CLASS: B.COM 3rdSem
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MERCANTILE LAW

Notes as per IKGPTU Syllabus

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BCOM 302-18 Mercantile Law Syllabus

Course Objective: To provide the brief idea about the frame work of Indian Business Laws. To orient students, about the legal aspects of business Along with these the course aims to familiarize the students with case law studies related to Business Laws.

Unit I

Introduction to Contract Act: Agreement, kinds of Agreements, Contract- kinds of contracts: Valid, Void, Voidable, Contingent and Quasi Contract and E contract, distinguish between agreement and contract.

Offer or Proposal- definition, Essentials of Valid proposal or offer, counter offer, Standing or open offer, distinguish between offer and invitation to offer, Acceptance definition, essentials of a valid acceptance, Promise, Communication of offer, acceptance and Revocation. Capacity to contract, Free Consent, Consideration, Legality of Object and Consideration Performance and discharge of contract, remedies for breach of contract

Unit II

Law of Indemnity and Guarantee, Law of Bailment and pledge, Law of Agency Partnership Act: Introduction to Partnership Act, Admission of Partner, Retirement and Death of Partner, Dissolution of Partnership Firm.

Unit III

The Sale of Goods Act 1930: Introduction, definitions, Formalities of the contract of sale, Distinction between 'sale' and 'agreement' of sell, Distinction between 'sale and hire-purchase agreement', Conditions and Warranties, Transfer of property as between the seller and buyer Rights of an unpaid seller. Consumer Protection Act, 1986: Objectives, features and structure.

Unit IV

Negotiable Instrument Act: Meaning and Characteristics of Negotiable Instrument, Operational rules of Evidence –Presumptions, classification of Negotiable Instruments, Promissory Notes and Bills of Exchange, Essential elements of promissory Note and Bill of Exchange, distinguish between Promissory note Bill of Exchange. Acceptor and Acceptance, definition of Acceptor, Acceptance for honour, Absolute and qualified or conditional acceptance, Drawer, Drawee in case of Need, Payee, Cheques, types of cheques and Penalties in case of dishonour of certain cheques, distinguish between cheque and Bill of exchange, Holder, Holder in Due Course, Rights and privileges of H.D.C. Payment in due course, Maturity of an Instrument.

INDEX

SR.NO	UNITS	PARTICULARS	PAGE NO
1	UNIT-I	Introduction to Contract Act Agreement, kinds of Agreements, Contract- kinds of contracts: Valid, Void, Voidable, Contingent and Quasi Contract and E contract, distinguish between agreement and contract.	4-10
2		Offer or Proposal- definition, Essentials of Valid proposal or offer, counter offer, Standing or open offer, distinguish between offer and invitation to offer.	10-14
3		Acceptance definition, essentials of a valid acceptance, Promise. Communication of offer, acceptance and Revocation, Consideration.	15-19
4		Capacity to contract	19-21
5		Free Consent	22-24
6		Legality of Object and Consideration	24-26
7		Performance and discharge of contract, remedies for breach of contract	27-33
8	UNIT-II	Law of Indemnity and Guarantee	34-38
9		Law of Bailment and pledge	39-47
10		Law of Agency	48-52
11		Partnership Act: Introduction to Partnership Act, Admission of Partner, Retirement and Death of Partner, Dissolution of Partnership Firm.	53-67
12	UNIT-III	The Sales Of Goods Act, 1930 (Introduction, definitions, formalities of contract of sale, Distinction between sale & agreement to sell. Distinction between sale & hire purchase agreement.)	68-72
13		Conditions & Warranties, Transfer of property as between the seller and buyer, Rights of an unpaid seller.	73-85
14		Consumer Protection Act, 1986: Objectives, features and structure.	86-94
15	UNIT-IV	Negotiable Instrument Act: Meaning and Characteristics of Negotiable Instrument, Operational rules of Evidence –Presumptions, classification of Negotiable Instruments, Promissory Notes and Bills of Exchange, Essential elements of promissory Note and Bill of Exchange, distinguish between Promissory note Bill of Exchange. Acceptor and Acceptance, definition of Acceptor, Acceptance for honour, Absolute and qualified or conditional acceptance, Drawer, Drawee in case of Need, Payee, Cheques, types of cheques and Penalties in case of dishonour of certain cheques, distinguish between cheque and Bill of exchange.	95-122
16		Holder, Holder in Due Course, Rights and privileges of H.D.C.	128-130
17		Payment in due course, Maturity of an Instrument.	123-127
18		KEY TERMS & IMPORTANT QUESTIONS	131-132
19		MCQs from all units	133-150
20		BIBLIOGRAPHY	151

MERCANTILE LAW

B.COM-302-18

UNIT-I

LAW OF CONTRACT

A contract is a written or expressed agreement between two parties to provide a product or service. There are essentially six elements of a contract that make it a legal and binding document. In order for a contract to be enforceable, it must contain:

a. An offer that specifically details exactly what will be provided
b. Acceptance, which is the agreement by the other party to the offer presented
c. Consideration, money or something of interest being exchanged between the parties
d. Capacity of the parties in terms of age and mental ability
e. The intent of both parties to carry out their promise
f. Legally enforceable terms and conditions, also called object of the contract

In other words, a contract is enforceable when both parties agree to something, back the promise up with money or something of value, both are in sound mind and intend to carry out their promise and what they promise to do is within the law.

A contract is written and signed by the parties. However, there are several other types of contracts that are considered enforceable. There are even some that are not considered enforceable and serve only as a way for a court to determine the obligation on the part of either party.

Express Contract

An express contract is the most common contract type. In this type of contract, all elements are specifically stated. This can be written or done orally. Either way, offer, acceptance and consideration must bind the parties together legally. And both parties must clearly understand the terms and conditions each is agreeing to.

An oral contract works the same way. In an oral contract, like negotiating the price of a new car, the parties agree on a set price, a monthly payment schedule if applicable and any warranties or guaranties included in the offer. Once acceptance is made and consideration is exchanged, the contract for the vehicle is binding and enforceable. As long as both parties uphold their promise, the car cannot be returned at a later date, nor can the salesman request the car back from the new owner.

Implied In-Fact Contract

Not every contract is as transparent as an expressed contract. An implied in-fact contract binds parties together through a mutual agreement and intent, but there are no expressed terms of the agreement. The agreement holds mutual intention based on facts and circumstances and a reasonable assumption from the circumstances and relations between the parties. For an implied in-fact contract to be enforceable, there are a few elements that must be present:

1. An unambiguous offer and acceptance
2. Mutuality of both parties to be bound to the contract

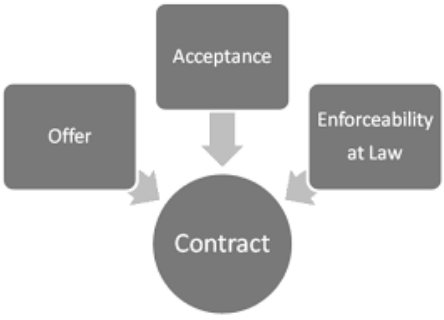
Consideration

The elements can be determined by the behaviors of the parties. For example, when a guest orders a steak at a restaurant, it is assumed that the steak will be cooked and served to the guest's liking and the guest has every intention of paying for the meal.

Implied In-Law Contract

An implied in-law contract, also known as a quasi-contract, works differently. In this type of contract, the elements are not specifically written or expressed. In fact, this type of contract is used as a remedy in a situation when one party to the quasi-agreement received unjust enrichment resulting from not paying for a product or service rendered. This sounds confusing but it really boils down to this - if a product or service is rendered to a party without paying, it becomes inequitable for the rendering party.

Contract Act



The Indian Contract Act, 1872 defines the term “Contract” under its section 2 (h) as “An agreement enforceable by law”. In other words, we can say that a contract is anything that is an agreement and enforceable by the law of the land.

This definition has two major elements in it i.e. – "agreement" and "enforceable by law". So in order to understand a contract in the light of The Indian Contract Act, 1872 we need to define and explain these two pivots in the definition of a contract.

Agreement

The Indian Contract Act, 1872 defines what we mean by "Agreement". In its section 2 (e), the Act defines the term agreement as "every promise and every set of promises, forming the consideration for each other". Now that we know how the Act defines the term "agreement", there may be some ambiguity in the definition of the term promise.

Examples

1. Mohan and Rishabh decided to go for lunch on Sunday. Mohan did not come for lunch, and this resulted in the waste of Rishabh's time. Now Rishabh cannot compel Mohan for the damages as the decision to go for the lunch is not a contract but a domestic agreement.
2. Varun promises his younger brother Anuj to pay his debts, and the agreement was in writing as well as registered. This is a valid agreement and can be enforceable.

Promise

This ambiguity is removed by the Act itself in its section 2(b) which defines the term "promise" here as: "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Proposal when accepted becomes a promise".

In other words, an agreement is an accepted promise, accepted by all the parties involved in the agreement or affected by it. This definition thus introduces a flow chart or a sequence of steps that need to be triggered in order to establish or draft a contract. The steps may be described as under:

The definition requires a person to whom a certain proposal is made.

The person (parties) in step one has to be in a position to fully understand all the aspects of a proposal. "Signifies his assent thereto" – means that the person in point one accepts or agrees with the proposal after having fully understood it. Once the "person" accepts the proposal, the status of the proposal changes to "accepted proposal".

"Accepted proposal" becomes a promise. Note that the proposal is not a promise. For the proposal to become a promise, it has to be accepted first.

Thus, in other words, an agreement is obtained from a proposal once the proposal, made by one or more of the participants affected by the proposal, is accepted by all the parties addressed by the agreement. To sum up, we can represent the above information below:

Agreement = Offer + Acceptance.

Enforceable By Law

Thus we can say that for an agreement to change into a Contract as per the Act, it must give rise to or lead to legal obligations or in other words must be within the scope of the law. Thus we can summarize it as Contract = Accepted Proposal (Agreement) + Enforceable by law (defined within the law)

Difference between Agreement and Contract

1. Promises and commitments forming consideration for the parties to the same consent are known as an agreement. The agreement, which is legally enforceable, is known as a contract.
2. The agreement is defined in section 2 (e) while a Contract is defined in section 2 (h) of the Indian Contract Act, 1872.
3. The major elements of an agreement are the offer and its acceptance by the same person to whom it is made, for adequate consideration. Conversely, the major elements of an agreement are agreement and its enforceability by law.
4. Every agreement is not a contract, but every contract is an agreement.
5. An agreement needs not to be given in writing, but the contracts are normally written and registered.
6. The agreement does not legally bind any party for the performance. In the Contract, the people are legally bound to perform their part.
7. The scope of the agreement is wider than a contract because it covers all types of agreement as well as contract. On the contrary, the scope of a contract is relatively narrower than an agreement because it covers only that agreement which have legal enforceability.

Types of contracts

1. Legal validity Express - Parties state the terms of the agreement to which they will be found, usually in writing.
2. Implied - Terms of agreement can be reasonably inferred by acts of the parties, even if not expressed in writing or orally.
3. Bilateral - All parties exchange promises to perform.
4. Unilateral - One party makes a promise in anticipation of some act. There is no reciprocal promise.
5. Executed - All parties have completed their promises.
6. Executory - Contract only partially performed or totally unperformed by the parties.

BASIS FOR COMPARISON	AGREEMENT	CONTRACT
Meaning	When a proposal is accepted by the person to whom it is made, with requisite consideration, it is an agreement.	When an agreement is enforceable by law, it becomes a contract.
Elements	Offer and Acceptance	Agreement and Enforceability
Defined in	Section 2 (e)	Section 2 (h)

LEGAL VALADITY

1. Valid and enforceable - All elements of legal and binding contract present.
2. Void - Contract without legal force or effect.
3. Voidable - Contact that can be annulled by either party after signing because it is legally defective or allows one party to rescind the contract.
4. Unenforceable - A contract that cannot be verified for legal enforcement or fails to meet certain requirements.

Intention to Contract

There is no provision in the Indian Contract Act requiring that an offer or its acceptance should be made with the intention of creating a legal relationship. But in English law it is a settled principle that “to create a contract there must be a common intention of the parties to enter into legal obligations.”

Case law: Balfour v Balfour

The defendant and his wife were enjoying leave in England. When the defendant was due to return to Ceylon, where he was employed, and his wife was advised, by reason of her health, to remain in England. The defendant agreed to send her an amount of 30 pound a month for the probable expenses of

maintenance. He did send the amount for some time, but afterwards differences arose which resulted in their separation and the allowance fell into arrears. The wife's action to recover the arrears was dismissed.

General Offers: Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

CASE: Carlil v Carbolic Smoke Ball Co

A company offered by advertisement to pay 100 pound to anyone "who contracts the increasing epidemic influenza, colds or any disease caused by taking cold, after having used the ball according to printed directions." It was added that 1000 pound is deposited with the Alliance Bank showing our sincerity in the matter". The plaintiff used the smoke balls according to the directions but she nevertheless subsequently suffered from influenza. She was held entitled to recover the promised reward.

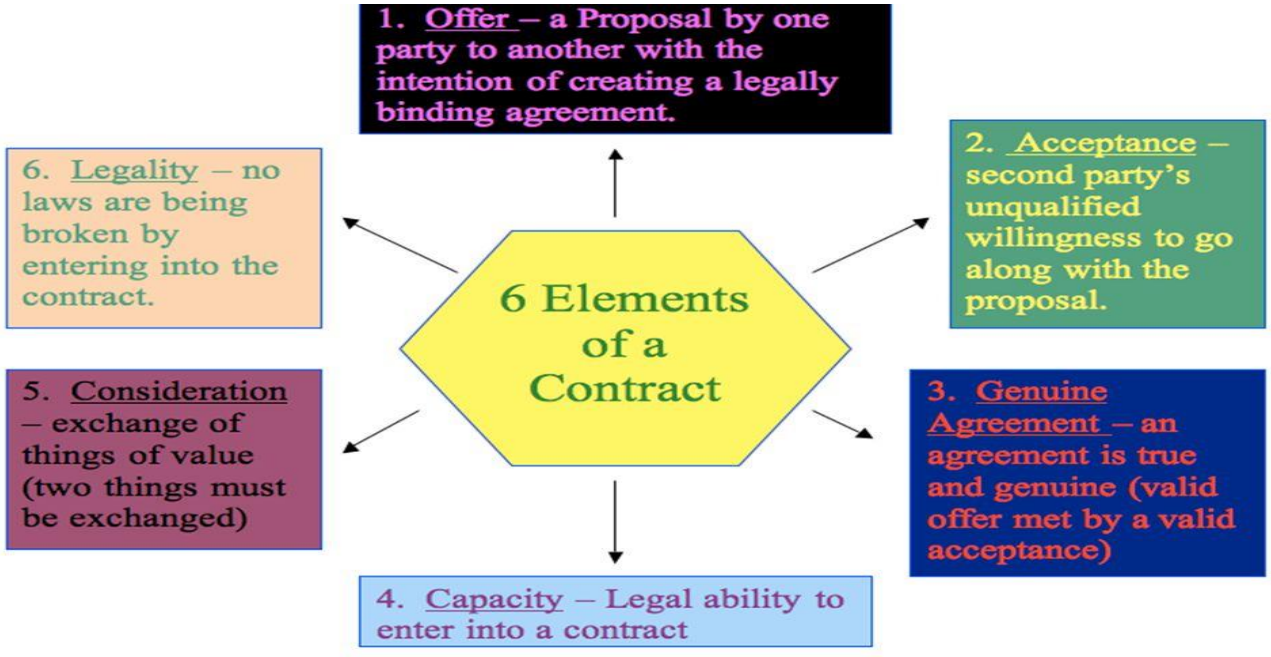
General offer of continuing nature

Where a general offer is of continuing nature, as it was, for example, in the Smoke Ball case, it will be open for acceptance to any number of persons until it is retracted. But where an offer requires some information as to a missing thing, it is closed as soon as the first information comes in.

Offer and Invitation to Treat

An offer should be distinguished from an invitation to receive offers. When a man advertises that he has got a stock of books to sell, or houses to let, there is no offer to be bound by any contract. "Such advertisements are offers to negotiate – offers to receive offers – offers to chaffer".

Essential Elements of a Contract



Essential Elements of a Contract as defined in Section 10 of the Indian Contract Act 1872

1. Agreement - Offer and Acceptance
2. Legal purpose
3. Lawful Consideration
4. Capacity to contract
5. Consent to contract
6. Lawful object
7. Certainty
8. Possibility of Performance
9. Not expressly declared void
10. Legal formalities like Writing, Registration etc

Acceptance – Section 2(b)

Introduction of Acceptance – Sec. 2 (b)

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

Thus "acceptance" is the assent given to a proposal, and it has the effect of converting the proposal into promise.

This is another way of saying that an agreement is an accepted proposal. Every agreement, in its ultimate analysis, is the result of a proposal from one side and its acceptance by the other.

There are three factors in Acceptance:

1. Communication to Offeror
2. Communication to Acceptor
3. When Communication is not necessary

CASE: Brogden v Metropolitan Railway co.

B had been supplying coal to a railway company without any formal agreement. B suggested that a formal agreement should be drawn up. The agents of both the parties met and drew up a draft agreement. It had some blanks when it was sent to B for his approval. He filled up the blanks including the name of an arbitrator and then returned it to the company. The agent of the company put the draft in his drawer and it remained there without final approval having been signified. B kept up his supply of coals but on the new terms and also received payment on the new terms. A dispute having arisen B refused to be bound by the agreement.

WHEN COMMUNICATION NOT NECESSARY

In certain cases, communication of acceptance is not necessary. The offeror may inform a particular mode of acceptance, then all that the acceptor as to do is to follow that particular mode.

Case law: Carlil v Carbolic Smoke Ball

BOWEN LJ observed as: "But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, he may dispense with notice to himself… and there can be no doubt that where the offeror expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding it is only necessary for the other person to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification".

MODE OF COMMUNICATION

Acceptance should be made in prescribed manner. Acceptance has to be made in the manner prescribed or indicated by the offeror. An acceptance given in any other manner may not be effective. Particularly where the offeror clearly insists that the acceptance shall be made in the prescribed manner. For example, A offered to buy flour from B requesting that acceptance should be sent by the wagon which brought the offer. B sent his acceptance by post, thinking that this would reach the offeror more speedily. But the letter arrived after the time of the wagon. A was held to be not bound by the acceptance.

Absolute and Unqualified

Section 7: Acceptance Must Be Absolute

In order to convert a proposal into a promise, the acceptance must — (1) be absolute and unqualified, (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

EFFECT OF DEPARTURE FROM PRESCRIBED MANNER

A departure from that manner does not of itself invalidate the acceptance. A duty is cast on the offeror to reject such acceptance within reasonable time. A minor departure from the prescribed mode of communication should not upset the fact of acceptance provided that the communication is made in an equally expeditious way.

Counter proposals- An acceptance containing additions, limitations, or other modifications shall be rejection of the offer and shall constitute a counter-offer. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.

If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

PARTIAL ACCEPTANCE

Acceptance should be of the whole of the offer. The offeree cannot accept a part of its terms which are favorable to him and reject the rest. Such an acceptance is another kind of counter proposal and does not bind the offeror.

INQUIRY INTO TERMS OF PROPOSAL: A mere inquiry into the terms of a proposal is not the same thing as a counter-proposal. On acceptance of the proposal, the contract will be created on the basis of the terms and conditions of the original proposal including arbitration clause.

ACCEPTANCE WITH CONDITION SUBSEQUENT

If an acceptance carries a condition subsequent, it may not have the effect of a counter-proposal. Thus, where an acceptance said: "terms accepted, remit cash down Rs.25, 000 by February 5, otherwise acceptance subject to withdrawal, this was not a counter-proposal, but an acceptance with a warning that if the money was not sent the contract would be deemed to have been broken.

ACCEPTANCE OF COUNTER PROPOSAL

Even "where the acceptance of a proposal is not absolute and unqualified the proposer may become bound, if, by his subsequent conduct, he indicates that he has accepted the qualifications set up".

Lapse of Offer

1. Notice of revocation
2. Lapse of Time
3. By failure to accept condition precedent
4. By death or insanity of offerer
5. Revocation of Acceptance

Revocation of proposals and acceptances (Section-5)-A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

NOTICE OF REVOCATION: Withdrawal before expiry of fixed period. Where an offeror gives the offeree an option to accept within a fixed period, he may withdraw it even before the expiry of that period.

CASE LAW: Alfred Schonlank v. Muthunayna Chetti

The defendant left an offer to sell a quantity of indigo at the plaintiff's office allowing him eight days' time to give his answer. On the 4th day however the defendant revoked his proposal. The plaintiff accepted it on the 5th day. Holding the acceptance was useless.

LAPSE OF TIME

An offer lapses on the expiry of the time, if any, fixed for acceptance. Where an offer says that it shall remain open for acceptance up to a certain date, it has to be accepted within that date. For example, where an offer was to last until the end of March and the offeree sent a telegram accepting the offer on 28th March which was received by the offeror on 30th March, it was held that the option was duly exercised.

FAILURE TO ACCEPT CONDITION PRECEDENT

Where the offer is subject to a condition precedent, it lapses if it is accepted without fulfilling the condition. Where a salt lake was offered by way of lease on deposit of a sum of money within a specified period, and the intended lessee did not deposit the amount for 3 long years, it was held that this entailed cancellation of the allotment.

DEATH OR INSANITY OF OFFEROR

An offer lapses on the death or insanity of the offeror, provided that the fact comes to the knowledge of the offeree before he makes his acceptance. In the case of Dickinson v Dodds, it was held that an offer cannot be accepted after the death of the offeror.

SECTION 6: Revocation how made

A proposal is revoked —

1. By the communication of notice of revocation by the proposer to the other party;
2. By the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
3. By the failure of the acceptor to fulfill a condition precedent to acceptance; or
4. By the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Revocation of Acceptance: An acceptor may cancel his acceptance by a speedier mode of communication which will reach earlier than the acceptance itself. Section 5 is the relevant provision.

Consideration [SECTION 2 (d) and SECTION 25]

Section 25 of the Indian Contract Act, 1872 states that "an agreement made without consideration is void" Consideration is a price of the promise.

Definitions

In the words of Pollock, "Consideration is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

Section 2(d) of the Indian Contract Act defines consideration as: When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

It means price for which the promise of the other is bought – a valuable considerations a price of the promise – some of value received by the promisee as an inducement of the promise quid pro quo (something in return) – may be of some benefit to the plaintiff or some detriment to the defendant.

Abdul Aziz vs. Masum Ali

A promise to subscribe Rs.500 for re-building a mosque – not fulfilled – secretary of mosque committee filed a suit for enforcement of promise – Held, the promise not enforceable as no consideration in the sense of benefit for the promisor – the secretary of the committee suffered no detriment as nothing has been done to carry out the repairs – no contract.

Essential Elements of a Valid Consideration

1. It must move at the desire of promisor
2. It may move from promisee or any other person (Privity of consideration)
3. It must be real, not illusory
4. It need not be adequate
5. It may be past, present or future
6. It must not be illegal, immoral or opposed to public policy

PROMISSORY ESTOPPEL-The doctrine of promissory estoppels prevents one party from withdrawing a promise made to a second party if the latter has reasonably relied on that promise.

Promissory estoppels require:

a. an unequivocal promise by words or conduct
b. evidence that there is a change in position of the promisee as a result of the promise (reliance but not necessarily to their detriment)
c. inequity if the promisor were to go back on the promise

In general, estoppels is 'a shield not a sword' — it cannot be used as the basis of an action on its own. It also does not extinguish rights.

ACTS DONE AT REQUEST:

An act done at the promisors desire furnishes a good consideration for his promise even though it is of no personal significance or benefit to him.

PROMISES OF CHARITABLE NATURE

Doraswami Iyer v Arunachala Ayyar

Facts: The repair of a temple was in progress. As the work proceeded, more money was required and to raise this money subscription were invited and a subscription list raised. The defendant put himself down on the list for Rs. 125 and it was to recover this sum that the suit was filed. The plaint found the consideration for the promise as a reliance on the promise of the subscriber that they have incurred liabilities in repairing the temple.

Judgment: The learned judge held that there was no evidence of any request by the subscriber to the plaintiff to do the temple repairs. Since, the temple repairs were already in progress when the subscriptions were invited. The action was not induced by the promise to subscribe but was rather independent of it. Hence, no recovery was allowed.

UNILATERAL PROMISES

A unilateral promise is a promise from one side only and is intended to induce some action by the other party. The promisee is not bound to act, for he gives no promise from his side. But if he carries out the act desired by the promisor, he can hold the promisor to his promise. “An act done at the request of the offeror in response to his promise is consideration, and consideration in its essence is nothing else but response to such a request.”

Abdul Aziz v Masum Ali

The defendant promised Rs.500 to a fund started to rebuild a mosque but nothing had been done to carry out the repairs and reconstruction. The subscriber was, therefore, held not liable.

REVOCATION OF UNILATERAL PROMISES

Errington v Errington

Facts: The owner of a house had mortgaged it. The house was in the occupation of his son and daughter-in-law. He told them that the house would become their property if they paid off the mortgage debt in installments and they commenced payment.

Judgment: The father’s promise was a unilateral contract, a promise of the house in return for their act of paying the installments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed.

PROMISSORY ESTOPPEL AND GOVERNMENT AGENCIES

In Pournami Oil Mills v State of Kerala, the Government was not permitted to go back on its earlier promise of wider exemption from sales tax in pursuance of which certain industries were set up. A subsequent notification curtailing the exemption was held to be applicable to industries established after the

notification. A promise which is against public policy or in violation of a statutory prohibition cannot be the foundation of estoppels.

Privity of Contract and of Consideration

"PROMISEE OR ANY OTHER PERSON"

It means that as long as there is a consideration for a promise, it is immaterial who has furnished it. It may move from the promisee, or, if the promisor has no objection, from any other person.

Dutton v Poole

Facts: A person had a daughter to marry and in order to provide her a marriage portion, he intended to sell a wood of which he was possessed at the time. His son (the defendant) promised that if "the father would forbear to sell at his request he would pay the daughter £1000". The father accordingly forbore but the defendant did not pay. The daughter and her husband sued the defendant for the amount.

Judgment: The court held that if a man should say, 'Give me a horse, I will give your son £10', the son may bring the action, because the gift was upon the consideration of a profit to the son, and the father is obliged by natural affection to provide for his children. There was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children.

PRIVITY OF CONSIDERATION

According to Section 2(d), it is not necessary that consideration should be finished by the promisee. A promise is enforceable if there is some consideration for it and it is quite immaterial whether it moves from the promisee or any other person.

Chinnaya v Ramayya

An old lady, by deed of gift, made over certain landed property to the defendant, her daughter. By the terms of the deed, which was registered, it was stipulated that an annuity of Rs.653 should be paid every year to the plaintiff, who was the sister of the old woman. The defendant on the same day executed in plaintiff's favor an agreement promising to give effect to the stipulation. The annuity was however not paid and the plaintiff sued to recover it.

It was held that the deed of gift and the defendant's promise to pay the annuity were executed simultaneously and, therefore, they should be regarded as one transaction and there was sufficient consideration for that transaction.

EXECUTORY CONSIDERATION

"Such Act, Abstinence or Promise is called Consideration"

CONSIDERATION MUST BE OF SOME VALUE

Consideration as defined in the Act means some act, abstinence or promise on the part of the promisee or any other which has been done at the desire of the promisor. E.g. A promises to give his new Rolls-Royce car to B, provided B will fetch it from the garage. The act of fetching the car cannot by any stretch of imagination be called a consideration for the promise. Even though it is the only act, the promisor desired the promisee to do. Such an act no doubt satisfies the words of the definition, but it does not catch its spirit. It is for this reason that English common law insisted that "consideration must be of some value in the eyes of the law." It must be real and not illusory, whether adequate or not as long as the consideration is not unreal, it is sufficient if it be of slight value only.

VALUE NEED NOT BE ADEQUATE (ADEQUACY OF CONSIDERATION)

It is not necessary that consideration should be adequate to the promise. The courts cannot assume the job of settling what should be the appropriate consideration for a promise. It is up to the parties.

INADEQUACY AS EVIDENCE OF IMPOSITION

The act in Explanation 2 to Section 25 states that "inadequacy of consideration may be taken into account by the court in determining the question whether the consent of promisor was freely given. E.g.,

A agrees to sell a horse worth Rs.1000 for Rs.10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the court should take into account in considering whether or not A's consent was freely given.

FORBEARANCE TO SUE

Forbearance to sue has always been regarded as valuable consideration. It means that the plaintiff has a certain right of action against the defendant or any other person and on a promise by the defendant, he refrains from bring the action.

COMPROMISE GOOD IRRESPECTIVE OF MERITS

Compromise of a pending suit is a good consideration for the agreement of compromise. But the dispute should be bona fide. A compromise is a good consideration "irrespective of merits of the claim of either side" and even where there is some doubt in the minds of the parties as to their respective rights.

Performance of Existing Duties

PERFORMANCE OF LEGAL OBLIGATIONS

Consideration must be something more than what the promisee is already bound to do. Performance of a legal duty is no consideration for a promise.

PERFORMANCE OF CONTRACTUAL OBLIGATIONS

A. Pre-existing Contract with Promisor: Compliance with legal obligation imposed by a contract with the promisor can be no consideration for a promise.

Promise to pay less than amount due: A promise to pay less than what is due under a contract cannot be regarded as a consideration.

CONSIDERATION AND MOTIVE

Consideration should be distinguished from motive or a pious desire to fulfil an obligation. “Motive is not the same thing with consideration.”

Thomas v Thomas

Facts: “A testator, on the death of his death, had verbally said in front of witnesses that he was desirous that his wife should enjoy certain premises for her life. The executors, who were also the assignees, “in consideration of such desire and of the premises,” agreed with the widow to convey the premises to her provided she would pay to the executors the sum of 1 pound yearly towards the ground rent and keep the said house in repair.

Court Held: On the question of consideration for the agreement between the executors and the widow the court pointed out that the motive for the agreement was, unquestionably, respect for the wishes of the testator. But that was no part of the legal consideration for the agreement. Motive should not be confounded with consideration. The agreement was, however, held to be binding as the undertaking to pay the ground rent was a sufficient consideration.

Exceptions to Consideration

An agreement made without consideration is void unless –

(1) It is in writing and registered

(2) Or is a promise to compensate for something done

Natural love and affection: A written and registered agreement based on natural love and affection between near relatives is enforceable without consideration. E.g., A family settlement between a man and his wife was made for providing maintenance to wife. This was held to be enforceable because it was meant for deriving satisfaction and peace of mind from family harmony.

Past voluntary service: A promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor, is enforceable.

Time-barred debt: A promise to pay a time-barred debt is enforceable. The promise should be in writing. It should also be signed by the promisor or by his agent generally or specially authorized in that behalf.

One of the most essential elements of a valid contract is the competence of the parties to make a contract. Section 11 of the Indian Contract Act, 1872, defines the capacity to contract of a person to be dependent on

three aspects; attaining the age of majority, being of sound mind, and not disqualified from entering into a contract by any law that he is subject to. In this article, we will look at all aspects in a detailed manner.

Capacity to Contract

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

The three main aspects:

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

1] Attaining the Age of Majority

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

A Contract made with a Minor is Void

Since any person less than 18 years of age does not have the capacity to contract, any agreement made with a minor is void ab-initio (from the beginning).Peter is 17 years and 6 months old. He needs some money to go for a vacation with his friends. He approached a moneylender and borrows Rs 25,000. As security, he signs some papers mortgaging his laptop and motorcycle. Six months later, when he attains the age of majority, he files a suit declaring that the mortgage executed by him when he was a minor is void and should be canceled. The Court agrees and relieves Peter of all liability to repay the loan.Also, if a minor enters into a contract, then he cannot ratify it even after he attains majority since the contract is void ab-initio. And, a void agreement cannot be ratified.

