INTEGRAL UNIVERSITY, LUCKNOW

DIRECTORATE OF DISTANCE EDUCATION

BBA-302 Paper Code: BL/B

BUSINESS LAW

s

CONTENTS

s

UNIT-1 INDIAN CONTRACT ACT

CONTENTS

INTRODUCTION

Law means a 'set of rules' which governs our behaviours and relating in a civilized society. So there is no need of Law in a uncivilized society. One should know the law to which he is subject because ignorance of law is no excuse.

The general principals of the Law of Contract are contained in Sections 1 to 75 of the Indian Contract Act. These principles apply to all kinds of contracts irrespective of their nature.

Special contracts are contained in Sections 124 to 238 of the Indian Contract Act. These special contracts are Indemnity, Guarantee, Bailment, pledge and Agency.

Contracts as Defined by Eminent Jurists

1. "Every agreement and promise enforceable at law is a contract." – Pollock

2. "A Contract is an agreement between two or more persons which is intended to be enforceable at law and is contracted by the acceptance by one party of an offer made to him by the other party to do or abstain from doing some act." – Halsbury

3. “A contract is an agreement creating and defining obligation between the parties” – Salmond

DEFINITIONS (Sec 2)

1. Offer(i.e. Proposal) [section 2(a)]:-When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obta7ining the assent of that other person either to such act or abstinence, he is said to make a proposal.
2. Acceptance 2(b):- When the person to whom the proposal is made, signifies his assent there to, the proposal is said to be accepted.
3. Promise 2(b) :- A Proposal when accepted becomes a promise. In simple words, when an offer is accepted it becomes promise.
4. Promisor and promise 2(c) :- When the proposal is accepted, the person making the proposal is called as promisor and the person accepting the proposal is called as promisee.
5. Consideration 2(d):- When at the desire of the promisor, the promisee or any other person has done or abstained from doing something or does or abstains from doing something or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise. Price paid by the one party for the promise of the other Technical word meaning QUID-PRO-QUO i.e. something in return.
6. Agreement 2(e) :- Every promise and set of promises forming the consideration for each other. In short, agreement = offer + acceptance.
7. Contract 2(h) :- An agreement enforceable by Law is a contract
8. Void agreement 2(g):- An agreement not enforceable by law is void.
9. Voidable contract 2(i):- An agreement is a voidable contract if it is enforceable by Law at the option of one or more of the parties there to (i.e. the aggrieved party), and it is not enforceable by Law at the option of the other or others.
10. Void contract: - A contract which ceases to be enforceable by Law becomes void when it ceases to be enforceable.

“All agreements are contracts, if they are made – by free consent of the parties, competent to contract, for a lawful consideration and with a lawful object, and not hereby expressly declared to be void.” - Sec.10.

Offer + acceptance = Promise + Consideration + Agreement enforceability By Law= Contract

ESSENTIALS OF A VALID CONTRACT

1. Proper offer and proper acceptance with intention to create legal relationship. Cases;- A and B agree to go to a movie on coming Sunday. A does not turn in resulting in loss of B’s time B cannot claim any

damages from B since the agreement to watch a movie is a domestic agreement which does not result in a contract.

In case of social agreement there is no intention to create legal relationship and there the is no contract (Balfour v. Balfour)

In case of commercial agreements, the law presume that the parties had the intention to create legal relations. [an agreement of a purely domestic or social nature is not a contract]

2. Lawful consideration: - consideration must not be unlawful, immoral or opposed to the public policy.

3. Capacity:- The parties to a contract must have capacity (legal ability) to make valid contract.

Section 11:- of the Indian contract Act specify that every person is competent to contract provided.

Is of the age of majority according to the Law which he is subject, and

(ii) Who is of sound mind and

(iii) Is not disqualified from contracting by any law to which he is subject.

- Person of unsound mind can enter into a contract during his lucid interval.

- An alien enemy, foreign sovereigns and accredited representative of a foreign state. Insolvents and convicts are not competent to contract.

4. Free consent: - consent of the parties must be genuine consent means agreed upon something in the same sense i.e. there should be consensus – ad – idem. A consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

5. Lawful object

•The object of agreement should be lawful and legal.

•Two persons cannot enter into an agreement to do a criminal act.

•Consideration or object of an agreement is unlawful if it

(a) is forbidden by law; or

(b) is of such nature that, if permitted, would defeat the provisions of any law; or

(c) is fraudulent; or

(d) Involves or implies, injury to person or property of another; or

(e) Court regards it as immoral, or opposed to public policy.

6. Possibility of performance:

• The terms of the agreement should be capable of performance.

• An agreements to do act, impossible in itself cannot be enforced.

Example: A agrees to B to discover treasure by magic. The agreement is void because the act in itself is impossible to be performed from the very beginning.

7. The terms of the agreements are certain or are capable of being made certain.

Example : A agreed to pay Rs.5 lakh to B for ultra-modern decoration of his drawing room. The agreement is void because the meaning of the term " ultra – modern" is not certain.

8. Not declared Void

•The agreement should be such that it should be capable or being enforced by law.

•Certain agreements have been expressly declared illegal or void by the law.

9. Necessary legal formalities

•A contract may be oral or in writing.

•Where a particular type of contract is required by law to be in writing and registered, it must comply with necessary formalities as to writing, registration and attestation.

•If legal formalities are not carried out then the contract is not enforceable by law.

Example: A promise to pay a time. Barred debt must be in writing.

Agreement is a wider term than contract where as all contracts are agreements. All agreements are not contracts. All Contracts are Agreements, but all Agreements are not Contracts The various agreements may be classified into two categories:

Agreement not enforceable by law Agreement enforceable by law Any essential of a valid contract is not available.

All essentials of a valid contract are available

Conclusion:

Thus we see that an agreement may be or may not be enforceable by law, and so all agreement are not contract. Only those agreements are contracts, which are enforceable by law, In short.

Contracts = Agreement + Enforceability by Law

Hence, we can conclude "All contracts are agreement, but all agreements are not contracts."

Distinction between Contract & Agreement

Basis	Contract	Agreement
1. Section :	Sec. 2(h)	Sec. 2(e)
2. Definition :	A contract is an agreement enforceable by law.	Every promise or every set of promises forming consideration for each other is an agreements.
3. Enforceability :	Every contract is enforceable	Every promise is not enforceable.
4. Interrelationship	A contract includes an agreement.	An agreement does not include a contract.
5. Scope :	The scope of a contract is limited, as it includes only commercial agreements.	Its scope is relatively wider, as it includes both social agreement and commercial agreements.
6. Validity :	Only legal agreements are called contracts.	An agreement may be both legal and illegal.
7. Legal Obligation :	Every contract contains a legal obligation.	It is not necessary for every agreement to have legal obligation.

Types of contracts :-

(1) On the Basis of creation	(2) On the Basis of Validity	(3) On the Basis of execution	(4) On the Basis of Liability
a. Express contract	a. Valid contract	a. Executed contract	a. Bilateral contract
b. Implied contract	b. Void contract	b. Executed contract	b. Unilateral contract
c. Tacit contract	c. Voidable contrac	c. Partly executed and party executory	
d. Quasi contract	d. Unenforceable contract		
e. E contract	e. Illegal contract		

(a) Express contract :- A contract made by word spoken or written. According to sec 9 in so for as he proposal or acceptance of any promise is made in words, the promise is said to be express. Example : A says to B 'will you purchase my bike for Rs.20,000?" B says to A "Yes". (b) Implied contract:- A contract inferred by

The conduct of person or

The circumstances of the case.

By implies contract means implied by law (i.e.) the law implied a contract through parties never intended. According to sec 9 in so for as such proposed or acceptance is made otherwise than in words, the promise is said to be implied.

Example:

A stops a taxi by waving his hand and takes his seat. There is an implied contract that A will pay the prescribed fare.

(c) Tacit contract: - A contract is said to be tacit when it has to be inferred from the conduct of the parties. Example obtaining cash through automatic teller machine, sale by fall hammer of an auction sale.

(d). Quasi Contracts are contracts which are created -

• Neither by word spoken

• Nor written

• Nor by the conduct of the parties.

• But these are created by the law.

Example:

If Mr. A leaves his goods at Mr. B's shop by mistake, then it is for Mr. B to return the goods or to compensate the price. In fact, these contracts depend on the principle that nobody will be allowed to become rich at the expenses of the other.

(e). e – Contract: An e – contract is one, which is entered into between two parties via the internet.

(a) Valid contract:- An agreement which satisfies all the requirements prescribed by law

On the basis of creation

(b) Void contract (2(j)):- a contract which ceases to be enforceable by law because void when of ceased to be enforceable

When both parties to an agreement are:-

- Under a mistake of facts [20]

- Consideration or object of an agreement is unlawful [23]
- Agreement made without consideration [25]
- Agreement in restrain of marriage [26]
- Restraint of trade [27]
- Restrain legal proceeding [28].
- Agreement by wage of wager [30]

(c) Voidable contract 2(i) :- an agreement which is enforceable by law at the option of one or more the parties but not at the option of the other or others is a voidable contract.

Result of coercion, undue influence, fraud and misrepresentation.

(d) Unenforceable contract: - where a contract is good in substance but because of some technical defect i.e. absence in writing barred by imitation etc one or both the parties cannot sue upon but is described as unenforceable contract.

Example: Writing registration or stamping.

Example: An agreement which is required to be stamped will be unenforceable if the same is not stamped at all or is under stamped.

(e) Illegal contract:- It is a contract which the law forbids to be made. All illegal agreements are void but all void agreements or contracts are not necessary illegal.

Contract that is immoral or opposed to public policy are illegal in nature.

- Unlike illegal agreements there is no punishment to the parties to a void agreement.

- Illegal agreements are void from the very beginning agreements are void from the very beginning but sometimes valid contracts may subsequently becomes void.

(a) Executed contract :- A contract in which both the parties have fulfilled their obligations under the contract.

Example: A contracts to buy a car from B by paying cash, B instantly delivers his car.

(b) Executory contract:- A contract in which both the parties have still to fulfilled their obligations.

Example : D agrees to buy V's cycle by promising to pay cash on 15th July. V agrees to deliver the cycle on 20th July.

(c) Partly executed and partly executory:- A contract in which one of the parties has fulfilled his obligation but the other party is yet to fulfill his obligation.

Example: A sells his car to B and A has delivered the car but B is yet to pay the price. For A, it is excuted contract whereas it is executory contract on the part of B since the price is yet to be paid.

On the basis of liability for performance:-

(a) Bilateral contract:- A contract in which both the parties commit to perform their respective promises is called a bilateral contract.

Example : A offers to sell his fiat car to B for Rs.1,00,000 on acceptance of A's offer by B, there is a promise by A to Sell the car and there is a promise by B to purchase the car there are two promise.

(b) Unilateral contract:- A unilateral contract is a one sided contract in which only one party has to perform his promise or obligation party has to perform his promise or obligation to do or forbear.

Example: - A wants to get his room painted. He offers Rs.500 to B for this purpose B says to A " if I have spare time on next Sunday I will paint your room". There is a promise by A to pay Rs 500 to B. If B is able to spare time to paint A's room. However there is no promise by B to Paint the house. There is only one promise.

Difference Between Void and Voidable Contract

Matter	Void contract	Voidable contract
Definition	It means contract which cease to be enforceable.	It means an agreement enforceable by law by one or more parties.
Nature	Valid when made subsequently becomes unenforceable.	It remains voidable until cancelled by party.
Rights or remedy	No legal remedy.	Aggrieved party has remedy to cancel the contract.
Performance of contract	Party can't demand performance of contract	If aggrieved party does not cancel it within reasonable time, performance can be demanded.
Reason	Due to change in law or circumstances	If consent is not obtained freely
Damages	Not available	Can demand in certain cases.

Difference between Void and illegal Agreement

Matter	Void agreement	Illegal agreement
What	Void agreement is not prohibited by law.	It is prohibited by law.
Effect on collateral transaction	Enforced	Not enforced
Punishment	No	Yes
Void ab initio	May not be void ab initio	Always void initio

Contract of record:

It is either a judgment of a court of a Recognizance.

A Judgment is an obligation imposed by a Court upon one or more persons in favour of another or others. In real sense, it is not a contract, as it is not based upon any agreement between two parties.

Recognizance is a Bond by which a person undertakes before a Court of Magistrate to observe some condition e.g. to appear on summons.

Contracts of record derive their binding force from the authority of the Court.

Contract under Seal:

(a) A contract under Seal is one which derives its binding force from its form alone.

(b) It is in writing and signed, sealed and delivered by the parties.

(c) It is also called a Deed or a Specialty contract.

OFFER

Offer(i.e. Proposal) [section 2(a)]:-When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other person either to such act or abstinence, he is said to make a proposal.

To form an agreement, there must be at least two elements – one offer and the other acceptance. Thus offer is the foundation of any agreement.

"When one person signifies to another his willingness –

• to do or to abstain from doing anything,

• with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

The person who makes an offer is called "Offeror" or " Promisor" and the person to whom the offer is made is called the Offeree" or "Promisee".

Example

Mr. A says to Mr. B, "Will you purchase my car for Rs.1,00,000?" In this case, Mr. A is making an offer to Mr. B. Here A is the offeror and B is the offeree.

Essentials elements of an offer:-

(1) There must be two parties.

(2) The offer must be communicated to the offeree.

(3) The offer must show the willingness of offeror. Mere telling the plan is not offer.

(4) The offer must be made with a view to obtaining the assent of the offeree.

(5) A statement made jokingly does not amount to an offer.

(6) An offer may involve a positive act or abstinence by the offeree.

(7) Mere expression of willingness does not constitute an offer.

A tells B' that be desires to marry by the end of 2008, if does not constitute an offer of marriage by A' to B' A further adds will you marry me. Then it becomes offer.

Legal Rules as to valid offer:-

1. Offer must be communicated to the offeree: The offer is completed only when it has been communicated to the offeree. Until the offer is communicated, it cannot be accepted. Thus, an offer accepted without its knowledge, does not confer any legal rights on the acceptor.

Example:

A's nephew has absconded from his home. He sent his servant to trace his missing nephew. When he servant had left, A then announced that anybody who discovered the missing boy, would be given the reward of Rs.500. The servant discovered the missing boy without knowing the reward. When the servant came to know about the reward, he brought an action against A to recover the same. But his action failed. It was held

that the servant was not entitled to the reward because he did not know about the offer when the discovered the missing boy.

2. The offer must be certain definite and not vague unambiguous and certain.

Example: A offered to sell to B. 'a hundred tons of oil'. The offer is uncertain as there is nothing to show what kind of oil is intended to be sold.

3. The offer must be capable of creating legal relation. A social invitation is not create legal relation.

Example: A invited B to a dinner and B accepted the invitation. It is a mere social invitation. And A will not be liable if he fails to provide dinner to B.

4. Offer may be express and implied

The offer may be express or implied; An offer may be express as well as implied. An offer which is expressed by words, written or spoken, is called an express offer. The offer which is expressed by conduct, is called an implied offer [Section 9].

5. Communication of complete offer

Example: A offered to sell his pen to B for Rs.1,000. B replied, "I am ready to pay Rs.950". On A's refusal to sell at this price, B agreed to pay Rs.1,000. held, there was not contract at the acceptance to buy it for Rs.950 was a counter offer, i.e. rejection of the offer of A. Subsequent acceptance to pay Rs.1,000 is a fresh offer from B to which A was not bound go give his acceptance.

6. Counter offer – A counter offer amounts to rejection of the original offer

7. Cross offer do not conclude a contract

8. An offer must not thrust the burden of acceptance on the offeree.

Example: A made a contract with B and promised that if he was satisfied as a customer he would favorably consider his case for the renewal of the contract. The promise is too vague to create a legal relationship.

- The acceptance cannot be presumed from silence.
- Acceptance is valid only if it is communicated to the offeror.

9. Offer must be distinguished from invitation to offer.

Example: Menu card of restaurant is an invitation to put an offer.

Example ; Price – tags attached with the goods displayed in any showroom or supermarket is also an invitation to proposal. If the salesman or the cashier does not accept the price, the or the cashier does not accept the price, the interested buyer cannot compel him to sell, if he wants to buy it, he must make a proposal.

Invitation to offer

- Show his readiness to enter into a contract, it is called as an offer
- Purpose of entering contract

- Results in a contract

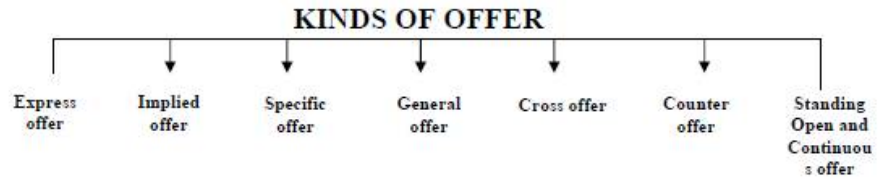
Example

Application filled in by a prospective applicable to the Institution, a student seeking admission in educational Institution.

- Person invites offer to make an offer to him.
- Purpose of enter offer
- Results in offer.

Example

Offer	Invitation to offer
➢ Show his readiness to enter into a contract, it is called as an offer ➢ Purpose of entering contract ➢ Results in a contract **Example** Application filled in by a prospective applicable to the Institution, a student seeking admission in educational Institution.	➢ Person invites offer to make an offer to him. ➢ Purpose of enter offer ➢ Results in offer. **Example** Issue of prospectus by a Company, an education Institution.



S I. Express offer - When the offeror expressly communication the offer the offer is said to be an express offer the express communication of the offer may be made by

- Spoken word
- Written word

II. Implied offer – when the offer is not communicate expressly. An offer may be implied from:-

The conduct of the parties or

The circumstances of the case

III. Specific:- It means an offer made in a particular person or

(b) a group of person: It can be accepted only by that person to whom it is made communication of acceptance is necessary in case of specific offer.

IV. General offer: - It means on offer which is made to the public in general.

• General offer can be accepted by anyone.

• If offeree fulfill the term and condition which is given in offer then offer is accepted.

• Communication of acceptance is not necessary is case of general offer

V. Cross offer:- When two parties exchange identical offers in ignorance at the time of each other's offer the offer's are called cross offer.

Two cross offer does not conclude a contract. Two offer are said to be cross offer if

They are made by the same parties to one another

2.Each offer made in ignorance of the offer made by the

3. The terms and conditions contained in both the offers' are same.

VI Counter offer :- when the offeree give qualified acceptance of the offer subject to modified and variations in the terms of original offer. Counter offer amounts to rejection of the original offer.

Legal effect of counter offer:-

Rejection of original offer

(2) The original offer is lapsed

(3) A counter offer result is a new offer.

In other words an offer made by the offeree in return of the original offer is called as a counter offer.

LAPSE OF AN OFFER

An offer should be accepted before it lapses (i.e. comes to an end). An offer may come to an end in any of the following ways stated in Section 6 of the Indian Contract Act:

1. By communication of notice of revocation: An offer may come to an end by communication of notice of revocation by the offeror. It may be noted that an offer can be revoked only before its acceptance is complete for the offeror. In other words, an offeror can revoke his offer at any time before he becomes before bound by it. Thus, the communication of revocation of offer should reach the offeree before the acceptance is communicated.

2. By lapse of time; Where time is fixed for the acceptance of the offer, and it is not acceptance within the fixed time, the offer comes to an end automatically on the expiry of fixed time. Where no time for acceptance is prescribed, the offer has to be accepted within reasonable time. The offer lapses if it is not accepted within that time. The term 'reasonable time' will depend upon the facts and circumstances of each case.

3. By failure to accept condition precedent: Where, the offer requires that some condition must, be fulfilled before the acceptance of the offer, the offer lapses, if it is accepted without fulfilling the condition.

4. By the death or insanity of the offeror: Where, the offeror dies or becomes, insane, the offer comes to an end if the fact of his death or insanity comes to the knowledge of the acceptor before he makes his acceptance. But if the offer is accepted in ignorance of the fact of death or insanity of the offeror, the acceptance is valied. This will result in a valid contract, and legal representatives of the deceased offeror shall be bound by the contract. On the death of offeree before acceptance, the offer also comes to an end by operation of law.

5. By counter – offer by the offeree: Where, a counter – offer is made by the offeree, and then the original offer automatically comes to an end, as the counter – offer amounts to rejections of the original offer.

6. By not accepting the offer, according to the prescribed or usual mode: Where some manner of acceptance is prescribed in the offer, the offeror can revoke the offer if it is not accepted according to the prescribed manner.

7. By rejection of offer by the offeree: Where, the offeree rejects the offer, the offer comes to an end. Once the offeree rejects the offer, he cannot revive the offer by subsequently attempting to accept it. The rejection of offer may be express or implied.

8. By change in law: Sometimes, there is a change in law which makes the offer illegal or incapable of performance. In such cases also, the offer comes to an end.

ACCEPTANCE

Acceptance 2(b):- When the person to whom the proposal is made, signifies his assent there to , the proposal is said to be accepted.

Legal Rules for the Acceptance

1. Acceptance must be absolute and unqualified

2. Acceptance must be communicated: Mere mental acceptance is no acceptance, But there is no requirement of communication of acceptance of general offer.

3. Manner of acceptance

General rule say that it must be as per the manner prescribed by offeror. If no mode is prescribed in which it can be accepted, then it must be in some usual and reasonable manner.

4. If there is deviation in communication of an acceptance of offer, offeror may reject such acceptance by sending notice within reasonable time. If the offeror doesn't send notice or rejection, he accepted acceptance of offer.

5. Acceptance of offer must be made by offeror.

6. Acceptance must be communicated to offeror

7. Time limit for acceptance

• If the offer prescribes the time limit, it must be accepted within specified time.

• If the offer does not prescribe the time limit, it must be accepted within reasonable time.

8. Acceptance of offer may be expressly (by words spoken or written); or impliedly (by acceptance of consideration); or by performance of conditions (e.g.in case of a general offer)

9. Mere silence is not acceptance of the offer

10. However, following are the two exceptions to the above rule. It means silence amounts as acceptance of offer.

• Where offeree agrees that non – refusal by him within specified time shall amount to acceptance of offer.

• When there is custom or usage of trade which specified that silence shall amount to acceptance.

11. Acceptance subject to the contract is no acceptance

If the acceptance has been given 'subject to the contract" or subject to approval by certain persons, it has not effect at all. Such an acceptance will not create binding contract until a formal contract is prepared and signed by all the parties.

General Rules as to Communication of Acceptance

1. In case of acceptance by post

Where the acceptance is given by post, the communication of acceptance is complete as against the proposer when the letter of acceptance is posted. Thus, mere posting of letter of acceptance is sufficient to conclude a contract. However, the letter must be properly addressed and stamped.

2. Delayed or no delivery of letter

Where the letter of acceptance is posted by the acceptor but it never reaches the offeror, or it is delayed in transit, it will not affect the validity of acceptance. The offeror is bound by the acceptance.

3. Acceptance by telephones telex or tax

If the communication of an acceptance is made by telephone, tele-printer, telex, fax machines, etc, it completes when the acceptance is received by the offeror. The contract is concluded as soon as the offeror receives not hears the acceptance.

4. The place of Contract

In case of acceptance by the post, the place where the letter is posted is the place of contract. Where the acceptance is given by instantaneous means of communication (telephone, fax, tele-printer, telex etc.), the contract is made at the place where the acceptance is received,

5. The time of Contract

In case of acceptance by post, the time of posting the letter of acceptance to the time of contract. But in case of acceptance by instantaneous means of communication, the time of contract is the time when the offeror gets the communication, the time of contract is the time when offeror gets the communication of acceptance.

6. Communication of acceptance in case of an agent.

Where the offer has been made through an agent, the communication of acceptance is completed when the acceptance is given either to the agent or to the principal. In such a case, if the agent fails to convey the acceptance received from offeree, still the principal is bound by the acceptance.

7. Acceptance on loudspeakers

Acceptance given on loudspeaker is not a valid a acceptance.

When Communication is complete [Sec.4]

• Communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

• Example: A proposes by letter, to sell his Tonga to B at Rs.10,000. Communication of the proposal is complete when B receives the letter.

• As against the offerer/ Proposer: When it is put in a course of transmission to him so as to be out of the power of the Acceptor.

• As against the Offeree/Acceptor: When it comes to the knowledge of the Proposer.

When Revocation can be made [Sec.5]

• Offer/proposal may be revoked at any time before the communication of its acceptance is complete, as against the proposer, but not afterwards.

• Example: U sends a letter to Y proposing to sell his land. Y sends his acceptance by post. U can revoke the offer at any time before or at the moment when Y posts his letter of acceptance, but not afterwards.

• Acceptance may be revoked at any time before the communication of acceptor, but not afterwards.

• Example: T sends to S by post, an offer to sell his cycle. S sends his acceptance via post, S could revoke his acceptance, upto any time before or at the moment when he posts his letter of acceptance, but not afterwards.

When communication of revocation is complete [Sec.4]

• As against the offeror: When it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it.

• Example : S proposes to H by letter. H sends his acceptance by letter. Suddenly, S sends a telegram revoking his offer. Revocation is complete as against S when the telegram is dispatched; H's revocation of acceptance is complete when S receives such telegram.

• As against the Offeree: When it comes to his knowledge.

• Example : Communication of revocation is complete only when H receives the telegram.

• When H revokes his acceptance, it is complete when he dispatches the telegram.

Accepted is lighted match, while offer is a train of gun powder

Sir willian Anson.

CAPACITY TO CONTRACT

Parties unable to Enter into a contract Minor A person of unsound mind Person disqualified by law. Lunatic Idiot Drunken and Intoxicated Alien enemy Foreign Sovereign Convict Corporation and Company Insolvent

1. Who is competent to make a contract:-

Section 11. Every person is competent to contract who is of age of majority according to the Law to which he is subject, who is of sound

mind and not is disqualified from contracting by any Law to which he is subject.

Age of majority:- According to section 3 of Indian majority Act-1875 every person domiciled in Indian attains majority on the completion of 18 years of age.

Exception: - 21 years- in the following cases.

a. Where a guardian of a minor's person or property is appointed under the Guardian and wards Act, 1890.

b. Where minor's property has passed under the superintendence of the court of words.

Position of Agreements by Minor:-

1. Validity: - An agreement with a minor is void-ab-initio

[Mohoribibee v. Dharmodas Ghose]

Example : Mr. D, a minor, mortgaged his house for Rs.20000 to a money – lender, but the mortgagee, i.e. the money – lender, paid him a sum of Rs.8000. Subsequently, the minor sued for setting aside the mortgage. Held that the contract was void, as Mr. D was minor and therefore he is not liable to pay anything to the lender.

2. A minor's has received any benefit under a void contract, he cannot be asked to return the same.

3. If a minor has received any benefit under a void contract, he cannot be asked to return the same.

4. Fraudulent representation by a minor- no difference in the status of agreement. The contract remains void.

5. A minor with the consent of all the partners, be admitted to the benefits of an existing partnership.

6. Contracts entered into by minors are void-ab-initio. Hence no specific performance can be enforced for such contracts.

7. Minor's parent/guardians are not liable to a minor's creditor for the breach of contract by the minor.

8. A minor can act as an agent but not personally liable. But he cannot be principal.

9. A minor cannot become shareholder of a the company except when the shares are fully paid up and transfer by share.

10. A minor cannot be adjudicated as insolvent.

11. Can enter into contracts of Apprenticeship, Services, Education, etc:

(a) A minor can enter into contract of apprenticeship, or for training or instruction in a special art, education, etc.

(b) These are allowed because it generates benefits to the Minor.

12. Guarantee for and by minor

A contract of guarantee in favour of a minor is valid. However, a minor cannot be a surety in a contract of guarantee. This is because, the surety is ultimately liable under a contract of guarantee whereas a minor can never be held personally liable.

13. Minor as a trade union member

Any person who has attained the age of fifteen years may be a member for registered trade union, provided the rules of the trade union allow so. Such a member will enjoy all the rights of a member.

EXCEPTION

• Contract for the benefit of a minor.

• Contract by Guardian

Benefit of a minor by his guardian or manager of his estate.

a. within the scope of the authority of the guardian.

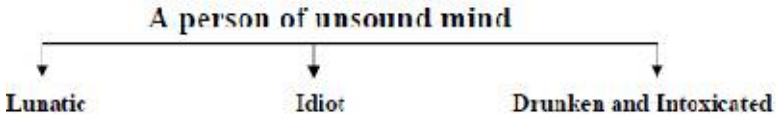
b. Is for the benefit of the minor.

• Contract for supply of Necessaries.

Example : Food, clothes, bed, shelter, shoes, medicines and similar other things required for the maintenance of his life or for the life of his dependents, expenses for instruction in grade or arts; expenses for moral religions or intellectual education, funeral expenses of his deceased family members, marriage expenses of a dependent female member in the family; expenses incurred in the protection of his property or personal liberty, Diwali pooja expenses, etc. have been held by courts to be necessaries of life. However, the things like earrings for a male, spectacles for a blind person or a wild animal cannot be considered as necessaries.

• Liability for tort: A minor is liable for a tort, i.e., civil wrong committed by him.

Example : A, a 14 – year – old boy drives a car carelessly and injures B. He is liable for the accident i.e., tort.



Person of Unsound Mind

A person who is usually of unsound mind, but occasionally of sound mind can make a contract when he is of sound mind. Similarly, a person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

⇒ At time of entering into a contract, a person must be sound mind. Law presumes that every person is of sound mind unless otherwise it is proved before court. An agreement by a person of unsound mind is void. The following are categories of a person considered as person of a unsound mind. ⇒ An idiot-An idiot is a person who is congenital (by birth) unsound mind. His incapacity is permanent and therefore he can never understand contract and make a rational judgment as to its effects upon his interest. Consequently, the agreement of an idiot is absolutely

void ab initio. He is not personally liable even for the payment of necessaries of life supplied to him.

⇒ Delirious persons -A person delirious from fever is also not capable of understanding the nature and implications of an agreement. Therefore, he cannot enter into a contract so long as delirium lasts.

⇒ Hypnotized persons -Hypnotism produces temporary incapacity till a person is under the effect of artificial induced sleep.

⇒ Mental decay-There may be mental decay or senile mind the to old age or poor health. When such person is not capable of understanding the contract and its effect upon his interest, he cannot enter into contract.

⇒ Lunatic is not permanently of unsound mined. He can enter into contract during lucid intervals i.e., during period when he is of sound mind.

Generally of	Occasionally of	Capacity to Contract	Example
Unsound Mind	Sound Mind	Can enter into a Contract when he is of Sound Mind.	A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.
Sound Mind	Unsound Mind	Cannot make a Contract when he is of Unsound Mind.	A sane man, who is delirious from fever or who is so drunk that he cannot understand terms of a contract or form a judgment, cannot contract
			while such delirium or drunkenness lasts

• An ‘alien’ is a person who is a foreigner to the land. He may be either an ‘alien friend’ or an ‘alien enemy. If the sovereign or state of the alien is at peace with the country of his stay, he is an alien friend. An if a war is declared between the two countries he is termed as an alien enemy.

• During the war, contract can be entered into with alien enemy with the permission of central government.

⇒ Insolvent When any person is declared as an insolvent, his property vests in receiver and therefore, he can’t enter into contract relating to his property. Again he becomes capable to enter into contract when he is discharged by court.

⇒ Foreign sovereigns, diplomatic staff and representative of foreign staff can enter into valid contract. However, a suit cannot be filed against them, in the Indian counts without the prior sanction of the central Government.

Third party to a contract cannot sue or a stranger to a contract cannot sue.

Only those persons, who are parties to a contract, can sue and be sued upon the contract. This Rule is called "Doctrine of privities of contract." Exception.

i. Trust:- In case of trust a beneficiary can sue upon the contract.

Example:A transferred certain properties to B to be held by him in trust for the benefit of C. In this case, C although not a party to the trust, can sue for the benefits available to him under the trust.

This exception to the rule of Privity of contract has been recognised in a well known case of khwaja

Mohd. Khan v. Hussaini Begum (1910) 32 All 410.

Family settlement / Marriage contract:- In case of family settlement members who were not originally party to the contract can also sue upon it.

A female members cone force a provision for marriage expenses made on partition of HUF. Example: H sued her father – in – law K to recover Rs.15,000 being arrears of allowance called Pin money payable to her by K under an agreement between K and H's father, consideration being H's marriage to K's son D. Both H and D were minors at the time of marriage. Held, the promise can be made enforceable by H. Provision of marriage expenses of female members of a Joint Hindu Family, entitles the female member to sue for such expenses on a partition between male members.,

Two brothers, on partition of family joint properties, agreed to invest in equal shares for their mother's maintenance. Held, the mother was entitled to require her sons to make the investment.

Acknowledgement of liability:- Where a person admits his Liability thereafter if he refused be will be stopped from denying his liability.

Example X receives money from Y for paying it to Z. X admits the receipt of that amount to Z. Z can recover the amount from X, even though the money is due from Y.

iv. Assignment of contract. Assignee (the person to whom benefits of contract are assigned) can enforce upon the contract..

v. Contract entered into through an agent.

vi. Covenants running with land. Stranger to consideration:- "Stranger to contract" must be distinguished from a stranger to consideration need not necessarily be provided by the promises if may flow from a third party also such a person is ' stranger to consideration,.

(Chinnaya Vs Ramayya).

CONSIDERATION

1.(a) Consideration is a quid pro quo i,e something in return it may be –

MEANING

(i) Some benefit right, interest, loss or profit that may accrue to one party

(ii) Some forbearance, detriment, loss or responsibility suffered on undertaken by the other party.

(b) According to Sir Frederick Pollock, "consideration is the price for which the promise of the other is bought and the promise thus given for value is enforceable.

2. Definition [Sec 2(d)]:- when at the desire of the Promisor, the promise or any other person.

(a) Has done or abstained from doing , or [Past consideration]

(b) Does or abstains from doing, or [Present consideration]

(c) Promises to do or abstain from doing something [Future consideration] such act or abstinence or promise is called a consideration for the promise.

3. Example (i) 'P' aggress to sell his car to 'Q' for Rs.50,000 Here 'Q's Promise to pay Rs50,000 is the consideration for P's promise and 'P's promise to sell the car is the consideration for 'Q's promise to pay Rs.50,000.

(ii) 'A' promises his debtor 'B' not to file a suit against him for one year on 'A's agreeing to pay him Rs.10,000 more. Here the abstinence of 'A' is the consideration for 'B's Promise to pay.

Legal Rules for valid consideration

Consideration must move at the desire of the promisor.

D constructed a market at the instance of District collector. Occupants of shops promised to pay D a commission on articles sold through their shops. Held, there was no consideration because money was not spent by Plaintiff at the request of the Defendants, but at instance of a third person viz. the Collector and, thus the contract was void.

Durga Prasad v. Baldeo

2. Consideration may move from the promisee or any other person who is not a party to the contract. [Chinnaya's Vs Ramayya]

A owed Rs.20,000 to B. A persuaded C to sign a Pro Note in favour of B. C promised B that he would pay the amount. On faith of promise by C, B credited the amount to A's account. Held, the discharge of A's account was consideration for C's promise.

National Bank of Upper India v. Bansidhar

3. Consideration may be past, present, Future:

• Under English law, Past consideration is no consideration.

• Present consideration: - cash sale

• Future or executory consideration:- A Promises to B to deliver him 100 bags of sugar at a future date . B promise to pay first on delivery.

4. Consideration should be real and not illusory. Illusory consideration renders the transaction void consideration is not valid if it is.

(i) Physically impossible (ii) Legally not permissible
(iii) Uncertain (iv) illusory (fulfillment of a pre existing obligation)

5. Must be legal:- Consideration must not be unlawful, immoral or opposed to public policy.

6. Consideration need not be adequate. A contract is not void merely became of the fact that the consideration is inadequate. The law simply requires that contract should be supported by consideration. So long as consideration exists and it is of some value, courts are not required to consider its adequacy.

Example: A agreed to sell a watch worth Rs.500 for Rs.20, A's consent to the agreement was freely given. The consideration, though inadequate. Will not affect the validity of the contract. However, the inadequacy of the consideration can be considered in order to know whether the consent of the promisor was free or not . [Section 25 Explanation II]

7. The performance of an act what one is legally bound to perform is not consideration for the contract mean's something other than the promisor's existing obligation –

A contract not supported by consideration is void .

Exceptions to the Rule " No consideration . No contract".

Ex. Nudo Pacto non oritur action, i,e, an agreement without consideration is void.

1. Written and registered agreements arising out of love and affection:-

• Expressed in writing and registered under law for the time being in force for registration of document
• Natural love and affection
• Between parties standing in a near relation to each other

Example:- An elder brother, on account of natural love and affection, promised to pay the debts of his younger brother. Agreement was put to writing and registered. Held, agreement was valid.

Exception: - Rajlukhy Dabee Vs Bhootnath Mukharjee

Example: A Hindu husband by a registered document, after referring to quarrels and disagreements between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence. Held that the promise was unenforceable since natural love and affection was missing.

2. Promise to compensate [25(2)]

• Promise to compensate wholly or in part
• Who has already voluntarily done something for the promisor
• Something which the promisor was legally compellable to do.

Example:- A finds B's purse and give to him. B Promise to give A Rs.500. This is a valid contract.

3. Promise to pay a time – barred debt. [Sec 25(3)]

• A debt barred by limitation con not recovered. Hence, a promise to pay a such a debt is without any consideration.

• Can be enforced only when – in writing and sighed by Debtor or his authorized agent.

Example: A owes B Rs.10,000 but the debt is barred by Limitation Act. A signs a written promise to pay B Rs.8,000 on account of debt. This is a valid contract.

4. Completed gift- gift do not require any consideration.

5. Agency (185) – According to the Indian contract Act. No consideration is necessary to create an agency.

6. Bailment (148)- consideration is not necessary to effect a valid bailment of goods. It is Called Gratuitous Bailment.

7. Remission (63).

8. Charity- If a person promises to contribute to charity and on this faith the promises undertakes a liability to the extent not exceeding the promised subscription, the contract shall be valid.

According to section 13. Two persons are said to have consented when they agree upon same thing in the same sense.

FREE CONSENT

In English law, this is called 'consensus – ad – idem'

Effect of absence of consent:

⇒ When there is no consent at all, the agreement is void – ab – initio'.

It is not enforceable at the option of either party

Example 1:-

X have two car one Maruti car and one Honda city car. Y does not know that X has two cars Y offers to buy car at Rs.50,000. Here, there is no identity of mind in respect of the subject matter. Hence there is no consent at all and the agreement is void – ab – inito.

Example 2:- An Illiterate woman signed a gift deed thinking that it was a power of attorney – no consent at all and the agreement was void – ab – inito [Bala Devi V S. Manumdats]

Free consent

⇒ Consent is said to be free when it is not caused by [Section 14]

coercion [Section 15]

(b) Undue influence [Section 16]

(c) Fraud [Section 17]

(d) Misrepresentation [Section 18]

(e) Mistake [Section 20, 21,22]

Effect of absence of Free Consent :- If consent coercion, undue influence, fraud , Misrepresentation the contract is voidable at the option of party whose consent was not free [19, 19A]

Committing any act which is forbidden by the IPC

(b) Threatening to commit any act which is forbidden by the IPC.

(c) Unlawful detaining of any property or

(d) Threatening to detain any property.

Coercion [Section 15]

Essential elements of coercion

Above four [a – d]

(e) Coercion need not necessary proceed from party to contract.

(f) Coercion need not necessary be directed against the other contracting party.

(g) It is immaterial whether the IPC is or is not in force at the time or at the place where the coercion is employed [Bay of Bengal caption]

Effect of threat to file a suit:- A threat to file a suit (whether civil or court) does not amount to coercion unless the suit is on false charge. Threat to file a suit on false charge is an act forbidden by the IPC and thus will amount to an act of coercion.

Effect of Threat to commit suicide:- Threat to commit suicide amounted to coercion and the release deed was example discussed in class. Therefore voidable. [Chikham Ammiraju v seshama]

Effect of undue Influence:-[Section 19A]

When consent to an agreement is caused by undue influence, the contract is voidable at the option of the party whose consent was so caused.

Burden of Proof:- A contract is presumed to be induced by undue influence if the following two condition:-

A party has the position to dominate the will of the others

- The transaction is unconscionable (unreasonable)

In such a case dominant party is under the burden to prove the undue influence was not employed.

[Unconscionable transactions:- if transaction appears to unreasonable the dominant party to prove that there is no undue influence.]

Any other transaction:- weaker party to prove the influence was employed]

Where some transaction is entered into in the ordinary course of business, but due to certain contingencies, one party is able to make the other party agree to certain terms and conditions then it is not undue influence.

Example : A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Example : A spiritual guru induced his chela to donate all his property to the ashram and said that in return of it, he will certainly get salvation. The chela did the same. Held, that this is a case, of undue influence so it becomes void.

Contract with Pardanashin woman;-

Induced by undue influence

Burden of Proof – Full disclosure is made to pardanashin women

Pardanashin Women - Understand the contract
- Receipt of competent independent advice .
Rebutting presumption:-
- Dominant party – full disclosure
- Price was adequate
- Receipt of competent independent advice before entering into contract – weaker party.
Similarities: - Voidable at the option of aggrieved party:-
Coercion (15)
Undue Influence (16)
Meaning – using or threat to use physical
Force obtain the consent of party (intention)
Punishment under IPC
Parties – Stranger
Relationship – Immaterial
- Voidable at the option of aggrieved party
Benefit - Back

- Involves use of moral force (mental pressure)
- Obtain an unfair advantage (intention)
- Not criminally liable
- Between the parties to the contract
- One party dominate the other party
- Voidable or court set aside
- Benefit – order of court – Back
- Undue influence Vs Coercion
- Fraud (17)

⇒ The term fraud means a take representation of facts made willfully with a view to deceive the other party.
⇒ Sec.17- fraud means any act committed by a party to a contract or with his connivance or by his agent with intent to deceive another party there to or his agent or to induce to enter into contract.
Essentials of fraud :-

By a party to the contract

(b) There must be representation – [an opinion a statement of expression – does not fraud].
(c) The representation must be false.
(d) Before conclusion of contract.
(e) The misrepresentation must be made willfully.
(f) The misrepresentation must be made with a view to deceive the other party.
(g) The other party must have actually been deceived.
(h) The other party have suffered a loss.

Fraud – definition include

⇒ The suggestion, as to fact, of that which is not true by one who does not believe it to be true.

⇒ The active concealment of a fact by one having knowledge or belief of the fact.

Ex. A furniture dealer conceals the crakes in furniture by polish work.

⇒ A promise made without any intention of performing it.

⇒ Any other act fitted to deceive.

⇒ Any such act or omission as the law specially declared to be fraudulent.

Ex:- T bought a cannon from H. It was defective, but H had plugged it. T did not examine the cannon, but it burst when he used it. Held as the plug had not deceived T, he was liable to pay for the cannon. Ex.: Where the representation was true at the time of when it was made but becomes untrue before the contract is entered into and this fact is known to the party who made the representation. If must be corrected. If it is not so corrected it will amount to be fraud.

When the silence amount to fraud:-

(a) General rule:- Mere (only) Silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud.

EXCEPTION

Where the circumstances of the case are such that regarding being had to them. It is duty of the person keeping silence to speak. Such duty arises in the following two cases.

(1) Duty to speak exists where the parties stand in a fiduciary relationship, e.g. father and son, guardian and ward, trustee and beneficiary etc. or where contract is a contract of ubberima fidei (requiring utmost good faith), e.g. contracts of insurance.

Ex.:- A sells by auction to B a horse which A knows to be unsound. B' is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B is the horse is unsound.

(2) When silence itself equivalent to speech. B says to A " if you do not deny it I shall assume that the horse is sound". A say nothing – A's silence equivalent to speech. A can held liable to fraud.

