UNIT – I

The Indian Contract Act, 1872

The Indian Contract Act, 1872: General Principles of Contract- Contract – Meaning, Characteristics and Kinds- Essentials of a Valid Contract - Offer and Acceptance, Consideration, Contractual capacity, Free Consent, Legality of objects- Void Agreements- Discharge of a Contract – Modes of discharge, Breach and Remedies against breach of Contract- Contingent contracts-

General Principles of Indian Contract

The Indian Contract Act was passed in the year 1872 and it came into force on the 1st day of September, 1872. The Act extends to the whole of India except the State of Jammu and Kashmir. It consists of 238 sections. It has been divided into 10 chapters. Chapter VII of the Contract Act is wholly repealed by the Indian Sale of Goods Act, 1930 (vide section 65). The Contract Act deals with particular contracts in separate chapters.

The provisions of the Act do not apply to contracts made before the Act came into force. Broadly speaking, The Indian Contract Act deals with all facets of contract, more particularly the stages of formation of a contract, the elements of a contract, the performance of a contract, breach of contract and available remedies when there is a breach of contract.

In case of a contract in which two or more countries are involved in respect of its performance, questions arise as to the law of which country would govern such a contract. In the first instance, the law which would govern such a contract would be the law expressed by the parties themselves in the contract. In the absence of an expressed intention, the rule to apply is to infer an intention from the terms and nature of the contract and the general circumstances of the case. Such circumstances may be (i) the country in which

the contract was entered into or (ii) The country where the payment was to be made. In such a contract, if a payment is to be made, it should be of the legal tender governing the country in which payment is to be made.

Meaning and Definition of a Contract

The meaning and definition of a contract are discussed below with reference to some eminent jurists.

Meaning

An agreement enforceable by law is a contract. As per Indian Contract Act 1872 "An agreement is an accepted proposal". Thus it can be said that a contract is an agreement; an agreement is a promise and a promise 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. Hence it is a bilateral transaction.

What is an Agreement?

An agreement is defined in section 2 (e) of the Indian Contract Act of 1872. It states "that ***every promise and every set of promises forming the consideration for each other is an agreement".***

Agreement = Offer / Proposal + Acceptance of Offer / Proposal

When the two parties make an agreement, they have to fulfil their promise. If either party defaults in carrying out its obligation there will be breach of contract if the agreement is enforceable by law.

What is a Promise?

Section 2 (b) of the Indian Contract Act of 1872 defines a promise as: "***A proposal when accepted becomes a 'promise".***

Under section 2 (c) "the person who makes the proposal is called the 'promisor'. The 'promisee' is the person that accepts the proposal".

Example

Rani makes an offer to sell her plot of residential land for Rs. 50 lakhs to Malthi. If Malthi accepts this offer, then after the offer is accepted, the acceptance becomes a promise. The promise between Rani and Malthi is an agreement.

Classification of Contracts

The Indian Contract Act classifies contracts into different categories. Contracts can be categorized from the point of view of (i) Enforceability/Legal validity (ii) Formation (iii) Performance and (iv) Obligation.

(A) Enforceable/legal validity contracts can be classified into the following:

- Valid Contract.
- Voidable Contract.
- Void Contract.
- Void Agreement.
- Illegal Agreement.
- Unenforceable Contract.

(B) Contracts according to their mode of creation/formation are the following:

- Express Contract
- Implied Contract
- Quasi Contract.

(C) Contracts classified according to performance:

- Executed Contract

- Executory Contract
- Unilateral Contract
- Bilateral Contract.

According to Enforceability

A contract that is enforceable can be classified under different categories. Such contracts may be valid contracts, voidable contracts, void agreements, void contracts, agreements discovered to be void, unlawful or illegal agreements and unenforceable contracts.

1. Valid Contract: A valid contract is one, which satisfies the essential elements described in section 10 of the Indian Contract Act. It must be an agreement in which an offer is made and accepted. It should have the intention to create legal relations. There should be lawful consideration and the object should be legal. It should have clear terms with free consent of both the parties. When all the essential elements are complete in all respects it is a valid contract and it is enforceable by law.

2. Voidable Contract: If one party to the contract has the option of enforcing a contract by law, but not at the option of the other or others, it is a voidable contract. In those cases when the consent is not given freely but coercion has been used the party has the option to continue with the contract or rescind it. Another example of a voidable contract is when a person has promised to deliver certain goods on a certain date and he does not deliver it, it is the option of the buyer to continue or to rescind the contract (section 55).

3. Void Contract: These contracts are enforceable when the agreement is made but due to certain lapses they become unenforceable at a later date. The agreement becomes unenforceable for the following reasons:

- According to section 56 if a contract is illegal or impossible to conduct it becomes void.
- Contracts that are made with British Shipping
- Contracts entered into by Corporations.

(ii) Contracts of record are those that adhere to judgements. The obligations of the parties under the agreement arise out of court judgements and not out of contract.

4. Void agreement: Section 2(g) describes void agreements as those that are unenforceable from the inception of the agreement. In other words these agreements are void. A mistake between the two parties to an agreement of a material fact makes the agreement void. Therefore a void agreement does not create any legal rights between the parties to the contract. It also does not create any obligations. There is a flaw in the agreement itself.

The most common example is that of a minor who does not have the legal rights to enter into an agreement. If he/she does, the agreement is null and void. The Indian Contract Act expressly declares agreements that have restraints in marriage or trade or uncertainty as void.

5. Illegal Contract

An illegal contract is unenforceable under the law for the simple reason that it is illegal. Most often, an illegal contract is deemed illegal because the contract is ultimately designed to perform some illegal function or purpose. For example, a “contract” under which one individual pays another to commit murder would be considered an illegal contract and would be entirely unenforceable.

6. Unenforceable Contracts

Certain contracts are not enforceable by law because they suffer from some technical faults. For Example, if certain documents have to be registered and

they have not been registered then such documents become unacceptable by the court. Likewise if agreements have to be written on stamp paper and the stamp paper has not been used, then such agreements are not enforceable in the Court. Hence formalities should be complete to make a contract enforceable by law.

According to Mode of Creation

Contracts on the basis of mode of creation refer to Express Contracts, Implied Contracts and Quasi Contracts.

1. Express Contract: When an offer is made in words or in writing and another person accepts it, an express contract is formed. Promise is considered to be express when it is made in words written or spoken.

Example: Priya writes to Prem offering to sell her car for a price of Rs.1,00,000. Prem accepts the offer by responding through an email. This is an express contract.

Example: Pummy makes a phone call to Raj and offers to sell her Laptop for Rs 20,000. Raj accepts the offer. It is a promise made by verbal contact and the offer is accepted. It is an express contract.

2. Implied Contract: A contract is said to be implied when it has to be inferred from the action, gestures or conduct of the parties. It is not a verbal or a written contract. It has to be implied from circumstances of the case. In the agreement some terms may be implied or the complete agreement is implied.

Example: Janaki attended an informal meeting of a company. The company was glad to receive her suggestions and accepted her presence and took some of her suggestions. There is an implied contract that Janaki should be paid for her services because the company allowed her to attend the meeting and also used her suggestions for the benefit of the company.

Example: The hotel porter cleaned Mr. Madan's car though he was not asked to do so. Mr. Madan accepted the services. The porter was expecting to be paid for services that he had not been asked to do. This is an implied contract as the porter expects payment for his services and Mr. Madan accepted his services and allowed him to clean his car.

The contracts can be of a mixed type as well. They can be express and implied contracts both. Some parts of the combination may be express and some parts of it may be implied.

Example: Ram offers to buy an I Pod from Tilak for Rs 10,000. Tilak accepts the offer by sending the I Pod to Ram. Ram's offer is expressed in words and Tilak's acceptance is implied by his conduct. This is a mixed type of contract. It combines the characteristics of both express and implied modes of creation.

3. Quasi Contract: When contracts are not in actual fact either express or implied but there is circumstantial evidence to show that they are actually contracts, they are called Quasi Contracts or semi contracts. There is actually no contract between the parties as there is no agreement between the parties but the obligations cited in sections 68 to 72 of the Indian Contract Act provide legality to them. These are known as "certain relations resembling those created by contracts".

Example: Arti leaves her computer in Monica's house. Monica treats it as her own and begins to use it for her official purposes. Arti has no agreement with Monica. She should pay for the use of the computer, which was kept with her for safe- keeping.

Contract According to Performance

Contracts can be classified according to performance measures. Such contracts are called executed contracts, executory contracts, unilateral contracts and bilateral contracts.

1. Executed contract: An executed contract is one where both the parties have performed and completed their obligations. The contract is completed and executed. No responsibilities remain from either side of the contract.

Example: Rajesh goes to a Westside store and buys a shirt for himself. He pays Rs 1450 and the shirt is packed and delivered to him. He leaves the store as the contract is executed. The obligations of both the parties are complete.

2. Executory Contract: In a contract sometimes one party may carry out his/her obligation but the other has still to conduct his/her obligation. This obligation will be performed in the future. This type of a contract, which is not yet complete, is called an executory contract. In some executory contracts both parties decide to complete their contract in the future because of certain important reasons.

Example: Minna sells her computer to Zara. Immediately Zara sends the payment for it. Minna has to still deliver the computer. This is partly an executed and partly an executory contract.

Example: Khem promises to install a kitchen grill for Tina. He expects a consideration of Rs 3,500 for it which Tina accepts. This is an executory contract. It is still not complete.

3. Unilateral Contract: In some contracts one party has already completed his/her obligation but now the other party is left to complete his/her part of the contract. When the other party executes his/her part of the contract that,

is still outstanding, it is called a unilateral contract. These contracts are also called contracts with executory consideration. When the contract is formed, there is an obligation of only one party to perform.

Example: Murli's dog was lost while he was taking a morning walk. He offered a reward of Rs 1,00,000 for bringing back his dog safely. Sashi found the dog and returned it to the owner. The owner now has a unilateral contract to perform of paying the reward money as the dog has been found.

4. Bilateral Contract: A bilateral contract is a reciprocal arrangement between two parties by which each promises to perform an act in exchange for the other party's act.

ESSENTIAL ELEMENTS OF A VALID CONTRACT

- An Agreement (Offer + Acceptance)
- Intention to create legal relationship
- Lawful Consideration
- Capacity of parties – Competency
  Free and genuine consent
- Lawful Object.
- Agreement not declared void
- Certainty and possibility of performance
- Legal Formalities

OFFER AND ACCEPTANCE

At the inception of every agreement, there must be a definite offer by one person to another and its unqualified acceptance by the person to whom the

offer is made. An offer is a proposal by one party to another to enter into a legally binding agreement with him.

According to Indian Contract Act 1872 **(Sec. 2 (a))** – A person is said to have made a proposal, when he " Signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence."

Sec. 2 (c) The Person making the offer is known as the offeror, proposer, or promisor and the person to whom it is made is called the offeree or propose. When the offeree accepts the offer, he is called the acceptor or promisee .

Kinds of Offer

- An offer may be express words, spoken or written **– Express Offer.**
- An offer may also be implied from the conduct of the parties or the circumstances of the case. **– Implied Offer**
- When an offer is made to a definite person, it is called a - **Specific offer.**
- When an offer is made to the world at large, it is called a **– General Offer**

1. **How an offer is made:** An offer may be either express or implied from the contract of the parties. An express offer is one may be made by words spoken or written such as letter, telegram, telex, fax messages, e-mail or through internet. Thus, where A offers to sell his pen to B for Rs. 20; it is an express offer. An implied offer is one which may be gathered from the conduct of the party or the circumstances of the case.

2. To whom an offer is made an offer may be made to

(a) A particular person,

(b) A particular group or body of persons,

(c) The public at large i.e. the whole world.

An offer made to a define person or body of persons is called specific offer. A specific offer can usually be accepted by the person or persons to whom it is made. On the other hand, when an offer is addressed to the whole world, it is called a general offer.

Legal Rules as to Offer

- Offer must be such as in law is capable of being accepted and giving rise to legal relationship.
- Terms of offer must be definite, unambiguous and certain and not loose and vague.
- An Offer may be distinguished from
    - A declaration of intention and an announcement.
    - An invitation to make an offer or do business
- An Offer must be communicated
- Offer must be made with a view to obtaining the assent.
- Offer should not contain a term the non-compliance of which may be assumed to amount to acceptance.
- A Statement of price is not an offer.

ACCEPTANCE

A Contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer.

According to Indian Contract Act 1872 **(Sec. 2 (b))** – Acceptance means, "when the offeree signifies his assent, to the offeror, the is said to be accepted. An offer when accepted becomes a promise."

Kinds of Acceptance

- Acceptance may be express words, spoken or written **– Express.**
- Acceptance may also be implied from the conduct of the parties or the circumstances of the case. **– Implied**
- When Acceptance is made to a definite person, it is called a - **Specific**

Acceptance.

- When Acceptance is made to the world at large, it is called a **– General Acceptance.**

Legal Rules As To Acceptance

- It must be absolute and unqualified
- It must be communicated to the offeror
- It must be according to the mode prescribed or usual or reasonable.
- It must be given within a reasonable time.
- It cannot be precede an offer.
- It must show an intention on the part of the acceptor to fulfill terms of the promise.
- It must be given by the party or parties to whom the offer is made.
- It cannot be implied from silence.

CONSIDERATION

When a party to an agreement promises to do something, he must get "something" in return. This something is defined as consideration.

DEFINITION

Sec 2 (d) of Indian Contract Act 1872 defines consideration as follows:

"When at the desire of the promisor, the promise 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." From the above definition we analyse the consideration may be

- An act

- An abstinence or forbearance, and
- A return promise.

Legal Rules to Consideration

- It must move at the desire of the promisor
- It must move at the desire of the promisee or any other person
- It may be an act, abstinence or forbearance or a return promise.
- It may be past, present or future.
- It need not be adequate.
- It must be real and not illusory.
- It must be something which the promisor is not already bound to do.
- It must not be illegal, immoral or opposed to public policy.

Importance of Consideration

Consideration is the foundation of ever contract. The law insists on the existence of consideration if a promise is to be enforced as creating legal obligations. A promise without consideration is null and void. It is called a naked promise or "Nudum Pactum." Thus if A promise to pay B Rs. 1000 without anything in return, this constitute a bare promise and gives no right of action.

Sir William Anson has brought out the importance of consideration thus, "offer and acceptance brings the parties together, and constitute an outward semblance of a contract, but most systems of law requires some further evidence of the intention of the parties and in default of such evidence, refuse to recognize an obligation.' This further evidence of the intention of the parties is supplied by consideration which is one of the element of a valid contract.

Section 25 of the Indian contract Act supports this contention and provides that agreement without consideration is void.

NO CONSIDERATION NO CONTRACT-EXCEPTIONS

Every agreement to be enforceable at law must be supported by valid consideration. An agreement made without consideration is void and is unenforceable except in certain cases. Section 25 specifies the cases where an agreement though made without consideration will be valid. These are as follows

1. Natural love and affection [Sec. 25(1)]

An agreement though made without consideration will be valid if it is in writing and registered and is made on account of natural love and affection between parties standing in a near relation to each other. An agreement without consideration will be valid provided-

(a) it is expressed in writing;

(b) it is registered under the law for the time being in force;

(c) it is made on account of natural love and affection;

(d) it is between parties standing in a near relation to each other.

All these essentials must be present to enforce an agreement made without consideration.

2. Compensation for services rendered [Sec. 25(2)]

An agreement made without consideration will be valid if it is a promise to compensate wholly or in a part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do. To apply this rule, the following essentials must exist:

(a) The act must have been done voluntarily;

(b) for the promisor or it must be something which was the legal obligation of the promiser;

(c) the promisor must be in existence at the time when the act was done;

(d) the promisor must agree now to compensate the promisee.

3. Time-barred debt [Sec. 25(3)]

A promise to pay a time-barred debt is also enforceable. But the promise must be in writing and be signed by the promisor or his agent authorized in that behalf. The promise may be to pay the whole or part of the debt. An oral promise to pay a time-barred debt is unenforceable.

4. Completed gifts [Exp. 1 to Sec. 25]

Explanation 1 to section 25 provides that the rule 'No consideration, No contract' shall not affect validity of any gifts actually made between the donor and the donee. Thus if a person gives certain properties to another according to the provision of the Transfer of Property Act, he cannot subsequently demand the property back on the ground that there was no consideration.

5. Agency (Sec. 185)

There is one more exception to the rule. IT is given in section 185 which says that no consideration is needed to create an agency.

6. Guarantee (Sec 127)

A contract of guarantee is made without consideration.

7. Remission (Sec 63)

No consideration is required for an agreement to receive less then what is du. This is called remission in the law.

CAPACITY TO CONTRACT

The parties who enter into a contract must have the capacity to do so. Capacity here means competence of the parties to enter into a valid contract.

According Sec 10 of Indian Contract Act 1872, An agreement becomes a contract if it is entered into between the parties who are competent to contract. **According Sec 11 of Indian Contract Act 1872,** Every person is competent to contract who (a) is of the age majority according to the law to which he is

subject, (b) is of sound mind. and (c) is not disqualified from contracting by any law to which he is subject. Thus Sec 11 declares the following persons to be incompetent to contract:

- Minors,
- Persons of unsound mind, and
- Persons disqualified by any law to which they are subject.

For a valid contract, the parties to a contract must have capacity i.e. competence to enter into a contract. Every person is presumed to have capacity to contract but there are certain persons whose age, condition or status renders them incapable of binding themselves by a contract. Incapacity must be proved by the party claiming the benefit of it and until proved the ordinary presumptions remains.

Section 11 of the Contract Act deals with the competency of parties and provides that "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 disqualified from contracting by any law to which he is subject."

It follow that the following person are incompetent to contract.

(a) minor

(b) person of unsound mind, and

(c) Person disqualified by any law to which they are subject. Contract entered into by the persons mentioned above are void. Every person is competent to contract:

(a) Who is of the age of majority.

(b) Who is of sound mind.

(c) Who is not disqualified from making a contract.

Therefore the following persons are not competent to contract

(a) A person who is a minor.

(b) A person of unsound mind.

(c) A person who is disqualified from making a contract.

Minors

According to sec 3 of the Indian Majority Act, 1875, a minor is a person who has not completed 18 years of age. In the following two cases, he attains majority after 21 years of age.

- Where a guardian of a minor's person or property has been appointed under the Guardians and Wards Act, 1890, or
- Where the superintendence of a minor's property is assumed by a Court of Wards.

The position of a minor as regards his agreements may be summed up as under

- An agreement with or by a minor is void and inoperative ab initio.
- He can be a promise or a beneficiary
- His agreement cannot be ratified by him on attaining the age of majority.

- If he has received any benefit under a void agreement.
- He can always plead minority.
- There can be no specific performance of the agreements entered into by him as they are void ab initio
- He cannot enter into a contract of partnership.
- He cannot be adjusted insolvent.
- He is liable for necessaries supplied or necessary services rendered to him or anyone whom he is legally bound to support.

Persons of Unsound Mind

One of the essential conditions of competency of parties to a contract is that they should be of sound mind. **Sec 12** lays down a test of soundness of mind. It reads as follows**:**

"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person, who is usually of unsound mind but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind but occasionally of unsound mind, may make a contract when he is of sound mind."

Other Persons

- Alien enemies
- Foreign sovereigns, their diplomatic staff and accredited representatives of foreign states**.**
- Corporations
- Insolvents
- Convicts

FREE CONSENT

It is essential to the creation of a contract that the parties are ad idem, i.e., they agree upon the same thing in the same sense at the same time and that their consent is free and real. Sec.10 also says that "all agreements are contracts if they are made by the free consent of parties…" Secs. 13 and 14

Consent: It means acquiescence or act of assenting to an offer. "Two or more persons are said to consent when they agree upon the same thing in the same sense."

Sec.13 – Free Consent : Consent it said to be free when it is not caused by -

Coercion as defined in Sec.15, or

Undue Influence as defined in Sec. 16, or

Fraud as defined in Sec. 17, or

Misrepresentation as defined in Sec. 18, or

Mistake, subject to the provisions of Secs. 20, 21 and 22 (Sec. 14)

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

A consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake.

Elements Vitiating free Consent

1. **Coercion (Section 15):** "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code under(45,1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. For example, "A" threatens to shoot "B"if he doesn't release him from a debt which he owes to "B". "B" releases "A" under threat. Since the release has been brought about by coercion, such release is not valid.

2. **Undue influence (Section 16):** "Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."

(Section 16(2)) States that "A person is deemed to be in a position to dominate the will of another;

- Where he holds a real or apparent authority over the other. For example, an employer may be deemed to be having authority over his employee. an income tax authority over to the assessee.
- Where he stands in a fiduciary relationship to other, For example, the relationship of Solicitor with his client, spiritual advisor and devotee.
- Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by the reason of age, illness or mental or bodily distress"

3. **Fraud (Section 17):** "Fraud" means and includes any act or concealment of material fact or misrepresentation made knowingly by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract. Mere silence is not fraud. a contracting party is not obliged to disclose each and everything to the other party. There are two exceptions where even mere silence may be fraud, one is where there is a duty to speak, then keeping silence is fraud, or when silence is in itself equivalent to speech, such silence is fraud.

4. **Misrepresentation (Section 18):** "causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement".

5. **Mistake of fact (Section 20):** "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void". A party cannot be allowed to get any relief on the ground that he had done some particular act in ignorance of law. Mistake may be bilateral mistake where both parties to an agreement are under mistake as to the matter of fact. The mistake must relate to a matter of fact essential to the agreement.

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.

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:

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

- Agreements hindering marital duties

VOID AGREEMENT

The last essential of a valid contract as declared by Section 10 is that it must not be one which is 'expressly declared' to be void by the Act. Thus, there arises a question, as to what are 'expressly declared' void agreements? The following agreements have been 'expressly declared', to be void by the Indian Contract Act:

1. Agreements in restraint of marriage (Sec. 26).
2. Agreements in restraint of trade (Sec. 27).
3. Agreements in restraint of legal proceedings (Sec. 28).
4. Agreements the meaning of which is uncertain (Sec. 29).
5. Agreements by way of wager (Sec. 30).
6. Agreements contingent on impossible events (Sec. 36).
7. Agreements to do impossible acts (Sec. 56).

At the very outset, it may be borne in mind that the law declares these agreements void-*ab-initio* and not illegal, and therefore transactions collateral to such agreements are not made void. In fact it is for this reason that these agreements have not been discussed in the preceding unit dealing with "unlawful or illegal agreements," because otherwise, in effect, these agreements are also 'unlawful agreements' as they are expressly declared void by the Contract Act. It may be recalled that in the case of illegal agreements, transactions collateral to them are also tainted with illegality and hence void.

1. **Agreements in Restraint of Marriage:** Every individual enjoys the freedom to marry and so according to Section 26 of the Contract Act "every agreement in restraint of the marriage of any person, other than a minor, is void." The restraint may be general or partial but the agreement is void, and therefore, an agreement agreeing not to marry at all, or a certain person, or a class of

persons, or for a fixed period, is void. However, an agreement restraining the marriage of a minor is valid under the Section.

It is interesting to note that a promise to marry a particular person does not imply any restraint of marriage, and is, therefore, a valid contract.

Illustrations. (a) *A* agrees with *B* for good consideration that she will not marry *C*. It is a void agreement.

(b) *A* agrees with *B* that she will marry him only. It is a valid contract of marriage.

2. **Agreements in Restraint of Trade:** The Constitution of India guarantees the freedom of trade and commerce to every citizen and therefore Section 27 declares "every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void." Thus no person is at liberty to deprive himself of the fruit of his labour, skill or talent, by any contracts that he enters into.

It is to be noted that whether restraint is reasonable or not, if it is in the nature of restraint of trade, the agreement is void always, subject to certain exceptions provided for statutorily.

Illustration. An agreement whereby one of the parties agrees to close his business in consideration of the promise by the other party to pay a certain sum of money is void, being an agreement is restraint of trade, and the amount is not recoverable, if the other party fails to pay the promised sum of money. But agreements merely restraining freedom of action necessary for the carrying on of business are not void, for the law does not intend to take away the right of a trader to regulate his business according to his own discretion and choice.

Illustration. An agreement to sell all produce to a certain party, with a stipulation that the purchaser was bound to accept the whole quantity, was held valid because it aimed to promote business and did not restrain it. But where in a similar agreement the purchaser was free to reject the goods (*i.e.*, was not bound to accept the whole quantity tendered) it was held that the agreement was void as being in restraint of trade.

Exceptions. An agreement in restraint of trade is valid in the following cases:

(i) **Sale of goodwill.** The seller of the 'goodwill' of a business can be restrained from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like

business therein, provided the restraint is reasonable in point of time and space (Exception to Sec. 27).

Illustrations. (a) *A*, after selling the goodwill of his business to *B* promises not to carry on similar business "anywhere in the world." As the restraint is unreasonable the agreement is void.

(b) *C*, a seller of imitation jewellery in London sells his business to *D* and promises that for a period of two years he would not deal: (a) in imitation jewellery in England, (b) in real jewellery in England, and (c) in real or imitation jewellery in certain foreign countries. The first promise alone was held lawful.

(ii) **Partners' agreements.** An agreement in restraint of trade among the partners or between any partner and the buyer of firm's goodwill is valid if the restraint comes within any of the following cases:

(a) An agreement among the partners that a partner shall not carry on any business other than that of the firm while he is a partner [Section 11(2) of *the Partnership Act*].

(b) An agreement by a partner with his other partners that on retiring from the partnership he will not carry on any business similar to that of the firm within a specified period or within specified local limits provided the restrictions imposed are reasonable [Section 36(2) of *the Partnership Act*].

(c) An agreement among the partners, upon or in anticipation of the dissolution of the firm, that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits, provided the restrictions imposed are reasonable (Section 54 of *the Partnership Act*).

(d) An agreement between any partner and the buyer of the firm's goodwill that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, provided the restrictions imposed are reasonable [Section 55(3) of *the Partnership Act*].

(iii) **Trade combinations.** As pointed out earlier, an agreement, the primary object of which is to regulate business and not to restrain it, is valid. Thus, an agreement in the nature of a business combination between traders or manufacturers *e.g.*, not to sell their goods below a certain price, to pool profits or output and to divide the same in an agreed proportion, does not amount to a restraint of trade and is perfectly valid.

Similarly, an agreement amongst the traders of a particular locality with the object of keeping the trade in their own hands is not void merely because it hurts a rival in trade. But if an agreement attempts to create a monopoly, it would be void.

Agreements tending to create monopolies are now also governed by the provisions of the Monopolies and Restrictive Trade Practices Act, 1969, which forbids certain types of trade agreements.

(iv) **Negative stipulations in service agreements.** An agreement of service by which a person binds himself *during the term of the agreement*, not to take service with anyone else, is not in restraint of lawful profession and is valid. Thus a chartered accountant employed in a company may be debarred from private practice or from serving elsewhere during the continuance of service.

But an agreement of service which seeks to restrict the freedom of occupation for some period, *after the termination of service*, is void. Thus, where *S*, who was an employee of Brahmputra Tea Co. Assam, agreed not to employ himself or to engage himself in any similar business within 40 miles from Assam, for a period of five years from the date of the termination of his service, it was held that the agreement is in restraint of lawful profession and hence void.

3. **Agreements in Restraint of Legal Proceedings:** Section 28, as amended by the Indian Contract (Amendment) Act, 1996, declares the following three kinds of agreements void:

(a) An agreement by which a party is restricted *absolutely* from taking usual legal proceedings, in respect of any rights arising from a contract.

(b) An agreement which limits the time within which one may enforce his contract rights, without regard to the time allowed by the Limitation Act.

(c) An agreement which provides for forfeiture of any rights arising from a contract, if suit is not brought within a specified period, without regard to the time allowed by the Limitation Act.

Restriction on Legal proceedings. As stated above Section 28 renders every agreement in restraint of legal proceedings void. This is in furtherance of what

we studied under the definition of a 'contract', namely, agreement *plus* enforceability at law is a contract. Thus if an agreement *inter-alia* provides that no party shall go to a court of law, in case of breach, there is no contract and the agreement is void *ab-initio*. In this connection the following points must also be borne in mind:

(a) The Section 'applies only to rights arising from a contract. It does not apply to cases10 of civil or criminal wrongs or torts.
(b) This Section does not affect the law relating to arbitration *e.g.*, if the parties agree to refer to arbitration any dispute which may arise between them under the contract, such a contract is valid (*Exceptions* 1 and 2 to Section 28).

(c) The Section does not affect an agreement whereby parties agree "not to file an appeal" in a higher court. Thus where it was agreed that neither party shall appeal against the trail court's decision, the agreement was held valid, for,
Section 28 applies only to *absolute* restriction on taking the legal proceedings, whereas here the restriction is only *partial* as the parties can go to a court of law alright and the only restriction is that the losing party cannot file an appeal.
(d) Lastly, this Section does not prevent the parties to a contract from selecting one of the two courts which are equally competent to try the suit.

Curtailing the period of limitation. Any agreement curtailing the period of limitation prescribed by the Limitation Act is also void under Section 28. Thus, if a clause in an agreement between *A* and *B* provides that either party can sue for breach within a year of breach only, the clause is void and despite the clause the parties have a right to sue in case of breach by either party within the time allowed by the Limitation Act *i.e.*, within three years from the date of breach. It is relevant to state that agreements extending the period of limitation

prescribed by the Limitation Act are also void, not under this Section but under Section 23, as the object will be to defeat the provisions of the law.

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Forfeiture of contract rights. Under Clause (c) of Section 28 (stated above) an agreement which provides for forfeiture of any rights arising from a contract, if suit is not brought within a specified time (say 3 months) is also void. This Clause was inserted by the Indian Contract (Amendment) Act, 1996. The distinction between Clause (b) and Clause (c) of Section 28 (stated above) may be noted. Under Clause (b), the agreement limits the time within which one may enforce his contract rights thereby curtailing the period of limitation prescribed by the Limitation Act, whereas under Clause (c), the agreement limits the time within which one is to have any contract rights to enforce. Thus,

Clause (c) refers to an agreement which does not affect the remedy for breach but which extinguishes the right itself after the specified time and such a stipulation has also been declared void.

The background behind the passing of the Indian Contract (Amendment) Act, 1996 may be briefly stated as follows. Prior to this Amendment Act, the insurance policy documents issued by general insurance companies invariably provided that if a claim is rejected and a suit is not filed within three months after such rejection, all benefits under the policy shall be forfeited. Such a provision was held valid and binding on the ground that it is outside the scope of Section 28.

The learned judge observed: "... what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he is to have any rights to enforce; and that appears to me to be a very different thing".

4. **Uncertain Agreements:** "Agreements, the meaning of which is not certain, or capable of being made certain, are void" (Sec. 29). Through Section 29 the law aims to ensure that the parties to a contract should be aware of the precise nature and scope of their mutual rights and obligations under the contract. Thus, if the words used by the parties are vague or indefinite, the law cannot enforce the agreement.

Illustrations (to Sec. 29). (a) *A* agrees to sell to *B* "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A,* who is a dealer in coconut oil only, agrees to sell to *B* "one hundred tons of oil." The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of coconut oil.

(c) *A* agrees to sell to *B* "one thousand mounds of rice at a price to be fixed by *C*." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(d) *A* agrees to sell to *B* "his white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Further, an agreement "to enter into an agreement in future" is void for uncertainty unless all the terms of the proposed agreement are agreed expressly or implicitly. Thus, an agreement to engage a servant sometime next year, at a salary to be mutually agreed upon is a void agreement.

5. **Wagering Agreements:** *What is a wager?* Literally the word 'wager' means a 'a bet': something stated to be lost or won on the result of a doubtful issue, and, therefore, wagering agreements are nothing but ordinary betting agreements. Thus where *A* and *B* mutually agree that if it rains today *A* will

pay *B* Rs 100 and if it does not rain *B* will pay *A* Rs 100 or where *C* and *D* enter into an agreement that on tossing up a coin, if it falls head upwards *C* will pay *D* Rs 50 and if it falls tail upwards *D* will pay *C* Rs 50, there is a wagering agreement.

6. **Agreements Contingent on Impossible Events.** "Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made." (Sec. 36)

Illustrations (to Sec. 36). (a) *A* agrees to pay *B* Rs 1,000 (as a loan) if two straight lines should enclose a space. The agreement is void.
(b) *A* agrees to pay *B* Rs. 1,000 (as a loan) if *B* will marry *A's* daughter, *C*. *C* was dead at the time of the agreement. The agreement is void.

7. **Agreements to do Impossible Acts.** "An agreement to do an act impossible in itself is void." (Sec. 56 Para 1)

Illustrations. (a) *A* agrees with *B* to discover treasure by magic. The agreement is void [Illustration (a) to Section 56].
(b) *A* agrees with *B* to run with a speed of 100 Kilometres per hour. The agreement is void.
No Restitution. The term 'restitution' means 'return' or 'restoration' of the benefit received from the plaintiff under the agreement. As per Section 65 no restitution of the benefit received is allowed in the case of expressly declared void agreement.

BREACH OF CONTRACT

Breach means failure of a party to perform his or her obligation under a contract. Breach of contract may arise in two ways:

(1) Anticipatory breach of contract

(2) Actual breach of contract

1 ANTICIPATORY BREACH OF CONTRACT

An anticipatory breach of contract is a breach of contract occurring before the time fixed for performance has arrived. When the promisor refuses altogether to perform his promise and signifies his unwillingness even before the time for performance has arrived, it is called Anticipatory Breach. Anticipatory breach of a contract may take either of the following two ways:

(a) Expressly by words spoken or written, and

(b) Impliedly by the conduct of one of the parties.

