SUBJECT: BUSINESS LAW
Code: BC 1.2
B. COM (Hons)
UNIT – I
The Indian Contract Act, 1872
General Principles of Contract

INTRODUCTION

The law of contract is the most important branch of Mercantile Law. Without such a law it would be difficult, if not impossible, to carry on any trade or business in a smooth manner. The law of contract is applicable not only to business but also to all day-to-day personal dealings. In fact, each one of us enters into a number of contracts from sunrise to sunset. When a person buys a newspaper or rides a bus or purchases goods or gives his radio for repairs or borrows a book from library, he is actually entering into a contract. All these transactions are subject to the provisions of the law of contract.

The term business law refers to those rules which govern and regulate business transactions. These rules, regulations etc bring a sense of seriousness and definiteness in business dealings. They provide for rules regarding the validity of making contracts and their performances.

INDIAN CONTRACT ACT, 1872

In the year 1861,the third law commission of British India under the chairmanship of Sir John Romily presented the report on contract law for India.The law commission submitted a draft on 28th July 1866.The draft contract law after several amendments was enacted as **The Act 9 of 1872 on 25th April 1872** and the **INDIAN CONTRACT ACT 1872** came into force w.e.f**1st September 1872**.The Indian Contract Act, 1872 is one of the oldest in the Indian law regime, passed by the legislature of pre-independence India; it received its assent on 25th April 1872. The statute contains essential principles for formation of contract along with law relating to indemnity, guarantee, bailment, pledge and agency.

WHAT IS A CONTRACT?

Broadly speaking, a *contract is an agreement made between two or more persons to do or to abstain from doing a particular act*. A contract invariably creates a legal obligation between the parties by which certain rights are given to one party and a corresponding duty is imposed on the other party. The law of contract is the most important part of mercantile law in India. It determines the circumstances in which the promise made by the parties to a contract shall be binding on them and provides for the remedies available against a person who fails to perform his promise. The law of contract is contained in the **Indian Contract Act, 1872**, which deals with the general principles of law governing all contracts 'and covers the special provisions relating to contracts like bailment, pledge, indemnity, guarantee and agency. Section **2(h)** of the Act states that an agreement enforceable by law is a contract. Let us discuss these two elements in detail. Every contract thus combines two essential elements(i)*agreement* and (ii)*obligation*.It creates rights and obligations between the parties to the contract which are correlative,in case a party refuses to honor a contacted obligation it will give right of action to other party.

According to the terms of **Section 10** of the Act, an agreement is a valid contract if it is made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void. On analysing this definition of contract, you will notice that a contract essentially consists of two elements: (i) *an agreement*, and (ii*) its enforceability by law.*

Agreement

Section **2(e)** of the Contract Act defines agreement as every promise 'and every set of promises forming the consideration for each other. In this context a promise refer to a proposal (offer) which has been accepted. *For example*, Ramesh offers to sell his T.V. for Rs. 8,000 to Shyam. Shyam accepts this offer. It becomes a promise and treated as an agreement between Ramesh and Shyam. In other words, an agreement consists of an offer by one party and its acceptance by the other. Thus, **Agreement** = **Offer + Acceptance**. From the above analysis it is clear that there must be at least two parties to an agreement, one making an offer and the other accepting it. No person can enter into agreement with himself. There is another important aspect relating to an agreement i.e., the parties to an agreement must have an identity of minds in respect of the subject matter. They must agree on the same thing in the same sense. This is also called consensus-ad-idem. Suppose A has two houses, one situated in South Delhi and the other in North Delhi. He offers to sell his North Delhi house to B while B is under the impression that he is buying the South Delhi house. Here, there is no identity of minds. Both the parties are thinking about different houses. Hence there is no agreement.

Legal Obligation

In order that an agreement may be regarded as a contract, it must give rise to a legal obligation i;e., it must be enforceable by law. Any obligation (duty) which is not enforceable by law is not regarded as a contract. Social, moral or religious agreements do not create any legal obligation. For example, an agreement to take lunch together or to go to a picnic is not a contract because it does not create a duty enforceable by law. Such agreements are purely of a social nature where there is no intention to create legal relationship. Hence, they do not result in contracts. , In case of business agreements, however, the usual presumption is that the parties intend to create a legal relationship. For example, an agreement to sell a scooter for Rs. 8,000 is a contract because it gives rise to an obligation enforceable by law. In this agreement if there is default by either party, an action for breach of contract can be enforced through a court of law provided all the essentials of a valid contract are present in the agreement.

DISTINCTION BETWEEN AN AGREEMENT AND A CONTRACT

Agreement.	**Contract**
Offer and its acceptance constitute anagreement.	Agreement and its enforceability ,an agreement. constitute a contract.
An agreement may not create a legal obligation.	A contract necessarily creates alegal obligation.
Every agreement may not be a contract	All contracts are agreements.
Agreement is not a concluded or a bindingcontract. .	Contract is concluded and binding on the concerned parties

CLASSIFICATION OF CONTRACTS

Contracts can be classified on a number of basis. They are:

1) On the basis of creation.
2) On the basis of execution.
3) On the basis of enforceability.

1) On the Basis of Creation

A contract may be (i) made in writing or by word of mouth or (ii) inferred from the conduct of the parties or circumstances of the case. The first category of contract is termed as 'express contract' and the second as 'implied contract' '

i) Express Contract: An express contract is one where the terms are clearly stated in words, spoken or written. For example, A wrote a letter to B stating "I offer to sell my car for Rs. 30,000 to you", B accepts the offer by letter sent to A. This is an express contract. Similarly, when A asks a scooter mechanic to repair his scooter and the mechanic agrees, it is an express contract made orally by spoken words.

ii) Implied Contract: A contract may be created by the conduct or acts of parties (and not by their words spoken or written). It may result from a continuing course of conduct of the parties. For example, where a coolie in uniform carries the luggage of A to be carried out of railway station without being asked by A to do so and A allows it, the law implies that A has agreed to pay for the services of the coolie. This is a case of an implied contract between A and the coolie. Similarly, when A boards a D.T.C bus, an implied contract comes into being. A is bound to pay the prescribed fare. 'There is another category of implied contracts recognized by the Contract Act known as quasi-contracts (Sections 68 to 72). Strictly speaking, a quasi-contract cannot be called a contract. It is regarded as a relationship resembling that of a contract. In such a contract the rights and obligations arise not by an agreement between the parties but by operation of law. For example, A, a trader, left certain goods at B's house by mistake. B treated the goods as his own and consumed it. In such a situation, B is bound to pay for the goods even though he has not asked for the goods.

2. On the Basis of Execution

On the basis of the extent to which the contracts have been performed, we may classify them as (i) executed contracts, and (ii) executory contracts.

i) Executed Contracts: It is a contract where both the parties have fulfilled their respective obligations under the contract. For example, A agrees to sell his book to B for Rs. 30. A delivers the book to B and B pays Rs. 30 to A. It is an executed contract.

ii) Executory Contracts: It is a contract where both the parties to the contract have still to perform their respective obligations. For example, A agrees to sell a book to B for Rs. 30. If the book has not been delivered by A and B has not paid the price. the contract is executory.

A contract may sometimes be partly executed and partly executory. It happens where only one of the parties has performed his obligation. In the example given above, if A has delivered the book to B but B has not paid the price. the contract is executed as to A and executory as to B.

On the basis of execution, a contract can also be classified as unilateral or bilateral. A unilateral contract is one in which only one party has to perform his obligation, the other party had fulfilled his part of the obligation at the time of the contract itself. For example, A buvs a ticket from the conductor and is waiting in the queue for the bus. A contract is created as soon as the

ticket is purchased. The other party is now to provide a bus wherein he could travel. 'A bilateral contract is one in which the obligations on the part of both the parties are outstanding at the time of the formation of the contract.

3. On the Basis of Enforceability

From the point of view of enforceability a contract may be (i) valid, (ii) void, , (iii) voidable, (iv) illegal or (v) unenforceable.

i) **Valid Contract:** A contract which satisfies all the conditions prescribed by law is a valid contract. If one or more of these elements is/are missing, the contract is either void, voidable, illegal or unenforceable.

ii) Void Contract: According to Section **2 (j)** A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. It is a contract without any legal effects and is a nullity. You should note that a contract is not void from its inception. It is valid and binding upon the parties when made, but subsequent to its formation, due to certain reasons, it becomes unenforceable and so treated as void. A contract may become void due to impossibility of performance, change of law or some other reasons. For example, A promised to marry B. Later on, B dies. This contract becomes void on the death of B. A void contract should be distinguished from void agreement. Section **2(g)** says that an agreement nor enforceable by law is said to be void. In the case of void agreement no contract comes into existence. Such an agreement confers no rights on any person and creates no obligations. It is void ab-initio i.e., from the very beginning. For example an agreement with a minor is void because a minor is incompetent to contract.

Now it should be clear to you that a void agreement is not the same thing as a void contract. A void agreement never matures into a contract, it is void from the very beginning. A void contract, on the other hand, was valid when it was entered into, but subsequently, because of one reason or the other, became void. A contract cannot be void ab-initio, it is only an agreement which can be void ab-initio.

iii)Voidable Contract: According to Section **2(i)** of the Contract Act, An agreement which is enforceable by law at the option of one or more of the parties thereon, but not at the option of the other or others, is a voidable contract. Thus, a voidable contract is one which can be set aside or repudiated at the option of the aggrieved party. Until it is set aside or avoided by the party entitled to do so, it remains a valid contract. A contract is usually treated as voidable when the consent of a party has not been free i.e., it has been obtained either by coercion, undue influence, misrepresentation or fraud. The contract is voidable at the option of the party whose consent has been so caused. For example, A threatens to shoot B if he does not sell his new scooter to A for Rs. 5,000. B agrees. Here the consent of B has been obtained by coercion. Hence, the contract is voidable at the option of B, the aggrieved party. If, however, B does not exercise his option to set aside the contract within a reasonable time and if in the meanwhile a third party acquires a right in relation to the subject matter for some consideration, the contract cannot be avoided. For example, A obtains a ring by fraud. Here, B's consent is not free and therefore he can cancel this contract. But if, before this option is exercised by B, A sells the ring to C' who acquires it after paying the price and in good faith, contract cannot be avoided.

Void Agreement	Voidable Contract
It is void from the very beginning.	It remains valid till it is repudiated by the aggrieved party.
A contract is void if any essentialelement of a valid contract (otherthan free consent) is missing.	A contract is voidable if the consent of a party is not free.
It cannot be enforced by any party.	If the aggrieved party so decides,the contract may continue to bevalid and enforceable.
Third party does not acquire anyrights.	An innocent party in good faithand for consideration acquires goodtitle before the contract is avoided.
Lapse of time will not make it avalid contract, it always remains void.	If it is not avoided withinreasonable time, it may become valid.
Question of damages does not arise.	The aggrieved party can also claimdamages.

iv) Illegal or unlawful contract: The word illegal means contrary to law. You know that contract is an agreement enforceable by law and therefore, it cannot be illegal. It is only the agreement which can be termed as illegal or unlawful. Hence, it is more appropriate to use the term 'illegal agreement' in place of 'illegal contract'.

An 'illegal agreement' is one which has been specifically declared to be unlawful under the provisions of the Contract Act or which goes against the provisions of any other law of the land. Such agreement cannot be enforced by law. For example, A agrees to pay R;. 50,000 to B if B kills C. This is an illegal agreement because its object is unlawful. Even if B kills C, he cannot claim the agreed amount from A.

The term 'illegal agreement' is wider than the term 'void agreement'. All illegal agreements are void but all void agreements are not necessarily illegal. For example, an agreement to sell a scooter to the minor i,e void but it is not illegal because the object of this agreement is not unlawful. The other important difference between the illegal and the void agreement relates to their effect on the transactions -which are collateral to the main agreement. In case of illegal agreements even the collateral agreements become void. For example, A engages B to shoot C. To pay B, A borrows Rs. 10,000 from D who is aware of the purpose of the loan. In this case, there are two agreements - one between A and B and the other between A and D. Since the main agreement between A and B is illegal, the agreement between A and D ,which is collateral to the main agreement, is also void. D cannot recover the money from A. Take another example. A borrows money from D to pay off his wagering (betting) debts to B. Here the main agreement is void (not illegal). Hence the agreement between A and D being a collateral agreement shall not be affected even though D was aware of the purpose of the loan. From these examples, it should be clear to you that the agreements collateral to the illegal agreements are also void but the transactions collateral to void agreements are not affected in any way, they remain valid.

v)Unenforceable contract: It is a contract which is actually valid but cannot be enforced because of some technical defect. This may be due to non-registration of the agreement, non-payment of the requisite stamp fee, etc. Sometimes, the law requires a particular agreement to be in writing. If such agreement has not been put in writing, it becomes unenforceable. For example, an oral agreement, for arbitration are unenforceable because the law requires that an

arbitration agreement must be in writing. It is important to note that in most cases, such , contracts can be enforced if the technical defect involved is removed. For example, if the document which embodies a contract is under stamped, it will become enforceable if the requisite stamp is affixed.

Void	Illegal
All void agreements are not necessarily illegal.	1) All illegal agreements are void.
Collateral transactions to a void agreements are not affected i.e.,they do not become void.	) Collateral transactions to an illegal agreements are also affected i.e they also become void.
If a contract becomes void subsequently, the benefit received has to be restored to the other party.	The money advanced or thing given cannot be claimed back.

ESSENTIALS OF A VALID CONTRACT

An agreement enforceable by law is a contract. An agreement in order to be enforceable must have certain essential elements. According to Section 10 - All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Thus, an agreement becomes a valid contract if it has the following elements.

1) Proper offer and its proper acceptance
2) Intention to create legal relationship
3) Free consent
4) Capacity of parties to contract
5) Lawful consideration
6) Lawful object .
7) Agreement not expressly declared void
8) Certainty of meaning
9) Possibility of performance
10) Legal formalities

Let us now discuss these essential elements one by one.

1) Proper offer and proper acceptance: In order to create a valid contract it is necessary that there must be at least two parties, one making the offer and the other accepting it. The law has prescribed certain rules for making the offer and its acceptance that must be satisfied while entering into an agreement. For example, the offer must be definite and duly communicated to the other party. Similarly, the acceptance must be unconditional and communicated to the offerer in the prescribe mode, and so on. Unless such conditions with regard to the offer and the acceptance are satisfied the agreement does not become enforceable.

2) Intention to create legal relationship: There must be an intention among the parties to create a legal relationship, If an agreement is not capable of creating a legal obligation it is not a contract. In case of social or domestic agreements, generallv there is no intention to create

legal relationship. For example, in an invitation to dinner there is no intention to create legal relationship and therefore, is not a contract. Similarly, certain agreements between husband and wife do not become contracts because there is no intention to create legal relationship. This point can well be illustrated by the famous case of Balfour v. Balfour. Mr. Balfour had promised to pay £30 per month to his wife living in England when she could not accompany him to Caulon where he was employed. Mr. Balfour failed to pay the promised amount. Mrs. Balfour filed a suit against her husband for breach of this agreement.It was held that she could not recover the amount as it was a social agreement and the parties never intended to create any legal relations.

In commercial. or business transactions the usual presumption is that the parties intend to create legal relations. However, this presumption may be negated by express terms to the contrary. The case of Rose & Frank Co. v. Crompton Brothers is relevant here. In this case there was an agreement between Rose & Frank Company and Crompton Brothers Ltd. whereby the former was appointed as selling agents in North America. One of the clauses in the agreement read, "This agreement is not entered into as a formal or legal , agreement and shall not be subject to legal jurisdiction in the law courts." It was held, that this agreement was not a legally binding contract as there was no intention to create legal relations.

You must note that whether intention to create legal relationship exists in an agreement or not is a matter for the court to decide which may look at the terms and conditions of the agreement and the circumstances under which the agreement was made

3) Free consent: For a contract to be valid, it is essential that there must be free and genuine consent of the parties to the contract. They must have made the contract of their own free will and not under any fear or pressure. According to Section 14, consent is said to be free when it is not caused by (i) coercion,' (ii) undue influence, (iii) fraud, (iv) misrepresentation, or (v) mistake. In case the consent is obtained by any of the first four factors, the contract would be voidable at the option of the aggrieved party. But if the agreement is induced by mutual mistake which is material to the agreement, it would be void.

4) Capacity of parties: The parties to an agreement must be competent to contract i.e., they must be capable of entering into a contract. If any party to the contract is not competent to contract, the contract is not valid. Now the question arises as to who are competent to contract? Answer to this question is provided by Section 1 I of the Act which says 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 contracting by any law to which he is subject. Hence in order to be competent to enter into a contract, the person should be a major (adult), should be of sound mind and he must not be declared disqualified from contracting by any law to which he is subject. Thus, the flaw in capacity may be due to minority, lunacy, idiocy, etc. If a party to a contract suffers from any of these flaws, the agreement, with a few exceptions, is not enforceable at law.

5) Lawful consideration: An agreement must be supported by consideration. Consideration means something in return. It is also defined as the price paid by one party to buy the promise of the other. However, this price need not always be in terms of money. For' example, A agrees to sell his book to B for Rs. 20. Here the consideration for A is Rs. 20, and for B it is the book.

