management of the company.
  5. All members, directors and the other interested person shall provide their names with surnames, Director Identification Number, residential address, nationality and other particulars as may be required including the proof of identity.
- The registrar on receiving the documents and information required for registration, shall issue a certificate of incorporation in the prescribed form and register the company under this Act.
- On the date of issue of certificate of incorporation, the registrar shall allot a separate distinct corporate identity to the company.
- There shall keep a copy of all the documents presented during the incorporation of the company till its dissolution.
- If a member furnishes false information in any matters, of which he/she is aware of, he/she shall be liable for committing fraud under Section 447 of the Companies Act, 2013.
- In any case, if it is proved that the company incorporated has furnished any information falsely, incorrectly or fraudulently, then the promoters, the person named as first directors and person making the declaration shall be held liable for committing fraud under Section 447 of the Companies Act, 2013.
- In the case of fraudulency, the tribunal will be constituted who after giving reasonable opportunity of being heard to the company shall pass such orders which it shall deem to be fit and sufficient. Following orders may be passed by the tribunal :
  1. Regulation of management of the company and its members.
  2. Liability of the members.
  3. Removal of the name of companies from the register of companies.
  4. Winding up of company.
  5. As the tribunal deems fit.

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Certificate of incorporation

Section 18 of The Companies(Incorporation) Rules, 2014 provides for the issuing of a certificate of incorporation. The Certificate of Incorporation is the 'birth certificate' of the company showing its legal name and the date of incorporation. It is issued to all the entities who have registered with the Registrar of Companies. The certificate confirms the company's existence and other important information like its date of incorporation, registration number, etc.

The Certificate of Incorporation is important for a company because this helps an investor to sell his/her shares. Even when the company applies for loans, this certificate is required.

Pre-incorporation contracts

As the word suggests, Pre-incorporation contract means those contracts which are made by or on behalf of the corporation at the time when it wasn't registered under Register of Companies.

Legal status of Pre-incorporation Contracts : Since, the contract is signed by the promoter on behalf of the corporation acting as an agent of the company which is still not registered, the liability of such contracts comes under the promoters itself. However, before 1963, although the promoter was acting for the company, yet he was solely responsible for any activity of the company. After enforcement of Special Relief Act of 1963, the promoters heaved a deep sigh of relief because according to Section 15(h) of the Special Relief Act, the companies were made liable for the acts done.

In the case of **Weaver Mills Ltd. v. Balkis Ammals**, the scope of this principle was extended by the Madras High Court. The court held that the promoters even though fail to convey the properties bought on behalf of the company after its incorporation, will automatically be acquired by the company as its own asset.

On the other hand, under Section 19(e) of Special Relief Act, 1963, the company can be held liable by the other party of pre-incorporation contract, if there is such terms written in the contract.

Pre-incorporation contracts can be undertaken by the company in the following manners :

1. Introducing the contract when the company is being incorporated.
2. Making a fresh contract with the members of the company.
3. Accepting the benefits of the contract, either expressly or impliedly.

Commencement of business : The provision of the 'Commencement Of Business' was initially incorporated under the Companies Act, 1956, and was also included under section 11 of the Companies Act, 2013. Later on, in 2015, it was omitted by the legislature.

Recently by The Companies (Amendment) Act, 2018, it was added under Section 10A of the Companies Act, 2013.

According to section 10A of Companies Act, 2013, a company after its incorporation cannot begin its business unless and until it has obtained the **Certificate of Commencement of Business** and fulfilled the following conditions :

1. Filed a declaration within 180 days of incorporation which has a confirmation that all the members of the company have paid the value of their shares as per the agreement.
2. Filed a verification of its registered office address with the Registrar of Companies within 30 days of its incorporation.
3. Removal of the name of companies from the Registrar of Companies if the provisions of the Act is not complied with or if the company is not carrying out any business.

Steps to obtain Certificate of Commencement of Business

1. A declaration form has to be filled up along with bank statements of the company showing the payment of value of shares by the shareholders.
2. A certificate of registration have to be submitted.

Consequences of Non-Compliance : There is a penal provision for the non-compliance of this provision under this Act. the defaulter is charged with a penalty of Rs. 50,000 on the company and Rs. 1,000 per day on every member of the company.

Other Provisions : Apart from complying with the rules, regulations and procedures, one must keep the following in mind while running the business. These provisions must be intimated or approved by the Registrar of Companies so that there is smooth running of business. They are :

1. Change in the members of the company.
2. Change in statutory auditor of the company.
3. Change of registered office.
4. Change in Memorandum or Articles.
5. Increase in capital.

The following provisions, according to the Companies Act, 2013 should never be violated.

1. The company should not do other activities which are not mentioned in the objective clause of the company's contract.
2. The company should not issue securities to third party or to the public at large.

3.10.3 Memorandum of Association

A company is formed when a number of people come together for achieving a specific purpose. This purpose is usually commercial in nature. Companies are generally formed to earn profit from business activities. To incorporate a company, an application has to be filed with the Registrar of Companies (ROC). This application is required to be submitted with a number of documents. One of

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the fundamental documents that are required to be submitted with the application for incorporation is the Memorandum of Association.

Definition of Memorandum of Association

Section 2(56) of the Companies Act, 2013 defines Memorandum of Association. It states that a "memorandum" means two things :

- Memorandum of Association as originally framed;

Memorandum as originally framed refers to the memorandum as it was during the incorporation of the company.

- Memorandum as altered from time to time;

This means that all the alterations that are made in the memorandum from time to time will also be a part of Memorandum of Association.

The section also states that the alterations must be made in pursuance of any previous company law or the present Act.

In addition to this, according to Section 399 of the Companies Act, 2013, any person can inspect any document filed with the Registrar in pursuance of the provisions of the Act. Hence, any person who wants to deal with the company can know about the company through the Memorandum of Association.

Meaning of Memorandum of Association : Memorandum of Association is a legal document which describes the purpose for which the company is formed. It defines the powers of the company and the conditions under which it operates. It is a document that contains all the rules and regulations that govern a company's relations with the outside world.

It is mandatory for every company to have a Memorandum of Association which defines the scope of its operations. Once prepared, the company cannot operate beyond the scope of the document. If the company goes beyond the scope, then the action will be considered ultra vires and hence will be void.

It is a foundation on which the company is made. The entire structure of the company is detailed in the Memorandum of Association.

The memorandum is a public document. Thus, if a person wants to enter into any contracts with the company, all he has to do is pay the required fees to the Registrar of Companies and obtain the Memorandum of Association. Through the Memorandum of Association he will get all the details of the company. It is the duty of the person who indulges in any transactions with the company to know about its memorandum.

Object of registering a Memorandum of Association or MOA : Memorandum of Association is an essential document that contains all the details of the company. It governs the relationship between the company and its stakeholders. Section 3 of the Companies Act, 2013 describes the importance of memorandum by stating that, for registering a company,

1. In case of a public company, seven or more people are required;
2. In case of a private company, two or more people are required;
3. In case of a one person company, only one person is required.

In all the above cases, the concerned people should first subscribe to a memorandum before registering the company with Registrar.

Thus, Memorandum of Association is essential for registration of a company. Section 7(1)(a) of the Act states that for incorporation of a company, Memorandum of Association and Articles of Association of the company should be duly signed by the subscribers and filed with the Registrar. In addition to this, a memorandum has other objects as well. These are :

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1. It allows the shareholders to know about the company before buying it shares. This helps the shareholders determine how much capital will they invest in the company.
2. It provides information to all the stakeholders who are willing to associate with the company in any way.

Format of Memorandum of Association : Section 4(5) of the Companies Act states that a memorandum should be in any form as given in Tables A, B, C, D, and E of Schedule 1. The Tables are of different kinds because of different kinds of companies.

Table A : It is applicable to a company limited by shares.

Table B : It is applicable to a company limited by guarantee and not having a share capital.

Table C : It is applicable to a company limited by guarantee and having a share capital.

Table D : It is applicable to an unlimited company not having a share capital.

Table E : It is applicable to an unlimited company having a share capital.

The memorandum should be printed, numbered and divided into paragraphs. It should also be signed by the subscribers of the company.

Sample of Memorandum of a Company Limited by Shares : XYZ Private Limited, a company, situated in Punjab, is engaged in the business of manufacturing security devices. It wants to register with the Registrar of Companies. For registration, the company has to first subscribe to a memorandum.

The Memorandum of Association of XYZ Private Limited will look like this :

(Since XYZ Private Limited is a company limited by shares, the form given in Table A will be applicable to it.)

The Companies Act, 2013

Company Limited by Shares

Memorandum of Association

Of

XYZ Private Limited

Notes

1. The name of the company is XYZ Private Limited. *(Name Clause)*
2. The registered office of the company will be situated in the state of Punjab. *(Registered Office Clause)*
3. The object for which the company is established are *(Object Clause):*

(a) The objects to be pursued by the company on its incorporation are :

I. To carry on business of manufacturing, converting, altering, designing, producing security systems.

II. To trade, buy, sell or act as agents to import or export all security related devices.

III. To carry on the business and act as buyers, sellers, traders, agents and dealers for obtaining the above objects.

(b) Matters which are necessary for the furtherance of the objects specified in clause 3A are :

1. To manufacture and deal in packaging materials, boxes, grading, branding, weighting, and marketing for all kinds of security devices and other electronic components associated with it.
2. To draw, make, accept, endorse, discount, execute, issue, negotiate, assign and otherwise deal with cheques, drafts, bills of exchange, promissory notes, hundies, debentures, bonds, bills of lading, railway receipts, warrants and all other negotiable or transferable instruments.
3. To amalgamate with any other company or companies.
4. To acquire or merge with any other company.
5. To start a joint venture with any other company.
6. To distribute any of the property of the Company amongst the members in specie or kind subject to the provisions of the Companies Act in the event of winding up.
7. To apply for, tender, purchase, or otherwise acquire any contracts, subcontracts licences and concessions for or in relation to the objects or business herein mentioned or any of them, and to undertake, execute, carry out, dispose of or otherwise turn to account the same.

- The liability of the member(s) is limited and this liability is limited to the amount unpaid, if any, on the shares held by them. (Liability Clause)
- The share capital of the company is 70,00,000 rupees, divided into 2000 shares of 3500 rupees each. (Capital Clause)
- We, the several persons, whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set against our respective names :

Notes

Names, addresses, descriptions and occupations of subscribers	No. of shares taken by each subscriber	Signature of subscriber	Signature, names, addresses, descriptions and occupations of witnesses
A.B. of...Merchant	.....		Signed before me: Signature.....
C.D. of...Merchant	.....		Signed before me: Signature.....
E.F. of. ..Merchant	.....		Signed before me: Signature.....
G.H. of...Merchant	.....		Signed before me: Signature.....
I.J. of...Merchant	.....		Signed before me: Signature.....
K.L. of...Merchant	.....		Signed before me: Signature.....
M.N. of...Merchant	.....		Signed before me: Signature.....
_____			
Total shares taken : 1400			

7. I, whose name and address are given below, am desirous of forming a company in pursuance of this memorandum of association and agree to take all the shares in the capital of the company *(Applicable in case of one person company)* :

Name, address, description and occupation of subscriber	Signature of subscriber	Signature, name, address, description and occupation of witness
A.B. .....Merchant		Signed before me: Signature.....

8. Shri/Smt_____, son/daughter of _____, resident of_____ aged_____ years shall be the nominee in the event of death of the sole member (*Applicable in case of one person company)*

Dated_____ the day of_____

Content of Memorandum of Association : Section 4 of the Companies Act, 2013 states the contents of the memorandum. It details all the essential information that the memorandum should contain.

Name Clause : The first clause states the name of the company. Any name can be chosen for the company. But there are certain conditions that need to be complied with.

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Section 4(1)(a) states :

1. If a company is a public company, then the word 'Limited' should be there in the name. Example, "Robotics", a public company, its registered name will be "Robotics Limited".
2. If a company is a private company, then 'Private Limited' should be there in the name. "Secure"a private company, its registered name will be "Secure Private Limited".
2. This condition is not applicable to Section 8 companies.

What are Section 8 companies ?

Section 8 Company is named after Section 8 of the Companies Act,2013. It describes companies which are established to promote commerce, art, sports, education, research, social welfare, religion etc. Section 8 companies are similar to Trust and Societies but they have a better recognition and legal standing than Trust and Societies.

What kind of names are not allowed ?

The name stated in the memorandum shall not be,

1. Identical to the name of another company;
2. Too nearly resembling the name of an existing company.

According to Rule 8 of the Company (Incorporation) Rules,2014.

- If a company adds 'Limited', 'Private Limited', 'LLP', 'Company', 'Corporation', 'Corp', 'inc' and any other kind of designation to its name to differentiate it from the name of the other company, the name would still not be accepted.

Illustration : Precious Technology Limited is same as Precious Technology Company.

- If plural or singular forms are added to differentiate between names. Illustrations: Greentech Solution is same as GreenTech Solutions.

Colors Technology is same as Color Technology.

- If type, and case of letters, or punctuation marks are added.

Illustration : We work is same as We.work.

- Different tenses are used in names.

Illustration : Ascend Solution is same as Ascended Solutions.

- If there is an intentional spelling mistake in the name or phonetic changes in the name.

Illustrations : Greentech is same as Green tek.

DQ is same as Dee Qew.

- Internet related designations are used like .org, .com, etc.

Illustration : Greentech Solution Ltd. is same as Greentech Solutions. com Ltd.

Exception : The name will not be disregarded if the existing company by a board of resolution allows it.

- Change in order of combination of words.

Illustration : Shah Builders and Contractors is same as Shah Contractors and Builders.

Exception : The name will not be disregarded if the existing company by a board of resolution allows it.

- Addition of a definite or indefinite article.

Illustration : Greentech Solutions Ltd is same as The Greentech Solutions Ltd.

Notes

Exception : The name will not be disregarded if the existing company by a board of resolution allows it.

- Slight variation in spelling of two names, including a grammatical variation.

Illustration : Colours TV Channel is same as Colors TV Channel.

- Translation of a name, from one language to another.

Illustration : Om Electricity Corporation is same as Om Vidyut Nigam.

- Addition of the name of a place to the name.

Illustration : Greentech Solutions Ltd. Is same as Greentech Mumbai Solutions Ltd.

Exception : The name will not be disregarded if the existing company by a board of resolution allows it.

- Addition, deletion or modification of numericals in the name.

Illustration : Greentech Solutions Ltd. Is same as 5 Greentech Solutions Ltd.

Exception : The name will not be disregarded if the existing company by a board of resolution allows it.

In addition to this, an undesirable name will also not be allowed to be chosen.

Undesirable names are those names which in the opinion of the Central Government are :

1. Prohibited under the Provisions of Section 3 of Emblems and Names (Prevention and Improper Use) Act, 1950.
2. Names which resemble each other, which are chosen to deceive.
3. The name includes a registered trademark.
4. The name includes any word or words which are offensive to a section of people.
5. Name which is identical to or too nearly resembles the name of an existing Limited Liability Partnership.

Furthermore, statutory names such as the UN, Red Cross, World Bank, Amnesty International etc. are also not allowed to be chosen.

Names which in any way indicate that the company is working for the government are also not allowed.

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Reservation of a Name : Section 4(5)(i) of the Act states that for formation of the Company, the Registrar on receiving the required documents can reserve a name for 20 days. If the application is made by an existing company, then once the application is accepted, the name will be reserved for 60 days from the date of application. The company should get incorporated with the reserved name in these 60 days.

If after making the reservation of a name, it is found that some wrong information is given. Then two cases arise.

1. In case the company has not been incorporated. In this case, the Registrar can cancel the reservation of the name and impose a fine of Rupees 1,00,000.
2. In case the company has been incorporated. In this case, after hearing the reasons of the company, the Registrar has 3 options. These are,
   - On being satisfied, he can give 3 months time to the company to change the name by passing an ordinary resolution.
   - He can strike off the name from the Register of Companies.
   - He can file a petition of winding up of the company.

Rule 8 and 9 of the Company (Incorporation) Rules, 2014 state that the application for reservation of name under section 4(4) should be filed on Form INC – 1.

Registered Office Clause : The Registered Office of a company determines its nationality and jurisdiction of courts. It is a place of residence and is used for the purpose of all communications with the company.

Section 12 of the Companies Act, 2013 talks about Registered Office of the company.

Before incorporation of the company, it is sufficient to mention only the name of the state where the company is located. But after incorporation, the company has to specify the exact location of the registered office. The company has to then get the location verified as well, within 30 days of incorporation.

It is mandatory for every company to fix its name and address of its registered office on the outside of every office in which the business of the company takes place. If the company is a one-person company, then "One-person Company" should be written in brackets below the affixed name of the company.

Change in place of Registered Office should be notified to the Registrar within the prescribed time period.

Object Clause : Section 4(c) of the Act, details the object clause.The Object Clause is the most important clause of Memorandum of Association. It states the purpose for which the company is formed. The object clause contains both, the main objects and matters which are necessary for achieving the stated objects also known as incidental or ancillary objects. The stated objects must be well defined and lawful according to Section 6(b) of the Companies Act, 2013.

By limiting the scope of powers of the company. The object clause provides protection to :

Shareholders : The object clause clearly states what operations will the company perform. This helps the shareholders know their investment in the company will be used for what purpose.

Creditors : It ensures the creditors that capital is not at risk and the company is working within the limits as stated in the clause.

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Public Interest : The object clause limits the number of matters the company can deal with thus, prohibiting diversification of activities of the company.

Doctrine of Ultra Vires : If the company operates beyond the scope of the powers stated in the object clause, then the action of the company will be ultra vires and thus void.

Consequences of Ultra Vires :

1. **Liability of Directors :** The directors of the company have a duty to ensure that company's capital is used for the right purpose only. If the capital is diverted for another purpose not stated in the memorandum, then the directors will be held personally liable.
2. **Ultra Vires Borrowing by the Company :** If a bank lends to the company for the purpose not stated in the object clause, then the borrowing would be Ultra Vires and the bank will not be able to recover the amount.
3. **Ultra Vires Lending by the Company :** If the company lends money for an ultra vires purpose, then the lending would be ultra vires.
4. **Void ab initio :** Ultra Vires acts of the company are considered void from the beginning.
5. **Injunction :** Any member of the company can use the remedy of injunction to prevent the company from doing ultra vires acts.

Liability Clause : The Liability Clause provides legal protection to the shareholders by protecting them from being held personally liable for the loss of the company.

There are two kinds of limited liabilities :

Limited By Shares : Section 2(22) of the Companies Act, 2013 defines a company limited by shares. In a company limited by shares, the shareholders only have to pay the price of the shares they have subscribed to. If for some reason they have not paid the full amount for the shares and the company winds up then their liability will only be limited to the unpaid amount.

Limited By Guarantee : It is defined in Section 2(21) of the Companies Act, 2013.A company limited by guarantee has members instead of shareholders. These members undertake to contribute to the assets of the company at the time of winding up. The members give guarantee of a fixed amount that they will be liable for.

Notes

Non-profit Organizations and other charities usually have a structure of companies limited by guarantee.

Capital Clause : It states the total amount of share capital in the company and how it is divided into shares. The way the amount of capital is divided into what kind of shares. The shares can be equity shares or preference shares.

Illustration : The share capital of the company is 80,00,000 rupees, divided into 3000 shares of 4000 rupees each.

Subscription Clause : The Subscription Clause states who are signing the memorandum. Each subscriber must state the number of shares he is subscribing to. The subscribers have to sign the memorandum in the presence of two witnesses. Each subscriber must subscribe to at least one share.

Association Clause : In this clause, the subscribers to the memorandum make a declaration that they want to associate themselves to the company and form an association.

Memorandum of Association for One-Person-Company

A one-person company is called so because it can be formed by one person. The minimum capital required to form a one-person company is 1,00,000 Rupees.

It is a new concept which has been introduced to promote entrepreneurship. All the laws which are applicable on private companies will be applicable on one-person company.

Section 2(62) of the Companies Act, 2013 defines one-person company.