A Minor can be a Beneficiary of a Contract

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

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

A Minor is always given the Benefit of being a Minor

Even if a minor falsely represents himself as a major and takes a loan or enters into a contract, he can plead minority. The rule of estoppels cannot be applied against a minor. He can plea his minority in defense.

Contract by Guardian: Under certain circumstances, a guardian of a minor can enter into a valid contract on behalf of the minor. Such a contract, which the guardian enters into, for the benefit of the minor, can also be enforced by the minor. However, guardians cannot bind a minor by a contract for buying immovable property. But, a contract entered into by a certified guardian of a minor, appointed by the Court, with an approval from the Court for the sale of a minor's property can be enforced.

Insolvency

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

Joint contract by a Minor and an Adult

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

2] Person of Sound Mind

According to Section 12 of the Indian Contract Act, 1872, for the purpose of entering into a contract, a person is said to be of sound mind if he is capable of understanding the contract and being able to assess its effects upon his interests. It is important to note that a person, who is usually of an unsound mind, but occasionally of a sound mind, can enter a contract when he is of sound mind. No person can enter a contract when he is of unsound mind, even if he is so temporarily. A contract made by a person of an unsound mind is void.

3] Disqualified Persons

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

Disqualified Persons

(Persons not eligible to enter into a contract)Apart from minors and persons of unsound mind, the following persons are not eligible to enter into a contract in certain circumstances:

- Alien Enemies,
- Foreign Sovereigns,
- Insolvents,
- Body Corporate,
- Convicts.

Agreements with Disqualified Persons

1. Aliens: Alien means a person of a foreign country.

a. Alien friend: Contracts with alien friend (persons of a foreign country which is in peace with India) are valid subject to some restrictions.

b. Alien enemy: Contracts with alien enemy (persons of a country which is in war with India) are void subject to following rules:

i. Contracts made during war period: During war period (i.e., after the war is declared), an alien enemy can neither make a contract with an Indian, nor can sue in an Indian court, unless permitted by Central Government.

ii. Contracts made before war: Such contracts may be suspended (or dissolved if against public policy or it would benefit the enemy country).

2. Foreign Sovereigns: Diplomatic staff may enter into contract and can sue. They enjoy some special privilege and cannot be sued in Indian court unless they voluntarily submit to the court or when permitted by Central Government to be sued.

3. Insolvents: Insolvent cannot enter into a contract. When a debtor is adjudged insolvent, his property is vested with the official assignee, which only can then enter into contracts relating to the property of the insolvent.

4. Body Corporate: A Company or Body Corporate may enter into contract as permitted by its Memorandum of Association & Articles of Association.

5. Convicts: A convict undergoing imprisonment cannot enter into a contract unless permitted by Central Govt. He can enter into a contract when he is lawfully at large, when he is pardoned or when his period of sentence expires. A contract already entered with a person who undergoes imprisonment cannot be enforced until the conviction is completed, unless permission from Central Government is obtained.

Free Consent

In the Indian Contract Act, the definition of Consent is given in Section 13, which states that "it is when two or more persons agree upon the same thing and in the same sense". So the two people must agree to something in the same sense as well. Let's say for example A agrees to sell his car to B. A owns three cars and wants to sell the Maruti. B thinks he is buying his Honda. Here A and B have not agreed upon the same thing in the same sense. Hence there is no consent and subsequently no contract. Free Consent has been defined in Section 14 of the Act. The section says that consent is considered free consent when it is not caused or affected by the following,

- Coercion
- Undue Influence
- Fraud
- Misrepresentation
- Mistake

Elements Vitiating Free Consent

The following are the essentials of Free Consent:

1] Coercion (Section 15): Coercion means using force to compel a person to enter into a contract. So force or threats are used to obtain the consent of the party under coercion, i.e it is not free consent. Section 15 of the Act describes coercion as

- committing or threatening to commit any act forbidden by the law in the IPC
- unlawfully detaining or threatening to detain any property with the intention of causing any person to enter into a contract

For example, A threatens to hurt B if he does not sell his house to A for 5 lakh rupees. Here even if B sells the house to A, it will not be a valid contract since B's consent was obtained by coercion. Now the effect of coercion is that it makes the contract voidable. This means the contract is voidable at the option of the party whose consent was not free. So the aggravated party will decide whether to perform the contract or to void the contract. So in the above example, if B still wishes, the contract can go ahead. Also, if any monies have been paid or goods delivered under coercion must be repaid or returned once the contract is void. And the burden of proof proving coercion will be on the party who wants to avoid the contract. So the aggravated party will have to prove the coercion, i.e. prove that his consent was not freely given.

2] Undue Influence (Section 16)

Section 16 of the Act contains the definition of undue influence. It states that when the relations between the two parties are such that one party is in a position to dominate the other party, and uses such influence to obtain an unfair advantage of the other party it will be undue influence. The section also further describes how the person can abuse his authority in the following two ways,

- When a person holds real or even apparent authority over the other person. Or if he is in a fiduciary relationship with the other person
- He makes a contract with a person whose mental capacity is affected by age, illness or distress. The unsoundness of mind can be temporary or permanent

For example A sold his gold watch for only Rs 500/- to his teacher B after his teacher promised him good grades. Here the consent of A (adult) is not freely given, he was under the influence of his teacher. Now undue influence to be evident the dominant party must have the objective to take advantage of the other party. If influence is wielded to benefit the other party it will not be undue influence. But if consent is not free due to undue influence, the contract becomes voidable at the option of the aggravated party. And the burden of proof will be on the dominant party to prove the absence of influence.

3] Fraud (Section 17): Fraud means deceit by one of the parties, i.e. when one of the parties deliberately makes false statements. So the misrepresentation is done with full knowledge that it is not true, or recklessly without checking for the trueness, this is said to be fraudulent. It absolutely impairs free consent. According to Section 17, a fraud is when a party convinces another to enter into an agreement by making statements that are

- suggesting a fact that is not true, and he does not believe it to be true
- active concealment of facts
- a promise made without any intention of performing it
- any other such act fitted to deceive

Example- A bought a horse from B. B claims the horse can be used on the farm. Turns out the horse are lame and A cannot use him on his farm. Here B knowingly deceived A and this will amount to fraud. One factor to consider is that the aggravated party should suffer from some actual loss due to the fraud. There is no fraud without damages. Also, the false statement must be a fact, not an opinion. In the above example if B had said his horse is better than C's this would be an opinion, not a fact. And it would not amount to fraud.

4] Misrepresentation (Section 18)

Misrepresentation is also when a party makes a representation which is false, inaccurate, incorrect etc. The difference here is the misrepresentation is innocent, i.e. not intentional. The party making the statement believes it to be true. Misrepresentation can be of three types

- A person makes a positive assertion believing it to be true
- Any breach of duty gives the person committing it an advantage by misleading another. But the breach of duty is without any intent to deceive
- When one party causes the other party to make a mistake as to the subject matter of the contract. But this is done innocently and not intentionally.

5] Mistake

When one of the parties has given its consent to the contract under some kind of misunderstanding then the consent is said to be have been given by mistake. If it wasn't for the misunderstanding the party would not have entered into the agreement. Under contract law, a mistake can of two kinds: 1) Mistake of Law and 2) Mistake of Fact.

Mistake of Law

When the party has any misunderstanding with regards to the legal provisions, it is called Mistake of Law. Now, the party can be confused regarding the law of the Homeland or law of a foreign land. If it is a mistake regarding the law of the homeland, the contract cannot be avoided. The party cannot take the plea of having no knowledge of laws of his homeland. But if it is a mistake regarding the law of a foreign country, he can be excused.

Mistake of Fact

When the parties have any misunderstanding regarding the subject matter or terms of the contract, it is said to be a Mistake of fact. The misunderstanding can be on the part of one party or both of them.

Bilateral Mistake – When both the parties are under any misunderstanding/mistake relating to a matter of fact essential to the agreement, the agreement becomes void.

Unilateral Mistake – When the misunderstanding/mistake is on the part of one party to the contract, the agreement remains valid. Only when the party is mistaken about the parties to agreement or nature of the transaction, the agreement becomes void.

Conclusion

Free Consent is absolutely essential to make an agreement a valid contract. The importance of free consent cannot be stressed enough. Consent of the parties to the contract must be free and voluntarily. Consent to the contract has to be given without any kind of pressure or delusions. It is important that the consent given by the parties is free as this can affect the validity of the contract. If the consent to the agreement was obtained or induced by coercion, undue influence, fraud, misrepresentation or mistake, then it has the potential to make the agreement void.

Legality of Object

Legality of Object: Section 23 of the Indian Contract Act has specified certain considerations and objects as unlawful. The consideration or objects of an agreement is lawful, unless- it is forbidden by law; is of such a nature that, if permitted, it would defeat the provision of any law; or is fraudulent; or involves injury to the person or property of another; or the court regards it as immoral or opposed to public policy.

In each of the above mentioned cases the consideration or object of an agreement is deemed to be unlawful. Every agreement in which the object or consideration is unlawful is void.

Some examples

X promises to obtain for Y an employment in the public service, and Y promises to pay X Rs. 1000 for that. This agreement is void as the consideration in this case is unlawful X agrees to let her daughter to hire to Y as a concubine. This agreement is void as it is immoral and as a result opposed to law.

The following agreements are considered to be against public policy:

1. Trade with the enemy:
2. An agreement between the citizens of two countries at war with each other is void and hence inoperative.
3. Agreement in interference with the course of justice:
4. All agreements which interfere with the normal course of law and justice are deemed to be opposed to public policy and hence are void.
5. Agreements which injure the public services are considered to be void.
6. Agreements infringing personal freedom
7. Agreements hindering parental duties.
8. Agreements hindering marital duties

LEGALITY OF OBJECT AND CONSIDERATION

One of the essentials of a valid contract is that the consideration and the object should be lawful. Every agreement of which the object or consideration is unlawful is void. Section 23 mentions the circumstances when the consideration or object of an agreement is not lawful.
Sec. 23The consideration or object of an agreement is unlawful unless. It is forbidden by law or 2.is of such nature that, if permitted, it would defeat the provisions of law, or 3.is fraudulent4.involves or implies injury to the person or property of another; or 5.the Court regards it as immoral or opposed to public policy.
1. Forbidden by Law
When something is forbidden by law, an agreement to do that is unlawful. An agreement to do what has been prohibited by the Indian Penal Code or by some other law cannot be enforced. A Contract to pay some money if a crime or a tort is committed is not enforceable. If the law prohibits bigamy, a promise by a married man to marry another lady is unlawful. Even if the promise says that a man would marry a woman after his wife's death, such a promise is not enforceable because such a promise tends to break up marriage, encourages immorality and often leads to commission of crimes. If the agreement does not satisfy the clear and unequivocal requirements of a statute it is void. In Re Mahmoud and Ispahani, (1921) during the war the sale of linseed oil without a license from the Food Controller had been forbidden. The Plaintiff agreed to sell linseed oil to the defendant, on a false assurance from the defendant, that he had such a license. Subsequently, when the oil was supplied the defendant refused to accept the same on the ground that he had such a

license. In an action against the defendant for damages for breach of contract it was held that he was not liable as there was no valid contract between the parties.

Opposed to public policy

If the court regards an agreement as opposed to public policy, the agreement is void. Public Policy is not capable of any precise definition. Public policy means the policy of the law at a stated time. An act which is injurious to the interest of the society is against public policy. If an agreement is prejudicial to social or economic interest of the community, it will be against public policy to enforce such an agreement. On the one hand a person's right of contractual freedom should be maintained, on the other hand if the contract is against public policy the law must not allow that to be enforced.

The following agreements have been held to be opposed to public policy Agreement to stifle prosecution Agreement of maintenance and champerty trading agreement with an enemy Marriage brokage contract Agreement tending to injure the public service.

i. Agreement to stifle prosecution: An agreement to stifle prosecution has been regarded as opposed to public policy. The purpose of criminal law is to punish a guilty person and a compromise with a view to save a guilty person from liability would frustrate this object. Some minor offences have been recognized as compoundable offences which permit of a compromise. Any compromise excluding compoundable cases to frustrate an action against a criminal would be deemed to be unlawful. By acceptance of some consideration to make a compromise in a criminal case, one is deemed to have accepted bribe. With regard to non compoundable offences, however, the position is clear that no court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not, for itself .If A promises B to drop a prosecution, which he has instituted against B for robbery, and B promises to restore the value of the things taken, the agreement is void, as its object is unlawful.

ii. Agreement of maintenance and Champerty

iii. Marriage brokage contract; Marriage brokage contracts mean such contracts under which a person agrees to procure a marriage between two persons on some consideration. Such agreements are opposed to public policy and are void. Public policy is that, suitable matrimonial unions should be made by a free and deliberate decision of the parties themselves, and the same may not be possible if the marriage is arranged through intermediaries, who may procure marriages for the sake of themselves gaining some financial advantages. Such an agreement is void even though the agreement is not to introduce any particular person of the opposite sex for marriage, but gives a choice of the number of persons out of whom the selection is to be made.

v. Agreement tending to injure the public service.: An agreement to buy, sell or procure a public office is against public policy. When there is a sale of public office, or assignment of the salary of an office, it is unlawful. Such agreements tend to corrupt public life as they are likely to interfere in the selection of properly qualified persons for an office, and are, therefore, void .For example, A

promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful. If a person procures the appointment as a Customs Officer at a port with the help of another, and in return promises to share some benefits of the post with the later, the agreement is void and unenforceable

PERFORMANCE AND DISCHARGE OF CONTRACT

Introduction: A contract places a legal obligation upon the contracting parties to perform their mutual promises, and it carries on until the discharge or termination of the contract. The most natural and usual mode of discharging a contract is to perform it. A person who performs a contract in accordance with its terms is discharged from any further obligations. As a rule, such performance entitles him to receive the other party's performance.

Exact and complete performance by both the parties puts an end to the contract. In expecting exact performance, the courts mean that, performance must match contractual obligations. In requiring a contract to be complete, the law is merely saying that any work undertaken must be carried out to the end of the obligations.

A contract should be performed at the time specified and at the place agreed upon. When this has been accomplished, the parties are discharged automatically and the contract is discharged eventually. There are, however, many other ways in which a discharge may be brought about. For example, it may result from an excuse for non-performance. In certain cases attempted performance may also operate as a substitute for actual performance, and can result in complete discharge of the contract.

The term 'Performance of contract 'means that both, the promisors, and the promisee have fulfilled their respective obligations, which the contract placed upon them. For instance, A visits a stationery shop to buy a calculator. The shopkeeper delivers the calculator and A pays the price. The contract is said to have been discharged by mutual performance.

Section 27 of Indian contract Act says 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 this Act, or any other law.

Promises bind the representatives of the promisor in case of the death of the latter before performance, unless a contrary intention appears in the contract. Thus, it is the primary duty of each contracting party to either perform or offer to perform its promise. For performance to be effective, the courts expect it to be exact and complete, i.e., the same must match the contractual obligations. However, where under the provisions of the Contract Act or any other law, the performance can be dispensed with or excused; a party is absolved from such a responsibility.

Example

A promise to deliver goods to B on a certain day on payment of Rs 1,000 A expires before the contracted date. A‘s representatives are bound to deliver the goods to B, and B is bound to pay Rs 1,000 to A‘s representatives.

Types of Performance

Performance, as an action of the performing may be actual or attempted.

Actual Performance

When a promisor to a contract has fulfilled his obligation in accordance with the terms of the contract, the promise is said to have been actually performed. Actual performance gives a discharge to the contract and the liability of the promisor ceases to exist. For example, A agrees to deliver10 bags of cement at B’s factory and B promises to pay the price on delivery. A delivers the cement on the due date and B makes the payment. This is actual performance. Actual performance can further be subdivided into substantial performance, and partial Performance

Substantial Performance

This is where the work agreed upon is almost finished. The court then orders that the money must be paid, but deducts the amount needed to correct minor existing defect. Substantial performance is applicable only if the contract is not an entire contract and is severable. The rationale behind creating the doctrine of substantial performance is to avoid the possibility of one party evading his liabilities by claiming that the contract has not been completely performed. However, what is deemed to be substantial performance is a question of fact to be decided in both the case. It will largely depend on what remains undone and its value in comparison to the contract as a whole.

Partial Performance

This is where one of the parties has performed the contract, but not completely, and the other side has shown willingness to accept the part performed. Partial performance may occur where there is shortfall on delivery of goods or where a service is not fully carried out.

There is a thin line of difference between substantial and partial performance. The two following points would help in distinguishing the two types of performance. Partial performance must be accepted by the other party. In other words, the party who is at the receiving end of the partial performance has a genuine choice whether to accept or reject. Substantial performance, on the other hand, is legally enforceable against the other party.

Payment is made on a different basis from that for substantial performance. It is made on quantum meruit, which literally means as much as is deserved. So, for example, if half of the work has been completed, half of the negotiated money would be payable. In case of substantial performance, the party that has performed can recover the amount appropriate to what has been done under the contract, provided that the contract is

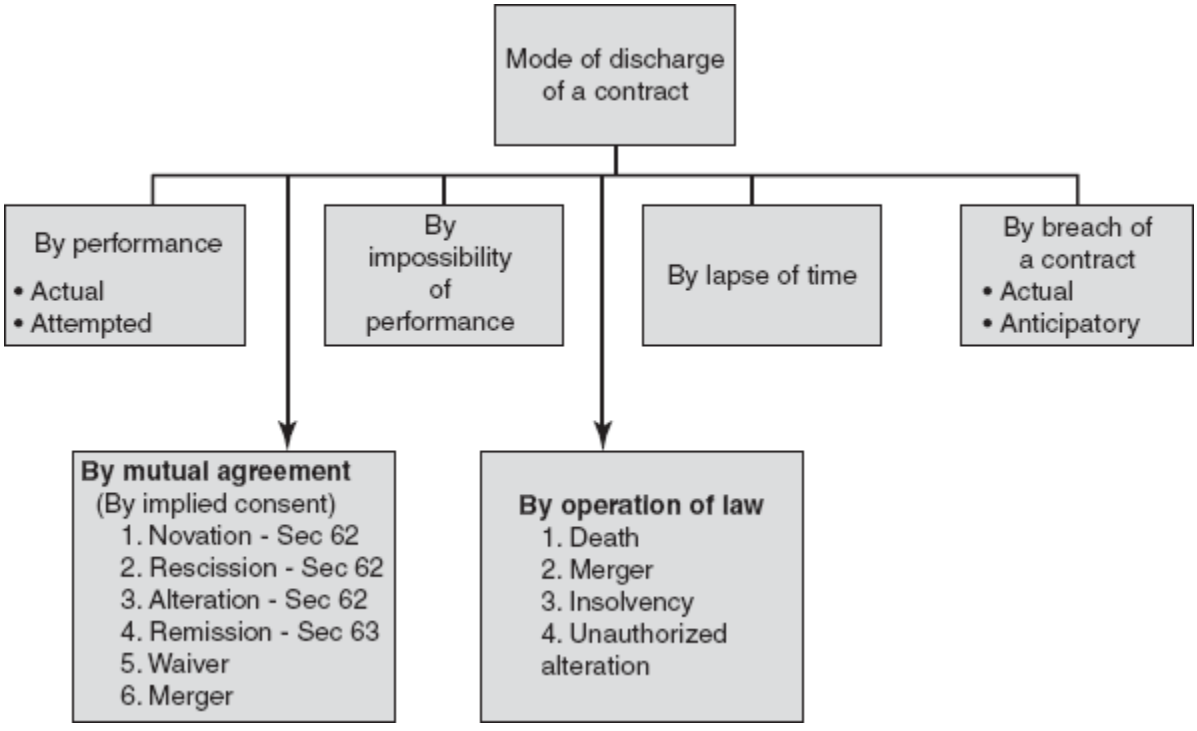
not an entire contract. The price is thus, often payable in such circumstances, and the sum deducted represents the cost of repairing defective workmanship.

Attempted Performance

When the performance has become due, it is sometimes sufficient if the promisor offers to perform his obligation under the contract. This offer is known as attempted performance or more commonly as tender. Thus, tender is an offer of performance, which of course, complies with the terms of the contract. If goods are tendered by the seller but refused by the buyer, the seller is discharged from further liability, given that the goods are in accordance with the contract as to quantity and quality, and he may sue the buyer for. Breach of contract if he so desires. The rationale being that when a person offers to perform, he is ready, willing and capable to perform. Accordingly, a tender of performance may operate as a substitute for actual performance, and can affect a complete discharge.

In this regard, Section 38 of Indian Contract Act says:

'Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, or does he thereby lose his rights under the contract. For example, A contracts to deliver to B, 100 tons of basmati rice at his warehouse, on 6 December 2015. A takes the goods to B's place on the due date during business hours, but B, without assigning any good reason, refuses to take the delivery. Here, A has performed what he was required to perform under the contract. It is a case of attempted performance and A is not responsible for non-performance of B, nor does he thereby lose his rights under the contract.'



Discharge of Contract by Performance

When the parties to a contract perform their respective promises, the contract is said to have been performed. This is the normal and natural mode of discharging a contract. When performance is proper and complete on either side, the parties become free from any further liability. If only one party performs what he promised, he alone gets a valid discharge, and he acquires a right of action against the other for non-performance.

Discharge of Contract - Discharge of Contract – Discharge by performance

Performance may be.

Actual performance, or

Offer to perform or tender.

1. Actual Performance: The contract is said to have been performed, if both the parties to the contract have performed their respective promises.

2. Offer to Perform or Tender: Tender is an offer to perform the obligation under the contract. When one party offers to perform its part of the promise and the other party refuses to accept the performance, the first party is discharged from its obligation provided the offer or tender to perform the contract was valid.

Discharge of Contract by Mutual Agreement

Discharge of Contract - Discharge by Mutual Agreement: Discharge of Contract – Discharge by Mutual Agreement

If both the parties to the contract, expressly or impliedly, agree to terminate the contract, the contract is said to have been discharged by mutual consent. Example: A buys a scooter from B with the condition that if it's working is not found satisfactory, he will return it within 10 days. A is not satisfied with the performance of the scooter and returns it to B within 10 days. The contract is discharged by mutual consent.

Ways Mutual discharge of contract takes place

Mutual discharge of a contract may take place in any of the following ways:

1. Novation: Novation means substitution of a new contract in place of the old one. It creates a new contract in exchange of the old contract. It discharges the old i.e., the original contract. New contract here may be either between the same parties or between different parties, the consideration being mutually the discharge of the old contract.

2. Alteration: Alteration of a contract means change in one or more of the terms of a contract. Alteration is valid, if it is done with the consent of all the parties to the contract. In such a case, the old contract is discharged.

3. Remission: Remission means the acceptance of less than what was contracted for.

4. Rescission: Rescission means cancellation of all or some of the terms of a contract. It may occur under various circumstances such as

- By mutual consent of the parties, or
- Where a party to a contract fails to perform his obligations, the other party can rescind the contract without prejudice to his rights to receive compensation for breach of contract.

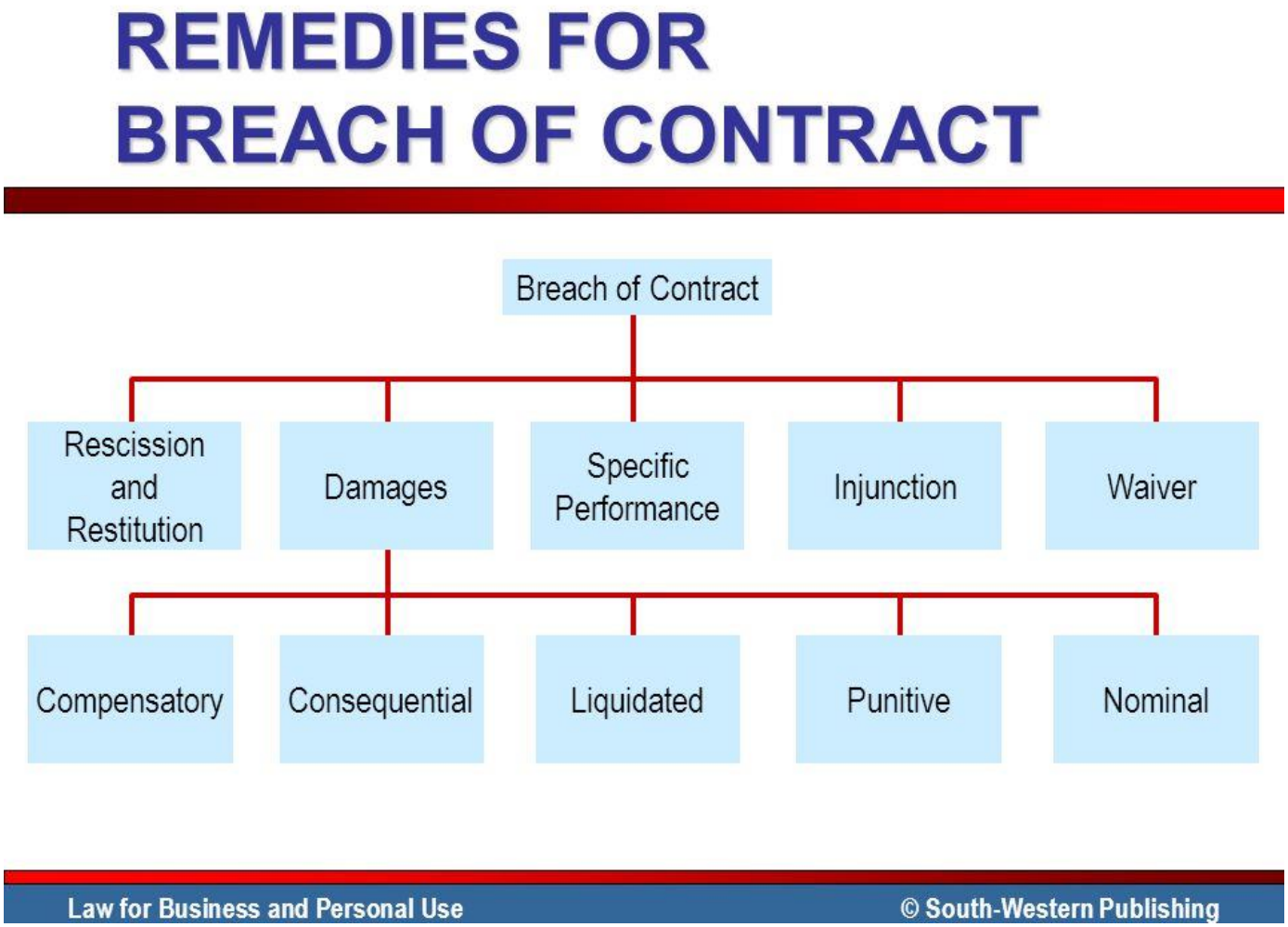
In case of a voidable contract, one of the parties has the option to rescind it.

5. Waiver: Waiver means "Abandoning" the rights. When a party to the contract abandons or waives his rights, the contract is discharged. Here, both the parties mutually agree that they shall no longer be bound by the contract. It amounts to a release of parties from their contractual obligations.

6. Merger: Merger denotes coinciding and meeting of an inferior and superior right in one and the same person. In such a case, inferior right available to a party under an agreement will vanish automatically.

Remedies for Breach of Contract

When a promise or agreement is broken by any of the parties we call it a breach of contract. So when either of the parties does not keep their end of the agreement or does not fulfill their obligation as per the terms of the contract, it is a breach of contract.



Rescission of the Contract

When one party to the contract breaches the contract, the other party need not perform his part of the obligations. The aggrieved party may rescind the contract. In such cases, the injured / aggrieved party can either rescind the contract of file a suit for damages. In general, rescission of the contract is accompanied by a suit for damages.

Suit for damages

The aggrieved party of the contract is entitled for monetary compensation when the contract is breached. The objective of Suit for damages is to put the aggrieved / injured party in a position in which he would have been had there been performance and not breach. The aggrieved / injured party must be able to prove the actual loss or no damages will be awarded. Damages can be of four kinds.

1. Ordinary or General Damages: NATURAL
2. Special Damages: UNSUAL CIRCUMSTANCES
3. Exemplary or Punitive Damages or Vindictive Damages: TO PUNISH THE PERSON
4. Nominal Damages: NOT MUCH LOSS

Suit for Quantum Merit

The term "Quantum Merit" is derived from Latin which means "what one has earned". The injured party can file a suit upon quantum merit and may claim payment in proportion to work done or goods supplied. Sections 65 to 70 deal with the provisions relating to suit for Quantum Merit.

Suit for Specific Performance

The suit for Specific Performance is regulated by the Specific Relief Act, 1963. Specific Performance means the actual carrying out of the contract as agreed. The Court may grant for specific performance where it is just and equitable to do. Specific Performance may be granted under the following grounds.

- Lack of standard for ascertaining the damages
- Where compensation is not adequate relief
- Substantial work done by the plaintiff.

The Court cannot grant the remedy of specific performance in the following situations.

- Where monetary compensation is an adequate relief
- Where the Court cannot supervise the actual execution of the work
- Where the Contract is for personal services
- Where the Contract is not enforceable by either party against the other.

Suit for Injunctions

Injunction is an order of the Court restraining a person from doing a particular act. Where the defendant is doing something which he is promised not to do, then the injured party will get a right to file a suit for injunction.

UNIT-II

CONTRACT OF INDEMNITY AND LAW OF GUARANTEE

The term Indemnity literally means "Security against loss". In a contract of indemnity one party – i.e. the indemnifier promise to compensate the other party i.e. the indemnified against the loss suffered by the other.

The definition of a contract of indemnity as laid down in Section 124 – "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.

Nature of Contract of Indemnity –

A contract of indemnity may be express or implied depending upon the circumstances of the case, though Section 124 of the Indian Contract Act does not seem to cover the case of implied indemnity.

The Indian Contract Act also deals with special cases of implied indemnity –

1. U/s 69 if a person who is interested in payment of money which another is bound by law to pay and therefore pays it, he is entitled to be indemnified. For instance – if a tenant pays certain electricity bill to be paid by the owner, he is entitled to be indemnified by the owner.

2. Section 145 provides for right of a surety to claim indemnity from the principal debtor for all sums which he has rightfully paid towards the guarantee.

3. Section 222 provides for liability of the principal to indemnify the agent in respect of all amounts paid by him during the lawful exercise of his authority.

Validity of Indemnity Agreement; A contract of indemnity is one of the species of contracts. The principles applicable to contracts in general are also applicable to such contracts so much so that the rules such as free consent, legality of object, etc., are equally applicable.

Where the consent to an agreement is caused by coercion, fraud, misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. As per the requirement of the Contract Act, the object of the agreement must be lawful. An agreement, the object of which is opposed to the law or against the public policy, is either unlawful or void depending upon the provision of the law to which it is subject.

Right of the indemnity holder – (Section 125)

An indemnity holder (i.e. indemnified) acting within the scope of his authority is entitled to the following rights –

1. **Right to recover damages** – he is entitled to recover all damages which he might have been compelled to pay in any suit in respect of any matter covered by the contract.

2. **Right to recover costs** – He is entitled to recover all costs incidental to the institution and defending of the suit.

3. **Right to recover sums paid under compromise** – he is entitled to recover all amounts which he had paid under the terms of the compromise of such suit. However, the compensation must not be against the directions of the indemnifier. It must be prudent and authorized by the indemnifier.

4. **Right to sue for specific performance** – he is entitled to sue for specific performance if he has incurred absolute liability and the contract covers such liability. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-

(1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit ;

(3) All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not

Right of Indemnifier –

Section 125 of the Act only lays down the rights of the indemnified and is quite silent of the rights of indemnifier as if the indemnifier has no rights but only liability towards the indemnified. In the logical state of things if we read Section 141 which deals with the rights of surety, we can easily conclude that the indemnifier's right would also be same as that of surety.