Example 1: Where A contracts with B on 15th July, 2016 to supply 10 bales of cotton for a specified sum on 14th August, 2016 and on 30th July informs B, that he will not be able to supply the said cotton on 14th August, 2016, there is an express rejection of the contract.

Example 2: Where A agrees to sell his white horse to B for ` 50,000/- on 10th of August, 2016, but he sells this horse to C on 1st of August, 2016, the anticipatory breach has occurred by the conduct of the promisor.

Section 39 of the Indian Contract Act deals with anticipatory breach of contract and provides as follows: "When a party to a contract has refused to perform or disable himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, but words or conduct, his acquiescence in its continuance."

Effect of anticipatory breach: The promisee is excused from performance or from further performance. Further he gets an option:

(1) To either treat the contract as "rescinded and sue the other party for damages from breach of contract immediately without waiting until the due date of performance; or

(2) He may elect not to rescind but to treat the contract as still operative, and wait for the time of performance and then hold the other party responsible for the consequences of non-performance. But in this case, he will keep the contract alive for the benefit of the other party as well as his own, and the guilty party, if he so decides on re-consideration, may still perform his part of the contract and can also take advantage of any supervening impossibility which may have the effect of discharging the contract.

2 ACTUAL BREACH OF CONTRACT In contrast to anticipatory breach, it is a case of refusal to perform the promise on the scheduled date. The parties to a lawful contract are bound to perform their respective promises. But when one of the parties breaks the contract by refusing to perform his promise, he is said to have committed a breach. In that case, the other party to the contract obtains a right of action against the one who has refused to perform his promise.

Actual breach of contract may be committed- **(a) At the time when the performance of the contract is due. Example:** A agrees to deliver 100 bags of sugar to B on 1st February 2016. On the said day, he failed to supply 100 bags of sugar to B. This is actual breach of contract. The breach has been committed by A at the time when the performance becomes due.

(b) During the performance of the contract: Actual breach of contract also occurs when during the performance of the contract, one party fails or refuses to perform his obligation under it by express or implied act.

DISCHARGE (OR) TERMINATION OF CONTRACT

Contract creates relation between the parties and binds them over. Termination of such contractual relations is called discharge of contract. The following are different modes of discharge or termination of contract.

1. Discharge by Performance.
2. Discharge by Breach of Contract.
3. Discharge by Impossibility.
4. Discharge by Operation of Law.
5. Discharge by Lapse of Time.
6. Discharge by Mutual understanding or by Agreement.

Discharge of contract by Performance

As said by Salmond, contract creates obligations to parties. If both parties perform their contractual obligations promptly, the contract is said to be discharged by performance. It is the ideal method that number of contracts gets terminated in this way.

Discharge of contract by Breach

Failure in performance of contractual obligation is called breach of contract. Discharge of contract takes place by breach of contract also. Breach of contract is of two types. Namely;

- Actual breach and
- Anticipatory breach.

In case where contract is breached by party on the date of performance, it is called actual breach. If breach of Contract takes place before data of performance, it is called anticipatory breach.

Discharge of contract by Impossibility

The element of impossibility terminate contractual relations. impossibility is of two types. Namely;

- Pre Contractual impossibility and
- Post Contractual impossibility.

If impossibility has already come into force before the contract itself, it is called Pre-Contractual impossibility. Here discharge of Contract takes place soon after formation of Contract. The impossibility which comes into force after the contract is called Post-Contractual Impossibility. Here contractual relations will exists only up to occurrence of impossibility.

Discharge of contract by lapse of time

Limitation act has specified duration to perform different contracts. The duration thus specified is called limitation period. Soon after expiry of limitation period, the contract gets discharged.

Example: There is a contract of loan between A and B. Her limitation period is 3 years. After completion of 3rd year discharge of contract takes place and debtor – creditor relationship comes an end. Thus it becomes time bared debt which cannot be recovered by means of legal proceedings.

Discharge of contract by Operation of law

This can be as following;

By Death: Whenever one of the parties comes across death, contractual relations will come to an end.

By Insolvency: When one of the parties to the contract becomes insolvent, he forgoes capacity to contract and those contracts which were made by that person will get discharge.

By lunacy: When one of the parties gets attached by lunacy discharge of contract takes place.

Right and liability going into the hands of same party: Contract creates right to one party and liability to the other when right and liability reach the same person, the result is discharge of contract.

Example: X has drawn a bill on Y. Here X has right to collect amount on the bill and Y has liability to pay. There after X has endorsed the bill to Z. Where Z has got the right and liability is with Y. Assume that Z has endorsed the bill to Y. Now right as well as liability are with Y. This situation discharges the contract.

Discharge of contract by Agreement

This can be as following;

By Alterations: Whenever Material alterations in contract are made, then it is said that old contract has got discharged and a new contract has come into force.

By Renewal: At times parties to the contracts may substitute completely new contract in the place of old contract. Now the old contract has got discharged.

By Recession: In case of recession old contract gets discharged and there will be no formation of new contract.

Example: There is a contract between A and B according to which A has to supply 100 pairs of ready made dresses to B on 10th January. Where date of formation of contractee`s 1st January. On 2nd January A says to B that those dresses have become out of fashion and hence not possible to assemble 100 pairs. Still B says that though he (B) supplies 100 pairs by taking a lot of risk, B cannot sell them because they are outdated. Thus by mutual understanding, they have terminated their contract.

REMEDIES FOR BREACH OF CONTRACT

1. SUIT FOR DAMAGES Compensation for loss or damage caused by breach of contract (Section 73)

When a contract has been broken, the party who suffers by such a breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract:

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation to Section 73 In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Analysis of Section 73

The Act, in Section 73, has laid down the rules as to how the amount of compensation is to be determined. On the breach of the contract, the party who suffers from such a breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him by breach. Compensation can be claimed for any loss or damage which naturally arises in the usual course of events. A compensation can also be claimed for any loss or damage which the party knew when they entered into the contract, as likely to result from the breach. That is to say, special damage can be claimed only on a previous notice. But the party suffering from the breach is bound to take reasonable steps to minimise the loss. No compensation is payable for any remote or indirect loss.

Remedy by way of Damages or Kind of Damages

Remedy by way of damages is the most common remedy available to the injured party. This entitles the injured party to recover compensation for the loss suffered by it due to the breach of contract, from the party who causes the breach. Section 73 to 75 of the Contract Act incorporate the provisions in this regard. The damages which may be awarded to the injured party may be of the following kinds:

(i) Ordinary damages: When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage cause to him thereby, which naturally arose in the usual course of things from such breach, or which the parties know, when they made the contract, to be likely to result from the breach of it: Such compensation is not to be given for any remote and indirect loss or damage sustained by reasons of the breach.

The crankshaft of P's flour mill had broken. He gives it to D, a common carrier who promised to deliver it to the foundry in 2 days where the new shaft was to be made. The mill stopped working, D delayed the delivery of the crankshaft so

the mill remained idle for another 5 days. P received the repaired crankshaft 7 days later than he would have otherwise received. Consequently, P sued D for damages not only for the delay in the delivering the broken part but also for loss of profits suffered by the mill for not having been worked. The count held that P was entitled only to ordinary damages and D was not liable for the loss of profits because the only information given by P to D was that the article to be carried was the broken shaft of a mill and it was not made known to them that the delay would result in loss of profits.

Example: A agrees to sell to B bags of rice at Rs 5,000 per bag, delivery to be given after two months. On the date of delivery, the price of rice goes up to Rs

5,500 per bag. A refuses to deliver the bags to B. B can claim from A Rs 500 as ordinary damages arising directly from the breach.

(ii) Special damages: Where a party to a contract receives a notice of special circumstances affecting the contract, he will be liable not only for damages arising naturally and directly from the breach but also for special damages.

Example: 'A' delivered a machine to 'B', a common carrier, to be conveyed to 'A's mill without delay. 'A' also informed 'B' that his mill was stopped for want of the machine. 'B' unreasonably delayed the delivery of the machine, and in consequence 'A' lost a profitable contract with the Government. In this case, 'A' is entitled to receive from 'B', by way of compensation, the average amount of profit, which would have been made by running the mill during the period of delay. But he cannot recover the loss sustained due to the loss of the Government contract, as 'A's contract with the Government was not brought to the notice of 'B'.

(iii) Vindictive or Exemplary damages These damages may be awarded only in two cases - (a) for breach of promise to marry because it causes injury to his or her feelings; and

(b) for wrongful dishonour by a banker of his customer's cheque because in this case the injury due to wrongful dishonour to the drawer of cheque is so heavy that it causes loss of credit and reputation to him. A business man whose credit has suffered will get exemplary damages even if he has sustained no pecuniary loss. But a non-trader cannot get heavy damages in the like circumstances, unless the damages are alleged and proved as special damages.

(iv) Nominal damages: Nominal damages are awarded where the plaintiff has proved that there has been a breach of contract but he has not in fact suffered any real damage. It is awarded just to establish the right to decree for the breach of contract. The amount may be a rupee or even 10 paise.

(v) Damages for deterioration caused by delay: In the case of deterioration caused to goods by delay, damages can be recovered from carrier even without notice. The word 'deterioration' not only implies physical damages to the goods but it may also mean loss of special opportunity for sale.

(vi) Pre-fixed damages: Sometimes, parties to a contract stipulate at the time of its formation that on a breach of contract by any of them, a certain amount will be payable as damage. It may amount to either liquidated damages (i.e., a reasonable estimate of the likely loss in case of breach) or a penalty (i.e., an amount arbitrarily fixed as the damages payable). Section 74 provides that if a sum is named in a contract as the amount to be paid in case of a breach, the

aggrieved party is entitled to receive from the party at fault a reasonable compensation not exceeding the amount so named (Section 74).

Example: If the penalty provided by the contract is Rs 1,00,000 and the actual loss because of breach is Rs 70,000, only Rs 70,000 shall be available as damages, i.e., the amount of actual loss and not the amount stipulated. But if the loss is, say, Rs 1,50,000, then only, Rs 1,00,000 shall be recoverable.

2. PENALTY AND LIQUIDATED DAMAGES (SECTION 74)

The parties to a contract may provide before hand, the amount of compensation payable in case of failure to perform the contract. In such cases, the question arises whether the courts will accept this figure as the measure of damage.

English Law: According to English law, the sum so fixed in the contract may be interpreted either as liquidated damages or as a penalty.

If the sum fixed in the contract represents a genuine pre-estimate by the parties of the loss, which would be caused by a future breach of the contract it is liquidated damages. It is an assessment of the amount which in the opinion of the parties will compensate for the breach. Such a clause is effective and the amount is recoverable. But where the sum fixed in the contract is unreasonable and is used to force the other party to perform the contract; it is penalty. Such a clause of disregarded and the injured party cannot recover more than the actual loss.

Indian Law: Indian law makes no distinction between 'penalty 'and liquidated damages'. The Courts in India award only a reasonable compensation not exceeding the sum so mentioned in the contract. Section 74 of the Contract Act lays down if the parties have fixed what the damages will be, the courts will never allow more. But the court may allow less. A decree is to be passed only for reasonable compensation not exceeding the sum named by the parties.

Thus, Section 74 entitles a person complaining of breach of contract to get reasonable compensation and does not entitle him to realise anything by way of penalty.

Exception: Where any person gives any bond to the Central or State government for the performance of any public duty or act in which the public are interested, on breach of the condition of any such instrument, he shall be liable to pay the whole sum mentioned therein.

Example 1: A contracts with B, that if A practices as a surgeon in Kolkata, he will pay B ` 50,000. A practices as a surgeon at Kolkata, B is entitled to such compensation not exceeding ` 50,000 as the court considers reasonable.

Example 2: A borrows ` 10,000 from B and gives him a bond for ` 20,000 payable by five yearly instalments of ` 4,000 with a stipulation that in default of payment, the whole shall become due. This is a stipulation by way of penalty.

Example 3: A undertakes to repay B, a loan of ` 10,000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the

whole shall become due. This stipulation is not by way of penalty and the contract may be enforced according to its terms.

Distinction between liquidated damages and penalty

Penalty and liquidated damages have one thing in common that both are payable on the occurrence of a breach of contract. It is very difficult to draw a clear line of distinction between the two but certain principles as laid down below may be helpful.

1. If the sum payable is so large as to be far in excess of the probable damage on breach, it is certainly a penalty.
2. Where a sum is expressed to be payable on a certain date and a further sum in the event of default being made, the latter sum is a penalty because mere delay in payment is unlikely to cause damage.
3. The expression used by the parties is not final. The court must find out whether the sum fixed in the contract is in truth a penalty or liquidated

damages. If the sum fixed is extravagant or exhorbitant, the court will regard it is as a penalty even if, it is termed as liquidated damages in the contract.

4. The essence of a penalty is payment of money stipulated as a terrorem of the offending party. The essence of liquidated damages is a genuine pre-estimate of the damage.

5. English law makes a distinction between liquidated damages and penalty, but no such distinction is followed in India. The courts in India must ascertain the actual loss and award the same which amount must not, however exceeds the sum so fixed in the contract. The courts have not to bother about the distinction but to award reasonable compensation not exceeding the sum so fixed.

Besides claiming damages as a remedy for the breach of contract, the following remedies are also available:

(i) Rescission of contract: When a contract is broken by one party, the other party may treat the contract as rescinded. In such a case he is absolved of all his obligations under the contract and is entitled to compensation for any damages that he might have suffered.

Example: A promises B to deliver 50 bags of cement on a certain day. B agrees to pay the amount on receipt of the goods. A failed to deliver the cement on the appointed day. B is discharged from his liability to pay the price.

(ii) Quantum Meruit: Where one person has rendered service to another in circumstances which indicate an understanding between them that it is to be paid for although no particular remuneration has been fixed, the law will infer a promise to pay. *Quantum Meruit* i.e. as much as the party doing the service has deserved. It covers a case where the party injured by the breach had at time of breach done part but not all of the work which he is bound to do under

the contract and seeks to be compensated for the value of the work done. For the application of this doctrine, two conditions must be ful_lled:

(1) It is only available if the original contract has been discharged.

(2) The claim must be brought by a party not in default. The object of allowing a claim on quantum meruit is to recompensate the party or person for value of work which he has done. Damages are compensatory in nature while quantum merit is restitutory. It is but reasonable compensation awarded on implication of a contract to remunerate. Where a person orders from a wine merchant 12 bottles of a whiskey and 2 of brandy, and the purchaser accepts them, the purchaser must pay a reasonable price for the brandy.

The claim for quantum meruit arises in the following cases:

(a) When an agreement is discovered to be void or when a contract becomes void.

(b) When something is done without any intention to do so gratuitously.

(c) Where there is an express or implied contract to render services but there is no agreement as to remuneration.

(d) When one party abandons or refuses to perform the contract.

(e) Where a contract is divisible and the party not in default has enjoyed the benefit of part performance.

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

Example 1: X wrongfully revoked Y's (his agent) authority before Y could complete his duties. Held, Y could recover, as a quantum meruit, for the work he had done and the expenses he had incurred in the course of his duties as an agent.

Example 2: A agrees to deliver 100 bales of cottons to B at a price of `1000 per bale. The cotton bales were to be delivered in two installments of 50 each. A

delivered the first installment but failed to supply the second. B must pay for 50 bags.

(iii) Suit for specific performance: Where damages are not an adequate remedy in the case of breach of contract, the court may in its discretion on a suit for specific performance direct party in breach, to carry out his promise according to the terms of the contract.

(iv) Suit for injunction: Where a party to a contract is negating the terms of a contract, the court may by issuing an 'injunction orders', restrain him from doing what he promised not to do.

Example: N, a film star, agreed to act exclusively for a particular producer, for one year. During the year she contracted to act for some other producer. Held, she could be restrained by an injunction.

Party rightfully rescinding contract, entitled to compensation (Section 75)

A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through non-fulfillment of the contract.

Example: A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her ` 100 for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.

Quasi Contract

Sections 68 to 72 deals with "certain relations resembling those created by contract" under Indian contract act, 1872. It incorporated those obligations which are known as "quasi contracts" under English law. It covers cases where the obligation to pay arises neither on the basis of a contract nor a tort, but a person has obtained an unjust benefit at the cost of another.

The quasi-contractual obligations are based on the principle that law as well as justice should try to prevent unjust enrichment means enrichment of one person at the cost of another or to prevent a man from retaining the money of, or some benefits derived from, another which it is against conscience that he should keep.

Thus the principle of unjust enrichment requires:
1st that the defendant has been 'enriched' by the receipt of a benefit:
2nd that this enrichment is at the expense of the plaintiff: and
3rd that the retention of unjust of the enrichment is unjust
Strictly speaking, a quasi-contract is not a contract at all. A contract is intentionally entered into. A quasi-contract, on the other hand, is created by law.

-2018-2021

"In truth it is not a contract at all. It is an obligation which the law creates in the absence of any agreement, when the acts of the parties or others have placed in the possession of one person, money or its equivalent, under such circumstances that in equity and good conscience he ought not retain it, and which ex aequo et bono (in justice and fairness) belongs to another".

Kinds of Quasi Contract

(1) SUPPLY OF NECESSITIES (Sec.68)

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

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

(2) PAYMENT BY AN INTERSTED PERSON (sec. 69)

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. Example: B holds land in Bengal, on a lease granted by A, the Zamindar. The revenue payable by A to the govt. being in the arrears, his land is advertised for sale by the govt. under the revenue law the consequences of such sale will be annulment of B's lease. B to prevent the sale and the consequent annulment of his own lease, pays to the government the sum due from A. A is bound to make good to B the amount so paid.

The conditions of the liability under sec. 69 are:

1. The plaintiff should be interested in making the payment. It is not necessary that he should have a legal proprietary interest in the property in respect of which the payment is made. However, often it is used to determine whether plaintiff was interested. Sec. 69 does not invite such judicial limitation that a person who has not an interest in the property can be interested in a payment of that property.
2. The plaintiff himself should not be bound to pay. He should only be interested in making the payment in order to protect his own interest.
3. The defendant should be under legal compulsion to pay.
4. The plaintiff should have made the payment to another parson and not to himself.

(3) OBLIGATION TO PAY FOR NON-GRATUITOUS ACTS (Sec. 70)

When a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the things so done or delivered.

Example1: A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay for them to A.

Example 2: A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously. Before any right of action under sec. 70 arises, 3 conditions must be satisfied:

(1) The thing must have been done lawfully.

(2) The person doing the act should not have intended to do it gratuitously.

(3) The person for whom the act is done must have enjoyed the benefit of the act.

Example3: A village was irrigated by a tank. The government affected certain repairs to the tank for its preservation and had no intention to do so gratuitously for the zamindars. The zamindars enjoyed the benefits thereof.

A person, who finds goods to another and takes them into his custody, is subject to the same responsibilities as a bailee. He is bound to take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value. If he does not, he will be guilty of wrongful conversion of the property. Till the owner is found out, the property in goods will vest in the finder and he can retain the goods as his own against the whole world.

Example: F picks up a diamond on the floor on K's shop. He hands it over to K to keep it till true owner is found out. No one appears to claim it for quite some weeks in spite of the wide advertisement in the newspapers. F claims the diamond from K Who refuses to return. K is bound to return the diamond to F who is entitled to retain the diamond against the whole world except the true owner.

(5) MISTAKE OR COERSION (Sec. 72)

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

Example. (1) A pays some money to B by mistake. It is really due to C. B must refund the money to A. C, however, cannot recover the amount from C is no privity of contract between B and C.

(2) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recovers so much of the charge as is illegally excessive. Sec. 72 does not draw any distinction between a mistake of fact and mistake of law

Ex.(1). K paid sales tax on his forward transactions of bullion. Subsequently this tax was declared ultra vires. Held, K could recover the amount of sales tax and that sec. 72 is wide enough to cover not only mistake of fact but also mistake of law.

CONTINGENT CONTRACT

Section 31 of the Contract Act defines a contingent contract as follows: "A contingent contract is a contract to do or not to do something, if some event, *collateral* to such contract does or does not happen." Thus it is a contract, the performance of which is *dependent upon*, the happening or non-happening of an uncertain event, *collateral* to such contract.

Illustration. *A* contracts to indemnify *B* upto Rs 20,000, in consideration of *B* paying Rs 1,000 annual premium, if *B*'s factory is burnt. This is a contingent contract. Any ordinary contract can be changed into a contingent contract, if

its performance is made dependent upon the happening or non-happening of an uncertain event, collateral to such contract. For example, the following are contingent contracts:

(a) *A* contracts to sell *B* 10 bales of cotton for Rs 20,000, if the ship by which they are coming returns safely.

(b) *A* promises to give a loan of Rs 1,000 to *B*, if he is elected the president of a particular association.

(c) *A* promises to pay Rs 50,000 to *B* if a certain ship does not return, of course after charging usual premium. (It is a contract of insurance.)

(d) *C* advances a loan of Rs 10,000 to *D* and *M* promises to *C* that if *D* does not repay the loan,

M will do so. (It is a contract of guarantee.)

Contracts of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

RULES REGARDING THE PERFORMANCE OF CONTINGENT CONTRACTS

The rules regarding the performance of contingent contracts, as contained in Sections 32 to 36 of the Contract Act, are given below:

1. Contingent contracts to do or not to do anything, if an uncertain future event *happens*, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void (Sec. 32).

Illustrations. (to Sec. 32). (a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. The contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy it. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money (as loan) when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

2. Contingent contracts to do or not to do anything, if an uncertain future event *does not happen*, can be enforced when the happening of that event becomes impossible, and not before (Sec. 33).

Illustration (to Sec. 33). *A* agrees to pay *B* a sum of money (as insurance claim) if a certain ship does not return (of course after charging premium). The ship is sunk. The contract can be enforced when the ship sinks.

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

Illustration (to Sec. 34). *A* agrees to pay *B* a sum of money (as loan) if *B* marries *C*. *C* marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*. (If later *B* actually marries *C* (the *D*'s widow), it will not revive the old obligation of *A* to pay the sum, because that came to an end when C married

4. Contingent contracts to do or not to do anything, *if a specified uncertain event happens within a fixed time*, becomes void, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible [Sec. 35 (1)].

Illustration (to Sec. 35). *A* promises to pay *B* a sum of money (as loan) if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year or if the ship does not return within the year.

5. Contingent contracts to do or not to do anything, *if a specified uncertain event does not happen within a fixed time, may* be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen [Sec. 35

(2)].

Illustration (to Sec. 35). A promises to pay B a sum of money (as insurance claim) if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

6. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made (Sec. 36).

IIllustrations (to Sec. 36). (a) *A* agrees to pay *B* Rs. 1,000 (as a loan), if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* Rs 1,000 (as a loan), if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

Possible Questions

PART – A (1 Mark)

Online Questions

PART – B (2 Marks)

1. Define contract.
2. What is misrepresentation?
3. Define quasi contract.
4. What you meant by obligation and agreement.
5. Write short note on quasi contract.
6. Who can be a acceptor in the contract?
7. What is agreement?
8. What is free consent?
9. Write a short note on unlawful contract.
10. Define Indian contract Act 1872.
11. Explain the nature of contract.
12. Write a note on obligation and agreement
13. Write a short note on obligation and agreement.
14. Write a note on offer in the contract.
15. Who are all under persons of unsound mind in contract?

PART – C (6 Marks)

1. Explain the classification of contract?
2. Illustrate the components of valid contract.
3. Briefly explain about offer and acceptance.
4. Explain about obligation and agreement.
5. Explain briefly about quasi contract.
6. Explain briefly about the essentials of contract.

The Indian Contract Act, 1872: Specific Contracts - Contract of Indemnity and Guarantee- Contract of Bailment- Contract of Agency-The Sale of Goods Act, 1930 - Contract of sale, Meaning and difference between sale and agreement to sell-Conditions and warranties- Transfer of ownership in goods including sale by a non-owner-

SPECIFIC CONTRACT

Contract of Indemnity

1. INTRODUCTION TO CONTRACT OF INDEMNITY

Indemnity Meaning –

- To make good the loss incurred by another person
- To compensate the party who has suffered some loss
- To protect a party from incurring a loss

Contract of indemnity Definition

A contract is called as a 'contract of indemnity' if – One party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.

Modes of contract of indemnity Expressed:

When a person expressly promises to compensate the other from loss. Implied :
When the contract is to be inferred from the conduct of the parties or from the circumstances of the case.

Essential elements of a contract of indemnity

Contract :

All the essentials of a valid contract must also be present in the contract of indemnity Example:- X asks Y to beat Z and promises to indemnify Y against the consequences. Y beats Z and is fined Rs.1,000. Y cannot claim this amount from X because the object of

the agreement was unlawful.

Loss to one party

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

Indemnity by the promisor

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

Reason for loss

- The contract of indemnity must specify that indemnity holder shall be protected from the loss caused due to
- Action of the promisor himself; or
- Action of any other person; or
- Any act, event or accident which is not in the control of the parties.

RIGHTS OF INDEMNITY HOLDER (Sec. 125)

Right to recover damages

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

Right to recover costs

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

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

(b) The indemnity holder did not contravene the orders of the indemnifier; and

The indemnity holder acted as it would have been prudent for him to act in the absence of any contract of indemnity.

Right to recover sums paid

The indemnity holder has the right to recover all the sums which he has paid under the

(a) terms of a compromise of such suit.
The indemnifier authorised him to compromise the suit; or

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

Contract of guarantee

- **Meaning of 'contract of guarantee'**

A 'contract of guarantee' is a contract to –

- Perform the promise; or
- Discharge the liability, of a third person in case of his default.

- **Meaning of 'surety'**

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

- **Meaning of 'principal debtor'**

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

- **Meaning of 'creditor'**

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

ESSENTIALS AND LEGAL RULES FOR A VALID CONTRACT OF GUARANTEE.

- **Must have all the essentials of a valid contract**

- All the essentials of a valid contract must be present in the contract of

- guarantee.

Exceptions:

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

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

Primary liability of some person

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

The debt must be legally enforceable.

- The debt must not be a time barred debt.

The contract must be conditional

- The liability of surety is secondary and conditional.
- The liability of surety arises only if the principal debtor makes a default.

No misrepresentation

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

There must not be any concealment of facts.

Form of contract

A contract of guarantee may be either oral or written.

Joining of other co-sureties

The guarantee by a surety is not valid if –

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

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

NATURE AND EXTENT OF SURETY'S LIABILITY

- **Surety's liability is coextensive with liability of principal debtor General rule –**

- Surety is liable for all the debts payable by the principal debtor to the
- creditor.
  Accordingly, interest, damages, costs etc. may also be recovered from the surety.
  Exception:-
  The contract of guarantee may provide otherwise.

- **Commencement of surety's liability**

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

The creditor is not required to –

- first sue the principal debtor; or
- first give a notice to the principal debtor.

- **Surety's liability may be limited**

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

- **Surety's liability may be continuous**

- The surety may agree to become liable for a series of transactions of continuous nature.
  However, the surety may fix a limit on his liability upto which the guarantee shall remain effective;
- a time period during which the guarantee shall remain effective.

- **Surety's liability may be conditional**

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

CONTINUING GUARANTEE

- **Meaning**

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

- **Revocation (Sec.130)**

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

- **Death of surety (sec. 131)**

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

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

I. **Rights against principal debtor**

- Right of indemnity

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

The surety is entitled to claim from the principal debtor all the sums which he has rightfully paid.
The surety cannot recover such sums, which the he has paid wrongfully.

- Right of subrogation

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

II. **Rights against the creditor**

- Right of subrogation

The surety can claim all the securities which the creditor had at the time of giving of guarantee
It is immaterial as to whether the surety had knowledge of such securities or not.
If the securities are returned by the creditor to the principal debtor the surety is discharged to the extent of value of the securities so returned.

- Right of set off

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

- Rights to share reduction

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

III. Rights against co-sureties

- Rights to contribution General Rule All the co-sureties shall contribute equally

Exceptions

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

- Right to share benefit of securities

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

BAILMENT

MEANING OF CONTRACT OF BAILMENT (Sec. 148)

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

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

- Contract

There must be a contract.
The contract may be expressed or implied.

- Goods

Bailment can be made of goods only.

- Delivery

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

- Purpose of delivery

The goods must be delivered for some purpose.

The purpose may be expressed or implied.

- Return or disposal of goods

- The delivery of goods must be conditional
- The condition shall be that the goods shall be –
  - returned (either in original form or in any altered from); or
  - disposed of according to the directions of the bailor, when the purpose is accomplished.

MODES OF DELIVERY (Sec.149)

Actual delivery

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

- Symbolic delivery

- Physical possession of goods is not actually transferred.
- A person does some act resulting in transfer of possession to any other person.

Examples:

Delivery of keys of a car to a friend

Delivery of a railway receipt.

 Constructive delivery If –

A person is already in possession of goods of owner.

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

Then –

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

CLASSIFICATION OF BAILMENT

 Gratuitous bailment

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

No hire charges are paid by bailee; and

No custody charges are paid by bailor.

 Non – gratuitous bailment Bailment for some charges or reward, i.e.-

- Hire charges are paid by bailee; or
- Custody charges are paid by bailor.

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

- Disclose faults in goods [Sec. 150]:

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

Liability for Defects in Goods

> **Example:** A owning a motorcycle, allows B, his friend, to take it for a joy ride. A knows that its brakes were not proper but does not disclose it to B. B meets with an accident. A is liable to compensate B for damages. But when A had lent the motorcycle on hire, he is liable to B even if he did not know of the failure of his brakes.

- **Bear expenses [Sec.158]**

Example: M lends his car to N and it runs out of petrol. N can recover the amount paid for refueling (ordinary expenses). If in case, the car suffers a breakdown, N can recover such charges as are paid by him in bringing it back to condition (extra – ordinary expenses). He M hired the car to N, he shall be liable only for the repair charges, being extra ordinary expenses.

- Indemnify the bailee for defective title

The bailor shall indemnify the bailee for any loss caused to bailee due to defective title of bailor.

- Indemnify the bailee for premature termination If –

- the bailment is gratuitous ; and
- for a specific period.

(a) the bailor may compel the bailee to return the goods before expiry
(b) of the peiod of bailment; but
the bailor shall indemnify the bailee for any loss incurred by the bailee.

- Receive back the goods

- It is the duty of the bailor to receive back the goods, when returned by bailee.

- If the bailor wrongfully refuses to receive back the goods, he shall be liable to pay ordinary expenses of custody of goods incurred by the bailee.

(a) the bailor may compel the bailee to return the goods before expiry of the peiod of bailment; but
(b) the bailor shall indemnify the bailee for any loss incurred by the bailee.

 Receive back the goods

• It is the duty of the bailor to receive back the goods, when returned by bailee.

• If the bailor wrongfully refuses to receive back the goods, he shall be liable to pay ordinary expenses of custody of goods incurred by the bailee.

DUTIES OF A BAILEE (Sec.151 to 157)

Take reasonable care

The bailee must take such case of goods as a man of ordinary prudence would take care of his own goods. The bailee shall not be liable for any loss or destruction of goods, if – he is not negligent; the loss was caused due to an act of God or other unavoidable reasons.

 Not to make unauthorized use of goods

• The bailee must not make any unauthorized use of the goods.
• If the bailee makes any unauthorized use of goods, then –
(a) the bailment becomes voidable at the option of the bailor; and
(b) the bailee shall be liable for any loss or damage even if such loss is caused due to an act of God or other unavoidable reasons.

 Not to mix goods
Goods are mixed with bailor's consent
The parties shall have a proportionate interest in such mixture.
Goods are mixed without bailor's consent, but the goods are separable
• The bailee shall pay the expenses of separation.

- The bailee shall pay damage incurred by the bailor.

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

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

 Return the goods

- The bailee must return the goods, without waiting for demand from

(a) bailor, if – the time specified in the contract has expired ; or

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

- If the goods are not so returned, then –

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

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

 Return accretion to goods

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

 Not to set up an adverse title

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

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

 Terminate the bailment If –

The bailee does any act inconsistent with the terms and conditions of the contract of bailment.
Then – The bailment becomes voidable at the option of the bailor.

 Demand back the goods If –

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

(a) the bailor may compel the bailee to return the goods before expiry

(b) of the period of bailment; and the bailor shall indemnify the bailee for any loss incurred by the bailee.

 File suit against wrongdoer The bailor has the right to sue –

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

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

 Sue the bailee

The bailor may sue the bailee to enforce his duties.

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

 Right to compensation

- The bailee has the right to be indemnified by the bailor, if –
  The bailor has no title to the goods; and
- As a consequence, the bailee suffers some loss.

 Return the goods

- It is the duty as well as the right of the bailee to return the goods
- to the bailor.
  In case of joint bailor, the goods may be returned to any of joint bailors.

 Recover charges incurred Extra ordinary expenses

- The bailor is liable to pay the extraordinary expenses.

- The bailee may recover the extraordinary expenses paid by him. Ordinary expenses

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

 Suit for deciding the title

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

 File suit against wrongdoer The bailee has the right to sue –

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

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

 Right of lien

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

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

 Finder of lost goods [Sec 71]

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

 Implied Agreement

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

 Duties of Finder

(a) A finder of lost goods is treated as Bailee of goods found. His duties are –
To take initiative to find the real owner of the goods,
(b) To take reasonable care of the goods found,
(c) Not to put the goods found for his personal use, and
(d) Not to mix the goods found with his own goods.