A one-person company is a separate legal entity from its owner. It is mandatory for the company to be converted into a private limited company in case its annual turnover crosses the 2 Crore mark.

In case of one-person-company, in addition to all the other clauses, the Memorandum of Association contains a clause called the Nomination Clause. This clause mentions the name of an individual who will become the member in case the subscriber dies or becomes incapacitated. The nominee must be an Indian citizen and resident of India i. e. he must have been living in India for at least 182 days in the preceding year. A minor cannot be a nominee.

The individual whose name is mentioned should give his consent in written form and it is required to be filed with the Registrar of Companies at the time of incorporation.

If the nominee wants to withdraw, he shall give it in writing and the owner of the company will have to nominate a new person within 15 days.

What's the use of Memorandum of Association ?

1. It defines the scope & powers of a company, beyond which the company cannot operate.
2. It regulates company's relation with the outside world.
3. It is used in the registration process, without it the company cannot be incorporated.

4. It helps anyone who wants to enter into a contractual relationship with the company to gain knowledge about the company.
5. It is also called the charter of the Company, as it contains all the details of the company, its members and their liabilities.

Subscription of Memorandum of Association

Notes

Subscribers are the first shareholders of the company. They are the people who agreed to come together and form the company. The name of each subscriber along with their particulars are mentioned in the memorandum.

Different kinds of companies require different number of subscribers for incorporation.

1. **Private Company :** In case of a private company, the minimum number of subscribers required are 2.
2. **Public Company :** In case of a public company, 7 or more subscribers are required.
3. **One-Person-Company :** In case of one-person-company, only one person is required.

Who can Subscribe ?

Rule 13 of the Companies (Incorporation) Rules, 2014 describes the provisions of subscribing to the memorandum.

There are specific kinds of persons (natural or artificial) who can subscribe to the memorandum. These are :

1. **Individuals :** An individual or a group of individuals can subscribe to the memorandum.
2. **Foreign citizens and Non Resident Indians :** Rule 13(5) of the Companies (Incorporation) Rules, states that for a foreign citizen to subscribe to a company in India, his signature, address and proof of identity will need to be notarized.

The foreign national must have visited India and should have a Business Visa.

For a Non Resident Indian, the photograph, address and identity proof should be attested at the Embassy with a certified copy of a passport. There is no requirement of Business Visa.

1. Minor – A minor can only be a subscriber through his guardian.
2. Company incorporated under the Companies Act – The company can be a subscriber to the memorandum. The Director, officer or employee of the company or any other person authorized by the board of resolution.
3. Company incorporated outside India – Foreign Company is defined in Section 2(42) of the act, it states that a foreign company is a company incorporated outside India. A company registered outside India can also subscribe to the memorandum by fulfilling the additional formalities.
4. Society registered under the Societies Registration Act, 1860.

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5. Limited Liability Partnership – A partner of a limited liability partnership can sign the memorandum with the agreement of all the other partners.
6. Body corporate incorporated under an Act of Parliament or State Legislature can also be a subscriber to the memorandum.

Subscription to Memorandum of Association

Every subscriber should sign the memorandum in presence of at least one witness. The following particulars of the witness should also be mentioned.

1. Name of the witness
2. Address
3. Description
4. Occupation

If the signature is in any other language then, then an affidavit is required that declares that the signature is the actual signature of the person.

According to Circular No. 8/15/8, dated 1-9-1958. The subscriber can also authorize another person to affix the signature by granting a power of attorney to the person. Department Circular No. 1/95, dated 16th February 1995 states that only one power of attorney is required.

The person who is granted the power of attorney may be known as an agent.

He should also state the following particulars in the memorandum :

1. Name of the agent
2. Address
3. Description
4. Occupation

Particulars to be Mentioned in Memorandum of Association

Rule 16 of the Companies (Incorporation) Rules, 2014 details the particulars that are to be mentioned in the memorandum.

Every Subscriber's following details should be mentioned.

1. Name (includes last name and family name), a photograph should be affixed and scanned with the memorandum.
2. Father's Name and Mother's Name
3. Nationality
4. Date of Birth
5. Place of Birth
6. Qualifications
7. Occupation
8. Permanent Account Number
9. Permanent and Current Address
10. Contact Number

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11. Fax Number (Optional)
12. 2 Identity Proofs in which Permanent Account Number is mandatory.
13. Residential Proof (not older than 2 months)
14. Proof of nationality, if subscriber is a foreign national
15. If the subscriber is a current director or promoter, then his designation along with Name and Company Identity Number

If a body corporate is subscribing to the memorandum then the following particulars should be mentioned.

1. Corporate identity number of the company or registration number of the body corporate.
2. Global location number, which is used to identify the location of the legal entity. (Optional)
3. The name of the body corporate.
4. The registered address of the business.
5. Email address.

In case the body corporate is a company, then a certified copy of Board resolution which authorizes the subscription to the memorandum. The particulars required in this case are,

1. Number of shares to be subscribed by a body corporate.
2. Name, designation and address of the authorized person.

In case the body corporate is a limited liability partnership. The particulars required are,

1. A certified copy of the resolution.
2. The number of shares that the firm is subscribing to.
3. The name of the authorized partner.

In case the body corporate is registered outside the country. The particulars required are,

1. The copy of certificate of incorporation.
2. The address of the registered office.

Printing and Signing of Memorandum of Association

Section 7(1)(a) states that the memorandum should be duly signed by all the subscribers and should be in a manner prescribed by the Act.

Rule 13 of the Company (Incorporation) Rules, 2014 describes the manner in which the memorandum should be signed.

1. The Memorandum of Association should be signed by each subscriber to the memorandum. The subscriber shall mention his name, address, occupation and the number of shares he is subscribing to. The documents should be signed in the presence of at least one witness. The witness would also mention his name, address, and occupation. By signing the memorandum, the witness states that, "I witness to subscriber/subscriber(s)who has/have subscribed and signed in my

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presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in."

2. If the person subscribing to the document is illiterate, he can either authorize an agent to sign the document through Power of Attorney or he can put his thumb impression on the column for signatures. The person's name, address, occupation and the number of shares he is subscribing to should be written by a person who has been allowed to write for him. The person who is writing for the illiterate person should read and explain the contents of the document to an illiterate person.
3. Where the person subscribing to the memorandum is an artificial person i. e. a body corporate the memorandum shall be signed by the employee, officer or any person authorized by the Board of Resolution.
4. Where the person subscribing to the memorandum is a foreign national who does not reside in India but in a country,
   - in any part of the Commonwealth, his signatures and address on the memorandum and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.
   - in a country which is a signatory to the Hague Apostille Convention, 1961, his signature and proof of identity and address on the memorandum shall be notarized before the Notary (Public) of the country of his origin and be duly approved in accordance with the said Hague Convention.
   - in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and proof of identity, shall be notarized before the Notary (Public) of such country and the certificate of the Notary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf under section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 (40 of 1948).

Section 3 of the Diplomatic and Consular Officers states that, every Diplomat or any officer in a foreign country can perform the functions of a notary public.

1. Where there is no Diplomatic or Consular officer by any of the officials mentioned in section 6 of the Commissioners of Oaths Act, 1889.
2. If the foreign national visited India and intended to incorporate a company, in such a case the incorporation shall be allowed if, he is having a valid Business Visa.

Section 15 of the Companies Act, 2013 states that the memorandum should be in printed form.

The Ministry of Corporate Affairs has clarified that a document printed in form laser printers will be considered valid provided it is legible and fulfills other requirements as well.

The submission of xerox copies is not allowed. The xerox copies can be submitted to the members of the company.

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Alteration, Amendment & Change in Memorandum of Association under Companies Act, 2013.

The term "alter" or "alteration" is defined in Section 2(3) of the Act, as any additions, omissions or substitutions. A company can alter the memorandum only to the extent as permitted by the Act. According to Section 13, the company can alter the clauses in the memorandum by passing a special resolution.

A resolution is a formal decision taken in a meeting. There are two kinds of resolutions, ordinary and special. A special resolution is one which requires at least 2/3rd majority to be effective. The alteration to the clauses also require the approval of the Central Government in writing.

The alteration of memorandum can happen for a variety of reasons. The alteration can be made if,

1. Enables the company to carry its business more effectively;
2. Helps to achieve the objectives;
3. Helps the company to amalgamate with another company;
4. Helps the company dispose off any undertaking.

Alteration of Memorandum : The alteration of various clauses of the memorandum have different procedures :

1. **Alteration to the Name Clause :** To alter the name of the company, a special resolution is required. After the resolution is passed, the copy is sent to the registrar. For changing the name, the application needs to be filed in Form INC- 24 with the prescribed fees. After the name is changed, a new certificate of incorporation is issued.
2. **Alteration to the Registered Office Clause :** The application for changing the place for Registered Office of the company shall be filed with the Central Government in Form INC- 23 with the prescribed fees.

If the company is changing its Registered Office from one to another, then the approval of the Central Government is required. The Central Government is required to dispose off the matter within 60 days and should ensure that the change of place has the consent of all the stakeholders of the company.

- **Alteration to the Object Clause :** To alter the object clause, a special resolution is required to be passed. The changes must be confirmed by the authority. The document which confirms the changes by authority with a printed copy of the altered memorandum should be filed with the Registrar.

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If the company is a public company, then the alteration should be published in the newspaper where the Registered Office of the company is located. The changes to the object clause must also mentioned on the company's website.

- **Alteration to the Liability Clause :** The Liability clause of the memorandum cannot be altered except with the written consent of all the members of the company. By altering the liability clause, the liability of the directors of the company can be made unlimited. In any case, the liability of the shareholders cannot be made unlimited. Changes in the liability clause can be made by passing a special a special resolution and sending a copy of the resolution to the Registrar of Companies.

Alteration to the Capital Clause: The capital clause of a company can be altered by an ordinary resolution.

The company can,

1. Increase its authorised share capital;
2. Convert the shares into stock;
3. Consolidate and divide all of its shares;
4. Cancel the shares which have not been subscribed to;
5. Diminish the share capital of the shares cancelled.

The altered Memorandum of Association should be submitted to the Registrar within 30 days of passing the resolution.

3.10.4 Articles of Association (AOA)

Memorandum of Association (MOA) and Articles of Association (AOA) are two important business documents of a company. Every company needs a set of rules and regulations to manage its internal affairs and the AOA specifies the internal regulations of the company. In simple words, AOA contains the bye-laws of the company, according to which the director and other members must perform their functions.

In this article we will discuss the following topics under AOA in detail :

1. Articles of Association (AOA) Definition
2. Objectives of Articles of Association (AOA)
3. Forms of Articles of Association (AOA)
4. Content of Articles of Association (AOA)
5. What is the difference between MOA and AOA?

Articles of Association (AOA) Definition : As per Section 2(5) of the Companies Act, 2013 articles means the Articles of Association (AOA) of a company originally framed or altered or applied in pursuance of any previous company law or of this Act.

Objectives of Articles of Association (AOA) :

- The AOA of a company shall contain the regulations for management of the company.

- The AOA shall also contain such matters, as may be prescribed.
- Further, it shall not prevent a company from including such additional matters in its AOA as may be considered necessary for its management.

Forms of Articles of Association (AOA)

Schedule I of the Companies Act, 2013 provides forms for Articles of Association (AOA) in tables F, G, H, I and J for different types of companies. Further, AOA must be in the respective form.

Notes

S.No	Table	Form
1	Table F	Articles of Association of a company limited by shares
2	Table G	Articles of Association of a company limited by guarantee and having share capital
3	Table H	Articles of Association of a company limited by guarantee and not having share capital
4	Table I	Articles of Association of an unlimited company and having share capital
5	Table J	Articles of Association of an unlimited company and not having share capital

Depending upon the applicability a company may adopt all or any of the regulations contained in the model Article.

In case of any company, which is registered after the commencement of this Act, in so far as the registered AOA of such company does not exclude or modify the regulations contained in the model AOA, those regulations shall be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered AOA of the company, so far as applicable.

Content of Articles of Association (AOA)

An AOA contains the rules and regulation regarding the following matters :

- **Share capital** including sub-division, rights of various shareholders, the relationship of these rights, share certificates, payment of commission.
- **Lien of shares :** To retain or hold the possession of shares in case the member is unable to pay his debt to the company
- **Calls on shares :** Calls on shares includes the whole or part unpaid on each share which has to be paid by the shareholders on the demand of the company.
- **Transfer of shares :** The AOA include the process for the transfer of shares by the shareholder to other person (transferee).
- **Transmission of shares :** Transmission includes title devolution by succession, death, marriage, insolvency, etc.
- **Forfeiture of shares :** The AOA provides for the forfeiture of shares if the purchase requirements such as paying call money are not met with.
- **Surrender of shares :** Surrender of shares is when the shareholders voluntary gives back or return the shares they own to the company.

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- **Conversion of shares in stock :** In consonance with the Articles of association, the company can convert the shares into stock by an ordinary resolution in a general meeting.
- **Share warrant :** A share warrant is a bearer document relating to the title of shares and cannot be issued by private companies; only public limited companies can issue a share warrant.
- **Alteration of capital :** Increase, decrease or rearrangement of capital must be done as the Articles of association provide.
- **General meetings and proceedings :** All the provisions relating to the general meetings and the manner in which they are to be conducted are to be contained in the Articles of association.
- **Voting rights of members, voting by poll, proxies :** The members right to vote on certain company matters and the manner in which voting can be done is provided in the Articles of association.
- **Directors,** their appointment, remuneration, qualifications, powers and proceedings of the boards of directors meetings.
- **Dividends and reserves :** The Articles of association of a company also provide for the distribution of dividend to the shareholders.
- **Accounts and Audits :** The auditing of a company shall be done subject to the provisions of the Articles of association of the company.
- **Borrowing Powers :** Every company has powers to borrow. However; this must be done according to the Articles of association of the company.
- **Winding Up :** Provisions relating to the winding up of the company finds mention in Articles of association of the company and must be done accordingly.

Difference between Memorandum of Association and Articles of Association : While Memorandum of Association is a document that governs a company's relationship with the outside world. The Articles of association governs a company's internal affairs and management. The directors and all other officers of the company should perform the functions in accordance with the Articles of Association. The Articles of Association are subordinate to the memorandum. Thus, while framing the Articles of Association it is very important to keep in mind that the Articles do not, in any way contradict or exceed the scope of the memorandum.

The Articles of Association form a contract,

1. Between members of the company;
2. Between the company and its members.

The Articles of Association are important for a company because,

1. They bind the company with its members.
2. They bind the members with each other.

3. They are not concerned with the outside world, they only deal with the internal affairs of the company which are essential for the smooth functioning of the business.

Parameters	MOA	AOA
Objectives	It defines the objectives of a company. Further, it specifies the conditions of incorporation.	It contains the rules and regulations as well as bye-laws for the internal management of the company.
Relationship	It defines the relationship of the company with the external world.	It defines the relationship between the members and the company.
Alteration	Only under special circumstances, it can be altered.	By passing a special resolution, It can be altered.
Ultra-Vires	Any acts beyond the scope of the MOA are ultra-vires and void. Furthermore, even unanimous votes for the consent of such act from all the shareholders cannot ratify it.	Acts which are ultra-vires the AOA can be ratified by a special resolution of the shareholders. However, such acts should not ultra-vires the MOA.

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Both Memorandum of Association and Articles of Association are essential documents which describe the procedure for companies to deal with the outside world and manage its internal affairs.

3.10.5 Prospectus

The Companies Act, 2013 defines a prospectus under section 2(70). Prospectus can be defined as "any document which is described or issued as a prospectus". This also includes any notice, circular, advertisement or any other document acting as an invitation to offers from the public. Such an invitation to offer should be for the purchase of any securities of a corporate body. Shelf prospectus and red herring prospectus are also considered as a prospectus.

Essentials for a document to be called as a prospectus

For any document to considered as a prospectus, it should satisfy two conditions.

1. The document should invite the subscription to public share or debentures, or it should invite deposits.
2. Such an invitation should be made to the public.
3. The invitation should be made by the company or on the behalf company.
4. The invitation should relate to shares, debentures or such other instruments.

Statement in lieu of prospectus : Every public company either issue a prospectus or file a statement in lieu of prospectus. This is not mandatory for a private company. But when a private company converts from private to public

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company, it must have to either file a prospectus if earlier issued or it has to file a statement in lieu of prospectus.

The provisions regarding the statement in lieu of prospectus have been stated under section 70 of the Companies Act 2013.

Advertisement of prospectus : Section 30 of the Companies Act 2013 contains the provisions regarding the advertisement of the prospectus. This section states that when in any manner the advertisement of a prospectus is published, it is mandatory to specify the contents of the memorandum of the company regarding the object, member's liabilities, amount of the company's share capital, signatories and the number of shares subscribed by them and the capital structure of the company. Types of the prospectus as follows.

- Red Herring Prospectus
- Shelf Prospectus
- Abridged prospectus
- Deemed Prospectus

Shelf Prospectus : Shelf prospectus can be defined as a prospectus that has been issued by any public financial institution, company or bank for one or more issues of securities or class of securities as mentioned in the prospectus. When a shelf prospectus is issued then the issuer does not need to issue a separate prospectus for each offering he can offer or sell securities without issuing any further prospectus.

The provisions related to shelf prospectus has been discussed under section 31 of the Companies Act, 2013.

The regulations are to be provided by the Securities and Exchange Board of India for any class or classes of companies that may file a shelf prospectus at the stage of the first offer of securities to the registrar.

The prospectus shall prescribe the validity period of the prospectus and it should be not be exceeding one year. This period commences from the opening date of the first offer of the securities. For any second or further offer, no separate prospectus is required.

While filing for a shelf prospectus, a company is required to file an information memorandum along with it.

Information Memorandum [Section 31(2)] : The company which is filing a shelf prospectus is required to file the information memorandum. It should contain all the facts regarding the new charges created, what changes have undergone in the financial position of the company since the first offer of the security or between the two offers.

It should be filed with the registrar within three months before the issue of the second or subsequent offer made under the shelf prospectus as given under **Rule 4CCA of section 60A(3) under the Companies (Central Government's) General Rules and Forms, 1956.**

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When any company or a person has received an application for the allotment of securities with advance payment of subscription before any changes have been made, then he must be informed about the changes. If he desires to withdraw the application within 15 days then the money must be refunded to them.

After the information memorandum has been filed, if any offer or securities is made, the memorandum along with the shelf prospectus is considered as a prospectus.

Red herring prospectus : Red herring prospectus is the prospectus which lacks the complete particulars about the quantum of the price of the securities. A company may issue a red herring prospectus prior to the issue of prospectus when it is proposing to make an offer of securities.

This type of prospectus needs to be filed with the registrar at least three days prior to the opening of the subscription list or the offer. The obligations carried by a red herring prospectus are same as a prospectus. If there is any variation between a red herring prospectus and a prospectus then it should be highlighted in the prospectus as variations.

When the offer of securities closes then the prospectus has to state the total capital raised either raised by the way of debt or share capital. It also has to state the closing price of the securities. Any other details which have not been included in the prospectus need to be registered with the registrar and SEBI.

The applicant or subscriber has right under Section60B(7) to withdraw the application on any intimation of variation within 7 days of such intimation and the withdrawal should be communicated in writing.

Abridged Prospectus : The abridged prospectus is a summary of a prospectus filed before the registrar. It contains all the features of a prospectus. An abridged prospectus contains all the information of the prospectus in brief so that it should be convenient and quick for an investor to know all the useful information in short.

Section33(1) of the Companies Act, 2013 also states that when any form for the purchase of securities of a company is issued, it must be accompanied by an abridged prospectus.

It contains all the useful and materialistic information so that the investor can take a rational decision and it also reduces the cost of public issue of the capital as it is a short form of a prospectus.

Deemed Prospectus : A deemed prospectus has been stated under section 25(1) of the Companies Act, 2013.

When any company to offer securities for sale to the public, allots or agrees to allot securities, the document will be considered as a deemed prospectus through which the offer is made to the public for sale. The document is deemed to be a prospectus of a company for all purposes and all the provision of content and liabilities of a prospectus will be applied upon it.