Where one person has agreed to indemnify the other, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. [Simpson v Thomson]

Principle of Subrogation is applicable because it is an essential part of law of indemnity and is based on equity and the Contract Act contains no provision in contravention with [Maharaja Shri Jarvat Singhji v Secretary of State for India]

CONTRACT OF GUARANTEE, SURETY, PRINCIPAL DEBTOR AND CREDITOR

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the" surety";

The person in respect of whose default the guarantee is given is called the" principal debtor ", and the person to whom the guarantee is given is called the" creditor ". A guarantee may be either oral or written.

Consideration for guarantee.-Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of

As promise to deliver the goods. This is a sufficient consideration for Cs promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for Cs promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

SURETY'S LIABILITY:-The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract. A guarantee to B the payment of a bill of exchange by C, the acceptor. The bill is dishonored by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Continuing guarantee.-A guarantee which extends to a series of transactions is called a "continuing guarantee".

(a) A, in consideration that B will employ C in collecting the rent of Bs zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents.

This is a continuing guarantee.

(b) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does riot pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Revocation of continuing guarantee.-A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

(a) A, in consideration of Bs discounting, at As request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But

A is liable to B for the 2,000 rupees, on default of C.

Revocation of continuing guarantee by surety's death.-The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

DISCHARGE OF SURETY BY VARIANCE IN TERMS OF CONTRACT

Any variance, made without the surety's consent, in the terms of the contract between the principal 1[debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

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

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an

By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect, of a duty not affected by the later Act.

(c) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the 1st of March.

Discharge of surety by release or discharge of principal debtor:-

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. (a) A contracts with B to grow a crop of indigo an As land and to deliver it to B at a fixed rate, and C guarantees As performance of this contract. B diverts a stream of water which is necessary for irrigation of As land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.-

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Surety not discharged when agreement made with third person to give time to principal debtor. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

(a) C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

Release of one co-surety does not discharge others.-

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties. Discharge of surety by creditors act or omission impairing surety's eventual remedy.

Guarantee obtained by misrepresentation invalid.

Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee on contract that creditor shall not act on it until co-surety joins

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Co-sureties liable to contribute equally

Where two or more persons are CO-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

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

Liability of co-sureties bound in different sums.- Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

(a)A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for Ds duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees

Difference between Indemnity and Guarantee:-

1. In a contract of indemnity there are two parties i.e. indemnifier and indemnified. A contract of guarantee involves three parties i.e. creditor, principal debtor and surety.
2. An indemnity is for reimbursement of a loss, while a guarantee is for security of the creditor.
3. In a contract of indemnity the liability of the indemnifier is primary and arises when the contingent event occurs. In case of contract of guarantee the liability of surety is secondary and arises when the principal debtor defaults.
4. The indemnifier after performing his part of the promise has no rights against the third party and he can sue the third party only if there is an assignment in his favor. Whereas in a contract of guarantee, the surety steps into the shoes of the creditor on discharge of his liability, and may sue the principal debtor.

BAILMENT AND PLEDGE

Bailment and Pledge are examples of specific contracts Indian Contract Act 1872. The word bailment is derived from French word 'bailer' which means "to deliver" 4 In law we use the term bailment in its technical sense which means change of I possession of goods from one person to another . Pledge, on the other hand is a kind I of bailment for some special purpose such as where the goods ate transferred from one person to another as security for payment of debt or performance of a promise.

MEANING OF BAILMENT

Section 148 of the Indian Contract Act reads: A bailment is the delivery of goods by one person to another for some8purpose, 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. The person delivering the goods is called the “bailor". The person to whom they are delivered is called the "bailee". For example, you deliver some gold to jeweler B to make bangles for your sister. In this case you are bailor and B is bailee and by delivering gold to B, a relationship of bailment is created between you and the jeweler.

Essentials of Valid Bailment

i) Agreement

ii) Delivery of goods

iii) Purpose

iv) Return of the specific goods

Agreement: For creating a bailment the first essential requirement is the existence of an agreement between the bailor and the bailee.

i) **Delivery of goods:** For bailment, it is necessary that the goods should be delivered to the bailee. It is the essence of the contract of bailrnent. It follows that bailment can be of movable goods only. It is further necessary that the possession of the goods should be voluntarily transferred and is in accordance with the contract. For example, A, a thief enters a house and by showing the revolver, orders the owner of the house to surrender all ornaments in the house to him. The owner of the house surrenders the ornaments.

Delivery of possession may be actual or constructive. Actual delivery means actual physical transfer of goods from one person to another. For example, when a person gives his scooter for repair to workshop, it is actual delivery. When physical possession of goods is not actually given but some such act is done which has the effect of putting the goods in the possession of bailee, or putting the goods in the possession of any other person authorized by the bailee to hold them on his behalf, it amounts to constructive delivery. Sometimes the other person may. Already be in possession of the goods of the bailor, and subsequently a contract of bailment is entered into, whereby the other person promises to keep the goods as bailee. This also amounts to constructive delivery of the goods. A railway receipt is a document of title to goods, a transfer of the railway receipt affects a constructive delivery of the goods.

iii) **Purpose:** In a bailment, the goods are delivered for some purpose. The purpose for which the goods are delivered is usually in the contemplation of both the bailor and the bailee.

iv) **Return of the goods:** It is important that the goods which form the subject matter of the bailment should be returned to the bailor or disposed or according to the directions of bailor, after the accomplishment of purpose or after this: expiry of period of bailment.

Duties of a Bailor

Section 150 of the Indian Contract Act, 1872 bound the bailor with certain duties to disclose the latent facts specifically pertaining to defect in goods. Bailor's duty of disclosure is:

Gratuitous Bailment: It is the duty of the bailor to disclose all the defects in the goods that he is aware of to the Bailee that can interfere with the use of goods or can expose him to extraordinary risks. And failure to do the same will make bailor liable for damages.

Non Gratuitous Bailment (Bailment for Reward): This duty particularly deals with the goods given on hire. As per this provision, when the goods are bailed for hire, then in such a situation even if the bailor is aware of the defect in the goods or not will be held liable for the injury that has been caused due to the existence of such defect.

Duties of Bailee

Bailee has to fulfill several obligations as per Indian Contract Act, 1872. That is:

1. Duty to take reasonable care: It is the duty of the Bailee to take care of goods as his own goods. He shall ensure all safety measures that are necessary to protect the goods. The goods shall be taken care of equally whether they are gratuitous or non-gratuitous. The Bailee shall be held liable for payment of compensation if he fails to take due care. But if the Bailee has taken due care and instead of that the goods are damaged then in such a situation Bailee will not be liable to pay compensation. The Bailee is not liable for the loss of goods due to destruction by fire. (Section 151-152)
2. Duty not to make unauthorized use of the goods: Bailee is duty bound to use the goods for a specific purpose only and not otherwise. If he uses the goods for any other purpose than what is agreed for then the bailor has the right to terminate such bailment or is entitled with compensation for damage caused due to unauthorized use. (Section 153-154)
3. Duty not to mix bailor's goods with his own goods: It is the duty of the Bailee not to mix bailor's goods with his own. But if he wants to do the same then he shall seek consent from the bailor for mixing of goods. If the bailor agrees for the mixing of the goods then the interest in the mixed goods shall be shared in proportion. In case, Bailee without the consent of bailor mixes the goods with his own then two situations arise: goods can be separated and goods can't be separated. In the former case the Bailee has to bear the cost of separation and in the latter case since there is the loss of the goods, therefore, bailor shall be entitled with damages of such loss. (Section 155-157)

4. Duty to return the goods on the fulfillment of purpose: Bailee is duty bound to return the goods once the purpose is achieved or on the expiry of the time period for which the goods were bailed. But if the Bailee makes default in returning the goods on proper time then he will be responsible with the loss, destruction or deterioration of the goods if any. (Section 160-161)
5. Duty to deliver to the bailor increase or profit if any on the goods bailed: The Bailee has a duty to return the goods along with increase or profit subject to contract to the contrary. Accretion that has accrued from the bailed goods is the part of the bailed goods and therefore bailor has the right over such accretions if any. And such accretions shall be handed over to the bailor along with the goods bailed. For instance, A leaves a cow in the custody of B and cow gives birth to the calf. Then B is duty bound to hand over the bailed goods along with accretion to the bailor. (Section 163)

Rights of a Bailor

As such Indian Contract Act, 1872 does not provide for Rights of a Bailor. But Rights of a Bailor is same as Duties of the Bailee i.e. Rights of Bailor = Duties of Bailee. So the rights of bailor are:

1. Enforcement of Bailee's Duty: Since Right of the bailor is same as the right of the Bailee, therefore on the fulfillment of all duties of Bailee the bailor's right is accomplished. For example, it is the duty of the Bailee to give the accretions and it is the right of bailor to demand the same.
2. Right to claim damages: If the Bailee fails to take care of the goods, the bailor has the right to claim damages for such loss. (Section 151)
3. Right to Termination the Contract: If the Bailee does not comply with the terms of the contract and acts in a negligent manner in such case the bailor has the right to rescind the contract. (Section 153)
4. Right to claim compensation: If the Bailee uses the goods for an unauthorized purpose or mixes the goods which cause loss of goods in such case bailor has the right to claim compensation.
5. Right to demand the return of goods: It is the duty of the Bailee to return the goods and the bailor has the right to demand the same.

Rights of a Bailee

1. Right to recover expenses: In the contract of Bailment, the Bailee incurs expenses to ensure the safety of goods. The Bailee has the right to recover such expenses from the bailor. (Section 158)
2. Right to remuneration: When the goods are bailed to the Bailee he is entitled to receive certain remuneration for services that he has rendered. But in case of gratuitous bailment, the Bailee is not awarded any remuneration.
3. Right to recover compensation: At times a situation arises wherein bailor did not have the capacity to contract for bailment. Such a contract causing loss to the Bailee, therefore the Bailee has the right to recover such compensation from the bailor. (Section 168)

4. Right to Lien: Bailee has the right over Lien. By this, we mean that if the bailor fails to make payment of remuneration or does not pay the amount due, the Bailee has the right to keep the goods bailed in his possession till the time debtor dues are cleared. Lien is of two types: particular lien and general lien. (Section 170-171)
5. Right to suit against a wrong doer: After the goods have been bailed and any third party deprives the Bailee of use of such goods, then the Bailee or bailor can bring an action against the third party. (Section 180)

PLEDGE

Pledge is a kind of bailment. Pledge is also known as Pawn. It is defined under section 172 of the Indian Contract Act, 1892. By pledge, we mean bailment of goods as a security for the repayment of debt or loan advanced or performance of an obligation or promise. The person who pledges the goods as security is known as Pledger or Pawnor and the person in whose favor the goods are pledged is known as Pledgee or Pawnee.

Essentials of Pledge

Since Pledge is a special kind of bailment, therefore all the essentials of bailment are also the essentials of the pledge. Apart from that, the other essentials of the pledge are:

1. There shall be a bailment for security against payment or performance of the promise,
2. The subject matter of pledge is goods,
3. Goods pledged for shall be in existence,
4. There shall be the delivery of goods from pledger to pledgee,
5. There is no transfer of ownership in case of the pledge.

Rights of Pawnor

As per Section 177 of the Indian Contract Act, 1872 the Pawnor has the Right to Redeem. By this, we mean that on the repayment of the debt or the performance of the promise, the Pawnor can redeem the goods or property pledged from the Pawnee before the Pawnee makes the actual sale. The right of redemption is extinguished once the actual sale is done by the Pawnee as per his right under section 176 of the Indian Contract Act, 1872.

Rights of a Pawnee

The rights of the Pawnee as per Indian Contract Act, 1872 are:

1. Right to retain the goods: If the Pawnor fails to make the payment of a debt or does not perform as per the promise made, the Pawnee has the right to retain the goods pledged as security. Moreover, Pawnee can also retain goods for non-payment of interest on debt or non-payment of expenses incurred. But Pawnee cannot retain goods for any other debt or promise other than that agreed for in the contract. (Section 173-174)

2. Right to recover extraordinary expenses: The expenses incurred by Pawnee on the preservation of goods pledged can be recovered from Pawnor. (Section 175)
3. The right of suit to procure debt and sale of pledged goods: On the failure to make repayment to Pawnee of the debt, the Pawnee has two rights: either to initiate suit proceedings against him or sell the goods.

DIFFERENCE BETWEEN BAILMENT AND PLEDGE

Basis	Bailment	Pledge
Meaning	Transfer of goods from one person to another for a specific purpose is known as the bailment.	Transfer of goods from one person to another as security for repayment of debt is known as the pledge.
Defined In	It is defined under section 148 of the Indian Contract Act, 1872.	It is defined under section 172 of the Indian Contract Act, 1872.
Parties	The person who delivers the bailed goods is known as Bailor and the person receiving such goods is known as Bailee.	The person who delivers the pledged goods is known as Pledger or Pawnor and the person receiving such goods is known as Pledgee or Pawnee.
Consideration	The consideration may or may not be present.	Consideration is always there.
Right to Sell	Bailee has no right to sell the goods bailed.	Pledgee or Pawnee has the right to sell the goods.

MERCANTILE AGENTS

"Mercantile Agent today plays a vital role in the transfer of goods from the producer to the ultimate consumer".

There are a number of persons who help in taking the goods from producers to consumers. A producer may not be in a position to reach a consumer so he needs the help of various persons. This transfer process is highly organized and a formal one, with the goods passing from the manufacturer to the wholesaler and onto the retailer and then finally to the ultimate consumer.

Meaning: A mercantile agent is a person who is appointed by those in business to act on their behalf or to represent them in dealing with other persons. The person on whose behalf he acts as an agent is known as the 'Principal'.

A mercantile agent possesses the following **characteristics:**

- He has the authority to buy and sell goods on behalf of his principal or to consign them for the purpose of sale;
- He does not do business for himself, but he only represents his principal in all business dealings;
- He is a link between the principal and the third parties in so far as the business transactions are concerned;
- He is a business intermediary between the manufacturer and the ultimate consumer who helps in the transfer of goods without actually acquiring the ownership of the same;
- He is entitled to a commission from his principal, as a monetary consideration for his services.

Importance of Appointing a Mercantile Agent:

- With the rapid development in the field of business activities, the business of today is not confined to a village or a town or a state. It is fast expanding and reaching far and wide, even to the remotest corners of the globe. Today, a businessman of one country can easily develop trade links with a businessman in another country.
- With the development of transport and communication facilities and with the increase in large-scale production international trade has become possible. In this situation, businessman is faced with many problems, especially the problem of delegating responsibility and authority to a person who can execute the work on his behalf.
- Moreover, the problems of time, distance and efficiency have also cropped up. So in order to overcome all these difficulties, need was felt for appointing a person who could work on behalf of the businessman and help him in carrying on his business more efficiently and smoothly.
- Such a person today is known as a Mercantile or Commercial Agent and has become indispensable for modern business. Thus we see that Mercantile Agent today plays a vital role in the transfer of goods from the producer to the ultimate consumer.
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DUTIES OF AN AGENT

(i) Performance of duties: An agent is bound by his agreement with his principal, to perform all the duties entrusted to him by the latter, to the best of his capability.

(ii) Maintenance of skill, care and diligence: The agent should act with reasonable skill, care and diligence while discharging his duties. He is expected to execute his work on behalf of his principal with the same efficiency with which he performs his own work.

(iii) Render proper accounts: The agent is expected to render true, correct and proper statement of accounts to his principal. He should not mix up the accounts of the agency with personal accounts and should intimate the principal from time to time on the financial position of the agency.

(iv) Return money received: Since the agent is the trustee of the wealth of the agency, he is bound to return all sums of money earned from the business to his principal.

(v) Delegation of authority: The agent cannot delegate his authority to others without the prior consent of the principal. If the principal agrees, then an agent may appoint a sub-agent to help him and the sub-agent so appointed would be liable to the agent and not the principal.

RIGHTS OF AN AGENT

(i) Right to receive remuneration on the completion of the agency function.

(ii) Right to meet necessary expenditure and get it reimbursed from the principal.

(iii) Right to hold agency or property.

(iv) Right of lien on goods for payment of his remuneration.

(v) Right to get losses indemnified by the principal.

(vi) Right to detain goods in transit.

Kinds of Mercantile Agents: Mercantile agents may be classified:

- On the basis of rights, and
- On the basis of functions.

On the basis of rights:

(i) **General Mercantile Agents,** i.e. an agent who has full authority to perform all functions relating to the business on behalf of his principal. All such acts shall be binding on the principal. Examples of general mercantile agents are factors, commission agents, branch managers, etc.

(ii) **Special/Particular Mercantile Agent,** i.e., an agent appointed to perform a special or a particular job for his principal. As soon as the particular work is done, he ceases to be an agent.

On the basis of functions:

(A) Factor: In the words of Storey, "A factor has been defined as an agent employed to sell goods or merchandise consigned or delivered to him by his principal for compensation." Thus a factor is a general agent who sells the goods delivered to him in his own name on a commission basis.

He has the following powers:

(a) To sell goods in his own name;

(b) To sell goods on credit at a place and at such time which he thinks best;

(c) To receive payment for the goods;

(d) To maintain a lien on goods for charges due to him.

(B) Commission Agent: A commission agent is one who acts on behalf of his principal in buying and selling of goods in return for a commission. He makes purchases and sells in his own name, but does not bear the trade risks. He has expert knowledge about the goods in which he is dealing and also knows the market trends in the particular commodity.

A commission agent performs the following duties:

(a) To buy goods at the most reasonable rates and to sell the same at maximum profit;

(b) To obtain orders from buyers and arrange for the goods from suppliers in his own name;

(c) To arrange for packing, transport and delivery of goods;

(d) To extend credit and collect payments;

(e) To claim from the principal his commission and incidental expenses.

(C) Del Credere Agent: A Del Credere agent guarantees his principal for the payment for all the goods he sells irrespective of the payment received by him or not and for his additional risk which he bears, he is entitled to an additional commission over and above his normal commission. The extra commission paid for such a guarantee is called "del Credere commission." Thus the principal of a Del Credere agent is guaranteed the payment of the sale proceeds of the goods in full.

(D) Broker: In the words of Storey, a broker has been defined as, "an agent employed to make bargains and contracts in matters of trade, commerce or navigation, between two parties for compensation, commonly called brokerage." He is a person whose main job is to arrange a buyer for a seller and vice versa, that is to say, the work of a broker is finished the moment a deal materializes between an intending buyer and a protective seller. Usually, a broker does not take possession of title to goods, but only negotiates for their use.

His chief characteristics are:

(a) He has only to establish a deal in context of purchase and sale by arranging a buyer for an intending seller and vice versa;
(b) He neither takes delivery or possession of goods which he is selling;
(c) He re-pares the BOUGHT NOTE and SOLD NOTE when a deal is complete and sends them to the buyer and seller respectively.
(d) He usually operates in the market for manufactured goods, real estate dealings, shares, securities and other types of investment dealings;
(e) He usually specializes in a particular field like stock brokers, ship brokers, insurance brokers etc.;
(f) He is entitled to a commission for his services, which is known as brokerage;
(g) He may work for one of the several principals.

(E) Auctioneers: An auctioneer is a special mercantile agent who sells the goods of his principal by auction. He gets the possession of the goods and gives prior publicity to the time and place of auction through daily newspapers, pamphlets and catalogues. The goods to be sold by auction are displayed at the place of auction for the benefit of the intending buyers. The seller usually quotes the minimum price from where the auctioneer starts his sale. The lowest price is known as "UPSET PRICE".
The price for which the bid is accepted is called 'Knocked down price", since the acceptance of a bid by auctioneer is indicated by striking a hammer on the desk by the latter. After the highest bid is accepted, the auctioneer becomes the agent for both seller and buyer. For his services, the auctioneer is entitled to a commission, which is a certain percentage of the sale proceeds, usually fixed between him and the seller, prior to the auction.

(A) Underwriters: Underwriters are persons who guarantee a company that in case the public does not subscribe to the entire shares offered by it, they shall subscribe and pay for the balance of shares specified in the underwriting agreement.

(B) Forwarding Agents: Such agents dispatch goods to foreign countries on behalf of their principals and play an important part in the international trade transactions. They take possession of goods in the home country and then arrange for its shipping and insurance before dispatching them abroad.

(C) Clearing Agents: They assist their principals in importing goods from abroad. They take delivery of goods when they arrive at the port of destination and after paying the import and custom duties along with port dues, arranged for their transportations to their principal's warehouses.

(D) Warehouse: A warehouse keeper is an agent who keeps the goods of his principal in storage in his godown, in return for storage charges, to be delivered to the person directed by the principal. He can exercise his right of lien on goods in his possession in case his charges are unpaid by the principal.

LAW OF AGENCY

Agent: The Indian Contract Act, 1872 defines an 'Agent' in Section 182 as a person employed to do any act for another or to represent another in dealing with third persons.

Principal: According to Section 182, the person for whom such act is done, or who is so represented, is called the "principal". Therefore, the person who has delegated his authority will be the principal.

EXAMPLES: 1.A, a businessman, delegates B to buy some goods on his behalf. Here, A is the principal and B is the agent, and the person from whom the goods are bought is the 'Third Person'.

2. Joe appoints Mary to deal with his bank transactions. In this case, Joe is the Principal, Mary is the Agent and the Bank is the Third Party.

Who can appoint an Agent?

According to Section 183, any person who has attained the age of majority and has a sound mind can appoint an agent. In other words, any person capable of contracting can legally appoint an agent. Minors and persons of unsound mind cannot appoint an agent.

Who may be an Agent?: In the same fashion, according to Section 184, the person who has attained the age of majority and has a sound mind can become an agent. A sound mind and a mature age is a necessity because an agent has to be answerable to the Principal.

Creation of Agency

An agency can be created by:

Direct (express) appointment– The standard form of creating an agency is by direct appointment. When a person, in writing or speech appoints another person as his agent, an agency is created between the two.

Implication– When an agent is not directly appointed but his appointment can be inferred from the circumstances, an agency by implication is created.

Necessity– In a situation of necessity, one person can act on behalf of another to save the person from any loss or damage, without expressly being appointed as an agent. This creates an agency out of necessity.

Estoppels– An agency can also be created by estoppels. In a situation where one person behaves in such a manner in front of a third person, as to make someone believe he is an authorized agent on behalf of someone, an agency by estoppels is created.

Ratification– When an act of a person, who acted as another person's agent (on his behalf) without his knowledge is later ratified by that person, this creates an agency by ratification between the two.

Types of Agents

1. Special Agent- Agent appointed to do a singular specific act.
2. General Agent- Agent appointed to do all acts relating to a specific job.
3. Sub-Agent-An agent appointed by an agent.
4. Co-Agent- Agents together appointed to do an act jointly.
5. Factor- An agent who is remunerated by a commission (one who looks like the apparent owner of the things concerned)
6. Broker- An agent whose job is to create a contractual relationship between two parties.
7. Auctioneer- An agent who acts a seller for the Principal in an auction.
8. Commission Agent- An appointed to buy and sell goods (make the best purchase) for his Principal
9. Del Credere- An agent who acts as a salesperson, broker and guarantor for the Principal. He guarantees the credit extended to the buyer.

Authority of an Agent: Authority of an agent can be both express and implied.

Express authority: According to Section 187, the authority is said to be express when it is given by words spoken or written.

Implied authority: According to Section 187, authority is said to be implied when it is to be inferred from the facts and circumstances of the case. In carrying out the work of the Principal, the agent can take any legal action. That is, the agent can do any lawful thing necessary to carry out the work of the Principal.

Implied authority is of four main types

1. Incidental authority- doing something that is incidental to the due performance of express authority
2. Usual authority- doing that which is usually done by persons occupying the same position
3. Customary authority- doing something according to the pre-established customs of a place where the agent acts
4. Circumstantial authority- doing something according to the circumstances of the case

Case

Chairman L.I.C v. Rajiv Kumar

In this case, as per the salary saving scheme of L.I.C, the employer was supposed to deduct the premium from the employee's salary and deposit it with L.I.C. Upon the death of the employee, it was found by his

heirs that the employer has defaulted in doing so, causing the policy to lapse. A clause in the acceptance letter was referred to, in which the employer had said that he would act as the agent of the employee and not as that of L.I.C. It was held that the employer was acting as the agent of the company, thereby making the company (L.I.C) responsible as a Principal due to the fault of the Agent (the employer).

Sub-Agent: An agent may sometimes delegate the duty that has been delegated to him by the Principal to somebody else. Section 191 of the Indian Contract Act, 1872 defines a sub-agent to be a person employed by and acting under the control of the original agent in the business of the agency.

Difference between sub-agent and substituted agent

The difference between sub-agent and the substituted agent is very fundamental. When a person, in the capacity of an agent, is asked to *name* someone for a certain task, the person who is named does not become a sub-agent to the Principal, but a substituted agent.

Agency by Ratification

A principal may subsequently ratify an act done by a person who acted on his behalf without his permission or knowledge. If the act is ratified, a relationship of the agency will come into existence and it will be as if he had previously authorized the person to act his agent. Ratification may be express (by speech or writing) or implied (by act or conduct).

Illustration: Steve bought apples on behalf of Mark, without his permission or knowledge. Mark later sold those apples to another person. This act of mark impliedly ratifies the purchase made by Steve.

Ratification is not allowed in the following cases

1. When the person's knowledge of the facts of the case is defective. That is, he only half knows things that he is ratifying to.
2. An act done on behalf of another person who would have the effect of injuring or harming the person or violating any of his rights if the act was done with his authority.

Termination of Agency

An agency can be terminated or is terminated in 5 different ways:

1. When the agent's authority is revoked by the Principal
2. When the agent renounces the business of the agency
3. When the business of the agency is completed
4. When either of the parties dies or becomes mentally disabled
5. When the Principal is adjudicated an insolvent.

Revocation of Agent's authority

There are certain rules regarding the revocation of an agent's authority.

1. It can be revoked any time before the authority has been exercised.
2. If according to the terms of the contract between the two, the agency has to continue upto a certain time, any prior revocation by the Principal shall be compensated for, to the agent.
3. The termination does not take effect before it has been communicated to the agent.
4. Termination of the authority of an agent terminates the authority of all the sub-agents under him.

Agent's duties to Principal

An agent has 6 duties towards his Principal:

1. He has to conduct the business of the Principal according to the directions of the Principal.
2. An agent is bound to conduct the business he is supposed to conduct with as much skill as a person on his position ordinarily holds.
3. An agent is supposed to show the relevant accounts to the Principal as and when the Principal demands.
4. An agent has the duty to communicate any difficulty whatsoever he may come across while doing the Principal's business. He is supposed to perform due diligence in this regard.
5. If any material fact has been concealed or the business is not carried out in the manner that the Principal directed, the Principal can repudiate the contract between them.
6. If the agent carries out the business in the manner he wanted to perform it, rather than on the directions of the Principal, the Principal may claim from the agent any benefit he may have achieved through doing so.

Illustration: Hala directs her agent Saima to buy a certain house for her. Saima does not buy the house, and tells Hala that it cannot be bought due to certain reasons, but ends up buying the house herself. In this case, Hala has the right to claim the house from Saima at the price which Saima bought it for herself.

Principal's duties to Agent

The Principal has 4 duties towards the Agent:

1. The Principal is bound to indemnify the agent against any lawful acts done by him in the exercise of his authority as an agent.

2. The Principal is bound to indemnify the agent against any act done by him in good faith, even if it ended up violating the rights of third parties.
3. The Principal is not liable to the agent if the act that is delegated is criminal in nature. The agent will also in no circumstances be indemnified against criminal acts.
4. The Principal must make compensation to his agent if he causes any injury to him because of his own competence or lack of skill.

Liability of Principal for Agent's Fraud or Misrepresentation

According to Section 238, The Principal is liable for any fraud or misrepresentation made by his agent during the course of his business, as if the fraud or misrepresentation was done by the Principal himself.

Rights of an Agent

An agent has the following 5 rights:

1. **Right of retainer**– An agent has the right to retain any remuneration or expenses incurred by him while conducting the Principal's business.
2. **Right to remuneration**– An agent, when he has wholly carried out the business of the agency has the right to be remunerated of any expenses suffered by him while conducting the business.
3. **Right of Lien on Principal's property-** The agent has the right to hold (keep with himself) any movable or immovable property of the Principal until his due remuneration is paid to him by the Principal.
4. **Right to be Indemnified**– The agent has the right to be indemnified against all the lawful acts done by him during the course of conducting the Principal's business.
5. **Right to Compensation**– the Agent has the right to be compensated for any injury or loss suffered by him due to the lack of skill and competency of the Principal.

Conclusion

Contracts establishing a relationship of the agency are very common in business law. These can be express or implied. An agency is created when a person delegates his authority to another person, that is, appoints them to do some specific job or a number of them in specified areas of work. Establishment of a Principal-Agent relationship confers rights and duties upon both the parties. There are various examples of such a relationship: Insurance agency, advertising agency, travel agency, factors, brokers, del credere agents, etc.

The Indian Partnership Act, 1932

MEANING: The Indian Partnership Act 1932 defines a partnership as a relation between two or more persons who agree to share the profits of a business run by them all or by one or more persons acting for them all.

True Test of a Partnership

The true test of a partnership is a way for us to determine whether a group or association of persons is a partnership firm or not. It also helps us recognize the partners of the firm and separate them from the third parties. The three important aspects of a true test of a partnership are agreement, profit sharing and mutual agency.

1] **Agreement/Contract between Parties:** A partnership between two or more persons there has to be an agreement of partnership between them. There has to be a specific agreement between the partners. So if family members of a HUF are running a business together this is not a partnership because there is no agreement of partnership between them. The members of HUF are born into the HUF, so they cannot be partners.

2] **Profit Sharing:** Sharing of profits is an aspect of the true test of a partnership. However, profit sharing is only a prima facie (first hand) evidence of a partnership.

3] **Mutual Agency:** This is the truest test of a partnership, if a partner is both the principle as well as an agent of the firm we can say that mutual agency exists. This means that the actions of any partners will bind all the other partners as well. If such an agency exists between the parties who run a business together and share profits it will be deemed that a partnership exists.

Elements of a Partnership

The Indian Partnership Act 1932 defines a partnership as a relation between two or more persons who agree to share the profits of a business run by them all or by one or more persons acting for them all. The Act has five essential elements that every partnership must contain.

1] Contract for Partnership: A partnership is contractual in nature. As the definition states a partnership is an association of two or more persons. So a partnership results from a contract or an agreement between two or more persons. A partnership does not arise from the operation of law. Neither can it be inherited. It

has to be a voluntary agreement between partners. Partnership agreements can be written or oral. Sometimes such an agreement is even implied by the continued actions and mutual understanding of the partners.

2] Association of Two or More Persons: A partnership is an association between two or more persons. And persons by law only include individuals, not other firms. The law also prohibits minors from being partners. But minors can be admitted to the benefits of a partnership.

The Act is actually silent on the maximum number of partners. But this has been covered under the Companies Act 2013. So a partnership can only have a maximum of 10 partners in a banking firm and 20 partners in all other kinds of firms.

3] Carrying on of Business: There are two aspects of this element. Firstly the firm must be carrying on some business. Here the business will include any trade, profession or occupation. Only that some business must exist and the partners must participate in the running of such business. Also, the business must be run on a profit motive. The ultimate aim of the business should be to make gains, which are then distributed among the partners. So a firm carrying on charitable work will not be a partnership. If there is no intention to earn profits, there is no partnership.

4] Profit Sharing: The sharing of profits is one of the essential elements of a partnership. The profit sharing ratio or the manner of sharing profits is not important. But one partner cannot be entitled to the entire profits of the firm. However, the sharing of losses is not of any essence. It is up to the partners whether the losses will be shared by all the partners. If nothing is said then the losses are also split in the profit sharing ratio.

For example two individuals are operating out of the same warehouse. So they agree to divide the rent amongst themselves. This is not a partnership since there is no profit sharing between the two.