[Half Truth is worse than a blatant: - Example – company pay dividend – in class room]

Sec. 19: A contract induced by fraud is voidable at the option of the party defrauded. Till the exercise of such option, the Contract is valid.

Effect of Fraud:-

1. Rescinds of contract
2. Right to insist upon performance
3. Right to claim damages – if he suffered loss.

Exception: The contract is not voidable in the following cases.

-When the party who consent was caused by silence amount to fraud and be has the means of discovering the truth with ordinary diligence. [Ex class room]

- When the party give the consent in ignorance of fraud.
- When the party after become aware of fraud takes a benefit.
- When the parties can't be restored to their original position.
- Where interests of third parties intervene before the contract is avoided.

Misrepresentation is when a party (person) asserts something which is not true though he believes is to be true. In other words misrepresentation is a falls representation made innocently.

An agreement is said to be influenced by misrepresentation if all the following conditions are satisfied.

a. The party makes a representation of a fact [The representation by a stranger (By anyone with his connivance or by agent) to the contract does not affect the validity of the contract.

(b) The misrepresentation was made innocently i.e. if was not made with a view to deceive the other party.

(c) The other party has actually acted believing the misrepresent to be true.

Misrepresentation include:-

- Unjustified statement of facts – positive assertion – Believe true really not true no basis misrepresentation
- Breach of duty.
- Inducing other to make mistake as to qualify or nature of subject matter.

(1) Right to Rescind contract:-

Can't do

- Discovering the truth with ordinary diligence.
- Give consent in ignorance of misrepresentation
- Become aware of misrepresentation takes a benefit
- Where an innocent third party before the contract is rescinds acquires consideration some interest in the property passing under the contract.
- Where the parties can't be restored to their original position.

(2) Right to insist upon performance.

Ex.:- Unlike Fraud he cannot sue for damage. Fraud (17)

Misrepresentation (18)

Meaning: - wrongful representation is made Wilfully to deceive the party.

Knowledge of falsehood. -

The person making the wrong statement does not believe it to be true. -

Right to claim damage Means of discovering of truth

In case of fraud the contract is voidable even though the aggrieved party had the means of discovering the truth with ordinary diligence.

Exception :- Silence Meaning - innocently without any intention to Deceive the other party.

-The person making the wrong statement believes it to be true.

- Can't claim damage

- In case of misrepresentation the contract is not voidable if the aggrieved party had the means of discovering the truth with ordinary diligence….

Effect of Misrepresentation:-

Misrepresentation (section 18)

MISTAKE

Mistake Erroneous Belief about some facts

Mistake of Fact Mistake of Law [21]

Unilateral [22] Bilateral [20] Mistake of Indian Mistake of foreign Law Law One party Under Both parties under Mistake of fact Mistake of facts the contract is valid same as mistake fact The contract is valid the contract is void void [Not voidable and void] Both parties under mistake

Exception: - Where contract is not valid (void)

1. Identity of persons contract with

Ex. :- A woman, falsely misrepresenting herself to be wife of a well known Baron obtained two pearl necklaces from a firm of jewelers on the pretext of showing them to her husband before buying. She pledged them with a broker who took them in good faith. Held that there was no contract between jeweler and woman and even an innocent buyer or a broker did not get a good title. Broker must return necklaces to jeweler. Jeweler intended to deal not with her but with quite a different person, i.e., wife of a Baron.

2. as the nature of the contract

Ex.:- illiterate man sign Bill of exchanges by means of false, representation that it was a mere guarantee. It was held that he was not liable for bill of exchange because never intended to sign the bill of exchange

Bilateral Mistakes:-

Subject matter Possibility

Existence Quantity Quality Prices Identity Title Legal Physical

EVERY AGREEMENT OF WHICH THE OBJECT OR CONSIDERATION IS UNLAWFUL IS VOID [SEC 23]

(a) It is forbidden by law – law would also include the rules regulations, notifications etc. under or issued under the authority given by a statute.

Ex.:- A sold liquor without license to B. The sale is unlawful as the sale of liquor without license is forbidden by the law, i.e., The Excise Act. Hence, A cannot recover the price.

Ex.:- a Hindu already married and his wife alive entered into a marriage agreement with Y an unmarried girl. The agreement is void because the second marriage is forbidden by Hindu Law.

(b) If it defeats the Provisions of any Law.

- not directly prohibited by any Law

Ex.:- A's estate is sold for arrears of revenue under the provision defaulter is prohibited from purchasing the state upon an understanding with A becomes the purchaser and agrees to convey the estate to A. Upon receiving from him the price which B has paid. The agreement is void.

(c) If it is Fraudulent

Ex.: Object or consideration of an agreement is fraudulent. An agreement with such an object or consideration is unlawful and void.

(d) If it involves or Implies injury to a person or property of another.

Ex. :- Where it create injury to a person or to the property of another. An agreement with such an object or consideration is unlawful and void.

(e) If the court regards it as immoral.

⇒ X gave Rs. 10,000 to Y a married woman to obtain a divorce from her husband. X agrees to marry when divorce taken. X would not recover the amt.

1. Partially unlawful Object or consideration [Sec. 24]: An Agreement is void if -

(a) any part of a single consideration for one or more objects is unlawful; or

(b) any one or any part of one of several consideration for a single object, is unlawful.

2. Example: B is a licensed manufactured of permitted chemicals. A promise B to supervise B's business and combine it with the production of some contraband items together with the permitted items. B promises to pay A, Salary of Rs.10,000 p.m. Agreement is void, object of A's promise and consideration for B's promise being partially unlawful.

3. Lawful Consideration enforceable: When there are several distinct promises made for one and the same consideration and one or more of them are of such nature that law will not enforce it, only such of the promises as are unlawful cannot be enforced. Other which are lawful, can be enforced.

4. Test of Severability:

(a) If illegal part cannot be severed from legal part of a covenant, contract is altogether void.

(b) If it is possible to severe them, whether the illegality be due to Statute or Common Law, bad part alone may be rejected and good retained.

In case of pre – existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability.

Union Carbide Corpn. v. UOI

Illegal agreement – Void – ab – intio

Punishable by the criminal Law of the country or by any special legislation regulation effect of illegal agreement.

Collateral transactions – illegal

No action can be taken for the recovery of money paid or property transferred.

If illegal part can't be separated from the legal part.

Whole agreement is altogether illegal. [Sec.57]

If separated

Legal part – enforces illegal part – reject.

Reciprocal promises – In respect of reciprocal promises the agreement as to illegal promise is void.

Agreement opposed to public policy:-

Alternative promises: where in alternative promises one part is illegal, only the legal pent can be enforced. [Sec. 58]

Champerty & Maintenance : (Refer Class Note)

VOID AGREEMENT

2(g)- Void agreement is an agreement which is not enforceable by Law – void – ab – inito.

Agreement by or with person's incompetent to contract [10, 11]

(2) Agreement entered into through a mutual mistake [20]

(3) Object or consideration – unlawful [23]

(4) Consideration or object partially, unlawful [24]

(5) Without consideration [25]

(6) Restraint of marriage [26]

(7) Restraint of trade [27]

(8) Legal proceeding [28]

(9) Consideration identified [29]

(10) Wagering agreement [30]

(11) Impossible agreement [56]

(12) An agreement to enter into an agreement in the future.

Agreement in Restraint of marriage [26]

Every agreement in restraint of marriage of any person other than a minor, is void, Any restraint of marriage whether total or partial is opposed to public policy.

Ex. A promised to marry else except Mr. B, and in default pay her a sum of Rs.1,00,000. A married someone else and B sued A for recovery of the sum. Held, the contract was in restraint of marriage, and as such void.

Ex. The consideration under a Sale Deed was for marriage expenses of a minor girl aged 12. Held the sale was a void transaction being opposed to public policy.

Ex. Two co-widows – agreement – is one of them remarried – she shout forfeit her eight to her share in the deceased husband's property was not void because no restraint was imposed upon either of the two widows from remarrying.

Ex. Wife to divorce herself and to claim maintenance from the husband on his marrying a second wife was not void because no restraint was impose upon husband from marrying a second wife.

Agreement in Restrain of trade [27]

Every agreement by which anyone is restrained from exercised a Lawful profession, trade or business of any kind is void.

Burden for Proof:-

Party supporting the contract:- must show that the restraint is reasonably necessary to protect public interest. Party challenging the contract:- restraints is injurious to the public.

Ex. : In Patna, 29 out of 30 manufacturers of combs agreed with R to supply combs only to him and not to anyone else. Under the agreements R was free to reject the goods if he found no market for them. Held, the agreement amounted to restraint of trade and void.

Exception to Sec. 27

(1) Sale of goodwill: - Seller of goodwill of a business may agree with the buyer to restrain from carrying on business.

(a) Must relate to same business

(b) Restriction shall apply within specified Local limits.

(c) Restriction shall apply within a reasonable time period

(d) The specified local limits – depends on nature of business.

(a) Restriction on existing partner [11(2)]

Not carry on business other than business of the firm till he is partner.

(b) Restriction on outgoing partner [36]

Not carry on a similar business after retirement

Local limits + specified period – local limit – nature of business

(c) Sec. 54: Upon or in anticipation of dissolution of Firm. Partners may agree that some or all of them will not carry on business similar to that of the Firm within specified periods or local limits.

(d) Sec. 55(2) : Partner may agree with due buyers of Goodwill, not to use the Firm name or carry on **Firm's business or solicit clients of the Firm.**

(e) Sec. 55(3): Upon sale of Firm's Goodwill, a partner may agree that he will not carry on any business similar to Firm's within specified periods or local limits.

Exception under judicial interpretations :-

(a) Trade combination.

- Traders may from associations among them to regulate the business or to fix prices.
- Such agreement like opening and closing of business venture, licensing of traders, supervision and control of dealers, etc. are valid even if they are in restraint of trade.
- But, a Combination that tends to create monopoly; or when two enter into an agreement to avoid competition, they are against public policy and hence void.

(b) Sale dealing agreement: - Agreements to deal in the products of a single manufacturer or to sell the whole produce to a single dealer are valid if their terms are reasonable.

Ex.: .(Discuss in class)

Agreement – buyer of goods for Delhi market not to sell them in Chennai is valid.

- Not to sell any other firm – valid.

(c) Service agreement.

- Agreement: Employers may enter into agreements with employees – (i) not to engage in other work during the tenure of his employment; or (ii) not to engage in similar work after his termination.
- During Employment: The first restraint is always valid, e.g. doctors may be paid non practicing allowances to avoid practicing when they are employed in a hospital.
- After termination of service: The second restraint is valid only is it is to protect the trade interests or the employer. It may be imposed to prevent the outgoing employee from using trade secrets he had learnt during his tenure, to the detriment of his previous employer.
- Valid Agreements : Requiring employees to serve the organization for a few years after training leaving; or execution of a bond requiring employees leaving the organization to pay compensation to the employer are valid.
- Use of Personal Skills: The employer cannot prevent the employees from using his personal skills and knowledge to his benefit; e.g. an employer cannot restrain an employee to act in theatre plays or in perforating an art.

Agreement in Restraint of legal proceedings

⇒ Agreement restricting enforcement of rights:

An agreement by which any party is restricted absolutely from enforcing his legal rights under any contract is void.

Agreements Limiting period of limitation:- An agreement which limits the time within which an action way be brought is void.

A partial restrain is not void, eg.

Ex. 1: A clause in a contract that any dispute arising between the parties shall be subject to jurisdiction of a court at a particular place only, is valid.

Ex. 2: An agreement is not void merely because if provides that any dispute arising between two or prove person shall be referred to arbitration.

That has arises.

-Which may arise

-Which has already arisen?

Ex. 3: An agreement not to go in appeal to higher court against the judgment of a lower court not amount to restart of legal proceeding.

An agreement the meaning of which is not certain (Sec 29):

1. An agreement is called an uncertain agreement when the meaning of that agreement is not certain or capable of being certain. Such agreements are declared void u/s 29.

2. Areas of uncertainty: Uncertainty may relate to – (a) Subject Matter of Contract; or (b) Terms of contract.

(a) Subject Matter: There may be uncertainty as regards – (i) existence; (ii) quantity (iii) quality; (iv) price; or (v) title to the subject matter.

(b) Terms of Contract: There may be uncertainty as regards – (i) existence (ii) quality; (iv) price; or (v) title and other terms in the contract.

Example:

1. A says to B "I shall sell my house; will you buy?" A says, "Yes, I shall buy". Due to uncertainty of price, the agreement is void and unenforceable. There is binding contract.

2. A agreed to pay a certain sum, when he was able to pay. Held, the agreement was void for uncertainty.

3. D agrees to sell his white horse, for Rs.5,000 or Rs.10,000.

WAGERING AGREEMENT [30] :-

An agreement between two persons under which money or money's worth is payable by one person to another on the happen or non happening of a future uncertain event is called a wagering agreement.

X promise to pay Rs. 1000 to Y if it is rained on a particular day, and Y promise to pay Rs.1000 to X if it did not.

Wagering agreement is promise to give money or money's worth upon the determination of uncertain event.- Sir Willian Anson.

Essential elements of wagering agreements

The must be a promise to pay money or money's worth

(2) Performance of a promise must depend upon determination of uncertain event. It might have already happened but the parties are not aware about it.

(3) Mutual chancels of Gains or Loss.

(4) Neither party to have control over the events

(5) Neither party should have any other interest in event.

(6) One party is to win and one party is to lose.

Ex. 1:- Agreement to settle the difference between the contract price and market price of certain goods or shares on a particular day.

Ex. 2: A lottery is wagering agreement. Therefore, an agreement to buy and sell lottery tickets is a wagering agreement. Section 294 – A of the Indian Penal Code declares that drawing of lottery is an offence. However, the government may authorize lotteries. The persons authorized to conduct lotteries are exempt from the punishment. But, the lotteries still remain a wagering transaction.

Ex. 3: However, if the crossword puzzle prizes depend upon sameness of the competitor's solution with a previously prepared solution kept with the organizer or newspaper editor, is a lottery and, therefore, a wagering transaction.

Ex. 4: However, when any transaction in any commodity or in shares with an intention of paying or getting difference in price, the agreement is a wager.

Agreement not held as wagers:-

⇒ Prize in terms of Prize competition Act, 1955 not exceeding Rs.1000 is not wagering agreement.

⇒ Horse race [500] – An agreement to contribute a plate or prize.

⇒ Contract of insurance utmost in good faith eg. Favour in public policy.

⇒ Share market transaction A commercial transaction should always be distinguished from a pure speculative transaction. A commercial transaction is done with an intention of delivery of goods (commodity or security) and payment of price. Therefore, it is not wagering agreement.

⇒ Crossword competition involving skill for its solution. If skill plays an important role in the result of a competition and prize depend upon the result, the competition is not Involve applications of skill and prizes are awarded to the participants on the basis of merit of their solutions and not on chance. Therefore, such competitions are valid and are not wagers.

⇒ Athletic Competitions also fall in the category of games of skill. Therefore, these are also not wagers.

Example: A and B, two wrestlers, agreed to enter into a wrestling contest in Ahmedabad on a certain day. They further agreed that a party failing to appear on the fixed day was to forfeit Rs.500 and the winning party will receive a sum of Rs.1,000. Held, it was not a wagering agreement.

⇒ Contribution to chit fund is not wager – contributions made by the members are refunded by draw of lots.

Effects of wagering agreements:-

⇒ Agreement is void.

⇒ No suit can be filled for any recovery of the amount won on any wager.

⇒ It is not illegal. Any agreement collateral to wagering agreement is valid.

⇒ However, it is illegal in state of Maharashtra and Gujarat.

⇒ Agreement which is prohibited by law is illegal agreement.

Example Agreement to commit crime.

⇒ Effects of illegal agreement:

• It is always void.

• Any collateral transaction to illegal agreement is also void.

• No action is allowed on illegal agreement.

	Void Agreement	Illegal agreement
Meaning	Not enforceable by Law	Forbidden by any law
One in another	All void agreement is not illegal	All illegal agreement are void
Reason	10,29,56	Against the provisions of law
Punishment	Not liable to punished	Party are criminally liable
Void – ab – initio	A valid – collateral – is not void	Illegal, collateral – illegal

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

⇒ A contract to pay B Rs.10,000 if B house is burnt.

⇒ A promise to pay B Rs.1,00,000 if a certain, ship does not return within a year.

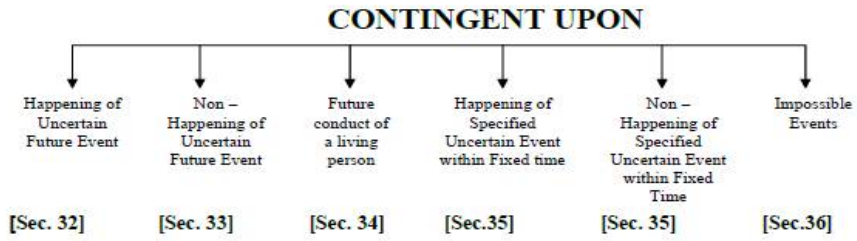
Essential features of a contingent contract :-

It is a contract to do or not to do something

(b) Dependent on happening or non happening of an event

(c) Such on event is a collateral event (i.e. it is collateral) to the contract i.e. the event must not depend upon the mere will of party.

(d) The event is uncertain



(1) Contracts contingent upon the happing of an event enforced – such event has happened [32]

Void – such event because impossible [happening of such event]

Ex.:- A contract to pay B a sum of money when B marries e dies without being married to B contract – void

(2) Non happening of a future event:- [33]

Enforced :- when the happening of such events becomes impossible.

Void:- such event has happened.

Ex.:- A agrees to pay B sum of money if a certain ship does not return. This ship is sunk. The contract can be enforced when the ship sinks.

(3) Happening of an event within a specified time [35]

Enforce :- when such event has happened within the specific time.
Void :- When the happening of such event because impossible before the expiry of specified time.
When such event has not happened within specified time.
A promise to pay B sum of money if a certain ship return within a Year.
Enforce :- ship returns within the year .
Void :- If the ship is burnt within the year / not come within the year.
(4) Non – happening of an event within a fixed time [35]
Enforce :- When the happening of such event because impossible before the expiry of specified time.
⇒ When such event has not happened within the specified .
Void:- When such event has happened within the specified period.
(5) Future conduct of a living person. [34]
Enforced:- When such person acts in the manner as desired in the contract.
Void :- When such person does anything which makes the desired future conduct of such person – impossible – dependent upon certain contingency.
A agrees to pay B a sum of money if B marries C . C married D. The marriage of B to C must now considered impossible, although it is possible that D may die any that C may afterwards marry B.
(6) Impossible events [36]
- Such an agreement can not be enforced since it is void whether the impossibility of the event was known to the parties or not is immaterial.
• A agrees to pay B Rs.1,000 if two parallel straight lines should enclose a space. Agreements are void.
• A agrees to pay B Rs.1,000 if B will marry A's daughter C and C was dead at the time of the agreement. Agreement is void.

Wagering agreement

Contingent agreement

	Wagering agreement	Contingent agreement
1. Defined	Not defined u/s 30	Defined o/s 31
2. Meaning	Promise to give money or money's with upon the determinative of an uncertain event.	To do or not to do something if some event. Collateral to such contract does or does not happen
3. Nature of uncertain event	Contingent nature	Not be a wagering nature
4. Void / valid.	**Void**	**Valid**
5. Interest	No other interest in the subject matter of the agreement except within of loss of wagering amt. A wagering agreement is essentially of a contingent nature. Consists of reciprocal promises futures event is the sole determine factor	Have real interest outcome of the uncertain gain. A contingent contract the not be a wagering nature. Not consist a reciprocal promises future event is fully collateral.

PERFORMANCE

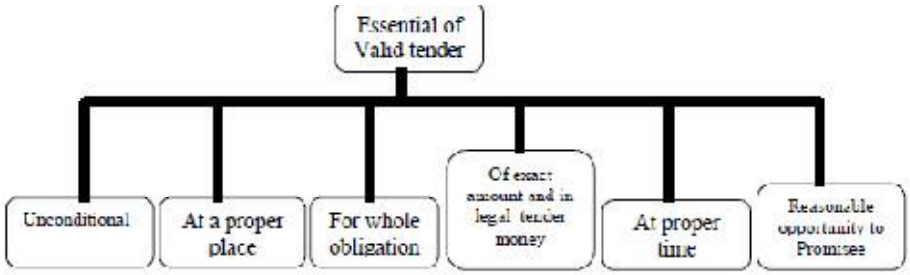
Sec 37:- That the parties to a contract must either perform or offer to perform, their respective promises unless such performance is dispensed with or excused under the provisions of contract Act, or of any other law.

Performance: - Two types

1. Actual performance – actually performed – liability of such a party comes to an end.

2. Attempted performance or tender of performance refusal to accept offer of performance by promise [38]

Promisor is not responsible for non performance and they can sue the promisee for breach of contract – nor he (promisor) thereby lose his rights under the contract.



1. No time is specified for performance [Sec 46]

Time place and manner of performance [46–50]

Time of performance is not specified + promisor agreed to perform without, a demand from the promise the performance must be made within a reasonable time. Reasonable time – in each particulars case – a question of fact.

2. Time specified but hour not mentioned [47].

Time of performance specified + promisor agreed to perform without application by the promisee

-

Performance must perform on the day fixed during the usual business hours and at the place at which the promise ought to be performed.

3. Where Time is fixed and application to be made [48]

- Proper place and within the usual hour of business
- Promisee to apply for performance

4. Performance of promise where no place is specified and no application is to be made by the promise [49]

- It is the duty of the promisor to apply to the promise to appoint a reasonable place for the performance and perform it at such appointed place.

5. Performance in manner or at time prescribed or sanctioned by promise [50]

- In such prescribed manner and
- Prescribed time

Ex:- ‘A’ desires ‘B’ who owes him Rs 10,000 to send him a promissory note for Rs 10,000 by Post. The debt is discharged as soon as ‘B’ puts into the post a letter containing the promissory note duly addressed to ‘A’.

Performance of reciprocal promises

Reciprocal Promise :- Promises which form the consideration or part of consideration for each other as called reciprocal promises.

1. Mutual and Independent:- Such promises all to be performed by each party independently without waiting for the other party to perform his promise can’t excuse himself on the ground of non-performance by the default party.

X maythpricethePayingYmaythonYgoodsthedeliver610

Y – Price – non Payment

X – goods delivered

2. Mutual and Dependent:- Sue damage . The performance of promise by one party depended on the prior performance of the promise by other party.

[The party at fault becomes liable to pay compensation to the other party may sustain by the non performance of the contract – [54]

3. Mutual and concurrent: - when reciprocal promises are to be performed simultaneously a promisor need not perform his part unless the promise is ready and willing to perform [51]

A iceThePayBgoodsthedeliverPr

Order of performance of reciprocal promises [52]

- Where the order in which reciprocal promises one to be performed is expressly fixed by the contract – they must be performed in that order.
- Order is not expressly fixed – nature of transaction requires

Ex :- ‘A’ and ‘B’ contract that ‘A’ shall build a house for ‘B’ at a fixed price ‘A’ promise to build the house must be performed before its promise to pay for it.

Sec 53 :- One party preventing – voidable at the option of the other party so prevented.

- Compensation for loss

Sec 54 :- Legal and illegal

Legal – valid, illegal – void

Sec 58:- alternative promise, one branch being illegal legal branch alone can be enforced.

A – B – 1000 rupees

Deliver – rice + smuggled goods

Time as the essence of the contract (Sec 55):-

Where time is essence – the concerned parties must perform their respective promises within the specified time.

Time are fact :- time is specified for the performance of the contract is not by itself sufficient to prove that time is essence of the contract.

- Intention of the parties.

Time is generally considered to be the essence of the contract:-

Where the parties have expressly agreed to treat as the essence of the contract.

(b) Delay operates as an injury to the party and

(c) Nature and necessities of the contracts requires it to be performs within the specified time.

- Delivery of the goods – considered – essence of the contract payment of the price – No

[However in case of sale and purchase of an immoral property, the time is presumed to not the essence of the contract]

Time is essence of the contract – party tails to perform

In time – the contract becomes voidable at the option the other party.

Time is not essence – only claim damages for delay in performance

Assignment of contract :- (a) by – operation of law

- Death
- Insolvency

(b) By an act of parties

Assignment is a made of transferring rights.

Assignment person anothererestandrightstranferint

Rules regarding assignment

The liabilities or obligations under a contract can't be assigned

(b) The rights and benefits under a contract which not of a personal nature can be assigned.

(c) An actionable claim can always be assigned

	Succession	Assignment
Meaning	Deceased person - Legal represent	Person – another person
Time	On the death of a person	During the life time of a person
Voluntary Act	Not voluntary automatic by operation of law	Voluntary
Written document	No. required	Required assignment deed
Scope	Liability and rights	Rights

Appropriation of Payments :- [Sec 59 – 61]

Appropriation means application of payments – The question of appropriation of payments arises when a debtor owes several debts to the same creditor and make a payment that is not sufficient to discharge the whole indebtness.

1. Appropriation of Payments

Sometimes, a debtor owes several distinct debts to the same creditor and he makes a payment which is insufficient to satisfy all the debts. In such a case, a question arises as to which particular debt the payment is to be appropriated. Section 59 to 61 of the Act lay down following rules as to appropriation of payments which provide an answer to this question.

⇒ Appropriation as per express instructions

Every debtor who owes several debts to a creditor has a right to instruct his creditor to which particular debt, the payment is to be appropriated or adjusted. Therefore, where the debtor expressly states that the payment is to be applied to the discharge of a particular debt, the payment must be applied accordingly.

Example: A owes B three distinct debts of Rs.2,000, 3,000 and 5,000. A sends Rs.5,000 and instructs B that the payment should be appropriated against the third debt. He is bound to appropriate the payment against the third debt only.

2. Application of payment where debt to be discharge is not indicated

If section 60 is attracted, the creditor shall have the discretion to apply such payment for any lawful debt which is due to him from the person making the payment.

Example: A owes to B, among other debts, the sum of Rs.520. B writes to A and demands payment of this sum. A sends to B Rs.520. This payment is to be applied to the discharge of the debt of which B had demanded payment.

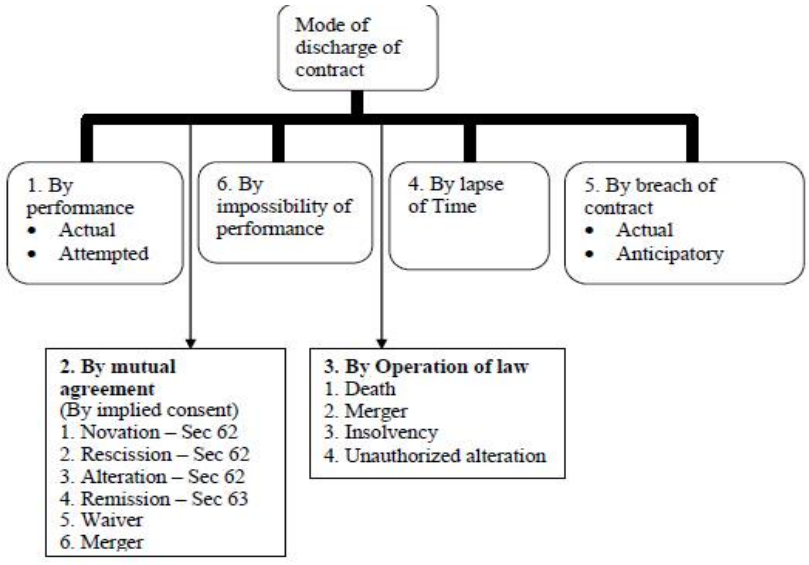
3. Application of payment where neither party appropriates [61]

The payment shall be applied in discharge of the debts in order of time whether they are or are not based by the limitation Act 1963, if the debt are of equal standing (i.e. payable on the same date) the payment shall be applied in discharge of each of these debt proportionately.

- First interest then principle
- Director of payer not receiver.
- Right primary of the debtor

DISCHARGE OF A CONTRACT

Discharge of a contract means termination of contractual relation between the parties to a contract in other words a contract is discharged when the rights and obligations created by it are extinguished (i.e. comes to an end).



Discharge by performance

fulfilment of obligations by a party to the contract within the time and in the manner prescribed in the contract.

(a) Actual performance – no party remains liable under the contract. Both the parties performed.

(b) Attempted performance or tender.:- Promisor offers to perform his obligation under the contract but the promise refuses to accept the performance. It is called as attempted performance or tender of performance

- But the contract is not discharged.

Discharge by mutual agreement

(a) Novation [Sec 62] – Novation means substitution of a new contract in the place of the original contract new contract entered into in consideration of discharge of the old contract. The new contract may be.

- Between the same parties (by change in the terms and condition)
- Between different parties (the term and condition remains same or changed)

Following conditions are satisfied :-

(1) All the parties must consent to novation

(2) The novation must take place before the breach of original contract.

(3) The new contract must be valid and enforceable.

A owes B Rs.50,000. A enters into an agreements with B and gives B a mortgage of his estate for Rs.40,000 in place of the debt of Rs.50,000. (Between same parties)

O A owes money Rs.50,000 to B under a contract. It is agreed between A, B & C that B shall henceforth accept C as his Debtor instead of A for the same amount. Old debt of A is discharged, and a new debt from C to B is contracted. (Among different parties)

(b) Rescission [62]:- Rescission means cancellation of the contract by any party or all the parties to a contract. X promises Y to sell and deliver 100 bales of cotton on 1st oct his go down and Y promises to par for goods on 1st Nov. X does not supply the goods. Y may rescind the contract.

(c) Alteration [62] :- Alteration means a change in one or more of the terms of a contracts with mutual consent of parties the parties of new contracts remains the same.

Ex:- X Promises to sell and delivers 100 bales of cotton on 1st oct. and Y promises to pay for goods on 1st Nov. Afterwards X and Y mutually decide that the goods shall be delivered in five equal installments at is go down . Here original contract has been discharged and a new contract has come into effect.

(d) Remission [63]:- Remission means accepting a lesser consideration than agreed in the contract. No consideration is necessary for remission. Remission takes place when a Promisee-

(a) Dispense with (wholly or part) the performance of a promise made to him.

(b) Extends the time for performance due by the promisors

(c) Accept a lesser sum instead of sum due under the contract

(d) Accept any other consideration that agreed in the contract

- A promise to paint a pictured for B. B after words for him to do so. A is no longer bound to perform the promise.

(e) Waiver:- Intentional relinquishment of a night under the contract.

(f) Merger :- conversion of an inferior right into a superior right is called as merger. (Inferior right end)

1. Meaning

It is substitution of an existing contract with new one.

It is alteration to some of the terms and conditions of the original Contract.

2. Change in parties

It is made by – (a) change in the terms of the contract or (b) change in the Contracting Parties.

Terms of the contract may be altered by mutual agreements by the same contracting parties. So, there is no change in the parties.

3. New Contract

A New Contract comes into existence in place of the old one.

It is not essential to substitute a new contract in place of the old contract.

4. Performance

Old contract need not be performed New contract must be performed.

Old contract as per the altered terms shall be performed.

Discharge by operation of law

Death: - involving the personal skill or ability, knowledge of the deceased party one discharged automatically. In other contract the rights and liability passed to legal represent.

Example: A promises to perform a dance in B's theatre. A dies. The contract comes to an end.

(b) Insolvency:- when a person is declared insolvent. He is discharged from his liability up to the date of insolvency.

Example: A contracts to sell 100 bags of sugar to B. Due to heavy loss by a major fire which leaves nothing to sell, A applies for insolvency and is adjudged insolvent. Contract is discharged.

(c) By unauthorized material alteration – without the approval of other party – comes to an end – nature of contract substance or legal effect.

Example : A agrees upon a Promissory Note to pay Rs.5,000 to B. B the amount as Rs.50,000. A is liable to pay only Rs.5,000.

(d) Merger: When an inferior right accruing to a party in a contract mergers into a superior right accruing to the same party, then the contract conferring inferior right is discharged.

Example: A took a land on lease from B. Subsequently, A purchases that land. A becomes owner of the land and ownership rights being superior to rights of a lessee, the earlier contract of lease stands terminated.

5. Rights and liabilities vest in the same person: Where the rights and liabilities under a Contract vest in the same person, the contract is discharged.

Example: A Bill of Exchange which was accepted by A, reaches A's hands after being negotiated and endorsed through 4 other parties. The contract is discharged.

Discharge by Lapse of time

Where a party fails to take action against the other party within the time prescribe under the limitation Act, 1963. All his rights to come end. Recover a debt – 3 Years recover an immovable property – 12 years

Ex.:- On 1st July 20X1 X sold goods to Y to Rs 1,00,000 and Y had made no payment till

August 20X4. state the legal position on 1st Aug 20X4

(a) If no. credit period allowed Ans. (Refer Classroom)

(b) If 2 month credit period allowed.

Discharge by Breach of contract

Failure of a party to perform his part of contract

(a) Anticipatory Breach of contract: - Anticipatory breach of contract occurs when the part declares his intention of not performing the contract before the performance is due .

(i) Express repudiation: - 5 agrees to supply B 100 tunes of specified category of iron on 15.01.2006 on 31.12.2005. 5 express his unwillingness to supply the iron to B.

(ii) Party disables himself: - Implied by conduct.

Ex.:- 5 agrees to sell his fiat car to B on 15.01.2006 on 31.12.05 5 sells his fiat car to T.

(b) Actual Breach of contract: - If party fails or neglects or refuses to perform his obligation on the due date of performance or during performance. It is called as actual breach.

During performance – party has performed a part of the contact.

Consequences of Breach of contract:- The aggrieved party (i.e. the party not at face it) is discharged from his obligation and get rights to proceed against the party at fault. The various remedial available to an aggrieved party.

Discharge by Impossibility performance

(a) Effect of Initial Impossibility

(b) Effect of supervening. Impossibility

(a) Initial Impossibility – at the time of making contract
- Both parties know – put life into deed body – void .
- Both don't know – void.
- One know – compensate to other party

(b) Effect of super vanity Impossibility:-
- Where an act becomes impossible after the contract is made – void
- Becomes unlawful, beyond the control of promisor – void
- Promisor alone knows about the Impossibility – compensate loss.
- When an agreement is discovered to be void or where a contract becomes void

Benefit must refund X yYAdSing.1000.

Cases when a contract is discharged on the group of super vent Impossible

(a) Distraction of subject matter - Failure of the ultimate purpose of contract – king coronate process.

(b) Death of personal Incapacity Example : (Refer Classroom)

(c) Declaration of war Example : (Refer Classroom)

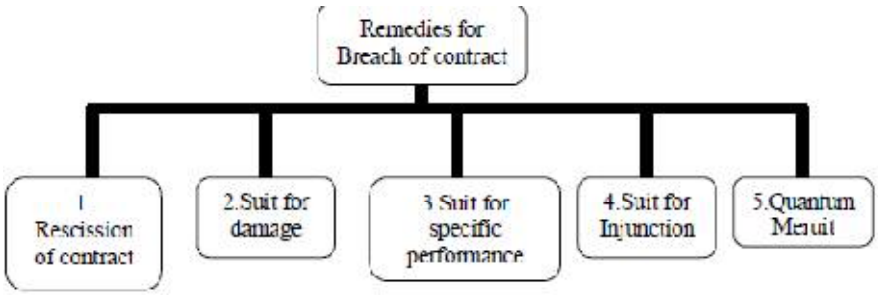
(d) change of Law Example : (Refer Classroom)

(e) Non existence or Non occurrence of a particular state of thing necessary for performance.

Example : (Refer Classroom)

No Super Impossibility – does not become void
- Difficulty of performance – coal – transport
- Commercial Impossibility
- Default of a third party
- Strikes, knockout and civil disturbance.
- Partial Impossibility – coronation of king and to sailing around the lake by boat.

Remedy means course of action available to an aggrieved party when other party breaches the contract.



REMEDIES FOR THE BREACH OF CONTRACT

⇒ It means right to party to cancel contract.

⇒ In case of breach of contract, other party may rescind contract.

Effect of Rescission of Contract

⇒ Aggrieved party is not required to perform his part of obligation under contract.

⇒ Aggrieved party claims compensation for any loss.
⇒ Party is liable to restore benefit, if any.
When can Court Grant Rescind Contract?
Court can rescind the contract in the following situation:
⇒ Contract is voidable.
⇒ Contract is unlawful.

RESCISSION OF CONTRACT – SEC 39

SUIT FOR DAMAGES

⇒ It means monetary compensation allowed for loss.
⇒ Purpose is to compensate aggrieved party and not to punish party as fault.
⇒ In India, rules relating to damages are based on English judgment of Hadley vs Baxendale.
The facts of case were – H's mill was stopped due to the breakdown of the shaft. He delivered the shaft to common carrier to repair it and agree to pay certain sum of repair it and agree to pay certain sum of money for doing this work. H has informed to B that delay would result into loss of profit. B delivered the shaft after reasonable time after repair. H filed suit for loss of profit. It was held that B is not liable for loss of profit. The court laid down rule that damage can be recovered if party has breach of contract.

KINDS OF DAMAGES

The following are the different kinds of damages:
⇒ Ordinary damages
These are the damages which are payable for the loss arising naturally and directly as result of breach of contract. It is also known as proximate damage or natural damage.
⇒ Special damages
These are damages which are payable for loss arising due to some special circumstances. It can be recovered only if special circumstances which result in special loss in case of breach of contract and party have notice of such damage.
Example: A sends sample of his products for exhibition to an agent of a railway company for carriage to "New Delhi" for an exhibition. The consignment note stated: "Must be at New Delhi, Monday Certain." Due to negligence of the company, the goods reached only after the exhibition was over. Held, the company was liable for the loss caused by late arrival of the products because the company's agent was aware of the special circumstances.
⇒ Exemplary or punitive or vindictive damages
These damages are allowed not to compensate party but as mean of punishment to defaulting party. The court may award these damages in the case of:

• Breach of contract to marry – loss based on mental injury.

• Wrongful dishonor of cheque – smaller amount, larger the damage.

⇒ Nominal damages

Where party suffers no loss, the court may allow nominal damages simply to establish that party has proved his case and won. Nominal damage is very small in amount.

⇒ Damages for inconvenience

If party has suffered physical inconvenience, discomfort for mental agony as result of breach of contract, party can recover the damage for such inconvenience.

Example: A photographer agreed to take photographs at a wedding ceremony but failed to do so. The bride brought an action for the breach of contract. Held, she was entitled to damages for her injured feelings.

⇒ Liquidated damages and penalty

Party may specify amount at the time of entering into contract. The amount so specified may be (a) liquidated damage, or (b) penalty. If specified sum represent, fair and genuine pre – estimate damages likely to result due to breach, it is called liquidated damage. But if specified sum is disproportionate to the damages, it is called as penalty.

As regard the payment of liquidated damages and penalty court can't' increase amount of damages beyond the amount specified in the contract.

Example : A gives B, a bond for the repayment of Rs.1,000 with interest at 12 per cent, at the end of six months, with a stipulation that, in case of default, the interest shall be payable at the rate of 75 per cent, 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.

⇒ Forfeiture of security deposit

Any clause in contract entitling the aggrieved party to forfeit security deposit in the nature of penalty and court may award reasonable compensation.

⇒ Payment of interest

• It is permissible.

• If interest is in nature of penalty, court may grant relief.

• If no rate of interest is specified in contract party shall be liable to pay as per the law in force or as per custom or usage of trade.

⇒ Cost of suit or decree

The court has also discretion to award cost of suit for damages in addition to the damages for breach of contract.

Suit for Specific Performance

It means, demanding an order from court that promise agreed in contract shall be carried out.

⇒ When is specific performance allowed?

• Where actual damages arising from breach is not measurable.
• Where monetary compensation is not adequate remedy.
⇒ When specific performance is not allowed?
• When damages are an adequate remedy.
• Where performance of contract requires numbers of minute details and therefore not possible for court to supervise.
• Where contract is of personal in nature.
• Where contract made by company beyond its power. (ultra – vires)
• Where one party to contract is minor
• Where contract is inequitable to either party.

Example: A agree to sell B, an artist painting for Rs.30,000. Later on, he refused to sell it. Here B can file suit against A for specific performance of the contract.

Suit for Injunction

⇒ It means stay order granted by court. This order prohibits a person to do particular act.

⇒ Where there is breach of contract by one party and order, of specific performance is not granted by court, injunction may be granted.

Example: Film actress agreed to act exclusively for W for a year and for no one else. During the year she contracted to act for Z.

QUASI CONTRACT

[Contracts implied in law or implied contract]

It means a contract which lacks one or more of the essentials of a contract.

Quasi contract are declared by law as valid contracts on the basis of principles of equity i.e. no person shall be allowed to enrich himself at the expense of another the legal obligations of parties remains same.

Nature of Quasi contracts:-

A quasi contract does not arise from any formal agreement but is imposed by law.

(b) Every quasi contract based upon the principle of equity and good conscience.

(c) A quasi contract is always a right to money and generally though not always to a liquidated sum of money.

(d) A suit for its breach may be filed in the same way as in case of a complete contract.

(e) The right grouted to a party under a quasi contract is not available to him against the whole world but against particular person(s) only.

(f) A suit for breach of a quasi contract may be filed in the same way as in case of an ordinary contract

(g) Although there is no contract between the parties under a quasi contracts, yet they are put in the same position as if he were a contract between them .

Provisions relating to various quasi contracts are contained in section 68 to sec 72 of the contract Act, 1872.

TYPES OF QUASI CONTRACTS

Sec. 68 Supply of Necessaries	Sec. 69 Reimbursement of money due	Sec. 70 Obligation to pay for benefit out of non – gratuitous act	Sec. 71 Responsibility of Finder of Goods	Sec.72 Person receiving goods are money by mistake

Sec. 68: If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person, with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

1. Meaning of Necessaries:

(a) Necessaries normally include articles required to maintain a particular person in the state, degree and station in life in which he is.

(b) They are essentials to run a life.

(c) An item will not be considered necessary, if a person already has sufficient supply of things of such kind.

(d) Necessaries include Services rendered to a person.

(e) What constitutes necessaries depends on the circumstances of each case.

2. Only property liable: person not liable:

(a) It is only the property (movable and immovable) of the incapable person they shall be liable.

(b) He cannot be held liable personally.

(c) Where he doesn't own any property, nothing shall be payable.

3. Example: (i) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property. (ii) A who supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life, is entitled to be reimbursed from B's Property.

Payment By a person who is interested in a transaction [69]

Condition of section [69]

Sec. 69; A person, who is interested in the payment of money and pays such money, which another is bound by low to pay, is entitled to be reimbursed by the other.

(a) one party is legally bound to make a payment

(b) Some other persons make such payment

(c) The person making such payment is not legally bound to make such payment

(d) The person making such payment is interested in paying such amount

Legal effect of sec 69.:- If all the conditions of sec 69 are satisfy the person who is interested in paying such amount shall be entitled to recover the payment made by him.

Ex.:- The goods belonging to A were wrongfully attached in order to realize arrears of Government revenue due by G. A paid the amount to save the goods from sale at was held that A was entitled to recover the amount from G.

Obligation of person enjoying benefit of non-gratuitous act [70]

Conditions of section 70.

Sec.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 benefits thereof, then he is bound to make compensation to the other in respect of, or to restore the thing so done or delivered.

A person has lawfully done something for another person or delivered something to another person.

(b) Such person must have acted voluntarily and non – gratuitously.

(c) The other person has enjoyed the benefit of the act done for him or the thing delivered to him.

Legal effect of sec 70.

- If the conditions of sec70 are satisfied, there will be quasi contract between the parties.
- Consequently, the party who has done something or delivered a thing shall be entitled to recover its value from the person who obtained the benefit of the same.