The consideration may be an act (doing something) or forbearance (not doing something) or a promise to do or not to do something, The consideration may be past, present or future,

consideration must be real i.e., it must have some value in the eyes of law. However, the consideration need not be adequate. For example, A sells his car worth Rs. 50,000 to B for Rs. 10,000 only. This is a valid promise provided the consent of A is free. .

For a contract to be valid, the consideration.should also be lawful. The consideration is considered lawful unless it is forbidden by law, or is fraudulent, or involves or implies injury to the person or property of another; or is immoral, or is opposed to public policy (Section 23).

6) Lawful object: The object of an agreement must be lawful. An agreement made for any act which is prohibited by law will not be valid. For example, if A rents out a house for use as a gambling den, the agreement is void because the object of the agreement is unlawful. If the object is unlawful for any of the reasons mentioned in Section 23, the agreement shall be void, Thus, the consideration as well as the object of the agreement should be lawful.

7) Agreement not expressly declared void: The agreement must not have been expressly declared void under Contract Act. Sections 24 to 30 specify certain

types of agreements which have been expressly declared void. They are . agreement in restraint of marriage, agreement in restraint of legal proceedings, agreement in restraint of trade and agreement by way of' wager. For example, A agreed to pay Rs. 1,000 to B if he (B) does not marry throughout his life. B promised not to marry at all. This agreement shall not be valid because it is in restraint of marriage which has been expressly declared void under Section 26.

You should note that if an agreement possesses all other essential elements of a valid contract but belongs to the category of such agreements that have been expressly declared void by the Contract Act, no power on earth can make it a valid contract.

8) Certainty of meaning: Section 29 of the Contract Act provides that Agreements, the meaning of which is not certain or capable of being made certain, are void. Thus to make a valid contract it is absolutely essential that its terms must be clear and not vague or uncertain. For example, A agreed to sell 100 tonnes of oil to B. Here it is not clear what kind of oil is intended to be sold. Therefore, this agreement is not valid on the ground of uncertainty. If, however, the meaning of the agreement could be made certain from the circumstances of the case, it will be treated as a valid contract. In the example given above if we know that A and B are dealers in mustard oil only, then the agreement shall be enforceable because the meaning of the agreement could be easily ascertained from the circumstances of the case.

9) Possibility of performance: The terms of the agreement must also be such as are capable of performance. An agreement to do an act impossible in itself is void (Section 56.) If the act is impossible of performance, physically or legally, the agreement cannot be enforced by law. The reasoning is very simple. For example, A promises to B that he will run at a speed of 200 kms. per hour or that he will bring gold from the sun. All these acts are such which are impossible of performance and therefore the agreement is not treated as valid.

10) Legal formalities: You have learnt that an oral agreement is as good as is a written agreement. The Contract Act does not require that a contract must be in writing to be valid. But, in some cases the Act has specified that the agreement must be made in writing. For example, a promise to pay a time barred debt must be in writing and an agreement for a sale of immovable property must be in writing and registered under the Transfer of Property Act, 1882. In such a situation, the agreement must comply with the necessary formalities as to writing, registration, etc. If these legal formalities are not carried out, then the contract is not enforceable by law.

After discussing the essential elements of a valid contract, it is now clear that all these elements must be present in an agreement so that it becomes .a valid contract. If any one of them is missing or absent, the agreement will not be enforceable by law.

OFFER

For making a valid contract there must be a lawful offer and a lawful acceptance of that offer. An offer is also called ‘proposal'. The words 'proposal' and 'offer' are synonymous and are used interchangeably. Section **2(a**) defines the term 'proposal' as follows:

"When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. "

From the above definition of offer you will notice that an offer involves the following elements.

i) It must be an expression of readiness or willingness to do or to abstain from doing something. Thus, it may involve a 'positive' or a 'negative' act. For example, A offers to sell his book to B for Rs. 30. A is making a proposal to do something i.e., to sell his book. It is a positive act on the part of the proposer A. On the other hand, when A offers not to file a suit against B if the latter pays A the outstanding amount of Rs. 1,000, the act of A is a negative one i.e., he is offering to abstain from filing a suit.

ii) It must be made to another person. There can be no 'proposal' by a person to himself,

iii) It must be made with a view to obtain the assent of that other person to such act or abstinence. Thus a mere statement of intention- "I may sell my furniture if I get a good price" is not a proposal.

The person making the offer is called the 'offerer' or the 'promisor' and the person to whom it is made is called the 'offeree'. When the offeree accepts the offer, he is called the 'acceptor' or the 'promisee'. For example, Ram offers to sell his scooter to Prem for Rs. 10,000 This is an offer by Ram. He is the offerer or the promisor. Prem to whom the offer has been made is the offeree and if he agrees to buy the scooter for Rs. 10,000 he becomes the acceptor or the promisee.

Express or Implied Offer

An offer may either be an 'express offer' or an 'implied offer'

Express Offer: When an offer is made by words, spoken or written, it is termed as an express offer. When A says to B that he wants to sell his book to B for Rs. 20, it is an express offer. Similarly, when A writes a letter to B offering to sell his car to him for Rs. 40,000, it is also an express offer by A. The oral offer may be made either in person or over telephone. Section 9 of the Contract Act reads: "In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. "

Implied Offer: It is an offer which is not made by words spoken or written. An implied offer is one which is inferred from the conduct of a person or the circumstances of the particular case. For example, public transport like DTC in Delhi or BEST in Bombay runs buses on different routes to carry passengers who are prepared to pay the specified fare. This is an implied offer. Similarly, when a coolie picks up your luggage to carry it from railway platform to the taxi, it means that the coolie is offering his service for some payment. This is an implied offer by the coolie. Section 9 says that "In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

General or Specific Offer

An offer may be 'specific' or 'general'. When an offer is made to a definite person or particular group of persons, it is known as specific offer and it can be accepted only by that definite person or that particular group of persons to whom it has been made. For example, A offered to buy certain goods from B at a certain price. This offer is made to a definite person B. Therefore, if goods are supplied by P, it will not give rise to a valid contract (Boultan v. Jones). On the other hand, if an offer which is not made to a definite person, but to the world at large or public in general, it is called a general offer. A general offer can be accepted by any person by fulfilling the terms of the offer. Offers of reward made by way of advertisement for finding lost articles is the most appropriate example of a general offer. For example, B issues a public advertisement to the effect that he would pay Rs. 100 to anyone who brings hack his missing dog. This is a general offer and any member of the public can accept the said offer by finding the lost dog.

Legal Rules for a Valid Offer

An offer or proposal made by a person cannot legally be regarded as an offer unless it satisfies the following conditions.

1) Offer must intend to create legal relations: An offer will not become a promise even after it has been accepted unless it is made with a view to create legal obligations. It is so because the very purpose of entering into an agreement is to make it enforceable in a court of law. A mere social invitation cannot be regarded as an offer because if such an invitation is accepted it will not give rise to any legal relationship. For example, A invites his friend B to a dinner and B accepts the invitation. If B fails to turn up for dinner, A cannot go to the court to claim his loss. In social agreements the presumption is that the parties do not intend to create legal relationship(Balfour vs Balfour).

2)Terms of offer must be certain, definite and not vague: No contract can be formed if the terms of the offer are vague, loose and indefinite. The reason is quite simple. When the offer itself is vague or loose or uncertain, it will not be clear as to what exactly the parties intended to do. A vague offer does not convey what it exactly means. For example, A promises to buy one more horse from B if the horse purchased earlier proves lucky. This promise cannot be enforced because it is loose and vague. If, however, the terms of the offer are capable of being made certain, the offer is not regarded as vague. For example, A offers to sell to B "a hundred 4 quintals of oil". The offer is uncertain as there is nothing to show what kind of oil is intended to be sold. But, if A is a dealer in coconut oil only, it is
quite clear that he wants to sell coconut oil. Hence, his offer is not vague. It is a valid offer.

3) The offer must be distinguished from a mere declaration of intention: Sometimes a person may make a statement without any intention of creating a binding obligation. Such statement or declaration only indicate that he is willing to negotiate and an offer will be made or invited in future. For example an auctioneer advertised in a newspaper that a sale of office furniture will be held on a certain date. A person with the intention to buy furniture came from a distant place for the auction, but the auction was cancelled. He cannot file a suit against the auctioneer for his loss of time and expenses because the advertisement was merely a declaration of intention to hold auction, (Harris v. W Nieversion).

4) Offer must be distinguished from an invitation to offer: An offer must be distinguished from an invitation to receive an offer or to make an offer or to negotiate. In the case of invitation to

offer there is no intention on the part of the person sending out the invitation to obtain the assent of the other party to such invitation. On the other hand, offer is a final expression of willingness by the offerer to be bound by his promise, should the other party choose to accept it. In case of an invitation to offer, his aim is to merely circulate information of his readiness to negotiate business with anybody who on such information comes to him. An invitation to offer is not an offer in the eyes of law and does not become a promise on acceptance.

You must have noticed that shopkeepers generally display their goods in showcases with pride tags attached. The shopkeeper in such cases is not making an offer so that you can accept it. He is in fact inviting you to make an offer which he may or may not accept. You cannot compel the shopkeeper to sell the goods displayed in the showcase at the market price. Similarly, quotations, catalogues, price list, advertisements in a newspaper for sale or a circular sent to prospective buyers do not constitute an offer. Similarly, a prospectus issued by a company for subscription to its shares by the members of the public is only an invitation to offer.

5) The offer must be communicated: An offer must be communicated to the person to whom it is made. It means that an offer is complete only when it is communicated to the offeree. You should note that a person can accept the offer only when he knows about it. In the case of Fitch v. Snedakar, S offered a reward to anyone who returns his lost dog. F brought the dog without any knowledge of the offer of reward. It was held that F was not entitled to the reward because F cannot be said to have accepted the offer which he was not aware of.

6) Offer should not contain a term the non-compliance of which would amount to acceptance: The offer should not impose on the offeree an obligation to reply. While making the offer the offerer cannot say that if the offer is not accepted before a certain date it will be presumed to have been accepted. Unless the offeree sends his reply, no contract will arise. For example, A .writes to B "I offer to sell my scooter to you for Rs. 7,000. If I do not receive a reply by Wednesday next, I shall assume that you have accepted the offer." If B does not reply, it shall not imply that he has accepted the offer. Hence, there will be no contract.

7) Special terms or conditions in an offer must also be communicated: The offerer is free to lay down any terms and conditions in his offer, and if the other party accepts the offer then he will be bound by those terms and conditions. The important point is that if there are some special terms and conditions they should also be duly communicated, The question of special terms arises generally in case of standard form of contracts. For example, the Life Insurance Corporation of India has printed form of contracts containing large number of terms and conditions. Similarly, standard contracts are made with railways, shipping companies, banks etc. If the terms and conditions in a standardized contract are unreasonable, then the other party will not be bound by them. For example, if a drycleaner limits his liability to 20 per cent of the market price of the article in case of loss, the customer will not be bound by this conditions because it means that the drycleaner can purchase garments at 20 per cent of their price.

Cross Offers

Two offers which are similar in all respects, made by two parties to each other, in ignorance of each other's offer are known as 'cross offers". Cross offers do not amount to acceptance of one's offer by the other and as such no contract is concluded. For example, A of Delhi, by a letter offers to sell his house to B of Bombay for Rs. 10 lakh. At the same time B of Bombay also makes an offer to A to buy A's house for Rs. 10 lakh. The two letters cross each other. There is no concluded contract between A and B because both the parties are making offers. If they

want to conclude a contract, at least one of them must send his acceptance to the offer made by the other.

Standing Offers

Sometimes an offer may be of a continuous nature. In that case it is known as standing offers, A standing offer is in the nature of a tender. Sometimes a person or a department or some other body requires certain goods in large quantities from time to time. In such a situation, it usually gives an advertisement inviting tenders.

An advertisement inviting tenders is not an offer but a mere invitation to offer. It is the person submitting the tender to supply goods or services who is deemed to have made the offer, when a particular tender is accepted or approved, it becomes

a standing offer. The acceptance or approval of a tender does not however, amount to acceptance of the offer. It simply means that the offer will remain open during a specified period and that it will be accepted from time to time by placing specific orders for the supply of goods. Thus each order placed creates a separate contract. The offerer can however withdraw his offer at any time before an order is placed with him. Similarly, the party who has accepted the tender is also not bound to place any order unless there is an agreement to purchase a specified quantity. For example,

A agrees to supply coal of any quantity to B at a certain price as will be ordered by B during the period of 12 months. It is a standing offer. Each order given by B will be an acceptance of the offer and A will be bound to supply the ordered quantity of coal. A can however, revoke the offer for future supplies at any time by giving a notice to the offeree.

ACCEPTANCE

When an offer is accepted, it results in an agreement. Acceptance is an expression by the offeree of his willingness to be bound by the terms of the offer. This results in the establishment of legal relations between the offerer and offeree. Section 2(b) of the Indian Contract Act defines the term 'acceptance' as "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise. " For example, A offers to sell his book to B for Rs. 20. B agrees to buy the book for Rs. 20. This is an acceptance of A's offer by B.

Legal Rules for a Valid Acceptance : The acceptance of an offer to be effective must fulfil certain conditions. These are:

1) Acceptance must be absolute and unqualified : Section **7 (1)** of the Indian Contract Act provides that 'In order to convert a proposal into a promise, the acceptance must be absolute and unqualified . This is so because a qualified and conditional acceptance amounts to a counter offer leading to the rejection of the original offer. No variation should be made by the offeree in the terms of offer. If while giving acceptance, any variation is made in the terms of the offer the acceptance will not be valid and there will be no contract. For example, A offers to sell his scooter to B for Rs. 8,000 and B agrees to buy it for Rs. 7,500. It is a counter offer and not an acceptance. If, later on, B is ready to pay Rs. 8,000 A is not bound to sell his scooter, because E's counter offer has put an end to the original offer.

Further an offer must be accepted in toto. If only a part of the offer is accepted the acceptance will not be valid. For example, G offers to sell 10 quintals of wheat to B at a certain price. B accepts to buy 70 quintals only. It is not a valid acceptance since it is not for the whole of the

offer. Thus, an offer should be accepted as it is, without any reservations, variations or conditions. Any variation, howsoever unimportant it may be, makes the acceptance invalid.

2) Acceptance must be in the prescribed manner : Where the offerer has prescribed a mode of acceptance, it must be accepted in that very manner. If the offer is not accepted in the prescribed manner it is up to the offerer to accept or reject such acceptance. But when the acceptance is not in the prescribed manner and the offerer wants to reject it, he must inform the acceptor within a reasonable time that he is not bound by acceptance since it is not in the prescribed manner. If he does not do so within a reasonable time, he will be bound by the acceptance. For example, A makes an offer to B and says "send your acceptance by telegram". B sends his acceptance by a letter. A can refuse this acceptance on the ground that it was not accepted in the prescribed manner. But, if A fails to inform B within a reasonable time he will be deemed to have accepted the acceptance by ordinary letter and it will result in the formation of a valid contract: If, however, no mode has been prescribed, it should be accepted in some usual and reasonable manner.

3) Acceptance must be communicated: Acceptance should be signified. In other words, the acceptance is complete only when it has been communicated to the offerer. A mere mental acceptance, not evidenced by words or conduct, is no acceptance. In Brogen v. Metropolitan Railway Co.'s case an offer to supply coal to the railway Co. was made. The manager wrote on the letter 'accepted', put it in his drawer and forgot all about it. It was held that no contract was made because acceptance was not commumicated.

Communication of acceptance does not mean that the offerer must come to know about the acceptance. Even if the letter of acceptance is lost in transit or delayed, the offerer is bound by the acceptance because the acceptor has done all that is required of him.

4) Acceptance must be communicated by a person who has the authority to accept: For an acceptance to be valid it should be communicated by the offeree himself or by a person who has the authority to accept. Thus, if acceptance is communicated by an unauthorised person, it will not give rise to legal relations. The case of Powell v. Lee can be mentioned in support of this point. In this case P applied for the post of a headmaster in a school. The managing committee passed a resolution appointing P to the post but this decision was not communicated to P. However, a member of the managing committee, in his individual capacity and without any authority, informed P about the decision. Subsequently, the managing committee cancelled its resolution and appointed someone else. P filed a suit for breach of contract. It was held that he was not informed about his appointment by some authorised person, hence there was no communication of acceptance.

5) Acceptance must be made within the time prescribed or within a reasonable time: Sometimes the offerer while making the offer fixes the period within which the offer should be accepted. In such a situation, the acceptance must be given within the prescribed time and if no time is prescribed, it should be . accepted within a reasonable time. What is the reasonable time depends upon the facts of the case. Where an offer to buy shares of a company was made in June but the acceptance was communicated in November, it was held that because acceptance was not give within a reasonable time the offer had elapsed. (Ramagate Victoria Hotel Co. v. Montefiore).

6) Acceptance must be given before the offer lapses or is withdrawn: The acceptance must be given while the offer is in force. Once an offer has been withdrawn or stands lapsed, it cannot

be accepted. For example, A offered, by a letter, to sell his car to B for Rs. 40,000. Subsequently, A withdraws his offer by a telegram, which was duly received by B: After the receipt of the telegram, B sends his acceptance to A. This acceptance is not valid.