5] Mutual Agency: The definition states that the business must be carried out by the partners, or any partner/s acting for all of them. This is a contract of mutual agency another one of the five elements of a partnership. This means that every partner is both a principle as well as an agent for all the other partners of the firm. An act done by any of the partners is binding on all the other partners and the firm as well. And so every partner is bound by the acts of all the other partners. This is one of the most important aspects of a partnership. It is, in fact, the truest test of a partnership.

FORMATION OF PARTNERSHIP

In a contract of partnership all the elements of a valid contract must be present. There must be free consent, consideration, lawful object and the parties must have capacity to contract. According to S.58 the registration should be made in the form of a Statement signed by all the partners and giving:

(1) The name of the firm;

(2) The principal place of business of the firm;

(3) Name of the other place (if any) where the firm carries on business;

(4) The date on which each partner joined the firm;

(5) The names in full and addresses of the partners;

(6) The duration of the firm. Furthermore, every change in the names and addresses of the partners or place of business should be notified to the Registrar of Firms from time to time.

Types of Partners

1] Active Partner/Managing Partner: An active partner is also known as Ostensible Partner. As the name suggests he takes active participation in the firm and the running of the business. He carries on the daily business on behalf of all the partners. This means he acts as an agent of all the other partners on a day to day basis and with regards to all ordinary business of the firm. Hence when an active partner wishes to retire from the firm he must give a public notice about the same. This will absolve him of the acts done by other partners after his retirement. Unless he gives a public notice he will be liable for all acts even after his retirement.

2] Dormant/Sleeping Partner: This is a partner that does not participate in the daily functioning of the partnership firm, i.e. he does not take an active part in the daily activities of the firm. He is however bound by the action of all the other partners. He will continue to share the profits and losses of the firm and even bring in his share of capital like any other partner. If such a dormant partner retires he need not give a public notice of the same.

3] Nominal Partner: This is a partner that does not have any real or significant interest in the partnership. So, in essence, he is only lending his name to the partnership. He will not make any capital contributions to the firm, and so he will not have a share in the profits either. But the nominal partner will be liable to outsiders and third parties for acts done by any other partners.

4] Partner by Estoppels: If a person holds out to another that he is a partner of the firm, either by his words, actions or conduct then such a partner cannot deny that he is not a partner. This basically means that even though such a person is not a partner he has represented himself as such, and so he becomes partner by estoppels or partner by holding out.

5] Partner in Profits Only: This partner will only share the profits of the firm, he will not be liable for any liabilities. Even when dealing with third parties he will be liable for all acts of profit only, he will share none of the liabilities.

6] Minor Partner: A minor cannot be a partner of a firm according to the Contract Act. However, a partner can be admitted to the benefits of a partnership if all partner gives their consent for the same. He will share profits of the firm but his liability for the losses will be limited to his share in the firm. Such a minor partner on attaining majority (becoming 18 years of age) has six months to decide if he wishes to

become a partner of the firm. He must then declare his decision via a public notice. So whether he continues as a partner or decides to retire, in both cases he will have to issue a public notice.

RIGHTS AND DUTIES OF PARTNERS

Rights of Partners

1. Subject to any contract to the contrary, every partner has a right to take part in the management of the business.

2. Every partner has a right to be consulted and heard in all matters affecting the business of the firm. In all matters of importance and those affecting the policy and nature of the business or any change in the constitution of the firm, all the partners must agree, mere majority will not be sufficient. But in ordinary routine matters the majority rule may apply.

3. Every partner, active or dormant, has a right of free access to all records, books and accounts of the business and also to examine and copy them.

4. Every partner is entitled to equal share in the profits, unless different proportions are stipulated.

5. A partner who has contributed more than his share of the capital for the purposes of the business is entitled to interest at a rate agreed upon and where no rate is agreed upon, at6 per cent per annum. But a partner is not entitled to any interest on the capital subscribed by him unless there is an agreement or a trade custom to that effect exists.

6. Subject to a contract to the contrary, a partner is entitled to be indemnified by the firm for all acts done by him in the course of the partnership business, for all payments made by him to discharge the debts and liabilities of the firm and for expenses made by him in an emergency.

7. Every partner is joint owner of the partnership property and is entitled to have the property used exclusively for the purposes of the partnership.

8. A partner has power to act in emergency for protecting the firm form loss.

9. Every partner is entitled to prevent the introduction of a new partner into the firm without his consent.

10. An incoming partner is not liable for any debts and obligations of the firm incurred before he joined it, excepting by his own consent.

11. Every partner has a right to retire from the firm.

12. Every partner has a right to continue in the partnership and not to be expelled from it unless power of expulsions provided in the partnership agreement.

13. Every outgoing partner has a right to carry on competing business, but without using the firm's name and without soliciting the customers. He may, however, agree not to do so for a specified period and within specified local limits.

14. Where a partner dies or otherwise ceases to be a partner because of his retirement, expulsion, insolvency, insanity, and the other partners carry on the business with the property of the firm without any final settlement of accounts, the estate of the deceased partner, or the partner himself, as the case may be, is entitled to share in the profit earned with the aid of the assets of the outgoing partner, or interest at 6 per cent per annum, if so desired by the legal representatives of the deceased partner, or by the partner himself.

Duties of Partners

The relation of partners is based on mutual confidence and the law required that a partner must act towards the other partners with the utmost good faith. In particular, the Partnership Act provides for the following duties:

1. Every partner must carry on the business of the firm to the greatest common advantage.

2. Every partner must be just and faithful to the other partners.

3. A partner is bound to keep and render true, proper and correct account of the partnership. He must permit the other partners to inspect such accounts and take copies of them. All money of the firm that may come to his hand must be handed over to the firm.

4. Every partner is an agent of the other partners and as such is bound to communicate full information relating to the business of the firm to the other partners.

5. Every partner is bound to indemnify the firm for any loss caused by his fraud in conduct of business. Also, if partner commits a fraud on his co-partner, he must indemnify him for any loss caused to him.

6. Every partner who is guilty of willful neglect in the conduct of the business and the firm suffers loss inconsequence, is bound to make compensation to the firm and other partners.

7. Subject to a contract to the contrary, every partner is bound to share losses equally with the others.

8. Every partner is bound to attend diligently to the business of the firm and in the absence of an agreement to the contrary, he is not entitled for any remuneration; whether in the form of salary, commission, or otherwise, on account of his own trouble in conducting the business of the firm.

9. In the absence of an agreement to the contrary, every partner is bound to hold and use the partnership property for the firm.

10. A partner cannot make private gain by reason of his membership with the firm. Thus, where a partner in the course of the business has received information and uses it for his personal gain as against the

interest of the firm, he must pay over any benefits he may have obtained by the use of this information. He cannot bargain for a private gain from the customers of the firm.

11. No partner can carry on any business which is likely to compete with the business of the partnership except with the consent of the other partners. If he does so, he shall have to account for the profits of such business to the firm, and also to compensate the firm for any loss sustained by his carrying on such competing business.

12. Every partner is bound to act within the scope of the actual authority conferred upon him. If he exceeds his authority, he shall have to compensate the other partners for any ensuing loss, unless they ratify his act.

Kinds of Partnership

The distinction between partnerships can be done on the basis of two criteria. They are as follows:

- With Regard to the Duration of the partnership – either Partnership at Will or Partnership for Fixed Duration
- With regards to the extent of the business carried by the partnership – either General Partnership or Particular Partnership

1] Partnership at Will: When forming a partnership if there is no clause about the expiration of such a partnership, we call it a partnership at will. According to Section 7 of the Indian Partnership Act 1932, there are two conditions to be fulfilled for a partnership to be a partnership at will. These are:

- ✓ There is no agreement about a fixed period for the existence of a partnership.
- ✓ No provision with regards to the determination of a partnership

So if there is an agreement between the partners about the duration or the determination of the firm, this will not be a partnership at will. But if a partnership was entered into a fixed term and continues to operate beyond this term it will become a partnership at will from the expiration of this term.

2] Partnership for a Fixed Term: During the creation of a partnership, the partners may agree on the duration of this arrangement. This would mean the partnership was created for a fixed duration of time. Hence such a partnership will not be a partnership at will; it will be a partnership for a fixed term. After the expiration of such duration, the partnership shall also end.

However, there may be cases when the partners continue their business even after the expiration of the duration. They continue to share profits and there is an element of mutual agency. Then in such a case, the partnership will now be a partnership at will.

3] Particular Partnership: A partnership can be formed for carrying on continuous business, or it can be formed for one particular venture or undertaking. If the partnership is formed only to carry out one business venture or to complete one undertaking such a partnership is known as a particular partnership. After the

completion of the venture or activity, the partnership will be dissolved. However, the partners can come to an agreement to continue the said partnership. But in the absence of this, the partnership ends when the task is complete.

4] General Partnership: When the purpose for the formation of the partnership is to carry out the business, in general, it is said to be a general partnership. Unlike a particular partnership in a general partnership the scope of the business to be carried out is not defined. So, all the partners will be liable for all the actions of the partnership.

Consequences (Results) of Non Registration of Firm

Section 69 of the Indian Partnership Act, 1932 offers a detailed explanation of the consequences of not opting for firm registration. These are:

1] No suit in a civil court by the firm or other co-partners against any third party

If the firm registration is not done, then the firm or any other person on its behalf cannot file a suit against a third party for breach of contract which the firm has entered into. Further, the person filing the suit on behalf of the firm should be in the register of the firm as a partner.

2] No relief to partners for set-off of claim

Without firm registration, any action brought against the firm by a third party having a value of more than Rs. 100 cannot be set-off by the firm or any of its partners. Pursuance of other proceedings to enforce rights arising from the contract cannot be done either.

3] An aggrieved partner cannot bring legal action against other partner or the firm

A partner of the firm or any person on his behalf cannot bring legal action against the firm or against any partner (or alleged to be a partner) if firm registration is not done. However, if the firm is dissolved, then such a person can sue the firm for dissolution it accounts and realization of his share in the firm's property.

4] A third party can sue the firm

Even if the firm registration is not done a third party can bring legal action against the firm. It is also, important to note that despite these disabilities, the non-registration of a firm does not affect the following rights:

- The right of a third party to sue the firm or any partner
- Partners' right to sue the firm for dissolution or settlement of accounts (in case of dissolution)
- The power of the Official Assignees, Receiver of Court to release the property of the insolvent partner and bring an action

- The right of the firm and partners to sue or claim set-off of the value of the suit does not exceed Rs. 100.

Minors Admitted to Benefits of Partnership

The Section 30 of the Indian Partnership Act 1932 contains legal provisions about a minor in a partnership. As in the Indian Contract Act 1857 clearly states that no person less than the age of 18, i.e. a minor can be a party to a contract. And a partnership is a contract between the partners. Hence a minor cannot be a partner in a partnership firm. However, according to the Partnership Act, a minor may be admitted to the benefits of a partnership. So while the minor will not be a partner he will enjoy all the benefits of a partnership. To admit the entire minor to the benefits of the partnership all of the partners of the firm must be in agreement.

Rights of a Minor Partner

- A minor partner will obviously have the right to his share of the profits of the firm. But the minor partner is not liable for any losses beyond his interests in the firm. So a minor partner's personal assets cannot be liquidated to pay the firms liabilities.
- He can also like any other partner inspect the books of accounts of the firm. He can demand a copy of the books as well.
- If necessary he can sue any or all of the other partners for his share of the profits or benefits.
- A minor partner on attaining majority has the right to become a partner of the firm. He has six months from attaining majority to decide if he will execute this right. Whether he decides to become a partner or not he must give public notice about the same.

Liabilities of a Minor Partner

- A minor cannot be held personally liable for the losses of the firm. And if the firm declares insolvency the minor's share is kept with the Official Receiver
- After turning 18 the minor partner can choose to become a partner of the firm. But he may choose to not become a partner. In this case, the minor partner has to give a public notice about this decision. And the notice has to be given within 6 months of gaining majority. If such a notice is not given even after 6 months then the minor partner will become liable for all acts done by the other partners till the date of such notice.
- Should the minor partner choose to become a partner he will be liable to all the third parties for the acts done by any and all partners since he was admitted to the benefits of the partnership.
- If he becomes a full-time partner he will be treated as a normal partner and have all the liabilities of one. His share in the profits and property of the firm will remain the same as it was when he was a minor partner.

Dissolution of a Firm

When the partnership between all the partners of a firm is dissolved, then it is called dissolution of a firm. It is important to note that the relationship between all partners should be dissolved for the firm to be dissolved.

Modes of Dissolution of a Firm

A firm can be dissolved either voluntarily or by an order from the Court.

Voluntary Dissolution of a Firm (without the order of the Court)

Voluntary dissolution can be of four types:

1] By Agreement (Section 40): According to Section 40 of the Indian Partnership Act, 1932, partners can dissolve the partnership by agreement and with the consent of all partners. Partners can also dissolve the partnership based on a contract that has already been made.

2] Compulsory Dissolution (Section 41): An event can make it unlawful for the firm to carry on its business. In such cases, it is compulsory for the firm to dissolve. However, if a firm carries on more than one undertakings and one of them becomes illegal, then it is not compulsory for the firm to dissolve. It can continue carrying out the legal undertakings. Section 41 of the Indian Partnership Act, 1932, specifies this type of voluntary dissolution.

3] On the happening of certain contingencies (Section 42): According to Section 42 of the Indian Partnership Act, 1932, the happening of any of the following contingencies can lead to the dissolution of the firm:

- Some firms are constituted for a fixed term. Such firms will dissolve on the expiry of that term.
- Some firms are constituted to carry out one or more undertaking. Such firms are dissolved when the undertaking is completed.
- Death of a partner.
- Insolvent partner.

4] By notice of partnership at will (Section 43): According to Section 43 of the Indian Partnership Act, 1932, if the partnership is at will, then any partner can give notice in writing to all other partners informing them about his intention to dissolve the firm. In such cases, the firm is dissolved on the date mentioned in the notice. If no date is mentioned, then the date of dissolution of the firm is the date of communication of the notice.

❖ Dissolution of a Firm by the Court

According to Section 44 of the Indian Partnership Act, 1932, the Court may dissolve a firm on the suit of a partner on any of the following grounds:

1] Insanity/Unsound mind: If an active partner becomes insane or of an unsound mind, and other partners or the next friend files a suit in the court, then the court may dissolve the firm. Two things to remember here:

- The partner is not a sleeping partner
- The sickness is not temporary

2] Permanent Incapacity: If a partner becomes permanently incapable of performing his duties as a partner, and other partners file a suit in the court, then the court may dissolve the firm. Also, the incapacity may arise from a physical disability, illness, etc.

3] Misconduct: When a partner is guilty of conduct which is likely to affect prejudicially the carrying on of the business and the other partners file a suit in the court, then the court may dissolve the firm. Further, it is not important that the misconduct is related to the conduct of the business. The court looks at the effect of the misconduct on the business along with the nature of the business.

4] Persistent Breach of the Agreement: A partner may willfully or persistently commit a breach of the agreement relating to –

- the management of the affairs of the firm, or
- a reasonable conduct of its business, or
- Conducting matters relating to business that is not reasonably practicable for other partners to carry on the business in partnership with him.

In such cases, the other partners may file a suit against him in the court and the court may order to dissolve the firm. The following acts fall in the category of breach of agreement:

- ✓ Embezzlement
- ✓ Keeping erroneous accounts
- ✓ Holding more cash than allowed
- ✓ Refusal to show accounts despite repeated requests, etc.

5] Transfer of Interest: A partner may transfer all his interest in the firm to a third party or allow the court to charge or sell his share in the recovery of arrears of land revenue. Now, if the other partners file a suit against him in the court, then the court may dissolve the firm.

6] Continuous/Perpetual losses: If a firm is running under losses and the court believes that the business of the firm cannot be carried on without a loss in the future too, then it may dissolve the firm.

7] Just and equitable grounds: The court may find other just and equitable grounds for the dissolution of the firm. Some such grounds are:

- ✓ Deadlock in management
- ✓ Partners not being in talking terms with each other
- ✓ Loss of substratum (the foundation of the business)
- ✓ Gambling by a partner on the stock exchange.

Dissolution of Partnership OR Reconstitution of the Firm

When there is a change in the relations of partners and the firm continues as a new firm, then it is called dissolution of the partnership or reconstitution of the firm. Reconstitution of the firm may take place in various ways, namely;

(1) By admission of a partner,

(2) By retirement of a partner

(3) By expulsion of a partner,

(4) By insolvency of a partner,

(5) By death of a partner and

(6) By transfer of a partner's share.

1. Admission of a partner (31): A new partner can be introduced in a firm with consent of all the existing partners of the firm. This is because the relations of partners are based on mutual trust and confidence, as such, only that person can be admitted as a new partner who enjoys the confidence of all the partners. A new partner can also be introduced in the firm if there is a contract between the partners in this regard. Therefore, it means that a new partner can be admitted either with the consent of all the partners or in accordance with the contract. A new partner is also called incoming partner. Liability of a new partner according to Sec. 31

(2), "Subject to provisions of Sec. 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner." This means the liability of a new partner starts from the date of his admission. However, the new partner may agree with his partners to be

liable for the liability of the firm incurred by the firm before the date of his admission. But such an agreement is finding only between the new partners and existing partners, and does not give any right to the creditor to sue the new partner for part debts of the firm. But a new partner may be made liable to the creditors of the firm for the past debts of the firm only, if,

(a) The new partners or the reconstituted firm should have assumed the liability of the past debs.

(b) The creditors should be informed of the new arrangement. The new partner becomes liable to those of the creditors who expressly or impliedly accept the new arrangement.

2. Retiring partner

The retirement of a partner from a firm takes place when he leaves the firm. When a partner retires or withdraws from the firm and the remaining partners continue with the firm, reconstitution of the firm takes place. A partner may retire from the firm —

(a) Where all the partners give their consent to retirement.

(b) Where it is a partnership agreement that a partner might retire without seeking the dissolution of the firm.

(c) Where partnership is at will, by giving notice to all other partners of his intention to retire.

Liability of a retiring partner

This may be discussed under two heads—

(i) Liability for the acts of the firm done before retirement. According to sec. 32 (2), a retiring partner remains liable to the creditors of the firm for all the acts of the firm done by the firm done before the date of retirement. In addition, he will also be liable for all the transactions of the firm begun but remain unfinished at the date of retirement. However, a retiring partner be discharged from such liabilities if there is an agreement in this connection between the retiring partner, the remaining partners and the creditors of the firm. This agreement is called 'Novation'. But in order to discharge him from the creditors by Novation two things must be fulfilled—

(i) The remaining partners must have agreed with the retiring partner to release him from existing debts and liabilities.

(ii) The creditors must be informed of the retirement and the new arrangement. After this the retiring partner will be released from liability to the creditors who have expressly or impliedly agreed to release the retired partner and to accept the reconstituted firm as their debtor. An implied agreement arises when a creditor continues to deal with reconstituted firm after notice.

(iii) Liability for the Acts of the firm done after retirement (sec. 32 (3)—The retiring partner remains liable to third parties for the acts of the firm done after his retirement until a public notice of his retirement given.

This liability of the retiring partner is based on the principle of holding out. But the act should be within the scope of the authority of the partner doing it. But the retiring partner is liable only to those persons who deal with the firm under the assumption that the retiring partner was still a partner. But he is not liable to the third parties who have no knowledge that he was a partner. However, a public notice is not required in case of a sleeping partner and he will not be liable for the acts of the firm done after his retirement. This is because such a partner is not known to the third parties.

3. Explusion (REMOVAL) of a partner (sec. 33)

Ordinarily a partner cannot be expelled from the firm by any majority of the partners. But the authority of expulsion can be given to the majority only by an express provision in the partnership agreement. But this power of expulsion can be exercised if three conditions are satisfied. These conditions are:

(a) The right of expulsion should be given to the partners by an express contract,

(b) The power of explusion should be exercised by a majority of partners,

(c) The power should be exercised in good faith. The test of good faith is that, first, the expulsion must be in the interest of the firm, two, that the partner to be expelled is served a notice and three, that he is given an opportunity to explain his position.

4. Insolvency of a Partner (sec. 34)

Where a partner in a firm is declared insolvent, he remains no more a partner on the date on which the order of declaring him insolvent is made, whether the firm is thereby dissolved or not. The other effects resulting from the insolvency of a partner are:

(a) The firm is dissolved on the date of order of insolvency but the partners may specifically provide that on such an event the firm shall not be dissolved.

(b) The estate of the insolvent partner shall not be liable for the acts of the firm done after the date of the order. A public notice of the order of adjudicating insolvent is not required.

(c) The firm is not liable for the acts of the insolvent partner after the date of order.

5. Death of a partner (sec.s.35 and 42 (c). A firm is dissolved, subject to contract between the partners, by the death of a partner. However, when under a contract between the partners the firm is not dissolved, the estate of the deceased partner is not liable for any act of the firm done after his death. Further, no public notice is required of the death of a partner.

6. Transfer of a partner's Interest (sec. 29): A partner may transfer his interest in firm by sale, mortgage or charge. But the transferee is not entitled to interfere in the conduct of the business of the firm, to require accounts of the firm and to inspect the books of the firm. When the partner transfers the share, the transferee only becomes entitled to receive the share of profit of the partner who has transferred his share. But he has to accept the account of profits provided by the partners. [Sec.29 (1)]

Partnership and Company:

The points of distinction between the two may be summed up as follows:

1. A company comes into existence after registration under the Companies Act. In the case of partnership, registration is not compulsory.

2. The maximum number of persons required to form a company is seven in the case of public company and two in the case of a private company. A partnership can be formed with two persons.

3. A public company may have any number of members. A private company cannot have more than 50 members. A partnership carrying on banking business cannot have more than 10 members and a partnership carrying on any other business cannot have more than 20 partners.

4. A company is regarded by law as a single person separate from the members, who constitute it. It has a legal personality. The partnership is a collection of partners. It is not a legal entity and has no rights and obligations separate from its partners.

5. The property of a partnership is the joint property of the partners. Each partner has authority to bind the firm by his acts. The property of a company belongs to the company. A shareholder in his individual capacity cannot bind the company by his acts.

6. A company has perpetual succession. The death or insolvency of a member does not affect its existence. A partnership firm, in the absence of a contract to the contrary, comes to an end when a partner dies or becomes insolvent.

7. The liability of partners for the debts of the firm is always unlimited. The liability of the members of a company is usually limited.

8. The creditors of a partnership firm are creditors of the individual partners, and a decree obtained against a firm can be executed even against the individual partners. The creditors of a company are not creditors of individual shareholders. A decree obtained against a company can be executed only against the company and not against the shareholders.

9. A partner of a firm cannot transfer his interest in the firm to an outsider and make the transferee a partner without the consent of all the others. A shareholder of a company can transfer his shares and the transferee can become a member of the company.

Partnership and Joint Hindu Family

A joint Hindu family which carries on a business handed down from its ancestors is called a Joint Hindu Family Firm. The interest in the business passes by survivorship to the surviving members, and every member acquires by birth an interest in the profits and assets of the business. This is not partnership, but a co-parcenery, a relationship created by Hindu Law, and each member is called a co-parcener. The points of distinction between Hindu family firm and a partnership may be enumerated as follows:

1. A partnership is created by agreement: A Joint Hindu family firm comes into existence by operation of law. Membership of joint family firm is the result of status, i.e. position of the person concerned as member of joint family.

2. In a partnership, the death of a partner dissolves the firm; the death of a coparcener does not dissolve the joint family firm.

3. In a joint family firm only the manager or Karta has authority to bind the members by his acts, in a partnership each partner can do this.

4. In a partnership every partner is personally liable to an unlimited extent for the debts of the firm. In a joint Hindu family firm, only the Karta has unlimited liability. The other members are liable only to the extent of their share in the joint family business. Minor members are not liable.

5. Minor members of a joint family are members of the firm from the date of their birth.

In a partnership a minor cannot be a partner, as a partnership is the result of an agreement and a minor does not have capacity to enter into a contract.

6. The partners have a right to demand accounts of the partnership firm, a co-partner cannot ask for an account of past dealings; his only right is to ask for partition of the assets of the firm.

7. A partnership is governed by the Partnership Act; a joint Hindu family firm is governed by Hindu Law.

UNIT-III

THE SALES OF GOODS ACT 1930

- The Sale of Goods Act, 1930 governs the contracts relating to sale of goods.
- It applies to the whole of India except the State of Jammu & Kashmir.
- The contacts for sale of goods are subject to the general principles of the law relating to contracts i.e. the Indian Contact Act.
- A contract for sale of goods has, however, certain peculiar features such as, transfer of ownership of the goods, delivery of goods rights and duties of the buyer and seller, remedies for breach of contract, conditions and warranties implied under a contract for sale of goods, etc. These peculiarities are the subject matter of the provisions of the Sale of Goods Act, 1930.

FORMATION OF CONTRACT OF SALE

CONTRACT OF SALE OF GOODS; a contract of goods is a contract whereby the seller transfers or agrees to transfer the property to goods to the buyer for a price. There may be a contract of sale between one part-owner and another [Sec. 4(1)]. A contract of sale may be absolute or conditional [Sec 4(2)].

The term 'contract of sale' is a generic term and includes both a SALE (ABSOLUTE SALE) and an AGREEMENT TO SELL (CONDITIONAL SALE).

Sale: When under a contract of sale, the property in the goods is transferred from the seller to the buyer; the contract is called a 'sale'.

Agreement to Sell: Where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an 'agreement to sell' [Sec. 4(3)].

- An agreement to sell becomes a sale when time elapses or the conditions, subject to which the property in the goods is to be transferred, are fulfilled [Sec. 4(4)].

ESSENTIAL ELEMENTS OF A CONTRACT OF SALE

1. Two parties: there must be 2 distinct parties i.e. a buyer and a seller, to affect a contract of sale and they must be competent to contract.
   'Buyer' means a person who buys or agrees to buy goods [Sec. 2(1)].
   'Seller' means a person who sells or agrees to sell goods [Sec. (13)].

2. Goods: there must be some goods the property in which is or is to be transferred from the seller to the buyer. The goods which form the subject-matter of the contract of sale must be movable. Transfer of immovable property is not regulated by the Sale of Goods Act.
3. Price: Price is an essential ingredient for all transactions of sale and in the absence of the price or the consideration, the transfer is not regarded as a sale. The transfer by way of sale must be in exchange for a price. It has been held that price normally means money. The price can be paid fully in cash or it can be partly paid and partly promised to be paid in future. The price can be fixed by the agreement between the parties before the conveyance of the property
4. Transfer of general property: There must be a transfer of general property as distinguishes from special property in goods from the seller to the buyer. For e.g. if A owns certain goods he has general property in the goods. If he pledges them with B, B has special property in the goods.
5. Essential elements of a valid contract: All essential elements of a valid contract must be present in the contract of sale.

EFFECT OF DESTRUCTION OF GOODS:

1. Goods perishing before making of contract (Sec 7): A contract for the sale of specific goods is void if at the time when the contract was made, the goods have, without the knowledge of the seller, perished. The same would be the case where the goods become so damaged as no longer to answer to their description in the contract.
2. Goods perishing after the agreement to sell but before the sale is effected (Sec.8): An agreement to sell specific goods becomes void if subsequently the goods, without any fault on the part of the seller or the buyer, perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, 'Fault' means wrongful act or default [Sec 2(5)]

GOODS: Section 2(7) of the Sale of Goods Act, 1930 defines Goods as any kind of moveable property (which is not an actionable claim or money) or land (including stock and shares, growing crops, grass, and things that are attached to or form a part of the land) which is agreed to be sold, under the contract of sale.

Goods form the subject-matter for the contract of sale against which the buyer pays a consideration (price for the good) at the time of completion of the contract. Goods can be classified into 3 types on the basis of their quality:

- **Existing goods**- The goods that are agreed to be the subject matter of the contract by the parties and are under the possession of the seller at the time of formation of the contract are referred to as existing goods. These can further be divided into two categories:

- **Ascertained or Specific Goods**- The goods that are specifically a part of, are identified and agreed upon at the time when a contract of sale is made, are ascertained goods .For example, when a customer selects a particular painting/artwork to buy from the seller at the time of formation of the contract, the painting/artwork is an 'ascertained good' since the customer contracted to purchase that specific painting/artwork only.
- **Unascertained Goods**- The goods that are not explicitly identified among similar goods at the time of formation of the contract are unascertained goods. For example, A contracts to buy one sack of rice from B. Here, the subject-matter of the contract, i.e. rice is not identified specifically by the buyer at the time of formation of contract but is under the possession of the seller.
- **Future goods**- The goods that are not present with the seller or are not under his possession at the time of formation of the contact but promises to produce, manufacture or acquire the same in order to fulfill the contract (4). When the seller has produced/manufactured/ acquired the goods, as agreed upon during the formation of the contract and are suitable to be transferred to the buyer, the goods are said to be in a deliverable state (5), and the buyer is bound to take delivery of the goods, so produced. For example, A contracts to buy a car from B after it is manufactured by B.
- **Contingent goods**- Section 31 of the Indian Contract Act 1872 defines contingent contract as, 'a contract to do or not to do something, if some event collateral to such contract, does or does not happen' which means such contracts which are dependent on some other event or contract. A contingent good in a similar sense means, a good, the acquisition of which by the seller depends upon a contingency which may or may not happen (6). For example, A agrees to deliver a T.V. set to B when he receives the same from the vendor upon fulfillment of his contract with the vendor (between the seller and the vendor).

Key Differences between Sale and Agreement to Sell

The following are the major differences between sale and agreement to sell:

1. When the vendor sells goods to the customer for a price, and the transfer of goods from the vendor to the customer takes place at the same time, then it is known as Sale. When the seller agrees to sell the goods to the buyer at a future specified date or after the necessary conditions are fulfilled then it is known as Agreement to sell.
2. The nature of sale is absolute while an agreement to sell is conditional.
3. A contract of sale is an example of Executed Contract whereas the Agreement to Sell is an example of Executory Contract.
4. Risk and rewards are transferred with the transfer of goods to the buyer in Sale. On the other hand, risk and rewards are not transferred as the goods are still in possession of the seller.

5. If the goods are lost or damaged subsequently, then in the case of sale it is the liability of the buyer, but if we talk about an agreement to sell, it is the liability of the seller.
6. Tax is imposed at the time of sale, not at the time of agreement to sell.
7. In the case of a sale, the right to sell the goods is in the hands of the buyer. Conversely, in agreement to sell, the seller has the right to sell the goods.

Difference between Sale and Bailment:

	Sale	**Bailment**
Possession	Possession of goods is transferred to the buyer.	Possession of goods is transferred to the bailee.
Ownership	Ownership is transferred to the buyer.	Ownership resides with the bailor.
Usage	The buyer may use the goods in any way he likes.	A bailee can use the goods only according to the directions of the bailor.
Return	There is no return of goods from the buyer to the seller, unless there is breach.	The goods are returned after the specified time or accomplishment of the purpose.
Consideration	The consideration is the price in terms of money.	The consideration is an undertaking to return the goods after the accomplishment of the purpose.
Charges	The question of any charges to be paid by the seller to buyer or vise versa does not arise.	The bailor has to repay the charges which the bailee has incurred in keeping the goods safe.
Duration	Final. Once the sale is transacted, the seller keeps the goods until he decides to sell them to another.	Temporary. The bailee has to return the goods to the bailor once the specified time is passed.

DIFFERENCE BETWEEN SALE AND HIRE PURCHASE

Contracts of sale resemble contracts of hire purchase very closely, and indeed the real object of a contract of hire purchase is the sale of the goods ultimately.-Nonetheless, a sale has to be distinguished from a hire purchase as their legal incidents are quite different.

Under hire purchase agreement, the goods are delivered to the hire purchaser for his use at the time of the agreement but the owner of the goods agrees to transfer the property in the goods to the hire purchaser only when a certain fixed number of installments of price are paid by the hirer.

It may be noted that mere payment of price by installments under an agreement does not necessarily make it a hire-purchase, but it may be a sale. For example, in the case, of "Installment Purchase Method," there is a sale, because in this case the buyer is bound to buy with no option to return and the property in goods passes to the buyer at once.