CREATION OF AGENCY

NATURE OF AGENCY

Agency is employment to represent another person/party for the purpose of bringing him into legal relations with a third party. Agency is the relationship which subsists between the principal and the agent who has been authorized to act for him or represent him in various dealings with other parties. For example, Mr. Tan is holidaying in Hong Kong and cannot be

present in Penang to sell his car or his house. Mr. Tan thus appoints another person to represent him in the transaction. Mr. Tan is the principal and that representative is the agent of Mr. Tan.

A minor can be an agent but he then cannot be sued for liability by his principal. As such, it is unwise to appoint a minor as one's agent. But no one can enter into legal relations with a principal who is a minor or is operating outside his conceptual capacity.

The agent speaks for the principal and the agent, generally speaking, has no rights and liabilities under the contract.

CREATION OF AGENCY

The following are the ways to create an agency:

(ii) By actual authority (express appointment) given by principal to the agent

(iii) By ratification of a contract entered into by the agent on behalf of the principal but without the principal's actual authority given

(iv) By an ostensible authority (implied appointment) given by principal to agent although no actual authority given

(v) By an implication of law in cases of necessity.

In the first two cases, principal can sue and be sued by the third party and rights and obligations arise between the principal and third party. In the last three cases, the principal can be sued but cannot himself sue.

1. Agency by Actual Authority

Actual authority (AA) may be express or implied. The authority given by the principal to his agent is the **express authority** (EA) enabling the later to bind the former by acts done by the agent within the scope of that authority. This express authority may be given orally but is more usually given in a special (written/ by deed) form. However, if the agent is required to enter into a contract under seal, his own appointment must be made under a Power of Attorney, that is under seal.

Every agent has an **implied authority** (IA) to act in accordance with the reasonable customs, usages and traditions of that particular place, trade or

market where he is employed. For example, if one is authorized to conduct trade as a dealer's representative for his principal in the London Stock Exchange, he has IA to do such acts as are usual in that trade/business or that which is incidental to that trade or business.

2. Agency by Ratification by the Principal

The principal may subsequently ratify (adopt the benefits and liabilities of) a contract made on his behalf. Ratification is done in two ways

(a) When the agent at time of contracting was not in fact his agent yet as he had not received precedent authority.

(b) The agent is the authorized agent of the principal at the material time but he exceeded the authority given to him by the principal.

In both instances, ratification will place the parties in exactly the same position in which they would have been if the agent had authority of the principal at the contractual time. Ratification renders the contract as binding on the principal as if the agent had been properly authorized beforehand. It also operates retrospectively, that is, it dates back to the time when the original contract was made by the agent and not from the date of the principal's ratification.

3. Agency by Ostensible Authority (Implied Appointment)

One situation where the law will infer the creation of an agency by implied appointment is when the principal, by his words or conduct, creates an inference among third parties that the agent has the actual authority to contract even though no actual authority was actually given to him. This situation may arise when the principal allows the agent to order goods and services on his behalf and he proceeds to pay for them. In such a scenario, if the agent contracts within the limits of the ostensible (apparent) authority, although without any actual authority, the principal will be bound to third parties by his agent's acts.

Three (3) principles to be noted:-

1. The representation must be made by or with the authority of the principal.

2. The third parties must rely on the representations of the agent. The doctrine will not apply if the third party does not know or believe him to be an agent of the principal.

3. The agent's want of authority must be unknown to the third party.

The relationship of principal and agent may exist between the husband

and the wife. There is a rebuttable presumption in law that a wife living together with her husband has the authority to pledge her husband's credit for necessaries (sundry goods, household needs, food, etc) suited to their station in life. Once the cohabitation ceases, the presumption ceases and the tradesman must prove that the husband held his wife out to have his authority to contract. The tradesman must also show that the goods ordered were necessary and not extravagant. A husband who habitually takes upon himself the liability to settle his wife's past dealings and purchases from tradesmen will remain responsible and liable for all such contracts unless and until he makes it known to the tradesmen that her agency has been determined. In other words, the presumption can be rebutted by the husband proving that:

1. He expressly forbade his wife to pledge his credit; or

2. He expressly warned the tradesman not to supply his wife with goods or credit; or

3. His wife was given sufficient allowance without having to pledge his credit; or The order, though for necessaries, was unreasonable, considering her husband's financial position at the time.

(iv) Agency of Necessity

In certain situations, the law allows the agent to act for the principal without the knowledge and consent of the principal. These are known as agencies of necessity.

Examples of agencies of necessity:

1. The agency of the deserted or separated wife (with no means of support) to supply household needs for herself and her children by pledging her husband's credit for necessaries. However, since the Matrimonial Proceedings and Property Act 1970 conferred on the courts extensive powers to protect the wives and children)

against the husband's willful neglect, it was felt that the needs of the separated wife would be adequately protected by this Act. In consequence, S. 41 of MPPA 1970 abolished the wife's agency of necessity.

2. A commercial agency of necessity occurs when a person is entrusted with another's property and it becomes necessary to act speedily to preserve that property although he has no express authority to do so.

The law of agency is an area of commercial law dealing with a set of contractual, quasi-contractual and non-contractual fiduciary relationships that involve a person, called the agent, that is authorized to act on behalf of another (called the principal) to create legal relations with a third party. Succinctly, it may be referred to as the relationship between a principal and an agent whereby the principal, expressly or implicitly, authorizes the agent to work under his control and on his behalf. The agent is, thus, required to negotiate on behalf of the principal or bring him and third parties into contractual relationship. This branch of law separates and regulates the relationships between:

2. Agents and principals (internal relationship), known as the principal-agent relationship;
3. Agents and the third parties with whom they deal on their principals' behalf (external relationship); and
4. Principals and the third parties when the agents purport to deal on their behalf.

The common law principle in operation is usually represented in the canon law maxim, qui facit per alium facit per se, i.e. "whoever acts through another does the act himself," and it is a parallel concept to vicarious liability and strict liability in which one person is held liable in criminal law or tort for the acts or omissions of another.

In 1986, the European community's enacted directive 86/653/eec on self-employed commercial agents. In the UK, this was implemented into national law in the commercial agents regulations 1993.

In India, section 182 of the contract act 1872 defines agent as "a person employed to do any act for another or to represent another in dealings with third persons".

Concepts

The reciprocal rights and liabilities between a principal and an agent reflect commercial and legal realities. A business owner often relies on an employee or another person to conduct a business. In the case of a corporation, since a corporation is a fictitious legal person, it can only act through human agents. The principal is bound by the contract entered into by the agent, so long as the agent performs within the scope of the agency.

A third party may rely in good faith on the representation by a person who identifies himself as an agent for another. It is not always cost effective to check whether someone who is represented as having the authority to act for another actually has such authority. If it is subsequently found that the alleged agent was acting without necessary authority, the agent will generally be held liable.

Brief statement of legal principles

Law relating to agency

Who is an agent?

An Agent is a person employed to do any act for another or represent another in dealing with third persons.

Rules Of Agency

(1) Whatever a person competent to contract may do himself, he may do through an agent.

(2) He, who does through another, does by himself.

Therefore, the acts of an agent are the acts of the principal (subject to certain conditions*)

*where personal skill is involved.

Concept Of Agency

It is only when a person acts as a representative of the other in business negotiations, that is to say, in the creation, modification or termination of contractual obligations, between that other and third persons, that he is an agent.

Who Is A Principal?

The Person for whom Such Act Is done, or who is so represented, is called the principal.

Who Can Be A Principal?

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who Can Be An Agent?

- As between the principal and third person, any person can become an agent, even if he is not competent to contract otherwise.

- If a person not competent to contract is appointed agent, principal is bound by his acts although such agent cannot be held liable by either the principal or third party.

Test Of Agency: Acts Of An Agent Are Acts Of The Principal

- Whether the person has the capacity to bind the principal & make him answerable to the third parties.

- Whether he can create legal relationship between the principal & such third parties & thus establish a Privity of contract between the principal & third parties.

Agent & Servant

- An agent has the authority to act on behalf of his principal and to create contractual relations between the principal & a third party.

- A principal has the right to direct what the agent has to do: but a master has not only the right, but also the right to say how it is to be done.

- While the servant is paid by way of salary or wages, the agent receives commission on the basis of work done.

- A master is responsible for the wrong of his servant if it occurs in the course of employment. A principal is liable for his agent's wrong done within the scope of authority.

Consideration

No consideration is necessary to create an agency.

Relationship Of A Principal And Agent

A contract of agency is one of good faith.
The relationship is fiduciary.

Kinds Of Agents

Mercantile: Brokers, Commission Agents, Bankers, Factors etc

Non Mercantile: Solicitors, Insurance Agents*, Wife* etc

Insurance Agent

LIC has regulations on the appointment & functions of agents. An agent may be authorised by the Corporation to collect and remit renewal premiums under policies on such conditions as may be specified.

Harshad J Shah V Lic (1997)

3rd semi-annual Premium paid to agent-bearer cheque-encashed-but did not deposit even after grace period-meanwhile insured dies-agent deposits premium the next day-by then the policy had lapsed-in his appointment letter agent was not authorized to collect premium.

Wife As An Agent

There must be a domestic establishment for a wife to have an implied authority of the husband to buy articles of household necessity.

Debenham V Mellon (1880)

Hotel manager's wife living with him in hotel incurring debt for clothes payment for which demanded from the husband-no domestic establishment; hence husband not liable.

Creation Of Agency

Express: Word of mouth or in writing.

Implied: By inference from the circumstances of the case.

- Agency by estoppel.
- Agency by holding out.
- Agent out of necessity.

Estoppel

Estoppel in its broadest sense is a legal term referring to a series of legal and equitable doctrines that preclude "a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied."

Pickering V Busk (1812)

Purchaser of hemp-allows it to remain in custody of broker-ordinary business to buy and sell-broker sells it.

Kashinath Das V Nisakar Raut (1962)

Landlord appoints tahsildar to manage agricultural lands-land let out to tenants on certain terms.

Necessity

Sims & Co V Midland Rly Co (1913)

Butter consigned – delay in transit owing to strike – goods being perishable sold by the company.

Great N Rly Co V Swafield (1874)

Horse consigned not received at the destination-arrangement for horse to be placed with stable keeper-company allowed to recover the charges of stable-keeper.

Necessity arises only when:

- Inability to communicate with principal

Gwilliam V Twist (1895)

Policeman thinking driver of bus is drunk orders him to discontinue driving-driver and conductor authorise a passerby to drive bus to company (defendant) yard quarter mile away-negligence of that person and injury is caused to plaintiff-Plaintiff's case failed as there was no necessity.

- Act should be reasonably necessary

Sachs v Milkos (1948)

Furniture allowed to be kept free of charge in defendants house – three years later space required- two letters sent to last known address of plaintiff- No reply, so furniture sold- six years later plaintiff claimed the furniture

Munro V Willmott (1949)

Car left in yard without payment-conversion of yard into garage-unsuccessful efforts to communicate –car repaired and sold.

EXTENT OF AGENT'S AUTHORITY

Actual or real authority.

- Express.
- Implied.

Ostensible or apparent authority.
Authority in emergency.
Ostensible Authority (apparent authority to do something or represent another person or entity)

Watteau v Fenwick (1893)

Manager of hotel –cigar purchase.

Kannelles v Locke (1919)

Act of a complete imposter at a small hotel, where the plaintiff arrived one night.

RIGHTS OF AN AGENT

- Right of retainer until he is paid in full.

- Right of remuneration.

Green V Bartlett (1863)

Agent appointed to sell house -Auction to find purchaser for a house fails-person attending auction takes address of principal-purchases house without intervention of agent-since, the bargain was direct result of agent's effort, he was held entitled to commission.

- Right of lien. (in addition to 1, above).

- Confers no authority on the agent to sell or otherwise dispose of the property without the consent of the owner

- Right of indemnification against the consequences of lawful acts.

- Right of indemnification against the consequences of acts done in good faith.
- Right of compensation.

Types of Agents

There are five types of agents.

General Agent

The general agent possesses the authority to carry out a broad range of transactions in the name and on behalf of the principal. The general agent may be the manager of a business or may have a more limited but nevertheless ongoing role—for example, as a purchasing agent or as a life insurance agent authorized to sign up customers for the home office. In either case, the general agent has authority to alter the principal's legal relationships with third parties. One who is designated a general agent has the authority to act in any way required by the principal's business.

To restrict the general agent's authority, the principal must spell out the limitations explicitly, and even so the principal may be liable for any of the agent's acts in excess of his authority. Normally, the general agent is a business agent, but there are circumstances under which an individual may appoint a general agent for personal purposes. One common form of a personal general agent is the person who holds another's power of attorney. This is a delegation of authority to another to act in his stead; it can be accomplished by executing a simple form, such as the one shown in the following diagram.

Ordinarily, the power of attorney is used for a special purpose—for example, to sell real estate or securities in the absence of the owner. But a person facing a lengthy operation and recuperation in a hospital might give a general power of attorney to a trusted family member or friend.

Special Agent

The special agent is one who has authority to act only in a specifically designated instance or in a specifically designated set of transactions. For example, a real estate broker is usually a special agent hired to find a buyer for the principal's land. Suppose Sam, the seller, appoints an agent Alberta to find a buyer for his property. Alberta's commission depends on the selling price, which, Sam states in a letter to her, "in any event may be no less than $150,000." If Alberta locates a buyer, Bob, who agrees to purchase the property for $160,000, her signature on the contract of sale will not bind Sam. As a special agent, Alberta had authority only to find a buyer; she had no authority to sign the contract.

Agency Coupled with an Interest

An agent whose reimbursement depends on his continuing to have the authority to act as an agent is said to have an agency coupled with an interest if he has a property interest in the business. A literary or author's agent, for example, customarily agrees to sell a literary work to a publisher in return for a percentage of all monies the author earns from the sale of the work. The literary agent also acts as a collection agent to ensure that his commission will be paid. By agreeing with the principal that the agency is coupled with an interest, the agent can prevent his own rights in a particular literary work from being terminated to his detriment.

Subagent

To carry out her duties, an agent will often need to appoint her own agents. These appointments may or may not be authorized by the principal. An insurance company, for example, might name a general agent to open offices in cities throughout a certain state. The agent will necessarily conduct her business through agents of her own choosing. These agents are subagents of the principal if the general agent had the express or implied authority of the principal to hire them. For legal purposes, they are agents of both the principal and the principal's general agent, and both are liable for the subagent's conduct although normally the general agent agrees to be primarily liable can be explained in the following diagram

Servant

The final category of agent is the servant. Until the early nineteenth century, any employee whose work duties were subject to an employer's control was called a servant; we would not use that term so broadly in modern English. The Restatement (Second) of Agency, Section 2, defines a servant as "an agent employed by a master [employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."

Independent Contractor

Not every contract for services necessarily creates a master-servant relationship. There is an important distinction made between the status of a servant and that of an independent contractor. According to the Restatement (Second) of Agency, Section 2, "an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." As the name implies, the independent contractor is legally autonomous.

A plumber salaried to a building contractor is an employee and agent of the contractor. But a plumber who hires himself out to repair pipes in people's homes is an independent contractor. If you hire a lawyer to settle a dispute, that person is not your employee or your servant; she is an independent contractor. The terms "agent" and "independent contractor" are not necessarily mutually exclusive. In fact, by definition, "... an independent contractor is an agent in the broad sense of the term in undertaking, at the request of another, to do something for the other. As a general rule the line of demarcation between an independent contractor and a servant is not clearly drawn."

This distinction between agent and independent contractor has important legal consequences for taxation, workers' compensation, and liability insurance. For example, employers are required to withhold income taxes from their employees' paychecks. But payment to an independent contractor, such as the plumber for hire, does not require

such withholding. Deciding who is an independent contractor is not always easy; there is no single factor or mechanical answer.

In *Robinson v. New York Commodities Corp.*, an injured salesman sought workers' compensation benefits, claiming to be an employee of the New York Commodities Corporation. But the state workmen's compensation board ruled against him, citing a variety of factors. The claimant sold canned meats, making rounds in his car from his home. The company did not establish hours for him, did not control his movements in any way, and did not reimburse him for mileage or any other expenses or withhold taxes from its straight commission payments to him. He reported his taxes on a form for the self-employed and hired an accountant to prepare it for him. The court agreed with the compensation board that these facts established the salesman's status as an independent contractor.

The factual situation in each case determines whether a worker is an employee or an independent contractor. Neither the company nor the worker can establish the worker's status by agreement. As the North Dakota Workmen's Compensation Bureau put it in a bulletin to real estate brokers, "It has come to the Bureau's attention that many employers are requiring that those who work for them sign 'independent contractor' forms so that the employer does not have to pay workmen's compensation premiums for his employees. Such forms are meaningless if the worker is in fact an employee."

In addition to determining a worker's status for tax and compensation insurance purposes, it is sometimes critical for decisions involving personal liability insurance policies, which usually exclude from coverage accidents involving employees of the insureds. *General Accident Fire & Life Assurance Corp v. Pro Golf Association* involved such a situation. The insurance policy in question covered members of the Professional Golfers Association. Gerald Hall, a golf pro employed by the local park department, was afforded coverage under the policy, which excluded "bodily injury to any employee of the insured arising out of and in the course of his employment by the insured."

That is, no employee of Hall's would be covered (rather, any such person would have coverage under workers' compensation statutes). Bradley Martin, age thirteen, was at the golf course for junior league play. At Hall's request, he agreed to retrieve or "shag" golf balls to be hit during a lesson Hall was giving; he was—as Hall put it—to be compensated "either through golf instructions or money or hotdogs or whatever." During the course of the lesson, a golf ball hit by Hall hit young Martin in the eye.

If Martin was an employee, the insurance company would be liable; if he was not an employee, the insurance company would not liable. The trial court determined he was not an employee. The evidence showed: sometimes the boys who "shagged" balls got paid, got golfing instructions, or got food, so the question of compensation was ambiguous. Martin was not directed in how to perform (the admittedly simple) task of retrieving golf balls, no control was exercised over him, and no equipment was required other than a bag to collect the balls: "We believe the evidence is susceptible of different inferences.…We
cannot say that the decision of the trial court is against the manifest weight of the evidence."

Creation of the Agency Relationship

The agency relationship can be created in two ways: by agreement (expressly) or by operation of law (constructively or impliedly).

Agency Created by Agreement

Most agencies are created by contract. Thus the general rules of contract law covered in "Introduction to Contract Law" through "Remedies" govern the law of agency. But agencies can also be created without contract, by agreement. Therefore, three contract principles are especially important: the first is the requirement for consideration, the second for a writing, and the third concerns contractual capacity.

Consideration

Agencies created by consent—agreement—are not necessarily contractual. It is not uncommon for one person to act as an agent for another without consideration. For

example, Abe asks Byron to run some errands for him: to buy some lumber on his account at the local lumberyard. Such a gratuitous agency gives rise to no different results than the more common contractual agency.

Formalities

Most oral agency contracts are legally binding; the law does not require that they be reduced to writing. In practice, many agency contracts are written to avoid problems of proof. And there are situations where an agency contract must be in writing: (1) if the agreed-on purpose of the agency cannot be fulfilled within one year or if the agency relationship is to last more than one year; (2) in many states, an agreement to pay a commission to a real estate broker; (3) in many states, authority given to an agent to sell real estate; and (4) in several states, contracts between companies and sales representatives.

Even when the agency contract is not required to be in writing, contracts that agents make with third parties often must be in writing. Thus Section 2-201 of the Uniform Commercial Code specifically requires contracts for the sale of goods for the price of five hundred dollars or more to be in writing and "signed by the party against whom enforcement is sought or by his authorized agent."

Capacity

A contract is void or voidable when one of the parties lacks capacity to make one. If both principal and agent lack capacity—for example, a minor appoints another minor to negotiate or sign an agreement—there can be no question of the contract's voidability. But suppose only one or the other lacks capacity.

Generally, the law focuses on the principal. If the principal is a minor or otherwise lacks capacity, the contract can be avoided even if the agent is fully competent. There are, however, a few situations in which the capacity of the agent is important. Thus a mentally incompetent agent cannot bind a principal.

Agency Created by Operation of Law

Most agencies are made by contract, but agency also may arise impliedly or apparently.

Implied Agency

In areas of social need, courts have declared an agency to exist in the absence of an agreement. The agency relationship then is said to have been implied "by operation of law." Children in most states may purchase necessary items—food or medical services—on the parent's account. Long-standing social policy deems it desirable for the head of a family to support his dependents, and the courts will put the expense on the family head in order to provide for the dependents' welfare. The courts achieve this result by supposing the dependent to be the family head's agent, thus allowing creditors to sue the family head for the debt.

Implied agencies also arise where one person behaves as an agent would and the "principal," knowing that the "agent" is behaving so, acquiesces, allowing the person to hold himself out as an agent. (*Weingart v. Directoire Restaurant)*

Apparent Agency

Suppose Arthur is Paul's agent, employed through October 31. On November 1, Arthur buys materials at Lumber Yard—as he has been doing since early spring—and charges them to Paul's account. Lumber Yard, not knowing that Arthur's employment terminated the day before, bills Paul. Will Paul have to pay? Yes, because the termination of the agency was not communicated to Lumber Yard. It *appeared* that Arthur was an authorized agent. This issue is discussed further in "Liability of Principal and Agent; Termination of Agency".

Agents are classified in various ways according to the point of view adopted. From the viewpoint of the authority they have, they can be classified as special agents, general agents and universal agents. They are classified as mercantile or commercial agents and non-mercantile or noncommercial agents. There are different various types of kind agents are as follows.

(a.)Sub-Agent:

Sub-agency denotes delegation of power by an agent to a person appointed by him as sub-agent. Incidentally the agent himself is delegate of his principal. The principal is that 'a delegate cannot delegate'. According to this, a person to whom powers have been

delegate cannot delegate them to another. Section 190 of the Act. Contains this principle. Generally, an agent cannot lawfully employ another to perform acts, which he has expressly. But, if by the ordinary custom of trade, a sub-agent may be employed, the agent may to do so.

A sub-agent, according to section 191, is a person whom the original agent employs in the business of the agency and who under the control of the original agent. Thus the relation of the sub-agent to the original agent is, as between themselves, that of the agent and the principal.

We shall now discuss the Impact of the appointment of a sub-agent from the Following two angles:-

(i.) **In case of proper appointment:**

The agent is responsible to the principal for the acts of the sub-agent. Thus, a commission agent for the sale of goods who makes a proper employment of a sub-agent for selling his principal's goods is liable to the principal for the fraudulent disposition of the goods by sub-agent within the course of his employment.

(ii.) **In the case of appointment without authority:**

In term of Section 193, the principal is not bound by the acts of the sub-agent, nor is the sub-agent liable to the principal. The agent is the principal of the sub-agent both to the principal and the third party.

(b.) Substituted Agent:

Substituted agents are different from sub-agents. Section 194 provides that substituted agents are not sub-agents but are in fact agents of the principal. Suppose an agent has an implied authority to name another person to act for the principal in the business of the agency, and he has named another person accordingly. In the circumstances, such a named person is not a sub-agent he is an agent of the principal for such part of the business of the agency as has been entrusted to him. ***For Example:*** A directs B who is a solicitor to sell his estate by auction and to employ an auctioneer for the purpose. B names C, an auctioneer, to

conduct the sale. In such a situation, C is not sub-agent, but is A's agent for the sale.

(c.) Special Agents:

A special agent is also known as a specific or particular agent. Such agent appointed to perform a particular work or to represents his principal in particular transaction only. As soon as the said period lapses, the agency stands terminated. Specific agents have a limited authority and as soon as the entrusted to him is performed, his authority also comes to an end.

A special agent cannot bind his principal in any act other than for which he is specially appointed. If he does anything outside his authority, his principal cannot be bound by it. The third parties that deal with a special agent must ascertain the extent of the authority he has.

(d.) General agents:

This type of agents has a general authority to do everything in the course of his agency and he has to perform all the acts in the interest of his principal. Thus, a general agent is one that ahs authority to do all acts connected with the business of his principal. A manager of a branch shop of a firm or a commission agent is instances of general agents. General agents have an implied authority to bind his principal by doing various acts necessary for carrying on the business of his principal. Sufficiently wide powers are vested in him to affect the business deals, enter into trade bargains, to make purchases and also payments of the purchases, to receive money on behalf of his principal.

(e.) Universal Agent:

A universal agent has a universal or an unlimited power to act on behalf of his principal. A universal agent is one whose authority is unlimited and who can do any act on behalf of his principal provide such act is legal and is agreeable to the law of land. A universal agent is practically substituted for his principal for all those transactions wherein his principal cannot participate. ***For Example:*** When a person leaves his

country for a long time, he may appoint his son, wife or friend as his universal agent to act on his behalf in his absence.

(f.) Co-Agents:

When a principal appoints two or more persons a agents jointly or severally, such agents are known as co-agents. Their authority is joint when nothing is mentioned about the exercise of their authority. It implies that all co-agents concur in the exercise of their authority unless their authority is fixed. But when their authority is several, any one of the co-agents can act without the concurrence of other.

(f.) Auctioneers:

An auctioneers is a mercantile agent who is appointed to sell goods on behalf of the principal i.e., seller and for this function, an auctioneer get a reward in the form of a commission. An auctioneer conducts auction on behalf of a seller, as he is primarily the agent of the seller. However, after the sale, he also becomes of the purchaser who gives the highest bid. An auctioneer has no authority to self-the goods of his principal by private contract or contracts. Besides the above mentioned agents, there are other types of agents also such as brokers, bankers, clearing agents, forwarding agents, underwriter, estate agents, etc. They also play an important role and perform various functions for and on behalf of their principals.

DUTIES OF AN AGENT

- Work according to the directions given by the Principal.

Pannalal Jankidas V Mohanlal (1951)

Agent purchases goods on behalf of principal-stored in godown pending their dispatch-did not follow instructions of principal to insure them-goods lost in explosion in Bombay harbor – Govt paid 50% in respect of uninsured merchandise-rest to be borne by agent

- Carry out the work with reasonable care skill and diligence.
- Render proper accounts.
- Communicate with Principal in case of difficulty.
- Not to deal on his own account.

- Pay Principal all sums received on his account.
- Protect and preserve interests of Principal in case of death or insolvency.
- Not to use information against the Principal.

  Not to make any secret profit.

Can an agent delegate authority?

A person to whom authority has been given cannot delegate that authority to another. (Reason being; when the Principal appoints a particular agent to act on his behalf, he relies upon the agent's skill, integrity & competence.)

When can a sub - agent be appointed?

- When there is a custom of trade.
- Nature of work is such that a sub-agent must be appointed.
- Express or implied permission.
- Ministerial acts (clerical or routine work).
- Emergency.

Substituted agent

When an agent has an express or implied authority of his principal to name a person to act for him and the agent has accordingly named a person, such a person is not a sub-agent, but he becomes an agent for the principal in respect of the business entrusted to him.

Rights & duties of principal

- Duties of the Agent become the rights of the Principal
- Rights of the Agent become the duties of the Principal

Termination of agency

- By Principal revoking the Agent's Authority.
- By the Agent renouncing the business of agency.
- Either the Principal or Agent dying or becoming of unsound mind.
- When Principal is adjudged insolvent.

Irrevocable agency

When:

- The agency is coupled with interest (the interest of the agent exists at the time of the creation of agency).
- The agent has incurred a personal liability.
- The agent has partly exercised his authority.

Partnerships and companies

This has become a more difficult area as states are not consistent on the nature of a partnership. Some states opt for the partnership as no more than an aggregate of the natural persons who have joined the firm. Others treat the partnership as a business entity and, like a corporation, vest the partnership with a separate legal personality. Hence, for example, in english law, a partner is the agent of the other partners whereas, in scots law where there is a separate personality, a partner is the agent of the partnership. This form of agency is inherent in the status of a partner and does not arise out of a contract of agency with a principal. The english partnership act 1890 provides that a partner who acts within the scope of his actual authority (express or implied) will bind the partnership when he does anything in the ordinary course of carrying on partnership business. Even if that implied authority has been revoked or limited, the partner will have apparent authority unless the third party knows that the authority has been compromised.

Hence, if the partnership wishes to limit any partner's authority, it must give express notice of the limitation to the world. However, there would be little substantive difference if english law was amended: partners will bind the partnership rather than their fellow partners individually. For these purposes, the knowledge of the partner acting will be imputed to the other partners or the firm if a separate personality. The other partners or the firm are the principal and third parties are entitled to assume that the principal has been informed of all relevant information. This causes problems when one partner acts fraudulently or negligently and causes loss to clients of the firm. In

most states, a distinction is drawn between knowledge of the firm's general business activities and the confidential affairs as they affect one client.

Thus, there is no imputation if the partner is acting against the interests of the firm as a fraud. There is more likely to be liability in tort if the partnership benefited by receiving fee income for the work negligently performed, even if only as an aspect of the standard provisions of vicarious liability. Whether the injured party wishes to sue the partnership or the individual partners is usually a matter for the plaintiff since, in most jurisdictions, their liability is joint and several.

Contract negotiation and promotion (business management) such as for publishing, fashion model, music, movies, theatre, show business, and sport.

An agent in commercial law (also referred to as a manager) is a person who is authorized to act on behalf of another (called the principal or client) to create a legal relationship with a third party

Agency relationship in a real estate transaction. real estate transactions refer to real estate brokerage, and mortgage brokerage. In real estate brokerage, the buyers or sellers are the principals themselves and the broker or his salesperson who represents each principal is his agent

Conditions before an agency of necessity may arise

1. The course taken was the only practicable one under the circumstances. The agent of necessity had no opportunity in the time available of communicating with the principal.
2. The agent of necessity had **acted in good faith (honestly)** in the interests of his principal.
3. The agent's action is **necessary to prevent further losses to the principal.**

The class of people who may claim to be agents of necessity is deliberately kept narrow and restricted by the courts.

DIFFERENT KINDS OF AGENCY

- Bankers
- Brokers
- Auctioneers
- Factors (agent to whom goods are consigned for sale purposes.)
  - Real Estate Agents
  - Solicitors
  - Del credere agents

Classification according to Extent of Authority

1. **Universal Agent:** A general agent with extensive powers to do all acts which a principal may personally do. The principal rarely awards such degree of power unless there are compelling and exceptional circumstances. This kind of agency is created by deed in the form of a General Power of Attorney.
2. **General Agent:** This is an agent who is employed on behalf of the principal to conduct a particular trade or business. The agent has power to do all that is usual in the ordinary course of his business or trade.
3. **Special Agent:** A special agent is appointed to perform a specific task or for a specific purpose and his authority is limited to the extent of that task, act or purpose.

Classification according to Functions

1. **Del credere agents**: These are agents who, in consideration for extra commission, undertake that the third party, will perform his obligations. Failure by the third party to perform his obligations under the contract will become the liability and responsibility of the del credere agents.
2. **Factors**: They are commercial agents entrusted with the goods of his principal for sale. They sell the goods under their own names without mentioning the principal. They hold a lien over the goods in their possession.
3. **Brokers**: Commercial agents employed to make contracts between the principal and third parties in return for a commission called a brokerage fee. The brokers do not contract in their own name and is usually not entrusted with possession of

the property. Their duties are limited to finding purchasers for the products to be sold.

4. **Auctioneers**: Agents who are employed to sell goods of the seller by auction. They start off as agents of the seller but when they accept a bid from a buyer, they become agents of the buyer also. They have a discretion as to the selling price but this discretion may be limited by the imposition of a minimum or reserve price set by the seller. The auctioneers are liable for damages should they sell goods below the reserve price. However, the contract remains binding on the seller unless the buyer has prior knowledge of the auctioneer's restriction.
5. **Bankers**: The bankers are agents for the customers. When they receive money from the customers, they are regarded as debtors in the sense that they are borrowing money from the customers. When bankers advances loans to the customers, they are creditors lending money to the customers who then become debtors.

The employees of a bank are agents for the bank. Their duties are to their employer, the bank, which in turn owes a duty to the customers. The bank as the employer becomes vicariously liable for torts committed by its employees in the course of their businesses.

DUTIES OF PRINCIPAL AND AGENT

Duties of an Agent to his Principal

1. To obey the principal's instructions
2. In the absence of instructions from the principal. To act according to the prevailing customs of that business
3. To exercise care and diligence in carrying out his work and to use such skill as he possesses
4. To render proper accounts when required
5. To pay to his principal all sums received on his behalf
6. To communicate with the principal

7. Not to let his own interest conflict with his duty
8. Not to make secret profits out of the performance of his duty.
9. Not to disclose confidential information or documents entrusted to him by the principal
10. Not to delegate his authority

Duties of Principal to his Agent

1. To pay the agent the commission or other agreed remuneration unless the agency relationship is gratuitous
2. Not to willfully prevent or hinder the agent from earning his commission
3. To indemnify and reimburse the agent for acts done in the exercise of his duties

TERMINATION OF THE AGENCY RELATIONSHIP

- Agreement of Parties.
  - Contract between principal and agent state when it will end.
- Agency at Will.
  - Terminable at any time by either party after notice.
- Fulfillment of the Agency Purpose.
  - Completion of work terminates
- Revocation.
  - Principals revoke authority of agents to act on their behalf.
- Renunciation.
  - Agent notifies principal they quit.
- Operation of Law.
  - Termination occurs automatically:
    - Upon death of agent or principal.
    - Either party becomes insane.
    - Principal becomes bankrupt.
    - Agent becomes bankrupts, if bankruptcy affects the agency.
    - Agency cannot be performed.

- Unforeseen events destroy the agency relationship.

- Importance of Notice.
  - Early termination by either party, except by operation of law, requires notice.
  - Actual or constructive notice may be acceptable.
- Breach of Agency Agreement.