Contractual Capacity/ Competence of Parties

Section 11 of the Indian Contract Act clearly states as to who shall be competent to contract. It provides that every person is competent to contract (i) who is of the age of majority according to the law to which he is subject, (ii) who is of sound mind, and (iii) who is not disqualified from contracting by any law to which he is subject. Thus, a person to be competent to contract should not be

i) a minor, or

ii) of an unsound mind, or

iii) disqualified from contracting.

Agreements by a Minor

According to Section **11,** as stated earlier, no person is competent to contract who is not of the age of majority. In other words, a minor is not competent to contract. In fact, the law acts as the guardian of minors and protects their rights because they are not mature and may not possess the capacity to judge what is good and what is bad for them. Hence the minor is not bound by any promises made by him under an agreement.

The position with regard to minor's contracts may be summed-up as follows:

1)Contract with or by a minor is absolutely void and the minor therefore cannot bind himself by a contract: The Privy Council in the case of MohiriBibee v. DharmodasGhosh held that a minor's agreement is altogether void. The facts of the case were: Dharmodas a minor, entered into a contract for borrowing a . sum of Rs. 20,000. The lender advanced Rs. 8,000 to him and Dharmodas executed a mortgage of his property in favour of the1ender. Subsequently, the minor sued for setting aside the mortgage. The Privy Council held that sections 10 and 11 of the Indian Contract Act make the minor's contract void and therefore the mortgage was not valid. Then, the mortgagee, prayed for refund ' of Rs. 8,000 by the minor. The privy council further held that as a minor's contract was void, any money advanced to him could not be recovered.

2) Fraudulent representation by a minor: Will it make any change in case minor is guilty of deliberate misrepresentation about his age thereby inducing the other party to contract with him? No! it will make no change in the status of the agreement. The contract shall continue to remain void because if such a thing is permitted, unscrupulous people while dealing with a minor shall, as a first thing, ask him to sign a declaration that he is of the age of majority. It will thus defeat the whole objective of protecting his interests.

In the case Leslie v. Sbeill. S, a minor by fraudulently representing himself to be a major, induced L to lend him f 400. He refused to repay it and L sued him for the money. Held, that the contract was void and S was not liable to repay the amount due. But, should it mean that those younger in age have liberty to cheat the seniors and retain the benefits. Sections 30 and 33 of the Specific Relief Act. 1963 provide that in case of a fraudulent misrepresentation f his age by the minor, inducing the other party to enter into a contract, the court may award compensation to the other party.

3) Ratification of a contract by minor on attaining the age of majority: A minor's agreement is void ab-initio. Hence, there can be no question of its being ratified even after he attains majority.

4) Minor's contract jointly with a major person: Documents jointly executed by a minor and an adult major person would be void vis-a-vis the minor. But they can be enforced against the major person who has jointly executed the same provided there is a joint promise to pay by such a major person (Jumna Bai v. VasaaataRino).

5) Minor as a partner: A minor cannot be a partner in a partnership firm. However, a minor may, with the consent of all the partners for the time being, be admitted to the benefits of partnership (Section 30 of the Partnership Act, 1932). This means he can share the profits without incurring any personal liability for losses.

6) Minor as an agent: A minor can act as an agent and bind his principal by his acts without incurring any personal liability.

7) Minor as a shareholder: There has been a strong controversy as to whether a minor can become a shareholder/member of a company. In view of the provisions of the Indian Contract Act and the Privy Council's decision, a minor cannot become a member of the company (Palaniaga v. Pnsupati Bank). Thus, if a minor acquires partly paid shares the company will not be able to recover . the uncalled amount from the minor. However, there are contrary decisions wherein it has been held that a minor can become a subscriber to the memorandum of association and can acquire shares by allotment. In Laxon Co.'s case, it was held that a minor can be a shareholder unless the articles of association OF the company prohibit it. In Dewan Singh v. Minewe Films Ltd., the Punjab High Court held that there was no legal bar to a minor becoming a member of a company by acquiring shares (i.e., by way of transfer) provided the shares were fully paid up and no further obligation or liability was attached to them. It may thus be concluded that a minor can become a shareholder/ member of a company provided that the shares held by him are fully paid shares and the articles of association do not prohibit it.

AGREEMENTS BY PERSONS OF UNSOUND MIND

Who is a person of sound mind has been amply clarified by Section 12 of the Indian Contract Act which reads 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 judgement as to its effect upon his interests.

Position of Agreements by Persons of Unsound Mind

1) Lunatics: A lunatic is a person who is mentally deranged due to some mental strain or other persona1 experience. However, he has some intervals of sound mind. He is not liable for contracts entered into while he is of unsound mind. However, as regards contracts entered into during lucid intervals, he is bound. His position in this regard is identical with that of a minor.

2) Idiots: An idiot is a person who is permanently of unsound mind. Idiocy is a congenital defect. Such a person has no lucid intervals. He cannot make a valid contract. In Inder Singh v. Parmeshwardhari Singh a property worth about Rs. 25,000 was agreed to be sold by a person for Rs. 7,000 only. His mother proved that he was a congenital idiot, incapable of understanding the transaction. Held the sale to be void.

3) Drunken Persons: Drunkenness is on the same footing as lunacy. A contract by drunken person is altogether void. It should be noted that partial or ordinary drunkenness is not sufficient to avoid a contract. It must be clearly shown that, at the time of contracting, the person pleading drunkenness was so intoxicated as to be temporarily deprived of reason and was not in a position to give valid consent to the contract.

PERSONS DISQUALIFIED BY LAW

Besides minors and persons of unsound mind, there are some other persons who have been declared incompetent of contracting, partially or wholly, so that the contracts of such persons are void. Incompetency to contract may arise from political status, corporate status, legal status, etc.

Alien Enemy: An alien is a person who is the citizen of a foreign country. Thus, in the Indian context an alien may be (i) an alien friend, or (ii) an alien enemy.

In the case of contracts with an alien enemy (i.e., an alien whose country is at war with India) the position may be studied under two heads: (i) contracts during the war and (ii) contracts made before the war. During the subsistence of the war, an alien can neither contract with an Indian subject nor can be sued in an Indian Court except by licence from the Central Government. As regards contracts entered' into before the war breaks out, they are either dissolved or merely suspended. All contracts, which are against the public policy or are such that may benefit the enemy, stand dissolved. The contracts which are not against public policy are merely suspended for the duration of the war and revived after the war is over, provided they have not already become time-barred under the law of limitations.

Convicts: A convict is not competent to contract during the continuance of sentence of imprisonment. This inability comes to an end with the expiration of the period of sentence. A convict can, however, enter into, or sue on, a contract when on parole or when he has been pardoned by the court.

Company under the Companies Act or Statutory Corporation under special Act of Parliament: A company or a corporation is an artificial person. It exists only in contemplation of law, its contractual capacity, is determined by its constitution. The contractual capacity of a statutory corporation is expressly defined by the statute creating it. The contractual capacity of a company registered under the Companies Act is determined by the objects clause of its memorandum of association. Any act done in excess of the powers given in the memorandum is ultra-vires and void.

Insolvents: When a debtor is adjudged insolvent, his property stands vested in the Official Receiver or Official Assignee appointed by the Court. He cannot enter into contracts relating to his property and sue, and be sued, on his behalf. This disqualification of an insolvent is removed after he is discharged.

FREE CONSENT

Section 14 of the Act states that Consent is said to be free when it is not caused by (i) coercion, or (ii) undue influence, or (iii) fraud, or (iv)misrepresentation, or (v)mistake. Thus, the consent of the parties to a contract is regarded as free if . it has not been induced by any of the five factors stated under Section 14. In other words, the consent is not free if it can be proved that it has been caused by coercion, undue influence, fraud, misrepresentation, or mistake, For example, X, at a gun point, makes Y agree to sell his house to X for Rs. 50,000. Here, Y's consent has been obtained by coercion and therefore, it shall not regarded as free.

When the consent of any party is not free, the contract is usually treated as voidable at the option of the party whose consent was not free. If, however, the consent has been caused by mistake on the part of both the parties, the contract is considered void.

COERCION

Coercion means forcibly compelling a person to enter into a contract i.e., the consent of the party is obtained by use of force or under a threat. Section 15 of the Contract Act defines 'coercion' as Coercion is (i) the committing or threatening to commit, any act forbidden by the Indian Penal Code; or (ii) 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. Let us now analyse the implications of this definition.

1) Committing any act forbidden by the Indian Penal Code : When the consent of a person is obtained by committing any act which is forbidden by the Indian Penal Code, the consent is said to be obtained by coercion. Committing a murder, kidnapping, causing hurt, rape, defamation, theft etc. are some of the examples of the acts forbidden by the Indian Penal Code. For example, A beats B and compels him to sell his scooter for Rs. 2,000. In this case the consent of B is induced by coercion.

2) Threatening to commit any act forbidden by the Indian Penal code : From the definition you will observe that not only the committing of an act forbidden by the Indian Penal Code amounts to coercion but even a threat to commit such act amounts to coercion. Thus, a threat to shoot, to murder, to kidnap or to cause bodily injury will amount to coercion.

3) Unlawful detaining of any property : If a person unlawfully detains the property of another person and compels him to enter into a contract with him, the consent is said to be induced by coercion. For example, an agent refused to hand over the account books of the principal to the new agent appointed in his place unless the principal released him from all liabilities. The principal had to give a release deed as demanded. It was held that the release was not binding because the consent of the principal was obtained by exercising coercion (Muthia v. Karuippan).

4) Threatening to detain any property unlawfully : If a threat is held out to detain any property of another person, this also amounts to coercion. In Bansrajvs The secretary of State, the government gave a threat of attachment against the property of A for the recovery of a fine due from B, the son of A. A paid the fine. It was held that the consent of A was induced by coercion and he could recover the amount paid under coercion.

5) Intention of causing any person to enter into an agreement : The act of coercion must have been done with the object of inducing or compelling any person to enter into a contract.

6)Threat to File a Suit: Sometimes a doubt may arise whether a threat to file a suit amounts to coercion or not. You should know that a threat to file a civil or criminal suit does not amount to coercion because it is not forbidden by the Indian Penal Code. However, a threat to file a suit on false charge amounts to coercion since such an act is forbidden by the Indian Penal Code.

7)Threat to Commit Suicide: Under the Indian Penal Code a suicide and a 'threat to commit suicide' are not punishable. But, an attempt to commit suicide is punishable. Now, the question arises whether a 'threat to commit suicide' shall amount to coercion or not. This point was considered by Madras High Court in the case of Ammiraju v. Seshamma. In this case a person, by a threat to commit suicide, induced his wife and son to execute a release deed in favour of his brother in respect of certain property. The transaction was set aside on the ground of coercion. The court held that though a threat to commit suicide is not punishable under the Indian Penal Code, it is deemed to be forbidden by that code.

From the above discussion it becomes clear that the definition does not say anywhere as to by whom or against whom coercion can be exercised. Hence, whether the act of coercion is

directed against the promisor or any other person in whose welfare the promisor is interested, the consent will not be free. For example, A threatens to kill B's son C if B refuses to sell his car to him. Here, the threat is directed against C (B's son). So, the consent is treated as induced by coercion. Similarly, it ia not necessary that the threat should come from a party to the contract, it may come from a stranger.

UNDUE INFLUENCE

The second factor which affects consent and makes it unfree, is undue influence. The term 'undue influence' means the improper or unfair use of one's superior power in order to obtain the consent of a person who is in a weaker position. Section 16 (i) of the Contract Act defines undue influence as 'A contract is said to be induced by undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

If we analyse this definition, two essentials of undue influence become clear :

i) the relations subsisting between the parties should be such that one of them is in a position to dominate the will of the other, and

ii) the dominant party should have used that position to obtain an unfair advantage over the other.

Both the characteristics must be present simultaneously. The presence of one without the other will not invalidate the contract on the ground of undue influence.

A, a lady gifted all her property to B, her spiritual guru so that she may secure benefits to her soul in next world. Later on, she disputed the validity of the gift deed. Here, the spiritual guru was in a position to dominate the will of his disciple A and by using his strong position obtained an unfair advantage. Hence, it was held that the consent of A was obtained by undue influence.

Presumption of Domination of Will

You have learnt that undue influence is involved only when one party is in a position to dominate the will of the other. Now the question arises as to when can a person be said to be in a position to dominate the will of the other. Answer to this question is provided by Section 16 (2) of the Act. It states that o person is deemed to be in a position to dominate the will of another where :

i) He holds a real or apparent authority over the other : Examples of such cases are relations between master and the servant, parent and child, income tax officer and assessee.

ii) He stands in a fiduciary relation to the other: It means a relationship based on trust and confidence. The category of fiduciary relationship is very wide. It includes the relationship of guardian and ward, spiritual adviser (guru) and his disciples, doctor, and patient, solicitor and client, trustee and beneficiary, a woman and her confidential managing agent. You should note that by judicial decisions it has been held that undue influence cannot be presumed between husband and wife, landlord and tenant, and creditor. and debtor.

iii)He makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress: Persons of weak intelligence, old age, indifferent health or those who are illiterate can be easily influenced. Hence, the law gives thein protection. For example, A, an illiterate old man of about 90 years, physically infirm and mentally in distress, executed a gift deed of his properties in favour of B, his nearest relative who was looking after his daily needs and managing his cultivation. The court held that B was in a position to dominate the will of A (Sher Singh v. Prithi Singh).

CONTINGENT CONTRACTS

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 (section 31). For example, A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

The following are the essential features of a contingent contract.

1. Performance of a contingent contract is made dependent upon the happening or non-happening of dome event.

2. The event on which the performance is made to depend, is an event collateral to the contract i.e., it does not form part of the reciprocal promises which constitute the contract. For example, where A agrees to deliver 100 bags of wheat and B agrees to pay the price only afterwards, the contract is a conditional contract and not contingent, because the event on which B's obligation is made to depend is a part of the promise itself and not a collateral event. Similarly, where A promises to pay B Rs. 10,000 if he marries C, it is not a contingent contract.

3. The contingent event should not be the mere will of the promisor. For instance, if A promises to pay B Rs. 1,000 if he so chooses, it is not a contingent contract. However, where the event is within the promisor's wi!l but not merely his will, it may be a contingent contract. ,For exarple, if A promises to pay B Rs. 1,000 if A left Delhi for Bombay, it is a contingent contract, because going to Bombay is an event no doubt within A's will, but is not merely his will.

Rules Regarding Enforcement of Contingent Contracts

The rules regarding contingent contracts are summarised hereunder (sections 32 to 36):

1 .Contracts contingent upon the happening of a future uncertain event cannot be enforced by law unless and until that event has happened. And if, the event becomes impossible, such contract becomes void (section 32).

Examples i) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's life-time.

2 .Contracts contingent upon the non-happening of a certain future event can be enforced when the happening of that event becomes impossible, and not before (section 33). For example, A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

3 .If a contract is contingent upon as to 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. (section 34). For example, A agrees to pay B a sum of money if B marries C. But 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.

4 .Contracts contingent upon the happening of an uncertain specified event within a fixed time become void if, at the expiration of the time fixed, such event has not happened or if, before the time fixed, such event becomes impossible (section 35) For example, A promises to pay B a sum of money 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.

5 .Contracts contingent upon the non-happening of a specified event 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 expired, if it becomes certain that such event will not happen' (section 35). For example, A promises to pay B a sum of money 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 agreement 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, * Examples i) A agrees to pay B Rs.'1,000 if two parallel straight lines should enclose a space. The agreement is void. ii) A agrees to pay B Rs. 1,000 if B will marry A's daughter C and C was dead at the time of the agreement. The agreement is void.

TERMINATION AND DISCHARGE OF A CONTRACT

The term 'discharge of a contract' means that the parties to it are no more liable under the contract. A contract may be discharged in any one of the following ways:

1 By performance
2 By mutual agreement
3 By lapse of time
4 By operation of law
5 By impossibility of performance
6 By breach.

1.Discharge by Performance : The most obvious or natural mode of discharge of a contract is by performance. The term 'performance' means that the parties to the contract have fulfilled or carried out their respective obligations arising out of the contract. For example, A contracts.to sell his book to B for Rs. 50. A delivers the book and B makes the payment, the contract is discharged by performance.

Section **37** of the Indian Contract Act lays down.the obligations of the parties regarding performance. It provides that, the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provision of this Act, or any otrher law.

Types of Performance

From Section 37 you can infer that the performance may be either actual or attempted.

a)Actual performance: When a party to a contract has done, what he had undertaken to do and there remains nothing to be done by him the promise is said to have been actually performed and the liability of such a party comes to an end. For example A who is indebted to B for Rs. 1,000, promises to repay the amount after two months. A repays the.amount on the due date. This is actual performance. .

b)Attempted Performance: Sometimes, when the performance becomes due, the promisor offers to perform his obligation but the promisee refuses to accept the performance. This is known as 'attempted performance' or 'tender. For example, A promises to deliver certain goods to B. A takes the goods to the appointed place during business hours but B refuses to take the delivery of goods. Thus, A has done what he was required to do under the contract, It is, an attempted performance. In case of an attempted performance, the promisor shall not be held liable for non-performance as an attempted performance or tender is as good as performing the contract. Section 38 of the Contract Act provides. where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non performance, nor does he thereby lose his rights under the contract.

2.Discharge by Mutual Agreement: Just as a contract is created by means of an agreement, it can be terminated or discharged by mutual agreement. If the parties to a contract agree to make a fresh contract in place of the original contract, the original contract is discharged. A contract can be discharged by mutual agreement in any of the following ways.

a) Novation: The term 'novation' means the substitution of a new contract for the existing one. This arrangement may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the original contract. Since novation implies a new contract, all the parties to the existing contract must agree to it.