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In the case of **SEBI v. Kunnamkulam Paper Mills Ltd.**, it was held by the court that where a rights issue is made to the existing members with a right to renounce in the favour of others, it becomes a deemed prospectus if the number of such others exceeds fifty.

In general parlance prospectus refers to an information booklet or offer document on the basis of which an investor invests in the securities of an issuer company. It has been defined under section 2(70) so as to mean any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.

Red herring Prospectus under Explanation to section 32 has been referred to mean a prospectus which does not include complete particulars of the quantum or price of the securities included therein.

Shelf Prospectus under Explanation to section 31 has been referred to mean a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

The definition clarifies that any notice, circular, advertisement or any other document inviting offers from public for the subscription or purchase of securities shall be included in the definition of Prospectus.

Matters To Be Stated In Prospectus

According to section 26(1) of the Act read with Companies (Prospectus and Allotment of Securities) Rules, 2014 (hereinafter referred to as "Rules"), the following are the matters to be included in a prospectus :

(i) Names and addresses of the registered office of the company, Company Secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed.

The rules provide that the names, addresses and contact details of the corporate office of the issuer company, compliance officer of the issuer company, merchant bankers and co-managers to the issue, registrar to the issue, bankers to the issue, stock brokers to the issue, credit rating agency for the issue, arrangers, if any, of the instrument, names and addresses of such other persons as may be specified by the Securities and Exchange Board in its regulations shall be included in prospectus.

(ii) Dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;

The rules clearly specify that the dates of opening and closing of the issue shall be prominently disclosed. Further the rules provide that the Board or the Committee authorized thereof shall make a declaration in the prospectus that the allotment letters shall be issued or application money shall be refunded within fifteen days from the closure of the issue or such lesser time as may be specified

by SEBI or else the application money shall be refunded to the applicants forthwith, failing which interest shall be due to be paid to the applicants at the rate of fifteen per cent per annum for the delayed period.

(iii) A statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner.

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The rules specify that the a statement shall be given by the Board of directors that all monies received out of the issue shall be transferred to a separate bank account maintained with a Scheduled Bank.

Section 2(80) of the Act "scheduled bank" means the scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934. The referred section enumerates a list of scheduled banks under second schedule of the Reserve Bank of India Act, 1934.

Further the aforesaid rules provide that the details of all utilized and unutilised monies out of the monies collected in the previous issue made by way of public offer shall be disclosed and continued to be disclosed in the balance sheet till the time any part of the proceeds of such previous issue remains unutilized indicating the purpose for which such monies have been utilized, and the securities or other forms of financial assets in which such unutilized monies have been invested.

(iv) Details about underwriting of the issue. As per the rules, the details about underwriting of the issue shall include the names, addresses, telephone numbers, fax numbers and e-mail addresses of the underwriters and the amount underwritten by them.

(v) Consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed.

As per the rules, the consent of trustees, solicitors or advocates, merchant bankers to the issue, registrar to the issue, lenders and experts shall also be included in prospectus.

(vi) The authority for the issue and the details of the resolution passed therefor. (vii) Procedure and time schedule for allotment and issue of securities.

(viii) Capital structure of the company in the prescribed manner. As per the rules, capital structure of the company shall be presented in the following manner :

(i) (a) the authorised, issued, subscribed and paid up capital (number of securities, description and aggregate nominal value);

(b) the size of the present issue;

(c) the paid up capital- (A) after the issue; (B) after conversion of convertible instruments (if applicable);

(d) the share premium account (before and after the issue);

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(ii) The details of the existing share capital of the issuer company in a tabular form, indicating therein with regard to each allotment, the date of allotment, the number of shares allotted, the face value of the shares allotted, the price and the form of consideration. In the case of an initial public offer of an existing company, the details regarding individual allotment shall be given from the date of incorporation of the issuer and in the case of a listed issuer company the details shall be given for five years immediately preceding the date of filing of the prospectus.

The issuer company shall also disclose the number and price at which each of the allotments were made in the last two years preceding the date of the prospectus separately indicating the allotments made for considerations other than cash and the details of the consideration in each case.

(iii) main objects of public offer, terms of the present issue and such other particulars as may be prescribed. As per the rules the prospectus to be issued shall contain the following particulars, namely :

(a) the objects of the issue;

(b) the purpose for which there is a requirement of funds;

(c) the funding plan (means of finance);

(d) the summary of the project appraisal report (if any);

(e) the schedule of implementation of the project;

(f) the interim use of funds, if any

(iv) main objects and present business of the company and its location, schedule of implementation of the project.

(v) particulars relating to :

(a) management perception of risk factors specific to the project;

(b) gestation period of the project;

(c) extent of progress made in the project;

(d) deadlines for completion of the project; and

(e) any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company.

The rules with respect to sub part (e) states that the prospectus to be issued shall contain the following details and disclosures, namely :

(i) the details of any litigation or legal action pending or taken by any Ministry or Department of the Government or a statutory authority against any promoter of the issuer company during the last five years immediately preceding the year of the issue of the prospectus and any direction issued by such Ministry or Department or statutory authority upon conclusion of such litigation or legal action shall be disclosed;

(ii) the details of pending litigation involving the issuer, promoter, director, subsidiaries, group companies or any other person, whose outcome could have material adverse effect on the position of the issuer;

(iii) the details of pending proceedings initiated against the issuer company for economic offences;

(iv) the details of default and non-payment of statutory dues etc.

(v) minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash.

(vi) details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed.

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As per the rules the details of directors including their appointment and remuneration, and particulars of the nature and extent of their interests in the company shall be disclosed in the following manner, namely :

(i) the name, designation, Director Identification Number (DIN), age, address, period of directorship, details of other directorships;

(ii) the remuneration payable or paid to the director by the issuer company, its subsidiary and associate company; shareholding of the director in the company including any stock options; shareholding in subsidiaries and associate companies; appointment of any relatives to an office or place of profit;

(iii) the full particulars of the nature and extent of interest, if any, of every director :

(a) in the promotion of the issuer company; or

(b) in any immoveable property acquired by the issuer company in the two years preceding the date of the Prospectus or any immoveable property proposed to be acquired by it.

(iv) where the interest of such a director consists in being a member of a firm or company, the nature and extent of his interest in the firm or company, with a statement of all sums paid or agreed to be paid to him or to the firm or company in cash or shares or otherwise by any person either to induce him to become, or to help him qualify as a director, or otherwise for services rendered by him or by the firm or company, in connection with the promotion or formation of the issuer company shall be disclosed.

(v) disclosures in such manner as may be prescribed about sources of promoter's contribution; As per the rules the sources of promoters' contribution, if any, shall be disclosed in the following manner, namely :

(i) the total shareholding of the promoters, clearly stating the name of the promoter, nature of issue, date of allotment, number of shares, face value, issue price or consideration, source of funds contributed , date when the shares were made fully paid up, percentage of the total pre and post issue capital;

(ii) the proceeds out of the sale of shares of the company and shares of its subsidiary companies previously held by each of the promoters;

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(iii) the disclosure for sources of promoters contribution shall also include the particulars of name, address and the amount so raised as loan, financial assistance etc , if any, by promoters for making such contributions and in case of own sources, complete details thereof.

The Prospectus shall also contain the following reports for the purpose of financial information :

(i) Reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed. The rules under the prescribed power provide that

(a) reports by the auditors with respect to profits and losses and assets and liabilities shall also include the amounts or rates of dividends, if any, paid by the issuer company in respect of each class of shares for each of the five financial years immediately preceding the year of issue of the prospectus, giving particulars of each class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares for any of those years; and

(b) if no accounts have been made up in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, a statement of that fact accompanied by a statement of the accounts of the issuer company in respect of that part of the said period up to a date not earlier than six months of the date of issue of the prospectus indicating the profit or loss for that period and assets and liabilities position as at the end of that period together with a certificate from the auditors that such accounts have been examined and found correct and the said statement may indicate the nature of provision or adjustments made or which are yet to be made.

(ii) reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed :

Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in such manner as may be prescribed, the reports relating to profits and losses for each of the financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries;

The rules under the prescribed power provides reports relating to profits and losses for each of the five financial years or where five financial years have not expired, for each of the financial year immediately preceding the financial year of the issue of the prospectus shall :

(a) if the company has no subsidiaries, so far as regards its profits and losses, deal separately with the profits or losses of the company (distinguishing items of a non-recurring nature) for each of the five

financial years immediately preceding the year of the issue of the prospectus; and

(b) if the company has subsidiaries, deal either :

(i) as a whole with the combined profits or losses of its subsidiaries, so far as they concern members of the issuer company; or

(ii) individually with the profits or losses of each subsidiary, so far as they concern members of the issuer company; or

(iii) as a whole with the profits or losses of the company, and, so far as they concern members of the issuer company, with the combined profits or losses of its subsidiaries;

(c) The mode adopted at 'b' above should be specified in the prospectus

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(iii) reports made in the prescribed manner by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding the issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus:

Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in the prescribed manner, the reports made by the auditors upon the profits and losses of the business of the company for all financial years from the date of its incorporation, and assets and liabilities of its business on the last date before the issue of prospectus; and The rules provide that the reports made by the auditors in respect of the business of the company shall be stated in the prospectus in the manner provided in rules for subsection 26(1) (b)(ii) (above stated).

(iv) reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly; Section 26(1)(c) of the Act provides that the issuer company shall make a declaration in the prospectus about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder; and Under the empowerment of delegated authority under section 26(1)(d) of the Act, the rules state other information, matters and reports, as under to be stated in the prospectus :

1. If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly :

(a) in the purchase of any business; or

(b) in the purchase of an interest in any business and by reason of that purchase, or anything to be done in consequence thereof, or in connection therewith; the company will become entitled to an interest as respects either the capital or profits and losses or both, in such business exceeding fifty per cent, thereof; a report made by chartered accountants (who shall be named in the prospectus) upon :

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(i) the profits or losses of the business for each of the five financial years immediately preceding the date of the issue of the prospectus; and

(ii) the assets and liabilities of the business as on the last date to which the accounts of the business were made up, being a date not more than one hundred and twenty days before the date of the issue of the prospectus;

(c) In case of purchase or acquisition of any immovable property including indirect acquisition of immovable property for which advances have been paid to even third parties, the following disclosures shall be made :

(i) the names, addresses, descriptions and occupations of the vendors;

(ii) the amount paid or payable in cash, to the vendor and, where there is more than one separate vendor, or the company is a sub-purchaser, the amount so paid or payable to each vendor, specifying separately the amount, if any, paid or payable for goodwill;

(iii) the nature of the title or interest in such property proposed to be acquired by the company;

(iv) short particulars of every transaction relating to the property completed within the two preceding years,in which any vendor of the property to the company or any person who is, or was at the time of the transaction, a promoter, or a director or proposed director of the company had any interest, direct or indirect, specifying the date of transaction and the name of such promoter, director or proposed director and stating the amount payable by or to such vendor, promoter, director or proposed director in respect of the transaction.

2. Further the rules provide that a report shall be made by Chartered Accountants (who shall be named in the prospectus) if :

(i) the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in any manner resulting in the acquisition by the company of shares in any other body corporate; and

(ii) by reason of that acquisition or anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company.

Such report prepared by chartered accountant shall be prepared upon :

(a) the profits or losses of the other body corporate for each of the five financial years immediately preceding the issue of the prospectus; and

(b) the assets and liabilities of the other body corporate as on the last date to which its accounts were made up.

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Further the aforesaid report said report shall :

(i) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the issuer and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with for holders of other shares, if the issuer had at all material times held the shares to be acquired; and

(ii) where the other body corporate has subsidiaries, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiaries in the manner similar to that of rules pursuant to 26(1) (b) (ii).

3. The matters relating to terms and conditions of the term loans including re-scheduling, prepayment, penalty, default.

4. The aggregate number of securities of the issuer company and its subsidiary companies purchased or sold by the promoter group and by the directors of the company which is a promoter of the issuer company and by the directors of the issuer company and their relatives within six months immediately preceding the date of filing the prospectus with the Registrar of Companies shall be disclosed.

The term promoter has been defined in section 2(69) so as to mean a person :

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act: Nothing in sub-clause

(d) shall apply to a person who is acting merely in a professional capacity.

5. The matters relating to :

(a) Material contracts;

(b) Other material contracts;

(c) Time and place at which the contracts together with documents will be available for inspection from the date of prospectus until the date of closing of subscription list.

6. The related party transactions entered during the last five financial years immediately preceding the issue of prospectus as under :

(a) all transactions with related parties with respect to giving of loans or, guarantees, providing securities in connection with loans made, or investments made;

(b) all other transactions which are material to the issuer company or the related party, or any transactions that are unusual in their nature or

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conditions, involving goods, services, or tangible or intangible assets, to which the issuer company or any of its parent companies was a party. The disclosures for related party transactions for the period prior to notification of these rules shall be to the extent of disclosure requirements as per the Companies Act, 1956 and the relevant accounting standards prevailing at the said time.

7. The summary of reservations or qualifications or adverse remarks of auditors in the last five financial years immediately preceding the year of issue of prospectus and of their impact on the financial statements and financial position of the company and the corrective steps taken and proposed to be taken by the company for each of the said reservations or qualifications or adverse remarks.

8. The details of any inquiry, inspections or investigations initiated or conducted under the Companies Act or any previous companies law in the last five years immediately preceding the year of issue of prospectus in the case of company and all of its subsidiaries; and if there were any prosecutions filed (whether pending or not); fines imposed or compounding of offences done in the last five years immediately preceding the year of the prospectus for the company and all of its subsidiaries.

9. The details of acts of material frauds committed against the company in the last five years, if any, and if so, the action taken by the company.

10. A fact sheet shall be included at the beginning of the prospectus which shall contain :

(a) the type of offer document ("Red Herring Prospectus" or "Shelf Prospectus" or "Prospectus").

(b) the name of the issuer company, date and place of its incorporation, its logo, address of its registered office, its telephone number, fax number, details of contact person, website address, e-mail address;

(c) the names of the promoters of the issuer company;

(d) the nature, number, price and amount of securities offered and issue size, as may be applicable;

(e) the aggregate amount proposed to be raised through all the stages of offers of specified securities made through the shelf prospectus;

(f) the name, logo and address of the registrar to the issue, along with its telephone number, fax number, website address and e-mail address;

(g) the issue schedule :

(i) date of opening of the issue;

(ii) date of closing of the issue;

(iii) date of earliest closing of the issue, if any.

(h) the credit rating, if applicable;

(i) all the grades obtained for the initial public offer;

(j) the name(s) of the recognised stock exchanges where the securities are proposed to be listed;

(k) the details about eligible investors;

(l) coupon rate, coupon payment frequency, redemption date, redemption amount and details of debenture trustee in case of debt securities.

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In case of companies which have not completed five years, it shall be sufficient compliance for a company which has not completed five years, if such company provides such particulars or information for all the previous years since its incorporation.

Sub-section(2) of Section 26 provides that nothing aforesaid (i.e. provisions of section 26(1)) shall apply under following circumstances :

(a) Where a prospectus or form of application relating to shares in or debentures of the company is issued to existing members or debenture-holders of a company, whether an applicant has a right to renounce the shares or not under section 62 sub-section (1) clause (a) sub-clause (ii) in favour of any other person; or;

(b) Where the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

Statement by Experts : A prospectus issued by public company shall not include a statement purporting to be made by an expert, unless the expert is a person who is not and has not been, engaged or interested in the formation or promotion or management, of the company. Such statement shall be included only when such expert has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration. A statement to that effect shall be included in the prospectus.

Dating & Signing and Registration of Prospectus : According to Section 26(1) of the Act, every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed. The date indicated in the prospectus shall be deemed to be the date of its publication. The prospectus shall be signed by every person who is named therein as a director or proposed director of the Company or by his duly authorised attorney.

Prospectus shall be issued by or on behalf of a company or in relation to an intended company only when it has been delivered to the Registrar for Registration a copy of signed prospectus on or before the date of its publication. The Registrar shall not register a prospectus unless the requirements with respect to its registration are complied with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.

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Prospectus is to be issued within ninety days from the date of delivery of prospectus to the Registrar. No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar.

Penalty for non- compliance of Section 26 : If a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

Shelf Prospectus

Shelf Prospectus means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. In simple terms Shelf Prospectus is a single prospectus for multiple public. Issuer is permitted to offer and sell securities to the public without a separate prospectus for each act of offering for a certain period.

Under the Act any class or classes of companies, as the Securities and Exchange Board (SEBI) may provide by regulations in this behalf, may file a shelf prospectus with the Registrar. Such prospectus is to be submitted at the stage of the first offer of securities which shall indicate a period not exceeding one year as the period of validity of such prospectus. The validity period shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

An information memorandum is required to be filed by a company filing a shelf prospectus which shall contain all material facts relating to

- new charges created,
- changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities, and
- such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

According to the rules the information memorandum shall be prepared in Form PAS-2 and filed with the Registrar along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within one month prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

The section also provides a benefitting provision for the investors, the proviso provides that where a company or any other person has received applications for the allotment of securities along with advance payments of

subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof.

Form PAS-2 significantly provides for following information to be disclosed :

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1. Change in financial position of the company
2. Changes in the Share Capital, i.e. Capitalization Statement
3. Changes in accounting policies
4. Change in the risk factors as stated in the Shelf Prospectus and in the information memorandum filed with respect to previous offer
5. Economic changes that may affect income from continuing operations
6. Any significant changes in the activities of the company, which may have a material effect on the profit/loss of the company, including the loss of agencies or markets and similar factors
7. Changes in the total turnover of each major industry segment in which the issuer operates
8. Any significant legal proceedings initiated by the company or against the company or its directors, the outcome of which could have an adverse impact on the company
9. Any significant claim made by any person or any authority against the company
10. Any significant change in the business environment of the company whether technological, financial, market related, government policy or otherwise, adversely affecting, in present or in future, the business of the company
11. Any significant change in the management or ownership of the company
12. Any other change which may reasonably influence the investment decision of an investor
13. Gist of details of Proposed objects with reference to the current offering including project plan, financial details, time period of meeting the objects and other relevant factors.
14. Date wise details of charges created on the assets / properties of the company since first offer or previous offer of securities
    (a) Date of creation of charge
    (b) Purpose for which charge has been created
    (c) Amount for which charge has been created
    (d) Period of charge
    (e) Details of assets / property on which charge has been created

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(f) Name of the charge holder

(g) Brief terms and conditions of the charge.

Where an information memorandum is filed, every time an offer of securities is made such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

Red Herring Prospectus : Red herring Prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. In simple terms a red herring prospectus contains most of the information pertaining to the company's operations and prospects, but does not include key details of the issue such as its price and the number of shares offered.

According to section 32 a company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus. Such company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.

A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.

Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

Abridged Prospectus : According to section 2(1) of the Act "abridged prospectus" means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf Section 33 of the Act provides that no form of application for the purchase of any of the securities of a company shall be issued unless such form is accompanied by an abridged prospectus. A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him. Nothing aforesaid shall apply if it is shown that the form of application was issued—

(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; or

(b) in relation to securities which were not offered to the public. The penal provisions provide that a company which makes any default in complying with the provisions shall be liable to a penalty of fifty thousand rupees for each default.

Offer For Sale : Public Offer includes or an offer for sale (OFS) of securities to the public by an existing shareholder, through issue of a prospectus.

Under section 25 of the Act where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being

offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company. In simple terms any document by which the offer or sale of shares or debentures to public is made shall for all purposes be treated as prospectus. The document "Offer for sale" is an invitation to the general public to purchase the shares of a company through an intermediary, such as an issuing house or a merchant bank. A company may allot or agree to allot any shares or debentures to an "Issue house" without there being any intention on the part of the company to make shares or debentures available directly to the public through issue of prospectus. The issue house in turn makes an "Offer for sale" to the public.