If principal wrongfully revokes agent's authority, agent can sue for breach of express or implied contract.

SALE OF GOODS ACT, 1930

Sale of Goods Act is one of very old mercantile law. Sale of Goods is one of the special types of Contract. Initially, this was part of Indian Contract Act itself in chapter VII (sections 76 to 123). Later these sections in Contract Act were deleted, and separate Sale of Goods Act was passed in 1930.

The Sale of Goods Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of Sale of Goods also. Basic requirements of contract i.e. offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration etc. apply to contract of Sale of Goods also.

CONTRACT OF SALE

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

Thus, following are essentials of contract of sale - * It is contract, i.e. all requirements of 'contract' must be fulfilled * It is of 'goods' * Transfer of property is required * Contract is between buyer and seller * Sale should be for 'price' * A part owner can sale his part to another part-owner * Contract may be absolute or conditional.

HOW CONTRACT OF SALE IS MADE

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed. [section 5(1)]. Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of

mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. [section 5(2)]. Thus, credit sale is also a 'sale'. A verbal contract or contract by conduct of parties is valid. e.g. putting goods in basket in super market or taking food in a hotel.

TWO PARTIES TO CONTRACT

Two parties are required for contract. "Buyer" means a person who buys or agrees to buy goods. [section 2(1)]. "Seller" means a person who sells or agrees to sell goods. [section 2(13)]. A part owner can sale his part to another part-owner. However, if joint owners distribute property among themselves as per mutual agreement, it is not 'sale' as there are no two parties.

CONTRACT OF SALE INCLUDES AGREEMENT TO SALE

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. [section 4(3)]. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. [section 4(4)]. The provision that contract of sale includes agreement to sale is only for the purposes of rights and liabilities under Sale of Goods Act and not to determine liability of sales tax, which arises only when actual sale takes place.

TRANSFER OF PROPERTY

"Property" means the general property in goods, and not merely a special property. [section 2(11)]. In layman's terms 'property' means 'ownership'. 'General

Property' means 'full ownership'. Thus, transfer of 'general property' is required to constitute a sale. If goods are given for hire, lease, hire purchase or pledge, 'general property' is not transferred and hence it is not a 'sale'.

POSSESSION AND PROPERTY

Note that 'property' and 'possession' are not synonymous. Transfer of possession does not mean transfer of property. e.g. - if goods are handed over to transporter or godown keeper, possession is transferred but 'property' remains with owner. Similarly, if goods remain in possession of seller after sale transaction is over, the 'possession' is with seller, but 'property' is with buyer.

GOODS

"Goods" means every kind of movable property other than actionable claims and money; and includes stock 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. [section 2(7)].

PRICE

"Price" means the money consideration for a sale of goods. [section 2(10)]. Consideration is required for any contract. However, in case of contract of sale of goods, the consideration should be 'price' i.e. money consideration.

ASCERTAINMENT OF PRICE

The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. [section 9(1)]. Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. [section 9(2)].

CONDITIONS AND WARRANTIES

Opening para of section 16 makes it clear that there is no implied warranty or condition as to quality of fitness of goods for any particular purpose, except those

specified in Sale of Goods Act or any other law. - - This is the basic principle of caveat emptor' i.e. buyer be aware. However, there are
certain stipulations which are essential for main purpose of the contract of sale of goods. These go the root of contract and non-fulfilment will mean loss of foundation of contract. These are termed as 'conditions'. Other stipulations, which are not essential are termed as 'warranty'. These are collateral to contract of sale of goods. Contract cannot be avoided for breach of warranty, but aggrieved party can claim damages. - - A breach of condition can be treated as breach of warranty, but vice versa is not permissible.

A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. [section 12(1)]. 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. [section 12(2)]. 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. [section 12(3)]. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. [section 12(4)].

Where a particular stipulation in contract is a condition or warranty depends on the interpretation of terms of contract. Mere stating 'Conditions of Contract' in agreement does not mean all stipulations mentioned are 'conditions' within meaning of section 12(2).

When condition to be treated as warranty - Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated. [section 13(1)]. Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the

contract, express or implied, to that effect. [section 13(2)]. Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility or otherwise. [section 13(3)].

TIME OF PAYMENT IS NOT ESSENCE OF CONTRACT BUT TIME OF DELIVERY OF GOODS IS, UNLESS SPECIFIED OTHERWISE

Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. [section 11]. As a general rule, time of payment is not essence of contract, unless there is specific different provision in Contract. In other words, time of payment specified is 'warranty'. If payment is not made in time, the seller can claim damages but cannot repudiate the contract.

CAVEAT EMPTOR

The principle termed as 'caveat emptor' means 'buyer be aware'. Generally, buyer is expected to be careful while purchasing the goods and seller is not liable for any defects in goods sold by him. This principle in basic form is embodied in section 16 that subject to provisions of Sale of Goods Act and any other law, there is no implied condition or warranty as to quality or fitness of goods for any particular purpose. As per section 2(12), "Quality of goods" includes their state or condition.

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

Transfer of general property is required in a sale. 'Property' means legal ownership. It is necessary to decide whether property in goods has transferred to buyer to determine rights and liabilities of buyer and seller. Generally, risk accompanies property in goods i.e. when property in goods passes, risk also passes. If property in goods has already passed on to buyer, seller cannot stop delivery of goods even if in the meanwhile buyer has become insolvent. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. [section 18].

PROPERTY PASSES WHEN INTENDED TO PASS

Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. [section 19(1)]. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. [section 19(2)]. Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. [section 19(3)].

SPECIFIC GOODS IN A DELIVERABLE STATE

Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. [section 20].

AUCTION SALE

Auction sale is special mode of sale. The sale is made in open after making public announcement. Buyers assemble and make offers on the spot. Person offering to pay highest price gets the goods. Usually, auctioneer is appointed to conduct auction. Higher and higher bids are offered and sale is complete when auctioneer accepts a bid.- - - In the case of a sale by auction— (1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale; (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid; (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction; (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer; (5) the sale may be notified to be subject to a reserved or upset price; (6) if the seller

makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer. [section 64].

DELIVERY OF GOODS TO BUYER

The Act makes elaborate provisions regarding delivery of goods to buyer. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. [section 31]. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods. [section 32]. - - Note that this is 'unless otherwise agreed', i.e. buyer and seller can agree to different provisions in respect of payment and delivery.

ACCEPTANCE OF GOODS BY BUYER

Contract of Sale is completed not by mere delivery of goods but by acceptance of goods by buyer. 'Acceptance' does not mean mere receipt of goods. It means checking the goods to ascertain whether they are as per contract. Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. [section 41(1)]. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. [section 41(2)].

Buyer's and Seller's duties - The Act casts various duties and grants certain rights on both buyer and seller.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

After goods are sold and property is transferred to buyer, the only remedy with seller is to approach Court, if the buyer does not pay. Seller has no right to take forceful possession of goods from buyer, once property in goods is transferred to him. However, the Act gives some rights to seller if his dues are not paid.

SUITS FOR BREACH OF THE CONTRACT

Unpaid seller can exercise his rights to the extent explained above. In addition, seller can exercise following rights in case of breach of contract. Buyer has also rights in case of breach of contract.

MEASURE FOR COMPENSATION AND DAMAGES

The Sale of Goods Act does not specify how to measure damages. However, since the Act is complimentary to Contract Act, measure of compensation and damages will be as provided in sections 73 and 74 of Contract Act.

SALE AND AGREEMENT TO SELL

1. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
2. A contract of sale may be absolute or conditional
3. Where under a contract of sale the property in the goods in transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
4. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Contract of Sale how made.

- A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by installments, or that the delivery or payment or both shall be postponed.
- Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

"Unpaid seller" defined.-

1. The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act-
    a. When the whole of the price has not been paid or tendered.
    b. When a bill of exchange or other negotiable instrument has been received as conditional payment, and the conditions on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.
2. In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Termination of lien.-

1. The unpaid seller of goods losses his lien thereon -
    a. When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.
    b. When the buyer or his agent lawfully obtains possession of the goods
    c. By waiver thereof.
2. The unpaid seller of goods, having a lien thereon, not lose his lien by reason only that he has obtained a decree for the price of the goods.

Right of stoppage in transit.-

Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

How stoppage in transit is effected.-

- The unpaid seller may exercise his right to stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the later case the notice, to be effectual, shall be given at such time and in such circumstances, that the principal, by the exercise of reasonable diligence, may communicate is to his servant or agent in time to prevent a delivery to the buyer.
- Whether notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery shall be borne by the seller.

The law relating to sale of goods is contained in the Sale of Goods Act, 1930. It has to be read as part of the Indian Contract Act, 1872 [Sections 2(5) and (3)].

Contract of Sale of Goods

According to Section 4, a contract of sale of goods is a contract whereby the seller:

(i) transfers or agrees to transfer the property in goods

(ii) to the buyer,

(iii) for a money consideration called the price.

It shows that the expression "contract of sale" includes both a sale where the seller transfers the ownership of the goods to the buyer, and an agreement to sell where the ownership of goods is to be transferred at a future time or subject to some conditions to be fulfilled later on.

The following are thus the essentials of a contract of sale of goods:

(i) Bilateral contract: It is a bilateral contract because the property in goods has to pass from one party to another. A person cannot buy the goods himself.

(ii) Transfer of property: The object of a contract of sale must be the transfer of property (meaning ownership) in goods from one person to another.

(iii) Goods: The subject matter must be some goods.

(iv) Price or money consideration: The goods must be sold for some price, where the goods are exchanged for goods it is barter, not sale.

(v) All essential elements of a valid contract must be present in a contract of sale.

Distinction between Sale and Agreement to Sell

The following points will bring out the distinction between sale and an agreement to sell:

(a) In a sale, the property in the goods sold passes to the buyer at the time of contract so that he becomes the owner of the goods. In an agreement to sell, the ownership does not pass to the buyer at the time of the contract, but it passes only when it becomes sale on the expiry of certain time or the fulfilment of some conditions subject to which the property in the goods is to be transferred.

(b) An agreement to sell is an executory contract, a sale is an executed contract.

(c) An agreement to sell is a contract pure and simple, but a sale is contract plus conveyance.

(d) If there is an agreement to sell and the goods are destroyed by accident, the loss falls on the seller. In a sale, the loss falls on the buyer, even though the goods are with the seller.

(e) If there is an agreement to sell and the seller commits a breach, the buyer has only a personal remedy against the seller, namely, a claim for damages. But if there has been a sale, and the seller commits a breach by refusing to_ deliver the goods, the buyer has not only a personal remedy against him but also the other remedies which an owner has in respect of goods themselves such as a suit for conversion or detinue, etc.

Sale and Bailment

A "bailment" is a transaction under which goods are delivered by one person (the bailor) to another (the bailee) for some purpose, upon a contract that they be returned

or disposed of as directed after the purpose is accomplished (Section 148 of the Indian Contact Act, 1872).

The property in the goods is not intended to and does not pass on delivery though it may sometimes be the intention of the parties that it should pass in due course. But where goods are delivered to another on terms which indicate that the property is to pass at once the contract must be one of sale and not bailment.

Sale and Contract for Work and Labour

The distinction between a "sale" and a "contract for work and labour" becomes important when question of passing of property arises for consideration.

However. these two are difficult to distinguish. The test generally applied is that if a,s a result of the contract, property in an article is transferred to one who had no property therein previously, for a money consideration, it is.a sale. where it is otherwise it is a contract for work and labour.

Sale and Hire Purchase Agreement

"Sale", is a contract by which property in goods passes from the seller fb the buyer for a price.

A "hire purchase agreement' is basically a contract of hire, but in addition, it g!ves the hirer an option to purchase the goods at the end of the hiring period. Consequently, until the final payment, the hirer is merely a bailee of goods and ownership remains vested in the bailor. Under such a contract, the owner of goods delivers the goods to person who agrees to pay certain stipulated periodical payments as hire charges. Though the possession is with the hirer, the ownership of the goods remains with the original owner. The essence of hire purchase agreement is that there is no agreement to buy, but only an option is given to the hirer to buy by paying all the instalments or put an end to the hiring and return the goods to the owner, at any time before the exercise of the option.

Since the hirer does not become owner of the goods until he has exercised his option to buy, he cannot pass any title even to an innocent and bona fide purchaser.

The transaction of hire-purchase protects the owner of the goods against the insolvency of the buyer, for if the buyer becomes insolvent or fails to pay the instalments, he can take back the goods, as owner. And if the hirer declines to take delivery of the goods, the remedy of the owner will be in damages for non-hiring and not for rent for the period agreed.

It is important to note the difference between a hire purchase agreement and mere payment of the price by instalments, because the latter is a sale, only the payment of price is to be made by instalments.

The distinction between the two is very important because, in a hire-purchase agreement the risk of loss or deterioration of the goods hired lies with the owner and the hirer will be absolved of any responsibility therefore, if he has taken reasonable care to protect the same as a bailee. But it is otherwise in the case of a sale where the price is to be paid in instalments.

Subject matter of Contract of Sale of Goods Goods

The subject matter of the contract of sale is essentially goods. Acc9rding to Section 2(7) "goods'" means every kind of movable property' other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale. .

Actionable claims and money are not goods and cannot be brought and sold under this Act. Money means current money, i.e., the recognised currency in circulation in the country, but not old and rare coins which may be treated as goods. An actionable claim is what a person cannot make a present use of or enjoy, but what can be recovered by him by means of a suit or an action. Thus, a debt due to a man from another is an actionable claim and cannot be sold as goods, although it can be assigned. Under the provisions of the Transfer of Property Act, 1882, goodwill, trade marks, copyrights, patents are all goods, so is a ship. As regards water, gas, electricity, it is doubtful whether they are goods (Rash Behari v. Emperor,

(1936) 41 C.W.N.225; M.B. Electric Supply Co. Ltd. v. State of Rajasthan, AIR (1973) RaJ. 132).

Goods may be (a) existing, (b) future, or (c) contingent. The existing goods may I be (i) specific or generic, (ii) ascertained or unascertained. Existing Goods

Existing goods are goods which are either owned or possessed by the seller at the time of the contract. Sale of goods possessed but not owned by the seller would' be by an agent or pledgee.

Existing goods are specific goods which are identified and agreed upon at the time of the contract of sale. Ascertained goods are either specific goods at the time of the contract or are ascertained or identified to the contract later on i.e. made specific.

Generic or unascertained goods are goods which are not specifically identified but are indicated by description. If a merchant agrees to supply a radioset from his stock of radio sets, it is a contract of sale of unascertained goods because it is not known which set will be delivered. As soon as a particular set is separated or identified for delivery' and the buyer has notice of it, the goods are ascertained and become specific goods.

Future Goods

Future goods are goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. A agrees to sell all the mangoes which will be produced in his garden next season. This is an agreement for the sale of future goods. [Section 2(6)]

Contingent Goods

Where there is a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which mayor may not happen - such goods are known as contigent goods. Contigent goods fall in the class of future goods. A agrees to sell a certain TV set provided he is able to get it from its present owner. This is an agreement to sell contigent goods. In such a case, if the contingency- does not happen for no fault of the seller, he will not be liable for damages.

Actual sale can take place only .of specific goods and property in goods passes from the seller to buyer at the time of the contract, provided the goods are in a

deliverable state and the contract is unconditional.

There can be an agreement to sell only in respect of future or contingent goods.

Effect of Perishing of Goods

In a contract of sale of goods, the goods may perish before sale is complete. Such a stage may arise in the following cases: (i) Goods perishing before making a contract Where in a contract of sale of specific goods, the goods without the knowledge of the seller have, at the time of making the contract perished or become so damagedas no longer to their description in the contract, the contract is void. This is based on the rule that mutual mistake of fact essential to the contract renders the contract void. (Section 7)

If the seller was aware of the destruction and still entered into the contract, he is estopped from disputing the contract. Moreover, perishing of goods not only includes loss by theft but also where the goods have lost their commercial value.

(ii) Goods perishing atter agreement to sell

Where there is an agreement to sell specific goods and subsequently, the goods without any fault of any party perish or are so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided. The provision applies only to sale of specific goods. If the sale is of unascertained goods. the perishing of the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver. (Section 8)

Price

No sale can take place without a price. Thus, if there is no valuable consideration to support a voluntary surrender of goods by the real owner to another person, the transaction is a gift, and is not governed by the Sale of Goods Act. Therefore, price. which is money consideration for the sale of goods, constitutes the essence for a contract of sale. It may be money actually paid or promised to b/3 paid. If a consideration other than money is to be given, it is not a sale.

Modes of Fixing Price (Sections 9 and 10)

The price may be fixed:

(i) at the time of contract by the parties themselves, or

(ii) may be left to be determined by the course of dealings between the parties, or

(iii) may be left to be fixed in some way stipulated in the contract, or

(iv) may be left to be fixed by some third-party.

Where the contract states that the price is to be fixed by a third-party and he fails to do so, the contract is void. But if the buyer has already taken the benefit of the goods, he must pay a reasonable price for them. If the third-party's failure to fix the price is due to the fault of one of the parties, then that party is liable for an action for damages.

Where nothing is said by the parties regarding price, the buyer must pay a reasonable price, and the market price would be a reasonable price.

Conditions and Warranties (Sections 10-17)

The. parties are at liberty to enter into a contract with any terms they please. As a rule, before a contract of sale is concluded, certain statements are made by the parties to each other. The statement may amount to a stipulation, forming part of the contract or a mere expression of opinion which is not part of the contract. If it is a statement by the seller on the reliance of which the buyer makes the contract, it will amount to a stipulation. If it is a mere commendation by the seller of his goods it does not amount to a stipulation and does not give the right of action. .

Conditions

If the stipulation forms the very basis of the contract or is essential to the main purpose of the contract. it is a condition. The breach of the condition gives the aggrieved party a right to treat the contract as repudiated. Thus, if the seller fails to fulfil a condition, the buyer may treat the contract as repudiated, refuse the goods and. if he has already paid for them, recover the price. He can also claim damages for the breach of contract. Warranties

If the stipulation is collateral to the main purpose of the contract, i.e.. is a subsidiary promise, it is a warranty. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the contract but can only claim damages. Thus, if the

seller does not fulfil a warranty. the buyer must accept the goods and claim damages for breach of warranty.

Section 11 states that the stipulation as to time of payment are not to be deemed conditions (and hence not to be of the essence of a contract of sale) unless such an intention appears from the contract. Whether any other stipulation as to time (e.g., time of delivery) is the essence of the contract or not depends on the terms of the contract.

When condition sinks to the level of warranty

In some cases a condition sinks or descends. to the level of a warranty. The first two cases depend upon the will of the buyer. but the third is compulsory and acts as estoppel against him.

(a) A condition will become a warranty where the buyer waives the condition, or

(b) A cond ition will sink to the level of a warranty where the buyer treats the breach of condition as a breach of warranty; or

(c) Where the contract is indivisible and the buyer has accepted the goods or part thereof. the breach of condition can only be treated as breach of warranty: The buyer can only claim damages and cannot reject the goods or treat the contract as repudiated.

Sometimes the seller may be excused by law from fulfilling any condition or warranty and the buyer will not then have a remedy in damages.

Even where no definite representations have been made, the law implies certain representations as having been made which may be warranties or conditions. An express warranty or condition does not negative an implied warranty or condition unless inconsistent therewith.

There are two implied warranties:

Implied Warranties [Section 14(b), 14(c) and 16(3)]

(a) Implied warranty of quiet possession: If the circl!mstances of the contract are such as there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(b) Implied warranty against encumbrances: There is a further warranty that the goods are not subject to any right in favour of a third-party, or the buyer's possession shall not be disturbed by reason of the existence of encumbrances.

This means that if the buyer is required to, and does discharge the amount of the encumbrance, there is breach of warranty, and he is entitled to claim damages from the seller.

Implied Conditions [Sections 14(a), 15(1), (2), 16(1) and Proviso 16(2), and Proviso 16(3) and 12(b) and 12(c)].

Different implied conditions apply under different types of contracts of sale of goods, such as sale by description, or sale by sample, or sale by description as well as sample. The condition, as to title to goods applies to all types of contracts, subject to that there is apparently no other intention. Implied Conditions as to title

There is an implied condition that the seller, in an actual sale, has the right to sell the goods, and, in an agreement to sell, he will have to it when property is to pass. As a result, if the title of the seller turns out to be defective, the buyer is entitled to reject the goods and can recover the full price paid by him.

In Rowland v. Divali (1923) 2 K.B. SOD, 'A' had bought a second hand motor car from 'B' and paid for it. After he had used it for six months, he was deprived of it because the seller had no title to it. It was held that 'A' could recover the full price from 'B' even though he had used the car for six months, as the consideration had totally failed.

Implied conditions under a sale by description

In a sale by description there are the following implied conditions:

(a) Goods must correspond with description: Under Section 15, when there is a sale of goods by description, there is an implied condition that the goods shall correspond with description.

In a sale by description, the buyer relies for his information on the description of the goods giVen by the seller, e.g. in the contract or in the preliminary negotiations.

Where 'A' buys goods which he has not seen, it must be sale by description, e.g., where he buys a 'new Fiat car' from 'B' and the car is not new, he can reject the car.

Even if the buyer has seen the goods, the goods must be in accordance with the description (Beale v. Taylor (1967) All E.R. 253).

(b) Goods must also be of merchantable quality: If they are bought by description from dealer of goods of that description. [Section 16(2)].

Merchantable quality means that the goods must be such as would be acceptable to a reasonable person, having regard to prevailing conditions. They are not merchantable if they have defects which make them unfit for ordinary use, or are such that a reasonable person knowing of their condition would not buy them. 'P' bought black yarn from' '0' and, when delivered, found it damaged by the white ants. The condition of merchantability was broken.

But, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. If, however, examination by the buyer does not reveal the defect, and he approves and accepts the goods, but when put to work, the goods are found to be defective, there is a breach of condition of merchantable quality.

The buyer is given a right to examine the goods before accepting them. But a mere opportunity without an actual examination, however, cursory, would not suffice to deprive him of this right.

(c) Condition as to wholesomeness: The provisions, (i.e., eatables) supplied must not only answer the description, but they must also be merchantable and wholesome or sound. 'F' bought milk from 'A' and the milk contained typhoid. germs. 'F's wife became infected and died. 'A' was liable for damages. Again, 'C' bought a bun at 'M's bakery, and broke one of his teeth by biting on a stone present in the bun. 'M' was held liable.

(a) there is an implied condition that the bulk shall correspond with the sample in quality;

(b) there is another implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) it is further an implied condition of merchantability, as regards latent or hidden defects in the goods which would not be apparent on reasonable examination of the sample. "Worsted coating" quality equal to sample was sold to tailors, the cloth was found to have a defect in the fixture rendering 'the same unfit for stitching into coats. The seller was held liable even though the same defect existed in the sample, which was examined.

Implied conditions in sale by sample as well as by description

In a sale by sample as well as by description, the goods supplied must correspond both with the samples as well as with the description. Thus, in Nichol v. Godis (1854) 158 E.R. 426, there was a sale of "foreign refined rape-oil having warranty only equal to sample". The oil tendered was the same as the sample, but it was not "foreign refined rape-oil" having a mixture.of it and other oil. It was held that the seller was liable, and the buyer could refuse to accept.

Implied Warranties

Implied warranties are those which the law presumes to have been incorporated in the contract of sale inspite of the fact that the parties have not expressly included them in a contract of sale. Subject to the contract to the contrary, the following are the implied warranties in the contract of sale:

(i) Warranty as to quite possession: Section 14(b) provides that there is an implied' warranty that the buyer shall have and enjoy quiet possession of goods'. If the buyer's possession is disturbed by anyone having superior title than that of the seller, the buyer is entitled to hold the seller liable for breach of warranty.

(ii) Warranty as to freedom from encumbrances: Section 14(c) states that in a contract for sale, there is an Implied warranty that the goods shall be so free from any charge or encumbrances in favot,Jr of any third party not declared or noun to the buyer before or at the time when the contract is made'. But. if the buyer is aware of any encumbrance on the goods at the time of entering into the contract, he will not be entitled to any compensation from the seller for discharging the encumbrance.

(iii) Warranty to disclose dangerous nature of goods: If the goods are inherently dangerous or likely to be dangerous and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger:

(iv) Warranties implied by the custom or usage of trade: Section 16(3) provides that an implied warranty or conditions as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Doctrine of Caveat Emptor

The term caveat emptor is a Latin word which means "let the buyer beware". This principle states that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires. If he buys goods for a particular purpose, he must satisfy himself that they are fit for that purpose. Section 6 provides that "subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale". In simple words, it is not the seller's duty to give to the buyer the goods which are fit for a suitable purposeof the buyer. If he makes a wrong selection, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose. The principle was applied in the case of Ward v. Hobbs. (1878) 4 A.C. 13, where certain pigs were sold by auction and no warranty was given by seller in respect of any fault or error of description. The buyer paid the price for healthy pigs. But they were ill and all but one died of typhoid fever. They also infected some of the buyer's own pigs. It was held that there was no implied condition or warranty that the pigs were of good health. It was the buyer's duty to satisfy himself regarding the health of the pigs.

Exceptions to the doctrine of Caveat Emptor:

(1) Where the seller makes a false representation and the buyer relies on it.

(2) When the seller actively conceals a defect in the goods which is not visible on a reasonable examination of the same.

(3)

When the buyer, relying upon the skill and judgement of the seller, has expressly or impliedly communicated to him the purpose for which the goods are required.

(4) Where goods are bought by description from a seller who deals in goods of that description.

Passing of Property or Transfer of Ownership (Sections 18-20)

The sole purpose of a sale is the transfer of owneJ:ship of goods from the seller to the buyer. It is important to know the precise moment of time at which the property in the goods passes from the seller to the buyer for the following reasons:

(a) The general rule is that risk follows the ownership, whether the delivery has been made or not. If the goods are lost or damaged by accident or otherwise, then, subject to certain exceptions, the loss falls on the owner of the goods at the time they are lost or damaged.

(b) When there is a danger of the goods being damaged by the action of third parties it is generally the owner who can take action.

(c) The rights of third parties may depend upon the passing of the property if the buyer resells the goods to a third-party, the third-party will only obtain a good title if the property in the goods has passed to the buyer before or at the time of the resale. Similarly, if the seller, in breach of his contract with the buyer, attempts to sell the goods to a third party in the goods, has not passed to the buyer, e.g., where there is only an agreement to sell.

(d) In case of insolvency of either the seller or the buyer, it is necessary to know whether the goods can be taken over by the official assignee or the official receiver. It will depend upon whether the property in the goods was with the party adjudged insolvent.

Thus in this context, ownership and possession are two distinct concepts and these two can at times remain separately with two different persons.

Passing of property in specific goods

In a sale of specific or ascertained goods, the property passes to the buyer as and when the parties intended to pass. The intention must be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case.

Unless a contrary intention appears, the following rules are applicable for ascertaining the intention of the parties:

(a) Where there is an unconditional contract fC?r the sale of specific goods in a deliverable state, the property passes to the buyer when the contract is made. Deliverable state means such a state that the buyer would be bound to take delivery of the goods. The fact that the time of delivery or the time of payment is postponed does not prevent the property from passing at once. (Section 20)

(b) Where there is a contract for the sale of specific goods not in a deliverable state, i.e., the selle~ has to do something to the goods to put them in a deliverable state, the property does not pass until tpat thing _ is done and the buyer has notice of it. (Section 21)

A certain quantity of oil was brought. The oil was to be filled into casks by the seller and then taken away by the buyer. Some casks were filled in the presence of buyer but, before the remained could be filled, a fire broke out and the entire quantity of oil has destroyed, Held, the buyer must bear

the loss of the oil which was put into the casks (i.e., put in deliverable state) and. the seller must bear the loss of the remainder (Rugg v. Minett (1809) 11 East ~10).

(c) Where there is a sale of specific goods. in a deliverable state, but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of ascertaining the -price, the property to the goods for the purpose of ascertaining the price, does not pass until that thing is done and the buyer has notice of it. (Section 22)

(d) When goods are delivered to the buyer on approval or "on sale.of return", the property therein passes to the buyer:

(i) when he signified his approval or acceptance to the seller, or does any other act adopting the transaction;

(ii) if he retains the goods, without giving notice of rejection, beyond the time fixed for the return of goods, or if no time is fixed, beyond a reasonable time.

The property in unascertained or future goods does not pass until the goods are ascertained.

Unascertained goods are goods defined by description only, for example, 100 quintals of wheat, and not goods identified and agreed upon when the contract is made.

Unless a different intention 'appears, the following rilles are applicable for ascertaining the intention of the parties in regard to passing of property in' respect of such goods:

(a) The property in unascertained or future goods sold by description passes to the buyer when goods of that description and in deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller. Such assent may be express~ or implied and may be given either before or after the appropriation is made. (Section 23)

(b) If there is a sale of a quantity of goods out of a large quantity, for example, 50 quintals of rice out of a heap in B's godown, the property will pass on the appropriation of the specified quantity by one party with the assent of the other.

(c) Delivery by the seller of the goods to a carrier or other buyer for the purpose of transmission to the buyer in pursuance of the contact is an appropriation sufficient to pass the property in the goods.

(d) The property in goods, whether specific or unascertained, does not pass if the seller reserves a right of disposal of the goods. Apart from an express reservation of the right of disposal, the seller is deemed to reserve the right of disposal in the following two cases:

(i) where goods are shipped and by the bill of lading of the goods deliverable to the order or the seller or his agent.

(ii) when the seller sends the bill of exchange for the price of the goods to the buyer for this acceptance, together with the bill of lading, the property in the goods does not pass to the buyer unless he accepts the bill qf exchange. Passing of Risk (Section 26)

The general rule is that goods remain at the seller's risk until the ownership is transferred to the buyer. After the ownership has passed to the buyer, the goods are at the buyer's risk whether the delivery has been made or not. For example, 'A' buys goods of 'B' and property has passed from 'B' to 'A': but the goods remain in 'B's wareho~se and the price is unpaid. Before delivery, 'B's warehouse is burnt down for no fault of 'B' and the goods are destroyed. 'A' must pay 'B' the price of the goods, as he was the owner. The rule is resperit demino- the loss falls on the owner.

But the parties may agree that risk will pass at the time different from the time when ownership passed. For eg. the seller may agree to be responsible for the goods even after the ownership is passed to the buyer or vice versa.

In Consolidated Coffee Ltd. v. Coffee Board, (19803 see 358), one of the terms adopted by coffee board for auction of coffee was the property in the coffee',knocked down to a bidder would not pass until the p~yment of price and in the F1)eantime the . goods would remain with the seller but at the risk of the buyer, In such cases, risk and property passes on at diffenmt stages.

Transfer of Title by Person not the Owner (Section 27-30)

The general rule is that only the owner of goods. can sell th~ goods. Conversely, the sale of an article by a person who is not or who has not the authority of the owner, gives no title to ttie buyer. The rule is expressed by the maxim; "Nemo dot quod non habet" Le. no one can pass a better title than what he himself has. As applied to the sale of goods, the rule means that a seller of goods cannot give a better title ~o the buyer than he himself possess. Thus, even bona fide buyer who buys stolen goods from

a thief or from a transfree from such a thief can get no valid title to them, since the thief has no title, nor could he give one to any transferee. Example:

1. A, the hirer of goods under a hire purchase agreement, sells them to B, then B though, a bonafide purchaser, does not acquire the property in the goods. At most he can acquire such an interest as the hirer had.
2. A finds a ring of B and sells it to a third person who purchases it for value and in good faith. The true owner, Le. B can recover from that person, for A having no title to the ring could pass none the better.

Exception to the General Rule

The Act while recognizing the general rule that no one can give a better title than what he himself has, laid down important exceptions to it. Under the exceptions the. buyer gets a better title of the goods than the seller himself. These exceptions are given below:

(a) Sale by a mercantile agent: A buyer will get a good title if he buys in good faith from a mercantile agent who is in posession either of the goods or' documents of title of goods with the consent of the owner, and who sells the goods in the ordinary course of his business.

(b) Sale by a co-owner: A buyer who bllYs in good faith from one of the several joint owners who is in sale possession of the goodo with the permission of his co-owners will get good title to the goods.

(c) Sale by a person in possession under a voidable contract: A buyer buys in good faith from a person in possession of goods under a contract which is voidable, but has not been. rescinded at the time of the sale.

(d) Sale by seller in possession after sale: Where a seller, after having sold the goods, continues in possession of goods, or documents of title to the goods and again sells them by himself or through his mercantile agent to a person who buys in good faith and without notice of the previous sale, such a buyer gets a good title to the goods.

e. Sale by buyer in possession: If a person has brought or agreed to buy goods obtains, with the seller's consent, possession of the goods or of the documents of title to them, any sale by him or by his mercantile agent to a buyer who takes in good faith without notice of any lien or other claim of the original seller against the goods, will give a good title to the buyer. In any of the above cases, if the transfer is by way of pledge or pawn only, it will be valid as a pledge or pawn.

(f) Estoppel: If the true owner stands by and allows an innocent buyer to pay over money to a third-party, who professes to have the right to sell an article, the true owner will be estopped from denying the third-party's right to sell.

(g) Sale by an unpaid seller: Where an unpaid seller has exercised his right of lien or stoppage in transit and is in possession of the goods, he may resell them and the second buyer will get absolute right to the goods.

(h) Sale by person under other laws: A pawnee, on default of the pawnee to repay, has a right to sell the goods, pawned and the buyer gets a good title to the goods. The finder of lost goods can also sell under certain circumstances. The Official Assignee or Official Receiver, Liquidator, Officers of Court selling under a decree, Executors, and Administrators, all these persons are not owners, but they can convey better title than they have.