Examples

i) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is discharged, and a new debt from C to B has been contracted. This is novation involving change of parties. 8 ii) A owes B Rs. 10,000. A enters into an agreement with B and gives B a mortgage of his estate for Rs. 5,000 in place of the debt of Rs. 10.000. This arrangement constitutes a new contract and terminates the old.

b) Rescission : Rescission means cancellation of the contract. If by mutual agreement the contracting parties agree to rescind the contract, the contract is discharged. A contract can be rescinded before the performance becomes due. Non-performance of a contract by both the parties for a long period, without complaint, amounts to implied rescission. Rescission is different from novation in the sense that in case of novation a new contract is substituted for the original contract whereas in rescission the original contract is cancelled and no new contract is made.

c) Alteration: It means a change in one or more of the terms of a contract with consent of all the parties. Alteration has the effect of terminating the original contract. In an alteration there is a change in the terms of a contract but no change of parties to it. In novation there may be change of parties.

d) Remission: It means the acceptance of a lesser sum than what was contracted for or a lesser fulfilment of the promise made. According to section 63, every promisee may (a) remit or dispense with it, wholly or in' part, or (b) extend the time of performance, or (c) accept any other satisfaction instead of performance. A owes B Rs. 5,000. A pays to B Rs. 3,000 who accepts it in full satisfaction of the debt. The whole debt is discharged.

e) Waiver: Waiver means abandonment or intentional relinquishment of a right under the contract. When a party waives his rights under it, the other party is released from his obligation. For example, A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

3.Discharge by Lapse of Time: The rights and obligations under a contract can be enforced only within a specified period called the 'period of limitation'. The Limitation Act has prescribed the period of limitation for various contracts: For example, period of limitation for exercising right to recover an immovable property is twelve years and right to recover a debt is three years. After the expiry of this limitation period, the contractual rights cannot be enforced. In other words, if a debt is not recovered within three years of its payment becoming due, the debt becomes time barred and is discharged by lapse of time.

4. Discharge by Operation of Law: A contract may be discharged by operation of law in the following cases.

i) Death of the Promisor: Contracts involving the personal skill or ability of the promisor come to an end with the death of the promisor.

ii) Insolvency: When a person is declared insolvent by an Insolvency Court, he is discharged from his obligation existing at that time. So, if a promisor is declared insolvent, he is discharged from his liability.

iii)**Merger:** When an inferior right accounting to a party in a contract merges into the superior rights accruing to the same party, the earlier contract is discharged. For example, A took a land on lease from B. Subsequently, A purchases that very land. Now A becomes the owner of the land and the earlier contract of lease stands terminated.

iv)**Material alteration:** In a written contract if any party makes some material alteration in the terms of the contract without the approval of the other party, the contract stands terminated. A material alteration is one which varies the rights, liabilities or the position of the parties as such, You should note that immaterial alterations, such as correcting the clerical errors or the spelling of a name has no effect on the validity of the contract.

5. Discharge by Impossibility of Performance: For a contract to be valid it must be capable of being performed. But sometimes, due to some reasons which are beyond the control of the parties, the performance of a contract becomes impossible. In such cases, the contract is discharged on the ground of impossibility of performance. Section 56 of Contract Act provides that an agreement to do an act impossible in itself is void. This rule is based on the principle that law does not recognise the impossible and what is impossible does not create any obligations.

Impossibility may be of two types : (i) initial and (ii) subsequent.

i**)Initial impossibility:** It means impossibility at the time of making the contract. Whether the fact of impossibility is known or unknown to the parties, the agreement is void ab initio. For example A agrees with B to discover a treasure by magic. The agreement is void due to initial impossibility. If, however, the promisor alone knows about the initial impossibility while making the contract, he shall have to compensate the promisee for any loss which the promisee may suffer on account of non-performance. This rule is given in Para 3 of section 56. For example, A contracts to marry B, being already married to C. Being forbidden by the law of which he is subject to practise polygamy, A must compensate B for the loss caused to her by the non-performance of the contract on account of impossibility.

ii)Subsequent or Supervening Impossibility : Impossibility which arises subsequent to the making of the contract is called supervening impossibility. If the contract was capable of performance at the time of making it, but subsequently because of some event (over which neither party has any control) the performance becomes impossible or unlawful, the contract becomes void and the parties are discharged' from their obligations. In case of initial impossibility the agreement is void ab-initio while in case of supervening impossibility the contract becomes void.

The performance of a contract may become subsequently impossible due to any of the following reasons.

a) Destruction of Subject-Matter: If the subject-matter of a contract is destroyed after the formation of the contract, without the fault of either party, the contract becomes void.

Examples i) A musical hall was agreed to be let out on certain dates, but before those dates the hall was destroyed by fire. The contract was held to have become void on the ground of

impossibility of performance (Taylor v. Caldwell). ii) A person agreed to deliver a part of a specific crop of potatoes. The potatoes were destroyed by a pest through no fault of the party. The contract was held to be discharged (Howell v. Coupland).

b) Death or personal incapacity: When the peformance of a contract depends upon the personal skill or ability of a party, the contract stands discharged on the . death or incapability of that person. For example, A agreed to perform at a concert on a specified day. A fell seriously ill and so could not perform on the said day. It was held that the contract is discharged on the ground of impossibility (Robinson v. Davison).

c)Change of Law: A contract which was lawful at the time of making it but becomes unlawful by reasons of subsequent change in law, the performance becomes impossible and the contract is discharged.

Examples i) A agreed to transport certain goods belonging to B from one place to another. Subsequently, A's trucks were requisitioned by the Government under a statutory power. It was held that A was discharged from his obligation (Noor Bux v. Kalyan).

ii) A agreed to sell his land to B. Subsequently, the land was acquired by the Government. Now A cannot perform his promise, the contract was held to become void on the ground of impossibility (Shyam Sunder v. Durga).

d) Cessation of a state of things: If a contract is entered into on the basis of the continued existence or occurrence of a particular state of things, the contract is discharged if the state of things ceases to exist or changes. It should be noted carefully that the contract is discharged only when the happening of the event was the basis of the contract,

Examples i) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

e)Declaration of War: If a war is declared subsequent to the formation of the contract, all pending contracts are either suspended or declared as void. If the war is of a short duration, such contracts may be revived after the end of the

war. For example, A contracts to take in cargo for H at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared.

Some of the cases which do not come within the principle of supervening impossibility are as follows:

Difficulty of Performance:The contract is not discharged simply because the performance has become more difficult, more expensive or less profitable than stipulated at the time of its formation.

Examples i) A agreed to supply coal within certain period. Due to government's restrictions on the transport of coal from collieries, he failed to supply on time. But since coal was available in the open market from where A could have obtained it, A will not be discharged on the ground of impossibility.

ii) A promised to send certain goods from Bombay to Antwerp in September. In August, war broke out and shipping space was not available except at very high rates. It was held that the increase of freight rates did not excuse performance.

Commercial Impossibility **:** Performance cannot be excused on the ground of commercial impossibility. If the raw material is available at a very high rate or wages have gone up and the performance becomes less profitable than anticipated, the contract does not become void.

Commercial impossibility not discharge the parties. For example, A agreed to supply certain goods to B. As a result of an increase in the cost of raw material and wage bill, it is now no longer profitable for A to supply the goods-at the agreed rate, A cannot be excused for non-performance.

***Default of a Third Party*:** If the contract cannot be performed because of the default of a third person on whose work the promisor relied, the promisor is not discharged. For example, A entered into a contract with B for the supply of certain cotton goods to be manufactured by C, a manufacturer of these goods. C did not manufacture those goods. A is not discharged from his obligation and is liable to B for damages.

Strikes, Lockouts and civil Disturbances: A strike by the workers or a lockout by the employer or riots etc. will not excuse the parties from performing the contract unless there is a clause in .the contract to that effect.. For example, a contract was entered into between two merchants for $lie sale of certain goods which were to be imported from Algeria. The goods could not be imported because of riots and civil disturbances in that country. It was held that this was no excuse for non-performance of the contract.

***Partial Impossibility* :** If the contract is made for several purposes, the failure of one or more of them does not discharge the contract. 'For example, A agreed to let a boat to H to (i) view the naval review at the coronation of King, and (ii) to cruise round the fleet. Due to the illness of the King, the naval review was cancelled, but the fleet was assembled and the boat could have been used to cruise round the fleet. It was held that the contract was not discharged.

6. Discharge by Breach: When a contract is made, the parties to it are expected to perform it, unless they are excused. If any party refuses or fails to perform his part of the contract, a breach of contract occurs and the contract is discharged. In case of breach the aggrieved party is relieved from performing his obligation and gets a right to proceed against the party at fault. A breach of contract may arise in two ways: (i) actual breach and (ii) anticipatory breach.

Actual Breach: Actual breach of contract may take place either on the due date of performance or during the course of performance. For example, A agreed to deliver 100 bags of rice to B at a certain price on 10th July. If A refuses or fails to deliver ;.he goods on time, there occurs an actual breach. If the promisor has performed part of the contract and then refuses or fails to deliver the remaining goods, it is also actual breach of contract.

Anticipatory Breach: Anticipatory breach occurs when the party declares his intention of not performing the contract before the performance is due. This intention may be declared expressly or impliedly. For example, A agrees to supply certain goods to B on 10th July. Before this date A informs B that he shall not supply the goods. If, instead of, expressly informing B about his intention of not performing the contract, A does something which makes it impossible for him to perform, this will also amount to anticipatory breach. If in the example given above, A sells all the goods before the said date to P at a higher price, this action of A clearly indicates his intention.

REMEDIES FOR BREACH OF CONTRACT

When a contract is broken by a party, there are several courses of action (remedies) which the other party may pursue. These remedies include:

1. Rescission of the contract

2. Suit for damage

3. Suit for specific performance

4. Suit for injunction

5. Suit upon quantum meruit

1. Rescission of the Contract : Section 39 of the Act provides that when a party to a contract has refused to perform, or disabled himself from performing his promise in. its entirety, the promisee may put an end to the contract. This is called right of rescission. It means setting aside of the contract. In such a case aggrieved party is discharged from all t obligations under the contract. It should be noted that section 75 of the Indian Contract Act also confers upon a person rightfully rescinding the contract to make a claim for compensation of any loss or damage sustained through the non-fulfilment of the contract.

2. Suit for Damages : In the event of breach of contract; the aggrieved party besides rescinding the contract can claim for damages. Damages are monetary compensation allowed for loss suffered by the aggrieved party due to the breach of contract.

3. Suit for Specific Performance : In certain cases of breach of contract, damages may not be considered as an adequate remedy. The aggrieved party may not be interested in monetary compensation. The court may, in such cases, direct the defaulting party to carry out the promise according to the terms of the contract. This is called 'Specific Performance' of the contract. .' Specific performance of a contract may, at the discretion of the Court, be enforced where the contract involves the sale of a particular house or some rare article or any other thing for which monetary compensation is not enough because the injured party will not be able to get an exact substitute in the market. For example, A agreed to sell an old painting to B for Rs. 10,000. Subsequently, A refused to sell the painting. Here, B may file a suit against A for the specific performance of the contract.

Specific performance is not granted under the following situations :

a) When monetary compensation is an adequate relief;

b) When the contract is of a personal nature, e.g., a contract to paint a picture, etc. In such contracts injunction is granted in place of specific performance.

c) Where it is not possible for the court to supervise the performance of the contract, e.g., a building construction contract.

d)l When the contract is made by a company beyond its powers as laid down in its memorandum of association. e) When the contract is inequitable to either party. '

f) Where one of the parties is a minor.

4. Suit for Injunction : Where a party is in breach of a negative term of a contract (i.e., where he does something which he promised not to do) the court may by issuing an order, prohibit him from doing so. Such an order issued by court is called an 'injunction'.

Example: G agreed to buy the whole of the electric energy required for his house from a certain company. He was, therefore, restrained by an injunction from buying electricity from any other person. (Metropolitan Electric Supply Company vsGinder).

5.Suit upon Quantum Meruit

The phrase 'Quantum Meruit' means 'as much as is merited (earned)'. The normal rule of law is that unless a party has performed his promise in its entirety, he cannot claim performance from the other. To this rule, however, there are certain exceptions on the basis of quantum meruit. When a person has done some work under a contract and the other party repudiates the contract, or some event happens which makes the further performance of the contract impossible, then the party who has already performed the work can claim payment for the

work he has already done. This right of claiming the payment for work already done, before the repudiation of the contract or its further performance becoming impossible is called the right to quantum meruit. For example, X, a writer, was engaged by M who is the editor of a magazine to write a series of twelve articles to be published in the magazine. After X had delivered six articles, the publication of the magazine was discontinued. X is entitled to receive payment for the six articles already written.

QUASI CONTRACTS

There are many situations in which a person may be required to conform to an obligation, although he has neither broken any contract nor committed any tort. For example, A has forgotten certain articles in B's house. Now B is bound to restore . Such obligations are generally described as 'quasi contractual obligations'. Quasi contracts are based on the principle of equity and justice. It simply states that nobody shall enrich himself unjustly at the expense of another. In fact, a quasi contract 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 party 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 to retain it, and which in justice and fairness belongs to another. He then is placed under an obligation to restore or repay for such a benefit.

DEFINITIONS OF QUASI CONTRACTS

There is no statutory definition of a ***quasi contract*** available either under the English Law or under the Indian Contract Act. Pollock describes quasi contracts as "contracts 'in law' but not 'in fact', being the subject matter of a fictitious extension of the sphere of the contract to cover obligations which do not in reality fall within it" Quasi contracts are also called implied contracts, They are implied because they create such obligations which resemble those created by contracts. The essentials for the formation of a contract are absent but as outcome resembles those created by a contract they are called quasi contracts. Under English Law, they are also termed as Constructive Contracts or Contracts in Law, etc. Indian Contract Act terms quasi contracts as certain relations resembling those created by contracts and are found under sections 68 to 72.

Difference Between Quasi Contracts and Contracts

In case of contracts, it is the consent of the party which produce the obligations. But in quasi contracts there is no question of consent, it is the law alone or natural equity which produces obligations. As noted earlier, a quasi contract is based on the ground that a person shall not be allowed to unjustly enrich himself at the expense - of another. There is, however, similarity between quasi contract and contracts in case of claims for damages. In case of breach of a quasi contract section 73 of the Indian Contract Act provides for the same remedies (claim for damages) as provided in case of breach of a contract. It reads: 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 has contracted to discharge it and has broken his contract.

TYPES OF QUASI CONTRACTS

Sections 68 to 72 deal with five types of quasi contractual obligations.

' **i)Supply of Necessaries:** According to section 68, if a person incapable of contracting (which would include a minor, idiot and lunatic) or anyone whom he is legally bound to support, is supplied by another with 'necessaries' suited to his condition in life such person is entitled to

recover the value thereof from the property of such incapable person. You should note that the aforesaid claim for necessaries is based upon' quasi contractual obligations because a contract with a person incompetent to contract is void-ab-initio. The following two points must, however, be noted in this regard:

a) The amount is recoverable only from the property (if any) of the incapable person and not from him personally.

b) The goods or services supplied must be 'necessaries'.

ii)Payment of Money Due by Another(Section 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 Government being in arrears, his land is advertised for sale by the Government, Under the revenue law, the consequences of such sale will be annulment of B's lease. B, to prevent the sale and 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 (Wazarilal v. NaurangLal).

For the section 69 to apply, the following essentials must be met:

a) The person paying must be himself interested in making the payment. Thus, where P left his carriage on D's premises and D's landlord seized the carriage for non-payment of the rent. P paid the rent to obtain the release of his carriage. Held. P could recover the amount from D

b) The payment should not be voluntary one.

c) The payment must be such as the other party was bound by law to pay.

Example : The goods belonging to A were wrongfully attached in order to realise arrears of Government revenue due by G. A paid the amount to save the goods from sale. Held he was entitled to recover the amount from G (AbidHussain v. Ganga Sahai).

iii)Obligations to Pay for Non-gratuitous Acts : Where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Under section 70, three conditions are required to establish a right of action at the suit of a person who does anything for another:

a)The thing must be done lawfully.

b) It must be done by a person not intending to act gratuitously.

c) The person for whom the act is done must enjoy the benefit of it.

iv)Contracts required to be in writing: You should note that where there is a mandatory provision in an act requiring contracts to be in writing, an oral contract is void. But it has been held by the Supreme Court that where work has been done and accepted, Section 70 is applicable and payment should be made for the work done (State of West Bengal v. B.K. Mandal& Sons).

v)Responsibility of a Finder of Goods: A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee. In such a case, an agreement is implied by law between the owner and finder of goods and the latter is deemed to be a bailee. A finder is, thus, bound to take as much care of the goods found as a man of

ordinary prudence would under similar circumstances take of his own goods of the same bulk, quantity and value. Besides, he must make reasonable efforts in finding the real owner.

Rights of the Finder of Goods : A finder of goods has the following rights:

1. The finder is entitled to retain the goods against the whole world, except the true owner. For example, A picked up a diamond from the floor of B's shop and handed it over to B to keep it till the owner is found. In spite of best efforts, the true owner could not be found. After some time, A tendered to B the lawful expenses incurred by him for finding the true owner and asked him to return the diamond to him (A). B refused to do so. Held B must return the diamond to A as A was entitled to retain it against the whole world, except the true owner (Hollins v. Fowler).