Ex.:- A a trades man leaves goods at B's house by mistake, B treat the goods as his own, He is bound to pay A for them.

- A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that be intended to act gratuitously.

Finder of Goods [71]

A person who finds goods belonging to another and takes them into custody, is subject to the same responsibility as a Bailee.

A finder of goods has same rights and duties at that of bailee.

- Duty to take reasonable care of the goods
- Duty not to use the goods for his own purpose.
- Duty not to mix the goods with own goods

Right to recover expenses, reward, sell the goods

Ex.:- X a guest found a diamond ring at a birthday party of Y. X told Y and other guests about it. He has performed his duty to find the own. If he is not able to find the owner he can retain the ring as bales.

Money paid under a mistake or conversion [72]

Sec. 72: A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

Conditions of Sec. 72

(a) A person has (i) paid money to another person or

(ii) Delivered something to another person

(b) Such person must have acted

- Under a mistake or under coercion.

Legal effect – quasi contract, recover its value from the person who obtained the benefit of same.

Example: (i) A and B jointly owe Rs.1,000 to C.A alone pays the full amount to C and B not knowing this fact, pays Rs.1,000 again to C.C is bound to repay the amount to B. (ii) A Railway Company refuses to deliver certain goods to the Consignee except upon payment of an illegal charge for carriage. The Consignee pays the sum charged in order to take delivery of goods. He is entitled to recover so much of the charge as was illegally excessive.

(c) A + B. – 100 – A – 100, B – 100, B – return.

Compensation for failure to discharge obligation created by quasi contract [73]

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

Quantum meruit: - [as much as is earned]

One party preventing the other:- If a party prevents the other party from completing his obligation under the contract the aggrieved party may claim payment on quantum merit for the part of contract already performed by him.

(a) In case of void agreement or contract that becomes

- Any person who has received any advantage under such agreement or contract is bound to restore if or to make compensation for it, to the person from who received it.

Ex.:(1)- A – B – 10000 – to marry c (A's daughter) – C – death of the time of performance of contract – B must repay A Rs 1000.

Ex.(2):- A – B decline 250 quince of rice before the 1st of May. A delivers 130 qu. Only before that day and none after. B retains the 130 qu. after the first of May. He is bound to pay A for them.

Ex(3):-A singer – two nights in every week during the next two month and B any ages to pay her Rs 100 for each night's performance on the sixth night, A willfully absent perfect. B must pay a for the five night on which she had sung.

(b) In case of Act preventing the completing of contract:-

If a party does not complete the contract or prevents the other party to complete the contract the aggrieved party can sue or quantum meruit.

Ex.c:- owner – P write a book to be published as series in his magazine. After a few series were published the publication of the magazine was stopped. It was held that P could claim payment on quantum meruit for the part already published.

(c) In case of divisible contract :-

(1) If the contract is divisible and
(2) If the party not at default has enjoyed benefit of the point performance.
(3) the contract is party performed
If the above condition an satisfied, the party at fault may claim on payment on quantum merit for the part of contract performed by him be con recover such proportion of the contract price as the work done, by him bears to the work under the contracts.
(d) In case of indivisible contract performed completely but Badly.
- Contract is indivisible
- Lump sum consideration
- Completely performed
- Performed badly
The party at fault may recover the contract price (Lump sum price) less the deduction made for done badly.
Ex.:- X agreed to decorate Y's flat for a lump sum of Rs20,000. X did the complete work but Y complained of faulty work man stop. It costs Y another Rs3000 to remedy the defect. X could recover only Rs 17000 from Y.
(e) In case of Non – gratuitous Act – Three condition
(i) The thing must have been done or delivered lawfully.
(ii) The person who has done or delivered the thing must not have intended to do so gratuitously
And
(iii) The person from whom the act is done must have enjoyed the benefit of the act.
Ex.:- A, a tradesman leaves goods at B's shop be mistake B treats the good as his own. He is bound to pay A for them.
Difference between Quasi Contract and Contract

Difference between Quasi Contract and Contract

Matter	Quasi – contract	Contract
Intentionally Form	It is not intentionally formed but law imposes upon the parties.	It is intentionally formed by parties.
Essentials of contract	A quasi – contract does not possess all the essential of a valid contract.	A contract possesses all the essentials of a valid contract.
Obligations	Obligations are implied upon by the law.	Obligations are mutually created by the parties.
Foundation	It is founded upon the principle of equity.	It is founded upon general principal of law of contracts.

Essentials of contract
A quasi – contract does not possess all the essential of a valid contract.
A contract possesses all the essentials of a valid contract. Obligations
Obligations are implied upon by the law.
Obligations are mutually created by the parties.
Foundation

It is founded upon the principle of equity.

It is founded upon general principal of law of contracts.

SPECIAL CONTRACT

Contract of Indemnity

1. INTRODUCTION TO CONTRACT OF INDEMNITY

- Indemnity Meaning –

• To make good the loss incurred by another person

• To compensate the party who has suffered some loss

• To protect a party from incurring a loss

- 'Contract of indemnity Definition

A contract is called as a 'contract of indemnity' if –

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.

- Modes of contract of indemnity

Expressed: When a person expressly promises to compensate the other from loss.

Implied: When the contract is to be inferred from the conduct of the parties or from the circumstances of the case.

- **Essential elements of a contract of indemnity**

Contract: All the essentials of a valid contract must also be present in the contract of indemnity

Example:- X asks Y to beat Z and promises to indemnify Y against the consequences. Y beats Z and is fined Rs.1,000. Y cannot claim this amount from X because the object of the agreement was unlawful.

Loss to one party

A person can indemnify another person only if such other person incurs some loss or it has become certain that he will incur some loss.

Indemnity by the promisor

The purpose of contract of indemnity is to protect the indemnity holder from any loss that may be caused to the indemnity holder.

Reason for loss

The contract of indemnity must specify that indemnity holder shall be protected from the loss caused due to –

• Action of the promisor himself; or

• Action of any other person; or

• Any act, event or accident which is not in the control of the parties.

2. RIGHTS OF INDEMNITY HOLDER (Sec. 125)

- Right to recover damages

The indemnity holder has the right to recover all the damages which he is compelled to pay in any suit in respect of any matter covered by the contract of indemnity.

- Right to recover costs

The indemnity holder has the right to recover all the costs which he is compelled to pay in bringing or defending such suit.

Condition:

(a) The indemnifier authorised him to bring or defend the suit; or

(b) The indemnity holder did not contravene the orders of the indemnifier; and The indemnity holder acted as it would have been prudent for him to act in the absence of any contract of indemnity.

- Right to recover sums paid

The indemnity holder has the right to recover all the sums which he has paid under the terms of a compromise of such suit.

(a) The indemnifier authorised him to compromise the suit; or

(b) The indemnifier holder did not contravene the orders of the indemnifier; and the indemnity holder acted as it would have been prudent for him to act in the absence of any contract of indemnity.

Contract of guarantee

3. MEANING OF CERAIN TERMS (Sec. 126)

- Meaning of 'contract of guarantee'

A 'contract of guarantee' is a contract to –

• Perform the promise; or

• Discharge the liability, of a third person in case of his default.

- Meaning of 'surety'

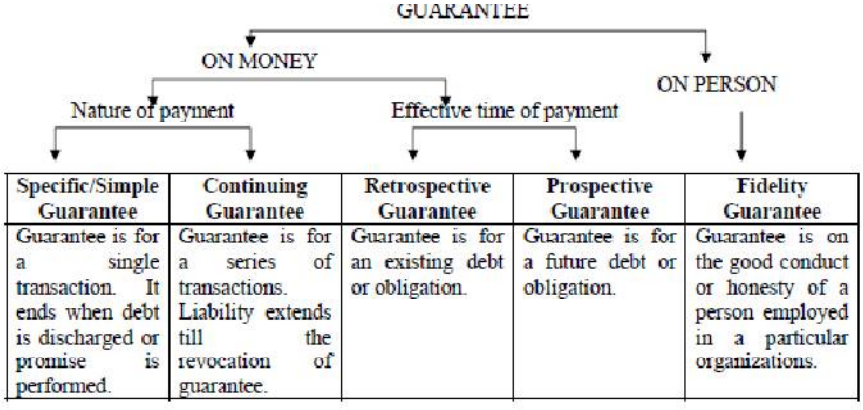
The person who gives the guarantee is called as 'surety'

- Meaning of 'principal debtor'

The person in respect of whose default the guarantee is given is called as 'principal debtor'.

- Meaning of 'creditor'

The person to whom the guarantee is given is called as 'creditor'.



Specific/Simple Guarantee	Continuing Guarantee	Retrospective Guarantee	Prospective Guarantee	Fidelity Guarantee
Guarantee is for a single transaction. It ends when debt is discharged or promise is performed.	Guarantee is for a series of transactions. Liability extends till the revocation of guarantee.	Guarantee is for an existing debt or obligation.	Guarantee is for a future debt or obligation.	Guarantee is on the good conduct or honesty of a person employed in a particular organizations.

4. ESSENTIALS AND LEGAL RULES FOR A VALID CONTRACT OF GUARANTEE.

- Must have all the essentials of a valid contract

• All the essentials of a valid contract must be present in the contract of guarantee.

• Exceptions:

(a) Consideration received by the principal debtor is a sufficient consideration to the surety for giving the guarantee.

(b) Even if principal debtor is incompetent to contract, the guarantee is valid. But, if surety is incompetent to contract, the guarantee is void.

- Primary liability of some person

• The principal debtor must be primarily liable. However, even if the principal debtor is incompetent to contract the guarantee is valid.

• The debt must be legally enforceable.

• The debt must not be a time barred debt.

- The contract must be conditional

• The liability of surety is secondary and conditional.

• The liability of surety arises only if the principal debtor makes a default.

- No misrepresentation

• The creditor should disclose all the facts which are likely to affect the surety's liability.

• There must not be any concealment of facts.

- Form of contract

A contract of guarantee may be either oral or written.

- Joining of other co-sureties

The guarantee by a surety is not valid if –

• A condition is imposed by a surety that some other person must also join as a co-surety; but

• Such other person does not join as a co-surety.

5. NATURE AND EXTENT OF SURETY'S LIABILITY

- Surety's liability is coextensive with liability of principal debtor

General rule –

• Surety is liable for all the debts payable by the principal debtor to the creditor.

• Accordingly, interest, damages, costs etc. may also be recovered from the surety.

Exception:-

The contract of guarantee may provide otherwise.

- Commencement of surety's liability

• The liability of surety arises immediately on default by the principal debtor.

• The creditor is not required to –

(a) first sue the principal debtor; or

(b) first give a notice to the principal debtor.

- Surety's liability may be limited

The surety may fix a limit on his liability up to which the guarantee shall remain effective.

- Surety's liability may be continuous

• The surety may agree to become liable for a series of transactions of continuous nature.

• However, the surety may fix –

a limit on his liability upto which the guarantee shall remain effective;

a time period during which the guarantee shall remain effective.

- Surety's liability may be conditional

The surety may impose certain conditions in the contract of guarantee. Until those conditions are met, the surety shall not be liable.

6. CONTINUING GUARANTEE

- Meaning

A guarantee which extends to a series of transactions is called as continuing guarantee.

- Revocation (Sec.130)

Continuing guarantee may be revoked, at anytime, by the surety by giving a notice to the creditor. However, revocations shall be effective only in respect of future transactions (i.e. the liability of the surety with regard to previous transactions remains unaffected)

- Death of surety (sec. 131)

Death of the surety operates as a revocation of a continuing guarantee as to future transaction.

7. RIGHTS OF SURETY (Sec.140, 141, 145, 146 and 147)

I. Rights against principal debtor

- Right of indemnity

• There is an implied promise by the principal debtor to indemnity the surety.

• The surety is entitled to claim from the principal debtor all the sums which he has rightfully paid.

• The surety cannot recover such sums, which the he has paid wrongfully.

- Right of subrogation

On payment of a debt, the surety shall be entitled to all the rights which the creditor could claim against the principal debtor.

II. Rights against the creditor

- Right of subrogation

•The surety can claim all the securities which the creditor had at the time of giving of guarantee

• It is immaterial as to whether the surety had knowledge of such securities or not.

• If the securities are returned by the creditor to the principal debtor the surety is discharged to the extent of value of the securities so returned.

- Right of set off

• Any amount recoverable by the principal debtor may be claimed as deduction.

• Any amount recoverable by the surety may be claimed as deduction.

- Rights to share reduction

If the principal debtor becomes insolvent, the surety may claim proportionate reduction in his liability.

III. Rights against co-sureties

- Rights to contribution

General Rule

All the co-sureties shall contribute equally

Exceptions

• Under the contract of guarantee, the co-sureties may fix limits on their respective liabilities. Even in such a case, the co-sureties shall contribute equally, subject to maximum limit fixed by the co-sureties.

• The contract of guarantee may provide that the co-sureties shall contribute in some other proportion.

- Right to share benefit of securities

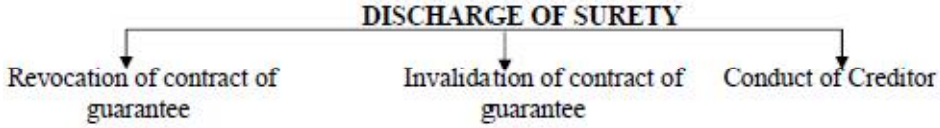
If one co-surety receives any security, all the other co-sureties are entitled to share the benefit of such security.

DISTINCTION BETWEEN INDEMNITY AND GUARANTEE

Basis	Contract of indemnity	Contract of guarantee
Meaning	A contract by which one party promises to save the other from loss caused to him is called as a contract of indemnity.	A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default.
Parties	There are only two parties, viz, the indemnifier and the indemnity holder.	There are three parties, viz., the principal debtor, creditor and the surety.
Nature of liability	The liability of the indemnifier is primary and independent.	The liability of the surety is secondary and conditional.
Number of contract	In a contract of indemnity there is only one contract.	In the contract of guarantee, there are three contracts; first between principal debtors and creditor, second between creditor and surety, and third between surety and principal debtor.
Nature of contract	The contract of indemnity is for the reimbursement of the loss	The contract of guarantee is for the security of the creditor

DISCHARGE OF SURETY FROM LIABILITY

DISCHARGE OF SURETY Revocation of contract of Invalidation of contract of Conduct of Creditor



• Specific guarantee

A specific guarantee can be revoked only if liability of principal debtor has not arisen.

• Continuing guarantee

A continuing guarantee can be revoked only in respect of future transactions.

- Death of surety

In case of death of surety, a continuing guarantee is automatically revoked in respect of future transactions.

- Variance in terms

If –

• Any variation is made subsequent to formation of contact of guarantee; and

• Such variation is made without the consent of surety;

Then –

• The surety shall be released for such transactions as take place after such variation.

- Release or discharge of principal debtor

If –

• The creditor makes a fresh contract with the principal debtor whereby the principal debtor is relieved from his liability; or –

• The creditor does any act or omission resulting in discharge of the principal debtor;

Then – The surety is discharged.

- Composition with principal debtor

The surety is discharged if the creditor makes a composition with the principal debtor without obtaining the consent of surety.

- Giving extension of time to principal debtor

The surety is discharged if the creditor extends the time for repayment of the debt by the principal debtor without obtaining the consent of the surety.

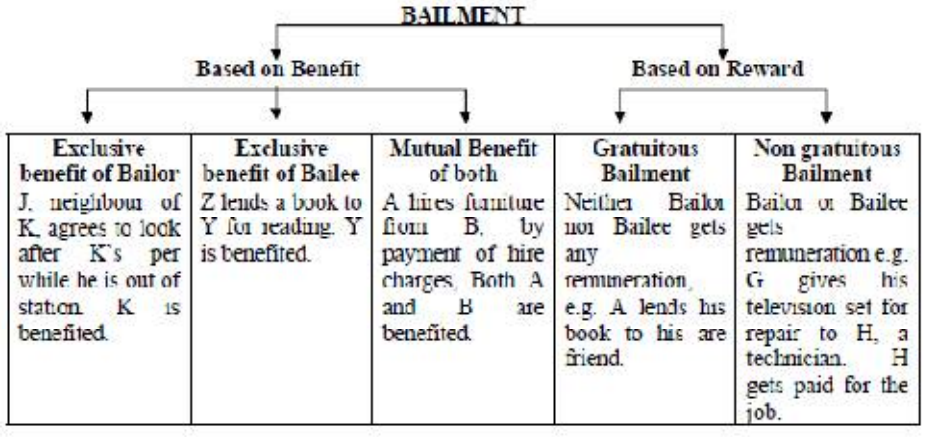
- Loss of security by a creditor

The surety is discharged to the extent of security lost by the creditor.

BAILMENT

10. MEANING OF CONTRACT OF BAILMENT (Sec. 148)

A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.



ESSENTIALS OF A VALID CONTRACT OF BAILEMENT (Sec.148)

- Contract

• There must be a contract.

• The contract may be expressed or implied.

- Goods

Bailment can be made of goods only.

- Delivery

There must be delivery of goods by one person to another person.

- Purpose of delivery

• The goods must be delivered for some purpose.

• The purpose may be expressed or implied.

- Return or disposal of goods

• The delivery of goods must be conditional

• The condition shall be that the goods shall be –

Returned (either in original form or in any altered from); or

Disposed of according to the directions of the bailor, when the purpose is accomplished.

12. MODES OF DELIVERY (Sec.149)

- Actual delivery

Transfer of physical possession of goods from one person to another .

- Symbolic delivery

• Physical possession of goods is not actually transferred.

• A person does some act resulting in transfer of possession to any other person.

Examples:

(a) Delivery of keys of a car to a friend

(b) Delivery of a railway receipt.

- Constructive delivery

If –

• A person is already in possession of goods of owner.

• Such person contracts to hold the goods as a bailee for a third person.

Then –

Such person becomes the bailee, and the third person becomes the bailor.

13. CLASSIFICATION OF BAILMENT

- Gratuitous bailment

- Bailment without any charges or reward, i.e. –

• No hire charges are paid by bailee; and

• No custody charges are paid by bailor.

- Non – gratuitous bailment

Bailment for some charges or reward, i.e.-

• Hire charges are paid by bailee; or

• Custody charges are paid by bailor.

14. DUTIES OF A BAILOR (Sec. 150, 158, 159 and 164)

- Disclose faults in goods [Sec. 150]:

Bailor is bound to disclose to Bailee, faults in the goods bailed, of which he has knowledge. He should also disclose such information which – (a) materially interferes with the use of goods, or (b) expose the Bailee to extraordinary risk.

Liability for Defects in Goods

In case of Gratuitous bailment	In case of Non – Gratuitous Bailment
Bailor is liable only for those losses which arise due to non – disclosed risks.	Bailor is liable for damages whether or not he was aware of the existence of faults.

Expenses of Bailment

In case of Gratuitous bailment	In case of Non – Gratuitous Bailment
Bailor shall repay to Bailee, all necessary expenses incurred by him for the purpose of Bailment.	Bailor is liable to repay only extra – ordinary expenses, and not the ordinary expenses.

15. DUTIES OF A BAILEE (Sec.151 to 157)

- Take reasonable care

• The bailee must take such case of goods as a man of ordinary prudence would take care of his own goods.

• The bailee shall not be liable for any loss or destruction of goods, if –

(a) he is not negligent; or

(b) the loss was caused due to an act of God or other unavoidable reasons.

- Not to make unauthorized use of goods

• The bailee must not make any unauthorized use of the goods.

• If the bailee makes any unauthorized use of goods, then –

(a) the bailment becomes voidable at the option of the bailor; and

(b) the bailee shall be liable for any loss or damage even if such loss is caused due to an act of God or other unavoidable reasons.

- Not to mix goods

Goods are mixed with bailor's consent

The parties shall have a proportionate interest in such mixture.

Goods are mixed without bailor's consent, but the goods are separable

• The bailee shall pay the expenses of separation.

• The bailee shall pay damage incurred by the bailor.

Goods are mixed without bailor's consent, and goods are not separable

The bailee shall compensate the bailor for any loss caused to him.

- Return the goods

• The bailee must return the goods, without waiting for demand from bailor, if –

(a)the time specified in the contract has expired ; or

(b) the purpose specified in the contract is accomplished.

• If the goods are not so returned, then –

(a) the goods shall be at the risk of the bailee;

(b) the bailee shall be liable for any loss or damage, even if such loss is caused without any fault or negligence of the bailee or due to an act of God or other unavoidable reasons.

- Return accretion to goods

The bailee must return to the bailor any accretion (i.e., addition) to the goods bailed.

- Not to set up an adverse title

The bailee has no right to allege that the bailor had no authority to bail the goods.

16. RIGHTS OF A BAILOR (Sec. 153, 159, 163, 180, 181)

- Terminate the bailment

If – The bailee does any act inconsistent with the terms and conditions of the contract of bailment.

Then – The bailment becomes voidable at the option of the bailor.

- Demand back the goods

If – The bailment is gratuitous; and For a specific period.

Then – (a) the bailor may compel the bailee to return the goods before expiry of the period of bailment; and

(b) the bailor shall indemnify the bailee for any loss incurred by the bailee.

- File suit against wrongdoer

The bailor has the right to sue –

• A third party who does any damages to the goods; or

• A third party who deprives the bailee from using the goods

- Sue the bailee

The bailor may sue the bailee to enforce his duties.

17. RIGHTS OF A BAILEE (Sec. 165, 166, 167, 170, 180)

- Right to compensation

The bailee has the right to be indemnified by the bailor, if –

• The bailor has no title to the goods; and

• As a consequence, the bailee suffers some loss.

- Return the goods

• It is the duty as well as the right of the bailee to return the goods to the bailor.

• In case of joint bailor, the goods may be returned to any of joint bailors.

- Recover charges incurred

Extra ordinary expenses

•The bailor is liable to pay the extraordinary expenses.

• The bailee may recover the extraordinary expenses paid by him.

Ordinary expenses

If the bailment is gratuitous, the bailor is liable to pay the ordinary necessary expenses, i.e., the bailee has the right to recover the ordinary necessary expenses incurred by him.

- Suit for deciding the title

The bailee may apply to the Court for deciding the title to goods, if a person other than the bailor claims that the goods belong to him.

- File suit against wrongdoer

The bailee has the right to sue –

• A third party who does any damages to the goods; or

• A third party who deprives the bailee from using the goods.

- Right of lien

The bailee has the right to retain the goods delivered to him until the charges due to him are paid by the bailor.

DISTINCTION BETWEEN BAILEE'S PARTICULAR AND GENERAL LIEN

Basis of distinction	Bailee's particular lien	Bailee's general lien
1. Natural of right	Particular lien gives right to retain only such goods in respect of which charges due remain unpaid.	General lien gives right to retain any goods belonging to another person for any amount due from him.
2. Condition for exercising lien	Particular lien can be exercised only when some labour or skill has been expended on the goods, resulting in an increase in value of goods.	General lien may be exercised even though no labour or skill has been expended on the goods.
3. Right to whom?	Every bailee is entitled to particular lien.	General lien can be exercised by only such persons as are specified u/s 171. e.g., bankers, factors, wharfingers, Attorneys of High Court, policy brokers. Any other bailee may exercise general lien if there is an agreement to this effect.

19. TERMINATION OF BAILMENT (Sec.153, 159 and 162)

Situation	Explanation	Example
1. Expiry of specified period	When bailment is for specific period, it terminates on the expiry of the specified period	Z lends a moped to Y for a period of 3 months April – June. The Bailment terminates by the end of June.
2. Accomplishment of specified purpose	Where bailment is for a specified purpose, it terminates when such purpose is accomplished.	G hires tables and chairs, utensils, etc. from H for organizing his son's engagement. G shall return them once the engagement functions are over.
3. Bailee's act inconsistent with conditions	When bailee does some act which is inconsistent with the terms and conditions of bailment, the Bailor may terminate the bailment.	J gives his car to K keeping it in K's garage. K gives it to his son for racing. J can terminate the bailment.
4. Destruction of subject matter	When goods bailed are destroyed, Bailment comes to an end.	K hires a cycle from L. When the cycle is damaged beyond repair in an accident, bailment ends.
5. Gratuitous Bailment	• Gratuitous Bailment can be terminated at any time. • Also, a Gratuitous Bailment ends by the death of either Bailor or Bailee. (Sec162)	Note: Where premature termination of bailment by the Bailor, causes loss to the Bailee exceeding the benefits derived by him, the Bailor shall indemnify the Bailee.

FINDER OF GOODS (Sec. 71, 168 and 169)

- Finder of lost goods

A person, who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a Bailee.

- Implied Agreement

There is an agreement, implied by law between finder and owner of goods.

- Duties of Finder

A finder of lost goods is treated as Bailee of goods found. His duties are–

(a) To take initiative to find the real owner of the goods,

(b) To take reasonable care of the goods found,

(c) Not to put the goods found for his personal use, and

(d) Not to mix the goods found with his own goods.

- Rights of Finder:

Suit for specific reward [Sec.168]

Right of Sale [Sec.169]

Finder of goods is not entitled to sue that owner for compensation for trouble and expenses voluntarily incurred in – (a) preserving the goods, or (b) finding out the owner. However, he is entitled to – If a thing which is commonly the subject of sale is lost, and

• Owner cannot be found with reasonable diligence, [or]

• Owner, if found, does not pay the lawful charges of the Finder.

Lien: Retain the goods against the owner till he receives such compensation

(b) Suit: Sue the owner for payment of any specific reward offered by the owner for the return of goods lost, and retains the goods till payment of such reward.

Then, Finder of Goods is entitled to sell the same when –

a. the thing is in danger of perishing, or

(b) the thing is in danger of losing the greater part of its value, or

(c) The lawful charges of finder, amount to 2/3rd of the value of the thing lost and found.

PLEDGE

MEANING OF 'PLEDGE', 'PAWNOR', 'PAWNEE'

- 'Pledge'

The bailment of goods as security for payment of a debt or performance of promise is called 'pledge'.- 'Pawnor'

The bailor in case of a pledge is called as 'pawnor'.

- 'Pawnee'

The bailee in case of pledge is called as 'pawnee'.

ESSENTIALS A VALID CONTRACT OF PLEDGE

- Contract

• There must be a contract

• The contract may be expressed or implied.

- Goods

Pledge can be made of goods only.

- Delivery

There must be delivery of goods by one person to another person.

- Purpose of delivery
• The goods must be delivered for some purpose.
• The purpose must be to deliver the goods as security for
(a) Payment of a debt; or
(b) Performance of a promise.
- Return of goods
• The delivery of goods must be conditional
• The condition shall be that the goods shall be – returned (either in original form or in altered form); or -
Disposed of according to the directions of the pawnor when the purpose is accomplished.

RIGHTS OF PAWNEE

- Right of Retainer
Pawnee may retain the goods pledged for –
Payment of the debt or the performance of promise,
(b) any interest due on the debt; and
(c) all necessary expenses incurred by him with respect to possession or for preservation of goods pledged.
- Retainer for subsequent advances
Where the Pawnee lends money to the Pawnor subsequently, after the date of pledge, it shall be presumed that the he has a right of retainer over the goods already pledged in respect of the subsequent lending also.
(b) This presumption can be made invalid only by an expenses provision to that effect.
- Reimbursement of Expenses
Where the Pawnee incurs extraordinary expenses to preserve the goods pledged with him, he is entitled to receive such amount from the Pawnor.
- Rights in case of default by Pawnor
Suit: Pawnee may institute a suit against Pawnor when there is a default in payment of debt or performance of promise at the stipulated time.
(b) Retention / Sale of goods: Pawnee may – (a) retain the goods pledged as collateral security, or (b) sell the goods pledged by giving a reasonable notice to the Pawnor.
(c) Surplus / Deficit on Sale : When there is a surplus on sale, Pawnee shall pay the excess to the Pawnor. In case of deficit, Pawnor shall be liable for the balance amount.
(d) No Notice: Where the Pawnee does not give a reasonable notice to the Pawnor, the sale is valid, but Pawnee is liable to pay damages to Pawnor.
- Right against true owner of goods [Sec.178A]
Where the Pawnor has acquired possession of pledged goods, under a voidable contract u/s 19 or 19A but contract has not been rescinded at the

time of pledge, the Pawnee acquires a good title to the goods, against the true owner.

(b) The title of Pawnee is good only where – (a) he had no notice of the Pawnor's defect in title and (b) he acts in good faith.

Reasonable notice u/s 176 means that a notice of intended sale of the security by the Creditor within a certain date, so as to afford an opportunity to the Debtor to pay the amount within the time mentioned in the notice. Notice of sale is essential and a clause in the agreement excluding the requirement of Notice is inconsistent with the Act & is void and unenforceable.

Prabhat Bank Ltd. vs Babu Ram

DUTIES OF A PAWNOR (Sec.175)

- Pay the debt

The pawnor is liable to pay the debt or perform his promise as the case may be.

- Pay deficit on sale

If the pawnee sells the goods due to default by the pawnor, the pawnor must pay the deficit.

- Pay extra – ordinary expenses

The pawnor is liable to pay to the pawnee any extraordinary expenses incurred by the pawnee for preservation of goods.

- Disclose faults in goods

The pawnor is liable to disclose all the faults which – are material for use of the goods; or

(b) May put the pawnee to extraordinary risks.

- Indemnify the pawnee

If loss is caused to the pawnee due to defect in pawnor's title to the goods, the pawnor must indemnify the pawnee.

DUTIES OF PAWNEE

- Not to use the goods

• The pawnee has no right to use the goods

• However, he may use the goods, if he has been so authorised by the pawnor.

- Return the goods

T he pawnee must return the goods if the pawnor pays the debt or performs his promise.

- Take reasonable care

The pawnee must take such care of goods pledged as a man of ordinary prudence would take care of his own goods.

- Not to mix goods

The pawnee must not mix his own goods with the goods pledged.

- Return increase in goods

The pawnee must return to the pawnor any accretion to the goods pledged with him.

RIGHTS OF A PAWNOR

- Redeem the goods pledged

Meaning of redemption

Right to recover back the goods by making payment of the debt or performance of promise.

Time for redemption

Where time of redemption is fixed, the pawnor may exercise redemption – within the time so fixed; or

(b) Even after expiry of time so fixed, provided –

• The pawnee has not sold the good; and

• The pawnee pays the pawnee all expenses arising on account of his default.

- Enforce pawnee's duties

The pawnor has the right to enforce the duties of pawnee, if the pawnee fails to fulfill his duties.

- Receive increase in goods

The pawnor has the right to recover from pawnee any increase in goods pledged.

- Right to receive notice of sale

In case of default by the pawnor to pay the debt or perform his promise, the pawnee has the right to sell the goods, after giving a reasonable notice to the pawnor. If the pawnee fails to give notice, the pawnor has the right to recover the loss incurred by him.

Basis	Pledge	Bailment
1. Purpose	Pledge is bailment of goods for a specific purpose, i.e. to provide a security for a loan or fulfillment of an obligation.	Bailment may be for purpose other than by way of providing security for a loan or fulfillment of an obligation. It may be for purpose like repairs, safe custody, etc.
2. Sale of Goods	Pawnee, i.e. Pledgee has a right of sale of goods pledged on default of Pawnor. He can do so by giving a notice to the pawnor.	There is no right of sale to the Bailee. Bailee may either – (a) retain goods, or (b) sue the Bailor for non – payment of his dues.
3. Use of Goods	Pledgee has no right of using goods pledged.	Bailee can use the goods bailed as per terms of contract.

1. Purpose

Pledge is bailment of goods for a specific purpose, i.e. to provide a security for a loan or fulfillment of an obligation. Bailment may be for purpose other than by way of providing security for a loan or fulfillment of an obligation. It may be for purpose like repairs, safe custody, etc.

2. Sale of Goods

Pawnee, i.e. Pledgee has a right of sale of goods pledged on default of Pawnor. He can do so by giving a notice to the pawnor.

There is no right of sale to the Bailee. Bailee may either – (a) retain goods, or (b) sue the Bailor for non – payment of his dues.

3. Use of Goods

Pledgee has no right of using goods pledged.

Bailee can use the goods bailed as per terms of contract.

AGENCY

INTRODUCTION TO CONTRACT OF AGENCY

- Meaning of 'agent'

An 'agent' is a person employed to –

• Do any act for another; or

• Represent another in dealings with third persons.

- Meaning of 'principal'

'Principal' is the person –

• For whom an act is done by the agent; or

• Who is represented by the agent in respect of dealing with third persons.

- Test of agency

Where a person has the capacity to –

• Create contractual relations between the principal and a third party;

• Bind the principal by his own acts, there exists a relationship of agency.

CREATION OF AGENCY

By Operation by Express by Implied Agreement by Ratification of acts of Law Agreement (a) Estoppel, (b) Holding Out,
(c) Necessity

SALIENT FEATURES OF AGENCY

- Principal is liable for the acts of agent

• The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority.

• The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself.

- Who may employ an agent?

Any person may employ an agent if –

• He is of the age of majority; and

• He is of sound mind.

- Who can be an agent?

• Any person may become an agent.

• Even a minor or a person of unsound mind can become an agent

- Liability of agent

• Generally an agent is liable to the principal

• An agent is not liable to the principal if he is a minor or is of unsound mind.

- Requirement of consideration

No consideration is necessary for creating an agency.

MODES OF CREATION OF AGANCY

- Express agreement

• A person may employ another person as his agent by entering into an express agreement with him.

• The agreement may be either oral or written.

- Implied agreement

Agency by estoppel

If – a person makes a representation (by his words or conduct) to a third person that a certain person is his agent; and - the third party believing such representation to be true, enters into a contract with the pretended agent.

Then – the person making the representation is prevented from denying the truth of agency. He may be held liable as a principal by such third party.

Agency of holding out

Such an agency comes into existence when a person by his affirmative or positive conduct leads third persons to believe that person doing some act on his behalf is doing with authority.

- Agency by necessity – Conditions

There was an actual and definite necessity for acting on behalf of the principal.

(ii) The agent was not in a position to communicate with the principal.

(iii) The act was done for the purpose of protecting the interest of his principal.

(iv) The agent has exercised such reasonable care as a man of ordinary prudence would have exercised in his own case.

(v) The act was done bonafide.

- Agency by operation of law

Agency by operation of law arises where the law treats one person as an agent of another.

- Agency by ratification

Meaning

If – -

a person (viz., pretended agent) acts on behalf of another person (viz, the principal)

the pretended agent acts without the knowledge or consent of the principal; and

Afterwards, the principal accepts such act.

Then – -

Agency by ratification comes into existence.

Effects of ratification

• The principal is bound by the acts ratified by him as if such acts had been performed by his authority.

• Ratification relates back to the actual date of the act that is ratified and not from the date when the act ratified.

ESSENTIALS OF A VALID RATIFICATION

- Full knowledge

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. In other words, the principal must have full knowledge of all the material facts.

- Whole transaction

It must be done for whole transaction in fact; ratification of the part of a transaction operates as a ratification of the whole transaction.

- Act on behalf of another person

The acts done by a person (i.e. pretended agent) on behalf of another person (i.e. pretended principal) can only be ratified.

- By the principal

Ratification can be made by only such person for whom the act was done.

- Existence of principal

The principal must be in existence at the time when the act was done in his name

- Contractual capacity

The principal must have contractual capacity both at the time of entering into the contract and at the time of ratification.

- Lawful acts.

Only those acts which are lawful can be ratified. Void, illegal, or ultra vires acts cannot be ratified.

- Acts within principal's power

Ratification can be made only for such acts which principal had the power to do.

- Communication

Ratification must be communicated to the third party so as to bind him

- Within reasonable time

Ratification must be made within reasonable time of the act purported to be ratified

KINDS OF AGENTS.

A. Based on Authority

1. Special Agent	2. General Agent	3. Universal Agent
(a) Appointed to perform a particular transaction, e.g. sale of a house property. (b) Agent has limited authority (c) Agent cannot bind Principal for acts other than for which he is employed.	(a) Appointed to do all acts connected with a particular trade, business or employment. (b) Authority is wide and continues till agency is terminated. (c) Principal may limit his authority. (d) Principal is bound by all acts unless it is beyond authority of Agent.	(a) Appointed to do all acts for the Principal. (b) Authority is unlimited (c) All acts of Agent bind his Principal provided that his acts are legal and agreeable as per law of land.

Authority is unlimited

(c) All acts of Agent bind his Principal provided that his acts are legal and agreeable as per law of land. Than for which he is employed.

(c) Principal may limit his authority.

(d) Principal is bound by all acts unless it is beyond authority of Agent.

B. Based on Nature of work

1. Commercial or Mercantile Agents

2. Non – Mercantile Agents.

(a) One who is authorised to sell goods or consign goods for the purpose of sale or to buy gods or to raise money on the security of goods.

(b) Includes Banker, Factor, Auctioneer, Broker, Commission Agent, & Del Credere Agent.

(a) Not engaged in business of selling or buying goods, but act in their respective professional capacities. i.e. render professional services for their Principal

(b) Includes Solicitors, Attorneys, C & F Agents, Insurance Agents, etc.

DUTIES OF AN AGENT

1. To conduct the business in accordance with the directions given by the principal

2. To work with reasonable diligence, care and skill.

3. To render proper accounts to the principal on demand.

4. To communicate with his principal in case of difficulty and seek his instructions.

5. Not to deal on his own account unless all the material facts have been disclosed to the principal and consent of the principal has been obtained.

If the agent, without the knowledge of the principal, deals in the business of agency on his own account, the principal has the following rights:

He may repudiate the transaction, if the agent dishonestly conceals any material facts or the dealings of the agent prove to be disadvantageous to him.

(b) He may claim from the agent the agency business other than the agreed remuneration.

6. Not to make any secret profit out of the agency business other than the agreed remuneration

7. To remit to the principal all the sums received in the principal's accounts in accordance with the terms and conditions of contract of agency.
8. Not to delegate authority or appoint sub – agent.
9. To protect and preserve the interest on behalf of the principal's representative in case of his death or insolvency of the principal.
10 Not to use information obtained in the course of the agency against the principal.

RIGHTS OF AN AGENT

1. To retain money out of the sums received in agency business for advances made or expenses incurred and remuneration due to him.
2. To receive the agreed remuneration. If the remuneration is not fixed, then he has the right to recover such remuneration as is usual and customary in such business.
3. Right of lien on principal's goods, papers and other property until the amount due to him in respect of the same is paid.
4. An agent has the right to be indemnified by the principal against the consequences of all lawful acts done in exercise of the authority conferred on him.
5. An agent has the right to be indemnified by the principal against consequences of acts done in good faith that caused an injury to third person.
6. To claim compensation for injury caused because of principal's neglect or want of skill.

WHEN AN AGENT IS PERSONALLY LIABLE?

- General Rule – No personal liability

In the absence of contract to contrary, an Agent cannot –

Personally enforce contracts entered into by him, on behalf of his Principal,

(b) be held personally liable for them.

This is because the Agent merely acts on behalf of his Principal. Thus, he enjoys immunity from being personally sued. Exceptions, i.e. Agent personally as well as Joint & Severally Liable

The Agent is personally liable in the following cases –

Foreign Principal [Sec.230] : Where the contract is made by an Agent for the sale or purchase of goods for a merchant resident abroad.

2. Undisclosed Principal : Where the Agent does not disclose the name of his Principal.
3. Principal cannot be sued: Where the Principal, though disclosed, cannot be sued, e.g. Principal becoming of unsound mind, subsequent to appointment of agent.
4. Acting for a Principal not in existence: Where the Agent acts for a Principal who is not in existence at the time of making contracts, he shall

be personally held liable e.g. contracts entered into by Promoters before incorporation of a Company are made in their personal capacity and hence personally liable.

5. Agency coupled with interest : Where the Agent has an interest in the subject matter of agency.

6. Agent guilty of Fraud: Where an Agent is guilty of fraud or misrepresentation in matters that are outside the scope of his authority, he is personally liable, and do not affect his Principal.

7. Agent exceeds authority & act not ratified: Where an Agent acts either without any authority or exceeds his authority, he shall be held personally liable when the principal does not ratify his acts.

8. Agent receives or pays money: Where an Agent receives or pays money by mistake or fraud to a third party, he shall be personally liable to such third party. Also ha can personally sue the third party if the fraud or mistake is accountable to such third party.

9. Express Agreement for personal liability: Where an Agent expressly aggress to be personally bound.

10. Execution of Contract in his own name: Where an Agent executes a contract in his own name, without disclosing that he is acting as Agent for a Principal, he shall be personally liable, e.g. An Agent signs a Negotiable Instrument without making it clear that he is signing it as an Agent only, he shall be held personally liable on the same. He would be personally liable as Maker of P/N, even though he may be described as Agent.

11. Trade custom or usage: Where trade usage or custom makes an Agent personally liable.

12. Agent with special interest: An Agent with special interest or with a beneficial interest, e.g. a Factor or Auctioneer, can sue and be sued personally. [Subramanya vs Narayana]

13. Action against Agent or Principal [Sec 233] : Where the Agent is personally liable, a person dealing with him may hold - (a) either him or (b) his Principal or (c) both of them liable. The liability of Principal and Agent is “joint and several”.

14. Exclusive liability [Sec. 234]

Where a person has made a contract with an Agent and –

• Induces such Agent to act upon it in the belief that only his principal would be held liable,

• Induces the principal to act upon it in the belief that only his Agent would be held liable.

Such Third person cannot later on, shift the liability on to –

• The Agent, or

• The principal, respectively.

AGENCY COUPLED WITH INTERST

• When agency is created for securing some benefit to the agent over and above his remuneration as an agent, it is called as agency coupled with interest.

• The interest should exist at the time of creation of agency. If the interest arises after the creation of agency then it would not be called as agency coupled with interest.

• Agency coupled with interest cannot be terminated to the prejudice of such interest.

• Agency coupled with interest does not terminate even on the death or insanity of the principal.

• Thus, such agency is irrevocable to the extent of such interest.

36. IRREVOCABLE AGENCY (Sec.202 and 204)

- Agency coupled with interest

Such agency cannot be terminated to the extend of such interest

- Part exercise of authority by the agent

Where the agent has partly exercised the authority, the principle cannot revoke the authority so far as regard such acts and obligation as arise from already done in the agency

- Personal liability incurred by agent

Where the agent has incurred personal liability, the agency is irrevocable

37. DELEGATION OF AUTHORITY (Sec.190)

- General rule

The general rule is that an agent cannot lawfully employ another act, which he has expressly or impliedly undertaken to perform personally.

- Exceptions

(a) There is a custom or usage of trade to that effect.

(b) Where power of the agent to delegate can be inferred from the conduct of the both the principle and the agent.

(c) When the principal is aware of the intention of the agent to appoint sub agent by the does not object to it.

(d) When principle permits appointment of a sub-agent.

(e) If the nature of the agency is such that the sub-agent is necessary.

(f) Where the acts to be done is purely ministerial not involving confidence or use of discretion.

(g) Where unforeseen emergencies arise rendering appointment of a sub-agent necessary.

LEGAL RELATIONSHIP BETWEEN THE PRINCIPLE AND SUB-AGENT AND AGENT

- If sub-agent is properly appointment

Principal is bound to the third parties for the acts of sub-agent.

(b) The agent is responsible to the principal for the acts of sub-agent.

(c) The sub-agent is responsible to the agent for the acts done by him.
(d) The sub – agent is not responsible to the principle, except in case of fraud or willful wrong.
- If sub – agent is not properly appointed.
(a) Principal is not bound to the third parties for the acts of sub – agent.
(b) The agent is responsible to the principle and third parties for the acts of sub – agent.
(c) The sub – agent is responsible to the agent for the acts done by him.
(d) The sub – agent is not responsible to the principle.