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All enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply to Offer for sale. Following additional information to the matters required to be stated in a prospectus:

(a) the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and

(b) the time and place at which the contract where under the said securities have been or are to be allotted may be inspected;

According to the section in order to construe "Offer for Sale" either of the following conditions needs to be fulfilled :

(a) "Offer for sale" to the public was made within six months after the allotment or agreement to allot; or

(b) at the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.

As for the signing of the Prospectus the section provides that where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the Offer document is signed on behalf of the company by two directors of the company and in case of a firm by not less than one-half of the partners in the firm, as the case may be.

Offer of sale of shares by certain members of a company : Section 28 of the Act permits certain members of a company, in consultation with Board of directors, to offer the whole or a part of their holdings of shares to the public. The document by which the offer offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company.

All laws and rules made thereunder as to the contents of the prospectus and as to liability in respect of mis-statements in and omission from prospectus or otherwise relating to prospectus shall apply as if this is a prospectus issued by the company.

The section lays that the members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively authorise the company, whose shares are offered for sale to the public, to take all actions in respect of offer of sale for and on their behalf and they shall reimburse

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the company all expenses incurred by it on this matter. The rules in this context provide that the provisions of Part I of Chapter III namely "Prospectus and Allotment of Securities" and rules made there under shall be applicable to an offer of sale referred to in section 28 except for the following, namely :

(a) the provisions relating to minimum subscription;

(b) the provisions for minimum application value;

(c) the provisions requiring any statement to be made by the Board of directors in respect of the utilization of money; and

(d) any other provision or information which cannot be compiled or gathered by the offeror, with detailed justifications for not being able to comply with such provisions. Further the rules provide that such offer document or prospectus issued under the section shall disclose the name of the entity bearing the cost of making the offer for sale along with reasons.

Variation in Terms of Contract or Objects in Prospectus

The section aims to protect the interests of those who subscribe to a company's shares and debentures in response to and on faith of a prospectus. Section 27 of the Act provides that a company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except subject to the approval of, or except subject to an authority given by the company in general meeting by way of special resolution. The section restrains a company from making any unilateral variations in terms of prospectus.

For the purpose of variation of terms of contract or objects the rules provide that in Prospectus where the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a special resolution through postal ballot and the notice of the proposed special resolution shall contain the following particulars, namely :

(a) the original purpose or object of the Issue;

(b) the total money raised;

(c) the money utilised for the objects of the company stated in the prospectus;

(d) the extent of achievement of proposed objects(that is fifty percent, sixty percent, etc);

(e) the unutilised amount out of the money so raised through prospectus,

(f) the particulars of the proposed variation in the terms of contracts referred to in the prospectus or objects for which prospectus was issued;

(g) the reason and justification for seeking variation;

(h) the proposed time limit within which the proposed varied objects would be achieved;

(i) the clause-wise details as specified in sub-rule (3) of rule 3 as was required with respect to the originally proposed objects of the issue;

(j) the risk factors pertaining to the new objects; and

(k) the other relevant information which is necessary for the members to take an informed decision on the proposed resolution.

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According to the first proviso of the section, the details of the notice in respect the resolution shall also be published in a newspaper (one in English and one in vernacular language) in the city where the registered office of the company is situated indicating clearly the justification for such variation. According to the rules such advertisement shall be in Form No. PAS-1 and shall be published simultaneously with dispatch of Postal Ballot Notices to Shareholders. The notice shall also be placed on the web-site of the company, if any.

Significant provisions under form PAS-1 are as under : The details regarding such variation/alteration are as follows :

1. Particulars of the terms of the contract to be varied (or objects to be altered)
2. Particulars of the proposed variation/alteration
3. Reasons/justification for the variation
4. Effect of the proposed variation/alteration on the financial position of the company
5. Major Risk factors pertaining to the new Objects
6. Name of Directors who voted against the proposed variation/ alteration

Second provision provides that a company which proposes to vary the terms of contract referred to in prospectus shall not use any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any other listed company.

The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf. The section protects the minority dissenting shareholders by providing them with an exit opportunity at a price which shall be determined by SEBI by making regulations.

Process for filing and issuing a prospectus

Application forms : As stated under section 33, the application form for the securities is issued only when they are accompanied by a memorandum with all the features of prospectus referred to as an abridged prospectus.

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The exceptions to this rule are :

- When an application form is issued as an invitation to a person to enter into underwriting agreement regarding securities.
- Application issued for the securities not offered to the public.

Contents : For filing and issuing the prospectus of a public company, it must be signed and dated and contain all the necessary information as stated under section 26 of the Companies Act, 2013 :

1. Name and registered address of the office, its secretary, auditor, legal advisor, bankers, trustees, etc.
2. Date of the opening and closing of the issue.
3. Statements of the Board of Directors about separate bank accounts where receipts of issues are to be kept.
4. Statement of the Board of Directors about the details of utilization and non-utilisation of receipts of previous issues.
5. Consent of the directors, auditors, bankers to the issue, expert opinions.
6. Authority for the issue and details of the resolution passed for it.
7. Procedure and time scheduled for the allotment and issue of securities.
8. The capital structure of the in the manner which may be prescribed.
9. The objective of a public offer.
10. The objective of the business and its location.
11. Particulars related to risk factors of the specific project, gestation period of the project, any pending legal action and other important details related to the project.
12. Minimum subscription and what amount is payable on the premium.
13. Details of directors, their remuneration and extent of their interest in the company.
14. Reports for the purpose of financial information such as auditor's report, report of profit and loss of the five financial years, business and transaction reports, statement of compliance with the provisions of the Act and any other report.

Filing of copy with the registrar : As stated under sub-section 4 of section26 of the Companies Act, 2013, the prospectus is not to be issued by a company or on its behalf unless on or before the date of publication, a copy of the prospectus is delivered to the registrar for registration.

The copy should be signed by every person whose name has been mentioned in the prospectus as a director or proposed director or the assigned attorney on his behalf.

Delivery of copy of the prospectus to the registrar : As per section26(6) of the Companies Act 2013, the prospectus should mention that its copy has been delivered to the registrar on its face. The statement should also mention the document submitted to the registrar along with the copy of the prospectus.

Registration of prospectus : Section26(7) states about the registration of a prospectus by the registrar. **According to this section, when the registrar can register a prospectus when :**

1. It fulfils the requirements of this section, i.e., section 26 of the Companies Act, 2013; and
2. It contains the consent of all the persons named in the prospectus in writing.

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Issue of prospectus after registration : If a prospectus is not issued before 90 days from the date from which a copy was delivered before the registrar, then it is considered to be invalid.

Contravention of section : If a prospectus is issued in contravention of the provision under section 26 of the Companies Act 2013, then the company can be punished under section 26(9). The punishment for the contravention is:

- Fine of not less than Rs. 50,000 extending up to 3,00,000.

If any person becomes aware of such prospectus after knowing the fact that such prospectus is being issued in contravention of section 26 then he is punishable with the following penal provisions.

- Imprisonment up to a term of 3 years, or
- Fine of more than Rs. 50,000 not exceeding Rs. 3,00,000.

3.10.6 Kind of Companies

The Indian economy has a variety of companies existing in its market such as public companies, private companies, investment companies, limited liability companies etc. These numerous entities in the market may look different from each other on the surface, but based upon certain identifiable common characteristics they can be grouped into below-mentioned classifications. This article aims to draw your attention towards the conventional classification of the companies that are made based upon factors such as liability, control, incorporation, transferability of shares etc.

Classification of Companies : The companies may be classified based upon the mode of their incorporation and incorporation process which is defined under Section 7 of the Companies Act, 2013.

Incorporation is the day when the company acquires a legal identity i.e. the day when a company takes birth in the eyes of law. Section 2 of the Companies Act, 2013 defines the various kinds of companies and their facets.

I. Classification of Companies on the basis of incorporation

Royal Charter Company : It may be better understood as the company born out of the authorization of the sovereign or the crown. This was the mode of incorporation which was followed earlier to the Registration under the Companies Act. A charter is granted by the crown to the people requesting to form a cooperative or a company. To name a few, The Bank of England (1694), The East India Company (1600) were formed by the means of charters passed by the then Crown of England. The authorization given by the sovereign gives legal

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existence to these companies by means of the body of the charter. This mode of incorporation is no more recognised in any Companies Act to incorporate new Companies.

Statutory Company : As the name suggests, these are the companies that are formed by the means of a special statute passed by the Parliament or the State Legislature. The examples of statutory companies in India are the Reserve bank of India, the Life Insurance Corporation of India Act, etc.

The Statutory origins of these companies provide power to such companies to be bound by their own statute, i.e. whenever there is any dispute between statute under which these companies were formed and the Companies Act 2013, the statute being special legislation persists over the general law of Companies Act. The parliaments both State and Centre are empowered to make such legislation for incorporation under the power endowed to them by the Constitution of India.

Registered Company : As defined under Section 2(20) of the Companies Act, 2013, registered companies are the companies which get registered under the statute of the Companies Act. Companies are also provided with a certificate of incorporation by the Registrar of the Company.

II. Classification of Companies on the basis of liability of members

The liability upon the members is also used to classify the companies, it describes the limit to which member will be liable if such liability were to befall upon the company. On the basis of liability of the members, the companies may be classified into :

Companies limited by shares : These types of companies are mentioned in Section 2(22) of the Companies Act, 2013. The liability of the members of such a company is based upon the number of shares kept unpaid. This liability against the shares kept may be brought to the authority. Once the payment towards the security is made by the shareholder or member then no liability beyond that is placed upon such member. The liability may be enforced during the company's existence and even during its winding-up process.

Companies limited by guarantee : These types of companies are mentioned in Section 2(21) of the Companies Act, 2013. In a Company where the liability is limited by guarantee, it means the member of the Company has agreed on the Memorandum of Association to repay the same amount during winding up of such Company. In such companies, the liability of the members is limited to the undertaking given by them. Trust research associations, etc. are examples of companies liability limited by guarantee.

Unlimited Liability Company : These companies as defined under Section 2(92) of the Companies Act, 2013 do not have a cap on the amount of liability that may add on their members in case the company has to repay any debt. For any amount that the company owes these members, the unlimited liability company shall be liable to the extent of their interest in the company. These companies do not draw any popularity when it comes to Indian Market.

Difference between limited and unlimited companies :

Limited liability company	Unlimited liability company
Liability of the members is only in proportion to the sum they have invested in the company.	Liability of the members is not in proportion to the investment in their company.
Personal properties or assets will not be forfeited if the company goes bankrupt or winds up.	Even the personal property of the member will be forfeited against the liability of the company.

III. Classification of Company on the basis of the number of members

The number of members in a company is looked upon while classifying them. This classification of the company has been discussed in detail under the below-mentioned headings. On the basis of the number of members in the companies may be classified into :

Private Company : The private companies as defined under Section 3(1) (b) of the Companies Act, 2013 are very restrictive in nature wherein it may in its Articles of Association restrict the right to transfer shares. The number of members in such a company might be a maximum of 50. The shares and debentures of such companies are not available for the public at large. The number of members in a company to be called a private company is two, wherein it is clearly set that two members jointly holding a single share shall be considered as one member and not two members. The easy identification of Private companies is the 'Pvt. Ltd.' attached to its name.

Public Company : As defined under Section 2(71) of the Companies Act, 2013, Public Companies are the ones which are not a private company. As mandated under Section 3(1)(a) of the Companies Act, 2013, there should be at least 7 members to form a public company. It is the intrinsic nature of the public company that there is the right to transfer shares and debentures of the public company to the public at large.

IV. Classification of Companies on the basis of domicile

On the basis of their domicile the companies may be classified into :

Foreign Company : A Company which is situated outside India, but has a registered place in India may be physical or electronic address or perhaps company has ownership itself or through the agents, representatives or managers of the company is known as a foreign company under Section 2 (42) of the Companies Act, 2013. The aforementioned definition included in the new Companies Act has widened the scope of the definition of foreign companies extending the same to the entities having their electronic presence in India. The list of foreign companies listed in India has names of the corporate giants such as Whirlpool of India Ltd., Timex Group India Ltd., Ambuja Cements Ltd., etc.

Indian Company : Indian Company has been defined under Section 2(20) of the Companies Act, 2013 as any company registered under the Companies Act, 2013, or any other previous law is known as an Indian Company. An Indian

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company may prove its locus standi with the help of its office address and the legislation provides a guideline to be followed while using such powers by an Indian company.

V. Classification of companies on the basis of Miscellaneous factors

On the basis of other miscellaneous factors the companies may be classified into :

Government Company : As defined under Section 2(45) of the Companies Act, 2013, any company in which a minimum of 51 per cent of the paid-up share capital is held by the Central/State Government, and/or held fractionally by the Central Government and partly by one or more State Governments is known as a Government Company. The major drawback of having a government company is the lack of autonomy.

Holding, Subsidiary Companies and Associated Companies : Under Section 2(46) of the Companies Act, 2013, a company is known as the holding company of another company if it has administrative control over another company. Such control may be regarding the affairs of the company. Under Section 2(87) of the Companies Act, 2013, a company is known as a subsidiary company of another company when control is exercised by the other company over the subsidiary company.

A company is deemed to be a subsidiary company of another :

1. If the other company
   - Exercises or controls more than 50% of the total voting power i.e. where the holders of preference shares have the same voting rights as the equity shares holder, or,
   - 50% in nominal value of its equity share capital held, or,
   - Possesses power regarding the composition of the Board of directors.
2. If it is a subsidiary of a company which is a subsidiary of the controlling company.

The holding power also includes another kind of Company known as Associate Company, which is now being explained with respect to the above-mentioned Holding and subsidiary company.

Associate Company : These Companies as defined under Section 2(6) of the Companies Act, 2013 are the one in which the other company has significant influence but these Companies are not the subsidiaries of such influencing companies known as the Associate Company. The Joint Venture Companies are such associate companies.

The significant control can be inferred directly from the explanation attached to the provision which requires the influencing company to hold 20% of the share capital or any agreement whereby the decision making of the associate is placed upon such Influencing Company. The Associate Company concept has

been seen as a harbinger of transparency in the working of the Company since it provides a more rationale grundnorm for an associated relationship between the two companies.

One man Company : Under Section 2(62) of the Companies Act, a company in which one person is the whole and sole owner of the share capital of the company is known as a One Man Company. In order to meet the statutory requirement of a minimum number of members, some namesake company shareholders hold one or two shares each. The namesake shareholder members are usually nominated by the principal shareholder. The principal shareholder enjoys all the profits of the business with the protective shield of limited liability. Such companies have been given legal sanctity.

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Difference between One person company and Sole Proprietorship

The major or fundamental difference between a one-person company and the sole proprietorship is based upon the limitations or extent of liability in the one-person company. One person company is different from the Sole proprietorship as the ne person company differentiates the promoter from the separate entity of the company. The liability of the director of the one-man company is limited in the event of any legal liability or claims made against the company.

Investment Company : The Investment Companies as defined under section 186 of the Companies Act, 2013, are the companies which have a fundamental business or transaction relating to the securities of other companies. Securities may be of a nature of shares or debenture or other securities offered by such entity. The word investment in its predominant sense means to acquire a resource and hold it for the interest earned over it, but in the case of an investment company, the investment is aimed not only at the acquisition and holding but perhaps to even the sale of the securities whenever they reach a better price.

The Investment company under Section 186 of the Companies Act, 2013 are based upon the market trend relating to the shares analyses the maximum profit investment for the Company. The commonly used terminology of stock market relating to the bear and bull market and the understanding of the trend plays a crucial role to attain profits aimed at by the company.

There are still two perspectives towards the investment company functioning and the characteristics of the transactions made by such company. One set of claims suggests that the Investment Companies are only supposed to purchase security and earn interest by maintaining them. The other school of thought suggests that the investment company may earn not only by purchase and hold but also selling of the securities.

New kind of Companies recognised under the Act, 2013

Dormant Companies : Where a company is formed under Section 455 of the Company Act, 2013 for a future endeavour or to hold an asset which may be a physical or intellectual property and has no significant accounting transaction, such a company or inactive company can make an application to the Registrar in the prescribed manner for obtaining the status of the dormant company.

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The explanation attached to this provision states about the inactive company prescribing a period of 2 years of inactivity in terms of business transactions, operations etc, or the companies which have not filed their annual returns or the financial statement in the last 2 years. Such transactions do not include all the necessary payment which are made by the company to the Registrar and other payments which are supposed to be made under any other law.

The Registrar allows the certificate of the inactive company to the applicant company. The registrar must maintain the list of dormant companies. A company to remain a dormant company on the books of the registrar has to pay the required sum. The Company on request may make the Dormant Company back to an active company.

3.11 DIRECTORS :THEIR POWERS AND DUTIES

The companies act, 2013 in section 2(34) defines the term "director" as, "a director appointed to the Board of a company"., wherein a "Board" in relation to a company, means the collective body of the directors of the company.

As per Companies Act provisions every director shall be appointed by the company in general meeting, provided they have been allotted the Director Identification Number (DIN) and on submission of a declaration that he/she is not disqualified to become a director. An additional director is also appointed by the Board of Directors through the Boards vested power to hold office till next general meeting. An alternate director may be appointed by the Board of Directors to act as a Director in absence for a period of not less than 3 months and not more than the allotted period for the director for whom the replacement is.

Section 166 (4) provides for the appointment of not less than two-thirds of the total number of the directors of a company, and such appointments may be made once in every three years and casual vacancies of such directors shall be filled.

The companies act 2013 is built on the principle of responsibility of the Board, protection of interests of the Shareholders, self- regulation and openness through disclosures. The 2013 amendment has ensured several effective measures through clearly defining liabilities and responsibilities of the Directors and penal actions on failure to follow the same.

3.11.1 Powers of Board of Directors

The board of directors is the highest authority in any company. According to Section 179, Companies Act 2013, the power of directors of a company – entitled to make any and all decisions, and thus exercise all the power, which the company has authority to enact.

Power of Directors :

According to Section 179, CA 2013, the powers of the board of directors are as follows :

- Board of Directors can exercise all such powers for which the company is authorised.
- Board of Directors can take all actions on matters in which the company has authority.

Power of Board subject to other Provisions'

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While using the power vested in the board of directors, the board must adhere to the rules and provisions of the following :

1. The Companies Act
2. The Memorandum of Association
3. The Articles of Association
4. Any Regulation, made by the company during general meetings.

Specifically, one can say that the authority of the company is the powers of the board. However, if necessary the power of the board can be restricted by the Companies Act, the Memorandum, the Articles. Resolutions passed by shareholders can also limit the powers of the board.

Power Exercised by Company in General Meeting

The board of directors are not allowed to exercise any power or take any decisions, which are specifically to be exercised or a decision to be taken in a General Meeting.

New Regulations Do Not Invalidate Acts made by the Board

According to Section 179, Companies Act 2013, any resolutions that are passed in a General Meeting cannot invalidate any provisions that the board of directors made prior to the resolution.

Power Exercised by Passing Resolution at Board Meetings

There are also certain powers of the board that those resolutions can only be passed by calling a board meeting. This is done as per Section 175, Companies Act 2013. Thus, the board of directors can exercise the following powers, only by passing a resolution in the meetings of the board :

- Make calls on shareholders
- Authorise the buyback of securities and shares
- Issue securities and shares
- Borrow monies
- Investing the funds
- Grant loans
- Approve the financial statement
- Approve amalgamation/merger
- Diversify the business
- Take over a company

Also, in accordance with Section 117, CA 2013, a copy of every board resolution must be submitted with the Registrar within 30 days of the passing of the resolution.

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In addition to this, Rule 8 of Companies Rules 2014 has given certain more powers to the board. Namely, resolutions that can be passed at board meetings :

1. Making political contributions
2. Appointing or removing key managerial personnel.
3. Appointing internal auditors and secretarial auditors.