2.The finder has lien in respect of any sum which may be due to him on account of expenditure incurred by him in respect of the goods (section 168).

3.Where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it (section 168). This right was re-endorsed in the case of Harbhajan v. Harcharan.

4.The finder may sell the goods in the following circumstances :

a) Where the thing found is in danger of perishing.

b) Where the owner cannot, with reasonable diligence, be found out.

c) Where the owner has been found but he refuses to pay the lawful charges of the finder.

d) Where the lawful charges of the finder, in respect of the thing found amount to 2/3rd or more of the value of the thing found.

UNIT-II

INDEMNITY

2. MEANING OF CONTRACT OF INDEMNITY

The term 'indemnity' simply means to make good the loss to compensate the party who has suffered some loss. The term 'contract of indemnity' is defined in Section 124 of the Indian Contract Act as follows, "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person, is called a contract of indemnity." The person who promises to compensate for the loss is called the "indemnifier" and the person to whom this promise is made: or whose loss is to be made good is known as "indemnity-holder" or "indemnified". For example, A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of money. This is a contract of indemnity, here A is the indemnifier and B is the indemnified.

The above definition restricts the scope of contracts of indemnity as it covers only the losses caused by the conduct of the promisor himself or by the conduct of any other person. If a strict view is taken of this definition, it will exclude the losses caused by accidents. In that case insurance contracts should not fall within the purview of contracts of indemnity. But the fact is that all contracts of insurance (except life insurance) are also contracts of indemnity. The intention of law makers had never been to exclude insurance contracts from the purview of contracts of indemnity. That is why we follow the English definition which states "a promise to save another harmless from loss caused as a result of a transaction entered into at the instance of the promisor". This definition includes a promise to make good the loss arising from any cause whatsoever e.g. fire, perils of sea, accidents etc. When a person expressly promises to compensate the other from loss, it is termed as express indemnity. The contract of indemnity is said to be implied when it is to be inferred from the conduct of the parties or from the circumstances of the case. In an auction there is an implied contract of indemnity between the auctioneer and the person who asks him to sell goods. For example, A, an auctioneer, sold certain goods on the instructions of B. Later on, it is discovered that the goods belonged to C and not B. So, C recovered damages from A for selling the goods to him. Here A is entitled to recover the compensation from B. In this case there was an implied promise to compensate the auctioneer for any loss which he may suffer on account of the defective title of B. As you know that contract of indemnity is a special type of contract, therefore, to enforce such contracts it is necessary that all the essentials of a valid contract must be present. In case any one of the essential is missing, the contract cannot be enforced. Thus if the object or consideration of an indemnity agreement is unlawful, it cannot be enforced. For example, A asks B to beat C, promising to indemnify him against the consequences this cannot be enforced. Suppose B beats C and is fined Rs. 1000, B cannot claim this amount from A, because the object of the agreement is unlawful.

2.1. RIGHTS OF INDEMNITY HOLDER

In pursuance of Section 125 of the Act, the indemnity-holder may recover from the indemnifier (promisor), the following amounts, provided he acts within the scope of his authority :

1) He is entitled to recover all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applied.
2) He is entitled to recover from the indemnifier all costs which he had paid in bringing or defending any suit in respect of contracts of indemnity. In bringing or defending the suit the indemnity-holder must not contravene the orders of the indemnifier and he must act in the same way as a prudent man would have acted under similar circumstances in his own case.

3) He is entitled to recover from the indemnifier, all the amount which he had paid under the terms of the compromise of such suit. However, it is essential that the compromise must not be contrary to the orders of the indemnifier and in compromising the suit, he must act as a prudent man. This right is also available to the indemnity-holder when he paid any amount under any compromise entered by him and authorized by the indemnifier.

2.2. MEANING OF CONTRACT OF GUARANTEE

The object of contract of guarantee is to enable a person to obtain an employment, a loan or goods on credit. According to Section 126 of the Indian Contract Act, 'A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called 'the principal debtor'; and the person to whom the guarantee is given is called ‘the creditor'. A guarantee may be either oral or written. For example, if A, and his friend B enter a trader's shop, and A asks the trader, "supply the articles required by B, and if he does not pay you I will'. It is a contract of guarantee. The primary liability to pay is that of B but if he fails to pay, A becomes liable to pay. On the other hand, if A says to the trader, "let him (B) have the goods, I will see you are paid", the contract is one of indemnity and not a contract of guarantee. There are three parties to the contract of guarantee known as creditor, principal debtor and surety. A contract of guarantee is formed when all the three agree. Let us take an example, A and B enter in a shop, and A orders to deliver certain goods to B on credit, The shopkeeper says "I can give goods on credit provided A gives the guarantee for the payment". A promises to guarantee the payment. In this example, B is the principal debtor, A is the surety and the shopkeeper is the creditor and the contract is a contract of guarantee.

A contract of guarantee is an agreement and as such all the essentials of a valid contract must be present .However if principal debtor is minor contract of guarantee still exists. Suppose in the above-mentioned example B is a minor i.e., incompetent to contract. In such a situation A would be regarded as the principal debtor and he will become personally liable to pay. Thus, the incapacity of the principal debtor does not affect the Validity of a contract of guarantee. The requirement is that the creditor and the surety must be competent to contract.

Now if a contract of guarantee should have all the essentials of a contract then what is the consideration between surety and the principal debtor. It is not necessary that there should be direct consideration between the surety and the creditor i.e., the surety need not be benefited. It is sufficient (for the purposes of consideration) that something is being done or some promise is made for the benefit of principal debtor. It is presumed that the consideration received by principal debtor is the sufficient consideration for the surety. Section 127 says: Anything done, or any promise made for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

On examining the definition of contract of guarantee, you would find that as there are three parties, there are three contracts as well. One contract is between the creditor and the principal debtor, out of which the guaranteed debt arises. Second contract is between the surety and the principal debtor which implies that the principal debtor shall indemnify the surety, if the principal debtor fails to pay and the surety is asked to pay. The third contract is between the surety and the creditor by which surety undertakes (guarantees) to pay the principal debtor's liabilities (debt) if the principal debtor fails to pay.

For a valid contract of guarantee, it is essential that there must be an existing debt or a promise whose performance is guaranteed. In case there is no such debt or promise, there can be no valid guarantee. In fact, a contract of guarantee pre-supposes the existence of a liability enforceable by law. For example, A gives the guarantee to B for the payment of a time-barred debt due from C. This is not a valid contract of guarantee because the primary liability between B and C is not enforceable by law. In case A pays the amount, he cannot recover it from C.

From this discussion, let us summarise the essential features of a contract of guarantee as follows :

i) Existence of a debt, for which some person other than the surety should be primarily liable.

ii) Consideration, but it is not necessary that the surety should be benefited. iii)

iii) All the essentials of a valid contract should be present.

iv) Creditor and surety must be competent i.e., principal debtor need not be Competent to contract.

v) Surety's liability is dependent on principal debtor's default.

vi) Guarantee must not be obtained by misrepresentation.

vii) Guarantee must not be obtained by concealment of material facts.

2.3. DISTINCTION BETWEEN CONTRACT OF INDEMNITY AND CONTRACT OF GUARANTEE

Following are the main points of difference between a contract of indemnity and a contract of guarantee.

i) In a contract of indemnity there are only two parties i.e., indemnifier and the indemnified while in a contract of guarantee there are three parties principal debtor, creditor and the surety.

ii) In a contract of indemnity there is only one contract, whereas in a contract of guarantee, there are three contracts.

iii) In a contract of indemnity the indemnifier undertakes to save the indemnified from any loss caused to him by the conduct of indemnifier hiinseif or the conduct of any other person, while in a contract of guarantee, the surety undertakes for the payment of debts of principal debtor, if the principal debtor fails to pay it.

iv) In a contract of indemnity, the liability of indemnifier is primary and independent, while in a contract of guarantee the liability of surety is secondary i.e., it arises only on the default of principal debtor. The primary liability is that of the principal debtor.

v) In a contract of indemnity, indemnifier's liability arises only on the happening of a contingency, while in a contract of guarantee there is an existing duty or debt, the performance of which is guaranteed by the surety.

vi) In a contract of indemnity, indemnifier acts independently without any request of the debtor or the third party, while in a contract of guarantee the surety guarantees at the request of principal debtor.

vii) In a contract of guarantee, if the principal debtor fails to pay and the surety discharge his debt, the surety can proceed against the principal debtor in his own right, while in a contract of indemnity, the indemnifier cannot sue the third party in his own name unless there is an assignment jn indemnifier's favour. If there is no such assignment, the indemnifier must bring the suit in the name of indemnified.

EXTENT OF SURETY'S LIABILITY

In the absence of a contract to the contrary, the liability of surety is co-extensive with that of the liability of the principal debtor. It means that the surety is liable to the same extent to which the principal debtor is liable. For example. A guarantees to B the payment of a bill of exchange by C, the acceptor. On the due date the bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it. Though the liability of the surety is equal to that of the principal debtorbut if at the time of giving the guarantee, the surety has given the guarantee for a 1 fixed amount,, in that case the liability of the surety can, in no case, be more than the fixed amount. For example, A lends Rs. 5,000 to B and C gives the guarantee I for Rs. 3,000 only. If B makes a default, C shall be liable only for Rs. 3,000.

It is true that the liability of surety is co-extensive with that of the principal debtor, but it does not mean that if due to some reason the principal debtor cannot be held liable then the surety will also not be liable. This is so because the contract between the, surety and the creditor is an independent contract and not a collateral one. For example, when the principal debtor is a minor, the surety is liable. Not only this, if by any act the liability of the principal debtor is reduced or terminated, the surety continues to be liable. If the creditor fails to sue the principal debtor and the debt becomes time barred, the surety continues to be liable.

In a contract, if there is a condition precedent for the surety's liability, the surety would only be liable when that condition is fulfilled first. For example, your friend A requires a loan of Rs. 10,000 from the bank. You and two of your friends C and D, agree to guarantee the repayment of loan. C does not sign the necessary documents. You and your friend D are also not liable on this guarantee because it is a condition precedent to your guarantee that the repayment of loan shall be guaranteed by all the three.

Kinds of Guarantee

Contracts of guarantee may be classified into two types: **Specific guarantee and continuing guarantee.** When a guarantee is given in respect of a single debt or specific transaction and is to come to an end when the guaranteed debt is paid or the promise is duly performed, it is called a specific or simple guarantee. However, a guarantee which extends to a series of transactions, is called a continuing guarantee (Section 129). The surety's liability in this case would continue till all the transactions are completed or till the guarantor revokes the guarantee as to the future transactions. Examples: a) S is a bookseller who supplies a set of books to P, under the contract that if P does not pay for the books, his friend K would make the payment. This is a contract of

specific guarantee and K's liability would come to an end, the moment the price of the books is paid to S.
b) On M's recommendation S, a wealthy landlord, employs P as his estate manager. It was the duty of P to collect rent every month from the tenants of S and remit the same to S before the 15th of each month. M, guarantee this arrangement and promises to make good any default made by P. This is a contract of continuing guarantee.

In order to understand continuing guarantee, the following points should be noted:
i) The most important feature of a continuing guarantee is that it applies to a series of separable, distinct transactions. Therefore, when a guarantee is given for an entire consideration, it cannot be termed as a continuing guarantee. For exampIe, K gave his house to S on a lease for ten years on a specified lease rent. P guaranteed that S, would fulfil his obligations. After seven years S stopped paying the lease rent. 'K sued him for the payment of rent. P then gave a notice revoking his guarantee for the remaining three years. P would not be able to revoke the guarantee because the lease for ten years is an entire indivisible consideration and cannot be classified as a series of transactions. This contract, therefore, cannot be classified as a contract of continuing guarantee.
ii) In deciding whether particular contract of guarantee is a Specific guarantee or a continuing one, you will have to see the intention of the parties as expressed by the terms of the contract and the prevailing circumstances. For example, A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C, C pays for them. Afterwards, B delivers four sacks to C for which C does not pay for. Here A cannot be held liable because it is clear from the terms of the contract that A intended to guarantee only for the payment of price of the first five sacks of flour.

iii) A continuing guarantee may be given for a part of the entire debt or for the entire debt subject to a limit. Let us understand this with the help of an example. S gave guarantee for the loans taken from time to time by P from C. P owes rupees ten thousand to C. S may have given his guarantee in the following two forms.
a) I guarantee the payment of the debt of rupees five thousand by P to C. This is a case of guarantee only for a part of the entire debt.
b) I guarantee the payment of any debts of P due to C subject to a limit of rupees five thousand. This is a guarantee for the payment of entire debt subject to a specified limit.
You will be wondering as to the distinction between the two forms because in both the cases, S appears to be liable for just five thousand rupees. The distinction becomes clear in the event of insolvency of P, the principal debtor. Let us suppose that P has been declared insolvent and his estate can only repay forty paisa in a rupee. In the first case when the guarantee is only for a part of the entire debt, C can recover rupees five thousand from S (the guaranteed amount) and 2,000 from P's estate (forty percent of the balance of rupees five thousand). C will, therefore, get Rs. 7,000 in all. After paying five thousand to C, S can claim rupees 2,000(i.e. 40 percent) from P's estate. However, when the guarantee is for the entire amount subject to a specified limit, C will recover rupees five thousand from S (upto the guaranteed limit) and Rs. 4,000 from P (forty per cent of the entire debt of Rs. 10,000). S would not be able to claim anything from P's estate till the entire amount of rupees ten thousand has been paid to C.

DISCHARGE OF SURETY FROM LIABILITY

Under any of the following circumstances a surety is discharged from his liability: 1) by revocation of the contract of guarantee, 2) by the conduct of the creditor, or 3) by the invalidation of the contract of guarantee

1. By Revocation of the Contract of Guarantee

i) **Notice by surety**: You have learnt that a contract of guarantee may be specific or continuing. A specific guarantee cannot be revoked if the liability has already accrued. Thus, if A lends B a certain sum on the guarantee of C, then C cannot revoke the contract of guarantee. But, if A has not yet given the sum to B, even though the guarantee has been executed by C, C may revoke the contract by giving notice. Where the guarantee is a continuing one and extends to a series of transactions, it may be revoked by the surety as to future transactions by giving notice to the creditor. The Act contemplates series of distinct and separate transactions to constitute a continuing guarantee which can be revoked by notice.

ii) **Death of surety**: In the absence of a contract to the contrary, a continuing guarantee is revoked by the death of the surety as to the future transactions, The estate of deceased surety is, however, liable for those transactions which had already taken place during the lifetime of the deceased. Surety's estate will not be liable for the transactions taking after the death of surety even if the creditor had no knowledge of surety's death.

iii)**Novation**: A contract of guarantee is discharged by novation when a fresh contract being entered into, either between the same parties or between other parties, the consideration being the mutual discharge of the old contract. The original contract of guarantee comes to an end and so the surety stands discharged with regard to the old contract.

2. By Conduct of the Creditor

i) **Variance in terms of the contract**: A surety is discharged by such conduct of the creditor which has the effect of materially altering the terms of the contract of guarantee. For example, C contracts to lend B Rs. 2,000 on 1st January. A guarantees repayment, C pays the amount to B on 30th August, A is discharged from the liability as the contract has been varied. A surety is liable only for what he has positively undertaken in the guarantee; any alteration made without the surety's consent, in the terms of contract between the principal debtor and the creditor, will discharge the surety as to transactions subsequent to the variation (Section 133). For example, A becomes surety to C for B's conduct as a manager in C's bank. Afterwards B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts, B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his surety ship due to the variance made in the terms without his consent.

ii) **Release or discharge of the principal debtor:** A surety is discharged if the creditor makes a contract with the principal debtor by which the principal debtor is released, or by any act or omission of the creditor, which results in the discharge of the principal debtor (Section 134). For example, A supplies goods to B on the guarantee of C. Afterwards B becomes unable to pay and contracts with A to assign some property to A in consideration of his releasing him from his demands on the goods supplied. Here, B is released from his debt, and C is also discharged from his suretyship. But, where the principal debtor is discharged of his debt by operation of law, say, on insolvency, this will not operate as a discharge of the surety. Also, where there are co-sureties, a release by the creditor of one of them does not discharge other co-sureties nor does it frees the surety so released from his responsibility to other sureties.

iii)**Arrangement between principal debtor and creditor:** Where the creditor, without the-consent of the surety, makes an arrangement with the principal debtor for composition, or promise to give him time to, or not to sue him, the surety will be discharged (Section 135). However, when the contract to allow more time to the principal debtor is made between the creditor and a third party, and not with the principal debtor, the surety is not discharged (Section 136). For example, C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B, A is not discharged. Similarly, mere forbearance by the creditor to sue the principal debtor or to enforce any other remedy against him, in the absence of any provision in the guarantee to the contrary, does not discharge the surety. For example, A owes Rs. 10,000 to K. The debt is guaranteed by M. The debt becomes payable but K does not sue A for six months after the debt has become payable. This will not discharge M.

iv)By creditor's act or omission impairing surety's eventual remedy: 'If the creditor does any act which is against the right of the surety, or omits to do any act which his duty to the surety requires, him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged (Section 139). For example, B, a shipbuilder, contract to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages (the last instalment not to be paid before the completion of the ship). A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays the last instalment to B. A is discharged by this payment.

iv) **Loss of security:** If the creditor parts with or loses any security given to him at the time of the guarantee, without the consent of the surety, the surety is discharged from liability to the extent of the value of security (Section 141).