The main points of distinction between the 'sale' and 'hire-purchase' are as follows:

1. In a sale, property in the goods is transferred to the buyer immediately at the time of contract, whereas in hire-purchase, the property in the goods passes to the hirer upon payment of the last installment.

2. In a sale, the position of the buyer is that of the owner of the goods but in hire purchase, the position of the hirer is that of a bailee till he pays the last installment.

3. In the case of a sale, the buyer cannot terminate the contract and is bound to pay the price of the goods. On the other hand, in the case of hire-purchase, the hirer may, if he so likes, terminate the contract by returning the goods to its owner without any liability to pay the remaining installments.

4. In the case of a sale, the seller takes the risk of any loss resulting from the insolvency of the buyer. In the case of hire purchase, the owner takes no such risk, for if the hirer fails to pay an installment, the owner has the right to take back the goods.

5. In the case of a sale, the buyer can pass a good title to a bonafide purchaser from him but in a hire-purchase, the hirer cannot pass any title even to a bonafide purchaser.

Hire purchase and an agreement to sell:

A contract of hire-purchase may also be distinguished from "an agreement to sell" (or "an agreement to buy" from buyer's point of view). As already observed, a hire-purchase agreement initially is merely an irrevocable offer for sale, that is, under it, the owner is bound to sell the goods later if the hirer pays all the installments as agreed, but on the part of the hire cannot be compelled to buy. 'An agreement to buy', on the other hand, imports a legal obligation to buy and therefore there is no option available to the buyer to buy or to terminate the contract in this case. Again, in a hire-purchase agreement, delivery of goods to the hire-purchase is necessary whereas it is not so in an 'agreement to sell.'

Condition

'A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated'.

A condition is referred to as, an essential element attached to the subject matter of an agreement which is mentioned by the buyer to the seller and is either expressed or implied while entering into the contract. The buyer can refuse to accept the goods delivered by the seller, in case of non-compliance with the condition mentioned by the seller in the contract. The condition may be expres or implied.

If while entering into a contract, the buyer mentions (in words or writing) that the goods are to be delivered to him before a given date, the date is taken as a condition to the contract since the buyer expressed it. Whereas, if a buyer contracts to buy a red-coloured saree for her 'wedding' which is to be held on a date mentioned to the seller, then the time is the implied condition for the contract. Even if the buyer doesn't mention the date of delivery (but has mentioned the date of the wedding or occasion), it is implied on the part of the seller that the garment is to be delivered before the mentioned date of the wedding. In this case, the seller is bound to deliver the garment before the date of the wedding as the delivery of the garment after the said date of the wedding is of no use to the buyer and the buyer can refuse to accept the same since the condition to the contract is not fulfilled.

Warranty

'A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated'9.

A warranty is referred to as extra information given with respect to the desired good or its condition. The warranty is of secondary importance to the contract for its fulfillment. Non-compliance of the seller to the warranty of the contract does not render the contract repudiated and hence, the buyer cannot refuse to buy the good but can only claim compensation from the buyer.

CONDITION/ WARRANTY

- A condition is of primary importance. A warranty is of secondary importance.
- Breach of condition leads to termination of the contract. In case of a breach of warranty, the injured party is liable to be compensated.
- The injured party can refuse to accept the goods as well as claim damages in case of breach of condition. The Injured party can only claim damages in case of breach of warranty.
- The injured party can refuse to accept goods not fulfilling the condition of the contract. The Injured party cannot refuse to accept the goods not fulfilling the warranty.
- A condition can be treated as a warranty on the wish of the buyer. A warranty cannot be treated as a condition.

Implied Conditions and Warranties under the Sale of Goods Act

Section 14-17 of the Sale of Goods Act, 1930 deal with the implied conditions and warranties attached to the subject matter for the sale of a good which may or may not be mentioned in the contract.

Implied Condition

Condition as to Title [Section 14(a)]

Section 14(a) of the Sale of Goods Act 1930 explains the implied condition as to title as 'in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass'.

This means that the seller has the right to sell a good only if he is the true owner and holds the title of the goods or is an agent of the title holder. When a good is sold the implied condition for the good is its title, i.e. the ownership of the good. If the seller does not own the title of the said good himself and sells it to the buyer, it is a breach of condition. In such a situation the buyer can return the goods to the seller and claim his money back or refuse to accept the good before delivery or whenever he learns about the false title of the seller.

CASE LAW: Rowland v Divall, 192210 – The plaintiff had purchased a car from the defendant and was compelled to return it to the true owner after having used it for a while. The plaintiff then sued the defendant for the purchase money, since the defendant didn't receive the consideration as per the condition of the title of ownership.

Sale by Description (Section 15)

Section 15 of the Sale of Goods Act, 1930 explains that when a buyer intends to buy goods by description, the goods must correspond with the description given by the buyer at the time of formation of the contract, failure in which the buyer can refuse to accept the goods.

Sale by Sample (Section 17)

When the goods are to be supplied on the basis of a sample provided to the seller by the buyer while the formation of a contract the following conditions are implied:

Bulk supplied should correspond with the sample in quality

Buyer shall have a reasonable opportunity to compare the goods with the sample

The good shall be free from any apparent defect on reasonable examination by the buyer.

Sale by sample as well as Description (Section 15);When the sale of goods is by a sample as well as a description the bulk of the goods should correspond with both, i.e. description and sample provided to the seller in the contract and not only sample or description.

Condition as to Quality or Fitness (Section 16)

The doctrine of Caveat Emptor is applicable in the case of sale/purchase of goods, which means 'Buyer Beware'. The maxim means that the buyer must take care of the quality and fitness of the goods he intends to buy and cannot blame the seller for his wrong choice. However, section 16 of the Sale of Goods Act 1930 provides a few conditions which are considered as an implied condition in terms of quality and fitness of the good:

When the buyer specifies the purpose for the purchase of the good to the seller, he relied on the sound judgment and expertise of the seller for the purchase there is an implied condition that the goods shall comply with the description of the purpose of purchase.

When the goods are bought on a description from a person who sells goods of that description (even if he doesn't manufacture the good), there is an implied condition that the goods shall correspond with the description. However, in case of an easily observable defect that is missed by the buyer while examining the good is not considered as an implied condition.

Implied Warranty

Section 14(b) of the Act mentions 'an implied warranty that the buyer shall have and enjoy quiet possession of the goods' which means a buyer is entitled to the quiet possession of the goods purchased as an implied warranty which means the buyer after receiving the title of ownership from the true owner should not be disturbed either by the seller or any other person claiming superior title of the goods. In such a case, the buyer is entitled to claim compensation and damages from the seller as a breach of implied warranty. Goods are free from any charge or encumbrance in favor of any third party [Section 14(c)]

Any charge or encumbrance pending in favor of the third party which was not declared to the buyer while entering into a contract shall be considered as a breach of warranty, and the buyer is be entitled to compensation and claim damages from the seller for the same.

Conclusion

The provision of implied conditions and warranties are provided in the Sale of Goods Act in order to protect the buyers in case of any fraud by the seller. However, it is seller's duty in the first place to look for the obvious defects and enquire about the quality of the product before entering into a contract of sale of goods since a seller cannot be held guilty for a customer's wrong choice.

In order to ensure purchase of an appropriate good by the seller, it is suggested that the buyer conveys the purpose and gives a reasonable description of the goods so desired

Ownership

The idea of ownership follows the idea of possession.

- The ownership is the de jure recognition of the right over the property.
- Ownership is the subjective and objective. It signifies the externally and internally.
- The right of alienation is an essential characteristic feature of ownership.

- The concept of ownership is used in widest meaning. The owner has the right to consume, destroy and alienate with his free will.
- The residuary power is vested in the owner.
- Ownership is the guarantee of the law.
- Ownership without possession is right, unaccompanied by that environment of fact in which it normally realizes itself.
- Ownership strives to realize itself in possession.
- The ownership is left to seek "proprietary remedies".
- The law of prescription determines the process by which, through the influence of time, ownership without possession withers away and dies.
- Transfer: the ownership generally can be transferred by the way of convincing and registration in case of immovable properties and by way of delivery in case of movable properties.

A right in rem can be owned and possessed. But a right in personam can only be owned.

"Ownership is a matter of multiple rights". Salmond says: "Whereas ownership is strictly a legal concept…..

Possession

- First the idea of possession came into existence in the human civilization.
- Possession is the de facto exercise of a claim over the property.
- Possession is the objective realization of ownership. It is the external significance of ownership.
- This right is not seen in possession.
- The concept of possession is narrower in this sense. The possession has limited rights to consume, destroy and alienate.
- The residuary power is not given to possessor.
- Possession is the guarantee of the facts.
- Possession without ownership is the body of fact, uniformed by the spirit of right which usually accompanies it.
- Possession to Endeavour's to justify itself as ownership.
- The possessor is left with "possessory remedies".

The law of prescription determines the process by which, through the influence of time, possession without title ripens into ownership. Transfer: the possession, comparatively, can easily be transferred. It does not require conveyancing.A right in personam can only be owned, and it cannot be possessed. "Whereas possession in singular, but stronger". "Possession is both a legal and a non-legal or pre-legal concept".

PERFORMANCE OF CONTRACT OF SALES

Delivery of Goods

Delivery of Goods in the Sale of Goods Act is defined as a voluntary transfer of possession from one person to another. Thus, to effect a valid delivery, goods from one person to another must be transferred willingly and not by means of fraud, theft, or force, etc. Mere possession of goods does not amount to delivery of goods.

Modes of Delivery of goods

Delivery of goods may be made in any of the following three ways:

1. Actual Delivery: Also known as physical delivery, actual delivery takes place when the goods are physically handed over by the seller or his/her authorized agent to the buyer or his/her agent authorized to take possession of the goods. For example, A, the seller of a car hands it over to B, the buyer; it is a case of actual delivery of the goods.

2. Symbolic Delivery: Where the goods are bulky and heavy and it is not possible to physically hand them over to the buyer, delivery thereof may be made by indicating or giving a symbol. Here the goods itself are not delivered, but the means of obtaining possession of goods is delivered.

Delivery of Goods

MEANING: Delivery of Goods in the Sale of Goods Act is defined as a voluntary transfer of possession from one person to another. Thus, to effect a valid delivery, goods from one person to another must be transferred willingly and not by means of fraud, theft, or force, etc. Mere possession of goods does not amount to delivery of goods.

Modes of Delivery of goods

Delivery of goods may be made in any of the following three ways:

1. Actual Delivery: Also known as physical delivery, actual delivery takes place when the goods are physically handed over by the seller or his/her authorized agent to the buyer or his/her agent authorized to take possession of the goods. For example, A, the seller of a car hands it over to B, the buyer; it is a case of actual delivery of the goods.

2. Symbolic Delivery: Where the goods are bulky and heavy and it is not possible to physically hand them over to the buyer, delivery thereof may be made by indicating or giving a symbol. Here the goods itself are not delivered, but the means of obtaining possession of goods is delivered. For example, delivering the keys of the warehouse where the goods are stored, or the keys of a purchased car to its buyer, bill of lading which will entitle the holder to receive the goods on arrival of the ship.

3. Constructive Delivery: In this case neither physical nor symbolic delivery is made. In constructive delivery the individual possessing the products recognizes that he holds the merchandise for the benefit of, and at the disposal of the purchaser. Constructive delivery is also called atonement. Constructive delivery may be affected in the following three ways.

- Where the seller, after having sold the goods, agrees to hold them as bailee for the buyer
- Where the buyer, who is already in possession of the goods as bailee of the seller, holds them as his own, after the sale, and
- Where a third party, for example, a carrier/transporter, who holds the goods, as bailee for the seller, agrees and acknowledges holding them for the buyer

Following are the important rules regarding the delivery of good.

1. Delivery Ways:-When goods are sold then delivery can be made by symbolic, actual or constructive way. It depends upon the parties that which way they adopt.

2. Time of Delivery:-The seller should deliver the goods on a specified date. If the time is not fixed then delivery should be within a reasonable time.

3. Payment and Delivery:-Both the actions should be at the same time. The buyer should make the payment and seller should deliver the goods in exchange of payment at the same time, just like the cash sale on the customer of a super stores.

4. Place of Delivery:-A delivery of goods should be at a specified place mentioned in the contract. Example: - "X" agrees with "Y" to supply furniture on 38-Tipu Road Ahmadabad. "X" is bound to supply the goods on the same place, where parties made contract.

5. Delivery Expenses:-The expenses of putting the goods into deliverable state must be borne by the seller, otherwise as the parties agree. Example: - "X" sells the T.V to "Y". The expenses of packing the T.V will be borne by the seller.

6. Delivery to Carrier:-When seller is required to send the goods to the buyer, the delivery to carrier is considered delivery to the buyer. Example: - "X" sells computer to "Y". "X" handed over the computer to the carrier to be delivered to "Y". It means delivery has been made.

7. Defective Delivery:-A buyer can reject or accept the defective and wrong delivery. In case of rejection buyer is not bound to return it to the seller. Example: - Mr. Imik buys 1000 books of Economics from Khan Publishers. Publishers send 500 books. Mr. Imik may reject the whole or accept 500 and ask for the rest.

8. Good in the Custody of Third Party:-If the seller's goods are in the custody of the third party, the delivery is not possible until the third party agrees to hand over the sold goods to the buyer on behalf of the seller. Example: - "M" has his cycle in the store of "Y". "M" sells the cycle to "B" and gives him letter to take from "Y". "Y" agrees to deliver the cycle to "B".

9. Delivery in Installments:-The buyer is not bound to receive the goods in installments but if the buyer and seller are agreed then the delivery of goods may be made in installments.

10. Buyer Should Apply for Delivery:-It is the duty of the buyer that he should apply for the delivery of goods. The seller is not bound to supply the goods without the demand of the buyer. If seller fails to supply the goods on demand then he will be held responsible.

11. Partial Delivery Effect:-If some portion of the goods has been made with the intention of delivering the rest of goods then the ownership of the whole goods is deemed to pass to the buyer as some portion is delivered. Example: - "X" sold 10 bikes to "Y". "Y" received 5 and paid their price. "Y" refused to accept the rest 5 bikes. It was a partial delivery.

12. Refusal of Buyers Liability:-When seller is ready to sell the goods. While buyer is not ready to accept the delivery, then buyer will be liable to the seller for the loss arising due to his refusal. Example: - "X" agrees to sell out ten bags of apples to "B". "B" refuses to take delivery. Apples destroy and "X" suffers a loss. "X" is entitled to claim damages from "B".

13. Acceptance of Buyer:-The buyer's acceptance can be judged by the following facts:

- Buyer himself can intimate the seller that he has accepted the goods.
- By his any action related to the goods like resale or by pledge.
- When he retains for a reasonable time, it means he has accepted the goods.

Sale of goods act, 1930 Unpaid Seller and his Rights

WHO IS UNPAID SELLER?

He is the seller to whom:-

1. Whole of the price is not paid

2. Conditional payment

Bill of exchange/ promissory note/ cheque has been received by seller but it dishonours. Till the time bill of exchange/ promissory note/ cheque is with the seller so, till that time he is only called as seller but when any of the mentioned instruments dishonours then after this seller is called unpaid seller.

Features of an unpaid seller

1. Seller must sell the goods on cash basis and must be unpaid (in cash transactions

payment becomes due instantly)

2. Seller must be unpaid either wholly or party
3. The decided period has expired and the price has not been paid to seller
4. Seller must not refuse to accept the payment
5. Where the price paid through negotiable instrument (bill of exchange/ promissory note/ cheque) and the same has been dishonoured

Example: A sells his bike to B for Rs. 60,000 and receives a cheque for the price. Till this time seller will only be called as seller. But when subsequently, the cheque is dishonoured due to insufficiency of funds in B's bank account, then only A becomes an unpaid seller

RIGHTS (REMEDIES) OF UNPAID SELLER

(The unpaid seller has the rights/ remedies against goods and buyer both)

Rights of unpaid seller against goods	**Rights of unpaid seller against buyer**
1. Right of possession/ lien	**1.Suit for price**
2. Right of stoppage of goods in transit	**2.Suit for interest and special damages**
3. Right of resale	**3.Suit for damages for non- acceptance**
	4. Suit for breach of contract

A. Rights of unpaid seller against goods 1.Right

of possession/ lien

If the buyer fails to pay the price within the decided time, then unpaid seller has the right to keep the goods in his possession and he can refuse to deliver the goods until the due payment is paid.

When right of possession can be exercised:-

→ When goods are sold on cash basis, but payment is unpaid

→ When goods have been sold on credit basis and the term of credit has expired

→ When the buyer becomes insolvent even within the decided period for payment

→ So, far as the goods are in the possession of unpaid seller, he can exercise this right. If goods are lost/ given up then right of possession/ lien is also lost/ given up

Termination of Right of Possession

→ By delivery of goods to the buyer/ his agent

→ By delivery of goods to the carrier/ courier company

→ By waiver

This means that it's specifically mentioned in the contract that seller can't retain the possession of the goods even if the price has not been paid

→ When buyer has obtained the possession of goods lawfully

2. Right of stoppage of goods in transit

If a buyer fails to pay the price within the decided time, then unpaid seller has the right to stop the goods in transit.

Conditions for stoppage of goods:-

→ When seller is unpaid either wholly or partially

→ When the buyer becomes insolvent

→ Goods must be in the course of transit- This means that goods must not be in the possession of the seller and have not reached the buyer's possession as well

Termination of Transit

→ By delivery to the buyer/ his agent

→ Interception by the buyer (Interception means the act of catching/ receiving)

When buyer or his agent obtains the delivery of the goods before their arrival at the appointed destination hence, the transit comes to an end

→ Acknowledgement to the buyer by the carrier/ courier company that they are holding the goods on buyer's behalf, then also transit comes to an end

→ Part delivery of goods

If part of the goods are delivered to the buyer then the transit comes to an end for the remainder of the goods as well

3. Right of resale

The unpaid seller has the right to resell the goods.

Conditions for resale:

→ When goods are of perishable nature- Then unpaid seller can resell them immediately without the notice to the buyer. But in case of non-perishable items unpaid seller needs to send notice to the buyer for reselling them

→ Where unpaid seller gives the notice to buyer and buyer still don't pay for it

→ Where the right of resale is reserved/ mentioned in the contract If contract

clearly specifies that reselling can't be done or vice versa

→ Buyer becomes insolvent

→ Buyer fails to pay the price of the goods

B. Rights of unpaid seller against buyer

1. Suit for price

2. Suit for interest and special damages

Here, suit can be filed for interest and special damages.

Where, interest will be paid on the amount of the deal between seller and buyer on the choice/ discretion of the court.

3. Suit for damages for non-acceptance

Suit can be filed against the buyer if the buyer wrongfully refuses to accept the goods. 4.Suit for

breach of contract

RIGHTS OF UNPAID SELLER AGAINST BUYER

When the buyer of goods does not pay his dues to the seller, the seller becomes an unpaid seller. And now the seller has certain rights against the buyer. Such rights are the seller remedies against the breach of contract by the buyer. Such rights of the unpaid seller are additional to the rights against the goods he sold.

1] Suit for Price: Under the contract of sale if the property of the goods is already passed but he refuses to pay for the goods the seller becomes an unpaid seller. In such a case the seller can sue the buyer for wrongfully refusing to pay him his due.

But say the sales contract says that the price will be paid at a later date irrespective of the delivery of goods and on such a day that if the buyer refuses to pay, the unpaid seller may sue for the price of these goods. The actual delivery of the goods is not of importance according to the law.

2] Suit for Damages for Non-Acceptance

If the buyer wrongfully refuses or neglects to accept and pay the unpaid seller, the seller can sue the buyer for damages caused due to his non-acceptance of goods. Since the buyer refused to buy the goods without any just cause, the seller may face certain damages.

The measure of such damages is decided by the Section 73 of the Indian Contract Act 1872, which deals with damages and penalties. Take for example the case of seller A. He agrees to sell to B 100 liters of milk for a decided price. On the day, B refuses to accept the goods for no justifiable reason. A is not able to find another buyer and the milk goes bad. In such a case, A can sue B for damages.

3] Repudiation of Contract before Due Date

If the buyer repudiates the contract before the delivery date of the goods the seller can still sue for damages. Such a contract is considered as a rescinded contract, and so the seller can sue for breach of contract. This is covered in the Indian Contract Act and is known as Anticipatory Breach of Contract.

4] Suit for Interest

If there is a specific agreement between the parties the seller can sue for the interest amount due to him from the buyer. This is when both parties have specifically agreed on the interest rate to be paid to seller from the date on which the payment becomes due.

But if the parties do not have such specific terms, still the court may award the seller with the interest amount due to him at a rate which it sees fit.

REMEDIES OF BUYER AGAINST THE SELLER

Rights (Remedies) of Buyer against Seller

1. Suit for damages for non-delivery

2. Suit for interest and special damages

3. Suit for specific performance

4. Suit for breach of contract

Just as the seller can rescind the contract, then so can the seller when the seller breaches the contract the buyer also has certain remedies against the seller. Let us take a look at some remedies that the Sales Act prescribes for the buyer.

1] Damages of Non-Delivery

If the seller wrongfully or neglectfully refuses to deliver the goods to the buyer, then the buyer can sue for non-delivery of the goods. According to Section 57 of the Sale of Goods Act, if the buyer faces losses due to the wrongful actions of the seller (non-delivery) he can sue for damages caused due to this.

Let's take for example A whose agrees to sell to B 10 pair of shoes for 1000/- each. B was going to sell the same shoes to C for 1100/- a pair. A neglects to deliver the goods to B. Now, B can sue A for non-delivery. He can sue for the amount of 100/- per pair, i.e. 1000/- (the difference between B's cost price and sale price)

2] Suit for Specific Performance

If the seller commits a breach of contract, the buyer can approach the court to ask the seller for specific performance. The court after deliberation can command the seller for specific performance. One important point to keep in mind is that this remedy is only available if the goods are ascertained or specific.

Example: There was a contract between A and B, that A will sell to B a very expensive painting on a specific date. On the said day A refuses to sell. B can approach the court, who orders A to sell the painting to B at the ascertained price.

3] Suit for Breach of Warranty

When the seller breaches the warranty of the goods, the buyer cannot simply reject the goods on such basis. The buyer has two options in such a case,

- set up against the buyer they said breach of warranty in the extinction of the price
- or sue the seller for breach of warranty

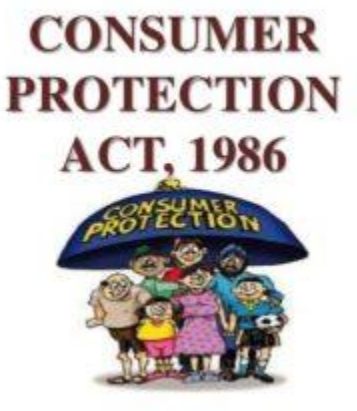
4] Repudiation of Contract

If the seller repudiates the contract, the buyer does not have to wait until the date of the contract. He can treat the contract as rescinded and sue for damages immediately. This will be an anticipatory breach of contract.

5] Sue for Interest

The Act specifically states that nothing in the act will affect the right of the seller or the buyer to recover interest or special damages due to him by the contract. And if there is no specific clause in the contract, the court can come to the rescue of the affected party.

CONSUMER PROTECTION ACT, 1986



- The Consumer Protection Act was passed by the Parliament in 1986 and it came into force from 1987.
- Its purposes to protect consumers against defective goods, unsatisfactory services, unfair trade practices, etc.
- The Act provides for three-tier machinery consisting of District Forum, State Commission and National Commission. It also provides for the formation protection councils in every state.
- The consumers can file their complaints at the appropriate forum for quick Redressal. The complaint may relate to defective refrigerator or TV set, non-functional telephone, lack of due cares in medical treatment and so on. Any service or product given free of charge is not covered by the Act.

Definitions of Important Terms

- **Complainant means:**

1. A consumer; or

2. Any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force; or

3. The Central Government or any State Government, who or which makes a complaint; or one or more consumers where there are numerous consumers having the same interest.

Complaint means any allegation in writing made by a complainant that:

- An unfair trade practice or a restricted trade practice has been adopted by any trader.
- The goods bought by him or agreed to be bought by him suffer from one more defects.
- The services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.

- The trader has charged for the goods mentioned in the complaint a price excess. of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.

Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force, requiring traders to display information in regard to the contents, manner and effect of use of such goods; with a view to obtaining any relief provided by law under the CPA.

- **Consumer means any person who:**

1. buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment (for example hire purchase or installment sales) and includes any other user of such goods when such use is made with the approval of the buyer, but does not include a person who obtains such goods for resale or for any commercial purpose; or

2. Hires or avails of any services for a consideration which has been paid or promised, or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services when such services are availed of with the approval of the first mentioned person

For the purposes of this definition "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.

- **Goods** mean goods as defined in the Sale of Goods Act, 1930. Under that act, goods means every kind of movable property other than actionable claims and money and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

- **Service** is defined to mean service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

- **Consumer dispute** means dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint.

- **Restrictive Trade Practice** means any trade practice which requires a consumer to buy, hire, or avail of any good or as the case may be, services as a condition precedent for buying, hiring or availing of any other goods or services.

- **Unfair Trade Practice** means unfair trade practice as defined under the Monopolies and Restrictive Trade Practices Act. The MRTP act has defined certain practices to be unfair trade practices.

Objects of the Consumer Protection Act, 1986

The CPA extends to the whole of India except the State of Jammu and Kashmir and applies to all goods and services unless otherwise notified by the Central Government.

The basic rights of consumers as per the Consumer Protection Act (CPA) are:

1. Right to safety.

2. Right to be informed.

3. Right to choose.

4. Right to representation (or to be heard).

5. Right to seek Redressal.

6. Right to consumer education.

1. **Right to Safety**: It is the consumer right to be protected against goods and services which is hazardous to health or life.

2. **Right to be informed:** The consumer has the right to be informed about the quality, quantity, purity, standard and price of goods he intends to purchase. Therefore, the manufacture must mention complete information about the product, its ingredients, date of manufacture, price, precaution of use, etc. on the label and package of the product.

3. **Right to Choose:** The consumer should be assured of freedom to choose from a variety of products at competitive prices. Every consumer wants to buy a product on his free will. There should be free competition in the market so that the consumer may make the right choice in satisfying his needs.

4. **Right to Representation (or to be Heard)**: The consumer has right to register dissatisfaction with any product and get his complaint heard. Most of the reputed firms have set up consumer service cells to listen to the consumer's complaint and take appropriate steps to redress their grievances.

5. **Right to Seek Redressal:** It is the right to seek Redressal against any defect in goods or unfair trader suffered by the consumer. If the quality and performance of a product falls short of seller's claims, the consumer has a right to certain remedies. The Consumer Protection Act requires that the product must be repaired, replaced or taken back by the seller as provided under the contract between the buyer and the seller.

6. **Right to Consumer Education:** It means right of acquiring knowledge and being a well-informed consumer throughout his life. He should also be made aware of his rights and the remedies available through publicity in the mass media.

Consumer Responsibilities

(i) To provide adequate information to the seller: The consumer has the responsibility to provide adequate information about his needs and expectation to the sellers.

(ii) To exercise caution in purchasing: The consumer must try to get full information on the quality, design, utility, quantity, price, etc. of the product before purchasing it.

(iii) To insist on cash memo or receipt: The consumer must get a cash memo or receipt as a proof of purchase of goods from the seller. This would help him in making a complaint to the seller in case of any defect in the goods.

(iv)To file complaint against genuine grievance: The consumer must file a complaint with the seller or manufacturer about any defects or shortcoming in the products and services.

(v) To be quality conscious: The consumer should never compromise on the quality of goods. While making purchases, the consumers must look for standard quality certification marks such as ISI, Agmark, Wool mark, FPO, etc. For example, electric iron must carry ISI mark.

Redressal Machinery under the Act

- Consumer Protection Councils: The interests of consumers are enforced through various authorities set up under the CPA. The CPA provides for the setting up of the Central Consumer Protection Council, the State Consumer Protection Council and the District Forum.
- Central Consumer Protection Council: The Central Government has set up the Central Consumer Protection Council, which consists of the following members:

(a) The Minister in charge of Consumer Affairs in the Central Government who is its Chairman, and

(b) Other official and non-official members representing varied interests. The Central council consists of 150 members and its term is 3 years. The Council meets as and when necessary but at least one meeting is held in a year.

- State Consumer Protection Council

The State Council consists of :(a) The Minister in charge of Consumer Affairs in the State Government who is its Chairman, and

(b) Other official and non-official members representing varied interests. The State Council meets as and when necessary but not less than two meetings must be held every year.

Redressal Machinery under the Act

The CPA provides for a 3-tier approach in resolving consumer disputes.

- The District Forum has jurisdiction to entertain complaints where the value of goods / services complained against and the compensation claimed is less than Rs. 20 lakhs,
- the State Commission for claims exceeding Rs. 20 lakhs but not exceeding Rs. 1crore and
- The National Commission for claims exceeding Rs.1 crores.

- **District Forum**

Under the CPA, the State Government has to set up a district Forum in each district of the State. The government may establish more than one District Forum in a district if it deems fit.

Each District Forum consists of:

(a) A person who is, or who has been, or is qualified to be, a District Judge who shall be its President

(b) Two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

- **State Commission**: The Act provides for the establishment of the State Consumer Disputes Redressal Commission by the State Government in the State by notification.

Each State Commission shall consist of:

(a) A person who is or has been a judge of a High Court appointed by State Government (in consultation with the Chief Justice of the High Court) who shall be its President;

(b) Two other members who shall be persons of ability, integrity, and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom must be a woman.

- **National Commission**

The Central Government provides for the establishment of the National Consumer Disputes Redressal Commission. The National Commission shall consist of:-

(a) A person who is or has been a judge of the Supreme Court, to be appoint by the Central Government (in consultation with the Chief Justice of India) who be its President;

(b) Four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman

Complaints may be filed with the District Forum by:

1. The consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided

2. Any recognized consumer association, whether the consumer to whom goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided, is a member of such association or not

3. One or more consumers, where there are numerous consumers having the same interest with the permission of the District Forum, on behalf of or for the benefit of, all consumers so interested

4. The Central or the State Government. On receipt of a complaint, a copy of the complaint is to be referred to the opposite party, directing him to give his version of the case within 30 days. This period may be extended by another 15 days. If the opposite party admits the allegations contained in the complaint, the complaint will be decided on the basis of materials on the record. Where the opposite party denies or disputes the allegations or omits or fails to take any action to represent his case within the time provided,

- **Limitation period for filing of complaint**: The District Forum, the State Commission, or the National Commission shall not admit a **complaint unless it is filed within two years from the date on which the cause of action has arisen**. However, where the complainant satisfies the District Forum / State Commission, that he had sufficient cause for not filing the complaint within two years; such complaint may be entertained by it after recording the reasons for condoning the delay.
- **Powers of the Redressal Agencies**: The District Forum, State Commission and the National Commission are vested with the powers of a civil court under the Code of Civil Procedure while trying a suit in respect of the following matters:-

1. The summoning and enforcing attendance of any defendant or witness examining the witness on oath;

2. The discovery and production of any document or other material producible as evidence;

3. The reception of evidence on affidavits:

4. The requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

5. Issuing of any commission for the examination of any witness; and

6. Any other matter which may be prescribed.

- **Remedies Granted under the Act :**

The District Forum / State Commission / National Commission may pass one or more of the following orders to grant relief to the aggrieved consumer: -

1. To remove the defects pointed out by the appropriate laboratory from goods in question;
2. To replace the goods with new goods of similar description, this shall be free from any defect;
3. To return to the complainant the price, or, as the case may be, the charges paid by the complainant;
4. To pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to negligence of the opposite party;
5. To remove the defects or deficiencies in the services in question;
6. To discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
7. Not to offer the hazardous goods for sale:
8. To withdraw the hazardous goods from being offered for sale:
9. To provide for adequate costs to parties.