12. **Performance of the Contract of Sale**

It is the duty of the seller and buyer that the contract is performed. The duty of the sellers is to deliver the goods and that of the buyer to accept the goods and pay for them in accordance with the contract of sale.

Unless otherwise agreed, payment of the price and the delivery of the goods and concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.,

Delivery (Sections 33-39)

Delivery is the voluntary transfer of possession from one person to another.

Delivery may be actual, constructive or symbolic. Actual or physical delivery takes

place where the goods are handed over by the seller to the buyer or his agent authorised to take possession of the goods. Constructive delivery takes place when the person in possession of the goods acknowledges that he holds the goods on behalf of and at the disposal of the buyer. For example, where the seller, after having sold the goods,may hold them as bailee for the buyer, there is constructive delivery. Symbolic delivery is made by indicating or giving a symbol. Here the goods themselves are not delivered. but the "means of obtaining possession" of goods is delivered, e.g, by delivering the key of the warehouse where the goods are stored, bill of lading which will entitle the holder to receive the goods on the arrival of the ship. Rules as to delivery

The following rules apply regarding delivery of goods:

(a) Delivery should have the effect of putting the buyer in possession.

(b) The seller must deliver the goods according to the contract.

(c) The seller is to deliver the goods when the buyer applies for delivery; it is the duty of the buyer to claim delivery.

(d) Where the goods at the time of the sale are in the possession of a third person, there will be delivery only when that person acknowledges to the buyer that he holds the goods on his. behalf. .

(e) The seller should tender delivery so that the buyer ca~ take the goods. It is no duty of the seller to send or carry the goods to the buyer unless the contract so provides. But the goods must be in a deliverable state at the time of delivery or tender of delivery. If by the contract the seller is bound to send the goods to the buyer, but no time is fixed, the seller is bound to send them within a reas9nable time.

(f) The place of delivery is usually stated in the contract. Where it is so stated, the goods must be delivered at the specified place during working hours on a working day. Where no place is mentioned, the goods are to be delivered at a place at which they happen to be at the time of the contract. of sale and if not then in existence they are to be delivered at the price they are produced.

(g) The seller has to bear the cost of delivery u~less the contract otherwise provides. While the cost of obtaining delivery is said to be of the buyer, the cost of the putting the goods into deliverable state must be borne by theeseller. In other words. in the absence of an agreement to the contrary, the expenses of and incidental to making delivery of the goods must be borne by the seller, the expenses of and incidental to receiving delivery must be borne by the buyer.

(h) If the goods are to be delivered at a place other than where they are, the risk of deterioration in transit will, unless otherwise agreed, be borne by the buyer.

(i) Unless otherwise agreed, the buyer is not bound to accept delivery in instalments.

Acceptance of Goods by the Buyer

a. Acceptance of the goods by the buyer takes place when the buyer: (a) intimates to the seller that he has accepted the goods; or

(b) retains the goods, after the lapse of a reasonable time without intimating to the seller that he has rejected them; or

(c) does any act on the goods which is inconsistent with the ownership of the seller, e.g., pledges or resells. If the seller sends the buyer a larger or smaller quantity of goods than ordered, the buyer may:

(a) reject the whole; or

(b) accept the whole; or

(c) accept the quantity be ordered and reject the rest.

If the seller delivers, with the goods ordered goods of a wrong description, the buyer may accept the goods ordered and reject the rest, or reject the whole.

Where the buyer rightly rejects the goods, he is not bound to return the rejected goods to the seller. It is sufficient if he intimates to seller that he refuses to accept them. In that case, the seller has to remove them.

Instalment Deliveries

When there is a contract for the sale of goods to be delivered in stated instalments which are to be separately paid for, and either the buyer or the seller commits a

breach of contract, it depends on the terms of the contract whether the breach is a repudiation of the whole contract or a severable breach merely giving right to claim for damages.

Suits for Breach of Contract

Were the property in the goods has passed to the buyer, the seller may sue him for the price.

Where the price is payable on a certain day regardless of delivery, the seller may sue for the price, if it is not paid on that day, although the property in the goods has not passed.

Where the buyer wrongfully neglects or refuses to accept the goods and pay for them, the seller may sue the buyer for damages for non-acceptance.

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue him for damages for non-delivery.

Where there is a breach of warranty or where the buyer elects or is compelled to treat the breach of condition as a breach of warranty, the buyer cannot reject the goods. He can set breach of warranty in extinction or dimunition of the price payable by him and if loss suffered by him is more than the price he may sue for the damages.

If the buyer has paid the price and the goods are not delivered, the buyer can sue the seller for the recovery of the amount paid. In appropriate cases the buyer can also get an order from the Court that the specific goods ought to be delivered.

Anticipatory Breach

Where either party to a contract of sale repudiates the contract before the date of delivery, the other party may,either treat the contract as still subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

In case the contract is treated as still subsisting it would be for the benefit of both

the parties and the party who had originally repudiated will not be deprived of:

(a) his right of performance on the due date in spite of his prior repudiation

or

(b) his rights to set up any defence for non-performance which might have actually arisen after the date of the prior repudiation.

Measure of Damages

The Act does not specifically provide for rules as regards the measure of damages except stating that nothing in the Act shall affect the right of the seller or the buyer to recover interest or special damages in any case were by law they are entitled to the same. The inference is that the rules laid down in Section 73 of the Indian Contract Act will apply. **Unpaid Seller** (Sections 45-54)

Who is an unpaid seller? (Section 45)

The seller of goods is deemed to be unpaid seller:

(a) When the whole of the price has not bee~ paid or tendered;

or

(b) When a conditional payment was made by a bill of exchange or other negotiable instrument, and the instrument has been dishonoured.

(a) A lien or right of retention

(b) The right of stoppage in transit.

(c) The right of resale.

(d) The right to withhold delivery.

(a) Lien (Sections 47-49 and 54) An unpaid seller in possession of goods sold, may exercise his lien on the goods, i.e., keep the goods in his possession and refuse to deliver them to the buyer until the fulfillment or tender of the price in cases where: the goods have been sold without stipulation as to credit; or the goods have been sold on credit, but the term of credit has expired; or the buyer becomes insolvent.

The lien depends on physical possession. The seller's lien is possessory lien, so that it can be exercised only so long as the seller is in possession of the goods. It can only be exercised for the non-payment of the price and not for any other charges.

A lien is lost

(i) When the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods;

(ii) When the buyer or his agent lawfully obtains possession of the goods;

(iii)By waiver of his lien by the unpaid seller.

(b) Stoppage in transit (Sections 50-52) The right of stoppage in transit is a right of stopping the goods while they are in transit, resuming possession of them and retaining possessiQn until payment of the price.

The right to stop goods is available to an unpaid seller

(i) when the buyer becomes insolvent; and

(ii) the goods are in transit.

The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the Court.

The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehousekeeper for the purpose of transmission to the buyer and until the buyer takes delivery of them.

The transit comes to an end in the following cases:

(i) If the buyer obtains delivery before the arrival of the goods at their destination;

(ii) If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer.

(iii) If the carrier wrongfully refuses to deliver the goods to the buyer.

If the goods are rejected by the buyer and the carrier or other bailee holds them, the transit will be deemed to continue even if the seller has refused to receive them back.

The right to stop in transit may be exercised by the unpaid seller either by taking actual possession of the goods or by giving notice of the seller's claim to the carrier or other person having control of the goods. On notice being given to the carrier hemust redeliver the goods to the seller, who must pay the e~penses of the redelivery.

The seller's right of lien or stoppage ,in transit is not affected by any sale on the part of the buyer unless the seller has assented to it. A transfer, however, of the bill of lading or other document of seller to a bona fide purchaser for value is valid against the seller's right.

(c) Right of re-sale (Section 54): The unpaid seller may re-sell:

(i) where the goods are perishable;

(ii) where the right is expressly reserved in the contract;

(iii) where in exercise of right of lien or stoppage in transit, the seller gives notice to the buyer of his intention to re-sell, and the buyer, does not payor tender the price within a reasonable time. '

If on a re-sale, there is a deficiency between the price due and amount realised, the re-seller is entitled to recover it from the buyer. If there is a surplus, he can keep it. He will not have these rights if he has not given any notice and he will have to pay the buyer any profits.

Rights to withhold delivery: If the property in the goods has passed, the unpaid seller has right as described above. If, however, the property has not passed, the unpaid seller has a right of withholding delivery similar to and co-e>..1ensive with his rights of lien and stoppage in transit. Rights of an unpaid seller against the buyer (Sections 55 and 56)

An unpaid seller may sue the buyer for the price of the goods in case of breach of contract where the property in the goods has passed to the buyer or he has wrongfully refused to pay the price according to the terms of the contract.

The seller may sue the buyer even if the property in the goods has not passed where the price is payable on a certain day.

Under Section 56, the seller may sue the buyer for damages or breach of contract where the buyer wrongfully neglects or refuses to accept and pay for the goods.

Thus an unpaid sellers rights against the buyer personally are:

(a) a suit for the price.

(b) a :suit for damages.

POSSIBLE QUESTIONS

PART B – (TWO MARKS)

1. Define the term guarantee.
2. What is discharge of duty?
3. Who may be an agent?
4. What is meant by anticipatory breach of contract?
5. Define Contract of sale
6. What do you mean by damage?
7. Define breach of contract.
8. What does condition means?
9. What are the rights of payee in contract?
10. Write a short note on Remedies for breach of contract?
11. What are the rules to be followed in rights of surety?
12. Define law of Agency.

13. Define condition and warranties.

PART C – (SIX MARKS)

1. Explain about contract of Indeminity
2. Explain about Contract of Bailment
3. Explain about contract of indemnity and guarantee.
4. Explain about contract of Agency
5. Distinguished between sale and agreement to sell
6. Discuss the rights of an unpaid seller against the goods and the buyer.
7. What does it mean by discharge of contract? Explain the various modes of discharging a contract.

UNIT – III

PARTNERSHIP LAWS

Partnership Laws: The Partnership Act, 1932-Nature and Characteristics of Partnership- Registration of a Partnership Firms- Types of Partners- Rights and Duties of Partners- Implied Authority of a Partner- Incoming and outgoing Partners- Mode of Dissolution of Partnership.

Intoduction

The need for partnership form of organization arose from the limitations of sole proprietorship. In sole proprietorship, financial resources and managerial skills are limited. One man cannot supervise personally all the business activities. Moreover, risk - bearing capacity of an individual is also limited. It is at this stage that a need for associating more persons arises. So more persons are associated to form groups to carry onbusiness.

Nature of Partnership

The partnership form of organization comes into existence in two ways. It may come into existence either as a result of expansion of the sole trading concern or two or more persons joining together through an agreement to form a partnership. In other words, it is an extension of sole tradingconcern.

History reveals that the partnership organization was started with the enactment of Partnership Act in 1907 in England. In India, the Act was approved in 1932. The Act governs the formation, management and control of various partnership firms in the country. A number of partnership enterprises are seen in market today. Examples of partnership firms are: running a cinema theatre, a book shop, chit fundsetc.

Definition ofPartnership

According to the Section 4 of Indian Partnership Act of 1932, partnership is "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all".

In the words of Prof. Haney, "partnership is the relation existing between persons, competent to make contracts, who have agreed to carry on a lawful business in common with a view to private gain".

According to Dr. William R.Spriegel, "partnership has two or more members, each of whom is responsible for obligation of the partnership. Each of the partners may bind the others and the assets of partners may be taken for the debts of the partnership".

In the words of Kimball and Kimball, "A partnership or firm as it is often called, is thus a groupof men who have joined capital or services for the prosecuting of some business".

Partnership may be defined as, "that form of business organization in which, partners agree to share the profits of a lawful business, managed and carried on either by all or by any one of them acting for all".

Partner, Firm and Firm Name

Persons who enter into partnership are individually called "Partners" and collectively called "a firm" and the name under which the business is carried on is called "firm name".

The Act also explains that persons who have entered into partnership with one another are called individually "partners" and collectively "a firm".

Characteristics of Partnership

1. Existence of an agreement:

Partnership is the outcome of an agreement between two or more persons to carry on business. This agreement may be oral or in writing. The Partnership Act, 1932 (Section 5) clearly states that "the relation of partnership arises from contract and not from status."

2. Existence of business:

Partnership is formed to carry on a business. As stated earlier, the Partnership Act, 1932 [Section 2 (6)] states that a "Business" includes every trade, occupation, and profession. Business, of course, must be lawful.

3. Sharing of profits:

The purpose of partnership should be to earn profits and to share it. In the absence of any agreement, the partner should share profits (and losses as well) in equal proportions.

Here it is pertinent to quote the Act (Section 6) which talks of the 'mode of determining existence of partnership'. It says that sharing of profits is as essential condition, but not a conclusive proof, of the existence of partnership between partners. In the following cases, persons do share profits, but are not the partners:

(a) By a lender of money to person engaged or about to engage in any business.

(b) By a servant or agent as remuneration.

(c) By the widow or child of a deceased partner, as annuity {i.e., fixed periodical payment), or

(d) By a previous owner or part-owner of the business as consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business. Thus, in determining whether a group of persons is or is not a firm, whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties as shown by all relevant facts taken together, and not by profit sharing alone.

4. Agency relationship:

The partnership business may be carried on by all or any of them acting for all. Thus, the law of partnership is a branch of the law of Agency. To the outside public, each partner is a principal, while to the other partners he is an agent. It must, however, be noted that a partner must function within the limits of authority conferred on him.

5. Membership:

The minimum number of persons required to constitute a partnership is two. The Act, however, does not mention the upper limit. For this recourse has to be taken to the Companies Act, 1956 [Section 11 (1) & (2)]. It states that the maximum number of persons is ten, in case of a banking business and twenty, in case of any other business.

6. Nature of liability:

The nature of liability of partners is the same as in case of sole proprietorship. The liability of partners is both individual and collective. The creditors have a right to recover the firm's debts from the private property of one or all partners, where firm's assets are insufficient.

7. Fusion of ownership and control:

In the eyes of law, the identity of partners is not different from the identity of partnership firm. As such, the right of management and control vests with the owners (i.e., partners).

8. Non-transferability of interest:

No partner can assign or transfer his partnership share to any other person so as to make him a partner in the business without the consent of all other partners.

9. Registration of firm:

Registration of a partnership firm is not compulsory under the Act. The only document or even an oral agreement among partners required is the 'partnership deed' to bring the partnership into existence.

Procedure for the Registration of a Partnership Firm in India

The registration of partnership is not compulsory under Indian Partnership Act. In England registration is, however, compulsory. In India there are certain privileges which are allowed to those firms which are registered. Unregistered firms are prejudiced in certain matters in comparison to registered firms.

Though directly the registration of firms is not compulsory but indirectly it is so. To avail of certain advantages under law the firm must be registered with the Registrar of Firms of the State. Registration of a firm does not provide a separate legal entity to the concern as in the case of Joint Stock Company.

Partnership does not need registration for coming into existence because it is created by an agreement among two or more persons. The registration of a firm

merely certifies its existence and non-registration does not invalidate the transactions of the firm.

Registration of Partnership Firm

(i) Filing an Application:

The first thing to be done is to file an application with the Registrar of Firms on a prescribed form. A small amount of registration fees is also deposited along-with the application.

The application should contain the following information:

(a) The name of the firm.

(b) The principal place of business of the firm.

(c) The names and addresses of partners and the dates on which they joined the firm.

(d) If the firm is started for a particular period then that period should be mentioned.

(e) If the firm is started to achieve a specific object then it should also be given.

The application form should be signed and verified by each partner or by his duly authorized agent.

(ii) Certificate:

The particulars submitted to the Registrar are examined. It is also seen whether all legal formalities required have been observed or not. If everything is in order, then the Registrar shall record an entry in the register of firms. The firm is considered registered thereon.

Alteration of Particulars:

Whenever a change or alteration is made in any of the following particulars then it should be communicated to the Registrar of firms and a suitable change is made in the register. The change to be made is sent in a prescribed form and with the prescribed fees.

Following changes or alterations are to be sent to the Registrar:

(i) Any change in the name of the firm.

(ii) Any change in the principal place of business. The change in name or principal place of business almost requires a new registration. These changes should be sent in a prescribed form and should be signed by all the partners.

(ii) When constitution of the firm is changed i.e., an old partner may retire or a new partner may be added.

(iv) Any change in the name of a partner or his address.

(v) When a minor partner attains the age of majority and he elects to become or not to become a partner.

(vi) When the firm is dissolved.

Exceptions:

The non-registration does not affect the following rights of a firm:

(i) The partners of an unregistered firm can bring a suit for the dissolution of the firm or for the settlement of its accounts. They can also use the property of a dissolved firm.

(ii) The right of an official receiver or official assignee is not affected for realizing the share of the insolvent partner, whether the firm is registered or not.

(iii) The unregistered firm or its partners may use or claim a set-off where the subject matter of the suit does not exceed Rs. 100 in value.

(iv) The third parties can always use a firm whether it is registered or not.

Advantages of Registration:

The registration of a firm is not only advantageous for the firm but also for those who deal with it.

The following advantages are derived from the registration of a firm:

(i) Advantages to the Firm:

The firm gets a right to the third parties in civil suits for getting its rights enforced. In the absence of registration, the firm cannot sue outside partners in courts.

(ii) Advantages to Creditors:

A creditor can use any partner for recovering his money due from the firm. All partners whose names are given in the registration are personally responsible to the outsiders. So, creditors can recover their money from any partner of the firm.

(iii) Advantages to Partners:

The partners can approach a court of law against each other in case of dispute among partners. The partners can sue outside parties also for recovering their amounts, etc.

(iv) Advantages to Incoming Partners:

A new partner can fight for his rights in the firm if the firm is registered. If the firm is not registered then he will have to depend upon the honesty of other partners.

(v) Advantages of Outgoing Partners:

The registration of a firm benefits the outgoing partners in a number of ways.

The outgoing partners may be divided into two categories:

(i) On the death of a partner,

(ii) On the retirement of a partner.

On the death of a partner his successors are not responsible for the liabilities incurred by the firm after the date of his death. In case of a retiring partner, he continues to be responsible up to the time he does not give public notice. The public notice is not registered with the Registrar and he ceases his liabilities from the date of this notice.

Types of Partners

There are different kinds of partners classified on the basis of managerial interests, profit sharing, behaviour and status. They are as follows.

1. ActivePartner

A partner who takes active part in the management of the partnership firm is known as active or working or managing or general partner. His liability is unlimited.

2. Sleeping Partner or DormantPartner

The partners who merely contribute capital and do not take active interest in the conduct of the business of the firm are called sleeping or dormant or financing partners.

3. Nominal or OstensiblePartner

He is a partner who neither contributes capital nor takes any part in the management of the firm. He lends his name to be used as partner in the business to increasethereputationofthefirm.Theyarenoteligibleforashareintheprofit.They

arealsoliabletothecreditorsforthedebtsofthefirm.

4. Partners in ProfitOnly

A person who shares the profit of a firm but does not share the loss, is called "partnerinprofitonly".Usuallyhehasnovoiceinthemanagementofthefirm.Buthis liability to third parties isunlimited.

5. Partner byEstoppel

A person may not be really a partner in the business. But by his behaviour he makesoutsidersbelievethatheisapartnerinthebusiness.Then,heisliabletosuch outsiders who advance money to the firm or enter into a contract under such false belief.Suchapersonisknownas"partnerbyestoppel".Hecannotlaterondenythat he is not apartner.

6. Partner by Holdingout

When a person who is not really a partner in a business, is described as a partnertoothers,thenhemustatoncedenyitwhenhecomestoknowaboutit.Ifhe keeps quiet, then he is liable to other persons who do business with that partnership believingthatheisalsoapartner.Suchapersoniscalledpartnerbyholdingout.

7. Sub-Partner

When a person makes an arrangement with a partner to share his profit, he is knownasasub-partner.Suchasub-partnerhasnorightsagainstthefirm,asheisnot liable for the debts of thefirm.

8. Minor as aPartner

Aminorisapersonwhohasnotcompleted18yearsofage,whereaguardian is

appointed by a court, his age of majority extends to 21 years. Legally, a minor cannotbecomeapartnerbecauseheisincapableofenteringintoacontract.Hemay, however,beadmittedtothebenefitsofpartnershipwiththeconsentofallpartners.

The position of a minor partner may be studied under the following two heads.

a. Position before attainingmajority

a) He has a right to share the property and profits of the firm as may have been agreedupon.

b) He has a right to have access to and inspect and take a copy of the accounts of thefirm.

c) Hisliabilityisconfinedonlytotheextentofhissharentheprofitsandpropertyof thefirm.Overandabovehiscapital,heisneitherpersonallyliablenorhisprivate properties isliable.

b. Position on attainingmajority

On attaining majority the minor partner has to decide within six months by giving notice whether he shall continue in the firm or not. If he decides to continue as partner, he becomes liable to the firm from the date, on which he was admitted as minorpartner.Ifhedecidesnottocontinueaspartner,heisnotliableforthedebtsof the firm after the date ofnotice.

Rights and Duties of Partners

Generally, the rights, duties and liabilities of partners are laid down in the partnershipdeed.Incasethepartnershipdeeddoesnotspecifytherightsandduties, theprovisionsofPartnershipAct1932willapply.TheActlaysdownthefollowingrights and duties of apartner.

1. Rights of Partners

1) Every partner has a right to take part in the conduct and management of the

business.

2) Everypartnerhasarighttoexpressopinionononanymatterrelatedtothefirm.

3) Everypartnerhasarighttobeconsultedbeforetakingimportantdecisions.

4) Everypartnerhasarighttoinspectandtakecopyofbooksofaccountandrecords of thefirm.

5) Every partner has the right to an equal share in the profits of the firm unless otherwise agreed by thepartners.

6) Everypartnerhastherighttoreceiveinterestonloansandadvancesattherateof 6% perannum.

7) Everypartnerhastherighttobeindemnifiedfortheexpensesincurredandlosses sustainedbyhimintheordinaryconductofthefirm'sbusiness.

8) Everypartnerhasanequalrighttousetheassetsofthefirmforitsbusiness.

9) No new partner can beadmitted into partnership without the consent of other partners.

10) Every partner has a right to retire from thefirm.

Duties ofPartners

Thedutiesofpartnerscanbeclassifiedinto 1.Absolutedutiesand2.Qualifiedduties.

1. Absolute Duties

Absolute duties are fixed by law which cannot be violated by partners agreement. These duties are applicable to all partnership.

1. Everypartnermustactdiligentlyandhonestlyinthedischargeofhisdutiestothe maximum advantage of allpartners.
2. Everypartnermustactinaloyalandfaithfulmannertowardseachother.
3. Everypartnermustactwithinthescopeoftheauthorityentrustedtohim.
4. Every partner is bound to share the losses of the firm equally unless otherwise agreed.
5. Every partner must indemnify the firm against loss sustained due to his willful negligence in the ordinary course ofbusiness.

6. No partner can transfer or assign his interest in the firm to others without the consent of otherpartners.

7. Everypartnermustmaintainandrendertrueandcorrectaccountsrelatingtothe firm'sbusiness.

8. No partner can engage himself in a business which is likely to compete with the business of thefirm.

9. Every partner should use the firm's property only for the firm's business and interest.

10. No partner can make any secret profit by way of commission on purchases or sales affected on behalf of thefirm.

2. QualifiedDuties

Qualified duties given in the Act can be modified by an agreement of partners entered into.

Implied Authority of a Partner

Every partner has the implied authority to bind the firm and other partners by his acts done in the name of the firm, in the ordinary course of the firm's business and with the intention to bind the firm.

A partner has the implied authority to do the following acts on behalf of his firm.

(i) To buy, sell and pledge goods on behalf of the firm.

(ii) To raise loans on the security of such assets.

(iii) To receive payments of debts due to the firm.

(iv) To accept, make an issue bills of exchange, promissory notes, etc., on behalf of the firm.

(v) To engage servants for the firm's business.

(vi) To take on lease a premises on behalf of the firm.

A partner has no implied authority, unless otherwise expressed in the partnership deed, in the following matters:

(a) To submit a dispute relating to the firm to arbitration.

(b) To compromise or relinquish any claim or a portion of claim made by the firm.

(c) To withdraw a suit or proceeding filed on behalf of the firm.

(d) To admit any liability in a suit or proceeding against the firm.

(e) To open a bank account on behalf of the firm in his own name.

(f) To acquire or purchase immovable property for and on behalf of the firm

(g) To transfer or sell immovable property belong to the firm; and

(h) To enter into partnership with others on behalf of the firm.

Incoming Partner (Admission of a New Partner)

When firm requires additional capital or managerial help or both for the expansion of its business a new partner may be admitted to supplement its existing resources. According to the Partnership Act 1932, a new partner can be admitted into the firm only with the consent of all the existing partners unless otherwise agreed upon. With the admission of a new partner, the partnership firm is reconstituted and a new agreement is entered into to carry on the business of the firm. A newly admitted partner acquires two main rights in the firm–

1. Right to share the assets of the partnership firm.
2. Right to share the profits of the partnership firm.

For the right to acquire share in the assets and profits of the partnership firm, the partner brings an agreed amount of capital either in cash or in kind. Moreover, in the case of an established firm which may be earning more profits than the normal rate of return on its capital the new partner is required to contribute some additional amount known as premium or goodwill. This is

done primarily to compensate the existing partners for loss of their share in super profits of the firm.

Following are the other important points which require attention at the time of admission of a new partner:

1. New profit sharing ratio
2. Sacrificing ratio
3. Valuation and adjustment of goodwill
4. Revaluation of assets and Reassessment of liabilities
5. Distribution of accumulated profits (reserves)
6. Adjustment of partners' capitals.

Outgoing Partner (Retirement of a partner)

Under the Partnership Act no person can be admitted into partnership without the consent of the other partner or partners unless there is any contract to the contrary (Sec. 31).

Any partner may with the consent of all the other partners or in terms of the deed of partnership where the partnership is at will, by giving notice in writing to all other partners, to that effect, dissolve the partnership or retire from partnership.

A retiring partner, however, continues to be liable to third parties even If the liability Is taken over by the remaining partners (Sec. 32) Therefore in a deed of retirement it is necessary to provide that In the event of the retiring partner being held liable by a third party, the remaining partners shall indemnify him to that extent, when the liabilities are taken over by the remaining partners.

Insolvency of a partner also causes compulsory retirement of an insolvent partner (Sec. 35). It is, therefore, generally provided in a deed of

partnership when there are more than two partners that the insolvency of any partner will not dissolve the partnership. If a partner retires, unless there is contract to the contrary, the retiring partner cannot use the firm name, represent himself as carrying on the business of the firm or solicit the customers of the Firm. (Sec. 36).

Therefore, in a deed of retirement it is generally not necessary to make explicit that the retiring partner shall not do any of these things. But if he is to be restrained from carrying on similar business for a specified period or in a specified area, such condition can be provided in the deed of retirement and it is legal (Sec. 36(2)).

Procedure to retire Partners

Section 32 of The Indian Partnership Act, 1932:

(1) A partner may retire,—
(a) with the consent of all the other partners,
(b) in accordance with an express agreement by the partners, or
(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement: Provided that a retired

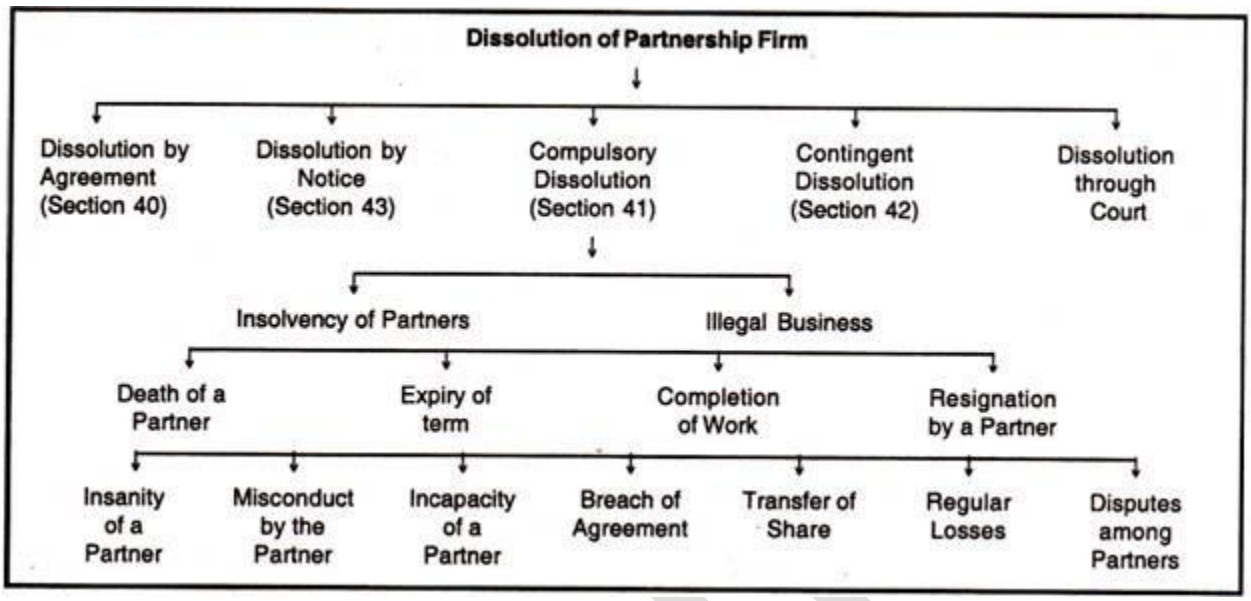
partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

Dissolution of Partnership

The dissolution of a firm means discontinuance of its activities. When the working of a firm is stopped and the assets are realised to pay various liabilities it amounts to dissolution of the firm. The dissolution of a firm should not be confused with the dissolution of partnership. When a partner agrees to continue the firm under the same name, even after the retirement or death of a partner, it amounts to dissolution of partnership and not of firm.

The remaining partners may purchase the share of the outgoing or deceased partner and continue the business under the same name; it involves only the dissolution of partnership. The dissolution of firm includes the dissolution of partnership too. The partners have a contractual relationship among themselves. When this relationship is terminated it is an end of the firm.



A firm may be dissolved under the following circumstances:

(a) Dissolution by Agreement (Section 40):

A partnership firm can be dissolved by an agreement among all the partners. Section 40 of Indian Partnership Act, 1932 allows the dissolution of a partnership firm if all the partners agree to dissolve it. Partnership concern is created by agreement and similarly it can be dissolved by agreement. This type of dissolution is known as voluntary dissolution.

(b) Dissolution by Notice (Section 43):

If a partnership is at will, it can be dissolved by any partner giving a notice to other partners. The notice for dissolution must be in writing. The dissolution will be effective from the date of the notice, in case no date is mentioned in the notice, and then it will be dissolved from the date of receipt of notice. A notice once given cannot be withdrawn without the consent of all the partners.

(c) Compulsory Dissolution (Section 41):

A firm may be compulsorily dissolved under the following situations:

(i) Insolvency of Partners:

When all the partners of a firm are declared insolvent or all but one partner are insolvent, then the firm is compulsorily dissolved.

(ii) Illegal Business:

The activities of the firm may become illegal under the changed circumstances. If government enforces prohibition policy, then all the firms dealing in liquor will have to close down their business because it will be an unlawful activity under the new law. Similarly, a firm may be trading with the businessmen of another country. The trading will be lawful under present conditions.

After some time a war erupts between the two countries, it will become a trading with an alien enemy and further trading with the same parties will be illegal. Under new circumstances the firm will have to be dissolved. In case a firm carries on more than one type of business, then illegality of one work will not amount to dissolution of the firm. The firm can continue with the activities which are lawful.

(d) Contingent Dissolution (Section 42):

In case there is no agreement among partners regarding certain contingencies, partnership firm will be dissolved on the happening of any of the situations:

(i) Death of a Partner:

A partnership firm is dissolved on the death of any of the partner.

(ii) Expiry of the Term:

A partnership firm may be for a fixed period. On the expiry of that period, the firm will be dissolved.

(iii) Completion of Work:

A partnership concern may be formed to carry out a specified work. On the completion of that work the firm will be automatically dissolved. If a firm is

formed to construct a road, then the moment the road is completed the firm will be dissolved.

(iv) Resignation by a Partner:

If a partner does not want to continue in the firm, his resignation from the concern will dissolve the partnership.

(e) Dissolution through Court (Section 44):

A partner can apply to the court for dissolution of the firm on any of these grounds:

(i) Insanity of a Partner:

If a partner goes insane, the partnership firm can be dissolved on the petition of other partners. The firm is not automatically dissolved on the insanity of a partner. The court will act only on the petition of a partner who himself is not insane.

(ii) Misconduct by the Partner:

When a partner is guilty of misconduct, the other partners can move the court for dissolution of the firm. The misconduct of a partner brings bad name to the firm and it adversely affects the reputation of the concern. The misconduct can be in business or otherwise. If a partner is jailed for committing a theft, it will also affect the good name of the firm though it has nothing to do with the business.

(iii) Incapacity of a Partner:

If a partner other than the suing partner becomes incapable of performing his duties, then partnership can be dissolved.

(iv) Breach of Agreement:

When a partner willfully commits breach of agreement relating to business, it becomes a ground for getting the firm dissolved. Under such a situation it becomes difficult to carry on the business smoothly.