3. **By Invalidation of the Contract** : A contract of guarantee, like any other contract, may be avoided if it becomes void or voidable at the option of the surety. A surety may be discharged from liability in the following cases:

i) **Guarantee obtained by misrepresentation**: When a misrepresentation is made by the creditor or with his knowledge or consent, relating to a material fact in the contract of guarantee, the contract is invalid (Section 142).

ii) **Guarantee obtained by concealment:** When a guarantee is obtained by the creditor by means of keeping silence regarding some material part of circumstances relating to the contracts, the contract is invalid. (Section 143).

iii) **Failure of co-surety to join a surety**: When a contract of guarantee provides that a creditor shall not act on it until another person has joined in it as a co-surety, the guarantee is not valid if that other person does not join.

RIGHTS OF A SURETY

After making a payment and discharging the liability of the principal debtor, the surety gets various rights. These rights can be studied under three heads: (1) rights against the ,principal debtors. (2) rights against the creditor, and (3) rights against the co-sureties.

1. **Rights against the Principal Debtor:** The surety has the following two rights against the principal debtor.

i) **Right of subrogation:** The surety acquires all the rights which the creditor had against the principal debtor. Section 140 lays down, where a guaranteed debt has become due or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. This right of the surety is called 'subrogation'. It means that on payment of the guaranteed debt, or performance of the guaranteed duty, the surety steps into the shoes of creditor

ii) **Right of Indemnity:** Section 145 of the Act vests in the surety another right i.e, right of indemnity. In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. The surety is not entitled to claim any sums which he has paid wrongfully.
Examples a) B is indebted to C, and A is surety for the debt. C demands payment from A and, on his refusal, sues him for the amount, A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.
b) A guarantees to C, to the extent of Rs. 2,000, payment for rice to be supplied by C to B. C supplies to B rice for an amount which is less than Rs. 2,000 but obtains from A payment of the sum of Rs. 2,000 in respect of the rice supplied. A cannot recover from B more than the rice actually supplied.
2. **Rights against the Creditor:**
i) **Right to securities :** When the surety has paid off the liabilities of principal debtor to the creditor, he becomes entitled to claim all the securities which were given by the principal debtor to the creditor. Surety has right to all securities whether received before or after the creation of the guarantee (Section 141). It is also immaterial whether the surety has knowledge of those securities or not. For example, on C's guarantee A lent Rs. 5,000 to B. This debt is also secured by an assignment deed as security for the debt, the lease of B's house. R defaults in paying the debt and C has to pay the debt. On paying off B's liabilities, C is entitled to receive the assignment deed in his favour.
ii) **Right to set off:** When the creditor sues the surety for payment of principal debtor's liabilities, the surety can claim set off, or counter claim if any, which the principal debtor had against the creditor.
3.**Rights against the Co-sureties :**When the repayment of debt to the principal debtor is guaranteed by more than one person, they are called Co-sureties. The co-sureties are liable to contribute, as agreed, towards the payment of guaranteed debt. Section 138 provided that where there are co-sureties, the release by the creditor of one of them does not discharge the others, nor does it free the surety so released from his responsibility to the other sureties. Thus when the payment of a debt or performance of duty is guaranteed by co-sureties and the principal debtor has defaulted in fulfilling his obligation and thereupon the creditor compels only one or more of the co-sureties to perform the whole contract, the co-surety sureties performing the contract are entitled to claim contribution from the remaining co-sureties. According to Section 146, in the absence of any contract to the contrary, the co-sureties are liable to contribute equally. This

principle will apply even when the liability of co-sureties is joint or several, and whether under the same or different contracts, and whether with or without the knowledge of each other. For example A, B, C and D are co-sureties for a debt of Rs. 2,000 lent by Z to R. R defaults in repaying the loan. A, B, C and D are liable to contribute Rs. 500 each. According to Section 147 where the co-sureties have agreed to guarantee different sums, they have to contribute equally subject to the maximum of the amount guaranteed by each one. It is immaterial whether sureties are liable jointly or severally, under one
contract or under independent contracts and with or without the knowledge, of each other. For example, A, B and C, sureties for D, enter into three separate bonds, each in a different penalty, viz., A for Rs. 10,000, B for Rs. 20,000 and C for Rs. 40,000. D makes default to the extent of Rs. 30,000. A, B and C are liable to nay Rs. 10,000 each. Suppose the default was to the extent of Rs. 40,000. Then A would be liable for Rs. 10,000 and B and C Rs. 15,000 each.

BAILMENT

Meaning Of Bailment

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

Essentials of Valid Bailment : From the definition of bailment it is evident that for creating a relationship of bailment the following features must be present:

i) **Agreement:** For creating a bailment the first essential requirement is the exis'tence of an agreement between the bailor and the bailee. The agreement between the bailor and bailee, may be either express or implied.

ii) **Delivery of goods:** For bailment, it is necessary that the goods should be delivered to the bailee. It is the essence of the contract of bailment. It follows that bailment can be of movable goods only. It is further necessary that the possession of the goods should be voluntarily transferred and is in accordance with the contract. For example, A, a thief enters a house and by showing the revolver, orders the owner of the house to surrender all ornaments in the house to him. The owner of the house surrenders the ornaments. In this case although, the possession of goods has been transferred but it does not create bailment because the delivery of goods is not voluntary.

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

also amounts to constructive delivery of the goods. A railway receipt is a document of title to goods, a transfer of the railway receipt effects a constructive delivery of the goods.
iii) **Purpose:** In a bailment, the goods are delivered for some purpose. The purpose for which the goods are delivered is usually in the contemplation of both the bailor and the bailee.
iv) **Return of the goods**: It is important that the goods which form the subject matter of the bailment should be returned to the bailor or disposed off according to the directions of bailor, after the accomplishment of purpose or after the expiry of period of bailment.
Some common examples of a contract of bailment are where a watch is given for repairs, or diamonds are given for being set in a gold ring. In both these cases, the ***same*** watch or the ***same*** diamonds, should be returned after the purpose for which they were given, has been fulfilled. A pledge of a jewel on the security of which money is borrowed, gold jewels delivered to a bank for safe custody, goods delivered to a railway company for being carried and delivered to the consignee, are all examples of bailment.

KINDS OF BAILMENT

Bailment may be classified on two bases, i.e., reward and benefit.
On the Basis of Reward: Bailment can be classified as gratuitous and non-gratuitous bailment on the basis of whether the parties are getting or not getting some value out of the contract of bailment. **(i)Gratuitous Bailment:** When there is no consideration involved in the contract of bailment it is called a gratuitous bailment. For example, when you lend your cycle to your friend so that he can have a ride or when you borrow his books to read, it is a case of gratuitous bailment because no exchange of money or any other consideration is involved. Neither you nor your friend would be entitled to any remuneration here.
(ii)**Non- Gratuitous Bailment:** A contract of bailment which involves some consideration passing between bailor and bailee, is called a non-gratuitous bailment. For example, if your friend hired a cycle from a cycle shop or you borrowed a book from a bookshop on hire, this would be a case of non-gratuitous bailment.
On the Basis of Benefit: On the basis of the benefits accruing to the parties, the contract of bailment may be divided into the following types:
i) **Bailment for the exclusive benefit of the bailor:** This is the case where a contract of bailment is executed only for the benefit of the bailor, and the bailee does not derive any benefit from it. For example, if you are going out of station and leave your valuable goods with your neighbour for safety, it is you as bailor, who alone is being benefited by this contract.
ii) **Bailment for the exclusive benefit of the bailee:** This is the case where the contract of bailment is executed only for the benefit of the bailee and the bailor does not derive any benefit from the contract. For example, if you lend your books to a friend, without charge, So that he can study for his exams, it is your friend as the bailee, who alone is going to be benefited by this contract.
iii)**Bailment for the mutual benefit of bailor and bailee**: In this case both the bailor and the bailee derive some benefit from the contract of bailment. For example, if you give your shirt to be stitched by the tailor, both of you are going to be benefited by this contract, while you get a stitched shirt, the tailor gets the stitching charges.

DUTIES OF BAILOR: A bailor has the following duties

1) **Duty to disclose defects**: The law of bailment imposes a duty on bailor to disclose the defects in the goods bailed. Bailor is under an obligation to inform those defects in the goods which would interfere with the use of the goods for which the goods being bailed or would expose the bailee to some risk.

In case of gratuitous bailment, the law imposes a duty on the bailor to reveal all the defects known to him, which would interfere with the use of goods bailed. If the bailor does not disclose the defects and the bailee in consequence suffers some loss, the bailor would be liable to compensate the bailee for the losses so suffered. For example, A the owner of a scooter allows B, his friend, to take his scooter for a joy ride. A knows that the brakes of the scooter were not working well. A does not disclose this fact to B. Consequently, B meets with an accident. A is liable to compensate B for damages.

In case of Non-gratuitous bailment, i.e., bailment for reward, the bailor has a duty to keep the goods in a fit condition. The goods should be fit to be used, for the purpose, they are meant. In such a case the bailor is responsible for all defects in the goods whether he knows the defects or not is immaterial, and if the bailee suffers any loss, the bailee has to bear it. For example, A hires a tractor from B, for ploughing his field. The shaft of the tractor is broken but B is not aware of the defect. While A was ploughing his field, because of the defect, the tractor overturns and A is injured. B is liable for A's losses.

You should note that in case of gratuitous bailment the bailor is responsible only for those defects which he is aware of and did not disclose.to the bailee

Duty to reveal is all the more important, where the goods bailed are of dangerous nature, otherwise the bailor would be liable for the resulting consequences. For example, A delivers to B, certain chemicals, to be carried to Delhi. These chemicals have a tendency to burst, if not kept below a certain temperature. A does not tell B to take this precaution. While carrying the chemicals, the chemicals burst and injure B. A is liable for all the damages.

2) **Duty to bear expenses:** The general rule in those bailments where the bailee is not to receive any remuneration is that the bailor should bear the usual expenses in keeping the goods or in carrying the goods or to have work done upon them by the bailee for the bailor. The bailor must repay to the bailee all the necessary expenses which the bailee has already incurred for the purpose of bailment. For example- if A, a farmer gives some gold to his friend B who is .a goldsmith, to make a gold ring. B is not to receive any remuneration for the job. But A has a duty to repay to B any expenses incurred by him in making the ring. In cases of non-gratuitous bailments (where the bailee is to receive remuneration). bailor has a duty to bear extraordinary expenses, borne by the bailee for the purposes of bailment. However, the bailor is not to bear ordinary or usual expenses. For example, if a horse is lent for a journey, the expenses for feeding the horse would be payable by the bailee. But, if the horse becomes sick and expenses have to be incurred, or if the horse is stolen and expenses are incurred for recovery. the bailor should pay those expenses.

3) **Duty to indemnify the bailee:** It is the duty of the bailor to indemnify the bailee, for any loss which the bailee may suffer because of the bailor's title being defective. The reason for this is that the bailor was not entitled to make the bailment or to receive back the goods bailed or to give directions regarding the goods bailed. For example, A asks his friend B to give him cycle for one hour. B instead of his own cycle gives C's cycle to A. While A was riding, the true owner

of the cycle catches A and surrenders him to police custody. A is entitled to recover from B all costs, which A had to pay in getting out of this situation

4) **Duty to bear risks:** It is the duty of bailor to bear the risk of loss, deterioration . and destruction, of the things bailed, provided that bailee has taken reasonable care to protect the goods from loss etc. 5) **Duty to receive back the goods:** It is the duty of the bailor that when the bailee, in accordance with the terms of bailment, returns thc goods to him the bailor should receive them. If the bailor, without any reasonable reason refuses to take the goods back, when they are offered at a proper time and at a proper place, the bailee can claim compensation from the bailor for all necessary and incidental expenses, which the bailee undertakes to keep and protect the goods.

DUTIES OF BAILEE

A bailee has the following duties:

i)**Duty to take reasonable care of the goods bailed:** Section 151 of the Indian Contract Act lays down the degree of care, which a bailee should take, in respect of goods bailed to him. The bailee is bound to take as much care "of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The standard of care is same whether the bailment is gratuitous or for reward. So a bailee is liable when the goods suffer loss due to the negligence on the part of bailee. However, under Section 152 of the Act, the standard of care of ordinary prudent man can be increased by entering into a contract, between the bailor and the bailee. In that situation the bailee, in order to save himself from any liability, would be bound to take as much care, as provided by the terms of contract. In the absence of any such contract, if the bailee has taken care as an ordinary prudent man of the goods bailed, he is not responsible for the loss, destruction or deterioration of the goods bailed. To take an example, if a diamond ring is kept by its owner A for safe custody with another person B and B is not to receive any reward for it. the bailee should keep it locked in an iron safe, or some other safe place but not keep it in his lumber room, simply because the bailment is gratuitous. Similary, if a cow is delivered for safe custody it is sufficient if it is kept in the backyard properly enclosed and even if it is for reward, no one would expect it to be kept in the drawing room. If the goods get stolen, lost or otherwise destroyed, even after the

bailee has taken reasonably good care, the bailee would not be liable for this loss. The bailor, would have to bear this loss. ii) **Not to make any unauthorised use of goods:** The bailee is under a duty to use the bailed goods in accordance with the terms of bailment. If bailee does any act with regard to the goods bailed, which is not in accordance with the terms of bailment, the contract is voidable at the option of the bailor. Besides it, the bailee is liable to compensate the bailor for any damage caused to the goods by an inconsistent use of the goods bailed. If he makes unauthorised use of goods, bailee would not be saved from his liability even if he has taken reasonable care of the ordinary prudent man. For example, A lends his car to B to be taken to Delhi from Hyderabad. The car was to be driven by B himself. B takes along with him a friend C, who has been driving his car for the last 10 years. B instead of going to Delhi, goes to Calcutta. The contract becomes voidable at the option of the bailor. On way to Calcutta, B allows C to drive the car. Inspite of the fact that C, in accordance with the directions of B, drives the car at a very slow speed, an accident takes place and the car is damaged. A is entitled to be compensated for the loss.

iii) **Duty not to mix bailor's goods with his own goods**: Next duty of the bailee is to keep the goods of the bailor separate from his own. Sections 155 to 157 of the Act lays down this duty in the following ways:

a) If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced (Section 155].

b) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damages arising from the mixture (Section 156). For example, A bails 100 bales of cotton marked with a.particular mark to B. B, without A's consent, mixes these 100 bales wilh other bales of his own, bearing a different mark, A is entitled to have his 100 bales returned, and B is bound to bear all expenses incurred in the separation of the bales, and any other incidental damage.

c) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods (Section 157). A bails a barrel of cape flour worth Rs. 50 to B. B without A's consent mixes the flour with country flour of his own, worth Rs. 20 a barrel. B must compensate A for the loss of his flour.

4) **Duty not to set up adverse title:** The bailee is duty bound not to do any act which is inconsistent which the title of the bailor. He should not set up his own title or the title of a third party on the goods bailed to him.

5) **Duty to return the goods:** It is the duty of the bailee to return or to deliver the goods according to the directions of bailor, without demand, on the expiry of the time fixed or when the

purpose is accomplished. If he does not return or deliver as directed by the bailor, or tender the goods at the proper time, he becomes liable to the bailor for any loss, destruction or deterioration of the goods from that time. He is liable even without his negligence. For example, a book-binder kept books beyond the time allowed to him for binding, and they were lost in an accidental fire, the binder is liable. If however, the bailment is gratuitous, then the bailee will have to return the goods loaned, at any time on demand by the bailor, even though the goods were lent for a specified time or purpose. But if on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

6) **Duty to return accretions to the goods:** In the absence of any contract to the contrary, the bailee must deliver to the bailor, or according to his directions, any increase or profit which have accrued from the goods bailed. For examplc, A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

RIGHTS OF BAILOR:

A bailor has the following rights.

1) **Enforcement of bailee's duties:** Duties of the bailee are the rights of the bailor. For example, when the bailee returns the goods bailed, he should also return all natural accretions to the goods. This is a duty of the bailee and it is the right of the bailor to receive all natural accretions in the goods bailed, when the goods are returned to him.

2) **Right to claim damages:** It is an inherent right of the bailor to claim damages for any loss that might have been caused to the goods bailed, due to the bailee's negligence (Section 151).

3) **Right to avoid the contract:** If the bailee does any act, in respect of the goods bailed, which is inconsistent with the terms of bailment, the bailor has a right to avoid the contract. For example, A lends his car to B for Bs personal use. B starts using the car as a taxi. A can avoid the contract (Section 153).

4) **Right to claim compensation:** If any damage is caused to-the goods bailed because of the unauthorised use of the goods. the bailor has a right to claim compensation from the bailee. In the same way the bailor has a right to claim compensation, if , some loss is caused to the goods bailed, due to unauthorised mixing by bailee, of bailee's own goods with the goods of the bailor (Sections 154 155 and 156).