- **Appeals** : Any person aggrieved by an order made by the Forum may prefer an appeal to the State Commission in the prescribed form and manner. Similarly, any person aggrieved by any original order of the State Commission may prefer an appeal to the National Commission in the prescribed form and manner. Any person aggrieved by any original order of the National Commission may prefer an appeal to the Supreme Court. All such appeals are to be made **within thirty days from the date of the order provided that the concerned Appellate authority** may entertain an appeal after the said period of thirty days if it is satisfied that there was sufficient cause for not filling it within that period. The period of 30 days is to be computed from the date of receipt of the order by the appellant.
- **Penalties**: Failure or omission by a trader or other person against whom a complaint is made or the complainant to comply with any order of the State Commission or the National Commission shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to 3 years, or with fine of not less than Rs. 2,000 but which may to Rs. 10000 or with both.

However, if it is satisfied that the circumstances of any case so requires, then the District Forum or the State Commission or the National Commission may impose a lower fine or a shorter term of **imprisonment.**

Consumer Protection Act, 2019: Meaning and Key Features

The Consumer Protection Act, 2019 replaced the old Consumer Protection Act, 1986. The new bill was passed by the president on Aug 06, 2019. Here we are explaining the key features of this Consumer Protection Act, 2019.

The Consumer Protection Bill, 2019 has been passed by the Lok Sabha on Jul 30, 2019, and Rajya Sabha passed on Aug 06, 2019. This bill was introduced in the parliament by the Minister of Consumer Affairs, Food and Public Distribution, Mr. Ram Vilas Paswan.

Meaning of Consumer Protection Act, 2019

Consumer Protection Act, 2019 is a law to protect the interests of the consumers. This act was inevitable to resolve a large number of pending consumer complaints in consumer courts across the country. It has ways and means to solve the consumer grievances speedily.

What is the aim of the Consumer Protection Act?

The basic aim of the Consumer Protection Act, 2019 to save the rights of the consumers by establishing authorities for timely and effective administration and settlement of consumers' disputes

- **Definition of the consumer:**

  As per the act; a person is called a consumer who avails the services and buys any good for self-use. Worth to mention that if a person buys any good and avail any service for resale or commercial purpose, is not considered a consumer. This definition covers all types of transactions i.e. online and offline.
- **Key features of the Consumer Protection Act, 2019**

1. Establishment of the Central Consumer Protection Authority (CCPA):

- ✓ The act has the provision of the Establishment of the CCPA which will protect, promote and enforce the rights of consumers. The CCPA will regulate cases related to unfair trade practices, misleading advertisements, and violation of consumer rights.

- ✓ The CCPA will have the right to impose a penalty on the violators and passing orders to recall goods or withdraw services, discontinuation of the unfair trade practices and reimbursement of the price paid by the consumers.
- ✓ The Central Consumer Protection Authority will have an investigation wing to enquire and investigate such violations. The CCPA will be headed by the Director-General.

2. Rights of consumers:

The act provides 6 rights to the consumers;

i. To have information about the quantity, quality, purity, potency, price, and standard of goods or services.

ii. To be protected from hazardous goods and services.

iii. To be protected from unfair or restrictive trade practices.

iv. To have a variety of goods or services at competitive prices

3. Prohibition and penalty for a misleading advertisement:

The Central Consumer Protection Authority (CCPA) will have the power to impose fines on the endorser or manufacturer up to 2-year imprisonment for misleading or false advertisement (Like Laxmi Dhan Warsha Yantra).

Worth to mention that repeated offense may attract a fine of Rs 50 lakh and imprisonment of up to 5 years.

4. Consumer Disputes Redressal Commission:

The act has the provision of the establishment of the Consumer Disputes Redressal Commissions (CDRCs) at the national, state and district levels.

The CDRCs will entertain complaints related to;

i. Overcharging or deceptive charging

ii. Unfair or restrictive trade practices

UNIT-IV

NEGOTIABLE INSTRUMENTS ACT, 1881

INTRODUCTION

The Negotiable Instruments Act was enacted, in India, in 1881. Prior to its enactment, the provision of the English Negotiable Instrument Act were applicable in India, and the present Act is also based on the English Act with certain modifications. It extends to the whole of India except the State of Jammu and Kashmir. The Act operates subject to the provisions of Sections 31 and 32 of the Reserve Bank of India Act, 1934.

MEANING OF NEGOTIABLE (TRANSFERABLE) INSTRUMENTS (WRITTEN DOCUMENTS)

According to Section 13 (a) of the Act, "Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer, whether the word "order" or " bearer" appear on the instrument or not."

In the words of Justice, Willis, "A negotiable instrument is one, the property in which is acquired by anyone who takes it bonafide and for value notwithstanding any defects of the title in the person from whom he took it".

Thus, the term, negotiable instrument means a written document which creates a right in favour of some person and which is freely transferable. Although the Act mentions only these three instruments (such as a promissory note, a bill of exchange and cheque), it does not exclude the possibility of adding any other instrument which satisfies the following two conditions of negotiability:

1. The instrument should be freely transferable (by delivery or by endorsement. and delivery) by the custom of the trade; and
2. The person who obtains it in good faith and for value should get it free from all defects, and be entitled to recover the money of the instrument in his own name.

CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT

A negotiable instrument has the following characteristics:

a. **TRANSFERABILITY/Property**: The possessor of the negotiable instrument is presumed to be the owner of the property contained therein. A negotiable instrument does not merely give possession of the instrument but right to property also. The property in a negotiable instrument can be transferred without any formality. In the case of bearer instrument, the property passes by mere delivery to the transferee. In the case of an order instrument, endorsement and delivery are required for the transfer of property.

b. **Title**: The transferee of a negotiable instrument is known as 'holder in due course.' A bona fide transferee for value is not affected by any defect of title on the part of the transferor or of any of the previous holders of the instrument.

c. **Rights**: The transferee of the negotiable instrument can sue in his own name, in case of dishonour. A negotiable instrument can be transferred any number of times till it is at maturity. The holder of the instrument need not give notice of transfer to the party liable on the instrument to pay.

d. **Presumptions**: Certain presumptions apply to all negotiable instruments e.g., a presumption that consideration has been paid under it. It is not necessary to write in a promissory note the words 'for value received' or similar expressions because the payment of consideration is presumed. The words are usually included to create additional evidence of consideration.

e. **Prompt payment**: A negotiable instrument enables the holder to expect prompt payment because dishonour means the ruin of the credit of all persons who are parties to the instrument.

➢ PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENT

Sections 118 and 119 of the Negotiable Instrument Act lay down certain presumptions which the court presumes in regard to negotiable instruments. In other words these presumptions need not be proved as they are presumed to exist in every negotiable instrument. Until the contrary is proved the following presumptions shall be made in case of all negotiable instruments:

1. **Consideration**: It shall be presumed that every negotiable instrument was made drawn, accepted or endorsed for consideration. It is presumed that, consideration is present in every negotiable instrument until the contrary is presumed. The presumption of consideration, however may be rebutted by proof that the instrument had been obtained from, its lawful owner by means of fraud or undue influence.

2. **Date**: Where a negotiable instrument is dated, the presumption is that it has been made or drawn on such date, unless the contrary is proved.

3. **Time of acceptance**: Unless the contrary is proved, every accepted bill of exchange is presumed to have been accepted within a reasonable time after its issue and before its maturity. This presumption only applies when the acceptance is not dated; if the acceptance bears a date, it will prima facie be taken as evidence of the date on which it was made.

4. **Time of transfer**: Unless the contrary is presumed it shall be presumed that every transfer of a negotiable instrument was made before its maturity.

5. **Order of endorsement**: Until the contrary is proved it shall be presumed that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.

6. **Stamp**: Unless the contrary is proved, it shall be presumed that a lost promissory note, bill of exchange or cheque was duly stamped.

7. **Holder in due course**: Until the contrary is proved, it shall be presumed that the holder of a negotiable instrument is the holder in due course. Every holder of a negotiable instrument is presumed to have paid consideration for it and to have taken it in good faith. But if the instrument was obtained from its lawful owner by means of an offence or fraud, the holder has to prove that he is a holder in due course.

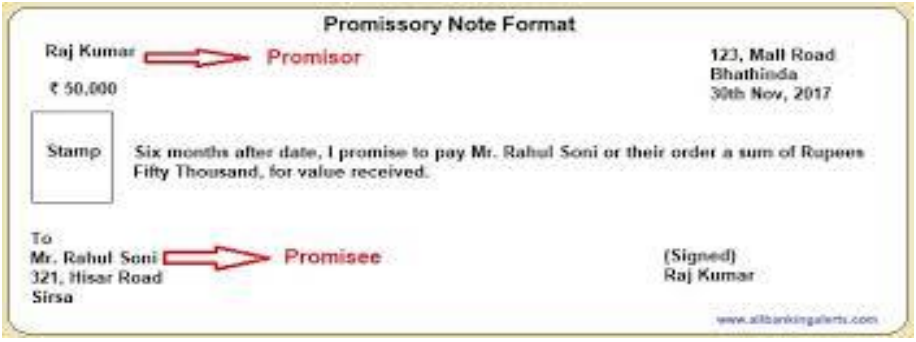
8. **Proof of protest**: Section 119 lays down that in a suit upon an instrument which has been dishonored, the court shall on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

TYPES OF NEGOTIABLE INSTRUMENT

Section 13 of the Negotiable Instruments Act states that a negotiable instrument is a promissory note, bill of exchange or a cheque payable either to order or to bearer Negotiable instruments recognised by statute are: (i) Promissory notes (ii) Bills of exchange (iii) Cheques. Negotiable instruments recognised by usage or custom are: (i) Hundis (ii) Share warrants (iii) Dividend warrants (iv) Bankers draft (v) Circular notes (vi) Bearer debentures (vii) Debentures of Bombay Port Trust (viii) Railway receipts (ix) Delivery orders.

PROMISSORY NOTES

Section 4 of the Act defines, “A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments.”



Essential elements

An instrument to be a promissory note must possess the following elements:

1. **It must be in writing:** A mere verbal promise to pay is not a promissory note. The method of writing (either in ink or pencil or printing, etc.) is unimportant, but it must be in any form that cannot be altered easily.

2. **It must certainly an express promise or clear understanding to pay:** There must be an express undertaking to pay. A mere acknowledgment is not enough. The following are not promissory notes as there is no promise to pay.

3. **Promise to pay must be unconditional:** A conditional undertaking destroys the negotiable character of an otherwise negotiable instrument. Therefore, the promise to pay must not depend upon the happening of some outside contingency or event. It must be payable absolutely.

4. **It should be signed by the maker:** The person who promises to pay must sign the instrument even though it might have been written by the promisor himself. There are no restrictions regarding the form or place of signatures in the instrument. It may be in any part of the instrument. It may be in pencil or ink, a thumb mark or initials. The promoter can be signed by the authorized agent of the maker, but the agent must expressly state as to on whose behalf he is signing, otherwise he himself may be held liable as a maker. The only legal requirement is that it should indicate with certainty the identity of the person and his intention to be bound by the terms of the agreement.

5. **The maker must be certain:** The note self must show clearly who the person is agreeing to undertake the liability to pay the amount. In case a person signs in an assumed name, he is liable as a maker because a maker is taken as certain if from his description sufficient indication follows about his identity. In case two or more persons promise to pay, they may find themselves jointly or jointly and severally, but their liability cannot be in the alternative.

6. **The payee must be certain:** The instrument must point out with certainty the person to whom the promise has been made. The payee may be ascertained by name or by designation. A note payable to the maker himself is not probate unless it is indorsed by him. In case, there is a mistake in the name of the payee or his designation; the note is valid, if the payee can be ascertained by evidence. Even where the name of a dead person is entered as payee in ignorance of his death, his legal representative can enforce payment.

7. **The promise should be to pay money and money only:** Money means legal tender money and not old and rare coins. A promise to deliver paddy either in the alternative or in addition to money does not constitute a promissory note.

8. **The amount should be certain:** One of the important characteristics of a promissory note is certainty—not only regarding the person to whom or by whom payment is to be made but also regarding the amount.

9. **Other formalities:** The other formalities regarding number, place, date, consideration etc. though usually found given in the promissory notes but are not essential in law. The date of instrument is not material unless the amount is made payable at a certain time after date. Even in such a case, omission of date does not invalidate the instrument and the date of execution can be independently ascertained and proved.

On demand (or six month after date) I promise to pay Peter or order the sum of rupees one thousand with interest at 8 per cent per annum until payment.

BILL OF EXCHANGE

Section 5 of the Act defines, "A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument".

Specimen of Bill of Exchange

Mr. A (Drawer)
48, MP Nagar, Bhopal (M.P.)
April 7, 2015

Rs. 10,000/-
Four months after date, pay to Mr. B (Payee) a sum of Rupees Ten Thousand, for value received.

To
Mr. C (Drawee)
576, Arera Colony, Bhopal (M.P.)

Signature
Mr. A

A bill of exchange, therefore, is a written acknowledgement of the debt, written by the creditor and accepted by the debtor. There are usually three parties to a bill of exchange drawer, acceptor or Drawee and payee. Drawer himself may be the payee.

Essential conditions of a bill of exchange

(1) It must be in writing.

(2) It must be signed by the drawer.

(3) The drawer, Drawee and payee must be certain.

(4) The sum payable must also be certain.

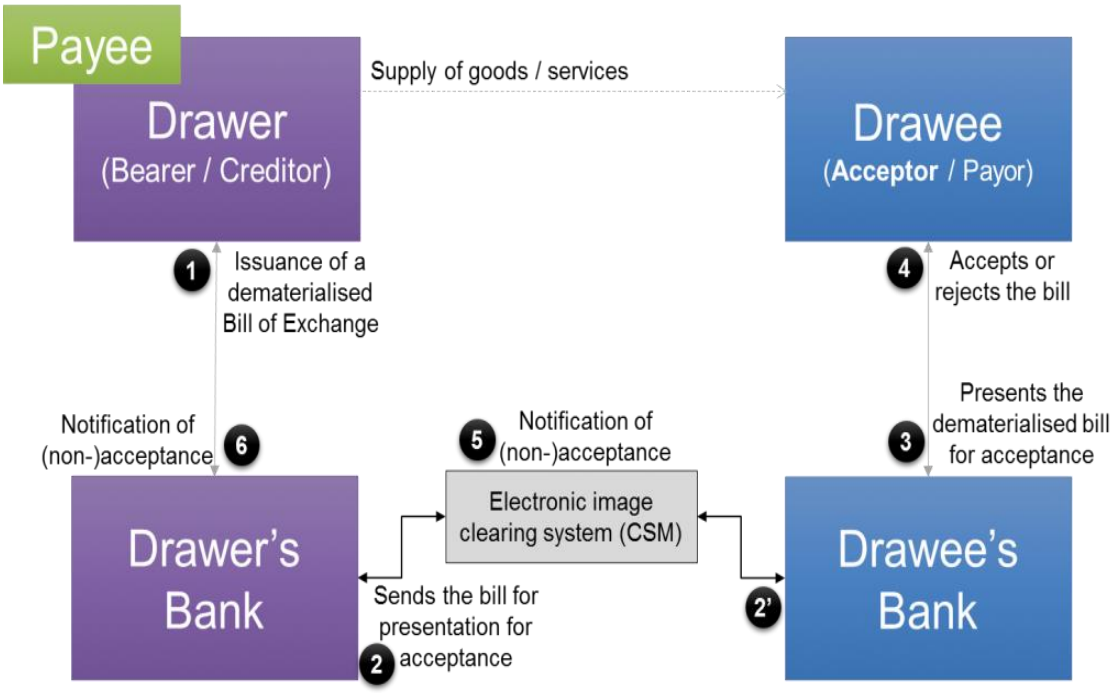
(5) It should be properly stamped.

(6) It must contain an express order to pay money and money alone.

For example, in the following cases, there is no order to pay, but only a request to pay. Therefore, none can be considered as a bill of exchange:

(a) "I shall be highly obliged if you make it convenient to pay Rs. 1000 to Suresh".

(b) "Mr. Rajesh, please let the bearer have one thousand rupees, and place it to my account and oblige"



Distinction between bill of exchange and Promissory Note

1. **Number of parties:** In a promissory note there are only two parties – the maker (debtor) and the payee (creditor). In a bill of exchange, there are three parties; drawer, Drawee and payee; although any two out of the three may be filled by one and the same person,
2. **Payment to the maker:** A promissory note cannot be made payable the maker himself, while in a bill of exchange to the drawer and payee or Drawee and payee may be same person.
3. **Unconditional promise:** A promissory note contains an unconditional promise by the maker to pay to the payee or his order, whereas in a bill of exchange, there is an unconditional order to the Drawee to pay according to the direction of the drawer.
4. **Prior acceptance:** A note is presented for payment without any prior acceptance by the maker. A bill of exchange is payable after sight must be accepted by the Drawee or someone else on his behalf, before it can be presented for payment.
5. **Primary or absolute liability:** The liability of the maker of a promissory note is primary and absolute, but the liability of the drawer of a bill of exchange is secondary and conditional.
6. **Relation:** The maker of the promissory note stands in immediate relation with the payee, while the maker or drawer of an accepted bill stands in immediate relations with the acceptor and not the payee.
7. **Protest for dishonour:** Foreign bill of exchange must be protested for dishonour when such protest is required to be made by the law of the country where they are drawn, but no such protest is needed in the case of a promissory note.
8. **Notice of dishonour:** When a bill is dishonored, due notice of dishonour is to be given by the holder to the drawer and the intermediate endorsers, but no such notice need be given in the case of a note.

Classification of Bills

Bills can be classified as:

(1) Inland and foreign bills.

(2) Time and demand bills.

(3) Trade and accommodation bills.

(1) Inland and Foreign Bills

- **Inland bill:** A bill is, named as an inland bill if:

  (a) It is drawn in India on a person residing in India, whether payable in or outside India, or

  (b) It is drawn in India on a person residing outside India but payable in India.

The following are the Inland bills

(i) A bill is drawn by a merchant in Delhi on a merchant in Madras. It is payable in Bombay. The bill is an inland bill.

(ii) A bill is drawn by a Delhi merchant on a person in London, but is made payable in India. This is an inland bill.

(iii) A bill is drawn by a merchant in Delhi on a merchant in Madras. It is accepted for payment in Japan. The bill is an inland bill.

- **Foreign Bill:** A bill which is not an inland bill is a foreign bill. The following are the foreign bills:

1. A bill has drawn outside India and made payable in India.
2. A bill drawn outside India on any person residing outside India.
3. A bill drawn in India on a person residing outside India and made payable outside India.
4. A bill drawn outside India on a person residing in India.
5. A bill has drawn outside India and made payable outside India.

Bills in sets (Secs. 132 and 133): The foreign bills are generally drawn in sets of three, and each sets is termed as a 'via'. As soon as anyone of the set is paid, the others becomes inoperative. These bills are drawn in different parts. They are drawn in order to avoid their loss or miscarriage during transit. Each part is dispatched separately. To avoid delay, all the parts are sent on the same day; by different mode of conveyance.

Rules: Sections 132 and 133 provide for the following rules:

(i) A bill of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the others remain unpaid. All parts make one bill and the entire bill is extinguished, i.e. when payment is made on one part- the other parts will become inoperative (Section 132).

(ii) The drawer should sign and deliver all the parts but the acceptance is to be conveyed only on one of the parts. In case a person accepts or endorses different parts of the bill in favour of different persons, he and the subsequent endorsers of each part are liable on such part as if it were a separate bill (Sec. 132).

As between holders in due course of the different parts of the same bill, he who first acquired title to anyone part is entitled to the other parts and is also entitled to claim the money represented by bill (Sec. 133).

(2) Time and Demand Bill

Time bill: A bill payable after a fixed time is termed as a time bill. In other words, bill payable "after date" is a time bill.

Demand bill: A bill payable at sight or on demand is termed as a demand bill.

(3) Trade and Accommodation Bill

Trade bill: A bill drawn and accepted for a genuine trade transaction is termed as a "trade bill".

Accommodation bill: A bill drawn and accepted not for a genuine trade transaction but only to provide financial help to some party is termed as an "accommodation bill".

Example: A, is need of money for three months. He induces his friend B to accept a bill of exchange drawn on him for Rs. 1,000 for three months. The bill is drawn and accepted. The bill is an "accommodation bill". A may get the bill discounted from his bankers immediately, paying a small sum as discount. Thus, he can use the funds for three months and then just before maturity he may remit the money to B, who will meet the bill on maturity. In the above example A is the "accommodated party" while B is the "accommodating party".

Rules regarding accommodation bills are:

(i) In case the patty accommodated continues to hold the bill till maturity, the accommodating party shall not be liable to him for payment of, the bill since the contract between them is not based on any consideration (Section 43).

(ii) But the accommodating party shall be liable to any subsequent holder for value who may know the exact position that the bill is an accommodation bill and that the full consideration has not been received by the acceptor. The accommodating party can, in turn, claim compensation from the accommodated party for the amount it has been asked to pay the holder for value.

(iii) An accommodation bill may be negotiated after maturity. The holder or such a bill after maturity is in the same position as a holder before maturity, provided he takes it in good faith and for value (Sec. 59)

In form and all other respects an accommodation bill is quite similar to an ordinary bill of exchange. There is nothing on the face of the accommodation bill to distinguish it from an ordinary trade bill.

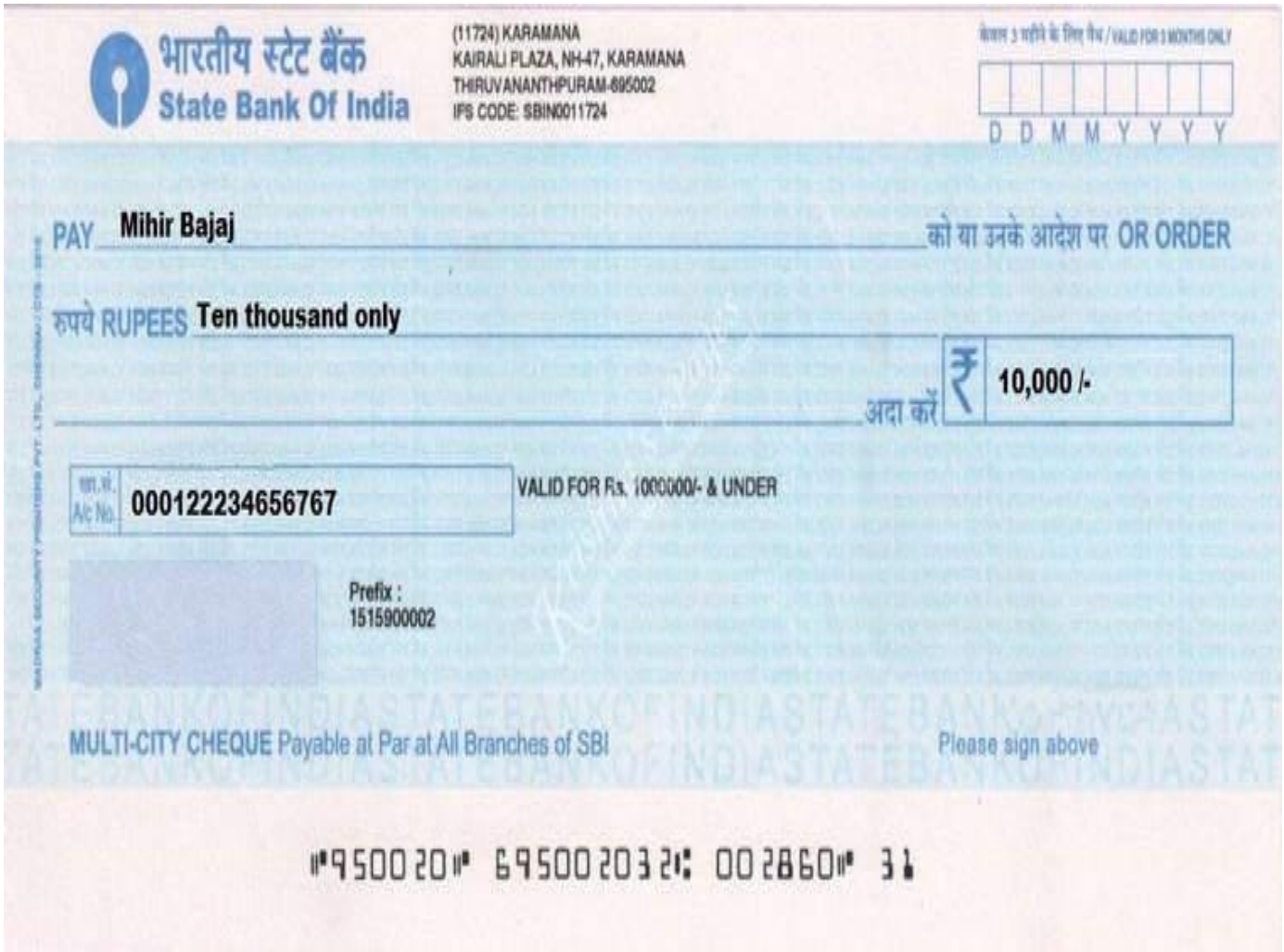
CHEQUES

Section 6 of the Act defines "A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand".

A cheque is bill of exchange with two more qualifications, namely,

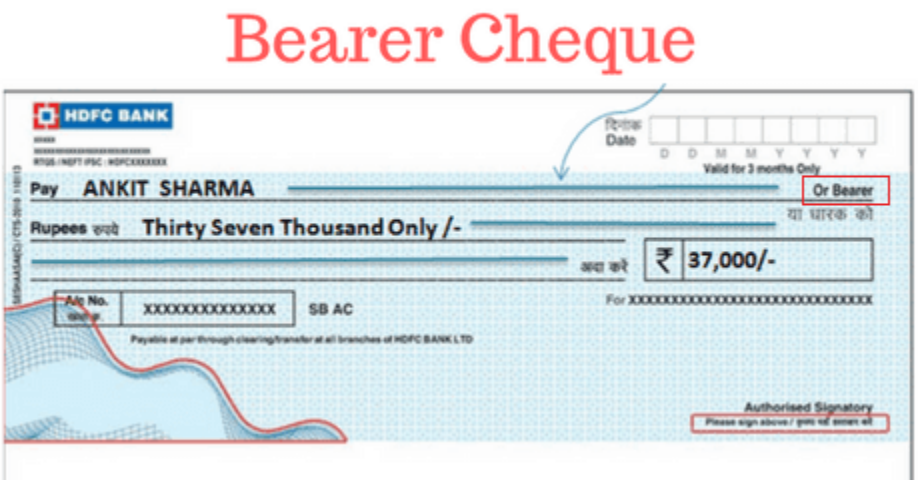
(i) It is always drawn on a specified banker, and

(ii) It is always payable on demand. Consequently, all cheque is bill of exchange, but all bills are not cheque. A cheque must satisfy all the requirements of a bill of exchange; that is, it must be signed by the drawer, and must contain an unconditional order on a specified banker to pay a certain sum of money to or to the order of a certain person or to the bearer of the cheque. It does not require acceptance.

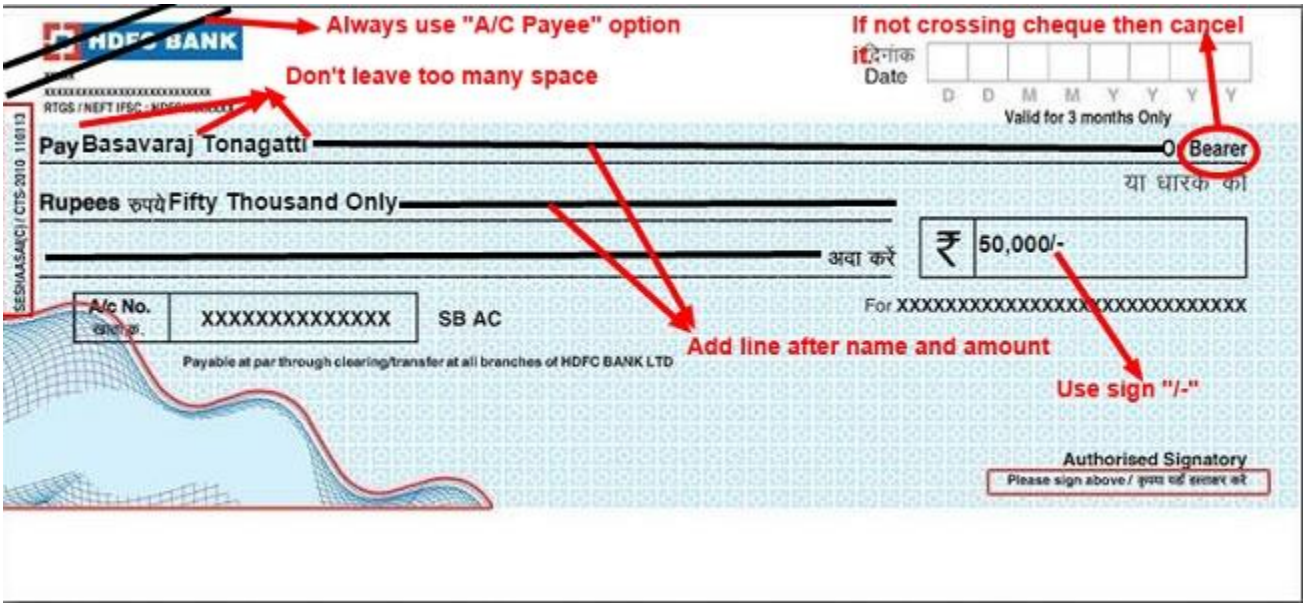


DIFFERENT TYPES OF CHEQUE:

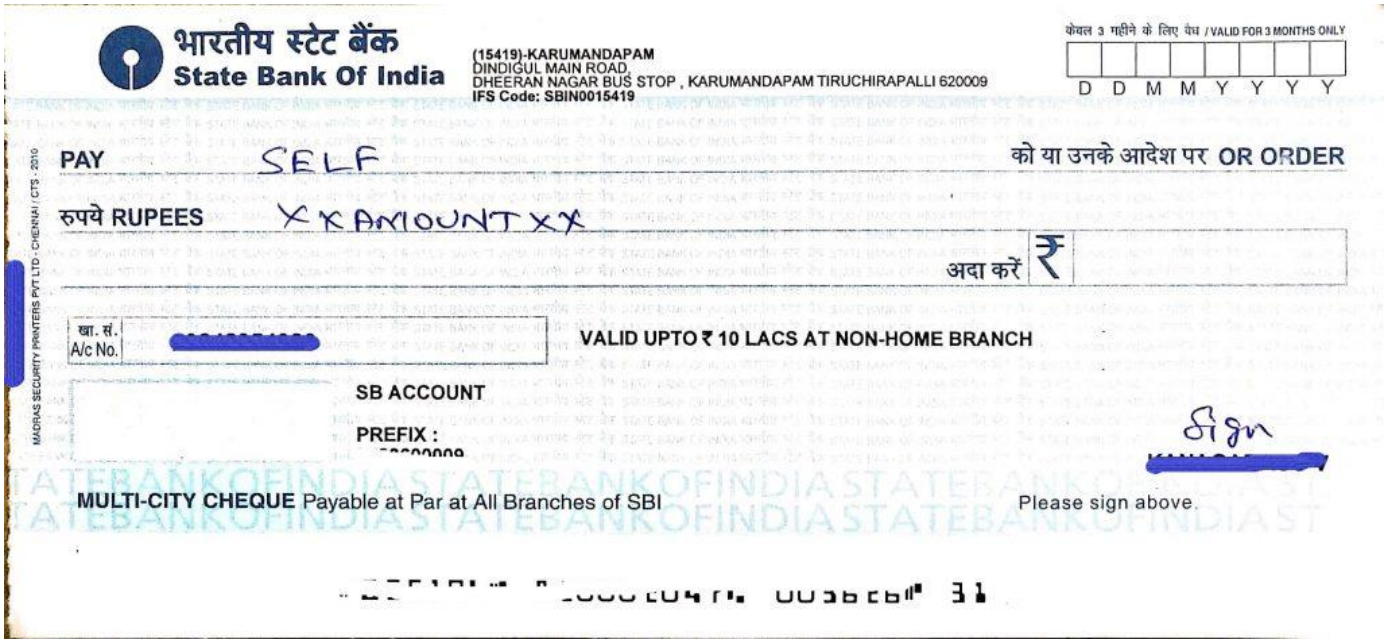
I. **BEARER CHEQUE**-A person holding the cheque can withdraw the amount (only if it is signed). Such type of cheques is very risky and in case misplaced can lead to loss of the amount mentioned on the cheque.