(v) Transfer of Share:

If a partner sells his share to a third party or transfers his share to another person permanently, other partners can move the court for dissolving the firm.

(vi) Regular Losses:

When the firm cannot be carried on profitably, then the firm can be dissolved. Though there may be losses in every type of business but if the firm is incurring losses continuously and it is not possible to run it profitably, then the court can order the dissolution of the firm.

(vii) Disputes among Partners:

Partnership firm is based on mutual faith. If partners do not trust each other, then it will not be possible to run the business. When the partners quarrel with each other, then the very basis of partnership is lost and it will be better to dissolve it.

Possible Questions

PART – A (1 Mark)

Online Questions

PART – B (2 Marks)

1. Define Partnership
2. Who is an active partner?
3. Who is a dormant partner?
4. What is sharing of profit?
5. What is agency relationship in partnership?
6. What is non transferability of interest?
7. Who is called as an incoming partner?
8. Who is called as an outgoing partner?
9. What is insanity of partner?
10. What is breach of an agreement in partnership?
11. What is limited partnership?
12. Define implied authority of a partner

PART – C (6 Marks)

1. Explain the Nature and Characteristics of Partnership.
2. Enumerate the Procedure for Registration of a Partnership Firms.
3. Describe the various types of Partners in detail.
4. Describe the Rights and Duties of Partners.
5. Describe the Duties of Partners.
6. Explain the position of minor in the partnership firm.
7. What are the circumstances under which a partnership firm is dissolved?

8. Who is a minor? Can a minor become a partner?
9. Explain the implied authority of a Partner.
10. Explain about the Incoming partner and outgoing partner.

UNIT – IV

THE LIMITED LIABILITY PARTNERSHIP ACT, 2008

The Limited Liability Partnership Act, 2008: Salient Features of LLP- Differences between LLP and Partnership, LLP and Company- LLP Agreement,- Partners and Designated Partners- Incorporation Document- Incorporation by Registration- Partners and their Relationship.

Introduction

LLP is a corporate business vehicle that enables professional expertise and entrepreneurial initiative to combine and operate in flexible, innovative andefficient manner, as a hybrid of companies & partnerships providing benefits of limited liability while allowing its members the flexibility for organizing theirinternal structure as a partnership.

Foreign Limited Liability Partnership: A LLP formed, incorporated or registered outside India which establishes a place of business within India.

Partner: Partner means any person who becomes a partner in the LLP in accordance with the LLP agreement.

The salient features of Limited Liability Partnership Act, 2008

1. It is a body corporate with separate legal entity from its partners. The mutual rights and duties of the partners of an LLP are governed by LLP Agreement.
2. LLP is liable to the extent of its assets. Partner's liability is limited to the extent of agreed contribution (capital) in the LLP Agreement.
3. No partner is liable on account of the independent or unauthorized action of other partners or for their misconduct.

4. Every LLP should have at least two partners with at least two individuals as "designated partners" of whom at least one must be resident in India. Only designated partners are responsible for compliance with the Act.

5. A firm, private company or an unlisted public company can be converted into LLP.

6. The Act empowers Central Government to apply provisions of the Companies Act, 1956 as appropriate, by notification with such changes as deemed necessary, in the LLP Act, 2008.

7. The winding up of LLP is either voluntary or by the High Court.

Difference between/among a Company, Partnership firm and an LLP:

Features	Company	Partnership firm	LLP
Registration	Compulsory registration with the ROC. Certificate of Incorporation is conclusive evidence.	Not compulsory. Unregistered Partnership Firm won't have the ability to sue.	Compulsory registration required with the ROC
Name	At the end of the name word "limited" of the name of a public company, and "private limited" with a private company.	No guidelines.	Name to end with "LLP" Limited Liability Partnership"
Capital contribution	Private company should have a minimum paid up capital of lakh and Rs. 5 lakhs for a public company	Not specified	Not specified
Legal entity	A separate legal entity	Not a separate legal entity	A separate legal entity

Liability	Limited to the extent of unpaid capital.	Unlimited, can extend to the personal assets of the partners	Limited to the extent of the contribution to the LLP.
No. of shareholders / Partners	Minimum of 2. In a private company, maximum of 50 shareholders	2- 20 partners	Minimum of 2. No maximum.
Foreign Nationals as shareholder / Partner	Foreign nationals can be shareholders.	Foreign nationals cannot form partnership firm.	Foreign nationals can be partners.
Meetings	Quarterly Board of Directors meeting, annual shareholding meeting is mandatory	Not required	Not required.
Annual Return	Annual Accounts and Annual Return to be filed with ROC	No returns to be filed with the Registrar of Firms	Annual statement of accounts and solvency & Annual Return has to be filed with ROC
Audit	Compulsory, irrespective of share capital and turnover	Compulsory	Required, if the contribution is above 25 lakhs or if annual turnover is above 40 lakhs.
How do the bankers view	High creditworthiness, due to stringent compliances and disclosures required	Creditworthiness depends on goodwill and credit worthiness of the partners	Perception is higher compared to that of a partnership but lesser than a company.
Dissolution	Very procedural. Voluntary or by Order of National Company Law Tribunal	By agreement of the partners, insolvency or by Court Order	Less procedural compared to company. Voluntary or by Order of National Company Law Tribunal

Whistle blowing	No such provision	No such provision	Protection provided to employees and partners who provide useful information during the investigation process.

Partners

Any individual or body corporate may be a partner in a limited liability partnership:

Provided that an individual shall not be capable of becoming a partner of a limited liability partnership, if—

(*a*) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;

(*b*) he is an undischarged insolvent; or

(*c*) he has applied to be adjudicated as an insolvent and his application is pending.

Designated partners

(1) Every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India :

Provided that in case of a limited liability partnership in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominees of such bodies corporate shall act as designated partners.

Explanation.—For the purposes of this section, the term "resident in India" means a person who has stayed in India for a period of not less than one hundred and eighty-two days during the immediately preceding one year.

(2) Subject to the provisions of sub-section (1),—

(*i*) If the incorporation document—

(*a*) Specifies who are to be designated partners, such persons shall be designated partners on incorporation; or (*b*) states that each of the partners from time to time of limited liability partnership is to be designated partner, every partner shall be a designated partner;

(*ii*) Any partner may become a designated partner by and in accordance with the limited liability partnership agreement and a partner may cease to be a designated partner in accordance with limited liability partnership agreement.

(3) An individual shall not become a designated partner in any limited liability partnership unless he has given his prior consent to act as such to the limited liability partnership in such form and manner as may be prescribed.

(4) Every limited liability partnership shall file with the Registrar the particulars of every individual who has given his consent to act as designated partner in such form and manner as may be prescribed within thirty days of his appointment.

(5) An individual eligible to be a designated partner shall satisfy such conditions and requirements as may be prescribed.

(6) Every designated partner of a limited liability partnership shall obtain a Designated Partner Identification Number (DPIN) from the Central Government and the provisions of sections 266A to 266G (both inclusive) of the Companies Act, 1956 (1 of 1956) shall apply *mutatis mutandis* for the said purpose.

Liabilities of designated partners

Unless expressly provided otherwise in this Act, a designated partner shall be—

(*a*) Responsible for the doing of all acts, matters and things as are required to be done by the limited liability partnership in respect of compliance of the provisions of this Act including filing of any document, return, statement and

the like report pursuant to the provisions of this Act and as may be specified in the limited liability partnership agreement; and

(*b*) Liable to all penalties imposed on the limited liability partnership for any contravention of those provisions.

Changes in designated partners

A limited liability partnership may appoint a designated partner within thirty days of a vacancy arising for any reason and provisions of sub-section (4) and sub-section (5) of section 7 shall apply in respect of such new designated partner :

Provided that if no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.

Incorporation document

(1) For a limited liability partnership to be incorporated,—

(*a*) Two or more persons associated for carrying on a lawful business with a view to profit shall subscribe their names to an incorporation document;

(*b*) The incorporation document shall be filed in such manner and with such fees, as may be prescribed with the Registrar of the State in which the registered office of the limited liability partnership is to be situated; and

(*c*) There shall be filed along with the incorporation document, a statement in the prescribed form, made by either an advocate, or a Company Secretary or a Chartered Accountant or a Cost Accountant, who is engaged in the formation of the limited liability partnership and by anyone who subscribed his name to the incorporation document, that all the requirements of this Act and the rules made thereunder have been complied with, in respect of incorporation and matters precedent and incidental thereto.

(2) The incorporation document shall—

(*a*) Be in a form as may be prescribed;

(*b*) State the name of the limited liability partnership;

(*c*) State the proposed business of the limited liability partnership; (*d*) state the address of the registered office of the limited liability partnership;

(*e*) State the name and address of each of the persons who are to be partners of the limited liability partnership on incorporation;

(*f*) State the name and address of the persons who are to be designated partners of the limited liability partnership on incorporation;

(*g*) Contain such other information concerning the proposed limited liability partnership as may be prescribed.

(3) If a person makes a statement under clause (*c*) of sub-section (1) which he—

(*a*) Knows to be false; or

(*b*) Does not believe to be true,shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than ten thousand rupees but which may extend to five lakh rupees.

Incorporation by registration

(1) When the requirements imposed by clauses (*b*) and (*c*) of sub-section (1) of section 11 have been complied with, the Registrar shall retain the incorporation document and, unless the requirement imposed by clause (*a*) of that sub-section has not been complied with, he shall, within a period of fourteen days—

(*a*) Register the incorporation document; and

(*b*) Give a certificate that the limited liability partnership is incorporated by the name specified therein.

(2) The Registrar may accept the statement delivered under clause (*c*) of sub-section (1) of section 11 as sufficient evidence that the requirement imposed by clause (*a*) of that sub-section has been complied with.

(3) The certificate issued under clause (*b*) of sub-section (1) shall be signed by the Registrar and authenticated by his official seal.

(4) The certificate shall be conclusive evidence that the limited liability partnership is incorporated by the name specified therein.

Partners and their Relationship

LLP Act, covers Section 22 to Section 25. Section 22 prescribes who would be considered as a partner of an LLP. Section 23 provides that the mutual rights and duties amongst the partners' inter-se and between partners and LLP shall be governed by the LLP agreement and in the absence of such agreement, shall be governed by the relevant provisions of the LLP Act. Section 24 prescribes the circumstances when a person may cease to be a partner of an LLP and governs the rights and duties of the person who is ceased to be a partner as well as of the LLP. Section 25 emphasizes on the requirement of public information regarding the fact of cessation of a partner from LLP and provides the mode in which such information has to be disseminated to the Registrar or third parties. The Section also prescribes penalties for default made in relation to its provisions.

Eligibility to be partners (Section 22)

Section 23 of LLP Act seeks to provide that the persons who subscribe their names to the incorporation document shall be partners of LLP and any other person may also become partner of the LLP in accordance with its agreement.

This section provides that there are two ways in which a person can become a partner in an LLP, one is by subscribing his name to the incorporation document and other is by following the procedures/norms prescribed in the partnership agreement for this purpose.

The first partners of an LLP are those who signed the incorporation document. Section 41 of the Companies Act, 1956 also contains a similar provision with respect to the members of a company. It provides that the subscribers of the memorandum of association shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in the register of members. In this regard, it was held in Official Liquidator v. SulemanBhai (AIR 1955 MB 166), that the subscriber of the memorandum is to be treated as having become the member by the very fact of subscription. Neither application form, nor allotment of shares is necessary. Even an absence of entry in the register of members cannot deprive him of his status. He acquires, as soon as the company is registered, the full status of a member with all the rights and liabilities.

After incorporation, any person may become a partner of an LLP by agreement with the existing partners. The agreement may prescribe any mode for taking a person as a partner in the LLP. It could be an admission of partner with the consent of three fourths of the partners or a partner having 10 years of (specified) professional experience and consent of majority of partners or any other criteria specified in the agreement. In the absence of partnership agreement or in the absence of a clause to this effect in the agreement, a new partner can be admitted to an LLP with the consent of all the existing partners as per the default provisions under Schedule I of the LLP Act, 2008.

Thus, a person can become a partner in an LLP in either of the above two modes. Thus a person who may be holding beneficial interest of a partner or a nominee of a deceased partner would not be considered as partner in LLP despite having interest therein. In context of the Companies Act, 1956, in BalkrishanGupt v. SwadeshiPolytex Ltd. (1985) 58 Comp. cas 563 SC, it was held that a pawnee of shares or a receiver appointed under Section 182A of the Land Revenue Act, or the person in whose favour, the order for attachment of shares has been passed by the court does not acquire any rights of a member.

Relationship of Partners (Section 23)

Section 23 of the LLP Act seeks to provide that the mutual rights and duties of the partners of the LLP inter se and that of the LLP and its partners shall be governed by the LLP agreement and in absence of any such agreement, such mutual rights and duties shall be determined as set out in the First Schedule of the Act. It also seeks to empower the Central Government to prescribe, by rules, the form, manner and fees for filing the LLP agreement and informing changes therein. This clause further seeks to provide that any agreement, made before the incorporation of LLP, between the partners who subscribe their names to the incorporation document may impose obligation on LLP, if ratified by all the partners after its incorporation.

Section 23 of the LLP Act provides that the relationship of partners with LLP and as also between themselves is governed by the partnership agreement and in the absence thereof, is covered by the default provisions in this regard given under Schedule I of the Act.

Section 23(1)

As regards the management of the internal affairs of the LLP there is a parallel with the system that operates for partnerships. As in case of partnership, the mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners are governed by the limited liability partnership agreement.

Partners are not obliged to enter into a formal agreement among themselves and there is no obligation to publish any agreement which is entered into. As in the case of partnerships, however, there will, in general, be clear advantages in having a formal written agreement between partners to regulate the affairs of the undertaking and to avoid disputes between them. The formal procedures needed to establish an LLP, including the need for an application to the

registrar of companies, are likely to encourage the partners to set up a formal arrangement before the LLP commences business.

As per Rule 21 of the LLP Rules, every limited liability partnership shall file information with regard to the limited liability partnership agreement in Form 4 with the registrar within 30 days from the date of agreement.

Here, notable point is that under the LLP rules, the partnership agreement to be submitted to the Registrar is supposed to be in a given format (i.e. Form No. 4) rather than in the usual form of a legal agreement.

In case, an LLP decides to make an LLP agreement; it would require determining parameters under above heads and Form 4 filled in with the above details is to be filed with the Registrar within 30 days of the agreement. It may be noted that though the law has provided a time limit to submit partnership agreement to the Registrar, however, forming and filing a partnership agreement as such is not a mandatory requirement.

Section 23(2)

This sub-section provides that limited liability partnership agreement and any changes, made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be prescribed.

Limited Liability Partnership Agreement

Our Limited Liability Partnership Agreements set-out detailed and practical rules in respect of the LLP and its members, including rules relating to:

- Defining the business of the LLP.
- When and how member meetings will be held and how decisions will be made at those meetings. It will also establish whether decisions require unanimity, a majority or a defined number of members to agree?
- Whether there are restrictions on an individual member's power to bind the LLP.

- The circumstances in which the members may appoint a new member or expel an existing member.
- Whether and what drawings members may make.
- How profits will be distributed.
- How the limited liability partnership is to be financed.
- How limited liability partnership property will be dealt with.
- Which members will be designated members.
- Whether and how members are to be prevented from competing with the LLP.
- Whether and how members are to be prevented from poaching customers and staff.
- How and when the limited liability partnership might be wound up.

Possible Questions

PART – A (1 Mark)

Online Questions

PART – B (2 Marks)

1. Who is said to be as designated partner?
2. What is LLP?
3. Mention any two points showing the importance of registering a LLP.
4. Mention any two differences between a LLP and Partnership.
5. Mention any two differences between a LLP and Company.
6. Define LLP.
7. State any two features of LLP.
8. Write a short note on LLP Agreement.

9. What is incorporation document in LLP?
10. What is incorporation registration in LLP?

PART – C (6 Marks)

1. List the contents of the incorporation document of a LLP.
2. Describe the features of a LLP.
3. Enumerate the Incorporation Registration of Limited Liability Partner.
4. Describe the procedure to register changes of partners in a LLP.
5. Distinguish between LLP and a Partnership firm.
6. Describe the provisions related to designated partners in a LLP.
7. Determine the Liabilities of designated partners in LLP.
8. How a Limited Liability Partnership is differs from a company?
9. How is the LLP agreement framed?

UNIT V

THE NEGOTIABLE INSTRUMENTS ACT, 1881

The Negotiable Instruments Act, 1881: Meaning, Characteristics, and Types of Negotiable Instruments: Promissory Note, Bill of Exchange, Cheque-Holder and Holder in Due Course, Privileges of Holder in Due Course. Negotiation: Types of Endorsements- Crossing of Cheque-Bouncing of Cheque

Introduction

The Negotiable Instruments Act was passed in 1881. Some provisions of the Act have become redundant due to passage of time, change in methods of doing business and technology changes. However, the basic principles of the Act are still valid and the Act has stood test of time. The Act extends to the whole of India. There is no doubt that the Act is to regulate commercial transactions and was drafted to suit requirements of business conditions then prevailing.

The instrument is mainly an instrument of credit readily convertible into money and easily passable from one hand to another.

Definition

A document that promises payment to a specified person or the assignee. The payee (the person who receives the payment) must be named or otherwise indicated on the instrument. A check is considered a negotiable instrument. This type of instrument is a transferable, signed document that promises to pay the bearer a sum of money at a future date or on demand. Examples also include bills of exchange, promissory notes, drafts and certificates of deposit.

According to Investopedia

A negotiable instrument is a written order or unconditional promise to pay a fixed sum of money on demand or at a certain time. A negotiable instrument can be transferred from one person to another. Once the instrument is transferred, the holder obtains full legal title to the instrument.

Characteristics of Negotiable Instruments

A negotiable instrument has the following characteristics.

1. Property

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

2. Title

The transferee of a negotiable instrument is known as holder in due course. A bonafide 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. This is the main distinction between a negotiable instrument and other subjects of ordinary transfer. The general rule of *nemo dat quod non habet* does not apply to negotiable instruments.

3. Rights

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

4. Presumptions

Certain presumptions apply to all negotiable instruments e.g. a presumption that consideration has been paid under it.

5. Prompt Payment

A negotiable instrument enables the holder to expect prompt payment because a dishonor means the ruin of the credit of all persons who are parties to the instrument.

Examples of negotiable instruments

(a) Negotiable instruments recognized by statute :

i) Bills of exchange

ii) Promissory notes.

iii) Cheques.

(b) Negotiable instruments recognized by usage or custom :

i) Hundis.

ii) Share warrants.

iii) Dividend warrants.

iv) Banker's drafts.

v) Circular notes.

vi) Bearer debentures.

vii) Debentures of Bombay port trust.

viii) Railway receipts.

ix) Delivery orders.

The list of negotiable instruments is not a closed chapter. With the growth of commerce, new kinds of securities may claim recognition as negotiable instruments.

Example of Non-negotiable instruments

i) Money orders.

ii) Deposit receipts.

iii) Share certificates

iv) Dock warrants.

v) Postal orders.

Promissory Notes

A promissory note is a negotiable instrument which contains an unconditional promise to pay a certain sum of money to a certain person or to the bearer of the instrument. Let us take an example. Suppose Shri Ram has taken a loan of Rs. 10, 000 from Shri Amal. Now, Shri Ram can write a promissory note stating "I promise to pay Shri Amal or order a sum of Rs. 10, 000, value received." Shri Ram must put his signature and it must be properly stamped to make it a valid promissory note.

Section 4, of the Negotiable Instrument Act, 1881 define a promissory note as "an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of, certain person, or to the bearer of the instrument." Thus, a promissory note contains an unconditional promise to pay a certain sum of money only to a certain person or to his order, on a specified future date. This instrument must bear the signature of the person who promises to make payment.

Parties to a promissory note: The main parties involved in a promissory note are-

i. Maker or Drawer:

The person, who draws or makes the instrument, is called the maker of the promissory note. The maker promises to pay the amount specified in the promissory note. He must sign the note.

ii. Payee:

The person to whom the amount will be paid is called the payee. The payee may transfer the instrument before the due date to meet his business obligations. In that case, the parties will be-

Endorser: The person, (the payee) who transfers the document to some other person to meet his financial obligation, is called the endorser.

Endorsee: The person in whose favour the instrument is transferred is called the endorsee.

Features of a promissory note

A written document: To be a valid promissory note, it must be in writing. A verbal promise to pay is not a promissory note.

Unconditional promise to pay: The promissory note must contain an unconditional promise to pay. A conditional promise to pay is not a promissory note. For example, if it is written as "I promise to pay Rs. 5, 000 to Hari, if he comes to my home", is not a promissory note.

The parties must be certain: The maker and the payee of a promissory note must be certain.

The amount payable must be certain: The amount of money which is payable as promised by the maker of the promissory note, must be certain. Money means the legal tender money. If any other things other than money are promised by the maker, it is not a promissory note.

It must be signed by the maker: The maker of the promissory note must put his signature on the instrument. The note may be signed by the agent of the maker but the agent must clearly state as to on whose behalf he is signing the note. The promissory note must be properly dated and stamped as per Indian Stamp Act.

Time of payment: A promissory note may be payable on demand or after a fixed period of time. The promissory note which is payable on demand is called

demand promissory note and those payable after a fixed period of time is called time promissory note.

The specimen of a promissory note is given below :

Rs. 10, 000 Guwahati
June 12, 2009

I, Shri Ram promise to Shri Amal or order a sum of Rupees Ten Thousand, value received.

To

Shri Amal,
Nalbari

Sd/- Ram
Stamp

BILLS OF EXCHANGE

Let us discuss another negotiable instrument i.e. bill of exchange. Section 5 of Negotiable Instruments Act, 1881 defines a bill of exchange as "an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument." A bill of exchange contains an unconditional order as opposed to unconditional promise in a promissory note. The bill must be signed by the maker, usually a creditor, who directs the debtor, to make the payment at a specified future date. Let us take another example. The specimen of a bill of exchange is given below :

Rs. 10, 000 Guwahati
June 12, 2009

Three months after date pay Mr. ... . or order a sum of Rs. 10, 000, value received.

To

Mr. ... ... ,

Barpeta.

Sd/- ... ...

Stamp

Suppose, Amar has purchased goods from Hari for Rs. 5, 000 on credit. Amar is the debtor and he have to pay Rs. 5,000 to Hari (creditor). Now, Hari can write a bill of exchange on Amar stating that Amar will pay him a sum of Rs. 5, 000 at a fixed future date. The bill must be accepted by Amar recognizing the fact that he will pay the money at the specified time. Suppose, Hari is indebted to Rakesh for Rs. 5, 000. Now, Hari can transfer the document to Rakesh, who will collect the amount from Amar on due date. In a bill of exchange, the main parties involved are-

- **Drawer:** The person, who draws or writes the bill, is called the drawer.
- **Drawee or Acceptor:** The person, on whom the bill is drawn, is called the drawee.
- **Payee:** The person, to whom the bill will be paid, is called the payee. The drawer may himself be the payee.

features of a bill of exchange-

- The bill of exchange must be in writing.
- The bill of exchange must contain an unconditional order to pay.
- The drawer, drawee and the payee of a bill of exchange must be certain.
- The amount of money which is payable through the bill must be certain.
- Money means the legal tender money.

- The drawer must sign the bill. It must be properly dated and stamped as per the Indian Stamp Act.
- The drawee must accept the bill by putting his signature on the bill.
- **A bill may be payable on demand or after the expiry of a fixed period of time. Differences between the Promissory Note and bIll of Exchange**

Points	**Promissory Note**	**Bill of Exchange**
1. Number of parties	There are mainly **two** parties-maker and the payee.	There are mainly **three** parties- drawer, drawee and the payee. The drawer may be the payee and in that case the number of parties will be two.
2. Promise/ Order	It contains an unconditional **promise** to pay.	It contains an unconditional **order** to pay.
3. Acceptance	Acceptance of the payee is **not required**.	The drawee **must accept** the bill.
4. Debtor/ Creditor	The maker is the **debtor**.	The drawer is the **creditor**.
5. Liability of the Maker/ Drawer	The liability of the maker is **primary and absolute**.	The liability of the drawer is **secondary and conditional** in the event of failure of the drawee.
6. Relationship of Maker/ Drawer	The maker stands in immediate relationship with the **payee**.	The drawer stands in immediate relationship with the **drawee**.

CHEQUES

The cheque has been defined by Section 6 of Negotiable Instrument Act as "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

The cheque is an unconditional order given to a banker by its customer to pay a certain amount of money to a person or the bearer of the cheque or a person authorized by the person on whose name the cheque is issued. Only an accountholder can issue a cheque to its bank. The cheque is handed over to the payee and the payee collects the money in person or through his bank. The main parties to a cheque are-

- **Drawer:** The person who draws the cheque is called the drawer of the cheque. The drawer is the accountholder of the bank.
- **Drawee:** The bank on whom the cheque is drawn is called the drawee. In case of cheques, the drawee is always a bank.
- **Payee:** The person on whom the cheque is payable is called the payee.

Features of a cheque:

A cheque is a bill of exchange. But it has some special features. They are-

- A cheque must be in writing.
- The cheque must be dated.
- It contains an unconditional order to pay.
- The drawer must sign the cheque. The signature of the drawer must match with the specimen signature given by the drawer (accountholder) to the bank at the time of opening the account.
- The cheque is always payable on demand. It means the banker must pay the cheque as and when presented for payment, if all other legal conditions are fulfilled like, availability of funds in the account of the accountholder, the amount of the cheque written in words must tally with the amount written in words etc.
- A cheque is always drawn on a specified banker.
- The parties to the cheque must be certain.
- The amount of money to be payable must be certain.

Holder

Section 8 of the Negotiable Instruments Act, defines a holder as “any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto”. The person whose name is in

the bill of exchange / promissory note / cheque or to whose order, the specific amount on it is payable, is the **payee.** The payee, therefore, is the original party to the negotiable instrument. Under the Bills of Exchange Act, 1882, it is essential to have possession of the instrument, but under the Indian Law it is not necessary to posses it but the payee should have an entitlement to the possession of the instrument even if he does not have actual possession of it. This means that he requires dejure and not defacto possession of the instrument. The payee has two options:

- To be entitled to keep in his possession the instrument and to receive the money specified on it. In this case, he has the rights of being a holder of the instrument.
- To negotiate the instrument to another person to whom he has to pay money in discharge of his liability. In this case, the rights of the holder will be transferred to the person on whose name the instrument has been negotiated and endorsed.

In order to be a holder, two conditions must be satisfied. These are the following:

- He should be entitled to possess the instrument in his own name.
- He should be entitled to receive or recover from the parties that are liable.

He should be entitled to possess the instrument in his own name.

1. **Identity of Holder:** A holder should identify himself with a legal or a valid title. Entitlement to the possession of an instrument is not a sufficient proof of identity. If it is a bearer instrument, the holder must be the person who is the original payee or the person to whom the instrument has been endorsed.

2. **Possession by Gift or Inheritance:** A person who has in his possession an instrument because of receiving a gift or by inheritance becomes a holder due to operation of law. He is entitled to posses the instrument in his own name.
3. **Possession as Assignee: .** In case of an assignment, an assignee of a bill / promissory note does not become a holder, unless it has been endorsed in his favour or it is payable to order. However, the assignee has a right to sue on the instrument. According to the English Law, an endorsee, who is making a collection on behalf of another, can become a holder, but according to the Indian Law, this is not allowed
4. **Identity by English and Indian Law:** A person, who finds a lost instrument, or a thief, who forges the instrument, cannot acquire a legal title thereto, and he is not entitled to have possession of this instrument in his own name. A person, who claims to be a trustee or a guardian in whose favour the instrument is drawn in place of the beneficiary, does not have the right to be a holder because he is not entitled to possess the instrument in his name.

Example: Raju finds a promissory note and forges it by putting his signature. He does not become entitled to the rights of a holder as he is a forger, and he cannot acquire legal title to it. Therefore, he cannot claim any funds on it.

He should be entitled to receive or recover from the parties that are liable

Clear Title: The person should be legally and lawfully entitled to receive or recover money. The instrument should have a clear title. Only in that condition will the holder be able to give a valid discharge to the payer. If the instrument is under a legal process and the right to recover money is not possible because of legal problems, the person cannot be called a holder.

- **Title in Case of Losses and Natural Calamities:** In case of a fire, earthquake, storm or any form of destruction of the negotiable instrument is lost or destroyed, the entitlement to the instrument will be that of the holder who was entitled to the instrument. A person, who finds this instrument and wrongfully decides to keep it, cannot be a holder
- **Title of Agent:** This rule also applies to an agent who holds an instrument for his principal. He cannot be called a holder, even though he may have the powers to receive payment on behalf of the lawfully entitled holder. A person who is an employee or an agent can receive a negotiable instrument on behalf of his employer, but he cannot sue in his own name for the instrument. Therefore, he cannot be a holder of the instrument.

Example: Latika receives a cheque from Karan for Rs 23000/-. She is entitled to recover the money as payee. When she wants to recover the amount, she finds that there is a dispute and is under consideration in the court. Only after it is cleared, would it be possible for her to receive the money.
In such a state her legal entitlement is questionable, and she cannot be called a holder.

Holder In Due Course

A negotiable instrument has the benefit of easy transferability. According to Section 9 of the Negotiable Instrument Act, "***a holder in due course*** is a person who possesses for some consideration a bill of exchange, promissory note or cheque payable to bearer or the payee or the endorsee in good faith, and without any reason to believe that there is any defective title in the instrument in his possession". If the following conditions are satisfied the person will become the holder in due course:

1. **He must be a Holder:** A holder in due course is a person who is entitled to possess a negotiable instrument in his own name and under a legal title. He should be able to recover the amounts from the parties legally. In other words, the holder in due course should actually have the qualities of a holder of the instrument.
2. **Lawful Consideration:** The holder in due course should have obtained the negotiable instrument by some consideration for acquiring it. The consideration may not be completely adequate, but it must be lawful and fulfill the conditions under Section 2 (d) of the Indian Contract Act. This means that if he has received the instrument as a gift or donation and there is no consideration attached to it, he cannot be called a holder in due course, even though he is a holder of the instrument.
3. **Acquisition before Maturity:** The date of acquiring the negotiable instrument is important for a person to become a holder in due course. If it is obtained before the maturity date by a person, then he is entitled to become a holder in due course. If however, he receives it on the date of maturity or after the payment has been attained, then the possessor of the instrument cannot become a holder in due course. The justification for it is that on an overdue instrument, the possession is taken with the defects that are attached to it. However, if acquisition is of an accommodation bill, it can be acquired after the date of maturity with all the benefits of being a holder in due course. A cheque, however, should be taken only within six months because legally after that date, the validity of the cheque expires.
4. **Technically Complete Instrument:** A negotiable instrument should be complete in all respects. It should be clear without any changes through overwriting or cutting. In case of alterations, the drawer should have signed the instrument. If the instrument is not technically sound, the person, who receives it, cannot become a holder in due course.

5. **Received in Good Faith:** To become a holder in due course, the person should have received the instrument in good faith. If he has received a defective title or a stolen instrument, but is not aware of it, he gets a valid title. However, he has to enquire about the title of the instrument and be sure of its legality before accepting it. In other words, he has to prove that he took all kinds of precaution, and did not suspect any defective title of the instrument accepted by him.

Privileges of a Holder In Due Course

A holder in due course is considered to be in a superior position having certain special privileges, which the holder does not have. He has the following rights:

- He has a better title than that of the transferor.
- He has certain special privileges in case of inchoate stamped instruments.
- He has rights against the prior parties.
- He has privileges in case of fictitious bills.
- He has rights against conditionally delivered instruments.
- He has the right of estoppel in case of validity of the instrument.
- He has the right of estoppel against the denying capacity of payee to endorsee.

1. Better Title than that of the Transferor: A holder has the same title as a transferor, but a holder in due course acquires a better title than the transferor. This means that if a transferor has a defective title, the holder will also have the same title, but a holder in due course gets a better title than the transferor. Thus, according to Section 58, if an instrument is acquired in good faith and without any knowledge of the defects of the instrument, the holder in due course is in a privileged position. Therefore, if there is a defence on the part of a person liable thereon that the instrument is lost or acquired by fraud

or unlawful consideration, it cannot be pleaded against a holder in due course. More privileges of a holder in due course are cited in section 53. According to it, "A holder of a negotiable instrument who derives the title from a holder in due course has the rights thereon of that holder in due course". Accordingly, a holder in due course is cleansed of all the defects of the previous holders in due course. He serves as a channel to protect all previous holders in due course. A transferee from a holder in due course is like a holder in due course, and can recover the amount from prior parties, even if he knew of the defects such as fraud or defective title.

Example: Karan drew a bearer cheque for Manhar and gave it to Kusam to deliver it. Kusam wrote her own name and indorsed it to Asif. Since Asif was a holder-in due course, who acquired the instrument for some consideration, he was interested in knowing his privileges and asked for advice.

Asif can collect the money from Karan as he is a holder in due course. He is entitled to recover the amount.

Example: Rajiv drew a bill on Reena, and made it payable to himself, taking her acceptance by fraud. Now, Rajiv indorses it to Ramesh, who becomes a holder in due course. Ramesh indorses it further to Rakesh, who indorses it back to Rajiv. Is Rajiv able to collect the money? What are his rights as holder in due course?

Rajiv cannot acquire a good title because he is a party to the fraud.A forged instrument cannot be cured of its defects.