LIABILITY OF PRINCIPAL TO THIRD PARTIES FOR THE ACTS OF AGENT

- Principal is liable for the acts of agent
• The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority.
• The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself.
- When agent exceeds his authority
Whether the acts done within the authority are separable from the acts done beyond authority.
If yes – The principal is not bound for excess acts done by the agent.
If no – The principal is not bound by the transaction and the principal can repudiate the whole transaction.

TERMINATION OF AGENCY

A. By the acts of parties
- By agreement
The principal and the agent may mutually agree to terminate the agency, at anytime.
- By revocation
• When the agency is coupled with interest, the principal cannot revoke the agency to the prejudice of such interest.
• The principal can revoke the authority at anytime before, the authority has been exercised so as to bind the principal.
• The principal cannot revoke the authority given to his agent after the authority has been partly exercised.
• When agency if for fixed period, the principal must make compensation to the agent for premature revocation of agency without sufficient cause.
• Revocation may be expressed or implied from the conduct of the principal
- By the agent renouncing the business of agency
• Renunciation may be expressed or implied from the conduct of the agent.

• When agency is for fixed period, the agent must make compensation to the principal for premature renunciation of agency without sufficient cause.

B. By operation of law

1. Completion of business of agency
2. Death or insanity of the principal or agent
3. Where the principal or the agent, being a company is dissolved
4. Destruction of subject matter of agency
5. Principal becoming insolvent
6. Expiration of period where agency was for a fixed period.

REVIEW QUESTIONS

1. Define contract. What are the essentials of A Valid Contract?
2. Define Offer. In what situations an offer will be suppose to be complete.
3. Discuss about the condition for proper Acceptance.
4. What are the conditions for Capacity to Contract?
5. Define Consideration. What are the essentials for valid consideration
6. What are the difference Void Agreement and voidable agreement?
7. Describe the Discharge of A Contract.
8. What are the Remedies for The Breach of Contract
9. Write a short note on following.
    a. Bailment
    b. Pledge
    c. Agency

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

UNIT-2 THE SALE OF GOODS ACT, 1930

CONTENTS

APPLICABILITY OF THE ACT

⇒ This act extends to whole of India, except the State of Jammu and Kashmir.

⇒ This act came into force w.e.f. 1 July 1930.

⇒ The 'contract of sale' includes both a sale as sell as an agreement to sell.

⇒ The word Indian was omitted the title of the Act in 1963 (22 sept.)

⇒ This Act does not deal with the sale of immovable property.

⇒ The transaction relating to immovable properties, e.g., the sale, lease, gifts, etc., are governed by a separate Act known as 'Transfer of Property Act, 1882'. This Act is beyond the scope of this book.

DEFINITIONS (Sec. 2)

Buyer – Sec 2 (1)

⇒ A person, who buys or agrees to buy the goods.

Delivery Sec (2)

⇒ It means voluntary transfer of possession from one person to another.

Delivery State Sec 2(3)

 Goods are said to be in delivered state, when they are in such state that the Buyer would be bound to take the delivery of them in accordance with the contract.

Documents of title to Goods 2(4)

 A document of the title to goods may be described as any document used as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Section 2(4) of the Sale of Goods Act, 1930 recognizes the following as documents of title to goods:

(i) Bill of lading,

(ii) Dock warrant,

(iii) Warehousekeeper's certificate,

(iv) Wharfinger's certificate,

(v) Railway receipt,

(vi) Multi – modal transport document,

(vii) Warrant or order for the delivery of goods, and

(viii) Any other document used in the ordinary course of business as document of title (as described in the preceding paragraph).

Document of Title v. Document showing the title :

A document of title enables a person named therein to transfer the property by mere endorsement and delivery, whereas a document showing title does not confer any right to transfer by way of endorsement and delivery.

For example, a share certificate shows that the person named therein is entitled to the shares represented by it, but does not allow transfer of the shares by mere endorsement and delivery of the certificate.

Goods – Sec 2 (7)

⇒ Goods mean every kind of movable property.

⇒ Other than actionable claims and money, and it includes.

⇒ stock and shares, growing crops, grass and things attached to or forming part of land which are agreed to be severed before sale or under the contract of sale.

⇒ You may notice that 'money' and 'actionable claims' have been expressly excluded from the term 'goods'. 'Money' means the legal tender. 'Money' does not include old coins and foreign currency. They can, therefore, be sold or bought as goods. Sale and purchase of foreign currency is, however, also regulated by the foreign Exchange Management Act,

⇒ 'Actionable claims', like debts, are things which a person cannot make use of, but which can be claimed by him by means of a legal

action. Actionable claims cannot be sold or purchased like goods, they can only be assigned, as per the provisions of Transfer of property Act.

⇒ Grass, growing crops, trees to be cut and their log wood to be delivered, malba of a building to be demolished, etc. are goods. Similarly, things like goodwill, copyright, trade mark, patents, water, gas electricity are all goods and may be the subject matter of a contract of sale.

Seller – Sec 2 (13)

⇒ A person, who sells or agrees to sell the goods,.

Agreement to sell

⇒ Where transfer of property in goods takes place at future date.

Sale

⇒ Where transfer of property in goods takes place at the time of contract.

ESSENTIAL ELEMENTS OF VALID CONTRACT OF SALES

The following are the essentials of valid contract of sale:

⇒ There must be two parties, one seller and other buyer.

• Seller and buyer must be different.

• Part owner can sell goods to another part owner.

• Partners are not regarded as separate persons for the purpose of sale of the partnership property. They are the joint owners of the goods and as such they cannot be both sellers and buyers [State of Gujarat v. Ramanlal S & W. (1965)]. But, a partner may buy goods from the firm or sell goods to the firm.

⇒ There must be movable goods as subject matter of contract.

⇒ There must be a transfer of property in goods. It means general property. (i.e. ownership)

⇒ There must be price involved. Price means money consideration for sale of goods.

• Exchange of goods for goods is barter.

• If Exchange is for partly goods and partly for money it is sale.

⇒ All essential elements of valid contract must be observed.

⇒ The contract of sale can be entered into, expressly or impliedly.

Formation. The contract of sale may provide for any of the following methods.

• Immediate delivery of goods.

• Immediate payment of price but delivery at some future date.

• Immediate payment of price and immediate delivery of goods.

• Delivery or payment or both made in installments.

• Delivery or payment or both will be made at future date.

TRANSFER OF "PROPERTY IN GOODS"

⇒ Property means general property in goods and not merely special property in goods. It means ownership of goods. Special property in goods means possession of goods.

⇒ Cases where property in goods is not transferred:

• Bailment

• Creating charge or pledge

Difference between Sale and Agreement to Sell

Difference between Sale and Bailment

Sale	Bailment
Transfer of property in goods for price	Delivery of goods for specific purpose that it will be returned to bailor or disposed of as per his direction
Property is transferred	It remains with bailor.
Consideration is in form of price, i.e., money	Gratuitous bailment is possible
Goods not returned to seller	Goods returned to bailor purpose of bailment is over

CONTRACT FOR WORK AND SKILL

⇒ Some contract involves use of both service and goods. This type of contract is considered as contract for work and skill.

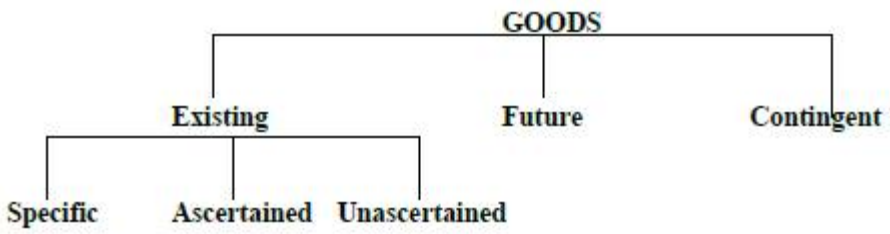
⇒ This kind of contract involves exercise of skill and labour by one party on some goods or materials supplied by other party or supplied by party who exercise skill and labour for price. It is immaterial who supply material. Alternatively, it can be said that in this kind of contract, main purpose is to exercise work and skill. Supply of own goods is only subsidiary. Intension of parties is to transfer goods only after exercise of some skill and labour.

⇒ As it is not falling within categories of contract for Sale no sales tax is payable. Example:

(1) A dentist agreed to supply a set of artificial teeth to a patient. The material was wholly found by the dentist. Held, it was a contract for the sale of goods.

(2) An artist was asked to paint a portrait. The material was supplied by the party and not by the painter. It was held to be a contract for work and labour and not of sale.

CLASSIFICATION OF GOODS



Types of Goods

The goods may be classified into following categories:

Existing goods

• Existing goods are the goods, which are owned and possessed by the seller at the time of sale. Existing goods may be of three types;

(a) Specific Goods:

• The goods, which are identified and agreed upon by the parties at the time of contract of sale.

• It should be noted that the goods must be both identified and agreed upon.

(b) Unascertained Goods:

• These are the goods, are not identified and agreed upon at the time of the contract of sale.

• These goods are merely described by the parties at the time of contract of sale.

(c) Ascertained Goods:

• There are the goods, which are identified after the formation of contract of sale. When the un-ascertained goods are identified and agreed upon by the parties, the goods are known as ascertained goods.

Future Goods

⇒ Future goods are those goods, which do not exist at the time of the contract of sale.

⇒ These goods are to be manufactured or acquired by the seller after the making of the contract of sale.

⇒ Future goods cannot be sold, but there can only be an agreement to sell.

Example: A, a manufacturer agrees to sell 5 tables and 50 chairs to B at Rs.10,000. B agrees to purchase it. However, tables and chairs are yet to manufactured by A.

Contingent goods

⇒ It is a kind of future goods.

⇒ It is goods, the acquisition of which is contingent upon the happening or non –happening of an uncertain event.

Example: A agrees to sell the goods loaded on the ship “Titanic”, which is coming from London to Bombay. The ship may or may not arrive. So, these goods will be called as contingent goods.

Basis	Futures Goods	Contingent Goods
1. Meaning	Goods that are yet to be manufactured produced or acquired by the Seller after making contract of sale.	Goods, the acquisition of which by the Seller depends upon a contingency, which may or may not happen
2. Element of uncertainty	Acquisition of Future Goods does not depend upon and uncertainty	The procurement of Contingent Goods is dependent upon an uncertain event
3. Scope	Future Goods do not include contingent Goods because of the element of certainty.	They are wider in scope, it includes future Goods.
4. Effect of Contract	Where by a contract of Sale, the Seller purports to effect a present sale of future Goods, the contract operates as an "agreement to sell" the Goods[Sec.6(3)]	There may be a "Contract for Sale" of Goods, the acquisition of which by the Seller depends upon a contingency which may or may not happen [Sec.6 (2)]
5. Example	B agrees to buy the entire crop of wheat that would yield in S's farm, at the rate of Rs.1000 per quintal.	A agrees to sell to B a certain painting only if C, its present owner, sells it to him. The sale is contingent upon the sale by C.

Price of Goods – Sec 9 – 10

Price means the money consideration for a sale of a Goods 2(10)

The following are the modes of determining price: [Sec. 9]

⇒ Price is specified under the contract. It is the most common method of determining the price. Here, parties decide the price in advance.

⇒ Price may be determined as per the method specified in contract.

Example :

Delivery of rice on 1st December 2008 at the rate prevailing on that day.

⇒ Price may be determined in accordance to custom and usage of trade. This method is applicable if parties regularly trade.

⇒ Where the price is not fixed as above, the buyer shall pay the seller a reasonable price. 'What is a reasonable price is a question of fact and circumstances.

Fixation of price by third party. (Sec. 10)

If it is so, contract shall specify name of third party.

If third party fails to specify, contract is void but if goods are delivered to buyer and used by him, he is required to pay reasonable price.

If the third party is prevented from fixing price, defaulting party is liable for the damages.

Consequences of Destruction of Specific Goods – Sec 7 – 8

The consequences of destruction of specific goods can be discussed under the following three heads:

⇒ If goods perish before making the contract

• Contract is void – ab – initio, due to mistake as to existence of subject matter.

• It is to be noted that if the seller has knowledge about the destruction of goods, even then the enters into the contract of sale with buyer, then seller is bound to compensate to the buyer.

⇒ Where a part of the goods is perished before making contract

• If the goods was divisible, then the contract can be enforced party and if the goods was indivisible, then the contract becomes void – ab – inito.

Example: A contracted to sell one wagon containing 700 bags of groundnut to B. Unknown to A, 109 bags had been stolen at the time of sale, Therefore, A made a delivery of 591 bags. Held, the sale was void.

If goods perish after the "Agreement to sell; but before' Sale [Sec. 8]

The contract is void if subsequently the goods have perished, and there is no fault on the part of the buyer or seller in perishing the goods.

Example: A horse was delivered upon trial for 8 days. However, the horse died within 8 days, without the fault of buyer or seller. Held, the seller must bear the loss, as the contract was void.

However, parties to the contract may provide otherwise also.

Section 7 and 8 are applicable only in case of specific goods.

Therefore, if unascertained goods are destroyed either before or after making the agreement, the contract shall not become void. Thus, in an agreement to sell unascertained goods, even if the entire stock of goods is destroyed, the contract that not become void and the seller will have to perform his promise.

Example 'A' agreed to sell to 'B' 100 bags of wheat from his stock of 1,000 bags in his go down. The entire stock was destroyed by fire. 'A' is bound to deliver 100 bags of wheat or else he will be liable for damages.

If the contract does not otherwise provide, then –

⇒ Stipulation as to time of payment is not deemed to be essence of contract.

⇒ Stipulation as to time of delivery is deemed to be essence of contract.

CONDITIONS AND WARRANTIES

⇒ Generally, at the time of sale, the seller makes some representation, statements of stipulations for the praise of his goods. Some of representations are in nature of opinion others are in nature of facts. Representation as to fact which becomes a part of contract of sale is called as stipulation.

⇒ Stipulation may be condition or warranty depends upon its importance in relation to contract.

⇒ Stipulation which is essential to the main purpose of contract is known as condition. Breach of condition gives the aggrieved party right to terminate the contract.

⇒ Stipulation which is collateral to the main purpose of the contract is warranty. Breach of warranty gives rise to the aggrieved party right to claim damages but contract cannot be terminated.

⇒ The conditions and warranties may be express or implied.

⇒ Express conditions and warranties are those, which the parties agree expressly, i.e. orally or in writing.

⇒ Implied conditions are those, which are implied by the law in the absence of any agreement to the contrary.

IMPLIED CONDITIONS

The following are the implied conditions which are contained in the Sales of Goods Act:

Conditions as to title – sec 14(a)

⇒ There is an implied condition on the part of the seller that

• In the case of sale, the seller has a right to sell the goods, and

• In the agreement to sell, the seller will have a right to sell the goods at the time of passing of ownership in goods.

⇒ If the title of seller out to be defective, the buyer must return the goods to the true owner and recover the price from the seller.

Conditions as to description – Sec 15

⇒Where the goods are sold by description, there is an implied condition that the goods shall correspond to the description.

Example; A machine was sold. The buyer has not been the machine, but the seller described it as a new one. However, it was found to be a very old one. Held, the machine was not according to the description.

Sale by sample – Sec 17

⇒ Where the goods are sold by sample, the following are implied conditions.

• The bulk shall correspond to sample in quality.

• The buyer shall be given a reasonable opportunity to compare the goods with the sample.

• The goods shall be free from any defect, rendering them un – merchantable. It is to be noted that this implied condition applies only in the case of latent defects, i.e. those defects which cannot be discovered by ordinary inspection. In fact, such defects are discovered when the goods are put to use or by examination in laboratories. The seller is not liable for apparent or visible defects which can be discovered by examination.

Sale by description as well as sample – Sec 15

⇒ If the sale is by sample as well as description, both conditions shall be satisfied. Goods must correspond with sample as well as description.

Example : A agreed to sell to C some oil described as “Foreign refined oil” and warranted only equal to sample. The goods supplied were equal to sample, but contained a mixture to hemp oil. Held, C could reject the goods.

Conditions as to quality and fitness for buyer’s purpose –Sec 16

⇒ Where the buyer, expressly or impliedly, tells the seller the particular purpose for which he needs the goods and relies on the skill or judgment of the seller, there is an implied condition that the goods shall be reasonably fit for such purpose.

⇒ When the article can be used only for one particular purpose, the buyer need not inform the seller the purpose for which the goods are required.

Example: A purchased a hot water bottle from a chemist. While the bottle was being used by A's wife, it burst and injured A's wife. Held, the seller was liable for damages as the bottle was not fit for the purpose for which it was meant – Priest vs Last.

Exceptions to the implied condition as to quality or fitness

⇒ The condition as to quality or fitness' well not apply, if the buyer is suffering from an abnormality, which renders the goods unsuitable for a particular purpose and the buyer does not inform the seller about that abnormally.

Example A purchased a coat. He had abnormally sensitive skin, By wearing the coat, he got skin complaint. Held, there was no breach of condition, as he had not disclosed the abnormally of his skin.

⇒ Where the goods can be used for a number of purposes, the buyer should inform the particular purpose for which such goods were required. If the does not disclose, there is no such conditions of quality or fitness.

Conditions as to merchantability

⇒ Where goods are bought by description from a seller, who deals in goods of that description, there is an implied conditions that the goods shall be of merchantable quality.

⇒ 'Merchantability' means that there is no defect in the goods, which renders them unfit for sale. Thus, a watch that will not keep time and a pen that will not write cannot be regarded as merchantable.

Example: A radio set was sold to a layman. The set was defective. It did not work in spite of repairs, Held, the buyer could return the set and claim refund.

Condition as to wholesomeness

⇒ In the case of eatable and food – stuff, there is an implied condition that the goods shall be wholesomeness, i.e., free from any defect which renders them unfit for human consumption.

Example: A Purchased milk from B, a milk dealer. The milk contained typhoid germs. A's wife on taking the milk got infected and died. Held, A was entitled to get damages – Frost vs Aylesbury Dairy Co. Ltd.

IMPLIED WARRANTIES

The following are the implied warranties which are contained in the Sales of Goods Act:

⇒ In the absence to any contract showing contrary intention, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. If the buyer is disturbed in the enjoyment of the goods, he can claim damages from the seller.

Warranty as to quiet possession – Sec 14

Warranty against encumbrances – Sec 14

⇒ Unless the circumstances of the case are such as to show a contrary intension, there is an implied warranty that the goods shall be free from any charge or encumbrance in

favour of any party not declared to the buyer before or at the time contract is made. However, there will not be any such warranty if charge is declared to buyer at the time of sale.

⇒ An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade.

⇒ In case of sale of dangerous goods, the seller is under an obligations to warn the buyer about the probable danger. Failure to do so will make the seller liable to pay damages.

Example : A sold a tin of disinfectant to B, knowing that it was likely to be dangerous to the tin, whereupon disinfectant powder went into her eyes, causing her injury. Held, A was liable in damages to B, as he failed to warn B of the probable danger.

Difference between Condition and Warranty

Matter	Condition	Warranty
Stipulation	Essential to main purpose of contract	Collateral (subsidiary) to main purpose of contract.
If breach?	Buyer has right to cancel contract	Buyer has no right to cancel the contract . Can claim damages
Treatment	Breach of condition may be treated as breach of warranty	Breach of warranty can't be treated as breach of condition

DOCTRINE OF CAVEAT EMPTOR

⇒ The doctrine of 'Caveat Emptor' means "let the buyer beware".

⇒ It means that the buyer while purchasing goods must act with a "third eye and ear", i.e.,

• He should be careful to see that the goods purchased will serve his purpose well.

• If the buyer is not careful and he finds later on that the goods do not serve his purpose, he cannot hold the seller liable for it.

• The seller is under no obligation to tell the defects of his articles.

However, in the following exceptions Doctrine of caveat emptor is not applicable:

⇒ • Implied conditions as to quality or fitness. It means when buyer has specified his

• When goods are sold by description, it should be

• In case of edible items, implied condition of wholesomeness is applicable and goods should a

• When the consent of buye

• Goods are not required to be weighed or measured for determining price. destroyed in fire. Here, seller is liable for damage because

Appropriation :

For property to pass u/s 23, the following conditions must be satisfied –

(a) Goods of the description mentioned in the contract must be produced or obtained.

(b under the contract, be bound to take delivery of them.

They must be unconditionally appropriated to the contract, Unconditional appropriation

(i) Delivers the Goods to Buyer or a carrier or other b

(ii) does not reserve the right of disposal. [Sec. 23(2)]

(d before or after the appropriation. Example: A having a quantity of sugar in bulk, more than sufficient to fill 20 bags, contracts to sell to B 20 bags of it. After the contract A fills 20 bags with the sugar, given notice to B that the

take them as soon as he can. By this appropriation by A, and assent by B, property in the

⇒ sell unascertained goods is not complete sell, it is agreement to sell.

the buyer could take their delivery. Goods were lost. Held, the buyer was responsible as.

It means buyer has the option either to return goods. Here, property in goods doesn't pass from seller to buyer:

A mercantile agent means an agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods [Section 2(9)].

⇒ Sale by one of the joint owners – Sec 28

One of the joint owners can sale goods if following condition are satisfied.

• Goods are in sole possession of one of the joint owner.

• Buyer has acted in good faith.

• Buyer has no knowledge that seller had no authority to sell.

Example A and B Jointly purchased a car. The car was in the possession of A with the consent of B. Later on A sold the car to an innocent purchaser. The purchaser will get a good title.

⇒ Sale by person in possession under voidable contract

• Seller must be in possession of goods under contract voidable.

• Goods must have been sold before contract is rescinded.

• Buyer has no knowledge that seller had no authority to sell.

Example

A purchased a watch from B under fraud. A sold the watch to C, who bought it in good faith. C gets goods title.

⇒ Sale by seller in possession after sale – Sec 30

• Ownership of goods has been passed to buyer.

• Seller continuous to be in possession of goods even after sale.

• Seller resells goods to new buyer.

• New buyer buys without notice to prior sell.

Example A sells certain goods to B and promises to deliver the goods the next day. Before the delivery, A sells and delivers the goods to C, who buys them in good faith and without notice of the prior sale to B, C gets a good title to the goods, not withstanding that the property had, before he purchased, passed to B.

⇒ Sale by unpaid seller Sec. 54

After exercise of his right of lien or right of stoppage goods in transit.

⇒ If the owner of goods has declared insolvent and his goods, is sold by official receiver or assignee or liquidator.

⇒ Sale by finder of goods (Sec.169 of IC Act 1872).

• The owner can't be found or found but refuse to pay lawful charges to finder.

• The Goods are perishable in nature or in danger. To save goods from loss, finder can sale it.

• Lawful charges of finder amount as 2/3 of its original value.

⇒ Sale by pawnee or pledge(Sec.176 of IC Act 1872).

• If there is default on part of payment of price or performance within time.

Reasonable notice is given by pawnee or pledge.

1. Meaning Sec.2(2): Delivery means voluntary transfer of possession from one person to PERFORMANCE OF A CONTACT OF SALE another.

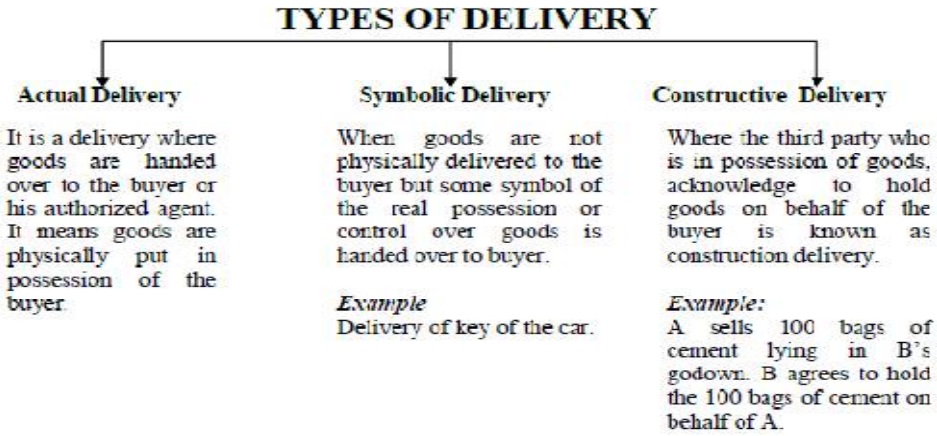
2. Duty of Seller Sec. 31: It is the duty of the Seller to deliver the goods and of the buyer to accept and pay for them in accordance with the contract of Sale.

3. Mode of delivery : Sec. 33: Delivery of Goods sold may be made by –

(a) doing anything which the parties agree shall be treated as delivery ; or

(b) which has the effect of putting the Goods in the possession of the Buyer or of any person authorized to hold them on his behalf.

TYPES OF DELIVERY



RULES REGARDING DELIVERY

Payment and delivery are concurrent Sec 32.

⇒ General rule suggest that the delivery of goods and payment of price are concurrent conditions. However, parties may provide otherwise.

A delivery of part of goods with an intention of giving the delivery of the whole amounts to the delivery of the whole for the purpose of transfer of ownership of goods but a delivery of part of goods with an intention of separating it from the whole lot does not amount to the delivery of the whole of the goods.

Buyer's duty to Demand the Goods Sec. 35

⇒ It is seller's duty to be ready and willing to deliver the goods to the buyer. But he is not bound to deliver goods unless the buyer makes a demand for delivery of the goods.

⇒ If the buyer fails to demand the delivery of goods, the seller is not liable for breach; Buyer must demand delivery within a reasonable time. However, contract may provide otherwise.

Rules as to Delivery [Sec. 36]

Situation	Place where goods are to be delivered
If contract specified the place of delivery	At the place specified
Contract does not specify the place of delivery;	At the place at which goods are at the time of sale
In case of sale	
In case of agreement of sell	
(i) In respect of existing goods	At the place at which goods are at the time of agreement of sell.
(ii) In respect of future goods	At the place at which goods are manufacture, produce or acquire

Time of Delivery

⇒ If the contract specified time of delivery, goods shall be delivered within such time.

⇒ If no time is specified in contract as to time of delivery of goods, it should be delivered within reasonable time.

Delivery when the Goods in Possession of third party 36(3):

Unless and until such third person acknowledge to the buyer that the holds the goods on his behalf

However this provision shall not affect the operation of the issue or transfer of any documents of the title of the goods.

Time is tender of delivery

Demand or tender of delivery may be treat is reasonable unless made at reasonable hour. That is reasonable hour is a question affects.

Expenses of delivery

⇒ All expenses of making delivery of goods shall be paid by seller

⇒ Buyer shall be the expense for receipt of goods.

⇒ unless otherwise agreed.

Delivery of Wrong quantity Sec 37

⇒ If the seller has delivered excess quantity, the buyer has the following options:

• To accept the whole of the goods delivered to him.

• To reject the whole of the goods delivered of him.

• To accept contracted quantity and reject the excess.

⇒ Seller has delivered short quantity, buyer has following options.

• To accept the goods delivered to him.

• To reject whole quantity delivered to him.

⇒ Right to reject the goods in excess of the contract does not apply where the variation is negligible.

⇒ Further, the right to reject the goods is not similar to the right to cancel the contract. If the buyer rejects the goods (either because they are less than or in excess of the quantity contracted for), the seller has a right to tender again the contract quantity and the buyer is bound to accept the same.

Delivery of Mixed Quality – Quantity

⇒ The seller is bound to deliver goods of exact quality – quantity otherwise buyer may:

• Reject the whole.

• Reject the goods not complying with quality or quantity and accept the rest.

[Contract is not repudiated] – means subsisting

Delivery by Installment Sec 38

⇒ Delivery by installment is not valid except when the contract provides so or buyer accepts the delivery in installment.

Delivery to Carrier or Wharfinger –Sec 39

⇒ Delivery to carrier or wharfinger amounts as delivery to buyer if the following conditions satisfy:

• Buyer has made reasonable contract with carrier.

• Seller is required to give notice to buyer to enable him to insure goods. If not to do then his risk.

⇒ If seller makes valid delivery of goods, buyer has following duties:
• To accept the goods.
• To pay the unpaid price.
⇒ Where goods are sent by sea route, seller shall give notice to buyer to insure goods other wise he will be liable for loss.

Risk where goods are delivered at distant place Sec 40

Where the seller agrees to deliver the Goods at his own risk at a place other than at which they are sold, the Buyer shall bear the risk of deterioration necessarily incident to the course of transit, unless otherwise agreed.

Buyer's right to examining goods Sec 41

Delivered to buyer – not previously examined reasonable opportunity.
Seller is bound on request to afforded the buyer a reasonable opportunity of examine the good.
Acceptance of Delivery – Sec 42
⇒ Delivery doesn't mean acceptance of goods, Buyer has deemed to have accepted the goods under the following circumstances:
• When he intimates the seller about acceptance of goods.
• After receipt of goods, he does some act of affirmation.
• When he doesn't inform seller about rejection of goods within a reasonable time.

Buyer's not bound to return the rejected good Sec 43.

He is required to intimate the seller about rejection. (Buyer's not bound to return the rejected goods)
Liability of the Buyer for refusal of delivery of goods Sec 44
⇒ If the buyer wrongfully refuses to take delivery of goods, he is liable for damages and expenses like storage cost and transportation cost to the seller. Section 45
A seller of goods is deemed to be unpaid in the following cases:
• The price must be due but not paid. (When the whole of the price has not been paid or tendered)
• A negotiable instrument, like cheque, bill of exchange etc., was received, but the same has been dishonored.
• Seller who has obtained a decree for the price of the goods will also be an unpaid seller, if the decree has not been satisfied.
• When the seller has been paid the large amount but small portion of payment remains to be paid.
• Seller must have an immediate right of action for the price.

UNPAID SELLER

Right of an Unpaid Seller

Unpaid seller has the right against goods as well as against the buyer:
⇒ Rights of unpaid seller against the goods:
• Where ownership is transferred

-- Right of lien – Sec 47 – 49

-- Right to stoppage in transit – Sec 50 – 52

-- Right to resale of the goods

-- Where ownership is not transferred to the buyer, seller has the right to with hold delivery of goods.

Right of an unpaid seller against the goods Sec 46

The ownership has not been transferred.

Conditions Unpaid Seller + ownership not transferred.

Consequences Lawfully refuse to deliver the goods to the buyer until he is paid the price.

Buyer cannot hold the seller liable for now delivery of goods.

Seller's Lien Sec.47

Condition for exercising lien

Condition – Unpaid seller – actual possession

Buyer not paid the price of the good. The unpaid seller can exercise lien even through.

The property is goods has passed to the buyer

He is in the possession of the goods as an agent or bailee for the buyer.

Right of Lien

⇒ It means the right to retain the possession of goods until full price is received.

⇒ Seller can exercise his right of lien on the following two conditions:

• He must be in possession of the goods.

• He is the unpaid seller.

⇒ If buyer becomes insolvent, lien can be exercised by unpaid seller.

• When the seller waives his right of lien.

• When the buyer disposes off the goods by sale with consent of seller.

• When the goods are delivered off the buyer or his agent.

• When price is paid by the buyer.

• The right of lien cannot be exercised, where the right of lien has been expressly excluded.

• By delivery of goods to carrier. Without reserving the right of disposal of goods,.

• By Estoppels i.e. where the seller so conducts himself that be leads third parties to believe that the lien does not exist.

Lien is not lost merely become the unpaid seller has obtained a decree for the price of the goods

Part delivery of goods does not disentitle the unpaid seller from exist lien on the remainder goods.

Part delivery Sec. 48

In the following circumstances, unpaid seller's lien is lost: Sec 49

Right of Stoppage in Transit – Sec 50 to 52

Right of stoppage goods in transit Sec 50

⇒ The right of stoppage in transit is an extension of the right of lien.
⇒ The right of lien is a right to retain possession, whereas right of stoppage in transit is a right to regain possession.
⇒ The right of stoppages in transit can be exercised, if the goods are in transit, and the buyer has become insolvent in the meantime.
Conditions : unpaid Seller + possession of goods with carrier (independent) + insolvent buyer
Duration of transit – Sec 51
⇒ Carrier may hold the goods in three capacities:
• As Seller's Agent : In this case, the seller has lien on the goods, so question of right of stoppage in transit does not arise.
• As Buyer's Agent: In this case, the seller cannot exercise the right of stoppage in transit.
• In an Independent Capacity: In this case, sit from the time they are delivered to a carrier for the purpose of transmission to the buyer, until the buyer or his agent takes their delivery.
⇒ Goods are deemed to be in course of transit from the time they are delivered to a carrier for the purpose of transmission to the buyer, until the buyer or his agent takes their delivery.
⇒ The goods are in transit, even if the buyer asks the carrier to take them to some other destination until they are delivered to the buyer at some other destination.
⇒ If the goods are rejected by the buyer and the goods are in the possession of the carrier, the transit is not at an end, even if the seller has refused to take them back.
⇒ Right of Stoppage of Goods in Transit can be exercised either:
• By taking actual possession of the goods, or
• By giving notice of his claim to the carrier, who holds the goods
How Stoppage in transit is effected Sec 52
Effect of sub – sale or pledge by the buyer Sec.53
Sub sale of pledge by the buyer
Effect on unpaid seller's right
The unpaid seller's right of lien or stoppage in transit is not affected by any further sale or other disposition of goods by the buyer.
Exception
O When seller has given his assent to such mortgage or other disposition of goods made by the buyer.
O When a document of title has been transferred to the buyer and the buyer transfer the document to a person who has brought the goods in good faith for value.

Distinction Between Lien and Stoppage – in – Transit

	Lien		Stoppage – in – Transit
1.	The goods are in actual possession of the seller.	1.	The goods are in possession of an independent carrier or bailes.
2.	This right can be exercised even when the buyer is solvent but fails or refuses to pay the price.	2.	This right can be exercised only when the buyer becomes insolvent.
3.	This right comes to an end when the seller parts with the goods.	3.	This right commences only when the seller delivers the goods to a carrier.
4.	This is a right to retain possession over the goods.		This is a right to regain possession o the goods.
5.	This right can be exercised by the seller himself.	4.	This right can be exercised by the seller through the carrier or the bailee in whose possession the goods are.

• Seller has exercised his right of lien or stoppage of goods in transit.

• Seller has given notice to buyer to pay the price within reasonable time and buyer fails to pay the price.

⇒ Following will be effect of resale:

Rights

Rights	In case of resale after notice	In case of resale without notice
Unpaid seller's right to recover loss on sale	Available	No Available
Original buyers' right to recover profit on goods	Not available	Available
New buyer's right to acquire good title.	Available	Available

⇒ It means seller refuses to deliver goods to buyer.

⇒ The following conditions must be satisfied to exercise right to withhold delivery of goods:

• Seller is unpaid seller

• Ownership of goods has not been passed.

Suit for price [sec 55]

55 (1) – Property has passed to the buyer

- Buyer wrongfully neglector refuses to pay price of goods

55 (2) - property has not passed to the buyer

- price is payable on a particular date irrespective of delivery.

- Buyer wrongfully neglects or refuses to pay price of goods

Suit for damages for non acceptance (56)

When buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non acceptance.

Suit for damages for Breach (60)

Repudiation of contract before due date: Where the contract is repudiated by the buyer before the date of delivery the seller may treat the contract as rescind and sue for damage for the breach.

Suit for interest [61(2) (d)]

Specific agreement between seller and buyer as to interest on price of goods from the date on which payment becomes due the seller may recover the interest from the buyer.

⇒ This right is in addition to other remedies available to the seller.

Rights of buyer/Buyers remedies against seller

- Suit for damage for non – delivery

- Suit for Specific performance
- Repudiation of contract
- Suit for Breach of warranty
- Right of unpaid seller against buyer:
- Right to Withhold Delivery of Goods
- Suit for Interest

The buyer has following remedies against the seller:

⇒ Suit for damage for non – delivery Sec 57

Buyer is ready and willing the take delivery of goods but seller wrongfully neglects or refuses delivery of goods, buyer may sue seller.

⇒ Suit for specific performance Sec 58

Where seller wrongfully refuses to deliver specific or ascertained goods, court may direct specific performance order.

⇒ Suit for breach of warranty Sec 59

If there is breach of warranty, buyer may claim damages from the seller. Buyer may deduct the amount of damage from price payable if price is not paid. Buyer may recover the damages if price paid.

⇒ Right to repudiate the contract

If the seller declares his intention of non – delivery of goods, buyer may repudiate the contract and immediately sue for damages.

⇒ Suit for Interest

• In the absence of any contract to the contrary no interest shall be payable by the buyer on the delay payment. If , there is no such agreement, the seller may give notice to the buyer of his intention to charge interest on delayed payment.

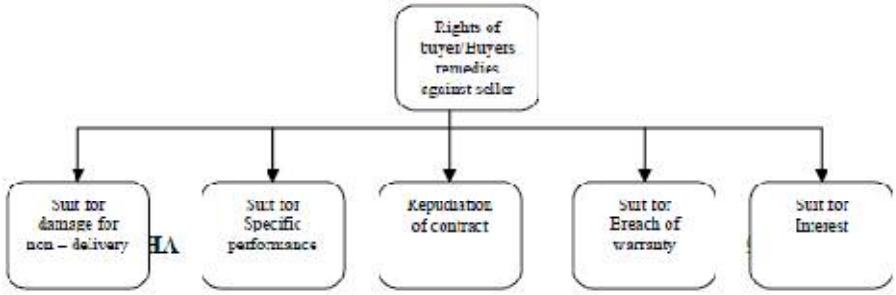
⇒ It means transporter or bailee to whom goods are delivered by the seller for transportation to buyer.

⇒ When goods are delivered to a carrier, it is deemed delivery of goods to the buyer if following conditions are satisfied:

• Seller delivers exactly same goods as per contract.

• The Buyer has informed carrier name, address and goods required to be delivered.

• The seller delivers goods for the purpose of delivery.



Delivery to Carrier

⇒ It means public sale. The seller invites the interested parties by advertisement to offer the price. (i.e. bid)

⇒ The seller may hire service of auctioneer. An auctioneer is an agent of seller.

⇒ Advertisement of auction sale is not offer but an invitation to make an offer and therefore if an auction sale is not held on appointed day, bidder can't sue auctioneer.

⇒ Every bid amounts as offer and acceptance is given by auctioneer by some usual mode of acceptance e.g., fall of hammer, going – going gone or one – two – three.

⇒ Auction sale starts with placing of bids. Auctioneer accepts the highest bids but he may accept lower bid without giving any reason. When bid accepted, valid contract is formed.

⇒ Bid once made can be withdrawn before fall of hammer even if expressly prohibit.

⇒ Seller can bid at auction sale if bidders are informed of fact. (pretended bidding)

⇒ If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer. The bid is said to be pretended when it is made by the seller or some one on his behalf.

⇒ Only one person can be appointed for bidding.(called puffer)

⇒ Auctioneer may set reserve price or upset price. Bid lower that which is invalid.

⇒ 'In the case of Knockout agreement, the buyers joint their hands to eliminate competition among themselves at an raise the bid against each other and only one of them will bid at the auction. When the profit. Prima facie, a knockout agreement is not illegal. However, if the intention of the parties to the agreement is to defraud a third party, this will be illegal.

⇒ Damping is illegal, it includes;

• Pointing out defects in the goods, or

• Misleading the purchaser or doing any other act so that he may not participate in the auction. It empowers the auctioneer to with draw the property from the auction.

 Sale in lots :

When the goods are put up for sale in lots, each lot is deemed, prima facie, to be the subject – matter of a separate contract of sale.

Delivery of Goods in Contract by Sea Route

It includes following three categories of contracts:

⇒ CIF Contract

• It means 'cost, insurance and freight;

• Here, the price of goods includes the cost of goods, insurance and freight expenses.

• In CIF contract, buyer pays insurance and freight expenses.

• The essential of CIF contract is that seller shall deliver shipping documents to the buyer usually through the bank. If the seller fails to deliver the documents within reasonable time, he is liable for breach of contract.

• Ownership of goods is transferred to the buyer, when he pays the price of goods while receiving shipping documents. If buyer refuses to pay the price, the seller can claim damages for breach of contract.

⇒ FOB Contract

• It means free on board. Here, seller is required to put the goods on board of ship at his expense.

• Buyer is liable for all the expenses and risk one goods are loaded on ship.

• The ownership of goods is transferred to the buyer as soon as goods are loaded to ship.

⇒ Ex – Ship Contract

• It means contract in which the seller has to deliver the goods to the buyer at the port of destination.

• All the freight charges and risk during voyage for goods remain with seller.

• Ownership of the goods is transferred to the buyer when goods are actually delivered at the port of destination.

REVIEW QUESTIONS

1. What are the essential elements of valid contract of sales?
2. Discuss about the classification of goods
3. What are the differences between conditions and warranties?
4. Discuss about implied conditions and implied warranties.
5. Describe doctrine of caveat emptor.
6. Describe various types of delivery?
7. What are rights of unpaid seller?
8. What are the rights of buyer/buyers remedies against seller

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

UNIT-3 THE NEGOTIABLE INSTRUMENTS, ACT, 1881

CONTENTS

INTRODUCTION TO NEGOTIABLE INSTRUMENTS

- Definition of Negotiable instrument

Negotiable instrument means a promissory note; or bill of exchange; or cheque Payable either to order; or to the bearer.

- Meaning of Negotiable instrument

Negotiable instrument means an instrument the property in which is acquired by anyone who takes it –

• Bonafide; and

• For value

Notwithstanding any defect in the title of any prior party.

In other words negotiable instrument means an instrument

-Notwithstanding any defect in the title of any prior party.

ESSENTIALS OR CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT (Sec.13)

• Freely transferable from one person to another

• Transferable infinitum (i.e. indefinitely).

• HDC gets a good title to negotiable instrument even though the title of transferor is defective.

• A negotiable instrument may more than one payee jointly or alternatively.

PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENTS (Sec.118)

Unless the contrary is proved, the following presumptions shall be made –

- As to consideration

That every negotiable instrument was made or drawn for consideration and that every such instrument when it has been accepted, endorsed or negotiated has been for consideration.

- As to date That every negotiable instrument bearing a date was made or drawn on such date.

- As to time of acceptance That every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity.

- As to time of transfer That every transfer of a negotiable instrument was made before its maturity.

- As to order of endorsements That the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.

- As to stamp That a lost promissory note or bill of exchange was duly stamped.

- That holder is a holder; That the holder of a negotiable instrument is a holder in due course.

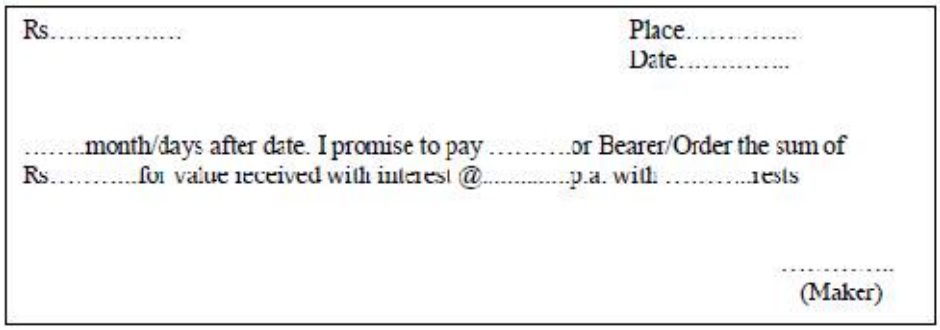
- As to dishonour If a suit is filed upon an instrument which has been dishonored, the court shall, on proof of the protest, presume the fact of dishonour.

The above presumptions are rebuttable (debatable) by producing evidence to the contrary. It is the responsibility of the person alleging the non existence of presumptions to prove the same.