5) **Right to demand return of goods**: It is a right of the bailor to compel the bailee, to return the goods bailed, when the time of bailment has expired or when that purpose for which the goods were bailed has been accomplished. In thc case of a gratuitous bailment, even if the goods have been bailed for a fixed time or for a fixed purpose, the bailor has a right to compel the bailee to return them, before the agreed time.

RIGHTS OF BAILEE

The duties of bailor are the rights of bailee and bailee can enforce his rights against the bailor by suing him in case of a default. The rights of bailee are as follows.

1) **Right to claim damages**: If the bailor has bailed the goods, without disclosing the defects in the goods, and the bailee has suffered some loss, the bailee has a right to sue the bailor for

damages. A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury (Section 150).

2) **Right to claim reimbursement**: In case of gratuitous bailment the bailee has a right to recover from the bailor, all necessary expenses, which the bailee had incurred for achieving the purpose of bailment. In case of a non- gratuitous bailment, bailee has a right to recover from the bailor, all extraordinary expenses, borne by the bailee for the purposes of bailment (Section 158).

3) **Right to recover losses:** It is a right of bailee to recover from the bailor, all losses suffered by him by reason of the fact that the bailor was not entitled to make the bailment of the goods or to receive back the goods, or to give directions regarding them (Section 164).

4) **Right to deliver goods to any one of the joint bailors**: If the goods are owned and bailed by more than one person, the bailee has a right, in the absenceof a contrary contract, to deliver back the goods to any one of the joint owners, or may deliver the goods back according to the directions of, one joint owner, without the consent of all. (Section 165).

5) **Right to deliver the goods to bailor even if his title is defective**: If the title of bailor is defective and the bailee, in good faith returns the goods to the bailor or according to the directions of bailor, the bailee is not liable to the true owner in respect of such delivery (Section 166).

6) **Right to lien:** When the bailee, in accordance with the purpose of agreement has rendered any service involving the exercise of labour or skill, to the goods bailed, and his lawful payments are not made by the bailor, the bailee has a right to retain, unless there is a contract to the contrary, the goods bailed, until he received his remuneration for the services rendered by him. This right to retain goods is known as bailee's lien (Section 170).

The bailee has a right of lien in respect of charges due to him for work of labour done in respect of goods bailed. The right of lien is a right to detain goods belonging to another, by a person in possession, until the sum claimed or other demand of the person in possession is satisfied. The Indian Contract Act has dealt with the following kinds of lien: (i) lien of a finder of goods (Section 168); (ii) particular lien of bailee (Section 170); (iii) general lien of bankers, factors, wharfingers, attroneys and policy brokers (Section 171); (iv) lien of pawnees (Sections 173; 174); and (v) lien of agents (Section 221).

Possession of goods is necessary to claim the right of lien. The possession must be rightful, not for a particular purpose and lastly it should be continuous. For example, A, a trader took on lease, B's warehouse for 5 years. It was also agreed between A and B that A can at any time deposit or take out his goods from the warehouse. After six months A stopped paying the lease rent. B detained A's goods and claimed lien. B cannot claim lien because it was was agreed that A can take out his goods whenever he wanted.

A lien may be either a particular lien or a general lien.

Particular Lien: A lien which can be exercised only on goods in respect of which some payment is due is called particular lien. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the-exercises of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he received due remuneration for the services he has rendered in respect of them (Section 170). For example, A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the service he has rendered. Again, A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat.

As a general rule a bailee is entitled only to particular lien, which means the right to retain only that particular property in respect of which the charge is due. The right is available subject to certain important conditions. The foremost among them is that the bailee must have rendered some service involving the exercise of labour or skill or expenses incurred in respect of the goods bailed. Further, a bailee's right of lien arises only where "Labour and skill" have been used so as to confer an additional value on the article. So, a person who takes an animal for feeding has no lien, but a veterinary surgeon who has treated the animals has right of lien. Further conditions are that the contract has been fully in accordance with the contract, and goods, as you already know, are still in possession of the bailee and there exists no contract for payment of price in future.

General Lien: The right of general lien, as provided for in Section 171, means the . right to hold the goods bailed as security for a general balance of account. Whereas right of particular lien entitles a bailee to detain only that particular property in respect of which charges are due. Right of general lien entitles the bailee to detain any , goods bailed to him for any amount due to him whether in respect of those goods or any other goods. The right of general lien is privilege and is specially conferred by Section 171 on certain kinds of bailees only. They are bankers, factors, wharfingers, attorneys of a high court, and policy brokers.

TERMINATION OF BAILMENT

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

1) **On the expiry of fixed period**: If the goods are bailed-for a fixed time, the bailment is terminated at the end of that period.
2) **On the fulfilment of the object**: If the goods are bailed for some specific purpose or purposes, the bailment is terminated on fulfilling the object.
3) **Inconsistent use of goods bailed**: If the bailee uses the goods in contravention of the terms of bailment, the bailor may terminate the bailment even before the term of bailment .
4) **Destruction of the subject matter:** A bailment is terminated if the subject matter of the bailment is destroyed or because of some change in the nature of goods bailed if the goods become incapable of being used for bailment.
5) **Termination of gratuitous bailment**: A gratuitous bailment can be terminated by the bailor at any time even though the bailment was for a fixed period or purpose. But in such a case, the loss to be suffered by the bailee from such premature termination should not exceed the benefit he had derived from the bailment. If the loss exceeds the benefit, the bailor shall indemnify the bailee.
6) **Death**: A gratuitous bailment is terminated by the death of either the bailor or the bailee.

Agency

Meaning of Agency: Agency is relation between an agent his principal created by an agreement. The relationship of agency arises whenever one person called the agent has authority

to act on behalf of another called the principal. Section 182 of the Contract Act defines an Agent as ‘‘a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented is called the principal”.

Essential Features of Agency

1.**Authorization by the principal** : A contract of agency requires that one person (principal) must authorize the other(agent) to act on his behalf and represent him in the outside world.
2. **Contractual Relationship between Principal and third party:** The contracts formed by the agent on behalf of the principal will be enforced in the way as if formed by the principal himself provided the agent has acted within the scope of the authority so given by the principal.
3. **Representative capacity of Agent**: An agent is distinguished from others (such as servants) ,who may also be acting for another, on the basis of representative capacity as an agent has the authority to represent the principal in forming contracts with third parties.
4. **Competence of the principal (Section 183)**: The principal must be competent to become a party to the contract otherwise he cannot enter into a contract through his agent as well. In other words if principal is minor he cannot employ an agent.
5. **Consideration not necessary(Section 185):** Generally an agent is remunerated by way of some commission but no consideration is necessary to form the contract of agency. The acceptance of the office of an agent is regarded as a sufficient consideration for the appointment.

Modes or Methods of Creation of Agency

1. **Agency by express agreement(Sec 187)**: A contract of agency may be made by express words, whether written or oral.
2. **Agency by implied agreement**: An authority is said to be implied when it is to be inferred from the conduct of parties or circumstances of the case.
(a) **Agency by estoppel** : When a principal by his conduct or act cause a third person to believe that a certain person is his authorized agent the agency is aid to be an agency by estoppels. For example, A tells B within the hearing of C that he (A) is C’s agent. C does not object to this statement of A. Later B supplied certain goods to A who pretends to be the agent of C. C is liable to pay the price to B as by remaining silent, C led B to believe that A is his agent.
(b) **Agency by necessity (Section 189):** It means the agency which comes into existence when certain circumstances compel a person to act as an agent for another without his express authority. For example, A sends goods to B at Kolkata with the direction to send them immediately to C at Cuttack. B may sell the goods if they will not bear the journey to Cuttack without spoiling.
(c) **Agency by holding out** : When a principal by his active conduct or act and without any objection permits another to act as his agent, the agency is the result of principal’s conduct as to the agent.
3. **Agency by ratification (section 196-200)** : Ratification means confirmation of an act which has already been done. Sometimes, an act is done by a person on behalf of another person but without another person’s knowledge and authority. If he accepts and confirm the act, he is said to have ratified it. The same effects will follow as if the act had been performed by his

authority(Section 196). Ratification may be express or implied in the conduct of the person on whose behalf the acts are done(Sec. 197). For example A, without authority, buys goods for B. Afterwards B sells them on his own account. B's conduct implies a ratification of the purchase made for him by A.

4. **Agency by operation of law** : In certain circumstances the law treats a person as an agent of another person. For example, (a) when a partnership is formed, every partner automatically becomes agent o another partner. (b) when a company is formed its promoters are treated as its agents by operation of law.

Sub-Agents: A sub-agent is a person employed by, and acting under the control of, the original agent. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally as contract of agency is based on the confidence reposed by the principal in the agent and that is why a delegatee cannot further delegate. However, there are some exceptions to this rule

1. The appointment of a sub-agent would be valid if the terms of appointment originally contemplated it.

2. Sometimes customs of the trade may provide for appointment of sub agents.

3. Where in the course of the agent's employment, unforeseen emergency arise which make it necessary for him to delegate authority.

Sub-Agent properly appointed(Sec.192): Where a sub-agent is properly appointed-

a) The principal is, so far as regards third persons, bound by and responsible for his acts as if he were an agent originally appointed by the principal.

b) The agent is responsible to the principal for the acts of the sub-agent.

c) The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong(when he is directly liable to the principal).

Sub-Agent appointed without authority(Sec.193): Where a sub-agent is appointed by the agent without authority or recognised exceptions-

a) The agent is liable and responsible to both the principal and the third parties.

b) The principal is not responsible for the acts of the sub-agent nor is sub-agent responsible to the principal at all. He is only responsible to the agent.

Substituted Agent: Substituted Agent is a person appointed by the agent to act for the principal with his knowledge and consent. Substituted agents are not sub-agents. They are agents

of the principal. Where the principal appoints an agent and if that agent identifies another person to carry out the acts ordered by the principal, then the second person is not to be treated as a sub-agent but only as an agent of the original principal.

Effect:

1. The contract of agency is formed between principal and substituted agent.
2. The principal is liable for the acts of the substituted agent to the third parties.
3. The substituted agent is responsible and answerable to the principal.
4. The agent is in no way responsible for the acts of the substituted agent provided he has exercised the caution and due care in appointing him.

Example: A directs B, his solicitor, to sell his estate by auction. B names C, an auctioneer, for the purpose. C is not a sub-agent, but is A's agent for the conduct of the sale i.e., he is a substituted agent.

Kinds of Agents:

1. **Auctioneer:** He is an agent to sell property at a public auction. He is primarily an agent for the sellers. He becomes the agent of the buyer also, when the property is knocked down.

2. **Factor:** A factor is an agent who is entrusted with the possession of the goods for the purpose of sale. He may sell the goods in his own name, may give credit to the buyer and also receive the price.

3. **Broker:** A broker is an agent employed to negotiate a contract between his principal and a third person. He himself has no possession of property but merely makes the parties to enter into a contract.

4. ***Del Credre*** **Agent:** He is an agent, who, on the payment of some extra commission, known as *del credre* commission, guarantees the performance of the contract by the third party. It is a type of principal-agent relationship wherein the agent acts not only as a salesperson, or broker, for the principal, but also as a guarantor of credit extended to the buyer. If the buyer fails to pay, the principal can ask the agent to make good the loss.

5. **General and special agent:** A general agent is one who has the authority to do all acts connected with a particular trade, business or profession. He acts for several principals in the normal course of his business or profession. For example a real estate agent is a general agent.

A special agent is one who is appointed to represent his principal in some particular transaction. He cannot bind his principal in any matter other than that for which he is appointed.

Duties of an Agent:

(i)To conduct the business of agency according to the principal's directions (Section 211): An agent is bound to act according to the direction given by the principal. If the agent does not act accordingly and the principal suffers any loss, he must make it good to his principal. In case some profit accrues ,the agent must account for it to principal. Example : the principal instructed his manager to insure his goods. The manager did not and the goods were stolen. Held, manager was liable.

(ii)To act with reasonable skill and diligence (Section 212): An agent is bound to perform his duties with as much skill as is generally possessed by persons engaged in similar business. The standard of care and skill depends upon the nature of profession of the agent, such as a stock broker must know all the regulations of a Stock Exchange. In case the principal suffers any loss due to negligence of agent ,want of skill or misconduct, he is bound to compensate the principal for the same. For example, A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiry as to the solvency of B. B, at the time of such sale was insolvent. A must make compensation to his principal in respect of any loss thereby sustained. However section 212 limits the agent's liability to direct consequences only and not in respect of loss or damage which are indirectly or remotely caused by such negligence, want of skill or misconduct. For example, A , a merchant in England, directs B, his agent in Kolkata to send him 100 bales of cotton by a certain ship but B omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time ship arrived, but not any profit he might have made by the subsequent rise.

(iii)To render proper accounts (Section 213): An agent is bound to render proper accounts to his principal on demand supported by vouchers.

(iv)Duty to communicate (Section 214): An agent is bound to communicate with his principal seeking to obtain his instructions.

(v)Repudiation of the transaction by principal (Section 215): If an agent deals on his own account without obtaining the consent of his principal , the principal can repudiate the transaction if the case shows either that any material fact has been dishonestly concealed by the agent, or that the dealings of the agent have been disadvantageous to him. For example, A directs B to sell his property. B buys the property for himself in the name of C. A may repudiate the sale if he can prove that B has dishonestly concealed any material fact , or that sale has been disadvantageous to him.

(vi)Not to deal on his own account (Section 216): If an agent deals on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction. For example, A directs B, his agent, to buy a certain property for him. B tells A it cannot be bought, and buys the property for himself. A may compel B to sell that property to him(A) at the price he(B) gave for it.

(vii)Duty to pay money received for principal (Section 218): Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Rights of an agent:

(i)Right of retain out of sums received on principal's account(Section 217): This section empowers the agent to retain, out of any sums received on account of the principal in the business of agency, for the following payments:

(a) all money due to himself in respect of advances made

(b) in respect of expenses properly incurred by him in conducting such business

(c) such remuneration as may be payable to him for acting as agent.

(ii) Right to remuneration (Section 219): The agent is entitled to remuneration as per the contract. In the absence of any agreed amount of remuneration, he is entitled for usual remuneration which is customary in the business. However he is not entitled for any remuneration for acts done through misconduct or negligence. For example, A employs B to

collect money from his debtor. Due to B's negligence the money could not be recovered. B is not entitled to any remuneration and must make good the loss.

(iii) Right of lien on principal's property(Section 221): An agent is entitled to retain the principal's property for any remuneration , commission or lawful expenses due to him. However the possession of such property should be lawful.

(iv) Right of indemnification for lawful acts(Section 222): The agent must be indemnified by the principal for the lawful acts done by him for his principal in exercise of his(agent's) authority.For example, A appoints B as agent to sell his merchandise. As a result B contracts to deliver the merchandise to various parties. But A failed to send merchandise to B and B faces litigations for non performance. Here A is bound to protect B against the litigations and all costs arising out of that.

(v) Right to be indemnified for acts done in good faith(Section 223): Where the agent acts in good faith on the instructions of principal, agent is entitled for indemnification of any loss or damage from the principal. Where B appoints A as his agent and directs him to sell certain goods which in fact turned out to be not those belonging to B and if third parties sue A for this act, A is entitled for reimbursement and indemnification for such act done in good faith. However, the agent cannot claim any indemnification for the acts done by him in violation of the penal laws of the country.

Rights of the Principal: Refer the duties of the agent as all the duties of agent are conversely the rights of the principal.

Duties of the Principal: Refer rights of agent as all rights of agent are duties of principal.

SALE OF GOODS ACT,1930

Sale of goods is one of the specific forms of contracts recognized and regulated by law in India. Sale is a typical bargain between the buyer and the seller. The Sale of Goods Act, 1930 allows the parties to modify the provisions of the law by express stipulations. However, in some places this freedom is severely restricted. Sale of Goods Act, 1930 is the Act to define and amend the law relating to the sale of goods. It extends to the whole of India. It came into force on 1st July, 1930.

According to section 4(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.

A contract of sale may be absolute or conditional. [Section 4(2)]

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)]

ANALYSIS;

A contract for the sale of goods may be either sale or agreement to sell.

Sale: In Sale, the property in goods is transferred from seller to the buyer immediately. The term sale is defined in the Section 4(3) of the Sale of Goods Act, 1930 as – "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."

Agreement to Sell: In an agreement to sell, the ownership of the goods is not transferred immediately. It is intending to transfer at a future date upon the completion of certain conditions thereon. The term is defined in Section 4(3) of the Sale of Goods Act, 1930, as – "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."

Thus, whether a contract of sale of goods is an absolute sale or an agreement to sell, depends on the fact whether it contemplates immediate transfer from the seller to the buyer or the transfer is to take place at a future date.

When agreement to sell becomes sale: 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.

The following elements must co-exist so as to constitute a contract of sale of goods under the Sale of Goods Act, 1930:

(i) There must be at least two parties, the seller and the buyer.

(ii) The subject matter of the contract must necessarily be goods covering only movable property. It may be either existing goods, owned or possessed by the seller or future goods.

(ii) A price in money (not in kind) should be paid or promised. But there is nothing to prevent the consideration from being partly in money and partly in kind.

(iv) A transfer of property in goods from seller to the buyer must take place. The contract of sale is made by an offer to buy or sell goods for a price by one party and the acceptance of such offer by other.

(v) A contract of sale may be absolute or conditional.

(vi) All other essential elements of a valid contract must be present in the contract of sale, e.g. competency of parties, legality of object and consideration etc.