The Delegation of Powers of the Board : The Board of Directors may delegate powers such as investing monies, granting loans, giving guarantee or security by passing a resolution in the board meeting :

1. Committee of Directors
2. Managing Director
3. Manager
4. Any other principal officer of the company
5. The principal officer of a branch office

Restrictions of Powers of the Board : In accordance with provisions of Section 179, the company can impose restrictions and conditions on the power of the board of directors. Moreover, the shareholders are responsible for imposing restrictions and conditions of the power of the board. Thus, the shareholders pass an ordinary resolution at a general meeting to do this.

3.11.2 Duties of Directors

Section 166 of the new Act provides that a director of a company (including a private company) shall act in accordance with the Articles of the company. His duties are listed in the section as under :

(i) He has to act in good faith in order to promote the objects of the company for the benefit of its members as a whole.

(ii) He has to act in the best interest of the company, its employees, shareholders, community and for the protection of environment.

(iii) He has to carry on his duties with due and reasonable care, skill and diligence and exercise independent judgment.

(iv) He shall not involve in a situation in which he may have a direct or indirect interest that conflicts or likely to conflict with the interest of the company.

(v) He shall not achieve or attempt to achieve any undue gain or advantage either to himself, his relatives, partners or associates.

(vi) He shall not assign his office to any other person.

If he contravenes any of the above provisions of section 166, he shall be punishable with fine which shall not be less than Rs.1 lac which may extend to Rs.5 lacs. It is also provided that if he is found guilty of making any undue gain during the course of discharging his duties as a director, he shall be liable to refund an amount equal to such gain to the company.

Section 172 provides that if a company contravenes any of the provisions of chapter XI (sections 149 to 171), for which no specific punishment is

provided, the company and every officer of the company who is in default shall be punishable with minimum fine of Rs.50000/- which may extend to Rs.five lacs.

Draft Rules 11.11 to 11.15 provide for procedure for Notice of Candidate to be appointed as Director, Notice of Resignation of Directors, Maintenance of Register of Directors, KMP etc.

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3.11.3 Meetings

Board meetings are meetings at the highest level, i.e. a meeting where board members or their representatives are present. A company is not an actual entity but a legal one so it cannot take actions and make decisions. The board of directors act as agents through which the company takes actions as well as makes decisions.

Board Meetings : The board of directors is the supreme authority in a company and they have the powers to take all major actions and decisions for the company. The board is also responsible for managing the affairs of the whole company.

For the effective functioning and management, it is imperative that board meetings be held at frequent intervals. For this, Section 173 of Companies Act, 2013 provides :

In the case of a Public Limited Company, the first board meeting has to be held within the first 30 days, since the incorporation date. Additionally, a minimum of 4 board meetings must be held in a span of one year. Also, there cannot be a gap of more than 120 days between two meetings.

In the case of small companies or one person company, at least two meetings must be conducted; one in each half of the financial year. Additionally, the gap between the two meetings must be at least 90 days. In a situation where the meeting is held at a short notice, at least one independent director must be attending the meeting.

Notice of Board Meeting : The notice of Board Meeting refers to a document that is sent to all directors of the company. This document informs the members about the venue, date, time, and agenda of the meeting. All types of companies are required to give notice at least 7 days before the actual day of the meeting.

Quorum for the Board Meeting : The quorum for the Board Meeting refers to the minimum number of members of the Board to conduct a valid Board Meeting. According to Section 174 of Companies Act, 2013, the minimum number of members of the board required for a meeting is 1/3rd of a total number of directors.

At any rate, a minimum of two directors must be present. However, in the case of One Person Company, the rules of Section 174, do not apply.

Participation in Board Meeting : All directors are encouraged to actively attend board meetings and in case that's not possible at least attend the meetings

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through a video conference. This is so that all directors can take part in the decision-making process.

Right Convening Authority : The board meeting must be held under the direction of proper authority. Usually, the company secretary (CS) is there to authorize the board meeting. In case the company secretary is unavailable, the predetermined authorized person shall act as the authority to conduct the board meeting.

Adequate Quorum : The proper requirements of the quorum or the minimum number of Directors required to conduct a Board meeting must be present for it to be considered a valid board meeting.

Proper Notice : Proper notice is one of the major requirements to be fulfilled when planning a board meeting. Formal notice has to be served to all members before conducting a board meeting.

Proper Presiding Officer : The meeting must always be conducted in the presence of a chairman of the board.

Proper Agenda : Every board meeting has a set agenda that must be followed. The agenda refers to the topic of discussion of the board meeting. No other business, which is not mentioned in the meeting must be considered.

3.11.4 Winding Up

Since we believe in Going Concern Assumption, as we want our business to flourish more & more, but at some point of time due to several reasons one has to close down his business and that stage is known as winding up of a company. It is the last stage of company in which its existence for past several years is dissolved and all its assets are used to pay off the creditors, shareholders and other liabilities.

As per section 270 of the Companies Act 2013, the procedure for winding up of a company can be initiated either :

(a) By the tribunal or,

(b) Voluntary.

I. Winding up of a company by a tribunal :

As per Companies Act 1956, a company can be wound up by a tribunal on the basis of the following reasons :

1. Suspension of the business for one year from the date of incorporation or suspension of business for whole year.
2. Reduction in number of minimum members as specified in the act (2 in case of private company and 7 in case of public company)

But with the introduction of new Companies Act 2013, these above stated grounds for winding up have been deleted and some new situations for winding up have been inserted.

As per new Companies Act 2013, a company can be wound up by a tribunal in the below mentioned circumstances :

1. When the company is unable to pay its debts.
2. If the company has by special resolution resolved that the company be wound up by the tribunal.
3. If the company has acted against the interest of the integrity or morality of India, security of the state, or has spoiled any kind of friendly relations with foreign or neighboring countries.
4. If the company has not filled its financial statements or annual returns for preceding 5 consecutive financial years.
5. If the tribunal by any means finds that it is just & equitable that the company should be wound up.
6. If the company in any way is indulged in fraudulent activities or any other unlawful business, or any person or management connected with the formation of company is found guilty of fraud, or any kind of misconduct.

II. Filing of winding up petition : Section 272 provides that a winding up petition is to be filed in the prescribed form no 1, 2 or 3 whichever is applicable and it is to be submitted in 3 sets. The petition for compulsory winding up can be presented by the following persons:

- The company
- The creditors ; or
- Any contributory or contributories
- By the central or state govt.
- By the registrar of any person authorized by central govt. for that purpose

At the time of filing petition, it shall be accompanied with the statement of Affairs in form no 4. That petition shall state the facts up to a specific date which shall not more than 15 days prior to the date of making the statement. After preparing the statement it shall be certified by a Practicing Chartered Accountant. This petition shall be advertised in not less than 14 days before the date fixed for hearing in both of the newspapers English and any other regional language.

III. Final Order And Its Content : The tribunal after hearing the petition has the power to dismiss it or to make an interim order as it think appropriate or it can appoint the provisional liquidator of the company till the passing of winding up order. An order for winding up is given in form 11.

IV. Voluntary winding up of a company : The company can be wound up voluntarily by the mutual decision of members of the company, if :

- The company passes a Special Resolution stating about the winding up of the company.
- The company in its general meeting passes a resolution for winding up as a result of expiry of the period of its duration as fixed by its Articles of Association or at the occurrence of any such event where the articles provide for dissolution of company.

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V. Procedure for voluntary winding up :

1. Conduct a board meeting with 2 Directors and thereby pass a resolution with a declaration given by directors that they are of the opinion that company has no debt or it will be able to pay its debt after utilizing all the proceeds from sale of its assets.
2. Issues notices in writing for calling of a General Meeting proposing the resolution along with the explanatory statement.
3. In General Meeting pass the ordinary resolution for the purpose of winding up by ordinary majority or special resolution by 3/4th majority. The winding up shall be started from the date of passing the resolution.
4. Conduct a meeting of creditors after passing the resolution, if majority creditors are of the opinion that winding up of the company is beneficial for all parties then company can be wound up voluntarily.
5. Within 10 days of passing the resolution, file a notice with the registrar for appointment of liquidator.
6. Within 14 days of passing such resolution, give a notice of the resolution in the official gazette and also advertise in a newspaper.
7. Within 30 days of General meeting, file certified copies of ordinary or special resolution passed in general meeting.
8. Wind up the affairs of the company and prepare the liquidators account and get the same audited.
9. Conduct a General Meeting of the company.
10. In that General Meeting pass a special resolution for disposal of books and all necessary documents of the company, when the affairs of the company are totally wound up and it is about to dissolve.
11. Within 15 days of final General Meeting of the company, submit a copy of accounts and file an application to the tribunal for passing an order for dissolution.
12. If the tribunal is of the opinion that the accounts are in order and all the necessary compliances have been fulfilled, the tribunal shall pass an order for dissolving the company within 60 days of receiving such application.
13. The appointed liquidator would then file a copy of order with the registrar.
14. After receiving the order passed by tribunal, the registrar then publish a notice in the official Gazette declaring that the company is dissolved.

Case Name: M/s Meters and Instruments Private Limited &Anr. v. Kanchan Mehta

In this case, the Two-Judge Bench of Supreme Court made some key observations regarding dishonor of cheque cases and also issued directions for speedy disposal of cheque cases under Section 138 of NI Act.

Use of modern technology for speedy disposal of cases– The Court took into consideration the use of modern technologies for enabling speedy disposal of cases under Section 138 of NI Act and noted that the use of modern technology needs to be considered not only for paperless Courts but also to reduce overcrowding of Courts. There appears to need to consider categories of cases that can be partly or entirely concluded "online" without the physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated. Traffic challans may perhaps be one such category.

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At least some number of Section 138 cases can be decided online. If a complaint with affidavits and documents can be filed online, process issued online and accused pays the specified amount online, it may obviate the need for the personal appearance of the complainant or the accused. Only if the accused contests, need for the appearance of parties may arise which may be through Counsel and wherever viable, video conferencing can be used. Personal appearances can be dispensed with on suitable self-operating conditions.

3.12 SUMMARY

A negotiable instrument is a piece of paper which entitles a person to a sum of money and which is transferable from one person to another by mere delivery or by endorsement and delivery. The characteristics of a negotiable instrument are easy negotiability, transferee gets good title, transferee gets a right to sue in his own name and certain presumptions which apply to all negotiable instruments. There are two types fo negotiable instruments (a) Recognised by statue: Promissory notes, Bill of exchange and cheques and (b) Recognised by usage: Hundis, Bill of lading, Share warrant, Dividend warrant, Railway receipts, Delivery orders etc.

The parties to bill of exchange are drawer, drawee, acceptor, payee, indorser, indorsee, holder, drawee in case of need and acceptor for honour. The parties to a promissory note are maker, payee, holder, indorser and indorsee while parties to cheque are drawer, drawee, payee, holder, indorser and indorsee. Negotiation of an instrument is a process by which the ownership of the instrument is transferred by one person to another. There are two methods of negotiation: by mere delivery and by endorsement. In its literal sense, the term 'indorsement' means writing on an instrument but in its technical sense, under the Negotiable Instrument Act, it means the writing of a person's name on the face or back of a negotiable instrument or on a slip of paper annexed thereto, for the purpose of negotiation.

A bill may be dishonoured by non-acceptance (since only bills require acceptance) or by non-payment, while a promissory note and cheque may be dishonoured by non-payment only. Noting means recording of the fact of dishonour by a notary public on the bill or paper or bothpartly. Protest is a formal notarial certificate attesting the dishonour of the bill. The term 'discharge' in

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relation to negotiable instrument is used in two senses, viz., (a) discharge of one or more parties from liability thereon, and (b) discharge of the instrument

Legislation being the part of the government and companies being the most important part of economy to earn revenue for the country, they are taking initiative to make the company law simpler. But, being a responsible citizen of India, one should be aware of the post-registration compliance which is equally important for a corporation because in any case, penal action will be taken by the authorities for the non-compliance. Therefore, the promoters should be well aware of the next steps to be taken for the company. It is always recommended to ask the help of professionals for reducing chances of being non-compliant.

This article has tried to consolidate all the basic knowledge and the documents required to incorporate a company under the Companies Act, 2013. The advantages and disadvantages have also been highlighted. Since every coin has two sides, therefore incorporation also has both pros and cons. The legislature of india have been very effective in bringing out changes that are required in the said Act. The only change required for the incorporation is that in the technological world, the procedure of incorporation should be made online so that the complexity is reduced and time is saved of the members involved.

3.13 EXERCISE

1. Define the term 'negotiable instrument'. What are its essential characteristics.
2. What is a bill of exchange ? How does it differ from a promissory note.
3. Define cheque distinguish between a cheque and a bill of exchange.
4. Discuss the presumption in respect of a negotiable instrument.
5. Explain the privileges granted to a holder in due course.

UNIT 4: CONSUMER PROTECTION ACT 1986

Notes

Structure:

4.0 OBJECTIVES

After reading this Unit. you will be able to:

- explain the aims & objective of act;
- describe the redressal machinery under the act;
- analysis the procedure for complaint under consumer protection act
- discuss the enforcement of orders and penalties.

4.1 INTRODUCTION

The Consumer Protection Act, 1986 was enacted to provide for better protection of the interest of the consumers and for the purpose to make provisions for the establishment of Consumer Councils and other authorities in the settlement of consumer disputes and for matters connected therewith. It seeks, inter-alia, to promote and to protect the rights of consumers such as protection against marketing of goods which are hazardous to life and property, the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices, the right to be assured, wherever possible, access to variety of goods at competitive prices, the right to be heard and to be assured that the interest of consumers will receive due consideration at appropriate forums, the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers and right to consumer education. The object is also to provide speedy and simple redressal to consumer disputes-quasi judicial machinery is sought to be set up at District, State and Central Levels. These quasi-judicial bodies are to observe principles of natural justice and have been empowered to give relief of specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of orders given by quasi-judicial bodies have also been provided.

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4.2 CONSUMER PROTECTION ACT 1986

4.2.1 Aims & Objective of Act

The principal objective of the Consumer Protection Act is to grant shield for the improved safeguard to consumers. Unlike prevailing laws, which are disciplinary or precautionary in nature, the provisions of this Act are compensatory in nature. The act is aimed to afford simple, quick and economical redressal to the consumers' grievances, and reliefs of a particular nature and award of damages wherever appropriate to the consumer.

The Consumer Protection Act has been revised in 1993 both to extend its coverage and scope and to augment the powers of the redressal. The fundamental rights of consumers as per the Consumer Protection Act are :

1. Right to be shielded against promotion of goods and services which are risky to life and property
2. Right to be conversant regarding the wholesomeness, standard ,quality, quantity, potency, and value of goods, or services so as to shield the buyer against unfair trade practices
3. Right to be ensured, access to range of goods and services at viable prices wherever possible
4. Right to be informed and be ensured that consumers' benefit will be given due consideration at appropriate level
5. Right to search for redressal against unjust trade practices or restraining trade practices or deceitful exploitation of consumers
6. Right to consumer education

The main objective of the Consumer Protection Act is to grant shield for the improved safeguard of consumers and their rights. Even though there is a prevailing Consumer Protection Act, it is still doubtful as to how far the objectives of the Act are achieved. Still we see that Rights of consumers are ignored but we hope the government will surely take necessary actions in order to establish the proclaimed fundamental rights soon. Government must ensure consumers right to be conversant regarding the purity, standard, quality, quantity, potency, and value of goods, or services so as to shield the buyer against unfair trade practices.

Consumer Protection Act, 1986 is an Act of the Parliament of India enacted in 1986 to protect the interests of consumers in India. It makes provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith also.

4.2.2 Redressal Machinery Under the Act

The CPA provides for a 3 tier approach in resolving consumer disputes. The District Forum has jurisdiction to entertain complaints where the value of goods / services complained against and the compensation claimed is less than Rs. 5 lakhs, the State Commission for claims exceeding Rs. 5 lakhs but not

exceeding Rs. 20 lakhs and the National Commission for claims exceeding Rs. 20 lakhs.

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District Forum : Under the CPA, the State Government has to set up a district Forum in each district of the State. The Government may establish more than one District Forum in a district if it deems fit. Each District Forum consists of :

(a) a person who is, or who has been, or is qualified to be, a District Judge who shall be its President

(b) two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

Appointments to the State Commission shall be made by the State Government on the recommendation of a Selection Committee consisting of the President of the State Committee, the Secretary - Law Department of the State and the secretary in charge of Consumer Affairs.

Every member of the District Forum holds office for 5 years or upto the age of 65 years, whichever is earlier and is not eligible for re-appointment. A member may resign by giving notice in writing to the State Government whereupon the vacancy will be filled up by the State Government.

The District Forum can entertain complaints where the value of goods or services and the compensation, if any, claimed is less than rupees five lakhs. However, in addition to jurisdiction over consumer goods services valued upto Rs. 5 lakhs, the District Forum also may pass orders against traders indulging in unfair trade practices, sale of defective goods or render deficient services provided the turnover of goods or value of services does not exceed rupees five lakhs.

A complaint shall be instituted in the District Forum within the local limits of whose jurisdiction :

(a) the opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office or personally works for gain at the time of institution of the complaint; or

(b) any one of the opposite parties (where there are more than one) actually and voluntarily resides or carries on business or has a branch office or personally works for gain, at the time of institution of the complaint provided that the other opposite party/parties acquiescence in such institution or the permission of the Forum is obtained in respect of such opposite parties; or

(c) the cause of action arises, wholly or in part.

State Commission : The Act provides for the establishment of the State Consumer Disputes Redressal Commission by the State Government in the State by notification. Each State Commission shall consist of :

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(a) a person who is or has been a judge of a High Court appointed by State Government (in consultation with the Chief Justice of the High Court) who shall be its President;

(b) two other members who shall be persons of ability, integrity, and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom must be a woman.

Every appointment made under this hall be made by the State Government on the recommendation of a Selection Committee consisting of the President of the State Commission, Secretary -Law Department of the State and Secretary in charge of Consumer Affairs in the State.

Every member of the District Forum holds office for 5 years or upto the age of 65 years, whichever is earlier and is not eligilbe for re-appointment. A member may resign by giving notice in writing to the State Government whereupon the vacancy will be filled up by the State Government.

The State Commission can entertain complaints where the value of goods or services and the compensation, if any claimed exceed Rs. 5 lakhs but does not exceed Rs. 20 lakhs;

The State Commission also has the jurisdiction to entertain appeal against the orders of any District Forum within the State.

The State Commission also has the power to call for the records and appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State if it appears that such District Forum has exercised any power not vested in it by law or has failed to exercise a power rightfully vested in it by law or has acted illegally or with material irregularity.

National Commission :

The Central Government provides for the establishment of the National Consumer Disputes Redressal Commission The National Commission shall consist of :

(a) a person who is or has been a judge of the Supreme Court, to be appoint by the Central Government (in consultation with the Chief Justice of India) who be its President;

(b) four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman

Appointments shall be by the Central Government on the recommendation of a Selection Committee consisting of a Judge of the Supreme Court to be nominated by the Chief Justice of India, the Secretary in the Department of Legal Affairs and the Secretary in charge of Consumer Affairs in the Government of India.

Every member of the National Commission shall hold office for a term of five years or upto seventy years of age, whichever is earlier and shall not be eligible for reappointment.

The National Commission shall have jurisdiction :

(a) to entertain complaints where the value of the goods or services and the compensation, if any, claimed exceeds rupees twenty lakhs:

(b) to entertain appeals against the orders of any State Commission; and

(c) to call for the records and pass appropriate orders in any consumer dispute which is pending before, or has been decided by any State Commission where it appears to the National Commission that such Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

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Complaints may be filed with the District Forum by :

1. the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided
2. any recognised consumer association, whether the consumer to whom goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided, is a member of such association or not
3. one or more consumers, where there are numerous consumers having the same interest with the permission of the District Forum, on behalf of or for the benefit of, all consumers so interested the Central or the State Government.