The above presumptions are not applicable where an instrument has been obtained by an offence, fraud or for unlawful consideration.

MEANING OF PROMISSORY NOTE

A 'Promissory note' is an instrument in writing (not being a bank – note or a currency – note) containing an unconditional undertaking
Signed by the maker to pay a certain sum of money only to –
(a) A certain person; or
(b) The order of a certain person.


Rs……. Place……..
Date……..

……month/days after date. I promise to pay ……or Bearer/Order the sum of Rs……..for value received with interest @.....p.a. with ……rests

……..
(Maker)

ESSENTIALS CHARACTERISTICS OF A PROMISSORY NOTE (Sec.4)

- In writing

An oral promise to pay is not sufficient
Example A promises to pay Rs.1,000 to 'B', over telephone.

- Express promise to pay

There must be express promise to pay.
Mere acknowledgement of indebtedness is not sufficient.

• "I acknowledge myself to be indebted to B in Rs.5,000, to be paid on demand, for value received". The promise to pay is definite and therefore this is a valid promissory note.

• "Mr. B.I.O.U Rs.1,000." There is no promise to pay and therefore this is not a valid promissory note.

- Definite and unconditional promise

If a promise to pay is dependent upon an event which is certain to happen, although the time of its happening is uncertain, the promise to pay is unconditional.

• "I promise to pay B Rs.500 seven days after my marriage with C." The promise is conditional since the promise is dependent upon marriage of the promisor with C, which may or not happen.

• "I promise to pay B Rs.500 on D's death, provided D leaves me enough to pay that sum." The promise is conditional since the promise is dependent upon the estate inherited by the promisor.

• "I promise to pay B Rs.500 on D's death." The promise is not conditional, but definite since death of D is certain. Therefore, the promissory not is valid.

- Signed by maker

A promissory note must be signed by the maker.

The signatures may be made on any part of the instrument.

- Promise to pay a certain sum

• "I promise to pay B Rs.500 and all other sums which shall be due to him." Since the amount payable is not certain, it is not a valid promissory note.

• "I promise to pay B Rs.500 first deducting there from any money which he owes me." Since the amount payable is not certain, it is not a valid promissory note.

- Promise to pay money only

"I promise to pay B Rs.500 and to deliver to him my black horse on 1st January next." It is not a valid promissory note since the promisor is required to deliver his black horse also, which is not 'money'.

- Payee must be certain

The name of payee must be specified in the promissory note, otherwise it will be invalid.

- Stamped

A promissory note must be stamped.

Parties to a promissory note

Maker: The person who makes the promissory note is called as maker. His liability is primary and unconditional.

Payee: The person to whom money is to be paid is named in the promissory note. He is called as payee.

The words " or to the bearer of the instrument" is inoperative in view of section 31 of the Reserve Bank of India Act, 1934, which provides that no person in India other than Reserve Bank of India or Central Government can make or issue promissory note payable to bearer of the instrument.

BILL OF EXCHANGE (Sec. 5)

A 'bill of exchange' is an instrument in writing containing an unconditional order

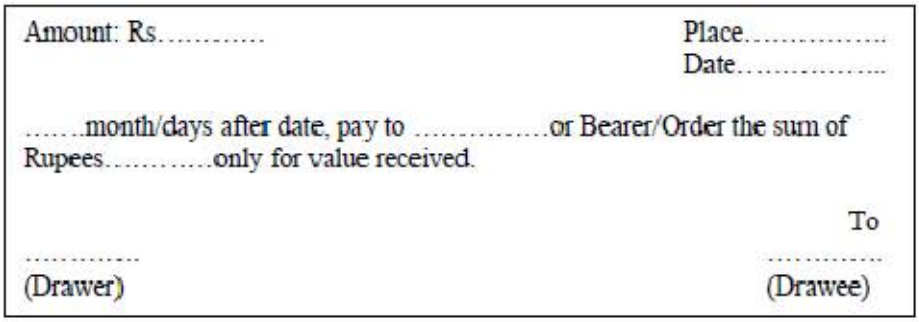
Signed by the maker directing a certain person

To pay a certain sum of money only to –

(a) a certain person ; or

(b) the order of a certain person; or

(c) the bearer of the instrument.


Amount: Rs.……. Place……..
Date……..

…….month/days after date, pay to ……or Bearer/Order the sum of Rupees……only for value received.

To

…… ……..
(Drawer) (Drawee)

Essentials characteristics of a bill of exchange

(a)It must be in writing
(b) It must contain an express order to pay
(c) The order to pay must be definite and unconditional
(d) It must be signed by the drawer
(e) The sum contained in the order must be certain
(f) The order must be to pay money only
(g) Drawer, drawee and payee must be certain (usually, same person is the drawer and payee)
(h) It must be stamped.
- Parties to a bill of exchange

Drawer

• The person who draws the bill (i.e.the person who makes the bill) is called as drawer.
• His liability is secondary and conditional
• His liability is primary and conditional until the bill is accepted.

Drawee

• The person on whom the bill is drawn is called as drawee.
• On acceptance of the bill
(a)he is called as acceptor;
(b) he becomes liable for the payment of the bill;
(c) his liability is primary and unconditional.

Payee.

• The person to whom money is to be paid is named in the bill.
• He is called as payee.

The words "or the bearer of the instrument" is inoperative is view of section 31 of the Reserve Bank of India Act, 1934, which provides that no person in India other than Reserve Bank of India or Central Government can make or issue promissory note payable to bearer of the instrument.

CHEQUE (Sec.6)

A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand (i.e. it is always payable on demand) and it includes –
- the electronic image of truncated cheque; and
- a cheque in electronic from.

Essentials characteristics of a cheque

(a)It must be in writing
(b)It must contain an express order to pay
(c)The order to pay must be definite and unconditional
(d)It must be signed by the drawer
(e)The sum contained in the order must be certain
(f)The order must be to pay money only

(g)Drawer, drawee and payee must be certain
(h)It is always drawn upon a specified banker
(i)It is always payable on demand
•A cheque must contain all the characteristics of a bill of exchange
•A cheque does not require
(a)stamping ; or
(b) Acceptance.
-Parties to a cheque
Drawer
•The person who draws the cheque, i.e., the person who makes the cheque is called as drawer.
•His liability is primary and conditional
Drawee
•The bank on whom the cheque is drawn is called as drawee.
•He makes the payment of the cheque.
Payee
•The person to whom money is to be paid (i.e., the person in whose favour cheque is issued) is named in the cheque. He is called as payee.
•The payee may be the drawer himself or a third party.

Meaning of electronic cheque and truncated cheque

-Meaning of truncated cheque
-A truncated cheque means a cheque
-Which is truncated during the course of a clearing cycle
-Either by the clearing house or bank whether paying or receiving payment.
-Immediately on generation of an electronic image.
-For transmission substituting the further physical movement of cheque in writing
-Meaning of 'a cheque in electronic form'
-A cheque in electronic form means a cheque
-Which contains the exact mirror image of a paper cheque
-and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometric signature) and asymmetric crypto system.
-Duties of collecting banker
The collecting banker shall verify with due diligence and ordinary care –
•The prima facie genuineness of the cheque to be truncated;
•As to whether any fraud, forgery or tampering is apparent on the face of the instrument.
-Presentment of truncated cheque
In case of any reasonable suspicion about the genuineness of the electronic image of a truncated cheque (e.g. suspicion as to fraud,

forgery, tampering or destruction of the instrument), the paying banker is entitled to –

•Demand any further information regarding the truncated cheque;

•Demand the presentment of truncated cheque itself for verification.

Difference between electronic cheque and truncated cheque

Electronic cheque

Truncated cheque

Paper is not used at any stage in creation of an electronic cheque.

A truncated cheque is nothing but a paper cheque, which is truncated during the clearing cycle.

Digital signatures must be used to create an electronic image of cheque. Thus, an electronic cheque contains digital signature.

The paper cheque, which is afterwards truncated, contains no digital signature. The signatures in ink appear on the truncated cheque.

The original writing of an electronic cheque is in electronic form.

The – original writing of a truncated cheque is on paper duly – signed in ink. After the paper cheque is converted into electronic form, it is truncated and thus, it becomes a truncated cheque.

CAPACITY OF A PERSON TO BE A PARTY TO A NEGOTIABLE INSTRUMENT (Sec. 26)

-Person must be capable of contracting

A person shall be liable on a negotiable instrument (by reason of making, drawing, accepting endorsing, delivering or negotiating a negotiable instrument) only if he is capable of contracting according to the law to which he is subject.

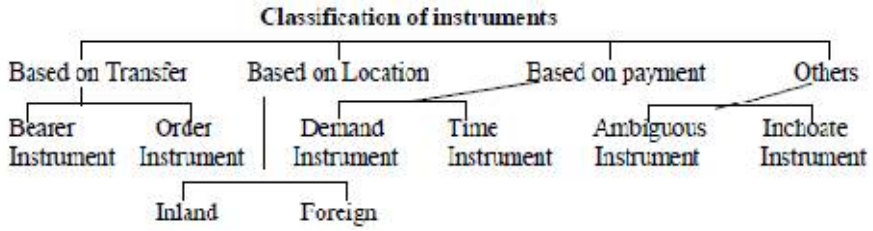
-Liability in case of a minor

•A minor may draw, endorse, deliver and negotiate any negotiable instrument.

•All the parties shall be bound on such negotiable instrument.

•However, the minor shall not be bound on such negotiable instrument.

CLASSIFICATION OF NEGOTIABLE INSTRUMENT (Sec. 13, 19 and 21)



An instrument -

• Payable to a particular person or expressed to be payable to a particular person, and

• Does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

- Bearer Instrument:

An instrument is payable to bearer of –

(a)it is expressed to be so payable, or

(b)on which the only or last endorsement is an endorsement in blank.

•Promissory note – can not be made payable to bearer

•Bill of exchange can not be made payable to bearer on demand

-Demand Instrument:

An instrument which satisfies the following conditions –

(a)Time for payment is not specified.

(b)Expressed to be payable on demand.

(c)Can be presented for payment at any time.

Note: A P/N or B/E, in which no time for payment is specified, and a cheque, are payable on demand. [Sec.19]

-Time Instrument :An instrument in which time for payments is specified and may be payable –

(a)After a specified period, or

(b)On a specified day, or

(c)Certain period after, sight, or

(d)On the happening of a certain event.

-Inland Instrument [Sec.11]:

A P/N, B/E or cheque is said to be an inland instrument, if any one of the following conditions is satisfied –(a) Drawn or made in India and made payable in India, or

(b) Drawn or made in India and drawn upon a person resident in India.

Note: Even if an Inland Bill is endorsed to a foreign country, it continues to be an Inland Instrument.

-Foreign Instrument [Sec.12]:

An instrument which is not an Inland Instrument, is deemed to be a Foreign Instrument.

-Ambiguous Instruments [Sec.17]:

(a)Where an instrument may be constructed either as a P/N or as a B/E, the holder may at his option treat it as either, and the instrument shall henceforth be treated accordingly, e.g. a B/E drawn in favour of a fictitious person.

(b)An Ambiguous Instrument treated as a P/N or as a B/E cannot be treated differently afterwards.

-Conditions for an inchoate instrument

(a)A person signs a negotiable instrument.

(b)The negotiable instrument is stamped.

(c)The negotiable instrument is either wholly blank or is partially blank.

(d)The person signing such negotiable instrument delivers it to another person.

-Legal effect

The holder gets a prima facie authority to make or complete the negotiable instrument.

-Liability on an inchoate instrument

Rights of a person to whom an inchoate instrument is delivered

He can recover only such amount as he was authorised to fill.

Rights of HDC

He can recover the whole amount stated in the instrument, but not exceeding the amount covered by the stamps.

10. MATURITY OF A NEGOTIABLE INSTRUMENT (Sec.22)

-Maturity of a negotiable instrument Days of grace

-It means the date on which the negotiable instrument falls due for payment.

-A negotiable instrument which is payable otherwise than on demand is entitled to 3 days of grace.

CALCULATION OF DAYS OF MATURITY

Case	Date of maturity
Negotiable instrument payable on a specified day	Specified day + 3rd day
Negotiable instrument payable on a stated number of days after date	Date on which negotiable instrument is drawn + stated number of days + 3rd day
Negotiable instrument payable on stated number of days after sight	Date on which negotiable instrument is presented for4 sight + stated number of days + 3rd day
Negotiable instrument payable on stated number of days after happening of a certain event	Date on which such event happens + stated number of day + 3rd day
Negotiable instrument payable on stated number of months after date	Corresponding day of the relevant month (i.e., date on which negotiable instrument is drawn + stated number of months) + 3rd day
Negotiable instrument payable on stated number of months after sight	Corresponding day of the relevant month* (i.e., Date on which negotiable instrument is presented for sight + stated number of months) + 3rd day
Negotiable instrument payable on stated number of months	Corresponding day of the relevant month* (i.e., Date on which such event happens + stated number of

NEGOTIATION – MEANING AND METHODS

-Meaning of negotiation

Negotiation means transfer of a negotiable instrument to any other person so an to constitute that person the holder of such negotiable instrument.

- Methods of negotiation

Negotiation by delivery

• A bearer instrument may be negotiated by delivery.

• The delivery must be voluntary

Negotiation by endorsement and delivery

An order instrument can be negotiated only by way of -

(i)endorsement; and

(ii) delivery.

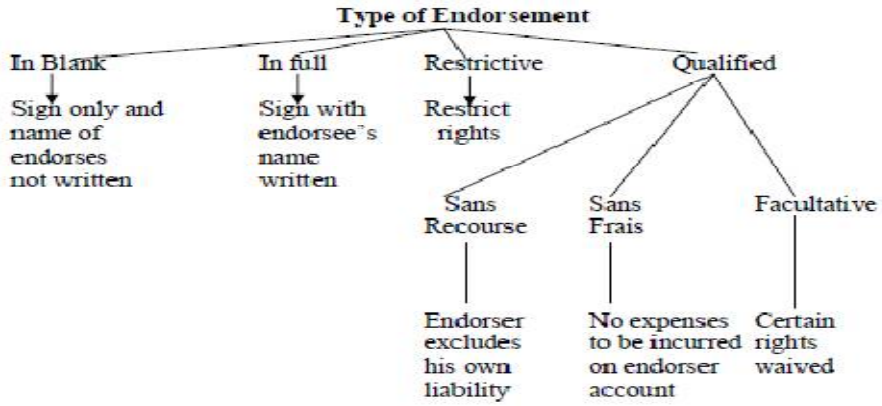
MEANING OF ENDORSEMENT

Endorsement means

Signing on the face or back of negotiable instrument; or on a slip of paper annexed to the negotiable instrument By - the holder of negotiable instrument

For the purpose of - negotiating such negotiable instrument .

Type of Endorsement



ESSENTIAL REQUEREMENTS OF A VALID ENDORSEMENT (Sec.15 and 16)

Writing The endorsement must be in writing

Signed The endorsement shall not be valid unless it is signed.

By holder The endorsement shall be valid only if the negotiable instrument is signed by the holder.

KINDS OF ENDORSEMENTS (Sec.16, 50, 52, 56)

- General endorsement i.e. endorsement in blank

Meaning -

General endorsement means, an endorsement made by the endorser without writing the name of the endorsee.

Effect -

Order instrument is converted into bearer instrument.

- Special endorsement i.e., endorsement in full

Special endorsement means an endorsement made by a holder by –

(a) singing his name, and

(b)adding a direction to pay the amount to a specified person

-Restrictive endorsement

An endorsement which restricts the right of further negotiation is called as restrictive endorsement.

-Partial endorsement

An endorsement which purports to transfer only a part of the amount of the instrument is called as partial endorsement. Partial endorsement is not valid at law.

-Conditional endorsement

(a)Sans Recourse – Endorser relieves himself from the liability to all subsequent endorsees.

(b)Facultative – Endorser waives any of his rights.

(c)Contingent - Endorser makes his liability dependent upon the happening of an event.

NEGOTIATION BACK (Sec.90)

-Meaning

If –a negotiable instrument is negotiated by the holder, but

-the endorser again becomes the holder of such negotiable instrument

Then –it is called as negotiation back.

Effect

• The holder cannot enforce payment against an intermediate party to whom he was previously liable.

• The holder can enforce payment against all the parties to whom he was not previously liable.

• However, the holder can sue all the prior parties (including all intermediate parties to whom he was previously liable), if he had made sans recourse endorsement.

DISTINCTION BETWEEN NEGOTIATION AND ASSIGNMENT

Basis	Negotiation	Assignment
1. Applicable Act	If a negotiable instrument is transferred by way of negotiation, Negotiable Instrument Act, 1881, applies.	Where any right is transferred by way of assignment, the Transfer of Property Act applies.
2. Meaning	Negotiation means transfer of a negotiable instrument to any other person so as to constitute that person the holder of such negotiable instrument.	Transfer of a right to receive the payment of a debt by one person (viz, assignor) to another document is called as assignment.
3. Scope	Negotiation can be made for transferring negotiable instruments only.	Assignment can be made of any right.
4. Method or manner	A bearer instrument can be negotiated merely by delivery, and an order instrument can be negotiated by endorsement and delivery	Assignment is valid only if it is made in writing and is signed by the assignor
5. Notice	Notice of negotiation is not required to be given to any party	Notice of assignment must be given by the assignee to the debtor
6. consideration	It is presumed that every negotiable instrument was negotiated for consideration.	There is no such presumption in case of assignment.
7. Burden of proof	The other party has to prove that negotiation was without any consideration.	The assignee has to prove that there was some consideration.
8. Better title	The transferee of a negotiable instrument acquires a title better than that of the transfer, i.e., he becomes a holder in due course.	The assignee does not acquire a title better than that of the assignor.
9. Stamp duty	Negotiation does not require payment of stamp duty.	Assignment requires payment of stamp duty.

MEANING AND PURPOSE OF CROSSING

Meaning of crossing

Crossing means a direction given by the drawer of the cheque to the drawee bank, not to pay the cheque at the counter of the bank, but to pay it to a person who presents it through a banker.

- Purpose of crossing

Crossing makes it possible to trace the person to whom the payment has been made. Thus, it makes the cheque safe.

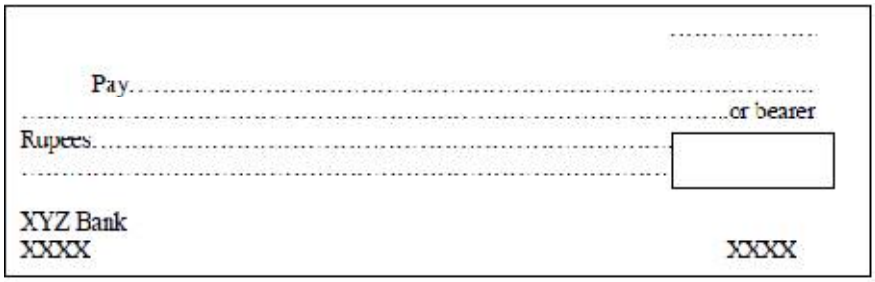
TYPES OF CROSSING (Sec. 123 to 131A)

- General Crossing ; Sec.123

Where a cheque bears across its face an addition of –

• The words 'and company' or any abbreviations thereof between two parallel transverse lines, or

• Two parallel transverse lines simply.

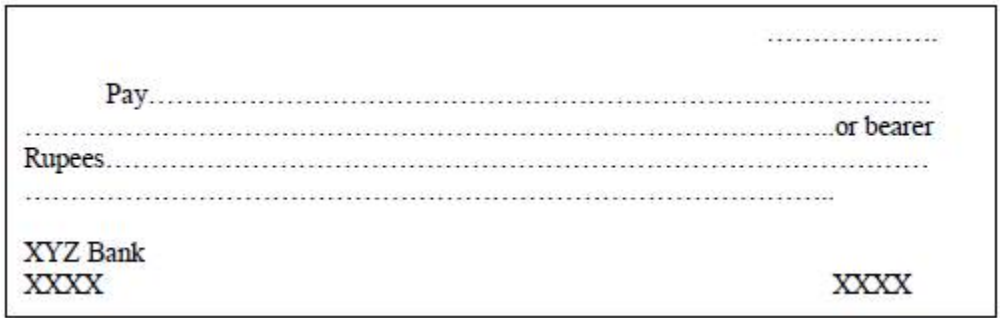


Either with or without the words 'not negotiable', the addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

- Special Crossing : Sec.124.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable', that addition shall be deemed a crossing and the cheque shall be deemed to be crossed specially.



Two parallel transverse lines are not a must. Where a cheque is crossed specially, the banker on whom it is crossed shall not pay it, otherwise than to the banker to whom it is crossed or his agent for collection.

Difference:

In general crossing the Name of the Bank is not mentioned whereas in special crossing the Name of the Bank is mentioned.

'Not Negotiable' Crossing: Sec.130.

The object of "Not negotiable" crossing is to protect the rights of holder of a cheque.

A person taking a cheque crossed generally or specially, bearing in either cases the words 'not negotiable', shall not have, and shall not be capable of giving a better title to the cheque other than that which the person from whom he took it had.

Ordinarily a person acquiring a cheque in good faith becomes its holder in due course just as in the case of an open document. Such a cheque can be negotiated further.

However, where a cheque is crossed as 'Not Negotiable', either generally or specially, the Holder in due course will not get a better title than the person from whom the received. It maybe noted that though it is mentioned 'Not Negotiable', the cheque can be transferred. The only restriction is with regard to the title passed.

In other words, the principle of nema dat quod non habet (nobody can pass on a title better than what he himself has) will be applicable to a cheque with a 'not negotiable' crossing, even though the cheque is in the hands of a holder in due course.

- 'Account Payee' Crossing / Restrictive Crossing

The purpose of this crossing bearing the words "A/c Payee" is to obviate the risk of a wrong person obtaining payment on a cheque.

It is a direction to banker to credit the proceeds only to the account of the payee.

The cheque remarks legally negotiable but "A/c payee" crossing hinders the negotiability of the cheque in practice.

BOUNCING OR DISHONOUR OF CHEQUES

- Liability of drawee on dishonour Conditions (Sec.31)

If – the drawer has sufficient funds in the account; and

such funds are properly applicable to payment of the cheque

Then – the drawee is duly required to pay the cheque.

In case of default by drawee (i.e. Banker), the drawee shall compensate the drawer for loss caused to him.

- Liability of drawer on dishonour (Sec.138)

Nature of liability

• Imprisonment – 2 years (Maximum); or

• Fine - 2 times the amount of cheque (Maximum); or

• Both Conditions

• Debt - Cheque was issued to discharge a legally enforceable debt.

• Reason for dishonour – insufficiency of funds

• Presentment of cheque – within 6 months or validity period of the cheque
• Demand made from drawer – within 30 days of dishonour
• Default by drawer to pay - within 15 days of demand made.
• Complaint by holder – within 1 month, with the Court.

HOLDER (Sec.8 and 9)

- Meaning of 'holder' (Sec.8)

(a) He must be entitled to the possession of negotiable instrument in his own name.

(b)He must be entitled to receive or recover the amount due on negotiable instrument from the parties liable on negotiable instrument.

-Holder for value

'Holder for value' means, as regards all parties prior to himself, holder of an instrument for which value has, at any time, been given.

- Meaning of 'holder in due course' (Sec.9)

(a)He must be a holder.

(b)He must have become the holder for consideration.

(c)He must have obtained the possession of negotiable instrument before maturity

(d)He must have obtained the negotiable instrument in good faith, i.e. without sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

Example:-

	Situation	Holder	Holder for Value	Holder in due Course
a.	X steals a cheque	√	×	×
b.	X gets a cheque for consideration but after maturity	√	√	×
c.	X gets a cheque for consideration before maturity.	√	√	√

PRIVILEGES OF A HOLDER IN DUE COURSE (Sec.20, 36, 43, 46, 53 and 58)

- Every prior party to a negotiable instrument is liable to a HDC (Sec.36)
- A holder who derives title from HDC has the same rights as that of a HDC (Sec.53)
- No prior party can set up a defense that the negotiable instrument was drawn, made or endorsed by him without any consideration (Sec.43)
- No prior party can set up a defence that the negotiable instrument was lost or was obtained from him by an offence or fraud or for an unlawful consideration. Thus, HDC gets a valid title to the negotiable instrument even though the title of the transferor was defective (Sec.58)
- No Prior party can allege that negotiable instrument was delivered conditionally or for a special purpose only (Sec.46).

- HDC can claim full amount of the negotiable instrument (but not exceeding the amount covered by the stamp) even though such amount is in excess of the amount authorised by the person delivering an inchoate negotiable instrument (Sec.20).

PAYMENT IN DUE COURSE. (Sec.10)

- Payment is made as per apparent tenor.
- Payment is made in good faith-
- Payment is made without negligence
- Payment is made to holder of negotiable instrument
- Payment is made in money only

PROTECTION TO PAYING BANKER (Sec.85)

- Cheque payable to order
• Payment is made in due course.
• The protection shall be available notwithstanding that any endorsement subsequently turns out to be a forgery.
- Cheque originally payable to bearer
• Payment is made in due course
• Payment is made to the bearer of the cheque
• The protection shall be available notwithstanding that any endorsement appears on the cheque
- Cheques crossed generally
• Payment is made in due course.
• Payment is made to any banker.
- Cheques crossed specially
• Payment is made in due course
• Payment is made to the banker to whom the cheque is crossed.

LIABILITY OF THE PAYING BANKER (Sec.129)

The paying banker shall be liable to the owner of the cheque for any loss sustained by him in the following 2 cases.

(a) Where the paying banker pays a cheque crossed generally otherwise than to a banker.

(b) Where the paying banker pays a cheque crossed specially otherwise than to the specified banker.

BANKER MUST REFUSE TO HONOUR A CUSTOMER'S CHEQUE

-Stop payment
-Garnishee order
-Death of customer
-Insolvency of customer
-Insanity or customer
-Assignment of funds by customer
-Defect in title of holder

-Loss of cheque
-Materially altered cheque, mutilated cheque, cheque of doubtful validity, incomplete cheque
-Different signatures
-Receipt of application for closure of account
-Irregular endorsement
-Stale cheque, i.e., outdated cheque
-Post dated cheque
-Undated cheque

BANKER MAY REFUSE TO HONOUR A CUSTOMER'S CHEQUE

-Insufficient funds
-Funds not applicable
-Presentment at different branch
-Presentment after banking hours

EFFECT OF NON – PRESENTMENT OF CHEQUE WITHIN REASONABLE TIME

(Sec.84)
-No liability of drawer if bank fails Conditions
(a)The drawer has sufficient balance when he issues the cheque, and when the cheque ought to be presented for payment.
(b)The holder fails to present the cheque within a reasonable time of issue of the cheque.
(c)Meanwhile (i.e. after issue of the cheque but before presentation of the cheque by the holder) the bank fails, and consequently the drawer suffers actual damages.

MATERIAL ALTERATION (Sec.20, 49, 87 and 125)

-Meaning
An alteration is called as material alteration if it alters –
•the character or operation (i.e. the legal effect) of a negotiable instrument; or
•the rights and liabilities of any of the parties to a negotiable instrument.
- Material alterations authorised by Act
(a) Filling blanks of an inchoate instrument (Sec.20)
(b)Conversion of a blank endorsement into an endorsement in full (Sec.49)
(c)Crossing of cheques (Sec.125)
(d)Conversion of general crossing into special crossing or not negotiable crossing or A/c Payee Crossing (but not vice – versa)
(e)Conversion of a bearer instrument into an order instrument by deleting the word 'Bearer'.

-Effects of material alteration (87)

All the parties to negotiable not consenting to the material alteration are discharged.

ACCEPTANCE (Sec.7 and 86)

-Meaning of acceptance (Sec.7)

(a)The drawee signs the bill; and

(b)The drawee delivers it to the holder of the bill; or

-Effect (Sec.7)

The drawee becomes the acceptor.

-Essentials of a valid acceptance (Sec.7)

(a)Writing (whether on the face or back of the bill)

(b)Signed (Signature without the word 'accepted' is also valid)

(c)Signing on the bill

(d)Delivery or intimation to the holder that the bill has been accepted.

-Types of acceptance (Sec.86)

(a)General – Acceptance of bill without any qualification.

(b)Qualified – Acceptance of bill subject to some qualification (e.g. accepting the bill subject to the condition that the payment of bill shall be made only on happening of an event specified therein).

-Effect of qualified acceptance (Sec. 86)

(a)The holder may object to the qualified acceptance. In such a case, it shall be treated that the bill is dishonoured due to non – acceptance.

(b)He may give his consent to the qualified acceptance. In such a case, all the previous parties, not consenting to it, are discharged.

DISHONOUR BY NON – ACCEPTANCE (Sec.91)

-Meaning

A bill is dishonoured by non – acceptance if it is duly presented for acceptance, but the drawee refuses to accept the bill.

-Cases in which a bill is dishonoured by non – acceptance

(a)Where a bill is not accepted by the drawee within 48 hours of presentment of bill. If the holder allows to the drawee more than 48 hours for acceptance, all the prior parties not consenting to the same are discharged from liability to such holder.

(b)In case there are two or more drawees who are not partners, if the bill is not accepted by all the drawees.

(c)Where the drawee is a fictitious person

(d)When the drawee cannot be found even after a reasonable search.

(e)When the drawee is incompetent to contract.

(f)Where the drawee gives a conditional acceptance, and the holder does not give his consent to the conditional acceptance.

-Effects

•The holders gets an immediate right to sue all the prior parties.

•He need not wait till the maturity of the bill for it to be dishonoured on presentment for payment.

-Non – applicability

A promissory note or a cheque cannot be dishonoured by non – acceptance since a promissory note or a cheque does not require any acceptance.

ACCEPTANCE FOR HONOUR (Sec.108 to 112)

-Meaning

The person who accepts the bill for the honour of any other person is called as an acceptor for honour;

-Conditions for 'acceptance for honour'

•The bill must have been noted for non – acceptance

•The acceptance is given –

-for the honour of any party already liable under the bill.

-By any person who is already not liable under the bill.

-With the consent of the holder of the bill.

•The acceptance must be made in writing on the bill.

-Liability of acceptor for honour

•He is liable to pay the amount of the bill, if the drawee does not pay.

•He is liable only to the parties subsequent to the party for whose honour the bill is accepted.

-Rights of acceptor for honour

He is entitled to recover the amount paid by him from the party for whose honour the bill was accepted and from all the parties prior to such party.

PAYMENT FOR HONOUR (Sec.113 and 114)

-Meaning of 'payer for honour'

A person who pays a bill for honour of any other person is called as 'payer for honour'

-Conditions for 'payment for honour'

•The bill must have been noted for non – payment.

•Payment for honour is made –

-for the honour of any party already liable under the bill.

-By any person (whether or not he is already liable under the bill).

-With the consent of the holder of the public.

•The payment must be recorded by Notary Public.

-Rights of payer for honour

•The payer for honour is entitled to all the rights of a holder.

•He can recover all the sums paid by him form –

(a)the party for whose honour he pays; and

(b)all the parties prior to such party.

DISHONOUR BY NON – PAYMENT (Sec.92)

Kinds of negotiable instrument	A negotiable instrument shall be dishonoured by non – payment if default in payment is made by the following parties
Promissory note	Maker
Bill	Acceptor (Drawee, in case the bill does not require acceptance
Cheque	Drawee

NOTICE OF DISHONOUR (Sec.93 to 98)

-Notice by whom?

Notice may be given by the holder or any party liable on the negotiable instrument.

-Notice to whom?

Notice must be given to all the parties to whom the holder seeks to make liable

-Contents of notice

Notice must disclose the fact of dishonour of negotiable instrument

-Effects of default

A party (other than the party primarily liable on the negotiable instrument) to whom notice of dishonour is not given is discharged from liability on the negotiable instrument.

-When notice of dishonour is unnecessary or excused (Sec.98)

(a)When notice of dishonour is dispensed with by a party.

(b)Where the drawer of the cheque has countermanded payment, notice to drawer is not required to be given.

(c)When the party entitled cannot be found even after due search.

(d)Where the party bound to give notice is unable to give notice without any fault of his own.

NOTING AND PROTESTING (Sec.99 to 103)

-Meaning of noting

Recording the fact of dishonour of a negotiable instrument on the negotiable instrument.

-Procedure and contents of noting

•The dishonoured bill is handed over to a Notary Public.

•Notary Public presents it again for acceptance/payment.

•If the drawee/acceptor refuses to accept or pay the bill, the Notary Public records the fact of dishonour on the bill.

-Noting is optional

It is net mandatory to get the fact of dishonour noted.

-Meaning of protest

A certificate issued by Notary Public stating the fact of dishonour.

DRAWEE IN CASE OF NEED (Sec.7 and 115)

- The name of any person may be given in a bill as ‘drawee in case of need’.

- His liability arises on the bill only when the bill is not accepted by the drawee named in the bill.

- The bill is not dishonoured until it has been dishonoured by drawee in case of need.

DISCHARGE OF A NEGOTIABLE INSTRUMENT

The Negotiable Instrument is deemed to be discharged in the following cases –

Payment [Sec.78]:

• When the party primarily liable on the instrument i.e. Maker of P/N, Acceptor of B/E or Drawee Bank, makes the payment in due course to the Holder at or after maturity.

• Payment by a party who is secondarily liable does not discharge the instrument because the payer holds it to enforce it against prior indorsers and the principle Debtor.

Cancellation of N/I [Sec.82]:

When the holder cancels an instrument with intention to release the party primarily liable thereon from liability, the instrument is discharged and ceases to be negotiable.

Express Waiver of Rights by Holder:

The N/I is discharged when the Holder, at or after its maturity absolucly and unconditionally renounces in writing, his rights against all the parties to the instrument.

Lapse of time:

An instrument becomes discharged by lapse of time making the debt time barred under the limitation Act.

Insolvency of party primarily liable:

When the party primarily liable becomes insolvent, the instrument is discharged and the holder cannot make any other prior party liable thereon.

Material Alteration to Instrument;

The instrument stands discharged when it is rendered void by a material alteration to the Instrument.

Negotiation to Acceptor [Sec. 90];

When a B/E which has been negotiated is, at or after maturity, held by the Acceptor in his own right, all rights of action thereon are extinguished, i.e. the B/E is discharged.

MEANING OF HUNDI

A. TYPE OF HUNDIS

- Shah jog hundi

• Three parties – Drawer, Drawee and financier (Shah)

• Payable to shah

• Shah presents the hundi when it falls due for payment to drawee on behalf of holder

Jokhmi hundi

•Documentary bill drawn by consignor on consignee in respect of goods shipped by consignor.
•Name of the vessel by which goods are shipped is mentioned in the hundi.
•Consignee is required to pay only on goods reaching destination.
-Nam Jog Hundi
•Hundi payable to party named or to his order.
•Party has right to endorse as in the case of Bill of Exchange.
-Jawabee Hundi
•Instrument for remitting money
•Form – Ordinary letter advising parties that he may collect money from banker.
•Remitter hands over hundi to banker
•Banker endorses hundi to a correspondent residing in the town in which payee is resident
•Correspondent forwards hundi to payee.
•Payee on presenting letter collects amount from correspondent.
-Dhani Jog Hundi
•Hundi payable to owner, i.e., person who owns it
-Firman Hundi
•Hundi payable at sight
-Dharshani Hundi
•Hundi payable at sight
•Transferable by endorsement
•Similar to bill of exchange payable on demand.
-Maidi Hundi
•Known in Bengal as MUDDATI HUNDI
•Hundi payment after a time
•Usually, the interest for the period upto the due date is deducted in advance.

B. OTHER TERMS

-Zikri Chit
•Issued by some party liable thereon to the holder of hundi
•Letter of protection addressed to a merchant in town where hundi is payable requesting acceptance of the hundi in case of dishonour.
•Intended to be used by holder if hundi is dishonoured by non – acceptance.
-Peth
•Duplicate copy of hundi issued on loss of original hundi.
•The holder at the time when bill is lost before it is overdue may apply to the drawer to give him another bill of the same tenor (Sec.45). The holder may give security, if required to indemnify him against all persons in case the bill alleged to have been lost is found again. If the

drawer refuses to give a duplicate bill on request, he may be compelled to do so.

-Perpeth

•Triplicate copy of hundi given on loss of duplicate hundi

-Khoka

•A hundi paid and cancelled.

REVIEW QUESTIONS

1. What are the characteristics of a negotiable instrument
2. Describe the meaning of promissory note. What are the essentials characteristics of a promissory note?
3. What is bill of exchange? What are essentials characteristics of a bill of exchange?
4. Define cheque. What are essentials characteristics of a cheque?
5. Describe the meaning of electronic cheque and truncated cheque.
6. What are the difference between electronic cheque and truncated cheque?
7. Describe the meaning of endorsement. What essential requirements of a valid endorsement?
8. What are the distinction between negotiation and assignment?
9. What is the meaning and purpose of crossing the cheque? What are the types of crossing?
10. What are the liability of the paying banker?
11. In what conditions banker must refuse to honour a customer's cheque?
12. When discharge of a negotiable instrument considered properly?

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

UNIT-4 INDIAN PARTERNERSHIP ACT

CONTENTS

WHAT IS PARTNERSHIP?

Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all (Section 4). It, therefore, follows that a partnership consists of three essential elements:

(i) It must be a result of an agreement between two or more persons.

(ii) The agreement must be to share the profits of the business.

(iii) The business must be carried on by all or any of them acting for all.

All these essentials must coexist before a partnership can come into existence.

Example: A manager, as a part of his remuneration, may be given a share in profits of the business.

He does not thereby become partner.

ESSENTIAL ELEMENTS OF PARTNERSHIP

We shall now consider the afore stated essential elements one by one.

Agreement: You have just observed that partnership must be the result of an agreement between two or more persons. You should note that it can arise only from a contract and not from status. That is why, a partnership is distinguishable from a Hindu Undivided Family carrying on a family business. The reason is that as a result of the peculiarities of the Mitakshara School of Hindu Law applicable to joint families, a male child of a Hindu acquires an interest in a family business even in the absence of an agreement in that behalf, whereas partnership is a creation only out of mutual agreement. Thus the nature of the partnership is voluntary and contractual.

An agreement from which relationship of Partnership arises may be express. It may also be implied from the act done by partners and from a consistent course of conduct being followed, showing mutual understanding between them. It may be oral or in writing. Sharing profit of business: In this context, we will consider two propositions. First, there must exist a business. For the purpose, the term 'business' includes every trade, occupation and profession. The existence of business is essential. The motive of the business is the "acquisition of gains" which leads to the formation of partnership. Therefore there can be no partnership where there is no intention to carry on the business and to share the profit thereof. For example, co-owners who share amongst themselves the rent derived from a piece of land are not partners, because there does not exist any business. Similarly, no charitable institution or club may be floated in partnership [A joint stock company may, however, be floated for non-economic purposes]. Secondly, there must be an agreement to share profits. For example X and Y buy certain bales of cotton which they agree to sell on their joint account and to share the profits equally. In these circumstances, X and Y are partners in respect of such cotton. But an agreement to share losses is not an essential element. However, in the event of losses, unless agreed otherwise, these must be borne in the profit-sharing ratio.

Business carried on by all or any of them acting for all: The third requirement is that the business must be carried on by all the partners or by anyone or more of the partners acting for all. This is the cardinal principle of the partnership Law. An act of one partner in the course of the business of the firm is in fact an act of all partners. Each partner carrying on the business is the principal as well as the agent for all the other partners. You should, therefore, note that the true test of partnership is mutual agency rather than sharing of profits. If the element of mutual agency is absent then there will be no partnership. Sharing of profits is only Prima facie evidence which can be rebutted by stronger evidence. Thus, this prima facie evidence can be rebutted by proving that there is no mutual agency.

TRUE TEST OF PARTNERSHIP

You must have understood that sharing of profit is an essential element to constitute a partnership. But, it is only a prima facie evidence and not conclusive evidence, in that regard. The sharing of profits or of gross returns accruing from property by persons holding joint or common interest in the property would not by itself make such persons partners. Although the right to participate in profits is a strong test of partnership, and there may be cases where, upon a simple participation in profits, there is a partnership, yet whether the relation does or does not exist must depend upon the whole contract between the parties. Where there is

an express agreement between partners to share the profit of a business and the business is being carried on by all or any of them acting for all, there will be no difficulty in the light of provisions of Section 4, in determining the existence or otherwise of partnership. But the task becomes difficult when either there is no specific agreement or the agreement is such as does not specifically speak of partnership. In such a case for testing the existence or otherwise of partnership relation, Section 6 has to be referred. According to Section 6, regard must be had to the real relation between the parties as shown by all relevant facts taken together. The rule is easily stated and is clear but its application is difficult. Cumulative effect of all relevant facts such as written or verbal agreement, real intention and conduct of the parties, other surrounding circumstances etc., are to be considered while deciding the relationship between the parties and ascertaining the existence of partnership.

The receipt by a person of a share of the profits of a business or a payment contingent upon the earning of profits or varying with the profits earned by business, would not by itself make him a partner with the persons carrying on the business, particularly, when such share of payment is received by the following persons:

(i)a lender of money to persons engaged or about to the engaged in any business, or

(iia servant (e.g., manager of a firm) or agent as his remuneration, or

(iii) widow or child of a deceased partner or

(iv) A previous owner of part of the business as the consideration for the sale of the goodwill or share thereof. Existence of Mutual Agency which is the cardinal principle of partnership law, is very much helpful in reaching a conclusion in this regard. Each partner carrying on the business is the principal as well as an agent of other partners. So, the act of one partner done on behalf of firm, binds all the partners. If the elements of mutual agency relationship exist between the parties constituting a group formed with a view to earn profits by running a business, a partnership may be deemed to exist.

Thus as laid down in Cox v. Hickman that the true test of partnership is agency, and not the sharing of profits.

Distinction between partnership and firm: Persons who have entered into partnership with one another are called individual “Partners”; and “collectively” the name under which the business is carried on is called the “firm name”. Partnership is merely an abstract legal relation between the partners. A firm is a concrete thing signifying the collective entity for all the partners. Partnership is thus that invisibility which binds the partners together and firm is the visible form of those partners who are thus bound together.

TYPES OF PARTNERSHIP

1. Partnership at will: Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will". Such a partnership can be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the partnership.

2. Particular partnership: A person may become a partner with another person in particular business enterprise/for a particular venture or undertakings, such as, construction of road, laying a railway line, etc. are particular partnership. It will come to an end on completion of task for which it was made.

TYPES OF PARTNERS

Based on the extent of liability, the different classes of partners are:

Active or Actual or ostensible partner: It is a person (i) Who has become a partner by agreement, and (ii) Who actively participates in the conduct of the partnership. He acts as an agent of other partners for all acts done in the ordinary course of business. In the event of his retirement, he must give a public notice in order to absolve himself of liabilities for acts of other partners done after his retirement.

Sleeping or Dormant partner: It is a person (i) Who is a partner by agreement, and (ii) Who does not actively take part in the conduct of the partnership business. They are called as 'sleeping 'or 'dormant' partners. They share profits and losses and are liable to the third parties for all acts of the firm. They are, however not required to give public notice of their retirement from the firm.

Nominal partner: A person, who lends his name to the firm, without having any real interest in it, is called a nominal partner. He is not entitled to share the profits of the firm. Neither he invest in the firm nor takes part in the conduct of the business. He is, however liable to third parties for all acts of the firm. Partner in profits only: A partner who is entitled to share the profits only without being liable for the losses is known as the partner for profits only and also liable to the third parties for all acts of the profits only.

Sub-partner: When a partner agrees to share his share of profits in a partnership firm with an outsider, such an outsider is called a sub-partner. Such a sub-partner does not hold any rights against the firm nor liable for the debts of the firm.