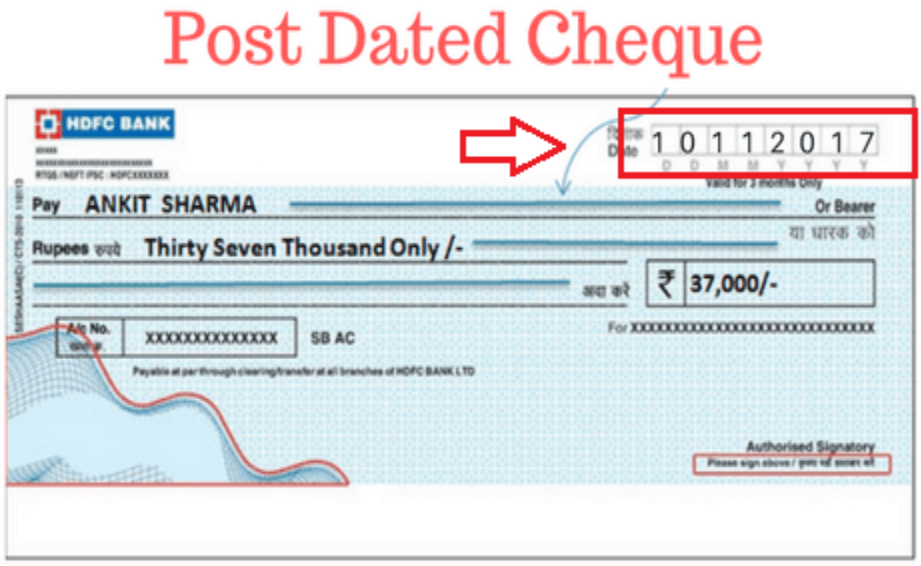
II. **CROSSED CHEQUE**-A bearer cheque becomes a crossed cheque by crossing it twice with two parallel lines on the left-hand top corner. Only person name written on it can get the amount transferred to his account.



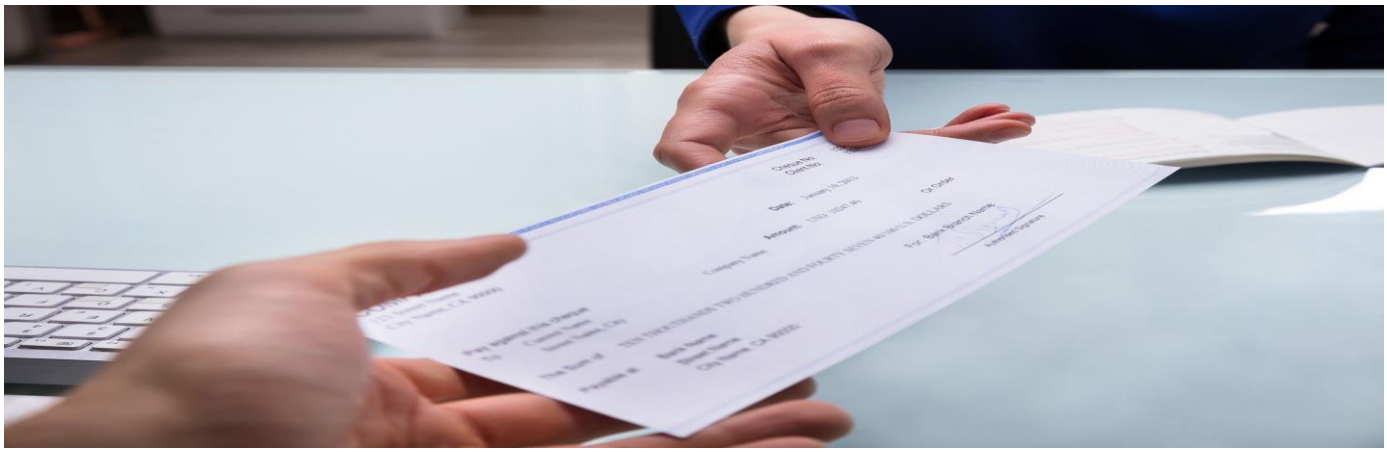
III. **SELF CHEQUE**-As the name suggests the account holders name is written on it to encash money in physical form from the branch where he holds his account.



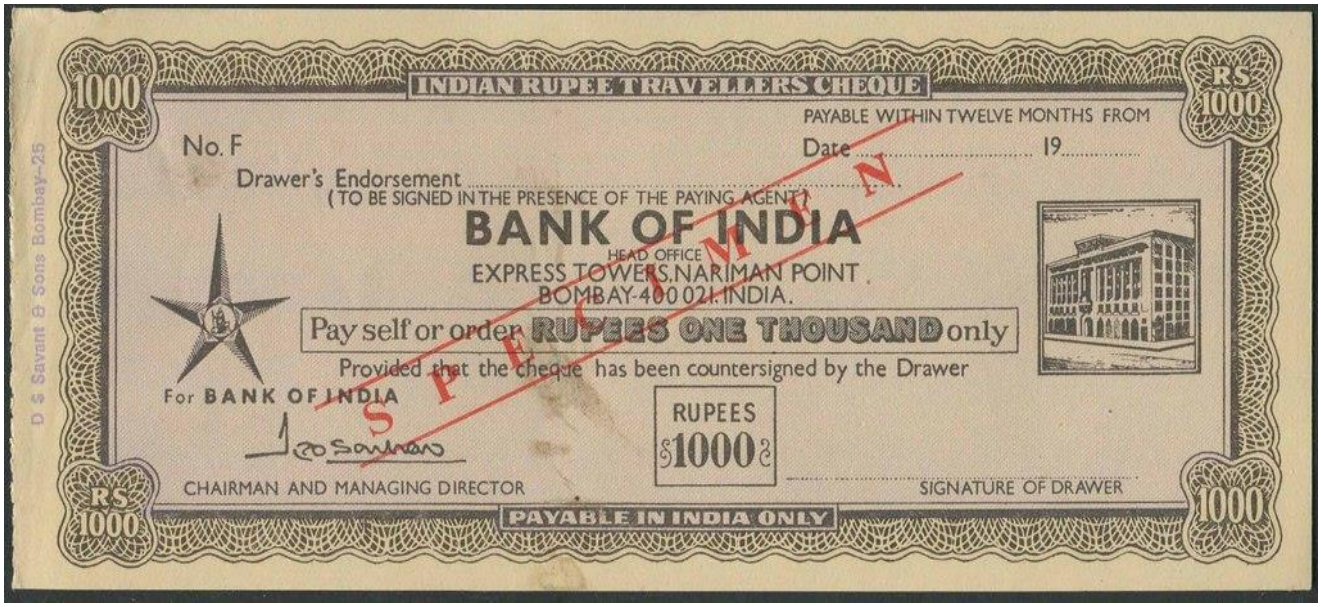
IV. **POST DATED CHEQUE**-Post-dated Cheques are cheques issued with a future date on it. Once a cheque is issued it will be valid for three months. It is used for business purposes or the making of payment in a future date.



V. **BANKER'S CHEQUE**-Such cheques are issued by the bank itself and guarantee a payment.



VI. **TRAVELER'S CHEQUE**-Such cheques can be used for withdrawal of money while travelling. It is equal to carrying cash but one can travel safely without carrying huge amount. They can be encashed abroad where foreign currency is normally acceptable.



DISHONOUR OF CHEQUE

A person suffers a lot if a cheque issued in his favor is dishonored due to the insufficiency of funds in the account of the drawer of the cheque. To discourage such dishonor, it has been made an offence by an amendment of the Negotiable Instrument Act by the Banking, Public Financial Institution and Negotiable Instrument Laws (Amendment) Act, 1988.

Section 138 makes the dishonor of cheque an offence. The payee or holder in due course can have recourse against the drawer, who may be held liable for the offence.

Under Section 138 –

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act be punished with imprisonment [a term may be extended to 2 years], or with fine which may extend to twice the amount of the cheque, or with both.

ESSENTIAL FOR AN ACTION UNDER SECTION 138

1. **There should be dishonor of cheque**: Section 138 makes dishonor of cheque in certain cases an offence. Cheque is the most common mode of making the payment. In order to duly protect the interest of its payee, holder in due course, there is an attempt to discourage dishonor of a cheque by making it an offence. These provisions do not cover the dishonor of other negotiable instruments.

2**. Payment in discharge of debtor liability:** The cheque should have been drawn by a person on an account with a banker for payment of money to another person for the discharge, in whole or part, of any debt or other liability. The debt or other liability in such a case means a legally enforceable debt or other liability.

If the payment by way of cheque is made as gift or charity, it is not the payment for legally enforceable debt or liability. The dishonor of such cheque does not attract the provisions of Section 138 of the Negotiable Instrument Act.

3. **Presentment of the cheque within the period of its validity:** It is further necessary that the cheque has been presented before it became stale and invalid. It means that the cheque has been presented within a period of 6 months from the date on which it is drawn or within the period of validity, whichever is earlier.

4. **Dishonor due to insufficient fund:** It is also necessary that the cheque should be returned by the bank unpaid.

Dishonor may be because of 2 reasons:

- Either the amount of money present in the account is insufficient
- Or the amount to be paid has exceeded the amount to be paid from that account as in the agreement made with that bank.

It has been generally held in various cases that dishonor due to the insufficiency of funds has to be interpreted liberally. Dishonor due to the remarks like “Account closed”, “Refer to the drawer” or “Stop payment” of the cheque may be deemed to be covered by the provision contained in Section 138 of the Act.

5. **Notice and demand from the drawer and drawer’s failure to pay:** Within 15 days of receipt of information from the bank about the dishonor of the cheque, the payee or holder in due course of the

negotiable instrument, as the case may be, must make a demand of the said amount from the drawer by giving a notice in writing.

CIRCUMSTANCES IN WHICH A BANKER IS JUSTIFIED IN DISHONOURING CUSTOMER'S CHEQUE

1. PAYMENT COUNTERMANDED BY THE DRAWER: When the cheque drawer of the cheque countermands the payment that is it issues the instruction to the bank not to make the payment. On receipt of a valid stop payment order, the cheque must be returned unpaid with the remark "payment countermanded by drawer"
2. NOTICE OF DRAWER'S DEATH: On receipt of the confirmed news of death of account holder, cheques signed by him should be returned unpaid with the remark "Drawer deceased".
3. NOTICE OF CUSTOMER'S INSANITY: Where the account holder is certified as insane by a recognized medical practitioner then the cheques signed by him should be signed by him should be returned unpaid.
4. NOTICE OF CUSTOMER'S INSOLVENCY: Where a customer is adjudged insolvent, the banker must refuse to pay cheques drawn by the customer.
5. LIQUIDATION OF COMPANY: When a bank receives notice from the liquidator in accordance with the provisions of Companies Act, requiring to pay the balance to liquidator's account , all the cheques by the companies should be returned unpaid.
6. OFFENCE BY COMPANY: A juristic person like incorporated companies and partnership firms are also made liable for the offence of dishonor of cheque described under section 138.

Under Section 141 –

If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company ,as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

LIABILITY OF A DRAWER OF A DISHONOURED CHEQUE

Civil liability: Where a cheque is dishonored, the legal position of the drawer of the cheque becomes that of a principal debtor to the holder. The holder can bring civil suit just like any creditor to recover the amount from the drawer making him liable as principal debtor.

Criminal liability: A drawer of a cheque is deemed to have committed a criminal offence when the cheque drawn by him is dishonored by the Drawee on account of insufficiency of funds.

The criminal liability of a drawer in case of dishonor of cheque is dealt in section 138 to Section 142 of Negotiable Instrument Act 1881.

MAXIMUM PUNISHMENT

The maximum punishment for such an offence is imprisonment upto 2 years or fine upto twice the amount of cheque or both.

Where the cheque is drawn by a company, a firm, or association of individuals, the punishment can be awarded to every person who was in-charge of and was responsible for its conduct of business and also to the company.

Distinction between Bills of Exchange and Cheque

1. A bill of exchange is usually drawn on some person or firm, while a cheque is always drawn on a bank.
2. It is essential that a bill of exchange must be accepted before its payment can be claimed. A cheque does not require any such acceptance.
3. A cheque can only be drawn payable on demand; a bill may be also drawn payable on demand, or on the expiry of a certain period after date or sight.
4. A grace of three days is allowed in the case of time bills while no grace is given in the case of a cheque.
5. The drawer of the bill is discharged from his liability, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presenting the cheque for payment.
6. Notice of dishonour of a bill is necessary, but no such notice is necessary in the case of cheque.
7. A cheque may be crossed, but not needed in the case of bill.
8. A bill of exchange must be properly stamped, while a cheque does not require any stamp.
9. A cheque drawn to bearer payable on demand shall be valid but a bill payable on demand can never be drawn to bearer.
10. Unlike cheques, the payment of a bill cannot be countermanded by the drawer.

HUNDIS

A "Hundi" is a negotiable instrument written in an oriental language. The term hundi includes all indigenous negotiable instruments whether they be in the form of notes or bills.

The word 'hundi' is said to be derived from the Sanskrit word 'hundi', which means "to collect". They are quite popular among the Indian merchants from very old days. They are used to finance trade and commerce and provide a fascile and sound medium of currency and credit.

Hundis are governed by the custom and usage of the locality in which they are intended to be used and not by the provision of the Negotiable Instruments Act. In case there is no customary rule known as to a certain point, the court may apply the provisions of the Negotiable Instruments Act.

PARTIES TO NEGOTIABLE INSTRUMENTS

Parties to Bill of Exchange

1. **Drawer:** The maker of a bill of exchange is called the 'drawer'.
2. **Drawee:** The person directed to pay the money by the drawer is called the 'Drawee',
3. **Acceptor**: After a Drawee of a bill has signed his assent upon the bill, or if there are more parts than one, upon one of such pares and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the ' acceptor'.
4. **Payee:** The person named in the instrument, to whom or to whose order the money is directed to be paid by the instrument is called the 'payee'. He is the real beneficiary under the instrument. Where he signs his name and makes the instrument payable to some other person, that other person does not become the payee.
5. **Endorser:** When the holder transfers or indorses the instrument to anyone else, the holder becomes the 'endorser'.
6. **Endorsee:** The person to whom the bill is indorsed is called an 'endorsee'.
7. **Holder:** A person who is legally entitled to the possession of the negotiable instrument in his own name and to receive the amount thereof, is called a 'holder'. He is either the original payee, or the endorsee. In case the bill is payable to the bearer, the person in possession of the negotiable instrument is called the 'holder'.
8. **Drawee in case of need:** When in the bill or in any endorsement, the name of any person is given, in addition to the Drawee, to be resorted to in case of need, such a person is called 'Drawee in case of need'.

In such a case it is obligatory on the part of the holder to present the bill to such a Drawee in case the original Drawee refuses to accept the bill. The bill is taken to be dishonored by non-acceptance or for nonpayment, only when such a Drawee refuses to accept or pay the bill.

9. **Acceptor for honour:** In case the original Drawee refuses to accept the bill or to furnish better security when demanded by the notary, any person who is not liable on the bill, may accept it with the consent of the holder, for the honour of any party liable on the bill. Such an acceptor is called 'acceptor for honour'.

Parties to a Promissory Note

1. **Maker.** He is the person who promises to pay the amount stated in the note. He is the debtor.
2. **Payee.** He is the person to whom the amount is payable i.e. the creditor.
3. **Holder.** He is the payee or the person to whom the note might have been indorsed.
4. The endorser and endorsee (the same as in the case of a bill).

Parties to a Cheque

1. **Drawer.** He is the person who draws the cheque, i.e., the depositor of money in the bank.
2. **Drawee**. It is the drawer's banker on whom the cheque has been drawn.
3. **Payee.** He is the person who is entitled to receive the payment of the cheque.
4. The holder, endorser and endorsee (the same as in the case of a bill or note).

TOPIC: ENDORSEMENT OF INSTRUMENTS

The act of a person who is a holder of a negotiable instrument in signing his or her name on the back of that instrument, thereby transferring title or ownership is an endorsement. An endorsement may be in favour of another individual or legal entity. An endorsement provides a transfer of the property to that other individual or legal entity. The person to whom the instrument is endorsed is called the endorsee. The person making the endorsement is the endorser.

Endorsement of Instruments

Types of Endorsement

- **Blank Endorsement –** Where the endorser signs his name only, and it becomes payable to bearer.
- **Special Endorsement –** Where the endorser puts his sign and writes the name of the person who will receive the payment.
- **Restrictive Endorsement –** Which restricts further negotiation
- **Partial Endorsement –** Which allows transferring to the endorsee a part only of the amount payable on the instrument
- **Conditional Endorsement –** Where the fulfillment of some conditions is required.

1. Blank Endorsement or General Endorsement: An endorsement is blank or general where the endorser signs his name only, and it becomes payable to bearer. Thus, where a bill is payable to "Ram or order", and he writes on its back "Ram", it is an endorsement in blank by Ram and the property in the bill can pass by a mere presentation.

We can convert a blank endorsement into an endorsement in full. We can do so by writing above the endorser's signature, a direction to pay the instrument to another person or his order.

2. Special or Full Endorsement

An endorsement "in full" or a special endorsement is one where the endorser puts his signature on the instrument as well as writes the name of a person to whom order the payment is to be made. A bill made payable to Ram or order, and endorsed "pay to the order of Shyam" would be specially endorsed and Shyam endorses it further. We can turn a blank endorsement into a special one by adding an order making the bill payable to the transferee.

3. Restrictive Endorsement

An endorsement is restrictive which restricts the further negotiation of an instrument.

Example of restrictive endorsement: "Pay to Mrs. Geeta only" or "Pay to Mrs Geeta for my use" or "Pay to Mrs Geeta on account of Reeta" or "Pay to Mrs. Geeta or order for collection".

4. Partial Endorsement

An endorsement partial is one which allows transferring to the endorsee a part only of the amount payable on the instrument. This does not operate as a negotiation of the instrument.

Example: Mr. Mohan holds a bill for Rs. 5,000 and endorses it as "Pay Sohan or order Rs. 2500". The endorsement is partial and invalid.

5. Conditional or Qualified Endorsement

Where the endorser puts his signature under such writing which makes the transfer of title subject to fulfillment of some conditions of the happening of some events, it is a conditional endorsement.

NEGOTIATION BACK

Where an endorser negotiates an instrument and again becomes its holder, we know it as negotiation back to that endorser. After negotiation back, none of the intermediary endorsees are then liable to him. For example, Ram, the holder of a bill endorses it to Bala, Bala endorses to Kala, and Kala to Lala, and endorses it again to Ram. Ram, being a holder in due course of the bill by the second endorsement by Lala, can recover the amount thereof from Bala, Kala, or Lala and himself being a prior party is liable to all of them.

Therefore, Ram having been relegated by the second endorsement to his original position, cannot sue Bala, Kala, and Lala. Where an endorser so excludes his liability and afterwards becomes the holder of the instrument, all the intermediate endorsers are liable to him. "the italicized portion of the above Section is important".

An illustration will make the point clear. Ram is the payee of a negotiable instrument. He endorses the instrument 'sans recourse' to Bala, Bala endorses to Kala, Kala to Lala, and Lala again endorses it to Ram.

In this case, Ram is not only reinstated in his former rights but has the right of an endorsee against Bala, Kala, and Lala.

Negotiation of Lost Instrument or that Obtained by Unlawful Means

When a negotiable instrument has been lost or has been obtained from a maker, acceptor or holder by means of fraud, or for an unlawful act, no possessor or endorsee, is entitled to receive the amount due thereon from such maker, acceptor, or holder from any party prior to such holder. He cannot do so unless such possessor or endorsee is, or some person through whom he claims was, a holder in due course.

CIRCUMSTANCES IN WHICH A BANKER IS JUSTIFIED IN DISHONOURING CUSTOMER'S CHEQUE

1. PAYMENT COUNTERMANDED BY THE DRAWER: When the cheque drawer of the cheque countermands the payment that is it issues the instruction to the bank not to make the payment. On receipt of a valid stop payment order, the cheque must be returned unpaid with the remark "payment countermanded by drawer"

2. NOTICE OF DRAWER'S DEATH: On receipt of the confirmed news of death of account holder, cheques signed by him should be returned unpaid with the remark "Drawer deceased".

3. NOTICE OF CUSTOMER'S INSANITY: Where the account holder is certified as insane by a recognized medical practitioner then the cheques signed by him should be signed by him should be returned unpaid.

4. NOTICE OF CUSTOMER'S INSOLVENCY: Where a customer is adjudged insolvent, the banker must refuse to pay cheques drawn by the customer.

5. LIQUIDATION OF COMPANY: When a bank receives notice from the liquidator in accordance with the provisions of Companies Act, requiring paying the balance to liquidator's account, all the cheques by the companies should be returned unpaid.

6. OFFENCE BY COMPANY: A juristic person like incorporated companies and partnership firms are also made liable for the offence of dishonor of cheque described under section 138.

Under Section 141 – If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence

Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the central Government or State Government or a financial corporation owned or controlled by the Central Government as the case may be, he shall not be liable for prosecution under this chapter.

Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to, any neglect on the part of, any director, manager, secretary, or other officer and shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation- For the purpose of this section –

"Company" means anybody corporate and includes a firm or other association of individuals; and

"Director" in relation to a firm, means a partner in the firm

Section 141 covers 3 categories of person liable for offence under Section 138-The Company as principal offender

Persons who were in charge and were responsible for the business of company

Any other person who is director or a manager or secretary or officer of the company

There must be a specific accusation against each of the persons alleged as accused that such person was in charge of and responsible for the conduct of the business of the company or the firm at the relevant time when the alleged offence was committed by the company or the firm.

LIABILITY OF A DRAWER OF A DISHONOURED CHEQUE

- **Civil liability:** Where a cheque is dishonored, the legal position of the drawer of the cheque becomes that of a principal debtor to the holder. The holder can bring civil suit just like any creditor to recover the amount from the drawer making him liable as principal debtor.
- **Criminal liability:** A drawer of a cheque is deemed to have committed a criminal offence when the cheque drawn by him is dishonored by the Drawee on account of insufficiency of funds.

The criminal liability of a drawer in case of dishonor of cheque is dealt in section 138 to Section 142 of Negotiable Instrument Act 1881.

- **MAXIMUM PUNISHMENT:** The maximum punishment for such an offence is imprisonment upto 2 years or fine upto twice the amount of cheque or both.

Where the cheque is drawn by a company, a firm, or association of individuals, the punishment can be awarded to every person who was in-charge of and was responsible for its conduct of business and also to the company.

DISHONOUR AND DISCHARGE OF NEGOTIABLE INSTRUMENT

MEANING: Dishonor of negotiable instrument means loss of honor or respect for the instrument in question on the part of the maker, Drawee, or acceptor, as the case may be, which eventually results in non-realization of payment due on the instrument.

1. **Dishonor by non-acceptance (SECTION 91)**: Any type of negotiable instruments, i.e., bill of exchange, promissory note, or cheque may be dishonored by non-payment by the Drawee/acceptor thereof. But a bill may also be dishonored by non-acceptance because bill of exchange is the only negotiable instrument which requires its presentment for acceptance and non-acceptance thereof, can amount to dishonor.

When is a bill said to be dishonored by Non-Acceptance?

A bill is said to be dishonored by non-acceptance in the following circumstances:

- When the Drawee or one of the several Drawee, not being partners, commit default in acceptance upon being duly required accepting the bill. In this regard Section 63 expressly provides that the holder must, if so required by the Drawee of a bill of exchange presented to

for acceptance, allow the Drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it.

- Where presentment is required and the bill remains unrepresented.
- Where the Drawee is incompetent to enter into a valid contract.
- Where the bill is given a qualified acceptance.
- If the Drawee is a fictitious person.
- If the Drawee cannot be found even after reasonable search.
- Where the Drawee has either become insolvent or is dead and the holder does not present the bill to the assignee or legal representative of the insolvent or deceased Drawee.
- It is relevant to note that where a Drawee-in-case-of-need is named in a bill of exchange or in any endorsement thereon, the bill is not dishonored until it has been dishonored by such Drawee.

2. **Dishonor of negotiable instrument by Non-payment (SEC 92):** A promissory note, bill of exchange, or cheque is said to be dishonored by non-payment when the maker of the note, acceptor of the bill, or Drawee of the cheque commit default in payment upon being duly required paying the same. Also the holder of a bill or pro-note may treat it as dishonored, without placing for payment when presentment for payment is excused expressly by the maker of the pro-note, or acceptor of the bill and the note or bill when overdue remains unpaid.

Dishonor by non-acceptance vs. Dishonor by non-payment:

If a bill is dishonored either by non-acceptance or by non-payment, the drawer and all the endorsers of the bill are liable to the holder, provided notice of such dishonor is given to them. The Drawee, on the other hand, shall be liable to the holder only in the event of dishonor by non-payment.

Effect of Dishonor

As soon as a negotiable instrument is dishonored (either by non-acceptance or by non-payment) the holder becomes entitled to sue the parties liable to pay thereon.

The holder MUST, however, give notice of dishonor to all the parties against whom he intends to proceed.

Notice of Dishonor- Notice of dishonor means formal communication of the fact of dishonor. Such a notice also serves the purpose of enabling the person so notified to protest himself against the prior parties.

Notice by Whom

- Notice of dishonor must be given by the holder or by some party to the instrument who remain liable thereon;

- Any party receiving the notice of dishonor must also transmit the same to all prior parties in order to make them liable to him.
- No suit can be filed against the prior party if he has not transmitted the fact of dishonor of instrument.
- One person can give the notice only.
- Duly authorized person can also give notice.

Notice to Whom

- Notice of dishonor must be given to all parties (other than the maker of note, acceptor of a bill or Drawee of a cheque) to whom the holder seeks to make liable or other duly authorized agents.
- In case of death of a person, notice must be given to his legal representative and were he has been declared insolvent to his Official Assignee.
- In case after dispatch of notice and before it receipt the person dies, it will be treated as if the notice has been served. (Not knowing the fact).

Mode of Giving Notice

- It may be oral or in writing. If it is in writing it must be sent by post
- It should be given in reasonable time.

Reasonable time is the consideration is to be given: -

1. Nature of the instrument
2. The usual course of dealing with respect to similar instruments
3. Distance between the parties
4. While calculating public holidays shall be excluded.
5. In case a party received the notice of dishonor is to transmit the same to his prior parties, the transmission should be done in reasonable time.

When Notice of Dishonor is Unnecessary

- Where the endorsee while signing in that capacity adds the words 'notice of dishonor waived'.
- Where the drawer of a cheque countermanded payment.

- Where the party charged could not suffer damage for want of notice such as bank account closed or in case of accommodation bill.
- Where the party to whom the notice is to be given not traceable or the party who has to give notice is unable to give notice like death, accident or serious illness.
- When the drawer also happens to be acceptor.
- In case the Promissory Note which is not negotiable
- When the party entitled to receive notice promise to pay unconditionally the amount as due after due date.

Consequences of not giving notice of dishonor

Any party to negotiable instrument (other than maker of a note, acceptor of a bill or drawer of cheque) is discharged from his obligation under the instrument unless circumstances are such where no notice is required to be sent.

Noting

- ✓ In case a promissory note or bill of exchange has been dishonored by non-acceptance or non-payment notice, the holder may cause such dishonor to be noted by Notary Public.
- ✓ Noting must be made within reasonable time after dishonor and must specify (i) the date of dishonor (ii) the reason assigned for dishonor and (iii) the notary's charges.

Protest: "Protest" is a formal certificate issued by the notary public to the holder of the bill or note on his demand (noting is merely a record of dishonor on the instrument).

Contents of Protest

- The instrument itself or a literal transcript of the instrument and of everything written or printed thereon,
- The name of the person for whom and against whom the instrument has been protested.
- The fact and reason for dishonor
- The place and time of dishonor
- The signature of notary public
- In case of acceptance for honor or payment for honor, the names of the persons by whom and for whom it is accepted or paid.

DISHONOUR OF CHEQUE

- A person suffers a lot if a cheque issued in his favor is dishonored due to the insufficiency of funds in the account of the drawer of the cheque. To discourage such dishonor, it has been made an offence by an amendment of the Negotiable Instrument Act by the Banking, Public Financial Institution and Negotiable Instrument Laws (Amendment) Act, 1988.
- Section 138 makes the dishonor of cheque an offence. The payee or holder in due course can have recourse against the drawer, who may be held liable for the offence.
- Under Section 138 – Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act be punished with imprisonment [a term may be extended to 2 years], or with fine which may extend to twice the amount of the cheque, or with both.

ESSENTIAL FOR AN ACTION UNDER SECTION 138

1. There should be dishonor of cheque: Section 138 makes dishonor of cheque in certain cases an offence. Cheque is the most common mode of making the payment. In order to duly protect the interest of its payee, holder in due course, there is an attempt to discourage dishonor of a cheque by making it an offence. These provisions do not cover the dishonor of other negotiable instruments.

2. Payment in discharge of debtor liability: The cheque should have been drawn by a person on an account with a banker for payment of money to another person for the discharge, in whole or part, of any debt or other liability. The debt or other liability in such a case means a legally enforceable debt or other liability. If the payment by way of cheque is made as gift or charity, it is not the payment for legally enforceable debt or liability. The dishonor of such cheque does not attract the provisions of Section 138 of the Negotiable Instrument Act.

3. Presentment of the cheque within the period of its validity: It is further necessary that the cheque has been presented before it became stale and invalid. It means that the cheque has been presented within a period of 6 months from the date on which it is drawn or within the period of validity, whichever is earlier.

4. Dishonor due to insufficient fund: It is also necessary that the cheque should be returned by the bank unpaid.

Dishonor may be because of 2 reasons:

- Either the amount of money present in the account is insufficient

- Or the amount to be paid has exceeded the amount to be paid from that account as in the agreement made with that bank.

It has been generally held in various cases that dishonor due to the insufficiency of funds has to be interpreted liberally. Dishonor due to the remarks like "Account closed", "Refer to the drawer" or "Stop payment" of the cheque may be deemed to be covered by the provision contained in Section 138 of the Act.

Notice and demand from the drawer and drawer's failure to pay

Within 15 days of receipt of information from the bank about the dishonor of the cheque, the payee or holder in due course of the negotiable instrument, as the case may be, must make a demand of the said amount from the drawer by giving a notice in writing.

Discharge of the Instrument

A negotiable instrument is said to be discharged when it becomes completely useless.

In the following cases the instrument is deemed to be discharged: -

1. When the party liable to make payment on the instrument makes the in due course to the holder.
2. When the acceptor in his own right at or after maturity, holds the bill of exchange, which has been negotiated, the instrument is discharged.
3. When the party primarily becomes insolvent.
4. When the holder cancels the instrument with an intention to release the party primarily liable thereon from liability.

Discharge of One or More Parties

- A party is said to be discharged from his liability when his liability on the instrument comes to an end.
- Discharge of one or more party does not discharge the instrument and rights under it can be enforced against those parties who continue to be liable thereon.