On receipt of a complaint, a copy of the complaint is to be referred to the opposite party, directing him to give his version of the case within 30 days. This period may be extended by another 15 days. If the opposite party admits the allegations contained in the complaint, the complaint will be decided on the basis of materials on the record. Where the opposite party denies or disputes the allegations or omits or fails to take any action to represent his case within the time provided, the dispute will be settled in the following manner :

I. In case of dispute relating to any goods : Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, a sample of the goods shall be obtained from the complainant, sealed and authenticated in the manner prescribed for referring to the appropriate laboratory for the purpose of any analysis or test whichever may be necessary, so as to find out whether such goods suffer from any other defect. The appropriate laboratory' would be required to report its finding to the referring authority, i.e. the District Forum or the State Commission within a period of forty- five days from the receipt of the reference or within such extended period as may be granted by these agencies.

Appropriate laboratory means a laboratory or organisation :

(i) recognised by the Central Government;

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(ii) recognised by a State Government, subject to such guidelines as may be prescribed by the Central Government

(iii) any such laboratory or organisation established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect.

The District Forum / State Commission may require the complainant to deposit with it such amount as may be specified towards payment of fees to the appropriate laboratory for carrying out the tests. On receipt of the report, a copy thereof is to be sent by District Forum/State Commission to the opposite party along with its own remarks.

In case any of the parties disputes the correctness of the methods of analysis/test adopted by the appropriate laboratory, the concerned party will be required to submit his objections in writing in regard to the report. After giving both the parties a reasonable opportunity of being heard and to present their objections, if any, the District Forum/Slate Commission shall pass appropriate orders.

II. In case of dispute relating to goods not requiring testing or analysis or relating to services : Where the opposite party denies or disputes the allegations contained in the complaint within the time given by the District Forum / State Commission, it shall dispose of the complaint on the basis of evidence tendered by the parties. In case of failure by the opposite party to represent his case within the prescribed time, the complaint shall be disposed of on the basis of evidence tendered by the complainant.

4.2.3 Procedure For Complaint Under Consumer Protection Act

With the economic development, the buying capacity of the consumers has increased along with the choices of products and services in the market. The consumer is now more aware of their rights than they were ever before. The Consumer Protection Act, 1986 of India protects the rights of the consumers in India and also has a mechanism to address the customer complaints. So how does one go about filing a complaint under the consumer protection Act, 1986? Here is a guide for you.

Who is a Consumer ?

The act clearly defines the term, ˜Consumer. According to the act, a consumer in India is any person who :

1. Buys any goods;
2. Hires any services;
3. Uses goods with the approval of the buyers;
4. Hires services with the service providers approval;
5. Uses the goods to earn livelihood or self-employment;
6. Uses the services to earn livelihood or self-employment;

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Who can file a complaint ?

According to the Consumer Protection Act, 1986, any person who is a consumer who bought a product or service, fully or partially paid for his use is a consumer. Since the Consumer Protection Act, 1986 extends to the whole of India, any consumer can file a complaint to the consumer forum in India.

Steps to file a complaint :

1. Drafting the complaint petition- In a precise manner, a complaint needs to be drafted with the facts and proofs such as any bills, receipts, documents. Three copies need to be made of the complaint and filed with an affidavit. The complaint also needs to be served to all the parties involved.
2. After the drafting, the complainant has to choose the court depending on the value of the consideration.

To ensure the rightful and speedy resolution of all the consumer complaints, the Consumer Protection Act, 1986 has a three-tier redressal system on which it operates. The three layers of the redressal system are :

1. The District Forum at District Level- The jurisdiction of this forum entertains complains of value equal to or less than INR 20 Lacs.
2. State Commission at the state level- The jurisdiction of this forum entertains complains of value equal to or less than INR One crores.
3. National Commission at National level- The jurisdiction of this forum entertains complains of value more than Rs. 1 Crores.

Each of these forums has to provide the resolution within thirty days failing to which the consumer can escalate the complaint to the next commission.

1. After choosing the court, the statutory fees are to be deposited while filing the complaint.
2. If one is not satisfied with the verdict of these forums, they have an option to apply for a revision to the honorable Supreme Court of India.

The complaint can be filed within two years of buying or using the service.

Consumer Protection Act, 2019 : The Consumer Protection Act, 2019 passed on 7th August 2019, provides protection of the interests of consumers and aims at establishing authorities to address the grievances of the consumers and settle consumer-related disputes. The authorities will also provide timely and effective redressals of consumer disputes. In the case of grievances, consumers can file a complaint in the manner laid down under the Consumer Protection Act, 2019.

Sec 2 of the Consumer Protection Act, 2019 defines a complaint as any written allegation made by a consumer to obtain relief under the **Consumer Protection Act** in the case of an unfair contract, unfair trade practice, restrictive trade practice, defective goods, deficiency of services or hazardous goods or service. A complaint may also include a written allegation to claim liability against the product manufacturer, seller or service provider.

Notes

A **consumer complaint** can be filed by one or more consumers, any registered voluntary consumer association, the Central or State Government, heirs or legal representatives of the consumer. Where the consumer is a minor, the complaint can be filed by his parent or legal guardian.

How to File a Consumer Complaint under Consumer Protection Act, 2019 ?

1. A Consumer Complaint can be made either in a written manner or in electronic mode to the District Collector, the Commissioner of regional office or the Central Authority. In the case of violation of consumer rights, a complainant can approach the District Forum, State Commission or the National Commission. Also, if the complainant is not satisfied with the order passed by a **Consumer Court**, he can file an appeal in the higher Court.
2. The first step before filing a **consumer complaint** is to determine the territorial and pecuniary jurisdiction of the complaint. A **consumer complaint** can be filed in the District Forum if the claims for goods and services does not exceed Rs 1 Crore. For claims where the value of goods and services is between Rs. 1 Crore to 10 Crore, the complaint can be filed in the State Commission whereas if the value of goods and services exceeds Rs 10 Crore, a consumer complaint can be filed in the National Commission.
3. The next step requires serving a legal or personal notice to the opposite party. After this, a complainant can file a complaint in the respective consumer redressal forum. The procedure for filing a consumer complaint is similar for all the District Forums, State Commissions and National Commissions.

Fee for a consumer complaint under Consumer Protection Law : As per the Consumer Protection (twenty-second amendment) Rules, 2018, the fee structure for filing a **consumer complaint** has been revised as per the following :

1. Cases of value up to Rs. 5 Lakh- No fee.
2. Cases of the value of Rs. 5 Lakh-10 Lakh- Rs 200
3. Cases of value exceeding Rs 10 Lakh- Rs 400

A complainant is not required to pay any fee for filing an appeal in the State Commission or National Commission.

Process to file a consumer complaint in District Forum :

1. A consumer complaint shall be made in writing to a District Forum. The complaint can be written on a plain paper and filed by the consumer himself or through an authorized agent.
2. The complaint should be notarised through a registered or regular post. It should be filed within 2 years of the date on which the dispute arose. The complainant is required to file four copies of the complaint and additional copies for each opposite party.

3. The consumer complaint shall include the details of the complainant and the opposite party along with the particulars of the dispute and the relief to be sought. Also, copies of relevant documents required to prove the claim mentioned in the complaint shall be attached to the complaint.
4. It is not necessary to approach an advocate to file a consumer complaint.
5. The fee shall be paid in demand draft to the President, **Consumer Disputes Redressal Forum,** (name of) district.

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Details to be included in complaint under Consumer Protection Act, 2019

A consumer complaint shall consist of the following details :

1. Name and address of the complainant and the opposite party.
2. The date on which the goods were purchased or services availed, details of such goods and services and the amount paid for the same.
3. The subject of the complaint, whether it was an unfair trade practice, defective goods were supplied, deficiency in services provided.
4. The bills and receipts of the concerned product or service.
5. The relief to be sought under the Act.
6. Signature of the complainant or his authorized agent.

Process to file a consumer complaint in State Commission :

1. A consumer complaint in State Forum can be filed if the value of goods or services exceeds Rs 1 Crore but less than Rs 10 Crore. One can also file an appeal in the State Commission against the order of the District Forum within a period of 45 days from the date of order.
2. The application shall accompany the requisite fee in the form of demand draft payable to the Registrar, (name of) State Commission in the respective state.
3. To file an appeal in the State Commission, the complainant should attach the following documents along with the complaint :
   I. Documents of record constituting correct names and addresses of all the parties.
   II. A certified copy of the order of the District Forum against which an appeal is to be filed.
   III. There should be more than four additional copies of the appeal for each respondent.
   IV. Any order of conditional delay, interim order or other petitions accompanied by an affidavit.
   V. Opposite parties or the appellant is required to pay a statutory deposit of Rs 25,000 or 50 per cent of the amount claimed, whichever is less.

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Process to file a consumer complaint in National Commission :

1. Consumer complaint cases with value more than Rs 10 Crore should be directly filed in the **National Consumer Disputed Redressal Commission**. A consumer aggrieved by the order of the State Commission can also file an appeal in the National Commission. The appeal should be filed within 30 days from the date of the order passed by the State Commission.
2. The fee for approaching **National Consumer Disputes Redressal Commission** is Rs. 5000 which is payable as demand draft in the name of the Registrar, National Consumer Disputes Redressal Commission.
3. An appeal against the order of the National Commission can be filed in the Supreme Court within one month from the date of order passed by the National Commission.

Online Consumer Complaint :

1. A consumer can be filed both offline as well as online manner. A **consumer complaint** can be filed online by registering on the website of the national consumer helpline https://consumerhelpline.gov.in/. A complainant can register himself as a consumer by filling in the required details such as name, email, contact number, and a password.
2. After registration, the consumer can log in with the help of log-in details and passwords. Then, the consumer should click on 'register your complaint' and should further fill the details regarding the complaint and upload the required documents. There are different grievance portals in different sectors.
3. Once the complainant registers itself as a consumer, he can also call on the National Consumer Helpline number 1800-11-4000 or 14404 to register his complaint or send a message on 8130009809.
4. A complainant can also register his grievance through the NCH app, Consumer app or the UMANG app.
5. The complainant will be provided with a unique id after registering the complainant. With the help of this unique id, the consumer can track the status of his complaint.
6. The required fee for the **consumer complainant** can be paid through an online payment gateway.

4.2.4 Remedies

The Consumer Protection Act provides consumers with various remedies.

Following are the remedies available under the act :

- **Removal of Defects :** if the consumer after conducting a proper test by using the product finds the product to be defective then the authority can pass an order of removing the defects in the product.
- Replacement of goods

- Refund of the price paid by the consumer while purchasing the product.
- **Award of Consumption :** a consumer can demand compensation from the trader or service provider if because of his negligence the consumer has suffered some physical or any other loss.
- **Removal of Deficiency in Service :** the authority can pass orders for removal of the deficiency if there is any deficiency in delivery of the service, for instance, if the consumer has applied for a loan and has fulfilled all the formalities but the bank is making unnecessary delay in sanctioning the loan, then the court can pass orders to sanction the loan.
- **Discontinuance of Unfair/ Restrictive Trade Practice :** if a complaint is filed by the consumer against any unfair trade practice in the market, the authority can order an immediate withdrawal of such practice and can also pass an order for banning such trade practice.
- Stopping of sale of hazardous goods
- Withdrawal of hazardous goods from the market.
- Payment of the adequate cost

Consumer Protection Amendment Bill of 2018

The Consumer Protection Act of 1986 has been amended thrice but the act is still not sufficient to deal with challenges such as online transactions, multi-level and digital marketing. The Bill has proposed to make various changes in the ancient act in order to provide better protection to the rights and interests of the consumer. Following are the changes which the Bill proposes :

- **Central Protection Councils(CPCs) :** in the act of 1986 CPCs just has the authority to promote and protect the rights of consumers but as proposed in the Bill CPCs will be advisory bodies for promotion and protection of consumer rights.
- **The ambit of law :** the 2018 Bill includes all goods and services, telecom and housing construction and all modes of transactions for consideration while excludes free and personal services.
- **Unfair trade practice :** this Bill proposes the addition of three more types to the list of unfair trade practices as given in the act of 1986 i.e.
  1. Failure to issue a bill or receipt
  2. Refusal to accept a good returned within 30 days
  3. Disclosure of personal information given in confidence, unless required by law or in public interest.
- **Product liability :** earlier there was no provision of product liability in the act of 1986 but now this Bill proposes that claim for product liability can be made against the manufacturer, service provider and seller. Moreover, compensation can be obtained by just proving one of the various conditions mentioned in the Bill.

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- **The pecuniary jurisdiction of the Commissions :** this Bill proposes to change the pecuniary jurisdiction of the commissions to Rs 1 crore for District Forum; between Rs 1 crore and 10 crores for State Commission; and above Rs 10 crores for National Commission.
- **Alternate dispute redressal mechanism :** there was no such provision in the original act but now the Bill proposes to attach Meditation cells to the District, State and National Commissions.
- **E-commerce :** the Bill mentions and defines direct selling, e-commerce and electronic service provider which were not there in the act of 1986. Moreover. The central government may prescribe rules for preventing unfair trade practices in e-commerce and direct selling.
- **Penalties :** the Bill proposes a change in the penalty i.e. imprisonment up to three years or fine not less than Rs 25,000 which can be extended to Rs one lakh or both.

4.2.5 Appeals

So far he Government has not prescribed any statutory form in which an appeal is to be filed under the Consumer Protection Act, (CPA) 1986. However, it is necessary to keep the following points in view while drafting an appeal.

Other relevant information such as the full name and complete address of the appellant and the respondent should also be included.

1. An appeal ca be preferred against the order of the district forum to the state commission; from the sate commission to he national commission and from the national commission to the Supreme Court.

The CPA mentions that the appeals should be filed within 30 days of the date of the order. In my view, the correct interpretation of this is within 30 days of the communication of the order because several days may pass between the passing of the order and the actual receipt.

For every order to be effective, it has to be communicated. The date on which the order of the district forum / state commission / national commission has been communicated should be noted by the person who receives it.

2. An appeal may be entertained after the expiry of the said period of 30 days if the appellant shows that there was sufficient cause for the delay in the filing of he appeal. In such cases, an application for the condonation of delay must be made along with the appeal and supported by an affidavit setting out adequate reasons for the delay and accompanied by necessary evidence.

3. If the applicant has to pay any compensation as per the order of the District Forum, then the State Commission will entertain the appeal only if the appellant deposits 50 percent of that amount or Rs. 25,000/- whichever is less with it.

If a person wants to appeal against the order of the State Commission to the National Commission and he is the party who has to pay the compensation, then the appellant will have to deposit 50 percent of the amount or Rs. 35,000/-, whichever is less with the National Commission.

If the appellant wants to appeal against the order of the National Commission to the Supreme Court of India and he is the party who had to pay compensation as per the National Commission's order, then his appeal will be entertained by the Supreme Court only if he deposits in the prescribed manner 50 percent of that amount or Rs. 50,000/-, whichever is less.

4. The appellant must enclose the original copy of the order against which an appeal is made along with the main set of the appeal. In the additional copies of the appeal. The petition of appeal should also be accompanied by such other documents which an appellant would require to support his grounds of objection mentioned in the appeal.

5. While filing an appeal, a memorandum of grounds has to be set out. The appeal petition should be presented in a paper-book form typed on one side of the paper with double spacing. The grounds of appeal should be set forth concisely under distinct heads which should be numbered consecutively. Give an index of the documents attached to the petition on the first page and paging should be done to all papers filed.

6. The appeal can be sent in English, Hindi or in the regional language of the State. However, if the appeal is made to the National Commission or to the Supreme Court, then it is better to make it in English. Also, if the address of the opposite party falls in another state of union territory, then it is better to make the appeal in English.

7. The appeal should be signed by the appellant. In case somebody else has been authorised to appeal on the behalf of the appellant, then he shall enclose the authority of the appeal in this behalf. The person having an authority in this behalf may sign it and indicate the reasons as to why the appellant himself is not able to sign the appeal. As for example when the appellant is out of India.

8. Send four sets of the appeal petition and the accompanying papers when making an appeal to the State commission; six sets of the appeal papers including the additional documents when appealing to the National Commission and seven sets of the appeal papers along with the documents if the appeal is to be filed in the Supreme Court. The number of copies should be increased correspondingly in case there is more than one opposite party.

9. Is there any stipulated period within which an appeal should be decided under the CPA? The CPA does not stipulate a time limit for the disposal of an appeal by a consumer court. However, the rules framed under the CPA mention the time within which an appeal should be decided. Rules framed by different State Governments lay down different time limits it is generally 90 days from he date of the first hearing.

Note :

(i) No court fee is payable for filing an appeal in the State Commission or the National Commission. However, while filing an appeal from the National Commission to the Supreme Court, there is a court fee of Rs. 250/-.

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(ii) Appeal papers can be sent by Registered A.D. Post.

(iii) One can oneself represent the case at the time of haring or if he so chooses he can authorize another person either an advocate or any other person by giving such a person the necessary authority.

(iv) In maters where the jurisdiction is not properly exercised by the District Forum or the State Commission or in the event of one not being able to file an appeal within the limitation period or with a request for condonation of delay, then one can file a revision petition under the CPA against the order of the District Forum to the State Commission to the National Commission. There is not limitation period for filing a revision petition under the CPA but it appears that such a revision petition can be filed within 90 days.

4.3 ENFORCEMENT OF ORDERS AND PENALTIES

Enforcement of orders of the District Forum, the State Commission or the National Commission.

Where an interim order made under this Act is not complied with, the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached.

No attachment made under sub-section (1) shall remain in force for more than three months at the end of which, if the non-compliance continues, the property attached may be sold and out of the proceeds thereof, the District Forum or the State Commission or the National Commission may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled thereto.

Where any amount is due from any person under an order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district (by whatever name called) and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

Penalties :

1. Where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousands rupees but which may extend to ten thousand rupees, or with both:

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2. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974), the District Forum or the State Commission or the National Commission, as the case may be, shall have the power of a Judicial Magistrate of the first class for the trial of offences under this Act, and on such conferment of powers, the District Forum or the State Commission or the National Commission, as the case may be, on whom the powers are so conferred, shall be deemed to be a Judicial Magistrate of the first class for the purpose of the Code of Criminal Procedure, 1973 (2 of 1974).
3. All offences under this Act may be tried summarily by the District Forum or the State Commission or the National Commission, as the case may be.

Case study: Merchant vs. Shrinath Chaturvedi

The question of natural justice is dealt with by the legislature in subSection (3) of Section 13 of the Consumer Protection Act, which clearly provides that "No proceedings complying with the procedure laid down in the subSection (1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with." The legislature was conscious that the complaint would result in being decided ex parte, or without the response of the opposite party, if not filed within such time as provided under the Consumer Protection Act, and in such a case, the opposite party will not be allowed to take the plea that he was not given sufficient time or that principles of natural justice were not complied with. Any other interpretation would defeat the very purpose of subSection (3) of Section 13 of the Consumer Protection Act.

It may further be noted that in Order VIII Rule 10 of the Code, for suits filed under the Commercial Courts Act, 2015, a proviso has been inserted for 'commercial disputes of a specified value' (vide Act 4 of 2016 w.r.e.f. 23.10.2015), which reads as under:

"Provided further that no Court shall make an Order to extend the time provided under Rule 1 of this Order for filing the written statement" From the above, it is clear that for commercial suits, time for filing written statement provided under Order VIII Rule 1 is meant to be mandatory, but not so for ordinary civil suits. Similarly, in our considered view, for cases under the Consumer Protection Act also, the time provided under Section 13(2)(a) of the Act has to be read as mandatory, and not directory.

Merchant vs. Shrinath Chaturvedi (2002) 6 SCC 635, this Court held that "the period for filing an objection in Section 4(2) in the Act is a mandatory provision given the language of the Section and having regard to the objects sought to be served by the Act."

Certain other cases, which have been referred to by the learned Counsel for the parties, have, in our considered opinion, no direct bearing on the facts and issue involved in the present case relating to the Consumer Protection Act, and thus, the same are not being dealt with and considered here.