Incoming partners: A person who is admitted as a partners into an already existing firm with the consent of all the existing partners is called as "incoming partner". Such a partner is not liable for any act of the firm done before his admission as a partner.

Outgoing partner: A partner who leaves a firm in which the rest of the partners continue to carry on business is called a retiring or outgoing

partner. Such a partner remains liable to third parties for all acts of the firm until public notice is given of his retirement.

Partner by holding out (Section 28): Partnership by holding out is also known as partnership by estoppel. Where a man holds himself out as a partner, or allows others to do it, he is then stopped from denying the character he has assumed and upon the faith of which creditors may be presumed to have acted. When a person (1) represents himself, or (ii) knowingly permits himself, to be represented as a partner in a firm (when in fact he is not) he is liable, like a partner in the firm to anyone who on the faith of such representation has given credit to the firm. A person may himself, by his words or conduct have induced others to believe that he is a partner or he may have allowed others to represent him as a partner. The result in both the cases is identical.

RELATIONS OF PARTNERS

MUTUAL RIGHTS AND DUTIES OF PARTNERS

The mutual relations of the partners of the firm come into existence by an agreement between the partners, giving rise to mutual rights and duties of the partners. Sections 9 to 17 of the Indian Partnership Act, 1932 lays down the provisions governing the mutual relations of the partners. These are governed by the contract existing between them which may be expressed or implied by the course of dealing. The contract may be varied by the consent of all the partners; which may be expressed or implied by the course of dealings.

The contract may provide that a partner shall not carry on any business other than that of the firm while he is a partner (Section 11). Subject to a contract between the partners the mutual rights and liabilities are as follows:

Rights: (1) Right to take part in the conduct of the Business [12(a)]: Every partner has the right to take part in the business of the firm. This is because partnership business is a business of the partners and their management powers are generally coextensive. Now suppose this management power of the particular partner is interfered with and he has been wrongfully precluded from participating therein. Can the Court interfere in these circumstances? The answer is in the affirmative. The Court can, and will, by injunction, restrain other partners from doing so. You should also note in this connection that a partner who has been wrongfully deprived of the right of participation in the management has also other remedies, e.g., a suit for dissolution, a suit for accounts without seeking dissolution, etc.

The above mentioned provisions of law will be applicable only if there is no contract to the contrary between the partners. It is quite common to find a term in partnership agreements, which gives only limited power of

management to a partner or a term that the management of the partnership will remain with one or more of the partners to the exclusion of others. In such a case, the Court will normally be unwilling to interpose with the management with such partner or partners, unless it is clearly made out that something was done illegally or in breach of the trust reposed in such partners.

(2) Right to be consulted [12(c)]: Where any difference arises between the partners with regard

to the business of the firm, it shall be determined by the views of the majority of them, and every partner shall have the right to express his opinion before the matter is decided. But no change in the nature of the business of the firm can be made without the consent of all the partners. This means that in routine matters, the opinion of the majority of the partners will prevail. Of course, the majority must act in good faith and every partner must be consulted as far as practicable.

You should note that the aforesaid majority rule will not apply where there is a change in the nature of the firm itself. In such a case, the unanimous consent of the partners is needed.

(3) Right of access to books [Section 12 (d)] : Every partner whether active or sleeping is entitled to have access to any of the books of the firm and to inspect and take out of copy thereof.

The right must, however, be exercised Bona fide.

(4) Right to remuneration [Section 13(a)]: No partner is entitled to receive any remuneration in addition to his share in the profits of the firm for taking part in the business of the firm. But this rule can always be varied by an express agreement, or by a course of dealings, in which event the partner will be entitled to remuneration. Thus a partner can claim remuneration even in the absence of a contract, when such remuneration is payable under the continued usage of the firm. In other words, where it is customary to pay remuneration to a partner for conducting the business of the firm he can claim it even in the absence of a contract for the payment of the same.

It is not uncommon for partners, in actual practice, to agree that a managing partner will receive over and above his share, salary or commission for the trouble that he will take while conducting the business of the firm.

(5) Right to share Profits [Section 13 (b)]: Partners are entitled to share equally in the profits earned and so contribute equally to the losses sustained by the firm. The amount of a partner's share must be ascertained by enquiring whether there is any agreement in that behalf between the partners. If there is no agreement then you should make a presumption of equality and the burden of proving that the shares are unequal, will lie on the party alleging the same. There is no connection between the proportion in which the partners shall share the profits and

the proportion in which they have contributed towards the capital of the firm.

(6) Interest on Capital [Section 13 (c)]: Suppose interest on capital subscribed by the partner is payable to him under the partnership deed, then in such a case the interest will be payable only out of profits. As a general rule, interest on capital subscribed by partners is not allowed unless there is an agreement or usage to that effect. The principle underlying this provision of law is that with regards to the capital brought by a partner in the business, he is not a creditor of the firm but an adventurer. The following elements must be before a partner can be entitled to interest on moneys brought by him in the partnership business: (i) an express agreement to that effect, or practice of the particular partnership or (ii) any trade custom to that effect; or (iii) a statutory provision which entitles him to such interest.

(7) Interest on advances [Section 13 (d)]: Suppose a partner makes an advance to the firm in addition to the amount of capital to be contributed by him. In such a case, the partner is entitled to claim interest thereon @ 6% per annum. While interest on capital account ceases to run on dissolution, the interest on advances keep running even after dissolution and up to the date of payment. From the discussion so far, you will notice that the Partnership Act makes a distinction between the capital contribution of a partner and the advance made by him to the firm. The advances are regarded as loans which should bear interest while capital interest only when there is an agreement to this effect.

(8) Right to be indemnified [Section 13 (e)]: Every partner has the right to be indemnified by the

firm in respect of payments made and liabilities incurred by him in the ordinary and proper conduct of the business of the firm as well as in the performance of an act in an emergency for protecting the firm from any loss, if the payments, liability and act are such as a prudent man would make, incur or perform in his own case, under similar circumstances.

(9) Right to stop admission of a new partner [Section 31]: Every partner has the right to prevent the introduction of a new partner in the firm without the consent of all the existing partners.

(10) Right to retire [Section 32 (1)]: Every partner has the right to retire with the consent of all the other partners and in the case of a partnership being at will, by giving notice to that effect to all the other partners.

(11) Right not to be expelled (Section 33): Every partner has the right to continue in the partnership. He cannot be expelled from the firm by any majority of the partners unless conferred by partnership agreement and exercised in good faith and for the benefit of the firm.

(12) Right of outgoing partner to carry on competing business [Section 36(1)] An outgoing partner may carry on business competing with that of the firm and he may advertise such business, but without using the firm

name or representing himself as carrying on the business of the firm or soliciting the customers who were dealing with the firm before he ceased to be a partner.

(13) Right of outgoing partner to share subsequent profits [Section 37]: Where any partner has died or ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, the outgoing partner or his estate has at his or his representative's option, the right to such share of the profit made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest @ 6% per annum on the amount of his share in the property of the firm.

(14) Right to dissolve the firm (Section 40): 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.

DUTIES

(1) General duties of a partner: Partners are bound to carry on the business of the firm (i) to the greatest common advantage, (ii) to be just and faithful to each other and (iii) to render to any partner or his legal representative a true account and full information of all things affecting the firm (Section 9).

(2) To indemnify for fraud or willful neglect:

(i) According to Section 10, every partner is liable to indemnify the firm for any damage caused to it by reason of his fraud in the conduct of the business of the firm.

(ii) According to Section 13 (f), a partner must indemnify the firm for any loss caused to it by willful neglect in the conduct of the business of the firm.

(3) To attend duties diligently without remuneration: According to Section 12(b) of the Act, every partner is bound to attend diligently to his duties relating to the conduct of the firm's business.

Section 13(a) enumerates that a partner is not, however, normally entitled to remuneration for participating in the conduct of the business.

He is also bound to let his partners have the advantage of his knowledge and skill.

(4) To share losses [Section 13(b)]: All the partners are liable to contribute equally to the loss sustained by the firm.

(5) To account for any profit: According to Section 16 (a), if a partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection of the firm or firm's name then he is bound to account for that profit and refund it to the firm.

(6) To account and pay for profits of competing business:. According to Section 16 (b), if a partner carries on business of the same nature as and competing with that of the firm, he must account for and pay to firm all profits made by him in the business. The firm will not be liable for any loss.

MODE OF EFFECTING REGISTRATION

The registration of a firm may be effected at any time by sending by post or delivering to the Registrar, of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form. It is not essential that the firm should be registered from the very beginning. When the partners decide to get the firm registered, as per the provisions of Section 58 of the Indian Partnership Act, 1932 they have to file the statement in the prescribed form. The statement must be accompanied by the prescribed fee stating (i) the firm's name, (ii) the principal place of business, (iii) the names of its other places of business, (iv) date of joining of each partner, (v) names in full and permanent addresses of the partners, and (vi) the duration of the firm. The aforesaid statement is to be signed by all the partners or by their agents specially authorized in this behalf. Each partner so signing it shall also verify it in the manner prescribed. When the Registrar is satisfied that the above mentioned provisions have been complied with, he shall record an entry of this statement in the register (called the Register of Firms) and shall file the statement. Subsequent alterations as alterations in the name, place, constitution, etc., of the firm that may occur during its continuance should also be registered.

When the Registration is complete?

When the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the statement in a Register called the Register of Firms and shall file the statement. Then he shall issue a certificate of Registration. However, registration is deemed to be complete as soon as an application in the prescribed form with the prescribed fee and necessary details concerning the particulars of partnership is delivered to the Registrar. The recording of an entry in the register of firms is a routine duty of Registrar.

Registration may also be effected even after a suit has been filed by the firm but in that case it is necessary to withdraw the suit first and get the firm registered and then file a fresh suit.

CONSEQUENCES OF NON-REGISTRATION

Under the English Law, the registration of firms is compulsory. Therefore, there is a penalty for non-registration of firms. But the Indian Partnership Act does not make the registration of firms compulsory nor does it impose any penalty for non-registration. However, under Section 69, on-registration of partnership gives rise to a number of disabilities

which we shall presently discuss. Although registration of firms is not compulsory, yet the consequences or disabilities of non-registration have a persuasive pressure for their registration. These disabilities briefly are as follows:

(i) No suit in a civil court by firm or other co-partners against third party: The firm or any other person on its behalf cannot bring an action against the third party for breach of contract entered into by the firm, unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm.

(ii) No relief to partners for set-off of claim: If an action is brought against the firm by a third party, then neither the firm nor the partner can claim any set-off, if the suit be valued for more than ` 100 or pursue other proceedings to enforce the rights arising from any contract.

(iii) Aggrieved partner cannot bring legal action against other partner or the firm: A partner of an unregistered firm (or any other person on his behalf) is precluded from bringing legal action against the firm or any person alleged to be or to have been a partner in the firm. But, such a person may sue for dissolution of the firm or for accounts and realization of his share in the firm's property where the firm is dissolved.

Exceptions: Non-registration of a firm does not, however effect the following rights:

1. The right of third parties to sue the firm or any partner.
2. The right of partners to sue for the dissolution of the firm or for the settlement of the accounts of a dissolved firm, or for realization of the property of a dissolved firm.
3. The power of an Official Assignees, Receiver of Court to release the property of the insolvent partner and to bring an action.
4. The right to sue or claim a set-off if the value of suit does not exceed ` 100 in value. Let us now examine the following cases:

DISSOLUTION OF FIRM (SECTIONS 39 - 47)

According to Section 39 of the Indian Partnership Act, 1932, the dissolution of partnership between all partners of a firm is called dissolution of the firm. Thus the Dissolution of firm means the discontinuation of the jural relation existing between all the partners of the firm. But when only one or the partners retires or becomes incapacitated from acting as a partner due to death, insolvency or insanity, the partnership, i.e. the relationship between such a partner and other is dissolved, but the rest may decide to continue. In such cases, there is in practice, no dissolution of the firm. The particular partner goes out, but the remaining partners carry on the business of the firm, it is called dissolution of partnership. In the case of dissolution of the firm, on the other hand, the whole firm is dissolved. The partnership terminates as between each and every partner of the firm.

modes of Dissolution of a firm (Sections 39-44)

The dissolution of partnership may be in any of the following ways:

1. Dissolution without the order of the court or voluntary dissolution : It consists of following four types:

(a) Dissolution by agreement (Section 40):

A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

(b) Compulsory dissolution (Section 41): A firm is compulsorily dissolved- (i) by adjudication of all the partners or of all the partners but one as insolvent, or (ii) by happening of any event which makes it unlawful for the business of the firm to be carried on.

Example: A firm is carrying on the business of trading a particular chemical and a law is passed which bans on the trading of such a particular chemical. The business of the firm becomes unlawful and so the firm will have to be compulsorily dissolved.

(c) Dissolution on the happening of certain contingencies (Section 42): Subject to contract between the partners a firm can be dissolved on the happening of any of the following contingencies-

(i) Where the firm is constituted for a fixed term, on the expiry of that term.

(ii) Where the firm is constituted to carry out one or more adventures or undertaking, then by completion thereof.

(iii) On the death of a partner, and

(iv) On the adjudication of a partner as an insolvent.

(d) Dissolution by notice of partnership at will (Section 43): 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. If the date is mentioned, the firm is dissolved as from the date mentioned in the notice as the date of dissolution, or

If no date is so mentioned, as from the date of the communication of the notice.

(2) Dissolution by the court (Section 44):Court may, at the suit of the party, dissolve a firm on any of the following ground:

(a) Insanity/unsound mind: Where a partner has become of unsound mind, the court may dissolve the firm on a suit of the other partners or by the next friend of the insane partner.

(b) Permanent incapacity: When a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner, there the court may dissolve the firm.

(c) Misconduct (Section 45): Where a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of business, the court may order for dissolution of the firm, by giving regard to the nature of business.

(d) Persistent breach of agreement: Where a partner other than the partner suing, willfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conduct himself in matters relating to the business that it is not reasonably practicable for other partners to carry on the business in partnership with him, there the court may dissolve the firm at the instance of any of the partners.

(e) Transfer of interest: Where a partner other than the partner suing, has transferred the whole of his interest in the firm to a third party or has allowed his share to be charged or sold by the court, in the recovery of arrears of land revenue, the court may dissolve the firm at the instance of any other partner.

(f) Continuous losses: Where the business of the firm cannot be carried on except at a loss in future also, the court may order for its dissolution.

(g) Just and equitable grounds: Where the court considers any other ground to be just and equitable for the dissolution of the firm, it may dissolve a firm. The following are the cases for the just and equitable grounds-

(i)Deadlock in the management.

(ii)Where the partners are not in talking terms between them.

(iii) Loss of substratum.

(iv) Gambling by a partner on a stock exchange.

REVIEW QUESTIONS

1. What is partnership? What are essential elements of partnership?
2. Describe various types of partnership in detail.
3. Discuss about various types of partners.
4. Explain the conditions in the relations of partners.
5. What are duties of partners towards each other?
6. What is the mode of effecting registration?
7. What are the consequences of non-registration?
8. Describe the process of dissolution of firm.

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

UNIT-5 IN SOLVENCY LAW

CONTENTS

Insolvency

Insolvency is when an individual, corporation, or other organization cannot meet its financial obligations for paying debts as they are due. Insolvency can occur when certain things happen, some of which may include: poor cash management, increase in cash expenses, or decrease in cash flow. A finding of insolvency is important, as specific rights are enabled for the creditor to exercise against the insolvent individual or organization. For example, outstanding debts may be paid off by liquidating assets of the insolvent party. Prior to proceedings, it is common for the insolvent entity to meet with the creditor in order to attempt to arrange an alternative payment method.

It is possible that a business may be "insolvent" in cash flow, yet still solvent on the balance sheet. These cases may involve illiquid assets, which help the balance sheet's solvency but not the cash flows. This can also work the other way around with negative net assets (balance sheet insolvency), yet a positive cash flow. In this case, the flow of cash is simply enough to pay off debts, despite the fact that the business has more liabilities than assets.

Bankruptcy

Bankruptcy is not exactly the same as insolvency. Technically, bankruptcy occurs when a court has determined insolvency, and given legal orders for it to be resolved. Bankruptcy is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency. Insolvency describes a situation where the debtor is unable to meet his/her obligations. Bankruptcy is a legal maneuver in which an insolvent debtor seeks relief.

Reasons behind insolvency

The main reasons behind insolvency are primarily poor management and financial constraints. This is much more prevalent in smaller companies. Specifically, the reasons are:

• Market – Company did not recognize the need for change
• Bad debts – obviously money owed by customers
• Management – failure to acquire adequate skills, imprudent accounting, lack of information systems
• Finance – loss of long term finance, over gearing or lack of cash flow
• Knock on effect – i.e. from other insolvencies
• Other – for example excessive overheads etc

It is however observed that the larger the company, the better the chance of survival and of receiving remedial treatment and of paying creditors.

Insolvency Laws in India

Under the Constitution of India 'Bankruptcy & Insolvency' is Entry 9 in List III -Concurrent List, (Article 246 –Seventh Schedule to the Constitution) i.e. both Center and State Governments can make laws relating to this subject. In India the process of winding up of companies is regulated by the Companies Act and is under the supervision of the court. Although article 19 (1)(g) of the Constitution of India gives freedom to practice any profession or to carry on any occupation, trade or business to the citizens of India, there are restrictions on closure of any industrial undertaking.

Such restriction is justified on the ground that it is in public interest to prevent unemployment. As a result of such policy there is a freedom to undertake any industrial activity, but there is no freedom to exit. In the process of deregulation and liberalization number of restrictions on undertaking industrial activity has been withdrawn and relaxed. There is a need to take the process of liberalization a step further and recognize that so long as a company is acting in the interest of shareholders and otherwise observing the law of the land it should have the freedom to manage its affairs, merge, amalgamate, restructure and reorganize or otherwise plan its affairs as it considers best in the interest of the stakeholders.

Interference by the Government or court or any tribunal should only be in the event of any detriment to the shareholders or under the Competition Act to prevent monopolies or restrictive trade practices. While undertaking reforms in the Insolvency Laws there is a need to change the focus from strict regulation of the activities of companies to granting freedom to the industry in conducting its business activities and lay down norms for protection of interest of stakeholders.

Insolvency Laws for Individuals and Corporates

In India the term insolvency has not been defined anywhere, but still the word is commonly used to describe the process of insolvency. The stream of insolvency laws in India can be segregated under three heads:

1. Pre-Insolvency Workouts

Pre-insolvency Work-out Schemes include:

• Companies Act, 1956 (Sections 391 to 396)

• The Sick Industrial Companies (Special Provisions) Act, 1985

• Corporate Debt Restructuring Scheme

• Asset Reconstruction under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)

• RBI Guidelines on Special Mention Accounts.

2. Insolvency of individuals and unincorporated entities

This deals with individuals and partnership firms going insolvent. The consequence of this personal insolvency is declaration of insolvency and incapacity to contract. It is governed by Provincial Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1909.

3. Corporate Insolvency

This deals with corporates going insolvent. The consequence is usually winding up of the company under the Companies Act, 1956.

4. Insolvency of incorporated associations and other incorporated bodies

This deals with insolvency of bodies like co-operative societies and body corporates incorporated under certain legislations.

There are certain common principles to corporate as well as individual insolvency. In any insolvency it is a grounded principle that all creditors must be treated equally. The only exception to this rule is that – preferential creditors are paid out in preference to ordinary creditors and secured creditors get priority next to preferential creditors.

Present nature of Insolvency Process in India

1. Insolvency/ Liquidation process essenti lly encompasses aspects of recovery, revival, reconstruction and winding up and therefore the process has to be seen in a holistic manner with all such aspects in sight.

2. No Separate Unified Insolvency Code covering all the above aspects in one place is present. Therefore the process is complicated, time consuming and ineffective.

3. The present Legal and procedural framework relating to Corporate Insolvency apart from several other special provisions like debt recovery laws, is laid out by major legislations, namely:

o Companies Act 1956

o Sick Industrial Companies (Special Provisions) Act, 1985 [SICA]

o Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) Act, 2002 also known as the Securitization Act

o Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act)

[Debt Recovery Tribunals are set up under this Act]

Provisions with regard to insolvency of individuals and unincorporated bodies The Presidency Towns Insolvency Act, 1909 and Provisional Insolvency Act, 1920 are two major enactments that deal with personal insolvency and have parallel provisions and their substantial content is also similar but the two differ in respect of their territorial jurisdiction. While Presidency Towns Insolvency Act, 1909 applies in Presidency towns namely, Kolkata, Mumbai and Chennai, Provincial Insolvency Act, 1920 applies to all provinces of India. These two Acts are applicable to individuals as well as to sole proprietorships and partnership firms.

The Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 exhaustively lays down as to what are the acts of insolvency, the powers of Courts to adjudicate a person as insolvent, restriction on the jurisdiction of the Court annulment of adjudication proceedings, consequences of an order of adjudication, submissions of proposal for composition in satisfaction of debts or for scheme of arrangement of the affairs of the insolvent, conditions in which composition and schemes of arrangement are approved by the Court, control over the person and property of insolvent, discharge of insolvent, administration and distribution of the property of the insolvent, Properties which would be available for payment of debts, realization of the insolvent property, appointments, duties, powers and functions of Official Assignee and other insolvency related procedural matters.

A debtor is supposed to have committed an act of insolvency in the following cases:

(a) If, in the States or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;

(b) If, in the States or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;

(c) If, in the States or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;

(d) If, with intent to defeat or delay his creditors,--

(i) he departs or remains out of the States,

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him;

(e) If any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money;

(f) If he petitions to be adjudged an insolvent;

(g) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts;

(h) If he is imprisoned in execution of the decree of any Court for the payment of money

For example – If an individual has assets worth Rupees 50 crores and liabilities worth Rupees 5 crores, he will be considered insolvent if he refuses to discharge his liabilities in spite of having assets more than his liabilities. The main criteria for a person to be adjudged insolvent is that he should suspend or refuse payment to his debtors irrespective of whether he has the money to repay his debtors.

Provisions with regard to Corporate Insolvency

• Part VII consisting of Sections 425 to 560 of the Companies Act, 1956 makes provisions deals with modes of winding up, cases in which the company may be wound up by the Court, consequences of winding up order appointment, powers, duties and functions of the Official Liquidators, committee of inspection, voluntary winding up of a company, a members winding up, a creditors winding up, winding up subject to the supervision of the Court, effect on winding up of antecedent and other transactions, etc.

• If Company is unable to pay its debt – discretionary power with Court to wind up the company [sec 433]

• If Company having become a "sick company" – mandatory reference to BIFR [SICA, proposed to be replaced by sec. 424A of Companies (second amendment) Act 2002]

• If Default in terms of repayment of debentures: appointment of receiver.

• Compromise and arrangement with creditors and members – sec 391-4 of Companies Act 1956: Apart from the lengthy and time consuming winding up procedure, all the companies liable to be wound up under the Companies Act may resort to the alternative of compromise or arrangement. The Court may make orders to enforce these remedies and where a meeting of creditors or class

of creditors or members or any class of members is called upon, certain disclosures shall be made. The orders passed by the Courts include transfer of property to another company and to facilitate amalgamation, merger and demergers..

• Reduction of capital –sec 100. Even reduction of capital to the extent that the capital is lost, or capital is in surplus is permitted.

• Striking off the name of a defunct company – sec. 560 Insolvency of incorporated associations and other incorporated bodies There are other categories of companies incorporated under various specific statutes, including public sector banks and insurance companies are to go by liquidation and reconstruction process in accordance with government regulatory process and such are more of administrative in nature.

Enforcement of security interests

"Security interest" means right, title and interest of any kind whatsoever upon property created in favour of any secured creditor and includes any mortgage, charge, hypothecation or assignment. Enforcement of security interests, and enforcement of claims of special creditors is dealt with by several statues in India, including the

SARFAESI Act, 2002 in case of secured creditors being banks, Recovery of Debts due to Banks & Financial Institutions Act 1993 in case creditors being banks or financial institutions, and State Finance Corporations Act, 1951 in case of creditors being State Finance Corporations, etc.

Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights mentioned below:

(a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) Take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Stacking order of priorities

The debts due as workmen's dues and the claims of the secured creditors sacrificed to workmen have an overriding preferential claim or priority to all debts. The debts payable shall be paid in full unless the assets are insufficient to meet them in which case they shall abate in equal proportions.

In the dying stages of winding up proceedings, there is stacking of priorities running from the secured creditors from out of their assets securing their claims, subject to the claims of the workmen, further, the costs and expenses of winding up under Section 530 (6), then, the preferential creditors under Section 530 (1), the floating charge holders and the unsecured creditors.

There are other statutory preferential payments for taxes, revenues and cess, wages or salary for past due prior to winding up or for period not exceeding 4 months when there is a continuing employment for the beneficial winding up and for provident fund, pension and other claims.

Rules of insolvency for valuation of annuities and contingent liabilities as are prescribed by the Provincial Insolvency Act and the Presidency Town Insolvency Act continue to apply.

Also, any transfer of property, delivery of goods, payment, execution or other act relating to the property made, taken or done by or against the company within six months prior to commencement of winding up be deemed a fraudulent preference.

Corporate restructuring

Just like a person requires treatment to treat his disease, a sick company also requires some form of treatment to overcome its problem of debts. This treatment may be in the form of restructuring of a company. Restructuring is the corporate management term for the act of reorganizing the legal, ownership, operational, or other structures of a company for the purpose of making it more profitable, or better organized for its present needs. Alternate reasons for restructuring include a change of ownership or ownership structure, demerger, or a response to a crisis or major change in the business such as bankruptcy, repositioning, or buyout. Restructuring may also be described as corporate restructuring, debt restructuring and financial restructuring.

In fact, the basic idea behind corporate restructuring and insolvency is to "save companies, preserve businesses and improve returns".

Compromises & Arrangements

Apart from the lengthy and time consuming winding up procedure, all the companies liable to be wound up under the Companies Act may resort to the alternative of compromise or arrangement. The Court may make orders to enforce these remedies and where a meeting of creditors or class of creditors or members or any class of members is called upon, certain disclosures shall be made. The orders passed by the Courts include transfer of property to another company and to facilitate amalgamation, merger and demergers. Even reduction of capital to the extent that the capital is lost, or capital is in surplus is permitted.

REVIEW QUESTIONS

1. Define insolvency. What is difference between insolvency and bankruptcy?
2. What are reasons behind insolvency?
3. Describe insolvency laws in India
4. Discuss about insolvency laws for individuals and corporate.
5. What are provisions with regard to corporate insolvency
6. Describe the process of compromises & arrangements

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

IMPORTANT NOTES

UNIT-6 CARRIAGE LAW

CONTENTS

LAWS GOVERNING CARRIAGE OF GOODS AND MULTI MODAL TRANPORTATION

Accordingly, the law relating to carrying of goods in India is contained in the following enactments:

1. In case of carriage of goods by land:

(i) Carriage by Road Act, 2007 (Earlier enactment - The Carriers Act, 1865).

(ii) The Railways Act, 1989.

2. In the case of carriage of goods by air:

The Carriage by Air Act, 1972

3. In case of carriage of goods by sea:

(i) The (Indian) Bills of Landing Act, 1856.

(ii) The Carriage of Goods by Sea Act, 1925.

(iii) The Merchant Shipping Act, 1958.

(iv) The Marine Insurance Act, 1963.

4. Law governing multimodal transportation of goods

The Multimodal Transportation of Goods Act, 1993 governs multi modal transportation of goods.

Wherever there is no specific provision for a particular matter in these statutes, then the Indian Courts resort to English Common Law. In the commercial life of any country, the need for carrying goods from one place to another cannot be overemphasised. Also, goods are to be moved from one country to another. For these purposes, a contract of carriage is to be entered into. The persons, organisations or associations which carry goods are known as carriers. Goods may be carried by land (including inland waterways), sea or air. Accordingly, the law relating to carrying of goods is contained in the following enactments:

1. In case of carriage of goods by land:

(i) Carriage by Road Act, 2007 (Earlier enactment - The Carriers Act, 1865).

(ii) The Railways Act, 1989.

2. In the case of carriage of goods by air:

The Carriage by Air Act, 1972.

3. In case of carriage of goods by sea:

(i) The (Indian) Bills of Landing Act, 1856.

(ii) The Carriage of Goods by Sea Act, 1925.

(iii) The Merchant Shipping Act, 1958.

(iv) The Marine Insurance Act, 1963.

Wherever there is no specific provision for a particular matter in these statutes, then the Indian Courts resort to English Common Law.

CARRIAGE OF GOODS BY LAND

The Carriage by Road Act 2007 and the Railways Act, 1890 apply to carriage of goods by land. The Carriage by Road Act applies only to common carriers as distinguished from private carriers.

As per Notification No. S.O 2001(E) Dated 13th August 2010, the Central government appoints the 1st of March 2011 as the date when the Carriage by Road Act 2007 shall come into force.

The Carriage by Road Act, 2007 defines the term "common carrier" and provides for his rights, duties and liabilities. As regards matters not covered by this Act, the rules of English Common Law will apply. A common carrier may be any individual, firm or company, which transports goods as regular business for money, over land or inland waterways. A private carrier, carries his own goods and may occasionally carry goods for selected persons. He is not covered by the Carriage by Road Act but by the Indian Contract Act.

The Carriage by Road Act 2007

The Carriage by Road Act, 2007 was passed to repeal the original Carriers Act, 1865 as it had become obsolete. The Carriage by Road Act, 2007 received the President's assent on 29th September 2007 and was notified on 1.10.2007. The Act will come into force on 1st March 2011. The Ministry of Road Transport and Highways, has framed draft Rules under this Act namely "Carriage by Road Rules 2010" and they are put on the Ministry's website for comments.

It is an Act to provide for the regulation of common carriers, limiting their liability and declaration of value of goods delivered to them to determine their liability for loss, or damage to, such goods occasioned by the negligence or criminal acts of themselves, their servants or agents and for matters connected therewith or incidental thereto.

The Act extends to the whole of India except the State of Jammu and Kashmir. The Act contains only 22 sections and envisages a central

registration unit for all common carriers and imposes deterring penalty on common carrier for violation of provisions of the Act.

Ministry of Road Transport and Highways

An apex organisation under the Central Government, the Ministry of Road Transport and Highways (MORTH) is entrusted with the task of formulating and administering, in consultation with other Central Ministries/Departments, State Governments/UT Administrations, organisations and individuals, policies for Road Transport, National Highways and Transport Research with a view to increasing the mobility and efficiency of the road transport system in the country. The Ministry has two wings – Roads Wing and Transport Wing. The Road Transport Division of the Ministry is entrusted with the job of administration of the Carriage by Road Act 2007.

Meaning of Common Carrier

Under the Carriage by Road Act 2007, common carrier means " a person engaged in the business of collecting, storing, forwarding or distributing goods to be carried by goods carriages under a goods receipt or transporting for hire of goods from place to place by motorized transport on road, for all persons undiscriminatingly and includes a goods booking company, contractor, agent, broker and courier agency engaged in the door-to-door transportation of documents, goods or articles utilizing the services of a person, either directly or indirectly, to carry or accompany such documents, goods or articles but does not include the Government"

A common carrier in common-law countries (corresponding to a public carrier in civil-law systems, usually called simply a carrier) is a person or company that transports goods or people for any person or company and that is responsible for any possible loss of the goods during transport. A common carrier offers its services to the general public under license or authority provided by a regulatory body. The regulatory body has usually been granted authority by the legislation which created it. The regulatory body may create, interpret, and enforce its regulations upon the common carrier (subject to judicial review) with independence and finality, as long as it acts within the bounds of the enabling legislation.

Classification of Carriers

Carriers can be classified as: i. Common carriers; ii. Private carriers; iii. Independent carriers; or iv. gratuitous carriers. i. Common carrier - The Carriage by Road Act 2007 defines "common carrier". A common carrier ho lds itself out to provide service to the general public without discrimination (to meet the needs of the regulator's quasi judicial role of impartiality toward the public's interest) for the "public convenience and necessity". A common carrier must further demonstrate to the regulator that it is "fit, willing, and able" to provide those services for which it is granted authority.

Common carriers typically transport persons or goods according to defined and published routes, time schedules, and rate tables upon the approval of regulators.

ii. Private Carrier - A private carrier is distinguished from a common carrier whose primary business is the transport of goods, and which is in business to serve any customers that hire them, such as buses, railroads, trucking companies, airlines and taxis. Private carriers may refuse to sell their services at their own discretion, whereas common carriers must treat all customers equally. A private carrier is a company that transports only their own goods. Usually the carrier's primary business is not transportation but rather something else. A private carrier does not make a general offer to carry goods for any one from one place to another for hire. However, he may enter into a contract with someone to carry goods on the terms agreed upon between them. In such a situation, it is a contract of bailment. Therefore, such transactions are not covered by the Carriage by Road Act 2007.

iii. Independent Carrier - is an individual owner-operator or trucker who may make deals with private carriers, common carriers, contract carriers, or others as he or she wishes.

iv. Gratuitous Carrier - When a person carries goods of another free of charge, he is a gratuitous carrier. Similarly a person may give lift in his transport to another person voluntarily without any compensation. Thus a gratuitous carrier may carry not only goods but persons also free of charge.

It is to be noted that the Carriage by Road Act 2007 does not apply to the Government. Also though the liabilities of a common carrier are determined by the Carriage by Road Act 2007, a private carrier's liability is not determined by this Act. He is liable as a bailee as given in the Indian Contract Act, 1872.

Important Terms

Consignee – means the person named as consignee in the Goods Forwarding Note.

Consignor – means a person, named as consignor in the goods forwarding note, by whom or on whose behalf the documents, goods or articles covered by such forwarding note are entrusted to the common carrier for carriage thereof. Goods Forwarding Note – Every consignor shall execute a goods forwarding note in the prescribed form and manner which shall include a declaration about the value of the consignment and of goods of dangerous or hazardous nature. The consignor shall be responsible for the correctness of the particulars furnished by him in the Goods Forwarding Note. He also has to indemnify the common carrier against any loss suffered by him due to incorrectness or incompleteness of the note.

Goods Receipt - A Goods Receipt is a receipt issued by the common carrier. A common carrier shall issue a Goods Receipt in the prescribed Form and Manner in the following cases:

a. In case where the goods are to be loaded by the consignor, on the completion of such loading; or

b. In any other case, on the acceptance of the goods by him.

The Goods Receipt shall be issued in triplicate and the original shall be given to the consignor.

General Responsibility of Common Carrier

A common carrier shall be responsible for the loss, destruction, damage or deterioration in transit or non-delivery of any consignment entrusted to him for carriage, arising from any cause except the following namely:

a. act of God;

b. act of war or public enemy;

c. riots and civil commotion;

d. arrest, restraint or seizure under legal process;

e. order or restriction or prohibition imposed by the Central Government or

a State Government or by any officer or authority subordinate to the

Central Government or a State Government authorized by it in this behalf.

However, the common carrier shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery of the consignment if the common carrier could have avoided such loss, destruction, damage, deterioration or non-delivery had the common carrier exercised due diligence and care in the carriage of the consignment.

Rights, Duties and Liabilities of the Common Carrier

• Any person who is engaged or intends to engage in the business of common carrier has to apply for Registration

• The common carrier has to maintain a register in such form and manner as may be prescribed.

• For shifting the registered office mentioned in the certificate of registration, submit an application to the registering authority which granted the registration

• A common carrier shall not load the motor vehicle beyond the gross vehicle weight mentioned in the registration certificate whose registration number is mentioned in the Goods forwarding note or goods receipt and the common carrier shall not allow such vehicle to be loaded beyond the gross vehicle weight

• In case of loss, damage or delays to the consignment, the liability of the carrier is limited to such amount as may be prescribed having regard to the value, freight or nature of the goods, documents, or articles of the consignment. A higher contingent liability could be mutually agreed to,

on payment of a higher rate (called risk rate) for carrying any consignment considered risky.

• For any delay in delivery up to the mutually agreed period, the liability is limited to the freight charged.

• Every common carrier shall be liable to the consignor for the loss or damage to any consignment in accordance with the goods forwarding note, where such loss or damage has arisen on account of any criminal act of the common carrier, or any of his servants or agents

• The common carrier will have to ensure that hazardous goods are insured before the consignment is accepted. The Central Government may prohibit carriage of certain goods.

• A consignment is deemed as unclaimed if the receiver of goods (consignee) fails to take delivery within 30 days of notice. For perishables, the notice period is 24 hours. Unclaimed goods may be sold by the common carrier without further notice if they are perishable or after a further 15 day notice period if they are not perishable. The common carrier may retain a portion of the proceeds for the expenses incurred and return the rest to the consignor or consignee.

Registration of Common Carrier

Certificate of registration is necessary for a person to engage in the business of common carrier. Registration authority shall take decisions on the applications for registration.

An application for registration has to be made to the Registering Authority having jurisdiction in the area in which the applicant resides or has his principal place of business stating that the application is for the main office, in such form and manner and accompanied by such fees payable to the registering authority as may be prescribed. The application for registration for main office shall contain the details of branch office, if any, to be operated outside the jurisdiction of the State or Union Territory in which the main office is to be registered.

Every common carrier is required to:

a) Maintain a register,

b) Obtain prior approval if the main office needs to be shifted,

c) Submit specified information and returns, and

d) Display the certificate of registration or an attested copy of the certificate at the office.

In case of failure to comply with the provisions or in case of complaint being made against common carriers, the registering authority may give a notice to the holder to rectify the same. On failure to do this, the registering authority can suspend or revoke the registration.

Any person aggrieved by an order of the registering authority can appeal to the State Transport Appellate Tribunal.

Carriage of Goods by Rail

Summary of More Important Provisions The carriage of goods by rail is regulated by the Railways Act, 1989. Some of the more important provisions contained in the Act are summarised below:

1. Maintenance of rate books, etc., for carriage of goods (Section 61). Every railway administration shall maintain, at each station and to such other places where goods are received for carriage, the rate books or other documents which shall contain the rate authorised for the carriage of goods from one station to another and make them available for the reference of any person during all reasonable hours without payment of any fee.

2. Provision of rate risks (Section 63). Where any goods are entrusted to a railway administration for carriage, such carriage shall, except where owner's risk rate is applicable in respect of such goods, be at railway risk rate.

Any goods, for which owner's risk rate and railway risk rate are in force, may be entrusted for carriage at either of the rates and if no rate is opted, the goods shall be deemed to have been entrusted at owner's risk rate.

3. Forwarding note (Section 64). Every person entrusting any goods to a railway administration for carriage shall execute a forwarding note in such form as may be specified by the Central Government. The consignor shall be responsible for the correctness of the particulars furnished by him in the forwarding note. He shall indemnify the railway administration against any damage suffered by it by reason of the incorrectness or incompleteness of the particulars in the forwarding note.

4. Railway receipt (Section 65). A railway administration shall issue a railway receipt in such form as may be specified by the Central Government:

(a) in a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or

(b) in any other case, on the acceptance of the goods by it. A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein.

5. Carriage of dangerous or offensive goods (Section 67). No person shall take with him on a railway or require a railway administration to carry such dangerous or offensive goods, unless (i) he gives a notice in writing of their dangerous or offensive nature to the railway servant authorised in this behalf; and (ii) he distinctly marks on the outside of the package containing such goods their dangerous or offensive nature.

6. Liability of railway administration for wrong delivery (Section 80). Where a railway administration delivers the consignment to the person who produces the railway receipt, it shall not be responsible for any

wrong delivery on the ground that such person is not entitled thereto or that endorsement on the railway receipt is forged or otherwise defective.

Responsibility of a Railway Administration as a Carrier of Goods: Sections 93 to 112 of the Railways Act, 1989 contain provisions on this subject. These provisions are summarised below.

1. General responsibility of a railway administration as carrier of goods (Section 93). A railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or non-delivery of any consignment (goods entrusted to a railway administration for carriage), arising from any cause except the following, namely:

(i) An act of God;

(ii) An act of war;

(iii) An act of public enemies;

(iv) Arrest, restraint or seizure under legal process;

(v) Orders of restrictions imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central Government or a State Government authorised by it in this behalf;

(vi) Act of omission or negligence of the consignor or consignee endorsee or the agent or servant of the consignor or the consignee or the endorsee;

(vii) Natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;

(viii) Latent defects;

(ix) Fire, explosion or any unforeseen risks.

Liability of a common carrier vis-a-vis the liability of a railway administration. The liability of a railway administration is the same as that of a common carrier. In other words, even where any loss, destruction, damage, deterioration or non delivery is proved to have arisen from any one or more of the aforesaid nine cases, a railway administration shall not be relieved of its responsibility unless it further proves that it has used reasonable foresight and care in the carriage of the goods [Union of India v Orissa Textile Mills, AIR (1979) Ori. 165].

A railway administration, like a common carrier, is bound to carry the goods of every person who is willing to pay the freight and comply with other requirements.

2. Delay or retention in transit (Section 95). A railway administration shall be responsible for the loss, destruction, damage or deterioration of any consignment proved by the owner to have been caused by the delay or detention in their carriage. The railway administration can, however, avoid liability if it proves that the delay or detention arose for reasons beyond its control or without negligence or misconduct on its part or on the part of any of its servants.

3. Owner’s risk rate or railway risk rate (Section 97). A consignment may be carried by a railway administration either at owner’s risk rate or

railway risk rate. Owner's risk rate is a special reduced rate whereas railway risk rate is an ordinary tariff rate. Owner's risk rate is lower than the railway risk rate for the simple reason that the goods in this case are carried at the owner's risk. In case of owner's risk rate, the railway administration is not responsible unless it is proved that any loss, destruction, damage or deterioration or non-delivery of goods arose from negligence or misconduct on the part of the railway administration or its servants.

4. Liability for damage to goods in defective condition or defectively packed (Section 98). Goods tendered to a railway administration to be carried by railway may be (a) in a defective condition or (b) defectively packed. As a result of these, goods are liable to damage, deterioration, leakage or wastage. If the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, the railway administration is not responsible for any damage, deterioration, leakage or wastage unless negligence or misconduct on the part of the railway administration or of its servants is proved.

5. Liability after termination of transit (Section 99). Whether the goods are carried at owner's risk rate or railway risk rate, the liability of the railway administration for any loss of goods within a period of seven days after the termination of transit is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872. But where the goods are carried at owner's risk rate the railway administration is not liable for such loss, destruction, damage, deterioration or non-delivery of goods except on proof of negligence or misconduct on the part of the railway administration or any of its servants.

After seven days from the date of termination of transit the railway administration is not liable in any case for any loss of such goods. Notwithstanding this provision, the railway administration is not responsible after the termination of transit for the loss, destruction, damage, deterioration or non-delivery of articles of perishable goods, animals, explosives and other dangerous goods.

6. Responsibility as carrier of luggage (Section 100). A railway administration shall not be responsible for the loss, destruction, damage, deterioration or non-delivery of any luggage unless a railway servant has booked the luggage and given a receipt therefor. Also it is to be proved that the loss, etc., was due to the negligence or misconduct on the part of the railway administration or on the part of any of its servants.

In the case of luggage which is carried by the passenger in his own charge, the railway administration shall not be responsible for the loss, etc., unless it is proved that the loss, etc., was due to the negligence or misconduct on the part of the railway administration or on the part of any of its servants.

7. Responsibility as a carrier of animals (Section 101). A railway administration shall not be responsible for any loss or destruction of, or injuries to, any animal carried by railway arising from fright or restiveness of the animal or from overloading of wagons by the consignor.