2. Special Privileges in Case of Inchoate Stamped Instruments: An inchoate stamped instrument is one, which is not complete in all respects. Under section 20, the original payee should fill in an amount that he / she is authorized to enforce. If the amount filled in is more than the authorized amount, he cannot recover the excess amount on it. If an incomplete

instrument is transferred to a holder in due course, exceeding the authorized amount, he would be entitled to recover the entire amount on the instrument if the stamp affixed on it covers the amount.

Example: Rajni signed a blank stamped instrument and gave it to Munish authorizing him to fill in a promissory note for Rs 7,200 to take an advance from Meenu. Munish fills it as a note for Rs 11000/- payable to Meenu, who in good faith advances Rs 11000/- to Munish. Meenu is entitled to receive the money from Rajni.

3. Rights Against the Prior Parties: Under Section 36, a holder in due course has a right against all prior parties, including drawer, acceptor and endorsees before him. They are liable to him both jointly and severally. He can hold any of the parties individually or jointly liable for payment of the instrument. Until the instrument is completely discharged by the person who is primarily liable, they continue to remain liable.

Example: Kavi drew a bill of exchange on Mattu payable to Somu. It is accepted by Somu and endorsed by him to Dara, who in turn endorses it to Sukhmani. Since Sukhmani becomes the holder in due course, she can realize the amount on the bill not only from Mattu, who accepts the bill, but also from Kavi and Dara.

All the prior parties remain liable to Sukhmani, until she is satisfied that the bill is duly discharged.

4. Privileges in Case of Fictitious Bills: A person who accepts a bill that is drawn in a fictitious name and is payable to the order of the drawer, does not get relieved from his responsibility towards the holder in due course because the bill is in a fictitious name. However, according to Section 42, the holder in due course has to prove that the signature of the first endorsee and the drawer are the same.

Example: Priya accepted a bill of exchange for Rs 5200/- drawn by Veeru and payable to the fictitious person Meera.The bill was returned to Veeru after Priya accepted the bill. Later, Veeru indorsed the bill to Rekha by signing as Meera, the endorser. During the course of negotiation, the bill came in the hands of Mattu, a holder in due course. How can Mattu recover the money as holder in due course?

Mattu can recover the amount on the bill from Priya by showing that the signatures of the drawer Veeru and the first endorser Meera are in the same handwriting.

5. Rights Against Conditionally Delivered Instruments: If an instrument which is prepared for a special purpose or delivered conditionally as a collateral security or for the safe custody, and not with the idea of transferring the rights of the property to the endorser, is negotiated to a holder in due course and a valid delivery is presumed, then under section 46, the holder in due course acquires a good title to it.

Example: Amir is the holder of a bill. He indorses it to Bali. Bali endorses the bill to Kavita. She becomes a holder in due course and acquires a good title to the bill and has the right to claim the money from the prior parties.

As a holder in due course, Kavita can also sue all the prior parties to the instrument.

6. Right of Estoppel in Case of Validity of the Instrument: The drawer and the acceptor of a bill or cheque are liable to the holder in due course. If a holder in due course sues any of those parties, they will not be permitted by court to deny that the instrument was not valid. The drawer/maker are the prior parties responsible to the holder in due course. They have prepared the original documents so they do not have the right to deny the validity of the instrument due to the right of estoppel of the holder in due course. However, if

the drawer can prove that the instrument is forged, then under Section 12, he can get relief.

Example: Amul draws a cheque in favour of Cheenu who endorses it to Mani for some consideration. On the due date it is dishonoured. Mani gives a notice to Cheenu. He cannot deny that he endorsed it.

Amul, as the drawer of the cheque, can also not deny that the instrument is valid. However, if he can prove that it is a forged instrument, then Mani will not get relief.

7. Right of Estoppel Against the Denying Capacity of Payee to Endorsee: Under Section 121, the maker of a promissory note or an acceptor of a bill are not permitted to state to the holder in due course that the payee did not have the capacity to endorse the bill or cheque. Therefore, if the holder in due course files a suit against the acceptor of a bill, he will not be permitted to state that he was a minor when he accepted the bill. However, the maker of the note or the acceptor can reject the instrument by bringing out the fact that the bill was not genuine or the payee's endorsement was not valid.

Example: Abhay is the maker of a promissory note, which is payable to Bani, who is a minor. Bani endorses it to another person by the name of Sanjay, who becomes the holder in due course. Abhay cannot state that Bani did not have the capacity to make an endorsement.

The holder in due course, Sanjay, can recover the money from Abhay, who is the drawer of the promissory note. Unless Sanjay's claim is discharged, he remains liable to him.

Provisions In Respect Of Cheques

A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. 'Cheque' includes electronic image of a truncated cheque and a cheque in electronic form.

[section 6]. The definition is amended by Amendment Act, 2002, making provision for electronic submission and clearance of cheque. The cheque is one form of bill of exchange. It is addressed to Banker. It cannot be made payable after some days. It must be made payable 'on demand'.

Endorsement

The term 'endorsement' means writing the name of the person on the back of the instrument to negotiate the instrument in favour of that person. Let us take an example. Mr. A wants to transfer a cheque to Mr. B. Now, Mr. A will write the name of Mr. B on the back of the cheque and put his signature to negotiate the cheque and then he delivered the cheque to Mr. B. This act is called endorsement. Mr. A is the endorser and Mr. B is the endorsee.

Definition of Endorsement

According to Section 15 of the Negotiable Instrument Act, "Endorsement is the signing by the holder of his /her name on a negotiable instrument for the purpose of its negotiation to another person." The holder signs on the back of the instrument, or may choose to sign on the face of the instrument, or signs on a slip of paper called "allonge", which is then attached to the negotiable instrument.

There are two parties to an endorsement:

1. Endorser
2. Endorsee

The Endorser is the person who signs the instrument and the endorsee is the person to whom the instrument is transferred. The endorsement is complete only after the instrument is delivered to the endorsee.

Example: Pompa purchases lots of dairy products from Ruksana, who is a supplier of dairy products. She draws a bill for rupees thousand payable to Ruksana on 19th August 2008, and gives it to her. The date of maturity of the instrument is 19th November 2008. Ruksana buys milk for preparation of her dairy products from Jaggu. She takes milk worth rupees thousand from Jaggu on credit. She writes on the back of the bill "Pay to Jaggu" and signs it. In this case, Ruksana is the endorser and Jaggu is the endorsee.

Kinds of Endorsements

There are five kinds of Endorsements, which are as follows:

1 Blank or General Endorsement: In this case the endorser only signs his/her name. He /she does not mention the name of the endorsee. In such a case, the endorser makes an order instrument payable to the bearer, and the property thereby is transferred by mere delivery.

Example: A bill of exchange is payable to Ravi. Ravi (endorser) signs only his name at the back of the bill and delivers it to Krishna (endorsee), his creditor.

2 Special / Full endorsement: In this case, the endorser not only signs his/her name, but also adds the name of the endorsee (the name of the person to whom the instrument is being transferred).

Example: A bill of exchange is payable to Ravi. Ravi (endorser) signs his name and also the name of his creditor, Krishna (endorsee), at the back of the bill, and delivers it to him.

3 Restrictive Endorsement: In this case, the endorser prohibits the endorsee from negotiating the instrument any further. It merely entitles the endorsee to receive the amount on the instrument for a specific purpose.

Example: A bill of exchange is payable to Ravi. Ravi signs his name and also writes on the bill 'Pay Krishna only', while delivering the bill to Krishna (endorsee). Krishna is prohibited from negotiating the instrument any further.

4 Partial Endorsement: In this case the endorsement transfers to the endorsee only a part of the amount of the instrument. However such instruments are not valid because they lead to plurality of action and interfere in its free circulation.

Example: A bill of exchange of rupees one thousand is payable to Ravi. Ravi signs his name and also writes on the bill 'Pay to Krishna Rs. 500'. As this is a partial endorsement it is invalid.

5 Conditional Endorsement: In this case the endorser makes his/her liability on the instrument conditional on the happening of a particular event. This limits or negates the liability of the endorser. It may take any of the following forms:

a) Sans Recourse Endorsement: when an endorser does not want to incur any liability to the endorsee or to any subsequent holder in the event of dishonour of a negotiable instrument, he/she may exclude his/her liability by using the words 'sans recourse', which means 'without recourse.'

Example: A bill of exchange is payable to Ravi. Ravi signs his name and also writes on the bill 'Pay Krishna at his own risk' while delivering the bill to Krishna (endorsee). Hence Ravi is free from any liability, which may arise due to the dishonoring of the bill.

b) Facultative Endorsement: In this case an endorser by express words increases his/her liability, or gives up some of his/her rights under the negotiable instruments act.

Example: A bill of exchange is payable to Ravi. Ravi signs his name and also writes on the bill 'Pay Krishna, notice of dishonour waived' while delivering the bill to Krishna (endorsee). Hence Ravi makes himself liable, in case the bill is dishonoured.

c) Sans Frais Endorsement: In this case, the endorsee does not incur any expenses on his/her account on the instrument drawn by the endorser.

Example: A bill of exchange is payable to Ravi. Ravi signs his name and also writes on the bill 'Pay Krishna, sans frais' while delivering the bill to Krishna (endorsee). Hence Krishna will not incur any expenses on Ravi's account on the instrument.

d) Contingent Endorsement: In this case the liability is dependent upon a contingency, which may or may not happen.

Example: A bill of exchange is payable to Ravi. Ravi signs his name and also writes on the bill 'Pay Krishna on his marriage with Radha' while delivering the bill to Krishna (endorsee). Hence Krishna cannot get the payment until he marries Radha.

An unconditional endorsement completed by delivery of the instrument shall have the following effects:

1 The ownership of the instrument is transferred from the endorser to the endorsee.

Example: A bill of exchange is payable to Ravi. Ravi (endorser) signs his name and also the name of his creditor Krishna (endorsee), at the back of the bill, and delivers it to him. Hence Krishna gets the ownership of the instrument.

2 The endorsee gets the right of further negotiation.

Example: A bill of exchange is payable to Ravi. Ravi (endorser) signs his name and also the name of his creditor, Krishna (endorsee), at the back of the bill and delivers it to him. Hence Krishna gets the ownership of the instrument as well as the right to further negotiate the instrument to any other party.

3 The endorsee can bring an action for recovery against all the parties whose names appear on the instrument.

Example: A bill of exchange is payable to Ravi. Ravi (endorser) signs his name and also the name of his creditor, Krishna (endorsee), at the back of the bill, and delivers it to him. Krishna places the bill at the bank, and the bill gets dishonored. Hence, Krishna can take action against Ravi as well as against all the other people who had endorsed the bill and had their name written on it, and make them liable for the dishonoring of the bill.

Negotiation Back

Sometimes in the course of negotiation, if a negotiable instrument is again endorsed by the last endorsee to the original holder or a previous endorser, it is called 'Negotiation Back'. The person who becomes the holder by reason of negotiation back cannot make any of the intermediate endorsers liable on the instrument because, being a prior party, he/she is liable to all of them, and so he/she will have to sue himself.

Crossing of cheque

The Act makes specific provisions for crossing of cheques.

Cheque crossed generally

Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not

negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. [section 123]

Cheque crossed specially

Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker. [section 124].

Payment of cheque crossed generally or specially

Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker. Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection. [section 126].

Cheque bearing "not negotiable"

A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable", shall not have, and shall not be capable of giving, a better title to the cheque than that which the person form whom he took it had. [section 130]. Thus, mere writing words 'Not negotiable' does not mean that the cheque is not transferable. It is still transferable, but the transferee cannot get title better than what transferor had.

Electronic Cheque

Provisions of electronic cheque has been made by Amendment Act, 2002. As per Explanation I(a) to section 6, 'A cheque in the electronic form' means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed by a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system.

Truncated Cheque

Provisions of electronic cheque has been made by Amendment Act, 2002. As per Explanation I(b) to section 6, 'A truncated cheque' means a cheque

which is truncated during the clearing cycle, either by the clearing house during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Penalty In Case Of Dishonour Of Cheques For Insufficiency Of Funds

If a cheque is dishonoured even when presented before expiry of 6 months, the payee or holder in due course is required to give notice to drawer of cheque within 30 days from receiving information from bank.. The drawer should make payment within 15 days of receipt of notice. If he does not pay within 15 days, the payee has to lodge a complaint with Metropolitan Magistrate or Judicial Magistrate of First Class, against drawer within one month from the last day on which drawer should have paid the amount.

The penalty can be upto two years imprisonment or fine upto twice the amount of cheque or both. The offense can be tried summarily. Notice can be sent to drawer by speed post or courier. Offense is compoundable. It must be noted that even if penalty is imposed on drawer, he is still liable to make payment of the cheque which was dishonoured. Thus, the fine/imprisonment is in addition to his liability to make payment of the cheque.

Return of Cheque Should be for Insufficiency of Funds

The offence takes place only when cheque is dishonoured for insufficiency of funds or where the amount exceeds the arrangement. Section 146 of NI Act only provides that once complainant produces bank's slip or memo having official mark that the cheque is dishonoured, the Court will presume dishonour of the cheque, unless and until such fact is disproved.

Calculation of Date of Maturity of Bill of Exchange

If the instrument is not payable on demand, calculation of date of maturity is important. An instrument not payable on demand is entitled to get 3 days grace period.

Presentment of Negotiable Instrument

The Negotiable Instrument is required to be presented for payment to the person who is liable to pay. Further, in case of Bill of Exchange payable 'after sight', it has to be presented for acceptance by drawee. 'Acceptance' means that drawee agrees to pay the amount as shown in the Bill. This is required as the maker of bill (drawer) is asking drawee to pay certain amount to payee. The drawee may refuse the payment as he has not signed the Bill and has not accepted the liability. In case of Promissory Note, such acceptance is not required, as the maker who has signed the note himself is liable to make payment. However, if the promissory note is payable certain days 'after sight' [say 30 days after sight], it will have to be presented for 'sight'. If the instrument uses the expressions "on demand", "at sight" or "on presentment", the amount is payable on demand. In such case, presentment for acceptance is not required. The Negotiable Instrument will be directly presented for payment.

Differences between Cheque and Bill of Exchange

Points	**Cheque**	**Bill of Exchange**
1. Drawee	A cheque is always **drawn on a banker**.	A bill can be **drawn on any person including a banker**.
2. Acceptance	A cheque **does not require acceptance** of the drawee.	A bill **must be accepted** by the drawee.
3. Payment	A cheque is always **payable on demand**.	A bill may be **payable on demand or after the expiry of a fixed period**.
4. Stamp	A cheque **does not require any stamp**.	A bill must be **properly stamped**.
5. Crossing	A cheque **can be crossed**.	A bill **can not be crossed**.

Acceptance and Payment for Honour and Drawee in Need

Provisions for acceptance and payment for honour have been made in case when the negotiable instrument is dishonoured. Bill is accepted for honour when it is dishonoured when presenting for acceptance, while payment for dishonour is made when Bill is dishonoured when presented for payment.

Based on this characteristic, cheques can be classified into two main groups. They are-

1. Open cheques
2. Crossed cheques

In case of open cheques, the amount of such cheques can be collected by the payee over the counter of the bank. These cheques are of two types-

1. Bearer cheque:

The cheque which is payable to the bearer or the possessor, is called the bearer cheque. Such cheque can be transferred by mere delivery without any endorsement. For example, "Pay Ram or bearer" is a bearer cheque, where Ram or any other person who possess the cheque, can collect the amount of the cheque.

2. Order cheque:

The cheque which is payable only to a certain person (whose name appears on the cheque) or to his order, is called the order cheque. The word 'Order' is written instead of the word 'Bearer' on the cheque. The drawer can strike off the word 'bearer' and can write the word 'order' to make it an order cheque. An order cheque can not be transferred without endorsement and the paying banker takes reasonable care before making the payment of such cheque. For example, "Pay Ram or order" is an order cheque, where payment will be made only to Ram or to the person to whom Ram has endorsed the cheque.

In case of crossed cheques, the amount of such cheques can not be collected over the counter of the bank. The amount of such a cheque is paid through the bank account of the payee. Hence, they are safer as compared to the open cheques. A cheque can be crossed by drawing two parallel transverse lines across the face of the cheque with or without the words "and company" or "not negotiable" or "account payee" between the parallel transverse lines. Crossing of a cheque means paying the money to the specified person only by transferring the money to his account and not directly (cash).

A cheque can be crossed by the-

1. Drawer; or
2. The holder; when the cheque is open; or
3. The collecting banker.

Types of Crossing

1. General crossing:

Section 123 of the Negotiable Instruments Act, 1881 defines general crossing as "where a cheque bears across its face, an addition of the word "and company" or any abbreviation thereof between two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally."

It means a cheque can be crossed generally by simply drawing two parallel transverse lines. The parallel lines are generally drawn on the left hand top corner of the cheque. The words "and company" or "not negotiable" may or may not be written in between the parallel lines.

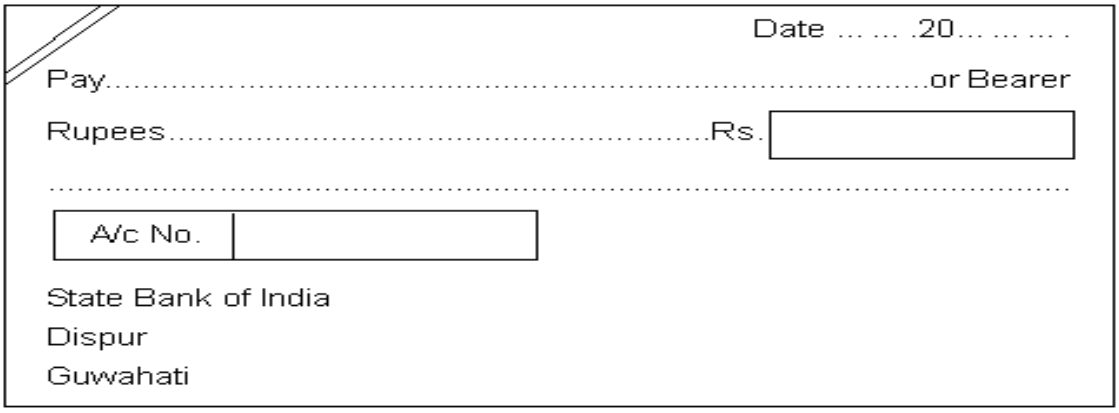


Figure: General crossing of a cheque

2. Special crossing:

Section 124 of the Negotiable Instruments Act, 1881 defines special crossing as "where a cheque bears across its face, an addition of the name of a banker with or without the words "not negotiable", that addition shall be deemed a crossing and the cheque shall be deemed to be crossed specially and to be crossed to that banker."

Thus, in case of special crossing, the name of a particular bank is written in between the parallel lines. The main implication of this type of crossing is that the amount of the cheque will be paid to the specified banker whose name is written in between the lines.

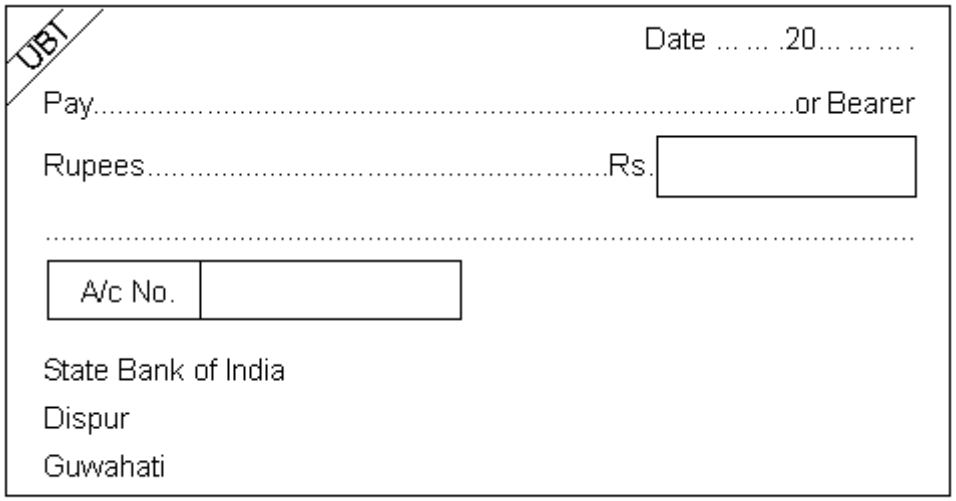


Figure: Special crossing of a cheque

3. Account payee crossing:

This type of crossing is done by adding the words 'Account Payee'. This can be made both in general crossing and special crossing. The implication of this type of crossing is that the collecting banker has to collect the amount of the cheque only for the payee. If he wrongly credits the amount of the cheque to another account, he will be held responsible for the same.

4. Not negotiable crossing:

When the words 'not negotiable' is added in generally or specially crossed cheques, it is called not negotiable crossing. A cheque bearing not negotiable crossing cannot be transferred. If a cheque bearing 'Not negotiable crossing' is transferred, care must be taken regarding the ownership of title of both the transferer and transferee.

In the above discussion, we have come across that a negotiable instrument (promissory note, bill of exchange, cheque) can be transferred from one person to another. At this point of time, it is important to discuss some important aspects relating to transferring of negotiable instruments.

Local Usage Prevails Unless Excluded

The Act does not affect any local usage relating to any instrument in an oriental language. However, the local usage can be excluded by any words in the body of the instrument, which indicate an intention that the legal relations of the parties will be governed by provisions of Negotiable Instruments Act and not by local usage. [section 1]. Thus, unless specifically excluded, local usage prevails, if the instrument is in regional language.

Bill of Exchange and Promissory Notes Excluded from Information Technology Act

Section (1)(4)(a) of Information Technology Act provides that the Act will not apply to Bill of Exchange and Promissory Notes. Thus, a Bill of Exchange or Promissory Note cannot be made by electronic means. However, cheque is covered under of Information Technology Act and hence can be made and / or sent by electronic means.

Changes Made By Amendment Act, 2002

a) Definition of 'cheque' and related provisions in respect of cheque amended to facilitate electronic submission and/or electronic clearance of cheque. Corresponding changes were also made in Information Technology Act.
b) Bouncing of cheque - Provisions amended * Provision for imprisonment upto 2 years against present one year * Period for issuing notice to drawer increased from 15 days to 30 days * Government Nominee Directors excluded from liability * Court empowered to take cognizance of offence even if complaint filed beyond one month * Summary trial procedure permitted for imposing punishment upto one year and fine even exceeding Rs 5,000 * Summons can be issued by speed post or courier service * Summons refused will be deemed to have been served * Evidence of complainant through affidavit permitted * Bank's slip or memo indicating dishonour of cheque will be prima facie evidence unless contrary proved * Offence can be compounded.

The amendments have been made effective from 6-2-2003.

Transferee can get better title than transferor

Normal principle is that a person cannot transfer better title to property that he himself has. For example, if a person steals a car and sells the same, the buyer does not get any legal title to the car as the transferor himself had no title to the car. The real owner of car can anytime obtain possession from the buyer, even if the buyer had purchased the car in good faith and even if he had no idea that the seller had no title to the car.

This provision is no doubt sound, but would make free negotiability of instrument difficult, as it would be difficult to verify title of transferor in many cases. Hence, it is provided that if a person acquires 'Negotiable Instrument' in good faith and without knowledge of defect in title of the transferor, the transferee can get better title to the negotiable instrument, even if the title of transferor was defective. This is really to ensure free negotiability of instrument so that persons can deal in the instrument without any fear.

Difference between Negotiation and Transfer/Assignment

Difference between "Negotiation' and assignment/transfer is that in case of negotiation, the transferee can get title better than transferor, which can never happen in assignment/transfer.

Liability of Parties

Basic liability of payment is as follows – (a) Maker in case of Promissory Note or Cheque and (b) Drawer of Bill till it is accepted by drawee and acceptor after the Bill is accepted. They are liable as 'principal debtors' and other parties to instrument are liable as sureties for maker, drawer or acceptor, as the case may be. When document is endorsed number of times, each prior party is liable to each subsequent party as principal debtor. In case of dishonour, notice is required to be given to drawer and all earlier endorsees.

Presumptions as to Negotiable Instruments

Until the contrary is proved, the following presumptions shall be made (a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration (b) as to date - that every negotiable instrument bearing a date was aide or drawn on such date (c) as to time of acceptance - that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity (d) as to time of transfer that every transfer of a negotiable instrument was made before its maturity (e) as to order of indorsements - that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon (f) as to stamps - that a lost promissory note, bill of exchange or cheque was duly stamped (g) that holder is a holder in due course - that the holder of a negotiable instrument is a holder in due course provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder in due course lies upon him.

A negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time. According to the Section 13 of the Negotiable Instruments Act, 1881 in India, a negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer. So, there are just three types of negotiable instruments such as promissory note, bill of exchange and cheque. Cheque also includes Demand Draft [Section 85A]. More specifically, it is a document contemplated by a contract, which (1) warrants the payment of money, the promise of or

order for conveyance of which is unconditional (2) specifies or describes the payee, who is designated on and memorialized by the instrument and (3) is capable of change through transfer by valid negotiation of the instrument. As payment of money is promised subsequently, the instrument itself can be used by the holder in due course as a store of value; although, instruments can be transferred for amounts in contractual exchange that are less than the instrument's face value (known as "discounting"). Under United States law, Article 3 of the Uniform Commercial Code as enacted in the applicable State law governs the use of negotiable instruments, except banknotes

Negotiable Instruments Act, 1881 is an act dating from the period of British colonial rule in India that is still in force largely unchanged.

The history of the present Act is a long one. The Act was originally drafted in 1866 by the 3rd India Law Commission and introduced in December, 1867 in the Council and it was referred to a Select Committee. Objections were raised by the mercantile community to the numerous deviations from the English Law which it contained. The Bill had to be redrafted in 1877. After the lapse of a sufficient period for criticism by the Local Governments, the High Courts and the chambers of commerce, the Bill was revised by a Select Committee. In spite of this Bill could not reach the final stage.

In 1880 by the Order of the Secretary of State, the Bill had to be referred to a new Law Commission. On the recommendation of the new Law Commission the Bill was re-drafted and again it was sent to a Select Committee which adopted most of the additions recommended by the new Law Commission. The draft thus prepared for the fourth time was introduced in the Council and was passed into law in 1881 being the Negotiable Instruments Act, 1881 (Act No.26 of 1881)

The most important class of Credit Instruments that evolved in India was termed Hundi. Their use was most widespread in the twelfth century, and has continued till today. In a sense, they represent the oldest surviving form of

credit instrument. These were used in trade and credit transactions; they were used as remittance instruments for the purpose of transfer of funds from one place to another. In Modern era Hundi served as Travellers Cheques.

With the insertion of these provisions in the Act the situation certainly improved and the instances of dishonour have relatively come down but on account of application of different interpretative techniques by different High Courts on different provisions of the Act it further compounded and complicated the situation although on dishonour of cheques the trends of the verdicts of the Supreme Court of India

Parliament enacted the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (55 of 2002), which is intended to plug the loopholes. This amendment Act inserts five new sections from 143 to 147 touching various limbs of the parent Act and Cheque truncation through digitally were also included and the amendment Act has been recently brought into force on Feb. 6, 2003.

Statutory definitions

Section 4 - Promissory note

A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

Section 5 - Bill 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.

A promise or order to pay is not "conditional", within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after

the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be "certain", within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person", within the meaning of this section and section 4, although he is mis-named or designated by description only.

Section 6 – Cheque

A cheque is bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Explanation: I. - For the purposes of this section, the expressions-

(a) *a cheque in the electronic* form means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system;

(b) *a truncated cheque* means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Explanation II - For the purposes of this section, the expression clearing house means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India.

Section 13 - Negotiable Instruments

A Negotiable Instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i).-A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii).-A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

Explanation (iii).-Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or - some of several payees.

Section 123 - Cheque Crossed Generally

Where a cheque bears across its face an addition of the words and company or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words, not negotiable, that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

Section 124 - Cheque crossed specially

Where a cheque bears across its face an addition of the name of a banker, either with or without the words not negotiable, that addition shall be

deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

Section 126 Cheque crossed specially

Where a cheque is crossed generally, the banker, on whom it is drawn shall not pay it otherwise than to a banker.

Payment of cheque crossed specially. - Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent, for collection.

Section 130 Cheque bearing Not Negotiable

A person taking a cheque crossed generally or specially, bearing in either case the words not negotiable, shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

Dishonour of certain cheques for insufficiency of funds provided that nothing contained in this section shall apply unless-

(a) The cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within 15 days of the receipt of the said notice.

Explanation - For the purposes of this section, debt or other liability means a legally enforceable debt or other liability.

Another very important section is presumptions as to Negotiable Instruments under Section 118 of the Act.

Section 118 - Presumptions as to Negotiable Instruments

Until the contrary is proved, the following presumptions shall be made:

(a) of consideration. - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date. - that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance. - that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer. - that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements. - that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamp. - that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course. - that the holder of a negotiable instrument is a holder in due course; Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Five ingredients of the offence under Section 138

It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

1. A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account.
2. The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability.
3. That cheque has been presented to bank within a period of three months from the date on which it is drawn or within the period of its validity whichever is earlier.
4. That cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank.
5. The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.
6. The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Bouncing Of Cheques and Penalties to the Drawer

Bouncing of cheques is a serious offence under section 138 to 142 of the amended Banking, Public Financial Institutions and Negotiable Instruments Laws Act, 1988. This amendment was brought about to make the drawer of the cheque consider that a promise to pay a cheque is serious business. If the

amount on it is not paid by the banker due to insufficiency of funds in the drawer's account, he would be penalized. This offence is punishable with imprisonment of one year and/or a fine or both extending to more than one year and up to a maximum two years with a fine of twice the amount of the cheque. Therefore when a person draws a cheque, he should keep sufficient amounts for clearing the cheque to avoid being penalized. If a person has committed an offence, he will be liable to be proceeded against and punished accordingly. However, if the drawer can prove that he did not commit the offence knowingly, and he has tried in every possible way not to inconvenience the payee, then, he will not be liable. To summarize, the following holds good if a person is found guilty of dishonouring a cheque:

Imprisonment for dishonouring cheque: Imprisonment of the drawer for a period that may extend up-to two years.

Fine for default in payment: The drawer can be fined. The fine may extend to be double the amount of the cheque.

Imprisonment and fine to drawer: The penalty to a drawer can include imprisonment and also fine that extends to double the amount of the cheque.

Conditions for Applicability of Section 138

The following conditions should be identified to prove that the drawer committed an offence and should be penalized:

Insufficient funds: When a banker receives a cheque, he should compare the amount drawn on the cheque with the customer's credit balance and the amounts assigned by him for his various other activities. If the amount is less than the required funds, he has a right to dishonour the cheques of the drawer. When the cheque is dishonoured, the drawer will be penalized.

Insufficiency of funds is thus, recognized in the following two cases:

- The funds in the drawer's account are not sufficient for honouring the cheque, Or, if the amount is greater than the amount of balance left in the drawer's account, after paying the funds assigned by him for other purposes.

Presentation of cheque beyond validity period: A cheque should be presented within 6 months of the issue. If the date of drawing the cheque or the validity period has expired, the cheque will be dishonoured.

Discharge of legally enforced debt or liability: The drawer should have made the cheque in favour of the payee as a payment for discharge of a legally enforceable debt or liability wholly or a part of it.

Dishonour notice to the drawer: The payee or the holder of the cheque must send a written notice to the drawer within 30 days of receiving a notice from the banker of the dishonour of the cheque, and demand the amount on the cheque from the drawer. A notice must preclude a complaint.

Demand of Payee within 30 days of notice: Notice to a drawer is given so that he gets a chance to rectify his mistake. If the drawer fails to pay within 30 days of the notice given to the drawer that the cheque has been dishonoured, it will be considered as an offence. However, if the drawer makes the payment within the time limit, he will be absolved of his liability.

Payee should give a written complaint within one month: The payee should make a written complaint within one month after the expiry of the notice period to the court under section 138 to a first class magistrate or metropolitan magistrate. A court inferior to this court cannot be allowed to try the offence. The complaint has to be filed in the place, where the cheque was presented for

collection or near the business house of the payee a holder in due course. The complaint must also be forwarded with details regarding the bank and its branch on which the cheque was issued and the date and the number of the cheque when it was drawn and the reasons given by the bank for not honouring the cheque. The court also requires the date, when the payee sent a notice demanding his payment from the drawer, and if there were any replies to the demand they were to be attached.

Section 139 also states that the court will presume that the cheque was given for discharge of debt or liability, unless the drawer proves that it is not so. Section 140 states that a drawer will not be able to take any defence under the fact that he issued the cheque, but did not expect it to be honoured.

Possible Questions

PART – A (1 Mark)

Online Questions

PART – B (2 Marks)

1. What is bill of exchange?
2. Define promissory note.
3. Define Cheque.
4. What is Crossing of Cheque?
5. Who is a Drawer?
6. Who is a Drawee?
7. Who is called as Payee?

8. What is endorsement?
9. Who is endorser?
10. Who is endorsee?

PART – C (6 Marks)

1. Explain the Characteristics of Negotiable Instrument.
2. Enumerate the Types of Crossing of Cheque.
3. Describe an overview of bill of exchange with suitable example.
4. Describe an overview of Promissory Note with suitable example.
5. Describe an overview of Cheque with suitable example.
6. Explain the Types of Endorsement.
7. Bring out the difference between Bill of Exchange and Cheque.
8. Determine the Privilege of Holder in Due Course.
9. Describe the features of cheque.
10. Elucidate the Holder and Holder in Due Course in detail.