In case of Topline Shoes (supra), this Court was also of the view that in the Consumer Protection Act, "no consequence is provided in case the time

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granted to file reply exceeds the total period of 45 days". While observing so, the Bench did not take into account the provisions of Section 13(2)(b)(ii) of the Consumer Protection Act, which provides that where the opposite party fails to file response to the complaint within the specified time provided in Clause (a), "the District Forum shall proceed to settle the consumer dispute..... on the basis of evidence brought to its notice by the complainant.....". After the said judgment. by Amendment Act 62 of 2002 (w.e.f. 15.03.2003), the legislature has provided that the District Forum shall proceed to settle the consumer dispute "ex parte on the basis of the evidence". The word "ex parte" has been added by the Amending Act. As we have observed herein above, the consequence of not filing the response to the complaint within the stipulated time is thus clearly provided for in the aforesaid subSection, which has not been noticed by the Bench while deciding the aforesaid case.

4.4 SUMMARY

From various landmark judgments by the Supreme Court in connection with cases affecting consumer rights, it will be clear that there is an increase in the number of cases involving consumer protection when compared to the past. It indicates that people are now aware of their various rights as consumers. The Act not only covers the rights of the consumers but also provides certain duties for them too. It has been stated that it is the duty of a consumer to ask clearly about various characteristics and features of the product which he/she wishes to buy. The Act does not entertain certain malicious acts such as black marketing and selling a good above the prescribed rate of MRP. The doctrine of 'caveat venditor' (let the seller beware) has been changed into 'caveat emptor' (let the purchaser beware) so that the purchaser will also be aware of various features, merits and demerits of the good as well as protection of their rights themselves. There is still an emerging need of various other redressal machineries in this field due to the increased number of pending cases as well as for implementing alternative means in the field of consumer protection. The Act may be amended in such a way that it includes certain dispute redressal mechanisms like 'Alternative Disputes Resolution' as a core function of the said redressal agencies dealing with consumer rights.

4.5 EXERCISE

1. What are the Redressal mechanism available under consumer protection Act ?
2. Who can file a complaint under CPA 1986 ?
3. Where to file a complaint if the disputable amount is more than Rs. 20 lakhs ?
4. What are the procedures for filling & hearing a complaint under Consumer Protection Act 1986
5. Explain of the Enforcement of orders and penalties.

UNIT 5: THE INFORMATION TECHNOLOGY ACT, 2000

Notes

Structure:

5.0 OBJECTIVES

After reading this Unit. you will be able to:

- understand the information technology, salient features of I.T act;
- explain the digital signature;
- analysis the electronic governance;
- describe the attribution, acknowledgment and dispatch of electronic records;
- explain the sense electronic records and sense digital signatures;
- discuss the penalties and offences.

5.1 INTRODUCTION

The Information Technology Act, 2000 provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as"electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend The Indian Penal Code, The Indian Evidence Act, 1872, The Banker's Books Evidence Act, 1891 and The Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereof.

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The Information Technology Act, 2000 extend to the whole of India and it applies also to any offence or contravention thereunder committed outside India by any person.

With the induction of computers in each and every part of our lives, it was not surprising to witness the enactment of the Information Technology Act, 2000. However, what took many people by surprise was the promptness of the enactment. The Ministry of Information Technology1 was formed in 1999 burdened with the enormous duty of making India an IT super power by 2008.2 In less than a year, India witnessed the enactment of its first statute relating to information technology3 on the pattern of the Model Law on Electronic Commerce (UNCITRAL)4 adopted by the United Nations Commission on International Trade Law. The Information Technology Act, 2000 (hereinafter "the IT Act") was passed by Parliament on May 15, 2000, approved by the President on June 9, 2000 and notified to come into force on October 17, 2000.

5.2 THE INFORMATION TECHNOLOGY ACT, 2000

5.2.1 Definitions

1. In this Act, unless the context otherwise requires :

(a) "access", with its grammatical variation and cognate expressions, means gaining entry into, instructing or communicating with the logical, arithmetical or memory function resources of a computer, computer system or computer network;

(b) "addressee" means a person who is intended by the originator to receive the electronic record but does not include any intermediary;

(c) "adjudicating officer" means an adjudicating officer appointed under sub-section (1) of section 46;

"affixing digital signature", with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature;

"appropriate Government" means as respects any matter- enumerated in List II of the Seventh Schedule to the Constitution;

relating to any State law enacted under List III of the Seventh Schedule to the Constitution,

the State Government and in any other case, the Central Government;

"asymmetric crypto system" means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature;

"Certifying Authority" means a person who has been granted a license to issue a Digital Signature Certificate under section 24;

"certification practice statement" issued by a Certifying Authority to specify the practices that the Certifying Authority employs in issuing Digital Signature Certificates;

"computer" means electronic, magnetic, optical or other high-speed date processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or relates to the computer in a computer system or computer network;

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"computer network" means the inter-connection of one or more computers through :

(i) the use of satellite, microwave, terrestrial lime or other communication media; and

(ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained;

"computer resources" means computer, computer system, computer network, data, computer database or software;

"computer system" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions;

"Controller" means the Controller of Certifying Authorities appointed under sub-section (1) of section 17'

"Cyber Appellate Tribunal" means the cyber Regulations Appellate Tribunal established under sub-section (1) of section 48;

"data" means a representation of information, knowledge, facts, concepts or instruction which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

"digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3;

"Digital Signature Certificate " means a Digital Signature Certificate issued under sub-section (4) of section 35;

"electronic from", with reference to information. Means, any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

"Electronic Gazette" means Official Gazette published in the electronic form;

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"electronic record" means date, record or date generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

"function", in relation to a computer, includes logic, control, arithmetical process, deletion, storage and retrieval and retrieval and communication or telecommunication from or within a computer;

"information' includes data, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche;

"intermediary" with respect to any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;

"key pair", in an asymmetric crypto system, means a private key and its mathematically related public key., which are so related that the public key can verify a digital signature created by the private key;

"law" includes any Act of Parliament or of a State Legislature, Ordinances promulgated by the President under article 240, Bills enacted as President's Act under sub-clause (a) of clause (1) of article 375 of the Constitution and includes rules, regulations, bye-laws and order issued or made thereunder;

"license" means a license granted to a Certifying Authority under section 24;

(za) "originator" means a license granted to a Certifying Authority under section 24;

(zb) "prescribed" means prescribed by rules made under the Act;

(zc) "private key" means the key of a key pair used to create a digital signature;

(zd) "public key" means the key of a key pair used to verify a digital signature and listed in the Digital Signature Certificate;

(ze) "secure system" means computer hardware, software and procedure that :

(a) are reasonably secure from unauthorized access and misuses;

(b) provide a reasonable level of reliability and correct operation;

(c) are reasonably suited to performing the intended functions; and

(d) adhere to generally accepted security procedures;

(zf) "security procedure" means the security procedure prescribed under section 16 by the Central Government;

(zg) "subscriber" means a person in whose name the Digital Signature Certificate is issued;

(zh) "verify", in relation to a digital signature, electronic record or public key, with its grammatical variations and cognate expressions, means to determine whether :

(a) the initial electronic record was affixed with the digital signature by the sue of private key corresponding to the public key of the subscriber;

(b) the initial electronic record is retained intact or has been altered since such electronic record was so affixed with the digital signature.

2. Any reference in this Act to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

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5.2.2 Salient Features of I.T Act

The salient features of the I.T Act are as follows :

- Digital signature has been replaced with electronic signature to make it a more technology neutral act.
- It elaborates on offenses, penalties, and breaches.
- It outlines the Justice Dispensation Systems for cyber-crimes.
- It defines in a new section that cyber café is any facility from where the access to the internet is offered by any person in the ordinary course of business to the members of the public.
- It provides for the constitution of the Cyber Regulations Advisory Committee.
- It is based on The Indian Penal Code, 1860, The Indian Evidence Act, 1872, The Bankers' Books Evidence Act, 1891, The Reserve Bank of India Act, 1934, etc.
- It adds a provision to Section 81, which states that the provisions of the Act shall have overriding effect. The provision states that nothing contained in the Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957.

Scheme of I.T Act

The following points define the scheme of the I.T. Act :

- The I.T. Act contains **13 chapters** and **90 sections**.
- The last four sections namely sections 91 to 94 in the I.T. Act 2000 deals with the amendments to the Indian Penal Code 1860, The Indian Evidence Act 1872, The Bankers' Books Evidence Act 1891 and the Reserve Bank of India Act 1934 were deleted.
- It commences with Preliminary aspect in Chapter 1, which deals with the short, title, extent, commencement and application of the Act in Section 1. Section 2 provides Definition.
- Chapter 2 deals with the authentication of electronic records, digital signatures, electronic signatures, etc.
- Chapter 11 deals with offences and penalties. A series of offences have been provided along with punishment in this part of The Act.

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- Thereafter the provisions about due diligence, role of intermediaries and some miscellaneous provisions are been stated.
- The Act is embedded with two schedules. The First Schedule deals with Documents or Transactions to which the Act shall not apply. The Second Schedule deals with electronic signature or electronic authentication technique and procedure. The Third and Fourth Schedule are omitted.

Application of the I.T Act

As per the sub clause (4) of Section 1, nothing in this Act shall apply to documents or transactions specified in First Schedule. Following are the documents or transactions to which the Act shall not apply :

- **Negotiable Instrument** (Other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881;
- A **power-of-attorney** as defined in section 1A of the Powers-of-Attorney Act, 1882;
- A **trust**as defined in section 3 of the Indian Trusts Act, 1882;
- A **will** as defined in clause (h) of section 2 of the Indian Succession Act, 1925 including any other testamentary disposition;
- Any **contract** for the sale or conveyance of immovable property or any interest in such property;
- Any such class of documents or transactions as may be notified by the Central Government.

Amendments Brought in the I.T Act

The I.T. Act has brought amendment in four statutes vide section 91-94. These changes have been provided in schedule 1-4.

- The first schedule contains the amendments in the Penal Code. It has widened the scope of the term "document" to bring within its ambit electronic documents.
- The second schedule deals with amendments to the India Evidence Act. It pertains to the inclusion of electronic document in the definition of evidence.
- The third schedule amends the Banker's Books Evidence Act. This amendment brings about change in the definition of "Banker's-book". It includes printouts of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device. Similar change has been brought about in the expression "Certified-copy" to include such printouts within its purview.
- The fourth schedule amends the Reserve Bank of India Act. It pertains to the regulation of fund transfer through electronic means between the banks or between the banks and other financial institution.

Intermediary Liability

Intermediary, dealing with any specific electronic records, is a person who on behalf of another person accepts, stores or transmits that record or provides any service with respect to that record.

Notes

According to the above mentioned definition, it includes the following :

- Telecom service providers
- Network service providers
- Internet service providers
- Web-hosting service providers
- Search engines
- Online payment sites
- Online auction sites
- Online market places and cyber cafes

Highlights of the Amended Act

The newly amended act came with following highlights :

- It stresses on privacy issues and highlights information security.
- It elaborates Digital Signature.
- It clarifies rational security practices for corporate.
- It focuses on the role of Intermediaries.
- New faces of Cyber Crime were added.

5.3 DIGITAL SIGNATURE

Digital Signature : A digital signature is a technique to validate the legitimacy of a digital message or a document. A valid digital signature provides the surety to the recipient that the message was generated by a known sender, such that the sender cannot deny having sent the message. Digital signatures are mostly used for software distribution, financial transactions, and in other cases where there is a risk of forgery.

Electronic Signature : An electronic signature or e-signature, indicates either that a person who demands to have created a message is the one who created it.

A signature can be defined as a schematic script related with a person. A signature on a document is a sign that the person accepts the purposes recorded in the document. In many engineering companies digital seals are also required for another layer of authentication and security. Digital seals and signatures are same as handwritten signatures and stamped seals.

Digital Signature to Electronic Signature : Digital Signature was the term defined in the old I.T. Act, 2000. **Electronic Signature** is the term defined by the amended act (I.T. Act, 2008). The concept of Electronic Signature is broader than Digital Signature. Section 3 of the Act delivers for the verification of Electronic Records by affixing Digital Signature.

As per the amendment, verification of electronic record by electronic signature or electronic authentication technique shall be considered reliable.

Notes

According to the **United Nations Commission on International Trade Law (UNCITRAL),** electronic authentication and signature methods may be classified into the following categories :

- Those based on the knowledge of the user or the recipient, i.e., passwords, personal identification numbers (PINs), etc.
- Those bases on the physical features of the user, i.e., biometrics.
- Those based on the possession of an object by the user, i.e., codes or other information stored on a magnetic card.
- Types of authentication and signature methods that, without falling under any of the above categories might also be used to indicate the originator of an electronic communication (Such as a facsimile of a handwritten signature, or a name typed at the bottom of an electronic message).

According to the UNCITRAL MODEL LAW on Electronic Signatures, the following technologies are presently in use –

- Digital Signature within a public key infrastructure (PKI)
- Biometric Device
- PINs
- Passwords
- Scanned handwritten signature
- Signature by Digital Pen
- Clickable "OK" or "I Accept" or "I Agree" click boxes

5.3.1 Electronic Governance

According to the World Bank, E-Governance is when government agencies use information and communication technologies to transform relations with citizens, businesses, and other government agencies. One of the prime objectives of the IT Act, 2000 is the promotion of electronic governance. In this article, we will talk about electronic records and e-governance.

In the IT Act, 2000, there are special provisions under Chapter III to grant legal recognition to electronic records, signature, and also encourage the government and its agencies to use them.

Provisions for e-governance under the IT Act, 2000

These are the provisions under the IT Act, 2000 in the context of e-governance :

1. Legal Recognition of Electronic Records (Section 4) : Let's say that a certain law requires a matter written, typewritten, or printed. Even in the case of such a law, the requirement is satisfied if the information is rendered or made available in an electronic form and also accessible for subsequent reference.

2. Legal recognition of digital signatures (Section 5) : Let's say that the law requires a person's signature to authenticate some information or a document. Notwithstanding anything contained in such law, if the person

authenticates it with a digital signature in a manner that the Central Government prescribes, then he satisfies the requirement of the law.

For the purpose of understanding this, signature means a person affixing his handwritten signature or a similar mark on the document.

3. Use of electronic records and digital signatures in Government and its agencies (Section 6)

Notes

(1) If any law provides for :

1. the filing of a form, application, or any document with any Government-owned or controlled office, agency, body, or authority
2. the grant or issue of any license, sanction, permit or approval in a particular manner
3. also, the receipt or payment of money in a certain way

Then, notwithstanding anything contained in any other law in force such filing, grant, issue, payment, or receipt is satisfied even if the person does it in an electronic form. The person needs to ensure that he follows the Government-approved format.

(2) With respect to the sub-section (1), may prescribe :

1. the format and manner of filing, creating or issuing such electronic records
2. also, the manner and method of payment of any fees or charges for filing, creating or issuing any such records

4. Retention of electronic records (Section 7)

(1) Let's say that the law requires the retention of certain records, documents or information for a specific period. In such cases, the requirement is also satisfied if the retention is in an electronic form, provided:

1. the information contained therein is accessible and also usable for a subsequent reference.
2. the format of the electronic record is the same as the one originally created, received or sent. Even if the format is changed, then it must accurately represent the original information.
3. the electronic record contains details to facilitate the identification of the origin, destination, and also the date and time of the dispatch or receipt of the record.

This is provided that the clause does not apply to any information which is automatically generated primarily for the purpose of enabling an electronic record for dispatch or receipt.

(2) Nothing in this section applies to any law which expressly provides for the retention of records, documents or information electronically.

5. Publication of rules, regulations, etc., in Electronic Gazette (Section 8) : Let's say that law requires the publishing of official regulation, rule, by-law, notification or any other matter in the Official Gazette. In such cases, the

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requirement is also satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette.

However, the date of publication of the rule, regulation, by-law, notification or any other matter is the date of the Gazette first published in any form – Official or Electronic.

6. Section 6,7 and 8 do not confer a right to insist document should be accepted in Electronic form (Section 9) : It is important to note that, nothing contained in Sections 6, 7, and 8 confer a right upon any person to insist either the acceptance, issuance, creation or also retention of any document or a monetary transaction in the electronic form from :

- Ministry or Department of the Central/State Government
- Also, any authority or body established under any law by the State/ Central Government

7. Power to make rules by Central Government in respect of digital signature (Section 10)

The IT Act, 2000 empowers the Central Government to prescribe :

- Type of digital signature
- Also, the manner and format of affixing the digital signature
- Procedures which facilitate the identification of the person affixing the digital signature
- Control processes and procedures to ensure the integrity, security, and confidentiality of electronic payments or records
- Further, any other matter which is legally important for digital signatures

Data Protection

Section 43A of the Information Technology Act, 2000 : Let's say that a body corporate which possesses, deals or handles any sensitive personal data or information in a computer resource which it owns, controls or operates, is certainly negligent in implementing and maintaining reasonable security practices and procedures leading to a wrongful loss or gain to a person.

In such cases, the body corporate is liable to pay damages by way of compensation. Further, these damages cannot exceed five crore rupees.

Further, the Government of India notified the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, under section 43A of the IT Act, 2000. These rules specifically pertain to sensitive personal information or data and are applicable to all body corporates within India.

5.3.2 Attribution, Acknowledgment and Dispatch of Electronic Records

Attribution of electronic records (Section 11) : The word attribution means, "The act of establishing a particular person as the creator of a work of art. 2. Something, such as a quality or characteristic, that is related to a particular possessor."

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With respect to IT At 2000, attribution of electronic records means fixing identity of sender and receiver. Here originator is a person who sends or generates any electronic record. The receiver of electronic record is termed as Addressee. For example if 'A' sends an email to 'B', then 'A' is a sender or originator and 'B' is Addressee. In normal course of communication (postal communication or paper communication), it's very easy to identify originator and addressee but in electronic communication it's not the same.

The electronic record can be sent by the originator himself or by the person who has been authorized by the originator or by an information system that the originator has authenticated.

Acknowledgment of receiving of electronic record (Section12) : If the originator has not specified any specific mode of acknowledgement (an act by the addressee that he/she has received the electronic record), the acknowledgement can be given by a return mail by the addressee or an automated response by the addressee or an act by addressee that shows the acknowledgement.

For example when a person receives an email by an estate agent, for real estate properties, the person can send a thank u mail or can send an automatic reply or can show interest in the offer given by the agent by visiting him. All the three option show an acknowledgement.

If the originator has specified a format and time period for sending the acknowledgement, then the addressee must send the acknowledgement in that format and within the given time period otherwise the originator can send a notice to the addressee stating that no acknowledgement was received.

Dispatch of Electronic Record (Section 13) : This section states that when a person sends an electronic record from his computer then that particular time becomes the time of dispatch. For example if Mr. A composes an email at 3.30 am and presses the "Send" button at 4.30 am then time of dispatch will be 4.30 am. because after pressing send button the sender cannot make any changes to the record.

5.3.3 Sense Electronic Records and Sense Digital Signatures

Secure Electronic Record : Where any security procedure has been applied to an electronic record at a specific point of time. Then such record shall be deemed to be a secure electronic record from such point of time to the time of verification.

Secure Digital Signature : If, by application of a security procedure agreed to by the parties concerned, it can be verified that a digital signature, at the time it was affixed, was :

- Unique to the subscriber affixing it.
- Capable of identifying such subscriber.
- Created in a manner or using a means under the exclusive control of the subscriber and is linked to the electronic record to which it relates in such a manner that if the electronic record was altered the digital signature would be invalidated.

Then such digital signature shall be deemed to be a secure digital signature.

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Security Procedure : The Central Government shall for the purposes of this Act prescribe the security procedure having regard to commercial circumstances prevailing at the time when the procedure was used, including :

- The nature of the transaction.
- The level of sophistication of the parties with reference to their technological capacity.
- The volume of similar transactions engaged in by other parties.
- The availability of alternatives offered to but rejected by any party.
- The cost of alternative procedures, and
- The procedures in general use for similar types of transactions or communications.

5.3.4 Regulation of Certifying Authorities

The Information Technology Act, 2000 has established a Certifying Authority to regulate the electronic transactions.