8. Exoneration from liability in certain cases (Section 102). A railway administration shall not be responsible for the loss, destruction, damage or deterioration or non delivery of any consignment —

(i) When such loss, etc., is due to the fact that a materially false description of the consignment is given; or

(ii) Where a fraud has been practised by the consignor or the endorsee, or by an agent of the consignor, consignee or the endorsee; or

(iii) Where it is proved by the railway administration to have been caused by, or to have arisen from -

(a) Improper loading or unloading by the consignor, or the consignee or the endorsee, or by an agent of the consignor, consignee or the endorsee;

(b) riot, civil commotion, strike, lock-out, stoppage or restraint of labour from whatever cause arising whether partial or general; or

(iv) For any indirect or consequential loss or damage or for loss of particular market.

CARRIAGE OF GOODS BY AIR

There is an international legal regime governing the liability of air carriers for injury or death of passengers, for destruction or loss of or damage to baggage and cargo, and losses caused by delay in international carriage of passengers , baggage and cargo. This regime is set out in a number of international instruments. However, India had so far ratified only two instruments, namely the Warsaw Convention 1929, and the Warsaw Convention as amended by The Hague Protocol 1955 and the same had been given effect to by the Carriage by Air Act 1972.

The various instruments adopted by the International Civil Aviation Organization (ICAO - a specialized agency of the United Nations, which codifies the principles and techniques of international air navigation and fosters the planning and development of international air transport to ensure safe and orderly growth) failed to receive the kind of universal acceptance as parent Warsaw Convention and the Hague Protocol had received. As a result a situation arose where several different combinations of liability regimes came into existence defying the much desired uniformity and unification of international law in this field. The ICAO then embarked upon serious initiative for a socio economic study of the levels of compensation and finally the Montreal Convention 1999 was adopted for the unification of certain rules for international carriage by air which aims to achieve the dual purpose of modernizing as well as consolidating the various instruments comprising the Warsaw System.

As of July 2010, 97 countries signed the Montreal Protocol treaty which included the United States, members of the European Union (EU), Australia, Canada, China, India, Japan, Korea and Mexico. India acceded to the Convention on 1st May 2009 and it entered into force in India on 30th June 2009.

In India, the Carriage by Air Act 1972 was amended by the Carriage by Air (Amendment) Act 2009 to give effect to the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929 and to the said Convention as amended by the Hague Protocol on the 28th day of September, 1955 and also to the Montreal Convention signed on the 28th day of May, 1999 and to make provision for applying the rules contained in the said Convention in its original form and in the amended form subject to exceptions, adaptations and modification to non-international carriage by air and for matters connected therewith.

The principal Act came into force w.e.f.15th May, 1973 vide Gazette of India, Part II, Section 3 (ii) (Ext) dated 26th March, 1973 and the Carriage by Air (Amendment) Act, 2009 came into force w.e.f.1st July,2009 vide Gazette of India, Part II, Section 3 (ii) (Ext) dated 20th March, 2009. The Warsaw System allowed four choices of jurisdiction for filing of a claim by the passenger namely, place of issue of ticket, principle place of business of the carrier, the place of destination of the passenger and the place of domicile of the carrier. Through the Montreal Convention a fifth jurisdiction is added which is the place of domicile of the passenger, provided the airline has a presence there. Therefore an Indian would be able to file claim in India even if the journey was undertaken outside India.

Administrative Machinery

The Ministry of Civil Aviation is the nodal Ministry responsible for the formulation of national policies and programmes for development and regulation of Civil Aviation and for devising and implementing schemes for the orderly growth and expansion of civil air transport. Its functions also extend to overseeing airport facilities, air traffic services and carriage of passengers and goods by air. It is responsible for the administration of the Aircraft Act, 1934, Aircraft Rules, 1937 and various other legislations pertaining to the aviation sector in the country. This Ministry exercises administrative control over attached and autonomous organizations like the Directorate General of Civil Aviation, Bureau of Civil Aviation Security and Indira Gandhi Rashtriya Udan Academy and affiliated Public Sector Undertakings like National Aviation Company of India Limited, Airports Authority of India and Pawan Hans Helicopters Limited. The Commission of Railway Safety, which is responsible for safety in rail travel and operations in terms of

the provisions of the Railways Act, 1989 also comes under the administrative control of this Ministry The Airports Economic Regulatory Authority of India The Airports Economic and Regulatory Authority of India was created by the enactment of the Airports Economic Regulatory Authority of India Act 2008 (AERA Act 2008).

It is An Act to provide for the establishment of an Airports Economic Regulatory Authority to regulate tariff and other charges for the aeronautical services rendered at airports and to monitor performance standards of airports and also to establish Appellate Tribunal to adjudicate disputes and dispose of appeals and for matters connected therewith or incidental thereto.

Thus, AERA is the economic regulator of the airport infrastructure sector and air navigation services in the country AERA Act, 2008, was enacted by Parliament and was notified in the Gazette of India vide Gazette No.36 dated 05.12.2008. The Act contains VII Chapters divided into 55 sections and contains One Schedule. All provisions of AERA Act, except chapter III and chapter VI, came into force on 1st day of January 2009. The provisions of Chapter III and VI also came into force from first day of September,2009. The Airports Economic Regulatory Authority (AERA) is a statutory body constituted under the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008) notified vide Gazette Notification dated 5th December 2008. The Central Government has notified the establishment of the Airports Economic Regulatory Authority with effect from 12th May, 2009 vide its notification no GSR 317 (E). The Head Office of The Authority is at New Delhi. The Airports Economic Regulatory Authority (AERA), will not have regulation over Army and Para-military Airports. AERA will prescribe tariffs every five years, and will also keep a check on the economic and operational viability of airports. Airport operators will have to get the prior approval of the regulator before charging a specific user development fee at an airport. Besides, it will also prescribe the passenger service fees. The statutory functions of the AERA as enshrined in the Airports Economic Regulatory Authority of India Act, 2008 are as below:

a. To determine the tariff for the aeronautical services taking into consideration.

i. The capital expenditure incurred and timely investment in improvement of airport facilities.

ii. The service provided, its quality and other relevant factors.

iii. The cost for improving efficiency.

iv. Economic and viable operation of major airports.

v. Revenue received from services other than the aeronautical services.

vi. The concession offered by the Central Government in any agreement or memorandum of understanding or otherwise.

vii. Any other factor which may be relevant for the purposes of this Act.

b. To determine the amount of the Development Fees in respect of major airports.

c. To determine the amount of the Passengers Service Fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934.

d. To monitor the set Performance Standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any authority authorized by it in this behalf.

e. To call for such information as may be necessary to determine the tariff under clause (a).

f. To perform such other functions relating to tariff, as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

Important points under the Act:

1. Aeronautical charges are the tariff for providing the aeronautical services.

2. Under Section 2(a) of the Act “aeronautical service" means any service provided-

(i) for navigation, surveillance and supportive communication thereto for air traffic management;

(ii) for the landing, housing or parking of an aircraft or any other ground facility offered in connection with aircraft operations at an airport;

(iii) for ground safety services at an airport;

(iv) for ground handling services relating to aircraft, passengers and cargo at an airport;

(v) for the cargo facility at an airport;

(vi) for supplying fuel to the aircraft at an airport; and

(vii) for a stake-holder at an airport, for which the charges, in the opinion of the

Central Government for the reasons to be recorded in writing, may be determined by the Authority;

3. Passenger Service Fee (PSF) : Passenger Service Fee is levied under rule 88 of the Indian Aircraft Rules 1937 which is collected by licensee from embarking passengers. It has two components, namely, Security Component and Facilitation Component. Security Component is utilised for incurring the expenditure in respect of the Aviation Security Force deployed at the airports and related equipments. The Facilitation Component is appropriated by the airport operator (s) towards services provided to the passengers at the airport. Further, Section 22 of the Airports Authority of India Act 1994 (AAI Act) empowers the AAI to charge fees for the amenities given to the passengers and visitors at any airport, civil enclave, heliport or airstrip.

4. Development Fee (DF) : Development Fee (DF) is levied on embarking passengers at an airport at the rate as may be prescribed by

Central Government, as per Airports Authority of India Act, 1994 (Section 22A) for following purposes:

a. Funding or financing the costs of upgradation, expansion or development of the airport at which the fee is collected; or

b. Establishment or development of a new airport in lieu of the airport referred to in clause a); or

c. Investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities.

It is a 'pre-funding' measure. In terms of Section 13(1)(b) of the AERA Act, AERA is required to determine the amount of development fee in respect of major airports.

5. User Development Fee(UDF) :User Development Fee is levied under rule 89 of the Aircraft rules 1937. Though the rule does not prescribe the specific purpose of levy, UDF is conventionally levied to ensure fair return to the airport operators on the investments made for providing airport services. In other words, UDF is a revenue enhancing measure to cover any deficit in revenues so as to ensure fair return on investment.

CARRIAGE OF GOODS BY SEA

Maritime Transport is a critical infrastructure for the social and economic development of a country. It influences the pace, structure and pattern of development.

In India, carriage of goods by sea is governed b the Indian Bills of Lading Act, 1856, the Indian Carriage of Goods by Sea Act, 1925, the Merchant Shipping Act, 1958, and general statutes, such as the Marine Insurance Act, 1963, the Contract Act, 1872, the Evidence Act, 1872, the Indian Penal Code, 1860, the Transfer of Property Act, 1882, the Code of Civil Procedure, 1908, the Criminal Procedure Code, 1973, the Companies Act, 1956 etc as well as the general principles of law such as the law of tort, public and private international law etc. In this connection, reference may also be made to the Indian Ports Act, 1908 and the Major Port Trusts Act, 1963 concerning the administration of the port and the jurisdiction over ships in port, the Customs Act, 1962 containing various regulatory measures affecting ships, goods and persons in connection with importation or exportation of goods, as well as the provisions governing employment of labour. The Indian Bills of Lading Act, 1856 emphasises the negotiable and other characteristics of a bill of lading. The Carriage of Goods by Sea Act, 1925, contains the Hague Rules regulating the respective rights and liabilities of the parties to a contract governed by bills of lading or similar documents of title for carriage of goods by sea "from any port in India to any other port

whether in India or outside India". The Merchant Shipping Act embodies rules regarding registration of Indian ships; transfers or mortgages of ships or shares; national character and flag; employment of seamen; safety, nuclear ships; collisions; accidents at sea and liability; limitation of liability; navigation; prevention of pollution; investigation and enquiries; wreck and salvage; coasting trade; sailing vessels; penalities and procedure, etc. Many of these provisions have been adopted from rules formulated by various international conventions.

Indian statutes lag behind the development of international law in comparision to contemporaneous statutes in England and other maritime countries. Although the Hague Rules are embodied in the Carriage of Goods by Sea Act, 1925, India never became a party to the International Convention laying down those rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels 1924). The Carriage of Goods by Sea Act, 1925 merely followed the (United Kingdom) Carriage of Goods by Sea Act, 1924. The United Kingdom repealed the Carriage of Goods by Sea Act, 1924 with a view to incorporating the Visby Rules adopted by the Brussels Protocal of 1968. The Hague-Visby Rules were accordingly adopted by the Carriage of Goods by Sea Act, 1971 (United Kingdom). Indian Legislation has not, however, progressed, notwithstanding the Brussels Protocol of 1968 adopting the Visby Rules or the United Nations Convention on the Carriage of Goods by Sea, 1978 adopting the Hamburg Rules. The Hamburg Rules prescribe the minimum liabilities of the carrier far more justly and equitably than the Hague Rules so as to correct the tilt in the latter in favour of the carriers. The Hamburg Rules are acclaimed to be a great improvement on the Hague Rules and far more beneficial from the point of view of the cargo owners. India has also not adopted the International Convention relating to the Arrest of Sea-going Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships. United Nations International Conventions on Carriage of Goods by Sea Hague Rules 1924 International Convention on Carriage of Goods by Sea. These rules govern liability for loss or damage to goods carried by sea under a bill of lading.

Hamburg Rules In March 1978 an international conference in Hamburg adopted a new set of rules (The Hamburg Rules), which radically alter

the liability which ship owners have to bear for loss or damage to goods in the courts of those nations where the rules apply.

1. United Nations Convention on the Carriage of Goods by Sea (1978) (the “Hamburg Rules”)

This Convention establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. It was prepared at the request of developing countries and its adoption by States has been endorsed by such intergovernmental organizations as UNCTAD, Asian-African Legal Consultative Committee and the Organization of American States. The twenty ratifications and accessions needed for the Convention to enter into force have been deposited and the Convention entered into force on 1 November 1992.

2. 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the "Rotterdam Rules" Adopted by the General Assembly on 11 December 2008, the Convention establishes a uniform and modern legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door carriage that includes an international sea leg. The Convention builds upon, and provides a modern alternative to, earlier conventions relating to the international carriage of goods by sea, in particular, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924) ("the Hague Rules"), and its Protocols ("the Hague-Visby Rules"), and the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) ("the Hamburg Rules"). The Rotterdam Rules provide a legal framework that takes into account the many technological and commercial developments that have occurred in maritime transport since the adoption of those earlier conventions, including the growth of containerization, the desire for door-to-door carriage under a single contract, and the development of electronic transport documents. The Convention provides shippers and carriers with a binding and balanced universal regime to support the operation of maritime contracts of carriage that may involve other modes of transport. Ministry of Shipping Ministry of Shipping was formed in 2009 by bifurcating the erstwhile Ministry of Shipping, Road Transport and Highways into two independent ministries. The Ministry of Shipping, a branch of the Government of India, is the apex body for formulation and administration of the rules and regulations and laws relating to Shipping.

The Ministry of Shipping encompasses within its fold shipping and port sectors which also include shipbuilding and ship repair, major ports and inland water transport. The Ministry has been entrusted with the responsibility to formulate policies and programmes on these sectors and their implementation.

REVIEW QUESTIONS

1. What are the laws governing carriage of goods and multi modal transportation?
2. Discuss mani provisions of the carriage by road act 2007.
3. Explain classification of carriers.
4. What are general responsibilities of common carrier?
5. What are rights, duties and liabilities of the common carrier?
6. Describe the registration process of common carrier?
7. What is the provision for carriage of goods by rail?
8. What is the provision for carriage of goods by air?
9. What is the provision for carriage of goods by sea?

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

IMPORTANT NOTES

UNIT-7 INSURANCE LAW

CONTENTS

PRINCIPLES OF INSURANCE

The business of insurance aims to protect the economic value of assets or life of a person. Through a contract of insurance the insurer agrees to make good any loss on the insured property or loss of life (as the case may be) that may occur in course of time in consideration for a small premium to be paid by the insured.

Apart from the above essentials of a valid contract, insurance contracts are subject to additional principles. These are:

1. Principle of Utmost good faith
2. Principle of Insurable interest
3. Principle of Indemnity
4. Principle of Subrogation
5. Principle of Contribution
6. Principle of Proximate cause
7. Principle of Loss of Minimization

These distinctive features are based on the basic principles of law and are applicable to all types of insurance contracts. These principles provide guidelines based upon which insurance agreements are undertaken.

A proper understanding of these principles is therefore necessary for a clear interpretation of insurance contracts and helps in proper termination of contracts, settlement of claims, enforcement of rules and smooth award of verdicts in case of disputes. Now we will be discussing various principles of Insurance in detail

PRINCIPLE OF UBERRIMAE FIDEI (UTMOST GOOD FAITH)

• Both the parties i.e. the insured and the insurer should have a good faith towards each other.

• The insurer must provide the insured complete, correct and clear information of subject matter.

• The insurer must provide the insured complete, correct and clear information regarding terms and conditions of the contract.

• This principle is applicable to all contracts of insurance i.e. life, fire and marine insurance.

Principle of Uberrimae fidei (a Latin phrase), or in simple English words, the Principle of Utmost Good Faith, is a very basic and first primary principle of insurance. According to this principle, the insurance contract must be signed by both parties (i.e insurer and insured) in an absolute good faith or belief or trust. The person getting insured must willingly disclose and surrender to the insurer his complete true information regarding the subject matter of insurance. The insurer's liability gets void (i.e legally revoked or cancelled) if any facts, about the subject matter of insurance are either omitted, hidden, falsified or presented in a wrong manner by the insured.

The principle of Uberrimae fidei applies to all types of insurance contracts.

PRINCIPLE OF INSURABLE INTEREST

• The insured must have insurable interest n the subject matter of insurance.

• In life insurance it refers to the life insured.

• In marine insurance it is enough if the insurable interest exists only at the time of occurrence of the loss.

• In fire and general insurance it must be present at the time of taking policy and also at the time of the occurrence of loss.

• The owner of the party is said to have insurable interest as long as he is the owner of it.

• It is applicable to all contracts of insurance.

The principle of insurable interest states that the person getting insured must have insurable interest in the object of insurance. A person has an insurable interest when the physical existence of the insured object gives him some gain but its non-existence will give him a loss. In simple words, the insured person must suffer some financial loss by the damage of the insured object.

For example: The owner of a taxicab has insurable interest in the taxicab because he is getting income from it. But, if he sells it, he will not have an insurable interest left in that taxicab. From above example, we can conclude that, ownership plays a very crucial role in evaluating insurable

interest. Every person has an insurable interest in his own life. A merchant has insurable interest in his business of trading. Similarly, a creditor has insurable interest in his debtor.

LIFE INSURANCE

Section 2(11) of the Insurance Act, 1938 defines Life Insurance Business as follows:

"life insurance business" means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, and any contract which is subject to payment of premiums for a term dependent on human life and shall be deemed to include--

(a) The granting of disability and double or triple indemnity accident benefits, if so provided in the contract of insurance,

(b) The granting of annuities upon human life; and

(c) The granting of superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment or of the dependents of such persons;

This definition is proposed to be amended in the Insurance Law Amendment Bill, 2008 where for the words “annuities payable out of any fund”, the words “benefit payable out of any fund’’ have been substituted; While under the current Act, health insurance has not been identified as a separate sector, the Bill proposes to introduce a separate sub-section to define health insurance business as follows: (6C) “health insurance business” means the effecting of contracts which provide for sickness benefits or medical, surgical or hospital expense benefits, whether in-patient or out-patient on an indemnity, reimbursement, service, prepaid, hospital or other plans basis including assured benefits, long term care, overseas travel cover and personal accident cover

Given the above, life insurance products can be broadly classified into:

(a) Pure protection plans;

(b) Protection cum savings plans;

(c) Pure savings and pension plans;

These can be further classified into:

I. Term insurance & Health Insurance plans

II. Endowment & Money-back plans

III. Whole life plans

IV. Pension and savings plans

V. Unit linked insurance plans (ULIPs)

VI. Variable Insurance plans (VIPs)

Further, apart from stand-alone health insurance companies providing health insurance products, health insurance is also provided by life

insurance companies both as riders to other products as well as standalone health plans.

Pure term insurance as well as Pension plans are also structured as Group insurance policies where a homogenous group of lives are covered. Variants of Group insurance are employer-employee groups, lender-borrower groups (credit life), social sector groups etc.

In order to effectively regulate the sector, the IRDA has issued various regulations for different types of life insurance products. These regulations stipulate the structure and broad features of different types of products with a view to ensuring protection of policy holders interests as well as robust development of the industry. The broad features of different types of insurance are discussed below:

A. PURE PROTECTION INSURANCE

A pure protection plan is a simple risk cover insurance product where the sum assured becomes payable upon the happening of the risk event during the term of the policy. The two variants of a pure protection plan are:

1. Term Insurance plan

A term insurance plan provides a pure risk cover where the sum assured becomes payable upon death of the life assured during the term of the policy. Since there is only a risk cover, the premiums are usually low and affordable and the policy assures a financial security to the family members upon death of the life assured. The term of the policy is fixed and where the life assured survives the full term, no amount is payable. Some variants of pure protection plans also assure a return of some or whole of the premiums paid if the life assured survives the term of the policy. The benefit arising to the insurance company in such case is the income out of the premiums invested during the term.

2. Health Insurance plan

A health insurance plan provides a pure risk cover where the sum assured becomes payable upon the life assured being diagnosed of certain identified illness during the term of the policy. Health insurance is also popularly known as Medical Insurance or Mediclaim that covers medical expenses including hospitalization expenses. The type and amount of health insurance depends upon the scope of illnesses covered and the extent of expenses required to be covered. Health insurance benefits are also available as riders in group insurance plans.

While life is very uncertain, a person may not stay healthy & fit throughout their life. Therefore it is prudent to have health cover at every stage of life. If a major illness like heart failure is diagnosed & the funds for treatment cannot be immediately arranged. It may lead to loss of life. If the family resorts to costly personal loans for treatment & the life of

the person cannot be saved then the family could incur huge debts. Having health insurance cover can help to overcome this problem.

The age of a person at the time of taking the health cover is very vital. Usually health plans are annually renewable policies, the cost will increase as the person gets older, regardless of the age of the policyholder when the policy commences.

Some of the critical illnesses that are usually covered under a health insurance plan are:

− Blindness
− Stroke
− Major organ transplant
− Multiple Sclerosis
− Paraplegia
− Arota Surgery
− Kidney failure
− Heart attack
− Cancer
− Coma

The list of illnesses differs between various health plans of different insurance companies and the premium would also differ according to the illnesses covered.

B. PROTECTION + SAVINGS INSURANCE

Life insurance is usually a long term contract and thus is used world over as an effective investment instrument. In Protection cum Savings insurance products, in addition to getting a pure term insurance cover, the policyholder is also able to leverage long term savings. Life insurance plans are an excellent choice for providing for Protection needs, Long term goals such like children's education and marriage, retirement and others.

In such plans, the premium payable is divided into two parts:

− Premium for life coverage – provides financial protection in case of death

− Premium for savings element – Is invested by the insurance company on behalf of the policyholders.

The returns earned from investment are set-off against the expenses and the surplus is shared among policyholders in the form of bonuses. Here the investment risk is borne by the Insurance company.

(1) Endowment Insurance – An endowment insurance offers death cover if the life insured dies during the term of the policy and also offers a Survival benefit if the life insured survives until the maturity of the policy.

Some of the key features of an Endowment insurance plan are -

• If the life insured survives the entire term of the plan, then a specified amount is paid to him/her on maturity of the plan

• If the life insured dies before the maturity of the plan, then the death cover benefit is paid to the nominee/beneficiary

• Savings element: After deducting the death cover charges & administration charges from the premium, the remaining amount is invested by the insurance company. The returns earned are later paid back to the life insured in the form of bonuses.

• Goal-based investment: Helps in accumulating money for specific plans like a child's higher education or marriage, etc.

• Some insurance companies also allow partial withdrawal or loans against these policies

• There are different variants under this plan –

− Higher death cover than the maturity benefit

− Maturity benefit is double the death cover, known as a double endowment insurance plan

(2) Whole of Life Insurance – A term insurance plan with an unspecified period is called a whole life plan. Some plans also have a savings element to them. The insurance company declares bonuses for these plans based on the returns earned on investments. As the name of the plan specifies, this plan covers the individual throughout their entire life. On the death of the life insured, the nominee/beneficiary is paid the sum insured along with the bonuses accumulated up until that point

in time. During the individual's lifetime they can make partial withdrawals to meet emergency requirements. An individual can also take out loans against the policy. Although, in case of Whole Life Plans, sum assured is payable only on death, some insurers pay the sum assured when life insured completes a certain age. For example, 80 years, 90 years, 100 years, etc.

3. Unit Linked Insurance Plan

A Unit Linked Insurance Plan or 'ULIP' as it is popularly known is basically a combination of insurance as well as investments, similar to a protection cum savings plan. While a part of the premium paid is utilized to provide insurance cover to the policy holder the remaining portion is invested in various equity and debt schemes. A fund is created from a pool of premiums collected from policyholders and the fund is used to invest in various market instruments (debt and equity) in varying proportions similar to mutual funds. The significant difference between a protection cum savings plan and a ULIP is that the investment risk in a ULIP is borne bythe policyholder (similar to a Mutual Fund), whereas the risk is borne by the Insurance company in the other case. The Policy holders can select the type of funds (debt or equity) or a mix of both based on their investment need and risk appetite. ULIP policy holders are allotted units and each unit has a net asset value (NAV) that is declared

on a daily basis. The NAV is the value based on which the net rate of returns on ULIPs are determined. The NAV varies from one ULIP to another based on market conditions and the fund's performance.

Features - ULIP policy holders can make use of features such as top-up facilities, switching between various funds during the tenure of the policy, reduce or increase the level of protection, options to surrender, additional riders to enhance coverage and returns as well as tax benefits.

Types - There are a variety of ULIP plans to choose from based on the investment objectives of the investor, his risk appetite as well as the investment horizon. Some ULIPs allocate a larger portion of the invested capital in debt instruments while others purely invest in equity. Again, all this is totally based on the type of ULIP chosen for investment and the investor preference and risk appetite.

Charges - Unlike traditional insurance policies, ULIP schemes have a list of applicable charges that are deducted from the payable premium. The notable ones include policy administration charges, premium allocation charges, fund switching charges, mortality charges, and a policy surrender or withdrawal charge. Some Insurer also charge "Guarantee Charge" as a percentage of Fund Value for built in minimum guarantee under the policy.

Risks - Since ULIP returns are directly linked to market performance and the investment risk in investment portfolio is borne entirely by the policy holder, one needs to thoroughly understand the risks involved and one's own risk absorption capacity before deciding to invest in ULIPs.

4. Variable Insurance Plan Variable life insurance is a permanent life insurance policy with an investment component. Variable universal life insurance can help meet the needs of those who want life insurance protection with the potential to build cash value. The policy has a cash value account, which is invested in a number of sub-accounts available in the policy. A sub-account act similar to a mutual fund, except it's only available within a variable life insurance policy. A typical variable life policy will have several sub-accounts to choose from, with some offering upwards of 50 different options. The cash value account has the potential to grow as the underlying investments in the policy's sub-accounts grow - at the same time, as the underlying investments drop, so may the cash value. The appeal to variable life insurance lies in the investment element available in the policy and the favorable tax treatment of the policy's cash value growth. Annual growth of the cash value account is not taxable as ordinary income. Furthermore, these values can be accessed in later years and, when done properly through loans using the account as collateral, instead of direct withdrawals, they may be received free of any income taxation. Similar to mutual funds and other types of investments, a variable life insurance policy must be presented with a prospectus detailing all policy charges, fees and sub-account expenses.

C. PURE SAVINGS AND PENSIONS

Pure savings and Pension plans address the risk of living too long. In the age of medical advancement where the mortality rates have declined and life span has increased significantly, it is important that the individual saves enough to meet his financial needs during the age when his earning capacity diminishes. In the Indian context, with the growth of the Indian economy, the nuclear family system is fast spreading and therefore old aged parents are left to fend for themselves. In order to mitigate the risk of not being able to meet financial needs during such old age, the savings and pension plans are effective tools. These plans should be looked at two parts:

Savings or accumulation stage – Deferred Annuity Plans. Under the deferred annuity plan, the policyholder contributes a small amount on a monthly/quarterly/ annual basis and on maturity, the sum assured is used to buy a pension plan (immediate annuities) that will provide a monthly income throughout retirement. These plans are best when bought at a young age as the corpus depends upon the period of accumulation.

The term of the policy is called deferment period. During this period, the insurance company will invest the lump sum amount on behalf of the policyholder and earn returns on it. The maturity of the policy is called vesting where the accumulated corpus will be used to pay a regular annuity to the policyholder.

At the time of vesting the policyholder can decide whether to buy the immediate annuity plan from the same insurance company or some other life insurer of his choice. This option to choose the pension provider is known as the open market option.

At the time of vesting the policyholder will also have the choice of selecting the type of annuity plan that he would like from the annuity options available to him. The annuity payout will depend on the type of annuity chosen and the rates prevailing at the time of vesting.

The deferred annuity plans are available both in traditional and ULIP forms. In India the deferred annuity plans are largely driven by tax benefits.

Payout or annuity stage – Immediate Annuity Plans.

An annuity is a series of regular payments from an annuity provider (insurance company) to an individual (called the annuitant) in return for a lump sum (purchase price) or instalment premiums for a specified number of years. Annuities are usually sold by life insurance companies. They may be purchased by a single lump sum payment or under a deferred annuity plan. The premium (purchase price) may be made by the person who is to be the annuitant or another annuity purchaser such as the annuitant's employer, other personal benefactor or a pension scheme. The tax laws in India stipulate that upon vesting of a deferred

annuity plan, only 1/3rd of the vested amount can be paid out as a lumpsum and the balance should be necessarily paid out only as annuities.

Some of the types of immediate annuities available in the market are:

− Life Annuity
− Life Annuity with returns
− Joint Life Annuity
− Guaranteed Annuity
− Increasing Annuity

PROPOSAL FORM

The Insurance policy is a legal contract between the Insurer and the Policyholder. As is required for any contract there is a proposal and an acceptance. The application document that is used for making the proposal is commonly known as the 'Proposal Form'. All the facts stated in the Proposal form becomes binding on both the parties and failure to appreciate its contents can lead to adverse consequences in the event of claim settlement.

The Proposal form has been defined under IRDA (Protection of Policyholders' Interests) Regulations, 2002 as "it means a form to be filled in by the proposer for insurance for furnishing all material information required by the insurer in respect of a risk, in order to enable the insurer to decide whether to accept or decline, to undertake the risk, and in the event of acceptance of the risk, to determine the rates, terms and conditions of a cover to be granted.

Explanation: "Material" for the purpose of these regulations shall mean and include all important, essential and relevant information in the context of underwriting the risk to be covered by the insurer."While the IRDA had defined the Proposal form, the design and content was left open to the discretion of the Insurance company. However based on the feedback received from policyholders, intermediaries, Ombudsmen and Insurance companies, the IRDA felt it necessary to standardise the form and content of the Proposal Form. Thus the IRDA has issued the IRDA (Standard Proposal form for Life Insurance) Regulations, 2013. While the IRDA has prescribed the design and content, it has provided the flexibility to the Insurance companies for seeking additional information. The Proposal form carries detailed instructions not only for the Proposer and the Proposed Life Insured but also to the Intermediary who solicits the policy and assists in filling up the form.

It also requires the Proposer and the Proposed Insured to declare the correctness and authenticity of the information provided in the form. In addition, the Intermediary is required to certify that he has explained the features of the policy, including terms and conditions, premium requirements, exclusions and applicable charges to the Proposer.

It is pertinent to mention here that the Proposal form gains utmost importance in any insurance contract, as the insurance company offers a cover on the basis of information provided in the Proposal form. Through the Proposal form, the Insurer seeks to elicit all material information of the Proposer and the Proposed Insured, which includes name, age, address, education, income and employment details of the Proposer, medical history of the Proposed Insured and his family members, income details, any existing life insurance cover on the Proposer as well as Proposed Insured. The Information sought in the Proposal form is important for an insurance company to assess the risk that can be underwritten and also to comply with other regulatory requirements such as the 'Know Your Customer' norms. The IRDA regulations divide the Proposal form into the following broad sections:

Section A – contains details of the Proposer;

Section B – contains specialised/additional information which may vary based on the product;

Section C – contains suitability analysis which is highly recommended;

Section D – contains details of the product proposed.

Some of the Insurers also have online versions of the Proposal form, through which an Insurance policy can be proposed online by the Proposer on the website of the Insurance Company.

The Intermediary plays a very vital role in executing the Proposal form. It is the responsibility of the intermediary to not only explain the features and benefits of the product but also explain the significance of the information sought in the Proposal form and thus help the Proposer appreciate the essence of material information.

This is where the doctrine of "Uberrima fides" becomes very important. The Insurance Company relies on the information provided in the Proposal form for taking a decision on acceptance of the risk and issuing the Insurance policy. In the event it is discovered later that the information provided was incorrect or any material fact was concealed in the Proposal form, the Insurance Company may deny paying benefits under the Policy. Insurance litigations in the country are predominantly on the premise of rejection of claim due to nondisclosure of material facts and there are numerous cases which have reinforced the principle of "Uberrimafides".

POLICY CONTRACT AND DOCUMENTATION

An Insurance Contract is known as a contract of 'Uberrimate Fides' or a contract based on 'utmost good faith', which means both the parties must disclose all material facts. Insurance contract is regulated by guidelines, rules, regulations, notifications and circulars of IRDA though not defined anywhere. It is a Intangible product. In return for the price (premium), the insurance companies issue the policies which are stamped and legally

enforceable document. This insurance document is basically a promise to pay for covered loss according to its terms and conditions.

Policy contract has the same meaning as stated u/s. 10 of Indian Contract Act, 1872, "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 hereby expressly declared to be void. Nothing herein contained shall affect any law in force in, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents". A Policy Contract needs to necessarily have all the ingredients as mentioned under Indian Contract Act, the prominent amongst them are communication, acceptance, consideration etc. However, unlike any other contract, an Insurance Contract commences only on communication of acceptance. Mere silence to the proposal doesn't complete the contract. There has to be an acceptance to the proposal which should be communicated. In a contract of insurance the insurer undertakes to protect the insured from a specified loss and the insurer receives a premium for running the risk of such loss. Insurance Contract entered into by mis-representation of facts, coercion or fraud, will not hold good in Law and the party in default will not enjoy the benefits under the same. IRDA (Protection of Policy holders' Interest) Regulations, 2002, under clause 6 stipulates the matters to be included in a Life Insurance Policy Contract.

As per Regulation 6, A Life insurance policy shall clearly state:

(a) the name of the plan governing the policy, its terms and conditions;

(b) whether it is participating in profits or not;

(c) the basis of participation in profits such as cash bonus, deferred bonus, simple or compound reversionary bonus;

(d) the benefits payable and the contingencies upon which these are payable and the other terms and conditions of the insurance contract;

(e) the details of the riders attaching to the main policy;

(f) the date of commencement of risk and the date of maturity or date(s) on which the benefits are payable;

(g) the premiums payable, periodicity of payment, grace period allowed for payment of the premium, the date the last instalment of premium, the implication of discontinuing the payment of an instalment(s) of premium and also the provisions of a guaranteed surrender value.

(h) the age at entry and whether the same has been admitted;

(i) the policy requirements for (a) conversion of the policy into paid-up policy, (b) surrender, (c) no forfeiture and (d) revival of lapsed policies;

(j) Contingencies excluded from the scope of the cover, both in respect of the main policy and the riders;

(k) the provisions for nomination, assignment, and loans on security of the policy and a statement that the rate of interest payable on such loan

amount shall be as prescribed by the insurer at the time of taking the loan;

(l) any special clauses or conditions, such as, first pregnancy clause, suicide clause etc.; and

(m) the address of the insurer to which all communications in respect of the policy shall be sent;

(n) the documents that are normally required to be submitted by a claimant in support of a claim under the policy.

The Policy contract is approved by the IRDA. The IRDA has advised that the language of the policy contract should be simple, unambiguous, clear and consistent for better understanding of common man. Guidelines on Insurance Repositories and Electronic Issuance of Policy contract, 2011 is a major breakthrough in Insurance arena, where procedures have been laid down for appointment of Insurance repositories and electronic issuance of policy contract. Despite the regulation, most of the Insurance Companies are yet to fully avail the fruitfully benefit of such advanced technology, which would not only benefit the Insurance company but also the Insured from operational and servicing view point. Though the Insurance Contract is of utmost significance in the life of an Insured who avails the same to cover his life, health, old age and investment, it is given least importance and is not even being perused completely to know its features and benefits, thus resulting into various issues of mis-selling, which causing hindrance to the growth of Insurance Industry.

FIRE INSURANCE

The most popular property insurance is the standard fire insurance policy. The fire insurance policy offers protection against any unforeseen loss or damage to/destruction of property due to fire or other perils covered under the policy. The different types of property that could be covered under a fire insurance policy are dwellings, offices, shops, hospitals, places o f worship and their contents industrial/manufacturing risks and contents such as machinery, plants, equipment and accessories; goods including raw material, material in process, semi-finished goods, finished goods, packing materials etc in factories, godowns and in the open; utilities located outside industrial/manufacturing risks; storage risks outside the compound of industrial risks; tank farms/gas holders located outside the compound of industrial risks etc.

What a Fire Policy Covers

Thought it is called ‘Fire Insurance’, apart from the risk of fire, it also offers cover against lightning, explosion/implosion, aircraft damage, riot, strike and malicious damage, storm, cyclone, typhoon, hurricane, flood and inundation, impact damage, subsidence and landslide including rockslide, bursting and/or overflowing of water tanks, apparatus and

pipes, missile testing operations, accidental leakage from automatic sprinkler installations, bush fire etc. What a Fire Policy Excludes

A fire insurance policy usually does not cover a certain amount known as "excess" under the policy. Loss or damage caused by war and warlike operations, nuclear perils, pollution or Contamination, electrical/mechanical breakdown, burglary and housebreaking are excluded. Certain perils like earthquake, spontaneous combustion etc can be covered on payment of additional premium. Fire insurance policies are issued for one year except for dwellings, where a policy may be issued for long term (with a minimum period of three years).

MARINE INSURANCE

A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the insured, in the manner and to the extent thereby agreed, against transit losses, that is to say losses incidental to transit. A contract of marine insurance may by its express terms or by usage of trade be extended so as to protect the insured against losses on inland waters or any land risk which may be incidental to any sea voyage. In simple words the marine insurance includes

(A) Hull insurance which is concerned with the insurance of ships (hull, machinery, etc

(B) Cargo insurance which provides insurance cover in respect of loss of or damage to goods during transit by rail, road, sea or air.

Hull Insurance

There are various types of policies issued to cover different types of ships/boats depending on their function and usage of the vessel.

Sundry vessels

There are separate policies designed for fishing vessels, Sailing vessels, inland vessels (barges, pontoons, flats, floating cranes, tugs , ferries, passenger vessels etc Other types of insurance include covers for jetties, wharves etc and vessels plying in inland waters such as lakes, rivers canals etc. Liners/Tankers/Bulk carriers/Dredgers -There are many types of vessels and policies have been designed to cover all these types of vessels- but primarily depend on the function and area of operation for the premium rating etc. They may be known as sundry vessels and rating of premium and cover is contained in a separate tariff. These policies are issued based on the areas of operation, the season and are annual policies insuring the hull(ship bottom) and machinery (ships engine etc). Insurance cover is for the actual vessel and contents, as well as for third party liability for property and lives and pollution hazards associated with the perils encountered in the areas of operation.

Marine Insurance Clauses are designed for hulls and cargo insurance and because of the very nature of the trade – (travelling across the globe) have spread across the world and are universally accepted.

The main clauses are developed by a number of organizations around the world but primarily the institute of London Underwriters and American Institute of Marine Underwriters. These clauses are universally used in marine insurance the world over, though they may be translated into various languages.

Hulls are usually protected by the

1. Institute Time Clauses Hull – for ships and machinery and liability for a period of one year usually.
2. Institute Voyage Clauses – for ships, machinery and liability for a specific voyage.

These are named perils policies – that is loss or damage to the property insured caused by any of the perils named are covered. e.g. Fire, explosion, violent theft, jettison, piracy, breakdown or accident , contact with airplanes or similar objects, bursting of boilers, accidents in loading , unloading, shifting or discharging cargo, caused due to negligence of the master of the ship or his crew, collision liability etc

War and Strike Risks

All marine policies exclude damage arising from war or warlike conditions and strikes. For this a separate cover has to be taken and is applicable to all vessels covered under the Indian Merchants Shipping Act, 1958.

Freight Cover

Freight is the primary reason for the shipping industry- plying all over the world conveying garangutan shiploads of goods to various countries around the world. Therefore, the ship owner has an insurable ineterst in the freignt and is enabled to insure the same through the Institute Time /Voyage Clauses (Freight). There are numerous other polcies and operations whichmay be insured under marine hull insurance – Ship Repairers liability, ship breaking insurance, Off shore Oil and Gas units policies – even the transport of oil through pipe lines is covered under hull policies.

Cargo Policies

Cargo policies insure goods in transit, whether by air, sea, road/rail or by post or courier.

Specific /Voyage Policies

Cargo in transit may be covered as a specific instance or if there are routine transport of cargo an annual cover may be availed of. Specific voyage policies are, exactly as named, policies insuring a single transit of goods from one place to another.

The usual practice, when seeking to u=insure the consignment, i to bring a copy of the invoice and the bill of affreightment (by sea – bill of lading; air – airway bill, road, lorry receipt or goods consignment note or by rail railway receipt and post – parcel receipt)

This specifies the value of the goods declared to the transporter and together with invoice forms negotiable instruments which lay claim to ownership.) Specific voyage policies are generally issued only for the duration of the transit and till the goods reach the final destination given in the policy, in the customary time. The cover would incept from the time the goods leave the warehouse (WH) and continue to the final destination warehouse.

Hence the term WH to WH cover.

It is to be noted that insurance cover should be sought before the voyage/transit actually commences. The transit can be multi modal and be covered in a single policy eg. Goods are moving from Nagpur to Birmingham, UK by sea. The transit from Nagpur to Mumbai, or any other port, by road and thereafter by sea till UK and further from Birmingham by road/rail is all insured under a single policy.

REVIEW QUESTIONS

1. Describe the principles of insurance.
2. Discuss about principle of UBERRIMAE FIDEI (utmost good faith).
3. What is the principle of insurable interest?
4. What are the types life insurance? Describe.
5. Discuss about proposal form, policy contract and documentation of insurance.
6. Write short notes on following.
    a. fire insurance
    b. marine insurance
    c. war and strike risks

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

UNIT-8 ARBITRATION AND CONCILIATION

CONTENTS

INTRODUCTION

The expansion of International trade and investment resulting from globalisation of world economy and emergence of new economic order calls for adoption of effective, efficacious and speedier alternatives for settlement of commercial disputes. A large number of foreign investors had from time to time expressed their concern about unsatisfactory and tedious dispute settlement mechanism prevailing in India. The business community within the country had also on several occasions suggested that the system of settlement of commercial disputes requires streamlining with a view to ensure quicker settlement of commercial disputes. Moreover there were consensuses

that the arbitration mechanism available under the Arbitration Act of 1940 had led to further litigation in the Courts because of the arbitral awards being challenged in the Courts on one or the other ground therefore all parties concerned showed their consent to evolve a system

whereby the disputes can be resolved through consensus. Speaking on the occasion of the 22nd National Convention of the Institute of Company Secretaries of India at Goa, in 1994 Justice A.M. Ahmadi, the then Judge and later Chief Justice of India pointed out that "with the opening of the economy and the simplification of procedures, the need for harmonisation of laws can never be over-emphasised unless necessary changes are introduced in the relevant laws ..... The updating and streamlining of economic laws is undoubtedly imperative, but that by itself may not be enough unless it is backed by an effective dispute resolution system..... . The outdated Arbitration Act is no solace because arbitration often proves to be an expensive added cycle to litigation ..... The judiciary is sensitive to the need for early resolution of disputes for a successful implementation of the economic reforms."

Arbitration is statutorily recognised procedure in most countries of the world and is used as a substitute for judicial proceedings. An arbitration clause in an agreement obliges the parties to arbitrate to resolve their disputes or differences. Use of arbitration leads to an award not to a judgement. Generally, an agreement provides for adoption of certain rules of arbitration procedures to be followed in case a dispute arises. An arbitrate on agreement may also stipulate use of the facilities of one of the recognised arbitration institutions, such as the International Centre for Alternative Dispute Resolution (ICADR) and Indian Council of Arbitration (ICA) in India, International

Chamber of Commerce (ICC) in Paris etc. The arbitration clause usually provides for each of the parties to appoint an arbitrator and for the arbitrators to choose a third arbitrator.

ALTERNATIVE DISPUTE RESOLUTION IN INDIA

The techniques of Alternative Dispute Resolution (ADR) are not alien to the justice dispensing system of India. The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunals was well known to ancient India. Long before the king came to adjudicate on disputes between persons, such disputes were quite peacefully decided by the intervention of the Kulas (family or clan assemblies), Srenis (guilds of men following the same occupation), Perishads (assemblies of learned men who knew law) and such other autonomous bodies. There were Nyaya Panchayats at grass root level before the advent of the British system of justice.