53	A sale is an executed Contract whereas an Agreement to sell is an _____ contract	Past	Arranged	Executory
54	For valid contract one of the following is not necessary:	Lawful object	Lawful consent	Lawful consideration
55	Actual breach of contract arises when the promisor refuses to perform his promise____	At the due date of performance	Before the time of performance has arrived	After the due date of performance
56	Quasi contract are contracts in which there is____	No offer	No consensus-ad-idem	No acceptance
57	Examples of contigent contract	Banking	Insurance	Pension
I B.Com (CA) (2018-2021)	Contigent contract is a contract_____	To do something	Not to do something	To do or not to do something
Business Law (18CCU203)	In the contigent contract if the happening of even becomes impossible then the contract becomes ____	Voidable	Void	Valid
60	Quantum Meruit indicates_____	The right to rescine the contract	A much as is earned or according to the quantity of work done	The claim for specific performance

Maintained	Executory
Lawful statement	Lawful consent
Both A & C	At the due date of performance
No agreement	No consensus- ad-idem
Company	Insurance
To do or not to do anything	To do or not to do something
Voidable at he option of the promisor	Void
Suit for injunction	Suit for injunction

S.No	Questions	Opt 1	Opt 2	Opt 3	Opt 4	Answer
1	The Banking Regulation Act……	1939	1949	1959	1969	1949
2	The primary relationship between a banker and customer starts from the	when customer visits that bank	when customer opens the account	when customer visits that bank	When customers do the transactions	when customer opens the account
3	The primary relationship between banker and customer is a ---------- relationship	Mutual	Contractual	Personal	Friendly	Contractual
4	Which one of the following is the most important relationship between banker and customer……	Debtor and Creditor	Bailee and Bailor	Agency and Principal	Trustee and Beneficiary	Debtor and Creditor
5	Banking Companies shall have minimum paid up capital not less than Rs.	50 lakhs	25 lakhs	75 lakhs	5 lakhs	5 lakhs
6	A foregin bank setting up of business of in India is required to bring in a minimum of	$20	$30	$10	$40	$10
7	……% of the Board of Directors of a banking company must consits of who	20	30	40	51	51
8	When banker received deposits from the customer, then the banker becomes ----------	Debtor	Creditor	Bailee	Trustee	Debtor
9	Banking Management comes under section of……	25 (A)	20 (A)	10 (A)	5 (A)	10 (A)
10	Which section comes licensing of banks in India……?	Section 11	Section 22	Section 25	Section 19	Section 22
11	Which body gives license to bank?	Central Government	State Government	RBI	State Bank of India	RBI
12	Which of the following public sector banks has highest number of branches in India?	Bank of india	Allahabad Bank	State bank of India	Punjab National Bank	State bank of India
13	Which bank has received Banking licenses by Reserve Bank of India in 2014 ?	Aditya Birla Nuvo Ltd	IDFC and Bandhan	HDFC	ICICI	IDFC and Bandhan
14	What is the full-form of HDFC?	Housing Department	Housing Development	Housing Development	Housing Development Finance	Housing Development Finance Corporation
15	Who was was the first Indian to become governor of RBI?	Liaquat Ali Khan	T. T. Krishnamachari	John Mathai	C. D. Deshmukh	C. D. Deshmukh
16	RBI will grant permission for opening a new branches for bank…….	concern about society	Providing job opportunities	capital structure is adequate	Reputation of the bank	capital structure is adequate

17	As per new licensing policy banks with good……	Financial health	Network	Brand name	Relation with customer	Financial health
18	As per new licensing policy, how many years banks have to show their profits?	1	3	5	7	3
19	The capital adequacy ratio is atleast……..	2%	4%	6%	8%	6%
20	How much fund bank's requireto open branches withour RBI prior permission?	Rs.10 Cr	Rs. 100 Cr	Rs.150 Cr	Rs.200 Cr	Rs. 100 Cr
21	Who would inspect the bank?	SBI	RBI	Central Government	State Government	RBI
22	Which section contains the provision for inspection of banks?	Section 15	Section 23	Section 35	Section 38	Section 35
23	Who would determine the credit policy of the bank?	SBI	RBI	Central Bank	State Government	RBI
24	Section 36AB indicates that…….	Rules and Regulation	Policy framing	Removal of Chairman	Appoint the additional directors	Appoint the additional directors
25	Removal of any chairman/Directors/Officer from the bank under section of……..	38AA	40AA	45AA	30 AA	38AA
26	Section 36 AE to 36 AJ provides that……	RBI Guidelines	Framing new policies	Acquisition of banking	Liquadation	Acquisition of banking companies
27	The word customer signifies a relationship in which ……is of no essence.	Commitment	dedication	duration	trust	duration
28	The banker has a statutory obligation to…..	honour customers cheques	exercise lien	maintain secrecy of his customer's	honour customer's bill	honour customers cheques
29	…….accepts the bailment of certain things on the condition that the things bailed	Bailor	Trustee	Bailee	Beneficiary	Bailee
30	It is a ---------- obligation of a banker to honour the cheques of the customer drawn	Mutual	Statutory	Unstatutory	deficit	Statutory
31	Which bank have given the instructions to the commercial banks regarding the immediate credit of outstation cheques?	Reserve Bank of India	Central Bank	World Bank	SBI	Reserve Bank of India
32	Special damages refers to damages payable by a banker to his customer for the actual ----------	Financial	Special	Unpecuniary	Unfinancial	Financial

33	Who signs One rupee note in India?	RBI Governor	RBI Deputy Governor	Finance Secretary	Prime Minister	Finance Secretary
34	First printing press for bank notes in India was established at __?	Calcutta	Surat	Nasik	Aurangabad	Nasik
35	In how many languages, the amount of a banknote is written on it……..	15	17	18	19	17
36	RBI provides Ways and Means Advances (WMA) to __:	Central Government	State Government	Local Bodies	Public companies	State Government
37	Which of the following is not a function / power of Reserve Bank of India?	To assume the responsibility of	To hold cash reserves of the	To assume responsibility of	To assume the responsibility of	To assume the responsibility of
38	What will be the impact on the cash reserves of commercial banks if RBI conducts a sale of securities ?	Increase	Decrease	Remain constant	Flexible	Decrease
39	RBI takes certain steps to curb the menace of Inflation. In this context, which among the following will not help RBI in controlling the inflation in the country?	An increase in the Bank Rate	An increase in the Reserve Ratio Requirements	A purchase of securities in the open market	Increasing the Repo Rate	A purchase of securities in the open market
40	Who works as RBI's agent at places where it has no office of its own?	State Bank of India	Ministry of Finance	Government of India	International Monetary Fund	State Bank of India
41	Which among the following is incorrect?	RBI is the Bank of Issue	RBI acts as Banker to the Government	RBI is Banker's Bank	RBI does not regulate the flow of credit	RBI does not regulate the flow of credit
42	Which of the following is true about the restrictions on RBI? (A) It is not to compete	Only A	Only B & C	Only B &D	A,B,C,& D	A,B,C,& D
43	According to which guidelines did the Government pick up the entire SBI shares	National Stock Exchange of	Securities Commission	Financial Regulations	Securities and Exchange Board of	Securities and Exchange Board of India (SEBI)
44	What is the full form of CBS?	Core Banking Solution	Core Banking Software	Core Banking System	Core Banking Service	Core Banking Solution
45	Which among the following is called the rate of interest charged by RBI for lending money to various commercial banks by rediscounting of bills in India?	Bank Rate	Discount Window	Monetary Policy	Overnight Rate	Bank Rate
46	Which of the following are to be followed by Commercial Banks for risk management?	Basel II norms	Basel III norms	Basel I norms	Solvency II norms	Basel II norms
47	What is the full form of CRR?	Cash Reserve Rate	Cash Reserve Ratio	Cash Recession Ratio	Core Reserve Rate	Cash Reserve Ratio

48	Which one of the following is the rate at which the RBI lends money to commercial	Benchmark Prime Lending	Annual Percentage Rate	Bank Rate	Repo Rate	Repo Rate
49	Who sets up 'Base Rate' for Banks?	Individual Banks Board	Interest Rate Commission of	RBI	World Bank	RBI
50	The credit control methods adopted by RBi includes:……..	Quantitative & Qualitative	Trail & error control	Fixed control	Flexible control	Quantitative & Qualitative control
51	Which of the following are qualitative control methods….. (i) Margins	only (i)	Only (i) and (iii)	Only (ii) and (iii)	(i) (ii) & (iiii)	(i) (ii) & (iiii)
52	Which act has given control & supervision powers to RBI over commercial	RBI Act 1934	Banking Regulation act	Both RBI Act 1934 & Banking	Banking Regulation Act 1960	Both RBI Act 1934 & Banking Regulation act
53	Central Bank_____ Credit	Create	controls	Restrict	unlimit	controls
54	……... policy refers to policy measure taken by RBI to control &	Credit	Monetary	Fiscal	Financial	Monetary
55	When RBI is the lender of last resort what does it mean?	RBI advances necessary credit	Commercial banks give funds to RBI	RBI advances money to public	World bank offers fund	RBI advances necessary credit against eligible
56	Bank rate means……..	Rate at which commercial	Rate at which RBI lends to	Rate of interest paid by banks to	Rate of interest paid by Government to its	Rate at which RBI lends to commercial bank
57	Which of the following statement is incorrect…….	Every country has only one	RBI is a profit making institution	RBI does not perform any	RBI has adopted minimum reserve	RBI is a profit making institution acting in the
58	RBI pays interest on CRR balances of banks at……..	Bank Rate	Repo Rate	Bank Rate minus 2%	Zero %	Zero %
59	The National Housing Bank (NHB) was set up in India as a wholly-owned subsidiary	SBI	RBI	Axis Bank	Indian Bank	RBI
60	Which one among the following formulates the fiscal policy in India ?	Planning Commission	Finance Commission	The Reserve Bank of India	Ministry of Finance	Ministry of Finance

S.No	Questions	Opt 1	Opt 2	Opt 3	Opt 4	Answer
1	Sale of goods Act is _____	1940	1930	1942	1952	1930
2	The first essential element of a contract of sale is ---------	Three Parties	Four Parties	Five Parties	Two Parties	Two Parties
3	The ------ for the contract of sale called price	Offer	Consideration	Acceptance	Consent	Consideration
4	Sale is an……	excuted contract	excutory contract	implied contract	expressed contract	excuted contract
5	Contract of Sale of goods Act is……	Section 1	Section 2	Section 3	Section 4	Section 4
6	Transfer of Property Act is…….	1882	1892	1872	1992	1882
7	Aution Sale is a……	Personal Sale	Public Sale	Private sale	quoted price sale	Public Sale
8	Unpaid Seller…….	Section 35	Section 40	Section 45	Section 55	Section 45
9	A -------- is a stipulation which is essential to the main purpose of the contract	Warranty	Condition	Guarantee	Surety	Condition
10	A------- is a stipulation which is collateral to the main purpose of the contract	Warranty	Condition	Guarantee	Surety	Warranty
11	When there is a contract for the -------- is an implied condition that the goods should correspond with the description	As to title	As to quality	Sale by description	Sale by merchantability	Sale by description
12	An implied condition as to --------- for a particular purpose may be annexed by the usage of trade	Custom	Wholesomeness	Title	Description	Custom
13	-------- means let the buyer beware	Lien	Caveat Emptor	Rem	Consensus aidem	Caveat Emptor

14	Ownership is transferred from the seller to the ---- only when a certain agreed number of installments is paid	Bailee	Buyer	Seller	Hire Purchase	Hire Purchase
15	The goods which are owned or passed by the seller at the time of sale is known as ----------	Specific goods	Existing goods	Future goods	Contingent goods	Existing goods
16	--------- goods which are identified and agreed upon at the time a contract of sale is made	Specific goods	Existing goods	Future goods	Contingent goods	Specific goods
17	-------- which become ascertained subsequent to the formation of a contract of sale	Specific goods	Existing goods	Ascertained goods	Contingent goods	Ascertained goods
18	---------- are the goods which are not identified and agreed upon at the time of the contract of sale	Unascertained goods	Existing goods	Ascertained goods	Contingent goods	Unascertained goods
19	Unascertained goods is also known as --------	Unascertained goods	Existing goods	Generic goods	Contingent goods	Generic goods
20	The goods which a seller does not possess at the time of the time of the contract but which will be manufactured by him after making of the contract of sale is known as -----	Future goods	Existing goods	Ascertained goods	Contingent goods	Future goods
21	Generic goods is also known as --------	Future goods	Existing goods	Ascertained goods	Unascertainegoods	Unascertained goods
22	The acquisition of which by the seller depends upon a contingency which may or may not happen is known as --------	Future goods	Contingentgoods	Ascertained goods	Unascertainegoods	Contingentgoods
23	---------- form the subject matter of contract of sale	Goods	Price	Property	Consent	Goods
24	------- means voluntary transfer of possession of goods one person to another	Transfer	Condition	Delivery	Warranty	Delivery
25	When the goods are handed over by the seller to the buyer or his duly authorized agent, the delivery is said to be ---------	Symbolic delivery	Constructive delivery	Delivery by attornment	Actual delivery	Actual delivery

26	When goods are bulky and incapable of bulky delivery, then it may be -------	Symbolic delivery	Constructive delivery	Delivery by attornment	Actual delivery	Symbolic delivery
27	Constructive delivery is also known as -------	Actual delivery	Symbolic delivery	Delivery by attornment	Specific delivery	Delivery by attornment
28	There are ------- modes of delivery	Two	Three	Four	Five	Three
29	A --------- is a right to retain possession of goods until payment of the price	Stoppage in transit	Re-sale	Lien	Withholding	Lien
30	The unpaid seller can exercise -------- against the goods	Rights	Liability	Lien	Re-sale	Rights
31	The sale of goods act was passed in ----------	1929	1928	1930	1927	1930
32	The person who sells or agrees to sell the goods is called the -----	Bailor	Seller	Buyer	Bailee	Seller
33	The person who buys or agrees to buy the goods is called the --------	Buyer	Seller	Bailor	Bailee	Buyer
34	The ownership of the goods is transferred immediately from a seller to a buyer is known as	Pledge	Hire purchase	Bailment	Sale	Sale
35	When the ownership of the goods is transferred at a future date is called -------	Pledge	Agreement to sell	Bailment	Sale	Agreement to sell
36	--------- are goods that will be manufactured or acquired by the seller after making the contract of sale	Future goods	Existing goods	Specifigoods	Contingent goods	Future goods
37	The existing goods may be classified into ------ type	Two	Four	Three	Five	Three
38	------- are the goods which are also not in existence at the time of contract of sale	Contingent goods	Specific goods	Existing goods	Future goods	Contingent goods
39	--------- means the money consideration for sale of goods	Goods	Property	Price	Earnest	Price

40	-------- is the money which is paid in advance by one party to another party as a security for the proper performance of his part of the contract	Goods	Property	Price	Earnest money	Earnest money
41	The ------- isfulfilled the main contract cannot be completed	Warranty	Condition	Transfer	Performance	Condition
42	The ------ is not fulfilled the main contract can be completed	Warranty	Condition	Transfer	Performance	Warranty
43	A breach of ------ cannot be treated as a breach of condition	Condition	Transfer	Performance	Warranty	Warranty
44	A breach of -------- cannot be treated as a breach of contract	Condition	Transfer	Performance	Warranty	Condition
45	A breach of -------- can be treated as a breach of warranty	Condition	Transfer	Performance	Warranty	Performance
46	Conditions are of --------- type	Three	Four	Two	Five	Four
47	There are -------- exceptions to the doctrine of caveat emptor	Three	Four	Two	Five	Two
48	The word ------- means the legal ownership or title to the goods	Transfer of property	Movement of property	Property in the goods	Performance of contract	Movement of property
49	The main purpose of a contract of sale is the transfer of ownership of the goods from a seller to a	Bailor	Buyer	Bailee	Pledge	Pledge
50	The rules relating to the transfer of ownership in case of sale of specific goods are contained in --------	Sec 24 to 26	Sec 15 to 27	Sec 12 to 15	Sec 20 to 22	Sec 24 to 26
51	---------- is a sale in which the buyer may retain the goods within a reasonable period if the goods do not serve his purpose	Sale on approval	Usage of trade	Sale by description	Sale by sample	Sale by description
52	The term transfer means a voluntary transfer of …….. from one person to another	possession	wealth	cash	goods	possession

53	Sale or return is also known as	Sale on approval	Usage of trade	Sale by description	Sale by sample	Sale on approval
54	The term ------ means a voluntary transfer of possession from one person to another	Delivery	Performance	Transfer	Movement	Transfer
55	When goods are physically handed over to the buyer is known as --------	Symbolic delivery	Construtive delivery	Actual delivery	Market avert	Symbolic delivery
56	Delivery of the key of the warehouse where the goods are shared is a example for ----------	Symbolic delivery	Construtive delivery	Actual delivery	Market avert	Market avert
57	------- of the sale of goods act, has defined the term unpaid seller	Sec 40	Sec 32	Sec 30	Sec 45	Sec 30
58	An --------- is a method of selling property by bids usually to the highest bidder by public competition	Contract of sale	Hire purchase	Auction sale	Agreement to sell	Contract of sale
59	In auction sale a contract is formed between the ------ and a buyer	Auctioneer	Seller	Bailor	Pledgee	Pledgee
60	---------- is an unlawful act by which an intending purchaser is prevented from bidding or raising the price at an auction sale	Auction	Hire purchase	Pledge	Dumping	Pledge
61	---------- is illegal	Hire purchase	Sale	Dumping	Auction sale	Dumping

S.No	Questions	Opt 1	Opt 2	Opt 3	Opt 4	Answer
1	A partnership firm comes into existence by an agreement called_____	Express agreement	Implied Agreement	Express or Implied	Registered	Express or Implied
2	Which of the following statement is incorrect?	A person who receives the profits is always a partner	A person who receives the profits is not necessarily a partner	The true test of partnership is the mutual agency	The partnership comes into existence only on an agreement	A person who receives the profits is always a partner
3	A, a contractor, appointed B to manage his entire work. It was agreed that B would receive 50% of the profits as his remuneration and would bear all the losses, if any. Here, B is	A's partner	A's agent	Sole proprietor	No Role	A's agent
4	A partnership where its duration is fixed and cannot be dissolved by any partner at his will, is known as	Particular partnership	General partnership	Partnership for fixed period	Partnership at will	Partnership for fixed period
5	In a partnership firm, the difference of opinion over some 'fundamental matter' can be settled by	All the partners	Majority of partners	Senior partners	Managing partner	All the partners
6	In the absence of any agreement, the interest to partners on the amount of loan advanced to the firm, is allowed at _____	4% per annum	6% per annum	8% per annum	Market rate	6% per annum
7	Where the money received from a third party by the firm, in the ordinary course of its business, is miasapplied by one of the partners to its own use, then the ……..	Defaulting partner alone is liable for the same	Firm is liable for the same	Firm is not liable for the same	Third party has no remedy	Firm is liable for the same
8	An incoming partner, who has been validly admitted in the firm, is	Liable for the past debts of the firm	Not liable for the past debts of the firm	Liable for debts of the firm incurred after his admission	Liable for debts of the firm incurred after his admission and for the past debts	Liable for debts of the firm incurred after his admission and for the past debts

9	On the death of a partner, public notice of death is not given and the firm continues the business, then for the acts of firm done after his death, the estate of the deceased partner is	Liable	Not liable	Treated as security	Proportionately liable	Not liable
10	The term 'partnership' has been defined under……	section 3	section 4	section 5	section 6	section 4
11	Under section 4 of the Indian Partnership Act, partnership is a……..	compulsory legal relation	creation of the choice and voluntarily agreement	a relation arising from status	either compulsory legal relation or of a Status	creation of the choice and voluntarily agreement between the concerned parties
12	The relation of partnership arises from contract and not from status, has been prescribed under……..	section 4	section 5	section 6	section 7	section 4
13	The minimum number of persons required for a partnership is……	two	five	ten	twenty	two
14	Which of the following is not a feature of partnership?	Two or more members	Sharing of profit	Limited Liability	Agreement among the partners	Limited Liability
15	The maximum number of partners allowed in the banking business are	Twenty	Ten	No limit	Two	Ten
16	The maximum number of partners allowed in the business are	Twenty	Ten	No limit	Two	Twenty
17	A partner whose association with the firm is unknown to the general public is called	Active partner	Sleeping partner	Nominal partner	Secret partner	Secret partner

18	A partner who invests money into the business of the firm, actively participates in the functioning and management of the business and shares its profits or losses……..	Ostensible Partner	Dormant Partner	Nominal Partner	Partner by estoppel	Ostensible Partner
19	A partner who invests money in the firm's business and shares profits but does not participate in the functioning and management of the business…….	Ostensible Partner	Dormant Partner	Nominal Partner	Partner by estoppel	Dormant Partner
20	A partner who does not invest or participate in the management of the firm but only give their name to the business or firm.	Ostensible Partner	Dormant Partner	Nominal Partner	Partner by estoppel	Nominal Partner
21	A partner who is entitled to share the profits of a partnership firm without being liable to share the losses.	Ostensible Partner	Dormant Partner	Nominal Partner	Partner in Profits Only	Partner in Profits Only
22	Where a partner agrees to share his profits in the firm with a third person, that third person is called a ……...	Ostensible Partner	Dormant Partner	Sub partner	Nominal Partner	Sub partner
23	A firm is a _____	Legal entity	Person	Corporation	Collective name of the members of a partnership	Collective name of the members of a partnership
24	_____ must be the purpose of agreement of a business.	Loss	Profit	Charity	Donation	Profit
25	The first element in a partnership firm is_____	Voluntary Contract	Compulsory Contract	General Contract	Ordinary Contract	Voluntary Contract
26	Persons who have entered into collective business with one another are _____.	Firm	Partners	Company	Organization	Partners

27	The collection of partners in business is called_____.	Firm	Company	Organization	Incorporation	Firm
28	_____ form the basis of legal existence of a firm.	Company	Partners	Firm	Organization	Partners
29	_____ is the collective name of the members of a partnership	Incorporation	Plc	GMB	Firm	Firm
30	A partnership firm cannot use_____ as part of its name.	Limited	Public	International	Private	Limited
31	_____ is essential for a partnership firm.	Offer	Acceptance	Agreement	Consideration	Agreement
32	The excess of returns over advances is called_____.	Contribution	Donation	Profits	Excess Capital	Profits
33	Sharing of profits include sharing of_____.	Capital	Interest Money	Dividends	Losses	Losses
34	The agreement to share profits shall be in_____ in partnership firms.	Constant sums	Specific Sums	Definite sums	Unspecific sums	Specific Sums
35	A person having a _____ in the profits may not be a partner of the firm	Liability	Share	Debt	Credit	Share
36	_____ is the foundation of partners liability.	Individual Agency	Mutual Agency	Mutual Trust	Individual Trust	Mutual Agency
37	Each person alleged to be a partner is_____ of another.	An Agent	A Representative	A Head	A Boss	An Agent
38	The law of partnership is the extension of the law of _____.	Agency	Group	Association	Confidence	Agency

39	_____is not required to create a partnership firm.	Agreement	Consideration	Deed	Rules	Consideration
40	_____is put in writing before partnership is started.	Partnership list	Partnership powers	Partnership deed	Partnership duties	Partnership deed
41	The Partnership deed is also called as_____.	Partnership document	Constitution of Partnership	Collection of Partnership	Certificate of Partnership	Constitution of Partnership
42	_____ is the association of two or more persons for a specific adventure.	Specific partnership	General partnership	Common partnership	Partnership at large	Specific partnership
43	_____ is the association of two or more persons without duration in a partnership firm.	Partnership at will	Common partnership	General partnership	Specific partnership	Partnership at will
44	The firm with partnership at will may be _____by any partner through a written notice.	Formed	Started	Initiated	Dissolved	Dissolved
45	Co-ownership of a firm arises out of _____.	Consent of Partners	Status of Partners	Difference of Partners	Income of Partners	Status of Partners
46	In a Co-ownership, the transfer of rights to strangers is _____.	Impossible	Possible	Dependent on the Deed	Obsolete	Possible
47	A HUF arises out of _____.	Status through Birth	Status through Achievement	Status through Association	Status through Education	Status through Birth
48	_____ is personally liable in a HUF.	Copercener	First son	Karta	All sons	Karta
49	There is _____ to the number of partners in a firm.	Freedom	Liberty	Limit	No Specification	Limit
50	A HUF business is governed by _____.	Karta	Hindu Law	Partnership Act	Specific Laws	Hindu Law

51	A company after incorporation becomes _____ of/from its members.	Integrated	Distinct	United	Defined	Distinct
52	Members of a company are _____ liable for its Debts.	Personally	Not Personally	Responsible	Bound to be	Not Personally
53	Partners' liability in a partnership firm is_____	Limited	Defined	Unlimited	Concrete	Unlimited
54	When a partner retires from a firm, there is change of _____ of the firm.	Policies	Procedures	Liabilities	Constitution	Constitution
55	Property of a firm in a partnership firm is decided by_____.	Any partner	Majority of partners	All partners	Any authority	All partners
56	The property of the partnership firm belongs to _____.	All partners	Firm only	Any partner	Specific partners	Firm only
57	A _____ cannot enter into a partnership deed.	Major	Minor	AOP	BOI	Minor
58	Under _____ a minor can be admitted to the benefits of partnership with the consent of all the partners.	Section 31	Section 32	Section 33	Section 30	Section 30
59	An authority of a partner is _____ when given by words, spoken or written.	Implied	Express	Implicit	Explicit	Express
60	Partnership may come into existence……..	By the operation of law	By an express agreement	By an express or implied agreement	By inheritance of property	By an express agreement

S.No	Questions	Opt 1	Opt 2	Opt 3	Opt 4	Answer
1	The carriers Act ---------	1855	1845	1865	1835	1865
2	The Railways Act -------	1989	1969	1979	1984	1989
3	French word of 'Echecs' meaning……	Check	Cheque	Chess	Cross	Chess
4	Section 6 of the Negotiable Instrument Act defines……..	Promissory note	Cheque	Bill of Exchange	Trade	Cheque
5	The (Indian) Bills of lading Act ---------	1936	1946	1856	1926	1856
6	The following one is a negotiable instrument, negotiable by usage or custom…….	Bill of Exchange	Accomdation bill	Promissory note	Share warrant	Share warrant
7	The document drawn by a debtor on	Cheque	Promissory note	Bill of Exchange	Draft	Promissory note
8	The most important feature of a negotiable instrument act is……..	Free transfer	Transfer free from defects	Right to sue	Free transfer and transfer free from	Free transfer and transfer free from
9	In the caseof a negotiable instrument, the following person generally gets a good title……..	Finder of the lost instrument	Holder of a stolen instrument	Holder in due course	Holder of a forged instrument	Holder in due course
10	The law relating to carriage by air is -------	The carriers act	The carriage by air	The marine	The merchant	The carriage by air
11	The document which can be used only for making a local payment is…….	A cheque	A bill of exchange	A banker's cheque	A draft	A banker's cheque
12	A right on holder to sue in his own name is…….	Right to sue	Transfer free from defects	Credit of the party	Free transfer	Right to sue
13	Negotiable instruments Act is --------	Sec 11	Sec 12	Sec 13	Sec 14	Sec 13
14	The law relating to carriage by sea is -------	The marine	The carriers act	The railway act	The (Indian) Bill of	The (Indian) Bill of
15	Carriers may be classified into ------	Three	Four	Two	Five	Two
16	A ---------- is one who undertaken for hire to transport from one place to another by land , sea or air	Private carrier	Gratutious carrier	Marine carrier	Common carrier	Common carrier
17	--------- is one who carriers his own goods	Private carrier	Gratutious carrier	Marine carrier	Common carrier	Private carrier
18	"All cheques are bills of exchange but all	Statement is true	State is false	Partial true or false	neither true nor	Statement is true
19	Negotiable Instrument Act defines a	Section 7	Section 11	Section 8	Section 6	Section 6
20	A cheque is always drawn on a …….	digital form	electronic form	printed form	tangible form	printed form
21	Who introduced 'Cheque'……..	Adam Smith	Taylor	Markus	Gilbart	Gilbart

22	-------- are those which are enumerated in a schedule to the carrier act	Existing goods	Future goods	Non-scheduled goods	Scheduled goods	Scheduled goods
23	---------- are those which are not enumerated in a schedule to the carriers act	Existing goods	Future goods	Non-scheduled goods	Scheduled goods	Non-scheduled goods
24	A ------- goods of dangerous character	Existing goods	Future goods	Non-scheduled goods	Dangerous	Dangerous
25	Every person entrusting any goods to a railway administration for carriage shall	Railway receipt	Forwarding note	Rate books	Bill of lading	Forwarding note
26	Every railway administration shall maintain ---------- at each station and at such other	Rate books	Railway receipt	Bill of lading	Forwarding note	Rate books
27	------- is a document issued by the railway acknowledging receipts of goods	Bill of lading	Dock warrant	Railway receipt	Delivery order	Railway receipt
28	A contract of carriage of goods by sea is called a contract of -------	Sale	Partnership	Affreightment	Hire purchase	Affreightment
29	The reasonable period allowed in Indiafor the presentation of a cheque is……..	1 year	6 months	9 months	depending upon banking custom	6 months
30	---------- of the act states that every railway administration shall maintain rate	Sec 50	Sec 21	Sec 61	Sec 71	Sec 61
31	A -------- is a contract providing for the hiring of a whole ship	Charter party	Bill of lading	Clean bill of lading	Dirty bill of lading	Charter party
32	A cheque is an instrument for…….	Cash on delivery	Late payment	immediate payment	non payment	immediate payment
33	A ---------- is an agreement where by a ship is based to the exclusive use of one shipper either for a particular voyage	Bill of lading	Charter party	Clean bill of lading	Dirty bill of lading	Charter party
34	When the vessel is charter as for a particular voyage it is called as --------	Time charterparty	Clean bill of lading	Dirty bill of lading	Voyage charter party	Voyage charter party
35	When the ship is chartered for a particular period it is called --------	Time charterparty	Clean bill of lading	Dirty bill of lading	Voyage charter party	Time charterparty
36	The following one is absolutely essential for a special crossing……..	Two parallel transverse lines	Words 'And Company'	Words 'Not Negotiable'	Name of a banker	Name of a banker

37	When the ship owner admits in the bill of lading that the goods shipped are in good order and condition it is called as -------	Dirty bill of lading	Received bill of lading	Through bill of lading	Clean bill of lading	Clean bill of lading
38	When the goods are to be carried partly by sea and partly by land it is called ----------	Dirty bill of lading	Through bill of lading	Received bill of lading	Clean bill of lading	Through bill of lading
39	When qualified statement say goods shipped in dump condition are contained in a bill of lading it is called as ---------	Dirty bill of lading	Through bill of lading	Received bill of lading	Clean bill of lading	Dirty bill of lading
40	-------- acknowledges receipt of goods by the shipowner for shipment in a particular ship	Dirty bill of lading	Through bill of lading	Received bill of lading	Clean bill of lading	Received bill of lading
41	One of the following endorsements is not a valid one…….	Partial Endorsement	Restrictive Endorsement	Facultative Endorsement	Conditional Endorsement	Partial Endorsement
42	------- is a document containing an order by the owner of the goods to the holder of the goods on his behalf asking him to deliver them	Bill of lading	Dock warrant	Railway receipt	Delivery order	Delivery order
43	A ---------- is an acknowledgment of receipt of goods	Bill of lading	Charter party	Mate receipt	Dock warrant	Bill of lading
44	_____ is a document issued by a dock owner giving details of the goods	Bill of lading	Dock warrant	Railway receipt	Delivery order	Dock warrat
45	A cheque which is not crossed is called……..	Uncrossed cheque	Open cheque	Order Cheque	Bearer cheque	Open cheque

46	--------- is transferable by endorsement and delivery	Railway receipt	Dock warrant	Charter party	Bill of lading	Bill of lading
47	The safest form of crossing is ……	General crossing	Special crossing	Double crossing	A/c payee crossing	A/c payee crossing
48	------- means right to retain the cargo until its charges are received	Lien	Consensus	Void	Valid	Lien
49	For carriage of passengers, the carrier must deliver a -------	Mate receipt	Dock warrant	Passenger ticket	Luggage ticket	Passenger ticket
50	The carrier must deliver a ------- for a carriage of luggage other than small personal objects of which the passenger takes charge himself	Bill of lading	Charter party	Dock warrant	Luggage ticket	Luggage ticket
51	Goods carried by air must be covered by an airway bill or an air is known as ---	Luggage ticket	Consignment note	Dock warrant	Railway receipt	Consignment note
52	The liability of the drawer continous for……months	3	6	9	12	6
53	A cheque is free from……	stamp duty	cash	non payment	payment	stamp duty
54	A bill is subject to……..	stamp duty	cash	ad valorem duty	payment	ad valorem duty
55	Negotiable Instruments Act is --------	1881	1984	1872	1870	1881
56	The ------- is however liable for the acts of such an agent	Pawnor	Principal	Pawnee	Agent	Principal
57	------- arises from the conduct, situation or relationship of parties	Implied Agency	Express Agency	Ratification	Operation of law	Implied Agency
58	Negotiability gives to the transferee…….title of the transferor.	the same title	no title	no better title	better title	better title

59	------- is not an acknowledgement	Bill of lading	Dock warrant	Charter party	Railway receipt	Charter party
60	------- is a document issued by a warehouse –keeper stating that the goods specified in	Warehouse Receipt	Dock warrant	Railway receipt	Delivery order	Warehouse Receipt