IT Act, 2000: Regulation of Certifying Authorities

The following sections pertain to the regulation of certifying authorities :

1. Section 17 : Appointment of the Controller and other officers

- The Central Government may appoint a Controller of Certifying Authorities after notifying the Official Gazette. They may also appoint Deputy Controllers and Assistant Controllers as it deems fit.
- The Controller discharges his responsibilities subject to the general control and also directions of the Central Government
- The Deputy Controllers and Assistant Controllers shall perform the functions assigned to them by the Controller under the general superintendence and also control of the Controller.
- The qualifications, experience and terms and conditions of service of Controller, Deputy Controllers, and Assistant Controllers shall be such as may be prescribed by the Central Government.
- The Head Office and Branch Office of the office of the Controller shall be at such places as the Central Government may specify, and these may be established at such places as the Central Government may think fit.
- There shall be a seal of the Office of the Controller.

2. Functions of Controller (Section 18)

A Controller performs some or all of the following functions :

- Supervise the activities of the Certifying Authorities and also certify their public keys
- Lay down the standards that the Certifying Authorities follow
- Specify the following :
  1. qualifications and also experience requirements of the employees of all Certifying Authorities

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2. conditions that the Certifying Authorities must follow for conducting business
3. the content of the printed, written, and also visual materials and advertisements in respect of the digital signature and the public key
4. the form and content of a digital signature certificate and the key
5. the form and manner in which the Certifying Authorities maintain accounts
6. terms and conditions for the appointment of auditors and their remuneration

- Facilitate the Certifying Authority to establish an electronic system, either solely or jointly with other Certifying Authorities and its regulation
- Specify the manner in which the Certifying Authorities deal with the subscribers
- Resolve any conflict of interests between the Certifying Authorities and the subscribers
- Lay down the duties of the Certifying Authorities
- Maintain a database containing the disclosure record of every Certifying Authority with all the details as per regulations. Further, this database is accessible to the public.

3. Recognition of Foreign Certifying Authority (Section 19)

- A Controller has the right to recognize any foreign certifying authority as a certifying authority for the purpose of the IT Act, 2000. While this is subject to the conditions and restrictions which the regulations specify, the Controller can recognize it with the previous approval of the Central Government and notify in the Official Gazette.
- If a controller recognizes a Certifying Authority under sub-section (i), then its digital signature certificate is also valid for the purpose of the Act.
- If the controller feels that any certifying authority has contravened any conditions or restrictions of recognition under sub-section (i), then he can revoke the recognition. However, he needs to record the reason in writing and notify in the Official Gazette.

4. Controller to act as a repository (Section 20)

- The Controller will act as a repository of all digital signature certificates under this Act.
- The Controller will –
  1. Make use of secure hardware, software, and also procedures.
  2. Observe the standards that the Central Government prescribes to ensure the secrecy and also the security of the digital signatures.

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- The Controller will maintain a computerized database of all public keys. Further, he must ensure that the public keys and the database are available to any member of the public.

5. License to issue Digital Signature Certificates (Section 21)

- Subject to the provisions of sub-section (2), any person can apply to the Controller for a license to issue digital signature certificates.
- A Controller can issue a license under sub-section (1) only if the applicant fulfills all the requirements. The Central Government specifies requirements with respect to qualification, expertise, manpower, financial resources, and also infrastructure facilities for the issuance of digital signature certificates.
- A license granted under this section is :
  (a) Valid for the period that the Central Government specifies
  (b) Not transferable or inheritable
  (c) Subject to the terms and conditions that the regulations specify

6. Power to investigate contraventions (Section 28)

- The Controller or any other Officer that he authorizes will investigate any contravention of the provisions, rules or regulations of the Act.
- The Controller or any other Officer that he authorizes will also exercise the powers conferred on Income-tax authorities under Chapter XIII of the Income Tax Act, 1961. Also, the exercise of powers will be limited according to the Act.

5.3.5 Digital Signature Certificates

A Digital Signature Certificate is a secure digital key that is issued by the certifying authorities for the purpose of validating and certifying the identity of the person holding this certificate. Digital Signatures make use of the public key encryptions to create the signatures.

A digital signature certificate (DSC) contains information about the user's name, pin code, country, email address, date of issuance of certificate and name of the certifying authority.

Certificates are helpful in authenticating the personal information details of the individual holder when conducting business online.

Reduced cost and time : Instead of signing the hard copy documents physically and scanning them to send them via e-mail, you can digitally sign the PDF files and send them much more quickly.

The Digital Signature certificate holder does not have to be physically present to conduct or authorize a business

Data integrity : Documents that are signed digitally cannot be altered or edited after signing, which makes the data safe and secure.

The government agencies often ask for these certificates to cross-check and verify the business transaction.

Authenticity of documents : Digitally signed documents give confidence to the receiver to be assured of the signer's authenticity. They can take action on the basis of such documents without getting worried about the documents being forged.

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Fulfilling Statutory Compliances

Individuals and entities who are required to get their accounts audited have to file their income tax return compulsorily using a digital signature. Furthermore, the Ministry of Corporate Affairs has made it mandatory for companies to file all reports, applications, and forms using a digital signature only.

Under GST also, a company can get registered only by verifying the GST application through a digital signature. The use of a digital signature is necessary even for filing all applications, amendments and other related forms.

Certifying Authorities for Digital Signature Certificate

The Controller of Certifying Authority for the purpose of issuing digital signatures in India has authorized eMudhra as one of the certifying authority for issuance of Digital Signature Certificate.

Other certifying authorities may include (n) Code Solutions, National Informatics Centre, Safescrypt and Institute for Development and Research in Banking Technology.

Classes of DSC

The type of applicant and the purpose for which the Digital Signature Certificate is obtained defines the kind of DSC one must apply for depending on the need. There are three types of Digital Signature certificates issued by the certifying authorities.

Class 1 Certificates : These are issued to individual/private subscribers and are used to confirm that the user's name and email contact details from the clearly defined subject lie within the database of the certifying authority.

Class 2 Certificates : These are issued to the director/signatory authorities of the companies for the purpose of e-filing with the Registrar of Companies (ROC). Class 2 certificate is mandatory for individuals who have to sign manual documents while filing of returns with the ROC.

Class 3 Certificates : These certificates are used in online participation/ bidding in e-auctions and online tenders anywhere in India. The vendors who wish to participate in the online tenders must have a Class 3 digital signature certificate.

Points to Remember

- Digital signatures are issued for 1 or 2 years. After their validity has expired, they need to be renewed
- A person can have different DSCs – one for official purpose and the other DSC for personal purpose
- Digitally signed documents are acceptable in legal courts as an evidence or proof

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5.3.6 Duties of Subscribers

1. Generating key pair : Where any Digital Signature Certificate, the public key of which corresponds to the private key of that subscriber which is to be listed in the Digital Signature Certificate has been accepted by a subscriber, then, the subscriber shall generate the key pair by applying the security procedure.

2. Acceptance of Digital Signature Certificate :

1. A subscriber shall be deemed to have accepted a Digital Signature Certificate if he publishes or authorises the publication of a Digital Signature Certificate :
   (a) to one or more persons;
   (b) in a repository, or otherwise demonstrates his approval of the Digital Signature Certificate in any manner,
2. By accepting a Digital Signature the subscriber certifies to all who reasonable rely on the information contained in the Digital Signature Certificate that :
   (a) the subscriber holds the private key corresponding to the public key listed in the Digital Signature Certificate and is entitled to hold the same;
   (b) all representations made by the subscriber to the Certifying Authority and all material relevant to the information contained in the Digital Signature Certificate are true.;
   (c) all information in the Digital Signature Certificate that is within the knowledge of the subscriber is true.

3. Control of private key :

1. Every subscriber shall exercise shall exercise reasonable care to retain control of the private key corresponding to the public key listed in his Digital Signature Certificate and take all steps to prevent its disclosure to a person not authorised to affix the digital signature of the subscriber.
2. If the private key corresponding to the public key listed in the Digital Signature Certificate has been compromised, then, the subscriber shall communicate the same without and delay to the Certifying Authority in such manner as may be specified by the regulations.

Explanation : For the removal of doubts, it is hereby declared that the subscriber shall be liable to till he has informed the Certifying Authority that the private key has been compromised.

5.4 PENALTIES AND OFFENCES

The faster world-wide connectivity has developed numerous online crimes and these increased offences led to the need of laws for protection. In order to keep in stride with the changing generation, the Indian Parliament passed the Information Technology Act 2000 that has been conceptualized on the United Nations Commissions on International Trade Law (UNCITRAL) Model Law.

The law defines the offenses in a detailed manner along with the penalties for each category of offence.

Offences : Cyber offences are the illegitimate actions, which are carried out in a classy manner where either the computer is the tool or target or both.

Cyber-crime usually includes the following :

- Unauthorized access of the computers
- Data diddling
- Virus/worms attack
- Theft of computer system
- Hacking
- Denial of attacks
- Logic bombs
- Trojan attacks
- Internet time theft
- Web jacking
- Email bombing
- Salami attacks
- Physically damaging computer system.

The offences included in the I.T. Act 2000 are as follows :

- Tampering with the computer source documents.
- Hacking with computer system.
- Publishing of information which is obscene in electronic form.
- Power of Controller to give directions.
- Directions of Controller to a subscriber to extend facilities to decrypt information.
- Protected system.
- Penalty for misrepresentation.
- Penalty for breach of confidentiality and privacy.
- Penalty for publishing Digital Signature Certificate false in certain particulars.
- Publication for fraudulent purpose.
- Act to apply for offence or contravention committed outside India Confiscation.
- Penalties or confiscation not to interfere with other punishments.
- Power to investigate offences.

Example

Offences Under The It Act 2000

Section 65. Tampering with computer source documents : Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer program, computer system or computer network,

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when the computer source code is required to be kept or maintained by law for the being time in force, shall be punishable with imprisonment up to three year, or with fine which may extend up to two lakh rupees, or with both.

Explanation : For the purpose of this section "computer source code" means the listing of programs, computer commands, design and layout and program analysis of computer resource in any form.

Object : The object of the section is to protect the "intellectual property" invested in the computer. It is an attempt to protect the computer source documents (codes) beyond what is available under the Copyright Law

Essential ingredients of the section :

- knowingly or intentionally concealing
- knowingly or intentionally destroying
- knowingly or intentionally altering
- knowingly or intentionally causing others to conceal
- knowingly or intentionally causing another to destroy
- knowingly or intentionally causing another to alter.

This section extends towards the Copyright Act and helps the companies to protect their source code of their programs.

Penalties – Section 65 is tried by any magistrate.

This is cognizable and non-bailable offence.

Penalties – Imprisonment up to 3 years and / or

Fine – Two lakh rupees.

The following table shows the offence and penalties against all the mentioned sections of the I.T. Act :

Section	Offence	Punishment	Bailability and Congizability
65	Tampering with Computer Source Code	Imprisonment up to 3 years or fine up to Rs 2 lakhs	Offence is Bailable, Cognizable and triable by Court of JMFC.
66	Computer Related Offences	Imprisonment up to 3 years or fine up to Rs 5 lakhs	Offence is Bailable, Cognizable and
66-A	Sending offensive messages through Communication service, etc...	Imprisonment up to 3 years and fine	Offence is Bailable, Cognizable and triable by Court of JMFC
66-B	Dishonestly receiving stolen computer resource or communication device	Imprisonment up to 3 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC

66-C	Identity Theft	Imprisonment of either description up to 3 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
66-D	Cheating by Personation by using computer resource	Imprisonment of either description up to 3 years and /or fine up to Rs. 1 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
66-E	Violation of Privacy	Imprisonment up to 3 years and /or fine up to Rs. 2 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
66-F	Cyber Terrorism	Imprisonment extend to imprisonment for Life	Offence is Non-Bailable, Cognizable and triable by Court of Sessions
67	Publishing or transmitting obscene material in electronic form	On first Conviction, imprisonment up to 3 years and/or fine up to Rs. 5 lakh On Subsequent Conviction imprisonment up to 5 years and/or fine up to Rs. 10 lakh	Offence is Bailable, Cognizable and triable by Court of JMFC
67-A	Publishing or transmitting of material containing sexually explicit act, etc... in electronic form	On first Conviction imprisonment up to 5 years and/or fine up to Rs. 10 lakh On Subsequent Conviction imprisonment up to 7 years and/or fine up to Rs. 10 lakh	Offence is Non-Bailable, Cognizable and triable by Court of JMFC
67-B	Publishing or transmitting of material depicting children in sexually explicit act etc., in electronic form	On first Conviction imprisonment of either description up to 5 years and/or fine up to Rs. 10 lakh On Subsequent Conviction imprisonment of either description up to 7 years and/or fine up to Rs. 10 lakh	Offence is Non Bailable, Cognizable and triable by Court of JMFC

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67-C	Intermediary intentionally or knowingly contravening the directions about Preservation and retention of information	Imprisonment up to 3 years and fine	Offence is Bailable, Cognizable.
68	Failure to comply with the directions given by Controller	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable.
69	Failure to assist the agency referred to in sub section (3) in regard interception or monitoring or decryption of any information through any computer resource	Imprisonment up to 7 years and fine	Offence is Non-Bailable, Cognizable.
69-A	Failure of the intermediary to comply with the direction issued for blocking for public access of any information through any computer resource	Imprisonment up to 7 years and fine	Offence is Non-Bailable, Cognizable.
69-B	Intermediary who intentionally or knowingly contravenes the provisions of sub-section (2) in regard monitor and collect traffic data or information through any computer resource for cybersecurity	Imprisonment up to 3 years and fine	Offence is Bailable, Cognizable.
70	Any person who secures access or attempts to secure access to the protected system in contravention of provision of Sec. 70	Imprisonment of either description up to 10 years and fine	Offence is Non-Bailable, Cognizable.

70-B	Indian Computer Emergency Response Team to serve as national agency for incident response. Any service provider, intermediaries, data centres, etc., who fails to prove the information called for or comply with the direction issued by the ICERT.	Imprisonment up to 1 year and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable
71	Misrepresentation to the Controller to the Certifying Authority	Imprisonment up to 2 years and/ or fine up to Rs. 1 lakh.	Offence is Bailable, Non-Cognizable.
72	Breach of Confidentiality and privacy	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh.	Offence is Bailable, Non-Cognizable.
72-A	Disclosure of information in breach of lawful contract	Imprisonment up to 3 years and/or fine up to Rs. 5 lakh.	Offence is Cognizable, Bailable
73	Publishing electronic Signature Certificate false in certain particulars	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable.
74	Publication for fraudulent purpose	Imprisonment up to 2 years and/or fine up to Rs. 1 lakh	Offence is Bailable, Non-Cognizable.

Compounding of Offences : As per Section 77-A of the I. T. Act, any Court of competent jurisdiction may compound offences, other than offences for which the punishment for life or imprisonment for a term exceeding three years has been provided under the Act.

No offence shall be compounded if :

- The accused is, by reason of his previous conviction, is liable to either enhanced punishment or to the punishment of different kind; OR
- Offence affects the socio economic conditions of the country; OR
- Offence has been committed against a child below the age of 18 years; OR
- Offence has been committed against a woman.

The person alleged of an offence under this Act may file an application for compounding in the Court. The offence will then be pending for trial and the provisions of Sections 265-B and 265-C of Cr. P.C. shall apply.

Notes

Gagan Harsh Sharma And Anr vs The State Of Maharashtra And Anr on 26 October, 2018

1. The principle question that arise in the present Criminal Writ Petition is whether the invocation and application of the provisions of the Indian Penal Code can be sustained in the facts and circumstances of the case when the offences committed by the petitioners are also sought to be brought within the purview of the Information Technology Act, 2000, in light of the judgment of the Hon'ble Apex Court in the case of Sharat Babu Digumarti V/s. Government (NCT of Delhi)1 In order to appreciate the controversy involved in the petition it would be necessary to refer to the basic facts involved in the matter. The petitioners before us are two brothers. The petitioner No.1 is an Electronic Engineer employed as Vice President-Strategy and Business Development of M/s.Bliss GVS 1 (2017) 2 SCC 18.

2. During the course of the hearing of the matter, the learned counsel for the petitioner has placed on record, copy of the order passed by the Hon'ble Apex Court on 03.10.2018 in Special Leave to Appeal (CRL) 8274 of 2018 in case of the petitioner No.1 who had approached it being aggrieved by the rejection of his Anticipatory Bail. We have perused the said order. The Hon'ble N.S. Kamble page 8 of 45 jud-917-wp-4361-2018 Apex Court, in the backdrop of the factum of Writ Petition No.4361 of 2018 being filed by the petitioners before the Bombay High Court for quashing the provisions of the Indian Penal Code, has observed that since the matter was examined by the High Court whether the case is primarily under the Information Technology Act and whether Sections 408 and 420 of Indian Penal Code can be applied, made the following observations :

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970)."

3. In the backdrop of the scheme of the enactment the claim of the rival parties will have to be examined.

4. The Hon'ble Apex Court in case of Sharat Babu Digumarti (Supra) had in great detail dealt with the offences punishable under the Information Technology Act and at the same time punishable under the relevant provisions of the Indian Penal Code. In the said case, an FIR was filed against the appellant and on investigation, chargesheet came to be filed before the Magistrate who took cognizance of the offences punishable under Section 292 and 294 of the Indian Penal Code and also Section 67 of the Information Technology Act. In a petition before the High Court seeking quashment, he was discharged of the offences under Section 292 and 294 but the prosecution under Section 67 of the Information Technology Act continued. The appellant approached the Apex Court and on the ground that the company was not arraigned as a party and the Director could not have been liable of the offences punishable under Section 85 of the Information N.S. Kamble page 16 of 45 jud-917-wp-4361-2018 Technology Act and the proceeding came to be quashed. Subsequently an application came to be filed before the Trial Court to drop the proceedings and the Trial Court refused to drop the proceedings under Section 292 of Indian Penal Code and framed

the charge. With this issue he approached the Apex Court and the question for consideration before the Hon'ble Apex Court was whether the appellant who has been discharged under Section 67 of the Information Technology Act could be proceeded under Section 292 of the Indian Penal Code. The Hon'ble Apex Court also examined whether an activity emanating from electronic form which may be obscene would be punishable under Section 292 of the Indian Penal Code or 67 of the Information Technology Act or both or any other provision of the Information Technology Act. In the backdrop of the said facts the Hon'ble Apex Court observed thus :

Notes

5.5 SUMMARY

India is one of the few countries other than U.S.A, Singapore, Malaysia in the world that have Information Technology Act to promote E-Commerce and electronic transactions. Indian parliament has already passed the legislation known as Information Technology Act 2000 drafted by the Ministry of Communications and Information Technology. The Act is based on the "United Nations Commission on International Trade Law" (UNCITRAL) model Law on Electronic Commerce. The passing of the Information Technology Act by the Indian Parliament and the consequent amendments to the Indian Evidence Act, etc. has now paved way for the legal recognition of transactions carried out by means of "electronic commerce." Electronic commerce can now be carried out by persons to whom a "Digital Certificate" is issued. Any person to whom such certificate is issued can now authenticate an electronic record by affixing his digital signature to the document.

The objectives of the Act are: There is a need for bringing in suitable amendments in the existing laws in our country to facilitate e-commerce. It is, therefore, proposed to provide for legal recognition of electronic records and digital signatures. This will enable the conclusion of contracts and the creation or rights and obligations through the electronic medium. It is also proposed to provide for a regulatory regime to supervise the Certifying Authorities issuing Digital Certificates. To prevent the possible misuse arising out of transactions and other dealings concluded over the electronic medium, it is also proposed to create civil and criminal liabilities for contravention of the provisions of the proposed legislation. With a view to facilitate Electronic Governance, it is proposed to provide for the use and acceptance of electronic records and digital signatures in the Government offices and its agencies which will make the citizens interaction with the Governmental offices hassle free.

5.6 EXERCISE

1. Which section of IT Act deals with misuse of digital signatures ?
2. What do you mean by enformation technology act 2000 ?
3. Explain the Digital Signature Certificate.
4. What is Digital Signature ?
5. Discuss of the Penalties and Offences.

MBA-201

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