During the British Raj, the Panchayat system undergone considerable changes. A number of statutes were enacted providing for arbitration as a mode of dispute settlement. The first statute providing substantive law on arbitration - The Indian Arbitration Act, was passed in 1899, however its application was restricted to Presidency towns of Calcutta, Bombay and

Madras. In 1908, the Code of Civil Procedure (CPC) was re-enacted and provisions relating to arbitration were set out in the Second Schedule. Ultimately in 1940, the Arbitration Act was passed repealing the Indian Arbitration Act of 1899 and provisions relating to arbitration in CPC. Additionally, the Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961 were also enacted to meet the need of domestic and certain aspects of international arbitration.

The Arbitration Act, 1940 though was an attempt to provide a comprehensive code on arbitration, could not meet the expectations of the legislators. In this context the Supreme Court in M/s Guru Nanak Foundation v. M/s Ratan Singh & Sons (AIR 1981 SG 2075) observed that the way in which the proceedings under the Act are conducted and, without exception, challenged in Courts, has made lawyers laugh and legal philosophers weep.

Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical, accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts, being clothed with legalese of unforeseeable complexity.

In these underpinnings and based on the UNCITRAL Model Law, The Arbitration and Conciliation Act, 1996 has been enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith and incidental thereto.

MAKING ADR COMPULSORY IN INDIA – RECOMMENDATIONS OF LAW COMMISSION

The Law Commission in its 124th Report on the High Court Arrears - A Fresh Look (1988) and the 129th Report on Urban Litigation - Mediation as Alternative to Adjudication (1988) emphasised the desirability of the Courts being empowered to compel parties to a private litigation to resort to arbitration or mediation. The Law Commission in its 129th Report examined at length the nature of litigation in urban areas and highlighted the staggering pendency of cases in various Courts of urban areas. The Report pointed to huge arrears of cases pending in Sessions Courts, Magisterial Courts, cases in Civil Courts of Original Jurisdiction and the Appellate side. Special attention was given in the Report to house rent / possession litigation in urban areas and as an alternative to the present method of disposal of disputes under the Rent Acts, following four distinct modes were considered :

(i) Establishment of Nagar Nyayalaya with a professional Judge and two lay Judges on lines similar to Gram Nyayalaya and having comparable powers, authority, jurisdiction and procedure;

(ii) Hearing of cases in Rent Courts by a Bench of Judges, minimum two in number, with no appeal but only a revision on questions of law to the district Court;

(iii) Setting up of Neighbourhood Justice Centres involving people in the vicinity of the premises in the resolution of dispute; and

(iv) Conciliation Court system working with full vigour in Himachai Pradesh.

In respect of suits involving disputes as to inheritance, succession, partition, maintenance and those concerning wills, which are generally blood relations, the Law Commission recommended that Conciliation Court system must be made compulsory by an effective amendment to the Code of Civil Procedure on the lines of Rule 5B, order XXVII. Rule 5B of order XXVII of the CPC makes it obligatory for the Court in a suit against the Government or public officer, to assist in arriving at a settlement in the first instance. In respect of all other kinds of suits, it was recommended that an attempt should be made at the pre -trialstage by the lawyers of respective parties for a reasonable settlement of the dispute through negotiations and that in case the dispute is not resolved, litigation may be resorted to but in that case the matter should be referred to the Conciliation Court and if such Court finds that its persuasion to the parties to go in for a amicable settlement has failed, the party who was recalcitrant and unjust in approach must be fined with heavy costs. In the field of criminal cases, Law Commission recommended, the reintroduction of the system of Honorary Magistrates who should be drawn from amongst the retired personnel of the judiciary. Such Honorary Magistrates should be empowered to do any work which a Stipendiary Magistrate can undertake and they should takeover all the old cases. The recommendation of Law Commission regarding service related matters was that State Government must take steps for setting up State Administrative Tribunals under the Administrative Tribunals Act, 1985.

The Law Commission in its 126th Report on Government and Public Sector Undertaking Litigation recommended that the Central Government should issue a binding directive to the Public Sector Undertakings regarding reference of disputes inter se between them or between them on the one hand and the Government on the other, to arbitration. The introduction of conciliation procedure in Writ matters, and the establishment of the Grievances' Cell to deal with disputes and complaints of employees of Public Sector Undertakings and the Government in regard to service matters and reference to compulsory

arbitration of issues involving law points in certain eventualities was also recommended by the Law Commission.

THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1999

Following the recommendations made, by Justice Malimath Committee, and Law commission in its 129th Report and the Committee on Subordinate Legislations (11th Lok Sabha), the Code of Civil Procedure (Amendment) Bill, 1997 was introduced in the Parliament keeping in view, among others, that every effort should be made to expedite the disposal of civil suits and proceedings so that justice might not be delayed. After the assent of the President the Amendment Act came into effect on July 1, 2001. The Code of Civil Procedure (Amendment) Act, 1999 inserted a new section 89 providing for settlement of Disputes outside the Court and also inserted Rules 1A, 1B and 1C to Rule 1 of Order 10.

Settlement of Disputes outside the Court

New Section 89 which deals with settlement of disputes outside the court provides that where it appears to the Court that there exist elements of a settlement,which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for arbitration; conciliation; judicial settlement including settlement through Lok Adalat; or mediation. Sub - section (2) of Section 89 which deals with the application of specific legislation in respect of arbitration, conciliation, judicial settlement or mediation provides that in the case of-

(i) Arbitration or Conciliation

The provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(ii) Lok Adalat

The Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.

(iii) Judicial Settlement

The Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act.

(iv) Mediation

The Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Rule 1 - Examination of Parties by the Court

Rule 1 of Order X of CPC provides that at the first hearing of the suit, the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials. The new Rule 1A provides that after recording the admissions and denials, the Court shall direct the parties to the suit, to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89 namely arbitration; conciliation; judicial settlement including settlement through Lok Adalat; or mediation. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties. New Rule 1B provides that where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit. New Rule 1C provides that where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

DEVELOPMENT OF ADR — INTERNATIONAL EXPERIENCE

Back in 1980s, the American experts and executives alike heralded alternative dispute resolution as a sensible, cost effective way to keep corporations out of Courts and away from kind of litigation that devastates winners almost as much as losers. Thus, the concept of resolving disputes through mediation or conciliation, in a different form under the title Alternative Dispute Resolution was developed in the United States to avoid increasing cost and complexity of litigations.

In the United States, ADR is offered by various organisations and individuals including the Centre for Public Resources (CPR) which has established a registry of a number of major corporations pledged to exploring ADR before litigating. In addition to private sector, ADR processes have also been introduced in the Court systems of a number of states and the concept of multi-door Court house is developing, providing for the Court to be a focal point for all dispute resolution services, both litigation and alternative.

Consequent to the success of ADR in United States, the acceptance of ADR processes extended to many countries including United Kingdom, Canada, Australia, Hong Kong, South Africa, New Zealand, Japan, China and India. Generally, the range of disputes covered under ADR

includes commercial and civil matters, labour disputes, family and divorce and public policy matters.

ADVANTAGES OF ADR

(i) It can be used at any time, even when a case is pending before a Court of law, though recourse to ADR as soon as the dispute arises may confer maximum advantage on the parties; it can be used to reduce the number of contentious issues between the parties; and it can be terminated at any stage by any of the disputing parties.

(ii) It can provide a better solution to disputes more expeditiously and at less cost than litigation. It helps in keeping the dispute a private matter and promotes creative and realistic business solutions, since parties are in control of ADR proceedings.

(iii) The ADR is flexible and not governed by the rigours of rules of procedures.

(iv) The freedom of parties to litigation is not affected by ADR proceedings. Even a failed ADR proceeding is never a waste either in terms of money or time spent on it, since it helps parties to appreciate each other's case better.

(v) The ADR can be used with or without a lawyer.

(vi) ADR helps in the reduction of the work load of the Courts and thereby help them to focus attention on other cases.

(vii) The ADR procedure permit parties to choose neutrals who are specialists in the subject matter of the dispute.

MODES OF DISPUTE RESOLUTION PROCESSES

All dispute resolution processes (traditional and alternative) have been divided into three primary categories: negotiation, mediation and adjudication. These categories are further divided into six primary categories: negotiation, mediation, the judicial process, arbitration, and the administrative and legislative processes. This effectively amounts to a sub-division of adjudication into its constituent parts. These primary dispute resolution processes, which are not limited to ADR but include both traditional and alternative procedures, are as follows:

Negotiation is the way in which individuals communicate with one another in order to arrange their affairs in commerce and everyday life, establishing areas of agreement and reconciling areas of disagreement. Negotiation has been defined as "the process we use to satisfy our needs when someone else controls what we want." Most disagreements are dealt with in one way or the other by negotiation between the principals themselves; relatively few involve legal intercession.

Negotiation tends often to be a practical skill learnt pragmatically by personal experience. There are, however, various theories of negotiation, as well as many different individual styles and approaches.

Adjudication, as a generic term, is a dispute resolution process in which a neutral has and exercises the authority to hear the respective positions submitted by the disputants and to make a decision on their dispute which will be binding on them.

Litigation is administered through the Courts and the neutral adjudicator is a judge, district judge, or other official appointed by the Court to undertake this function.

Arbitration, the neutral is privately chosen and paid by the disputants and/or the procedure regulating the dispute follows arbitration rules which may be statutory or imposed by an arbitral organisation. Administrative or statutory tribunals, the adjudication follows certain specific statutory requirements, such as establishing rent levels, compensation awards, social security benefits or a range of other matters through tribunals and appeal tribunals.

Expert Determination, the parties appoint an expert to consider their issues and to make a binding decision or appraisal without necessarily having to conduct an enquiry following adjudicatory rules.

Private judging, the Court refers the case to a referee chosen by the parties to decide some or all of the issues, or to establish any specific facts.

Mediation is a process by which disputing parties use the assistance of a neutral third party to act as a mediator-a facilitating intermediary-who has no authority to make any binding decisions, but who uses various procedures, techniques and skills to help the parties to resolve their dispute by negotiated agreement without adjudication.

Conciliation is a term used interchangeably with mediation, and sometimes used to distinguish between one of these processes (often mediation) involving a more pro-active mediator role, and the other (conciliation) involving a more facilitative mediator role; but there is no consistency in such usage. Hybrid Processes, each of the primary processes (litigation, arbitration or mediation) can be used in its own right without adaptation. In addition, by drawing elements from the primary processes and ”tailoring” them, an ADR practitioner can devise a permutation of procedures and approaches which fit all the nuances of the parties’ needs and circumstances without being constrained by prescribed rules. For example, it may be appropriate for the practitioner to have informal discussions with the parties, arrange for certain facts, or technical questions to be investigated, and then allow each of them to present their respective cases informally to one another before resuming further attempts at settlement. This and any other permutation of requirements can be met by devising a sequence of procedures specifically designed for that dispute and those parties. Certain common combinations of usage of the primary processes have been developed and known as hybrid processes, which include:

Mini-trial can be seen as a form of evaluative mediation, or an abbreviated non-binding arbitration, followed by negotiation and/or mediation.

Med-arb involves commencing with mediation, and if this does not result in the dispute being resolved, continuing with a binding arbitration.

The neutral fact-finding expert involves an-investigation by a neutral expert into certain specific issues of fact, technicality and/or law, and thereafter, if required, a mediatory role, and eventually participation in an adjudicatory process, if required.

Early neutral evaluation requires a neutral evaluator to meet parties at an early stage of a case in order to make a confidential assessment of the dispute, partly to help them to narrow and define the issues, and partly to promote efforts to arrive at a settlement.

Court-annexed arbitration, requires statutory introduction into the Court system, and which, depending upon the model adopted, may be binding or initially non-binding, and may or may not provide for a re-hearing by a judge under certain circumstances. The Code of Civil Procedure (Amendment) Act, 1999 provides for Courtannexed ADR processes.

Mediation and hybrid process generally provide a framework of informal procedures in which a neutral assists the disputing parties with information gathering, clarifying and narrowing issues, facilitating dialogue, negotiation, smoothing out personal conflicts, identifying options, testing the reality of views, risk assessment, impasse resolution and in some cases non-binding evaluation as an aid to reaching agreement. The term mediation being used interchangeably with conciliation, is a procedure in which a neutral individual, the mediator or conciliator, is appointed in order to asist the parties in reaching a mutually satisfactory resolution

DEFINITION OF MEDIATION/CONCILIATION

It is a facilitative process in which disputing parties engage a neutral third party who acts as a mediator or conciliator in their dispute. The neutral has no authority to make any decisions which are binding on the parties, but uses certain procedures, techniques and skills to help them to negotiate settlement of their dispute by agreement

The term mediation or conciliation may suggest one consistent and uniform procedure; but in fact, it comes in different models and covers various fields of activities. Mediation differs from arbitration in that the role of the neutral third party in arbitration is to consider the issues and then to make a decision which determines the issues and is binding on the parties.

SCOPE OF MEDIATION/CONCILIATION

The settlement of disputes through mediation/conciliation convers a wide range of issues. Among others they include commercial and civil

disputes and claims for breach of obligations. These may be factual, legal or technical disputes that can range from simple disagreement to complex and substantial technical or commercial disputes. They may arise in relation to virtually any kind of disputes e.g. issues arising under contracts; commercial or corporate disputes; torts and breach of duty including negilgence allegation and insurance claims; consumer disputes; disagreements in business or professional relationships such as partnership, principal and agent, franchiser/ franchisee and many others. Industrial and Labour disputes, family disputes including issues arising on separation and divorce, Community and Neighborhood issues, Public Policy issues and social conflicts may also be taken up under mediation/conciliation.

There are many other fields in which mediation/conciliation is being used for settlement of disputes for example, mediation in academia, hospsitals and health care systems for consumer disputes, to deal with farmer/ lender debt issues and for many other purposes. In the United Kingdom mediation has similarly been used for various issues and purposes, including complaints by patients about doctors, it is particularly used in the settlement of international commercial disputes.

Which Disputes can be Settled by Mediation/Conciliation?

Any dispute which has arisen or may arise between the parties in respect of a defined legal relationship, whether contractual or not, can be settled by mediation/conciliation. The parties may agree to seek an amicable settlement of their dispute by conciliation or mediation, except where a particular mode of settlement is prescribed by or under the law.

How Can Recourse to Conciliation be Sought?

Conciliation/mediation is a procedure mutually agreed to by the parties. Recourse to this procedure can be had -

(i) by entering into an agreement for seeking a settlement of the dispute by conciliation. The agreement can be entered into either before a dispute has arisen or after the actual dispute arises. It can be an independent agreement, or in the form of a clause in the main contract.

(ii) even where there is no agreement between the parties to seek settlement of the dispute by conciliation, a party desiring conciliation may send to the other party a written invitation to conciliate. Recourse to conciliation can be had if the other party accepts the invitation to conciliate. There can be no conciliation if the other party rejects the invitation.

Who can seek Conciliation?

Any of the parties, competent to contract can seek an amicable settlement of their dispute through conciliation. The parties may belong to the same or different nationalities.

Number of Conciliators

Normally, there is one conciliator but the parties have freedom to agree that there should be two or three conciliators.

What Role does the Conciliator Play?

The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. He is guided by the principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

CONCILIATION PROCESS: GENERALLY

The conciliator, upon his appointment calls upon the parties to present a written summary of their respective cases together with any relevant documents. After going through the summary of the case filed by each party, the conciliator holds a joint meeting with the parties where each party makes a brief oral presentation of its case. Thereafter, the conciliator holds private meetings with each party separately to further clarify its case and to discuss the merits of the case, guiding the party in respect of the legal position and the requirements to substantiate the claims. While doing so, he always tries to bring the parties closer to an agreement. Where the parties are so inclined he may even suggest a settlement for acceptance by the parties. If the conciliator receives factual information from the party, he discloses the substance of that information to the other party so that it may have an opportunity to present its explanation, if any. When a party gives any information to the conciliator subject to the condition that it be kept confidential, the conciliator shall not disclose that information to the other party. There may be several rounds of such separate meetings. If the conciliator is of the view that there is no scope for agreement between the parties or where the parties or any one of them indicates its unwillingness to pursue conciliation, the conciliator terminates the proceedings. Where the parties reach an agreement of settlement, the conciliator holds a final joint sitting for drawing up and signing a settlement agreement by the parties. The parties to such an agreement are bound by the settlement.

Once the settlement agreement is signed it is final and binding on the parties. Where settlement is reached during the pendency of the arbitral proceedings involving the same dispute and the law so provides, the settlement agreement can be enforced in the same manner as an arbitral award on agreed terms. The conciliator and the parties keep all matters relating to the conciliation proceedings confidential. They may treat the settlement agreement also confidential except where its disclosure is necessary for the purposes of implementation and enforcement.

As a principle inherent in conciliation process, the conciliator and the parties are bound by certain discipline. Unless all the parties otherwise agree, the conciliator is estopped from acting as an arbitrator or as a representative of a party in any arbitral, judicial or other proceedings in respect of a dispute which is or has been subject matter of conciliation proceedings in which he acts as conciliator. The conciliator cannot also be presented by a party as witness in any such proceedings. Similarly, the parties are estopped from relying on or introducing as evidence in arbitral, judicial or other proceedings –

(i) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(ii) admissions made by the other party in the course of the conciliation proceedings;

(iii) proposals made by the conciliator;

(iv) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Where the confidentiality and discipline referred to above are not protected by the law, the parties may enter into contractual arrangement for that purpose.

The parties may initiate conciliation even during the pendency of any Court or arbitration proceeding concerning the same dispute, without prejudice to their respective stand in those proceedings. If such conciliation succeeds they report to the Court or the arbitral tribunal, as the case may be, which may pass decree/ arbitral award in terms of such settlement.

ADVANTAGES OF CONCILIATION/MEDIATION

Conciliation/Mediation is becoming increasingly popular, as an alternative to other formal and informal modes of dispute resolution due to their following advantages :

(i) it offers a more flexible alternative, for a wide variety of disputes, small as well as large;

(ii) it obviates the parties from seeking recourse to the Court system;

(iii) it reserves the freedom of the parties to withdraw from the proceedings without prejudice to their legal position inter se at any stage of the proceedings;

(iv) it is committed to maintenance of confidentiality throughout the proceedings and thereafter, of the dispute, the information exchanged, the offers and counter offers of solutions made and the settlement arrived at;

(v) it is cost-effective and produces quicker resolution of dispute;

(vi) it facilitates the maintenance of continued relationship between the parties even after the settlement or at least during the period the

settlement is attempted at. This feature is of particular significance to the parties who are required to continue their relationship despite the dispute.

PRE-REQUISITES FOR CONCILIATOR

A conciliator is employed by the disputing parties to act as catalyst for better communication and problem solving. The conciliator is a person permitted by the parties to assist and empower them to reach their own lasting settlement. Therefore, the position of a conciliator requires fundamental abilities to act as such.

(i) Building Trust

Engaging a conciliator by the parties to assist them in reaching a settlement does not necessarily imply at the outset that the parties trust the conciliator or the process. Hence one of the most important ability required of a conciliator is to earn the trust of the parties.

The building of an atmosphere of mutual respect and trust in the conciliation process, conciliator and between parties, is the key to successful conciliation. The openness and honesty of the parties enhances the chances of the success of conciliation. Since the openness requires trust, the building of trust depends upon the conciliators ability, competence, consistency, integrity and neutrality at every stage of conciliation process.

(ii) Impartiality and Neutrality

There are following two absolute pre-requisites for a valid conciliation process.

(a) Impartiality

The conciliator must ensure that he has no interest in the ultimate outcome of the conciliation, because he is never a biased person. And it is required of him that he reinforced impartiality by his behaviour at every stage of the process.

(b) Neutrality

Neutrality refers to the conciliator's behaviour and attitude during the whole process and the relationship between him and the parties. The indication of any relationship between conciliator and any of the parties disqualifies him from accepting the role of conciliator. The neutrality during the process requires conciliator to ensure that equal treatment is always accorded to the parties.

However, neutrality does not deny the conciliator to have personal opinions, which are inevitable.

Hence, an impartial attitude and the ability to be neutral denotes that the conciliator is able to separate his personal views about the dispute and its outcome from the viewpoints of each of the parties and is able to concentrate exclusively upon assisting the parties towards settlement without overtly favouring one over the other. In this context it may be said that the consistant display of neutrality goes a long way in

encouraging parties to move towards an agreement, as it helps create an environment of mutual trust, clarity and non-defensiveness.

(iii) Control of the Process

Conciliator must have ability to exercise control of the process at every stage. The control requires conciliator to strike a balance and allow parties the freedom to fully express their case, associated feelings and preserving conducive atmosphere for negotiations. Although it is required of the conciliator not to jump in to stop aggressive interactions between the parties, particularly at the initial stages, yet there may be situations when parties are displaying such hostile behaviour that prevent them from moving any further towards settlement, in such situations the conciliator is required to act very tactfully by bringing the parties back on the settlement track.

(iv) Flexibility and Adaptability

Acting as conciliator is not at all an easy task and to accomplish this task, he has to be adaptable and flexible. The adaptability in relation to conciliation process requires conciliator to adapt appropriately to changing events and act suitably. There is no straight jacket formula to be followed in conciliation and here lies the advantage of conciliation process as it can be customised by the conciliator to fit the needs of the participants.

KINDS OF MEDIATION

Voluntary or Mandatory Mediation

The process of mediation is consensual in nature and depends upon the willingness of the parties concerned. Mediation is generally entered into by the parties voluntarily. However, in some situations parties may find themselves compelled to enter into this process of dispute resolution. In some countries like USA, there are Court rules which provide for mediation to take place as an integral part of Court proceeding. There are situations where some commercial contracts stipulate that the parties should initially try to resolve any dispute by mediation before arbitration or litigation is undertaken. All that mandatory stipulation for mediation can achieve, whether in the family or commercial field, is to get the parties to a negotiating table, but of course, it cannot compel them to negotiate. Whether the mediation is mandatory or voluntary, the parties reserve their right to have the matter resolved by adjudication if it is not settled by agreement.

Facilitative/Evaluative Mediation

Mediation may be facilitative in which the parties are assisted and helped to explore options and enhance their mutual interests. It may also be evaluative where the mediator makes or obtains an assessment and expresses a view on the respective merits of the issues or any matter under discussion between the parties. The evaluation is not binding but

may influence the parties to reassess their respective positions with a view to their agreeing a resolution broadly in line with what they perceive as reflecting their respective rights and prospects. Sole Mediation or Co-mediation Generally, a sole mediator is preferred in comparison to two or three mediators. If there are two or three mediators they act jointly. Similarly the mediation of commercial, civil or any other kinds of issues are undertaken by a sole mediator. However, Co-mediation can also be used for commercial and civil disputes in appropriate cases, particularly where a combination of different kinds of expertise is required. The use of co-mediation can be advantageous only in certain circumstances, particularly where a multidisciplinary approach is required. However, it is more expensive than sole mediation, involving two neutrals instead of one, though in some cases the use of co-mediators may be more effective covering more grounds. Sole mediation is more cost-effective. Section 64 of the Act clearly provides for the appointment of only one conciliator, unless otherwise agreed by the disputant parties.

CONCILIATION/MEDIATION PROCESS

Preliminary Communications and Preparation

The parties, before meeting the mediator/conciliator may require having some preliminary communications with the conciliator or with the institution arranging the conciliation. Once the conciliator has explained the process and has dealt with any queries or reservations which the parties may have, it will be easier to spend time meeting separately with each party. However, pre-meeting communications should be limited to procedural matters, venue, timetable for the conciliation, documents, information required, formulation of a preliminary programme for obtaining summaries of the parties in respective cases and contentions. At this stage of the conciliation process, the conciliator should ensure that all necessary parties attend the conciliation. Where corporate or institutional parties are involved, their representatives need to have authority to negotiate and reach agreement.

Meeting with the Parties

The initial joint meeting generally involves the conciliator making an opening address to the parties, and explanining the principles, procedures and ground rules of the conciliation The mediator/conciliator may also consult the parties about the preparation of an agreed agenda or the agenda may be formulated by the mediator personally, as working guidelines. The structure of mediation process and approach towards issues are the implicit part of the mediator’s management function and authority.

Presentation/Statements by the Parties

The parties, at this stage of the process, present their case before the conciliator. The manner of presentation depends upon various factors,

including whether it is the party or the representative or agent doing so; individual personality, style, skills and strategy; the nature and complexity of the issues; and the emotional factors involved. Most ideally, the presentation should be clear and well reasoned and explain their claims or grievances and impart the facts and any technical issues precisely. Section 65 of the Act contains provisions regarding the submission of statements describing nature of dispute and the points at issue.

The mediator/conciliator may during the presentation, raise questions to help clarify or amplify relevant aspects. After the presentation is made, the mediator may allow parties to ask questions of clarifying nature only. The mediator should exercise his authority and judgement to ensure that discussions do not degenerate into hostile exchanges which might make the process more difficult.

Relevant Information

Submission of information relevant to the dispute is an important part of the process. Information that is required for the purpose may include non-contentious facts about the parties and the background to the dispute may be obtained from an initial referral form or from statements of facts furnished by the parties. Relevant documents, including copy of pleadings or affidavits where adversarial proceedings are under way, may be obtained by the mediator from the parties. The conciliator/mediator may also request parties to submit statements comprising identification of the issues and the respective contentions of the parties and technical information, which may include expert opinion, legal opinions, valuations, assessment of damages and other specialised data.

Facilitating Negotiations

This is the substantive phase of the process where the conciliator/mediator helps the parties to communicate with one another, either directly or in joint session, or indirectly through separate meetings, and facilitates their negotiating with one another with a view to narrowing their differences and eventually resolving their dispute. During the negotiations, the mediator/conciliator can encourage and help the parties to generate and consider their options, and develop them into viable course of action. In most cases the parties themselves should suggest options, but the mediator can often add to these suggested options. The development of options is an intrinsic part of the problem solving approach which characterises mediation. Section 72 of the Act provides that each party may submit to conciliator suggestion for settlement. The mediator can also help the parties to understand one another more clearly by presenting their perceptions in a way which the other can comprehend and by correcting any distortions or misunderstandings.

The conciliator/mediator is required to use various skills at all levels of the proceedings, but especially during negotiating process. The skill of the mediator is an important ingredient in the mediation process. It is usually necessary for mediator/ conciliator to undertake specific skills training courses to develop and adopt those skills to ensure that they are appropriately used.

A mediator should, in addition to the usual facilitative role, also adopt some element of evaluation of the issues. The object of any evaluation is not to sit in judgement in the matter but to facilitate realistic negotiations by helping the parties to reassess their respective positions and prospects of success in the event of adjudication, particularly where there is deadlock.

The mediation may continue for consecutive days if necessary, until the parties reach an agreement or decide to adjourn or abandon the mediation. In some cases, the mediation may be conducted at agreed intervals, for example, weekly or fortnightly with agreed action being taken between meetings.

Deadlock/Impasse Strategies

Deadlock or stalemate is a situation where the parties find themselves unable to extricate. When negotiations come to a halt due to specific differences which seem irreconcilable and the mediation seems set to terminate, the mediator should try some appropriate strategies to help the parties back onto the negotiation table. Mediators need to devise strategies specifc to the deadlock. Where there is any blocking issue, it may help to suggest that the parties refer it to an expert for a non-binding opinion while the mediation is pending. In this context, the Act contains reference to expert advice under section 78. The expert could, in a suitable case be asked to attend a mediation meeting to answer questions and to help the parties through their difficulty. The mediator can help parties by identifying and normalizing differences of perception. If the parties cannot find a long-term solution to their differences, they can be suggested to formulate short term agreements and to review the position after a particular period of time. Where the parties remain stuck, adjudication may be necessary and appropriate. This is the prerogative of the parties.

Termination of Mediation/Conciliation

Mediation may be terminated where all the issues have been totally resolved or the parties may have resolved some issues and decide to take the others into a different ADR forum or process. The parties or any of them can also terminate the mediation even though some or all of the issues are unresolved. The mediator himself may consider the continuance of mediation in a appropriate case and may decide to terminate it. Section 76 of the Act enumerates grounds for termination of conciliation proceedings.

Recording of Settlement Agreeement

At the conclusion of the mediation/conciliation proceedings, the mediator/conciliator has to consider as to whether a written record of the outcome is needed. If the mediation ends without any of the issues being resolved, there may be no need to record anything in writing, though in some cases the parties may nevertheless wish to have an informal written summary of the mediation, providing information which might be useful to them in subsequently trying to narrow down issues and in facilitating any future bilateral negotiations. Where there is a complete or partial resolution of the issues a written agreement is required to record the matters resolved. Section 73 of the Act provides that if the parties reach agreement on a settlement of the dispute they may draw up and sign a written settlement agreement. If requested by the parties the conciliator may draw up, assist, the parties in drawing up the settlement agreement. After signing of agreement by the parties the conciliator authenticates the agreement and furnishes a copy to each of the parties. The agreement signed by the parties and authenticated by conciliator is binding on the parties and shall have status and effect of an arbitral award and shall be enforceable as decree of Court.

The document signed by the parties at the conclusion of the mediation/conciliation may either record the principles of their agreement and/or the key points. As a geneal rule, it is usually appropriate and important that the document should be precise, simple and clear to avoid subsequent misunderstanding and disagreement. Costs of Conciliation After termination of conciliation proceedings the Conciliator fixes the cost of proceedings and gives written 40 7TH NATIONAL CONFERENCE OF PRACTISING COMPANY SECRETARIES notice to the parties. Section 78(2) of the Act specifically defines the ‘costs’ as reasonable cost relating to fee and expenses of conciliator and witnesses and expert advice requested by the conciliator with the consent of the parties. The costs also include the cost charged by the institution for appointing conciliator or arranging administrative assistance to facilitate the conduct of the conciliation proceeding in accordance with section 64 or section 68 of the Act.

Deposits by the Parties

The conciliator, at the initiation of the proceedings may direct the parties to deposit an equal amount as an advance for the costs which may be incurred. Even during the proceedings he may direct each party to deposit supplementary amount. In this context section 79 of the Act empowers the conciliator to suspend the proceedings or declare in writing the termination of conciliation proceedings, if the deposits, as directed by the conciliator, have not been paid in full by both the parties within a period of thirty days.

Accounts Under section 79(4) of the Act the conciliator is under obligation, upon the termination of proceedings, to render accounts to parties about the deposits he had received during the proceedings and also return the unexpended balance, if any, to the parties.

POST CONCILIATION ROLE OF ON CONCILIATOR/INSTITUTION

Generally, the termination of the mediation/conciliation and the recording of the settlement agreement signifies the conclusion of the mediator's role. However, it is possible that the mediator, or the ADR institution which arranged the mediation may be asked by the parties to function in relation to the implementation of the settlement terms. The parties may wish the mediator or the ADR institution to act as a stockholder in relation to fund to be released on agreed terms or to hold documents pending the implementation of the settlement. The parties may also agree that any dispute which may arise in the course of execution of settlement agreement will be referred to mediation.

3. THE ARBITRATION AND CONCILIATION ACT, 1996 — AN ANALYSIS

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognises the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimises the supervisory role of Courts. A significant feature of the Act is the appointment of arbitrators by the Chief Justice of India or Chief Justice of High Court. The Chief Justice may either appoint the arbitrator himself or nominate a person or Institution to nominate the arbitrator. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

The Act has been divided into four Parts and contains three Schedules. Part one deals with Arbitration (Section 2 to 43); Part two deals with enforcement of certain Foreign Awards (Section 44 to 60); Part three deals with conciliation (Section 61 to 81); and Part four contains supplementary provisions (Sections 82 to 86). Similarly Schedule one contains provisions relating to convention on the Recognition and Enforcement of Foreign Arbitral Awards; Schedule two deals with Protocol on Arbitration Clauses and Schedule three contains provisions relating to Execution of Foreign Arbitral Awards.

ARBITRATION

Part one of the Act containing sections 2 to 43 has been divided into nine chapters and deals with General Provisions; Arbitration Agreements; Composition of Arbitral Tribunal; Jurisdiction of Arbitral Tribunal;

Conduct of Arbitral Proceedings; Making of Arbitral Award and Termination of Proceedings; Recourse against Arbitral Award; Finality and Enforcement of Arbitral Awards; Appeals and Miscellaneous provisions. The salient provisions of Part one are given below:

Definition of Arbitration Agreement - Section 2(b) read with section 7 of the Act requires arbitration agreement to be necessarily in writing, which may be included in the main contract as a clause or a separate agreement may be entered into by the parties. An agreement shall be deemed to be in writing when it is signed by the parties, including exchange of letters, telex, telegram and other means of telecommunication. This also includes exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other party.

Appointment of Arbitrators - The arbitrators can be appointed by the parties as agreed to between them, failing which the Chief Justice of India, Chief Jutice of State High Court or their nominees shall appoint the arbitrator. The Act under section 12 empowers the parties to challenge an appointed arbitrator on specific ground. This is an important departure from the provisions of section 11 of the 1940 Act which required the parties to approach the Court for removal of an appointed arbitrator. Section 13 authorises parties to agree on the procedure for challenging an arbitrator. Section 16 empowers the arbitral tribunal to rule on its own jurisdiction and to consider objections with respect to validity or existence of the arbitration agreement. Equal Treatment to Parties - Section 18 envisages the principle of equality to be followed in connection with the arbitral proceedings and obliges the arbitrators to accord each party equal treatment and give each party full opportunity to present his case.

Rules of Procedure - As far as the rules of procedure are concerned, it has been left to the parties concerned to agree on the procedure to be followed in arbitral proceedings. However, the arbitral tribunal may conduct the proceedings in an appropriate manner, where the parties are undecided as to the procedure for conduct of proceedings.

Place of Arbitration - Section 20 contains provisions regarding the place of conduct of arbitration proceedings as agreed upon by the parties. However, in case there is difference of opinion among the parties as to the place of arbitration, the tribunal has been empowered to conduct arbitral proceedings at appropriate place.

Language - Section 22 authorises the parties to agree on one language to be used in arbitral proceedings, failing which the tribunal shall be free to determine the issue and such language will be used in all written statements, document, awards etc.

Appointment of Experts - Under section 26, the arbitral tribunal has been empowered to appoint the experts to report to it on specific issues to be

determined by the tribunal. They can also sit during the hearings if the parties agree thereto or the tribunal considers it necessary.

Rules Applicable to Substance of Dispute - This is a very important provision as far as the international commercial arbitration is concerned. The arbitral tribunal is obliged to apply the rules of law designated by the parties as applicable to the substance of the dispute. However in the absence of any agreement as to the applicable law between the parties, the tribunal can apply rules of law, it considers appropriate.

Use of other ADR Techniques During Arbitral Proceedings - Section 30 is an important provision which allows arbitral tribunal to resort to mediation, conciliation or other procedure for settlement of the disputes, during the arbitration proceedings. The conciliation as envisaged in this section is different from the conciliation that has been provided under sections 61-81 of Part III of the Act. The conciliation under Part III is separate and independent proceeding as against informal, and flexible proceedings under this section.

Reasoned Award - The arbitral awards under section 31 of the Act are required to be reasoned awards unless parties agree otherwise.

Setting Aside of Arbitral Award - The provisions of section 34 of the Act clearly enumerate the grounds on which the Court can entertain the application for setting aside an award. These include capacity of a party, invalidity of arbitration agreement, violation of principles of natural justice and the exceeding of terms of reference by arbitrator. The only residuary ground on which the Court can go into the merits of the award is the public policy, which is always subject to circumstances and interpretation.

Enforcement of Arbitral Award - The arbitral award under section 36 of the Act has been given the status of a decree of Court and made enforceable under the Code of Civil Procedure. Now an award is not required to be converted into a decree.

ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Part II of the Act containing sections 44-60 deal with the enforcement of certain foreign awards. Chapter I containing sections 44 - 52 deals with the awards under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), whereas Chapter-ll containing sections 53-60 deal with awards under Geneva Convention on the Execution of Foreign Arbitral Awards. The Act repealed two earlier enactments relating to enforcement of foreign awards, yet it re-enacted operative portions of the repealed Acts. Sections 44 and 53 of the Act define the foreign awards as to mean an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered commercial under the law in force in India made on or

after the 11th day of October 1960 in the case of New York convention awards and after the 28th day of July 1924 in the case of Geneva Convention awards.

Awards made under New York Convention or Geneva Convention

Any foreign award whether made under New York Convention or Geneva Convention, which would be enforceable under the Act have been treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India.

Conditions for Enforcement of Foreign Awards Section 57 of the Act enumerates the conditions for enforcement of foreign awards and provides that the party against whom the award is invoked, may use any of the following grounds as defence before the Court for the purpose of refusal of enforcement of the foreign awards, namely :

(i) the parties were under some incapacity under the law applicable to them or the arbitration agreement is not valid under that law; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a difference not falling within the terms of submission to arbitration. However, if the award can be separated, the decision on the matters beyond the scope of the arbitration agreement shall not be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or in the law of the country where the arbitration took place; or

(v) the award has not yet become binding, or has been set aside or suspended by a competent authority of the country in which or under the law of which, the award was made; or

(vi) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(vii) the enforcement of award would be contrary to the public policy of India. In this context, it has been clarified that an award is in conflict with the public policy of India if the making of the award is induced or effected by fraud or corruption.

The provisions regarding conditions for enforcement of foreign awards made under the New York Convention or the Geneva Convention are almost the same. It is obligatory on the party applying for the enforcement of a foreign award to produce before the Court :

(a) the original award or a duly authenticated copy thereof;

(b) the original agreement for arbitration or a duly-certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

Where the award or agreement is in a foreign language, the party seeking to enforce the award is required to produce a certified translated copy in English. Where the Court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that Court.

Appealable Orders

An appeal to the Court authorised by law to hear appeals from such order, may lie on following two counts:

(i) Where the judicial authority in India has ordered refusing to refer the parties to arbitration under section 45 in case the New York Convention is applicable to them or under section 54 in case the
Geneva Convention is applicable to them.

The aforesaid sections i.e. section 45 and section 54 provide that a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred in section 44 or section 53, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

(ii) Where the Court has refused to enforce a foreign award either under section 48 or section 57 of the Act. Section 50(2) prohibits a second appeal from an order passed in appeal. However, any right of the parties to appeal to the Supreme Court shall not be affected or taken away by virtue of these provisions. Both the Chapters of Part II dealing with New York Convention awards and Geneva Convention awards contain a similar saving provision which provides that nothing in this chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this chapter had not been enacted.

CONCILIATION

The conciliation under Part III is an independent procedure and distinct from that as provided under section 30(1) of the Act where the conciliation may be taken up during the arbitration proceedings. The major provisions relating to Conciliation are explained below:

Commencement of Conciliation Proceedings - Section 62 of the Act provides that the Conciliation proceedings can be initiated by a party inviting other party to conciliate under the provisions of the Act. Once the other party accepts in writing the invitation to conciliate, the conciliation proceedings start.

Number of Conciliators - Section 63 of the Act provides that there can be only one conciliator unless parties agree for more than one conciliator. When there is more than one conciliator, they are required to act jointly together.

Appointment of Conciliators - Section 64 of the Act deals with the appointment of conciliator. The section says that in the case of one conciliator, parties have to agree on the name of the sole conciliator. Whereas in the case of three, each party can appoint one, and has to agree on the third, who will act as Presiding conciliator. The section further provides that the parties may also request institutions like ICADR to recommend the names of suitable individuals to act as conciliator or the parties may agree that the appointment be made by the institution. The proviso to this section particularly aims at conciliation in respect of international commercial disputes.

This section specifically provides that the conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

Role of Conciliator - Section 67 prescribes the role to be played by the conciliator during the proceedings.

The conciliator, as against an arbitrator is only a facilitator and not a judge. His authority is restricted to the extent the parties entrust it to him. The conciliator is required to follow the principles of objectivity, fairness and justice and is required to give due consideration to the usage of trade and business practices. He can make a settlement proposal at any stage of the proceedings.

Settlement Agreement and Status thereof - Sections 73 and 74 deal with the settlement agreement and its status" respectively. At any stage of proceedings the conciliator can propose possible settlement, if he is of the opinion that the settlement is possible. The settlement reached between the parties by consensus with the help of conciliator and signed by the parties, has been treated equally and given same status under the provisions of Act with that of an arbitral award. Section 74 makes the settlement agreement enforceable as a decree of the Court.

Termination of Proceedings - Under section 76 of the Act, the parties have been empowered to terminate conciliation proceedings by giving in writing a declaration to this effect. The declaration shall be addressed to the conciliator. Section 77 makes it clear that the parties cannot initiate any arbitral or judicial proceedings pending conciliation proceedings, unless it is necessary to protect the rights of the parties. Costs and Deposits - Sections 78 and 79 deal with costs and deposits respectively in relation to conciliation proceedings. Section 78(3) provides that the costs of the conciliation proceedings have to be born e by the parties equally. The conciliator at the end of proceedings is required to give notice to the parties in writing about the cost. This section specifically clarifies the cost as to mean reasonable cost. Section 79 of the Act provides that the conciliator before initiating the proceedings may ask the parties to deposit a particular amount as he thinks fit as cost of proceedings. He may, during the proceedings also ask the parties to deposit additional amount. This section empowers the conciliator to

suspend proceedings, if the amount is not deposited by the parties within 30 days. Similarly, conciliator is under obligation to render accounts at the termination of proceedings and return the unspent amount to parties.

Role of Conciliator in other Proceedings - Section 80 of the Act provides that no conciliator can act as arbitrator, representative or counsel in any arbitral or judicial proceeding relating to subject in which he has acted as conciliator. However, the parties by agreement may provide otherwise.

SUPPLEMENTARY PROVISIONS

Part four of the Act containing sections 82 to 86 deal with power of High Court to make Rules; Removal of Difficulties in giving effect to the provisions of the Act; Power of the Central Government to make rules and Repeal and Savings including repeal of Arbitration and Conciliation (Third) Ordinance, 1996 and Savings.

CONCLUSION

The development of Alternative Dispute Resolution (ADR) has its principal origins in the dissatisfaction of people with the way in which the disputes are traditionally resolved. One of the motivations for ADR is commonly said to be the empowerment of the individual. Under the traditional process, dispute resolution is generally in the hands of lawyers, who use procedures and reasoning to resolve the issues for the parties, whereas, ADR processes tend to help with the empowerment of individuals giving them responsibility for the resolution of their own issues.

REVIEW QUESTIONS

1. Describe the alternative dispute resolution system in India.
2. Give your views on recommendations of law commission for making ADR compulsory in India.
3. Discuss main provision of the code of civil procedure (amendment) act, 1999 related to ADR.
4. What are the advantages of ADR?
5. What are modes of dispute resolution processes?
6. Give the definition of mediation/conciliation; also discuss scope of mediation/conciliation.
7. Describe general conciliation process. What are the advantages of conciliation/mediation?
8. What are pre-requisites for conciliator?
9. Describe the kinds of mediation and conciliation/mediation process.
10. What is the post conciliation role of conciliator/institution?

FURTHER READINGS

1. Indian Business Laws –S.K. Agrawal
2. Business Laws- M.C. Kucchal, Deepa Prakash
3. Business Laws-D. Chandra Bose
4. Business Laws- Pro. P.K. Goel
5. Business Laws- S.S. Gulshan

BIBLIOGRAPHY

6. Indian Business Laws –S.K. Agrawal
7. Business Laws- M.C. Kucchal, Deepa Prakash
8. Business Laws-D. Chandra Bose
9. Business Laws- Pro. P.K. Goel
10. Business Laws- S.S. Gulshan
11. Business Laws- Nirmal Singh
12. Business Laws- Mathur