One or more parties to a negotiable instrument is/are discharged from liability in the following ways:-

1. By cancellation-When the holder of a negotiable instrument deliberately cancels the name of any of the party liable on the instrument with intent to discharge him from liability.
2. By release – If the holder of a negotiable instrument releases any party to the instrument by any method other than cancellation of names.
3. By payment

4. By allowing Drawee more than 48 hours to accept
5. By taking qualified acceptance
6. By not giving notice of dishonor
7. By non-presentment for acceptance of bill
8. By delay in presenting cheque
9. By material alternation like:

I. Any alteration of the date, the sum payable, the time of payment and place of payment
II. Alteration by the addition of a new party.
III. Alteration of the rate of interest.
IV. Tearing off the material part of the instrument

Alteration not vitiating the instrument

1. Alteration made for the purpose of correcting a mistake or clerical error
2. Alteration made to carry out the common intention of the original parties
3. Alteration made before the instrument is issued
4. Alteration made with the consent of the parties liable on the instrument
5. Conversion of bearer cheque into order.
6. Filling blanks in the case of inchoate or incomplete instrument.
7. Conversion of blank endorsement into an endorsement in full.
8. Making qualified acceptance
9. Alteration which result of the accident.

Holder refers to a person; we mean the payee of the negotiable instrument, who is in possession of it. Holder is someone who is entitled to receive or recover the amount due on the instrument from the parties thereto, on the other hand, the **holder in due course** i.e. **HDC** implies a person who obtains the instrument bonafide for consideration before maturity, without any knowledge of defect in the title of the person transferring the instrument.

Definition of Holder (SEC 8)

As per Negotiable Instrument Act, 1881, a holder is a party who is entitled in his own name and has legally obtained the possession of the negotiable instrument, i.e. bill, note or cheque, from a party who transferred it, by delivery or endorsement, to recover the amount from the parties liable to meet it. The party transferring the negotiable instrument should be legally capable. It does not include the person who finds the lost instrument payable to bearer and the one who is in wrongful possession of the negotiable instrument.

Definition of Holder in Due Course (HDC) (SEC 9)

Holder in Due Course is defined as a holder who acquires the negotiable instrument in good faith for consideration before it becomes due for payment and without any idea of a defective title of the party who transfers the instrument to him. Therefore, a holder in due course

The following is an example of a state statute dealing with a holder in due course:

"(a) Subject to subsection (c) and Section 7-3-106(d), "holder in due course" means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument

1. for value,
2. in good faith,
3. without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series,
4. without notice that the instrument contains an unauthorized signature or has been altered,
5. without notice of any claim to the instrument described in Section 7-3-306, and
6. Without notice that any party has a defense or claim in recoupment described in Section 7-3-305(a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken

1. by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding,
2. by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or
3. As the successor in interest to an estate or other organization.

(d) If, under Section 7-3-303(a) (1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

Comparison

BASIS FOR COMPARISON	HOLDER	HOLDER IN DUE COURSE (HDC)
Meaning	A holder is a person who legally obtains the negotiable instrument, with his name entitled on it, to receive the payment from the parties liable.	A holder in due course (HDC) is a person who acquires the negotiable instrument bonafide for some consideration, whose payment is still due.
Consideration	Not necessary	Necessary
Right to sue	A holder cannot sue all prior parties.	A holder in due course can sue all prior parties.
Good faith	The instrument may or may not be obtained in good faith.	The instrument must be obtained in good faith.
Privileges	Comparatively less	More
Maturity	A person can become holder, before or after the maturity of the negotiable instrument.	A person can become holder in due course, only before the maturity of negotiable instrument.

Rights of a holder

The holder of a negotiable instrument enjoys the following rights:

- An endorsement in blank may be converted by him into an endorsement in full.
- He is entitled to cross a cheque either generally or specially and also with the word " Not Negotiable"
- He can negotiate a cheque to a third person, if such negotiation is not prohibited by the direction given in the cheque.
- He can claim payment of the instrument and can sue in his own name on the instrument.

- A duplicate copy of a lost cheque may be obtained by a holder.

Privileges of a Holder in Due Course:

Besides the aforesaid right of a holder, a holder in due course enjoys the following privileges under various section of the Negotiable Instrument Act:

- He possesses better title free from defects. This is the greatest privilege of a holder in due course. He always possesses better little than that of his transferor or any of the previous parties and can give to the subsequent parties the good title that he possesses. Section 53 states that "a holder of a negotiable instrument who derives title from a holder in due course has the right thereon of that holder in due course ". The holder in due course is entitled to recover the amount of the instrument from any or all of the previous parties.

The good title of the holder in due course is affected if he himself was party to the fraud or illegality which affected the instrument earlier.

- Liability of prior parties to a negotiable instrument, i.e., its maker or drawee, acceptor or endorser, is liable thereon to a holder in due course until the instrument is duly satisfied" It means that a holder in due course can recover the amount of the negotiable instrument from any or all of the previous parties to the instruments . Example: A drawee a bill of exchange on B payable to C. It is duly accepted by B. C endorses it to F, who is its holder in due course. Now F, the holder in due course, can realize the amount of the bill from B, its acceptor. If B fails to do so, F can recover the amount from A,C and E. All of them shall remain liable to F in respect of the bill till its payment is made.

- Right of the holder in due course in case of the inchoate instrument. If a negotiable instrument was originally an inchoate instrument and a subsequent transferor completed the instrument for a sum greater than what was the intention of the maker, the right of a holder in due course to recover the money of the instrument is not at all affected.

Example: Sudhir purchased some goods from Ramesh. As the exact amount of money payable by him was not to known to Sudhir, he gave Ramesh a blank cheque duly signed by him. Ramesh filled in the figure of Tk5000, whereas the amount the amount payable to him was tk 4250. Ramesh endorse the cheque to Kamlesh, who took it for valuable consideration and in good faith. Kamlesh, the holder in due course, is entitled to recover from the bank the amount of Tk5000, though Ramesh from whom he got it was entitled to recover Tk4250 only.

- Right in case of fictitious bills, If a bill is drawn on behalf of a fictitious person and is payable to his order, the acceptor is not relieved of his liability to holder in due course because of such fictitious name. But it is essential that the holder in due course proves that the document bears the endorsement with signature in the same hand as that of the drawer and purporting to be made by the drawer.

Example: X draws a bill on Y but signs in the fictitious name of Z. It is payable to the order of Z and is duly accepted by Y. X endorses it to A who become its holder in due course. Y the acceptor of the bill cannot deny his liability on the bill to the holder in due course on the ground that it was drawn on behalf of a fictitious person Z. It is, however, essential that the signature of Z as drawer and as endorser must be in the same handwriting.

- Right in case the instrument is obtained by unlawful means or for unlawful consideration. A person liable on a negotiable instrument cannot defend himself against a holder in due course on the ground that the instrument was lost or obtained from him by means of an offence or for an unlawful consideration.

Example: A draws a bill of exchange on B in respect of an amount which the latter has lost in gambling. B accepts the bill. A endorses the bill to C who becomes its holder in due course. Now C has the right to recover the amount of the bill from B, who cannot plead that he was not liable on the bill as it was drawn for unlawful consideration. The same would be the position of B, if he is made to accept the bill under undue influence, coercion or fraud. In all such cases the right of the holder in due course remains unaffected.

- Estoppels against denying the original validity of the instrument. Section 120 provides that "no maker of a promissory note and no drawer of a bill of exchange or cheque and no acceptor of a bill of exchange for the honor of the drawer shall in a suit thereon by holder in due course, be permitted to deny the validity of the instrument as originally made or drawn".

Example: Ram is the maker of a promissory note for Tk 1000 payable to Ratan, who endorses it to Ravi for valuable consideration. On its due date, it is dishonored. Ravi files a suit for the recovery of the amount. Ram cannot deny that the instrument as drawn by him was not a valid one, i.e., he cannot dispute that no amount was due from him on the promissory note.

- Estoppels against denying the capacity of the payee to endorse. No maker of a promissory note and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity at the date of note or bill to endorse the same.

- Estoppels against denying signature or capacity of prior party. No endorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity of any prior party to the instrument.

Example: X draws a bill of exchange on Y in favor of Z who endorses the same to A, a minor. A endorses it to B and B to C, who becomes its holder in due course. It is dishonored on the due date. C, the holder in due course, has the right to file a suit against all or any of the parties to the bill except A, the minor. Now B the endorser cannot plead that A was a minor and had no capacity to endorse the bill and hence the bill is a void one. He will remain liable on the bill to C.

PAYMENT IN DUE COURSE:

The payment of a negotiable instrument should be made to the right person by the paying banker or the acceptor of the bill; otherwise the latter shall be responsible for the same. The negotiable instrument Act provides protection to the paying banker or the drawee of a bill, provided the payment is made as required in the Act such payment is called payment in due course.

Section 10 states " payment in due course means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned".

The essential features of a payment in due course are as follows:

- The payment should be made in accordance with the apparent tenor of the instrument. i.e., according to the true intention of the parties thereto as are apparent from the document itself. Payment may be made either in cash or through a clearing house or by a draft. If the banker makes payment of a postdated cheque before the date mentioned therein or pays a crossed cheque at the counter, he acts against the true intentions of the drawer and hence such payment will not be treated as payment in due course.

- The payment should be made in good faith and without negligence. The banker should make the payment in good faith, i.e., honesty and not fraudulently. For example, if a suspicion or doubt about the validity of the title of the payee or presenter of the cheque arises in the mind of the banker but he does not make proper enquires thereto, the payment is not deemed to made in good faith.

The banker should not make payment negligently. He should take all necessary precautions and act as a reasonable person will act in the particular circumstances of a case. For example, he should ascertain that the cheque is complete, all alterations are duly confirmed and the endorsement thereon is regular. In case per pro endorsement, he should ascertain that the signatory is duly authorized to sign on behalf of the payee. If a cheque with forged signature of a drawer is paid, it will be deemed an act of gross negligence on the part of the banker and its payment will not be deemed payment in due course.

- Payment must be made to the person in possession of the instrument in circumstances which do not arouse suspicion about his title to possess the instrument and to receive payment thereof. For example, if the drawer of a cheque countermands its payment, the holder in due course will not be entitled to receive the payment. The payment of an order cheque should be made to the right person after proper identification. Sometimes the appearance and behavior of the person presenting the cheque at the counter may arouse suspicion in the mind of the banker about the validity of the former's authority to receive payment.

Example of payments which are not deemed payment in due course.

1. A cheque dated 15th may 2017 is presented for payment on 5th may 2017 and is paid on the same day.
2. A cheque bearing a special crossing in the name of Islami bank is paid when presented through the Bangladeshi bank.
3. A cheque containing forged signature of the drawer is paid by the banker.
4. A cheque having alterations in the name of the payee or the amount of the cheque, not confirmed by the full signature of the drawer, is paid by the banker.
5. The drawer of a cheque countermands its payment, but the banker pays the cheque.
6. An orderly or a peon of a company presents a cheque for a big amount on behalf of the company, which is contrary to the practice. The banker should enquire from the company before its payment is made.

PAYMENT MUST BE MADE TO POSSESSOR OF INSTRUMENT

- The party making payment must insist on the presentment of the paper by the party demanding payment in order to make sure that it is at the time in his possession and not outstanding in another
- A receipt taken is no protection
- If at the time he makes payment, it is outstanding and in the hands of a holder in due course, he must pay it again
- Possession of notes by the maker is presumptive evidence

Maturity of Bill and Due Date

The date that comes after adding the 3 days of grace to the due date of the bill is known as 'date of maturity'. To understand the maturity of bill better, first, you need to under the concept of a due date.

- **Due date** – It is a date on which the payment is expected/due.
- **Bill at Sight** – Due date is the date on which a bill is presented for the payment.
- **Bill after Sight** –Here, the due date is the date of acceptance plus terms of the bill. For example, if the bill is drawn on 1st March and it is accepted on 5th March. In that case, if the maturity of the bill is 1 month after sight. Then the due date would be 5th March + 1 month = 5th April.
- **Bill after Date** – Here, the due date is the date of drawing plus the terms of the bill. For example, if the bill is drawn on 1st January and its maturity is 30 days after date then its due date would be 1st January + 30 days = 31st January.
- **Days of Grace** – Drawee is given three extra days following the due date of the bill for making payment. These 3 days are known as 'Days of Grace'. It is a custom to add the days of grace. For

example, if the bill is drawn on 1st January and its maturity is 1 month then the due date would be 1st January + 1 month + 3 days = 4th February.

Discounting of Bill: On the off chance that the holder of the bill needs money, then he can go to the bank for encashment of the bill before the due date. The bank will give money to the holder of the bill after cutting some interest. That interest deducted is called discounting.

Endorsement of Bill: Endorsement of the bill implies the procedure by which the maker or holder of bill transfers the title of the bill in assistance of his/her creditors. The individual transferring the title is called "Endorser" and the individual to whom the bill is exchanged called "Endorsee". An endorsement is done by signing at the back of the bill.

Key Terms

- ✓ **Agreement:** It is a promise in which one party makes an offer and the other party accepts it according to the conditions of the offer.
- ✓ **Contract:** It refers to an agreement made by free consent of parties competent to contract, with a lawful purpose and consideration, which is legally enforceable.
- ✓ **Consideration:** It means something in return. It is the benefit obtained by the parties entering into a contract. There may be adequate or inadequate consideration in a contract.
- ✓ **Free Consent:** The consent is said to be free if it is not due to any compulsion, pressure or mistake.
- ✓ **Breach of Contract:** It refers to non-fulfillment of the parties under the contract due to any reason.
- ✓ **Indemnity:** It refers to a contract in which one party promises to make good the loss caused to the other party due to certain specified reasons.
- ✓ **Guarantee:** It is a contract under which one party takes the responsibility of the fulfillment of the promise made by the other party.
- ✓ **Agency:** Agency is the relation between an agent & his principal created by an express or implied agreement where agent is authorized by his principal to represent him in dealing with third parties and to contract with them.
- ✓ **Consumer:** A consumer of goods means any person who buys any goods or services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment.
- ✓ **Consumer Protection Council:** The councils established to keep a surveillance over the protection of consumer rights are called consumer protection councils.
- ✓ **Dispute Redressal Agencies:** To provide speedy and simple Redressal of consumer disputes, three-tier quasi-judicial machinery has been set-up at district, state and national level. These are called consumer Redressal

- ✓ **Negotiable instrument**: A negotiable instrument is one, the property and the title in which is acquired by anyone who takes it as bonafide and for value notwithstanding any defect in the title of the person from whom he/she took it.
- ✓ **Promissory note**: A promissory note is an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to, or to the order of a certain person.
- ✓ **Bills of exchange**: A bill of exchange is an instrument in writing containing an unconditional order signed by the maker directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.
- ✓ **Accommodation bills**: Those bills, which are drawn without any actual consideration, merely, to help out friends and relatives are known as accommodation bills.
- ✓ **Banker's draft**: It is a bill of exchange in which a bank orders its branch or another bank, as the case may be, to pay a specified amount to a specified person or to the order of the specified person.
- ✓ **Cheque**: Cheque is a kind of bill of exchange, which is always drawn upon a specific bank and is payable on demand.
- ✓ **Crossing of a cheque**: When two angular parallel lines are drawn on the face of the cheque, then the cheque said to be crossed.
- ✓ **Usances**: The time fixed by the custom of countries for payment of bills drawn in one country but are payable in another country is known as a usance.
- ✓ **Payment in due course**: Payment in due course means payment of the instrument after the expiry of the duration of the instrument, in good faith and without any negligence, to the possessor thereof and without the existence of any circumstances that may lead one to believe that the person receiving the payment is not entitled to it.
- ✓ **Assignment**: Assignment of any object means the transfer of its tile to another person through a written and registered deed under the Transfer of Property Act.

➢ IMPORTANT QUESTIONS

a) Define Promissory Note?
b) Distinguish between sale & Hire purchase.
c) Distinguish between Voidable Contract and Void Agreement.
d) What are the different kinds of Agents?
e) How contract can be discharged?
f) Explain the meaning of breach of contract.
g) Distinguish between void and voidable contracts.
h) Who are the capable persons to do a valid contact under Indian Contract Act 1872?
i) What is Voidable Contract?
j) Can a minor act as an agent?
k) Explain the Modes of Dissolution of firm?
l) What are the essentials of a valid pledge?
m) "*All agreements are not contracts but all contracts are agreements*". Discuss the statement explaining the essentials of a valid contract.
n) What is contract of agency? What are the different kinds of agents? Briefly explain the different modes by which agency can be created.
o) Define the term consumer dispute under Consumer Protection Act; 1986.Who can file complaint under Consumer Protection Act, 1986?
p) Define contract. What are the essentials of a valid contract?
q) Explain the various ways in which a contract may be said to be discharged?

LONG QUESTIONS:

Q1. Explain the essential elements of a Valid Contract?
Q2. What are the remedies for Breach of Contract?
Q3. Discuss the various modes to create an Agency?
Discuss the various essential elements of a contract under The Indian Contract Act, 1872.
Q4. What is meant by 'Undue Influence'? 'A' applies to a banker for a loan at a time where 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. Whether the contract is induced by undue influence? Decide.
Q5. Discuss the different modes of discharge of a contract. Also state the consequences under each method.
Q6. Differentiate between the contract of indemnity and contract of guarantee.
Q7.Briefly states the important provisions of Consumer Protection Act, 1986.
Q8. Illustrate the various consumer rights in India.
Q9. Explain the different ways to create a contract of agency.
Q10. Explain the privileges granted to a holder in due course.

UNIT-I & UNIT-II

MULTIPLE CHOICE QUESTIONS

Question 1: 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 to such act or abstinence he is said to make a

A. Proposal
B. Promise
C. Both (a) and (b)
D. None of these

Question 2: When the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted than its called

A. Proposal
B. Promise
C. Agreement
D. None of these

Question 3: The committing or threatening to commit any act forbidden by the Pakistan Penal Code, or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with intention of causing any person to enter into an agreement is called

A. Free consent
B. Coercion
C. Both (a) and (b)
D. None of above

Question 4: The term "Coercion" means

A. Committing or threatening to commit any act forbidden by the Pakistan Penal Code
B.Compulsion
C.A unlawful pressure
D.All of the above

Question 5: Free consent is defined in section____ of the Contract Act

A. 10
B. 14
C. 18
D. None of above

Question 6: Mistake of fact

A. Makes a contract voidable
B. Does not make a contract voidable
C. Makes a contract void
D. None of above

Question 7: The consideration or object of an agreement is lawful unless it is

A. Forbidden by law
B. Forbidden by contractors themselves
C. Forbidden by custom
D. None of above

Question 8: The term "Contingent" means

A. Possible but not assured
B. Doubtful or uncertain
C. Both (a) and (b)
D. None of above

Question 9: "Indemnity" means

A. Security from damage or loss
B. Security for more profit
C. An act for protection
D. Both (a) and (b)

Question 10: A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person is called

A. Surety contract
B. Simple contract
C. Contract of indemnity
D. None of above

Question 11: A guarantee which extend to a series of transactions is called

A. Special guarantee
B. Continuing guarantee
C. Specific guarantees
D. None of above

Question 12: 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 dispose of upon discretion of the delivering person the contract is called

A. Indemnity
B. Bailment
C. Contingent Contract
D. None of above

Question 13: In contract of guarantee the person at whose place guarantee given is called

A. Surety holder
B. Principal debtor
C. Both (a) and (b)
D. None of above

Question 14: A continuing guarantee may at any time be revoked by the surety as to future transaction by giving notice to

A. The creditor
B. Principal debtor
C. Without giving any notice to any person
D. None of above

Question 15: The person who during the contract of bailment delivers goods is called

A. Bailor
B. Bailee
C. Both (a) and (b)
D. None of above

Question 16: The bailment of goods as security for payment of debt or performance of a promise is called

A. Pledge
B. Special bailment
C. Both (a) and (b)
D. None of above

Question 17: A person employed to do any act for another or to represent another in dealings with third person is called

A. Servant

B. Labour
C. Agent
D. None of above

Question 18: The person acting employed by under the control of the original gent in the business of the agency is called

A. Assistant agent
B. Associate agent
C. Sub-agent
D. None of above

Question 19: As per-section 201, of the Contract Act an agency can be terminated by

A. The principal revoking his authority
B. The agent renouncing the business of the agency
C. The completion of agency business
D. All of above

Question 20: Which is correct?

a) proposal + acceptance = promise
b) promise + consideration = agreement
c) agreement + enforceability = contract
d) all the above

Question 21: Find out the unenforceable contract among the following

a) A housing society agreed to sell land before it became a legal person by registration
b) A supplies B, a lunatic, with necessaries suitable to his life and wants to be reimbursed from B's property
c) money advanced to save a minor's estate from execution
d) none of the above

Question 22: Misrepresentation under section 18 means

a) a positive assertion, in a manner not warranted by the information of the person making it, not true but he believes it to be true

b) any breach of duty, which gains an advantage to the person committing it, by misleading another to his prejudice
c) causing a party to make an agreement to make a mistake as to the subject matter of contract
d) all the above

Question 23: A promises to pay B, a sum of Rs. 10000/- if it rains and in return B promises to pay Rs. 10000/- to A, if it does not rain. It is a/an _____

a) Valid agreement
b) Contingent contract
c) Wagering agreement
d) Uncertain agreement

Question 24: Rescission of contract means

a) All of the above
b) Minor changes
c) Alteration of terms
d) Cancellation of contract with the consent of both parties

Question 25: Which is the correct statement among the following?

a) Both the parties to an agreement are under mistake as to a matter of fact is void
b) An agreement to lease equipment instead of selling it to avoid sales tax is voidable
c) Surrender of right to maintenance is a good contract
d) An agreement to induce a public servant is void

Question 26: The parties to the contract agree to substitute the existing contract with new contract. This is

a) alteration
b) recession
c) Novation

d) None of the above

Question 27: After Novation

a) the parties can fall back upon the old contract
b) Damages were to be awarded on the terms of the old contract
c) The original is discharged and need not be performed
d) none of the above

Question 28: A breach of contract occurs when a party to a contract

A. renounces his liability under it
B. makes it impossible that he should perform his obligation under it
C. totally or partially fails to perform the obligations
D. (a) or (b) or (c)

Question 29: A sum fixed representing a genuine pre-estimate of the probable damage that is likely to result from the breach is

A. Unliquidated damages
B. Penalty
C. liquidated damages
D. none of the above

Question 30: Which among the following is incorrect with respect to a contract of guarantee?

A. A liability which is incurred independently of a 'default' is not within the scope of guarantee
B. The existence of a recoverable debt is necessary
C. A guarantee without consideration is not void
D. none of the above

Question 31: Finder of lost goods should _____.

A. Not mix with his own goods
B. Take care of the goods
C. Trace the true owner
D. All of the above

Question 32: Which among the following is not a bailment?

A. **Hiring of a bank's locker and storing things in it**
B. Delivery of a railway receipt for the delivery of goods
C. A car involved in an accident delivered under the policy of the insurer to the nearest garage for repair
D. none of the above

Question 33: Quantum meruit literally means

A. As much as no work done
B. As much as is credited
C. **As much as is merited**
D. None of the above

Question 34: When the aggrieved party does not face any loss _____ damages can be claimed.

A. Vindictive
B. **Nominal**
C. Special
D. General

Question 35: A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services.

A. B did not employs undue influence
B. **B employs undue influence**
C. either (A) or (B)
D. None of these

Question 36: Consumer Protection Act is significant to

A) Immovable Goods
B) Movable Goods
C) Particular Goods and Services
D) **All Goods and Services**

Question 37: In which forum it is compulsory to have a female member

A) National commission
B) State commission
C) District commission
D) All of the above

Question 38: The consumer has the right to get compensation against unfair trade practices under right to

(*a*) Right to choose
(*b*) Right to seek Redressal
(*c*) Right to safety
(*d*) Right to safety

Question 39: Which of the following are the ways and means of consumer protection?

(a) Self-regulation by the business
(b) Business associations
(c) Government
(d) All of the above

Question 40: _____ are made to hear complaints of the value less than 5 lakhs.

(a) Consumer forum at district level
(b) State commission
(c) National commission
(d) None of the above

Question 41: In partnership, partner's liabilities are

A) Unlimited
B) Limited to the capital of the business
C) Limited
D) Both A and C

Question 42: What is the partnership written agreement known as?:

A) Partnership contract
B) Agreement
C) Partnership deed
D) Partnership Act

Question 43: Which types of partnership have no agreement in terms of the duration of partnership?

A) Partnership-at-will
B) Limited partnership
C) General partnership
D) Particular partnership

Question 44: The partnership may come to an end due to the:

(a) Death of a partner
(b) Insolvency of partner
(c) By giving notice
(d) All of the above

Question 45: If the remaining partner want to continue the business, after the retirement of a partner, a new partnership agreement:

(a) Necessary
(b) Not necessary
(c) Optioned
(d) None of above

Question 46: Retirement or death of a partner

(a) Is dissolution of partnership agreement
(b) Is dissolution of a firm
(c) May or may not be a dissolution of partnership agreement
(d) None of above

Question 47: If all the partners, but one are insolvent it is:

(a) Dissolution of an agreement
(b) Dissolution of firm
(c) May or may not cause dissolution
(d) None of above

Question 48: A person who declares by word of mouth as partner of the firm is called:

(a) Active partner
(b) Estoppel partner
(c) Dormant partner
(d) Nominal partner

Question 49: A person who receives a share of profits from one of the regular partner is called:

(a) Secret partner
(b) Quasi
(c) Partner in profit only
(d) Sub – partner

Question 50: Every partner has a right to be consulted in all matters affecting the business of:

(a) Sole – tradership
(b) Partnership
(c) JSC
(d) Both (a) and (b)

UNIT-III & UNIT-IV

MULTIPLE CHOICE QUESTIONS

Q1. _____ means 'something legally transferable from one person to another for a consideration'.
a. Instrument
b. Negotiable
c. Negotiable Instruments
d. all of the above

Ans. B

Q2. _____ means ' a written document by which some legal rights are created in favor of some person'

a. Instrument
b. Negotiable
c. Negotiable Instruments
d. all of the above

Ans. A

Q3. Negotiable instrument means a promissory note, bill of exchange or cheque, payable to _____
a. Bearer
b. order
c. either to bearer or order
d. neither bearer nor order

Ans. C

Q4. A negotiable instrument is freely transferable, by delivery if it is a/an _____ instrument.
a. order
b. bearer
c. both a & B
d. None of the above
Ans. B

Q5. A negotiable instrument is freely transferable, by endorsement if it is a/an _____ instrument.
a. order
b. bearer
c. both a & b
d. None of the above

Ans. A

Q6. _____ is an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person, to a pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument
a. Promissory Note
b. bill of exchange
c. Cheque
d. none of the above

Ans. B

Q7. Sec. 4 of negotiable instruments Act 1880 deals with
a. Promissory Note
b. bill of exchange
c. Cheque
d. none of the above

Ans. A

Q8. Sec. 4 of negotiable instruments Act 1880 deals with
a. Promissory Note
b. bill of exchange
c. Cheque
d. none of the above

Ans. A

Q9. A Promissory Note or Bill of Exchange can be made payable
a. On demand
b. On a specific date
c. After a specified period – months or days.
d. all of the above

Ans. D

Q10. When is crossed with Two parallel lines or with word '& Co.' etc. this crossing is known as
a. general crossing
b. special crossing
c. restrictive crossing
d. none of the above

Ans. A

Q11. When the is crossed with Two parallel lines or with 'A/c payee only.' etc. this crossing is known as
a. general crossing
b. special crossing
c. restrictive crossing
d. none of the above

Ans. C

Q12. When bank has reason to believe that the title of the presenter is defective , then the cheque will be
a. dishonored
b. cancelled
c. stalled
d. countermanded.

Ans. A

Q13. A holder in due course will get protected from earlier defect of
a. no consideration
b. conditional delivery
c. unlawful means
d. all of the above

Ans. D

Q14. Holder of an instrument is a person who holds the instrument
a. for a longer period
b. before maturity
c. after maturity
d. on behalf of the owner

Ans. B

Q15. Consumer Protection Act is significant to

A) Immovable Goods
B) Movable Goods
C) Particular Goods and Services
D) All Goods and Services

Ans. D

Q16. In which forum it is compulsory to have a female member

A) National commission
B) State commission
C) District commission
D) All of the above

Ans. D

Q17. The consumer has the right to get compensation against unfair trade practices under right to

(*a*) Right to choose
(*b*) Right to seek Redressal
(*c*) Right to safety
(*d*) Right to safety

Ans. B

Q18. Which of the following are the ways and means of consumer protection?

(a) Self-regulation by the business
(b) Business associations
(c) Government
(d) All of the above

Ans. D

Q19. _____ are made to hear complaints of the value less than 5 lakhs.

(a) Consumer forum at district level
(b) State commission
(c) National commission
(d) None of the above

Ans. A

Q20. What is the purpose behind the enactment of Sale of Goods Act, 1930?

a) To define the laws relating to the sale of goods
b) To consolidate and amend the laws relating to the sale of goods
c) To consolidate, amend and define the laws relating to the sale of goods
d) To define and amend the laws relating to the sale of goods

Ans. D

Q21. Section 2(1) of Sale of Goods Act defines 'buyer' as:

a) Person who buys goods and services
b) Person who agrees to buy goods
c) Person who buys or agrees to buy goods
d) Person who buys or agrees to buy goods and services

Ans. C

Q22. Before the enactment of Sale of Goods Act, the provisions regarding Sale of Goods were contained in:

a) Indian Contract Act, 1872
b) Indian Registration Act, 1908
c) Transfer of Property Act, 1882
d) Indian Partnership Act, 1932

Ans. A

Q23. Which of the following most appropriately describes the term "sale" as per Sale of Goods Act,1930:

a) A contract whereby seller transfers the property in goods
b) A contract whereby seller transfers or agrees to transfer the property in goods to the buyer for a price
c) A contract where transfer of the property in goods is to take place at a future time
d) A contract where transfer of the property in goods is to take place subject to some condition thereafter to be fulfilled

Ans. B

Q24. When does an agreement to sell become a sale as per the provisions of Sale Of Goods Act, 1930:

a) When the seller transfers the property in goods
b) When the seller agrees to transfer the property in goods
c) When the time elapses or the conditions subject to which the property in the goods is to be transferred are fulfilled
d) Agreement to sell is deemed to be sale

Ans. C

Q25. What can be the subject matter of the contract of sale as per section 6 of Sale of Goods Act?

a) Only existing goods owned or possessed by the owner
b) Only Future goods
c) Existing goods which are neither owned nor possessed by the owner
d) Existing goods, owned or possessed by the owner or future goods

Ans. D

Q26. Where in a contract of sale the seller purports to affect the present sale of the future goods, the contract operates as:

a) A Contract of sale
b) An agreement to sell the goods
c) A Contact of sale or agreement to sell
d) It is not a valid contract

Ans. B

Q27. In a contract for sale of specific goods, the goods, without the knowledge of seller perished at the time when the contract was made, the contract is:

a) A voidable contract at the instance of seller
b) A voidable contract at the instance of buyer
c) A voidable contract subject to approval of the civil court
d) A void contract

Ans. D

Q28. A contract of sale may be made:

a) A in writing or by word of mouth
b) partly in writing of partly by word of mouth
c) by the implied conduct of parties
d) All of the above

Ans. D

Q29. A is a stipulation essential to main purpose of the contract and the breach of which gives rise to a right to treat the contract as repudiated:

a) Condition
b) Warranty
c) Disclaimer
d) Guarantee

Ans. A

Q30. When can a breach of condition be treated as a breach of warranty by the seller as per the provisions of Sale of Goods Act, 1930:

a) When the buyer fulfils the condition stipulated to the contract of sale
b) When the contract of sale is severable and the buyer has accepted the entire goods
c) When the contract of the sale is not severable and the buyer has accepted the goods or part thereof, subject to an express or implied term in the contract
d) When the contract of the sale is severable and the buyer has accepted the entire goods or part thereof

Ans. C

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