DISTINCTION BETWEEN SALE AND AN AGREEMENT TO SELL

The differences between the two are as follows:

(1) NATURE OF CONTACT: A sale is an executed contract where as an agreement to sell is an executory contract.
(2) TRANSFER OF PROPERTY: The sale has the immediate effect of transferring property in goods to the buyer. In an agreement to sell the property is to pass at some future time or subject to the fulfillment of some conditions and as such the seller continues to be the owner until the agreement to sell becomes a sale either by the expiry of certain time or the fulfillment of some conditions.
(3) RISK OF LOSS: In a sale, the property immediately passes to the buyer and the risk of loss, if any, of the goods is on the buyer. But in an agreement to sell the seller remains the owner of the goods and therefore, he runs all the risks.
(4) RIGHT OF RESALE: In a sale the property in the goods is immediately transferred to the buyer and as such the seller cannot resell the goods. In an agreement to sell the seller may sell the goods since ownership is with him.
(5) TAX LIABILITY: A sale is subject to payment of tax while as an agreement to sell us not liable for any tax until it actually converts into a sale.
(6) LIABILITY OF PARTIES: In a sale a subsequent loss or destruction of the goods is the liability of the buyer while as in agreement to sell such loss or destruction is the liability of seller.

(7) REMEDIES FOR BREACH: In a sale the seller can sue the buyer for the price of the goods because of the passing of the property therein to the buyer. In an agreement to sell the aggrieved party can sue for damages only an not for the price unless the price was payable at a stated date.

CONTRACT OF SALE HOW MADE:

According to section 5(1), 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.

Further, as per sub-section (2) of section 5, 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.

Analysis:

A contract of sale may be made in any of the following modes:

(i) Contract of sale is made by an offer to buy or sell goods for a price and acceptance of such offer.
(ii) There may be immediate delivery of the goods; or
(iii) There may be immediate payment of price, but it may be agreed that the delivery is to be made at some future date; or
(iv) There may be immediate delivery of the goods and an immediate payment of price; or
(v) It may be agreed that the delivery or payment or both are to be made in installments; or
(vi) It may be agreed that the delivery or payment or both are to be made at some future date.

SUBJECT MATTER OF CONTRACT OF SALE

Existing or future goods (section 6):

(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen. Example: A contract for sale of certain cloth to be manufactured by a certain mill is a valid contract. Such contacts are called contingent contracts.

(3) Whereby a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Goods perishing before making of contract (Section 7): Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description contract.

Example: A agrees to sell B 50 bags of wheat stored in the A's godown. Due to water logging, all the goods stored in the godown were destroyed. At the time of agreement, neither parties were aware of the fact. The agreement is void.

Goods perishing before sale but after agreement to sell (Section 8): Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become 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.

ASCERTAINMENT OF PRICE (SECTION 9 & 10)

Ascertainment of price (Section 9):

(1) 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.

(2) 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.

Analysis:

'Price' means the monetary consideration for sale of goods [Section 2 (10)]. By virtue of Section 9, the price in the contract of sale may be:

(1) Fixed by the contract, or

(2) Agreed to be fixed in a manner provided by the contract, e.g., by a value, or (3) determined by the course of dealings between the parties**.**

Agreement to sell at valuation (Section 10):

(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of third party and such third party cannot or does not make such valuation, the agreements is thereby avoided: Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefore.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in default.

Analysis

Section 10 provides for the determination of price by a third party. Where there is an agreement to sell goods on the terms that price has to be fixed by the third party and he either does not or cannot make such valuation, the agreement will be void. In case the third party is prevented by the default of either party from fixing the price, the party at fault will be liable to the damages to the other party who is not at fault. However, a buyer who has received and appropriated the goods must pay a reasonable price for them in any eventuality.

Example: P is having two bikes. He agrees to sell both of the bikes to S at a price to be fixed by the Q. He gives delivery of one bike immediately. Q refuses to fix the price. As such P ask S to return the bike already delivered while S claims for the delivery of the second bike too. In the given instance buyer S shall pay reasonable price to P for the bike already taken. As regards the Second bike, the contract can be avoided.

CONDITIONS AND WARRANTIES

STIPULATION AS TO TIME (SECTION 11)

Stipulations as to time: 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.

Analysis:

As regard time for the payment of price, unless a different intention appears from the terms of contract, stipulation as regard this, is not deemed to be of the essence of a contract of sale. But delivery of goods must be made without delay. Whether or not such a stipulation is of the essence of a contract depends on the terms agreed upon.

Price for goods may be fixed by the contract or may be agreed to be fixed later on in a specific manner. Stipulations as to time of delivery are usually the essence of the contract.

INTRODUCTION - CONDITIONS AND WARRANTIES:

At the time of selling the goods, a seller usually makes certain statements or representations with a view to induce the intending buyer to purchase the goods. Such representations are generally about the nature and quality of goods, and about their fitness for buyer's purpose.

When these statements or representations do not form a part of the contract of sale, they are not relevant and have no legal effects on the contract. But when these form part of the contract of sale and the buyer relies upon them, they are relevant and have legal effects on the contract.

A representation which forms a part of the contract of sale and affects the contract, is called a stipulation. However, every stipulation is not of equal importance.

Condition and warranty (Section 12): A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. [Sub-section (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". [Sub-section (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". [Sub-section (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. [Sub-section (4)]

Example: Ram consults Shyam, a motor-car dealer for a car suitable for touring purposes to promote the sale of his product. Shyam suggests 'Maruti' and Ram accordingly buys it from Shyam. The car turns out to be unfit for touring purposes. Here the term that the 'car should be suitable for touring purposes' is a condition of the contract. It is so vital that its non-fulfilment defeats the very purpose for which Ram purchases the car. Ram is therefore entitled to reject the car and have refund of the price.

Let us assume Ram buys a new Maruti car from the show room and the car is guaranteed against any manufacturing defect under normal usage for a period of one year from the date of original purchase and in the event of any manufacturing defect there is a warranty for replacement of defective part if it cannot be properly repaired. After six months Ram finds that the horn of the car is not working, here in this case he cannot terminate the contract. The manufacturer can either get it repaired or replaced it with a new horn. Ram gets a right to claim for damages, if any, suffered by him but not the right of repudiation.

DISTINCTION BETWEEN CONDITION AND WARRANTY:

Section 12 lays down two rules for the purpose of distinguishing a condition from a warranty:

(i) Whether a stipulation in a Contract of Sale is a *Condition* or a *Warranty* depends in each case on the construction of the contract.

(ii) A stipulation may be a Condition though it is called a Warranty in a contract. In other words, it depends entirely on the intention of the parties, as evidenced by the terms of the contract, whether a particular term is a Condition or a Warranty, the name given to it in the contract itself being, for this purpose, quite immaterial.

The points of distinction between a condition and a warranty may be summed up as under:

1. A Condition is a stipulation which is essential to the main purpose of the contract, whereas a Warranty is a stipulation collateral or incidental to the main purpose of the contract. A Warranty is not as essential a stipulation of the contract as a Condition is.
2. The breach of a Condition gives the right to the aggrieved party to repudiate the contract and also to claim damages, whereas the breach of a warranty entitles the aggrieved party to claim damages only.
3. The breach of a Condition may be treated as breach of a Warranty. But breach of a Warranty cannot be treated as breach of a Condition.

WHEN CONDITION TO BE TREATED AS WARRANTY (SECTION 13)

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. [Sub-section (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. [Sub-section (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. [Sub-section (3)]

Analysis:

Section 13 specifies cases where a breach of condition be treated as a breach of warranty. As a result of which the buyer loses his right to rescind the contract and can claim for damages only.

In the following cases, a contract is not avoided even on account of a breach of a condition:

(i) Where the buyer altogether waives the performance of the condition. A party may for his own benefit, waive a stipulation.

(ii) Where the buyer elects to treat the breach of the conditions, as one of a warranty. That is to say, he may claim only damages instead of repudiating the contract.

Example: A agrees to supply B 10 bags of first quality sugar @ ` 625 per bag but supplies only second quality sugar, the price of which is ` 600 per bag. There is a breach of condition and the buyer can reject the goods. But if the buyer so elects, he may treat it as a breach of warranty, accept the second quality sugar and claim damages @ ` 25 per bag.

(iii) Where the contract is non-severable and the buyer has accepted either the whole goods or any part thereof. Acceptance means acceptance as envisaged in Section 72 of the Indian Contract Act, 1872.

(iv) Where the fulfillment of any condition or warranty is excused by law by reason of impossibility or otherwise

EXPRESS AND IMPLIED CONDITIONS AND WARRANTIES (SECTION 14-17)

'Conditions' and 'Warranties' may be either **express or implied**. They are "express" when the terms of the contract expressly state them. They are implied when, not being expressly provided for.

Express conditions are those, which are agreed upon between the parties at the time of contract and are expressly provided in the contract.

The implied conditions, on the other hand, are those, which are presumed by law to be present in the contract. It should be noted that an implied condition may be negated or waived by an express agreements.

Implied Conditions: Following conditions are implied in a contract of sale of goods unless the circumstances of the contract show a different intention. Implied

(i**) Condition as to title [Section 14(a)].** In every contract of sale, unless there is an agreement to the contrary, the first implied condition on the part of the seller is that

(a) in case of a sale, he has a right to sell the goods, and

(b) in the case of an agreement to sell, he will have right to sell the goods at the time when the property is to pass.

In simple words, the condition implied is that the seller has the right to sell the goods at the time when the property is to pass. If the seller's title turns out to be defective, the buyer must return the goods to the true owner and recover the price from the seller.

Example 1: A purchased a tractor from B who had no title to it. After 2 months, the true owner spotted the tractor and demanded it from A. Held that A was bound to hand over the tractor to its true owner and that A could sue B, the seller without title, for the recovery of the purchase price.

Example 2: If A sells to B tins of condensed milk labelled 'C.D.F. brand', and this is proved to be an infringement of N Company's trade mark, it will be a breach of implied condition that A had the right to sell. B in such a case will be entitled to reject the goods or take off the labels, and claim damages for the reduced value. If the seller has no title and the buyer has to make over the goods to the true owner, he will be entitled to refund of the price.

(ii) **Sale by description [Section 15]:** Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description. This rule is based on the principle that "if you contract to sell peas, you

cannot compel the buyer to take beans." The buyer is not bound to accept and pay for the goods which are not in accordance with the description of goods.

Thus, it has to be determined whether the buyer has undertaken to purchase the goods by their description, i.e., whether the description was essential for identifying the goods where the buyer had agreed to purchase. If that is required and the goods tendered do not correspond with the description, it would be breach of condition entitling the buyer to reject the goods.

It is a condition which goes to the root of the contract and the breach of it entitles the buyer to reject the goods whether the buyer is able to inspect them or not.

Example 1: A at Kolkata sells to B twelve bags of "waste silk" on its way from Murshidabad to Kolkatta. There is an implied condition that the silk shall be such as is known in the market as "Waste Silk". If it not, B is entitled to reject the goods.

Example 2: A ship was contracted to be sold as "copper-fastened vessel" but actually it was only partly copper-fastened. Held that goods did not correspond to description and hence could be returned or if buyer took the goods, he could claim damages for breach.

The Act, however, does not define 'description'. A sale has been deemed to be by the description

(i) Where the class or kind to which the goods belong has been specified, e.g., 'Egyptian cotton', "java sugar", "Shffield crockery", etc., and

(ii) Where the goods have been described by certain characteristics essential to their identification, e.g., jute bales of specified shipment, steel of specific dimension, etc.

(iii) It may be noted that the description in these cases assumes that form of a statement or representation as regards the identity of particular goods by reference to the place of origin or mode of packing, etc. Whether or not such a statement or representation is essential to the identity of the goods is a question of fact depending, in each case, on the construction of the contract.

(iii**) Sale by sample [Section 17]:** In a contract of sale by sample, there is an implied condition that

(a) the bulk shall correspond with the sample in quality;

(b) the buyer shall have a reasonable opportunity of comparing the bulk with the sample,

Example: In a case of sale by sample of two parcels of wheat, the seller allowed the buyer an inspection of the smaller parcel but not of the larger parcel. In this case it was held that the buyer was entitled to refuse to take any latent of the parcels of wheat. (c) the goods shall be free from any defect rendering them un-merchantable, which would not be apparent on reasonable examination of the sample. This condition is applicable only with regard to

defects, which could not be discovered by an ordinary examination of the goods. But if the defects are latent, then the buyer can avoid the contract.

Example: A company sold certain shoes made of special sole by sample for the French Army. The shoes were found to contain paper not discoverable by ordinary inspection. Held, the buyer was entitled to the refund of the price plus damages.

(iv) **Sale by sample as well as by description [Section 15]:** Where the goods are sold by sample as well as by description the implied condition is that the bulk of the goods supplied shall correspond both with the sample and the description. In case the goods correspond with the sample but do not tally with description or vice versa or both, the buyer can repudiate the contract.

Example: A agreed with B to sell certain oil described as refined sunflower oil, warranted only equal to sample. The goods tendered were equal to sample, but contained a mixture of hemp oil. B can reject the goods.

(v) **Condition as to quality or fitness [Section 16(1)]:** Ordinarily, there is no implied condition as to the quality or fitness of the goods sold for any particular purpose.

However, the condition as to the reasonable fitness of goods for a particular purpose may be implied if the buyer had made known to the seller the purpose of his purchase and relied upon the skill and judgment of the seller to select the best goods and the seller has ordinarily been dealing in those goods. Even this implied condition will not apply if the goods have been sold under a trademark or a patent name.

Example 1: 'A' bought a set of false teeth from 'B', a dentist. But the set was not fit for 'A's mouth. 'A' rejected the set of teeth and claimed the refund of price. It was held that 'A' was entitled to do so as the only purpose for which he wanted the set of teeth was not fulfilled.

Example 2: 'A' went to 'B's shop and asked for a 'Merrit' sewing machine. 'B' gave 'A' the same and 'A' paid the price. 'A' relied on the trade name of the machine rather than on the skill and judgement of the seller 'B'. In this case, there is no implied condition as to fitness of the machine for buyer's particular purpose.

As a general rule, it is the duty of the buyer to examine the goods thoroughly before he buys them in order to satisfy himself that the goods will be suitable for his purpose for which he is buying them. This is known as rule of caveat emptor which means "Let the buyer beware".

(vi) **Condition as to Merchantability [Section 16(2)]:** Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

The expression "merchantable quality", though not defined, nevertheless connotes goods of such a quality and in such a condition a man of ordinary prudence would accept them as goods of that description. It does not imply any legal right or legal title to sell.

Example 1: If a person orders motor horns from a manufacturer of horns, and the horns supplied are scratched and damaged owing to bad packing, he is entitled to reject them as unmerchantable. Example 2: A bought a black velvet cloth from C and found it to be damaged by white ants. Held, the condition as to merchantability was broken.

(vii) **Condition as to wholesomeness:** In the case of eatables and provisions, in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be wholesome.

Example: A supplied F with milk. The milk contained typhoid germs. F's wife consumed the milk and was infected and died. Held, there was a breach of condition as to fitness and A was liable to pay damages.

Implied Warranties: It is a warranty which the law implies into the contract of sale. In other words, it is the stipulation which has not been included in the contract of sale in express words. But the law presumes that the parties have incorporated it into their contract. It will be interesting to know that implied warranties are read into every contract of sale unless they are expressly excluded by the express agreement of the parties.

These may also be excluded by the course of dealings between the parties or by usage of trade (Section 62).

The examination of Sections 14 and 16 of the Sale of Goods Act, 1930 discloses the following implied warranties

1. Warranty as to undisturbed possession [Section 14(b)]: An implied warranty that the buyer shall have and enjoy quiet possession of the goods. That is to say, if the buyer having got possession of the goods, is later on disturbed in his possession, he is entitled to sue the seller for the breach of the warranty.

2. Warranty as to non-existence of encumbrances [Section 14(c)]: An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time the contract is entered into.

Example: A pledges his car with C for a loan of `15,000 and promises him to give its possession the next day. A, then sells the car immediately to B, who purchased it on good faith, without knowing the fact. B, may either ask A to clear the loan or himself may pay the money and then, file a suit against A for recovery of the money with interest.

3. Warranty as to quality or fitness by usage of trade [Section 16(3)]: An implied warranty as to quality or fitness for a particular purpose may be annexed or attached by the usage of trade. Regarding implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied, the rule is 'let the buyer beware' i.e., the seller is under no duty to reveal unflattering truths about the goods sold, but this rule has certain exceptions.

4. Disclosure of dangerous nature of goods: Where the goods are dangerous in nature and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger. If there is a breach of warranty, the seller may be liable in damages.

CAVEAT EMPTOR

In case of sale of goods, the doctrine 'Caveat Emptor' means 'let the buyer beware'. When sellers display their goods in the open market, it is for the buyers to make a proper selection or choice of the goods. If the goods turn out to be defective he cannot hold the seller liable. The seller is in no way responsible for the bad selection of the buyer. The seller is not bound to disclose the defects in the goods which he is selling.

It is the duty of the buyer to satisfy himself before buying the goods that the goods will serve the purpose for which they are being bought. If the goods turn out to be defective or do not serve his purpose or if he depends on his own skill or judgment, the buyer cannot hold the seller responsible.

The rule of Caveat Emptor is laid down in the Section 16, which states that, "subject to the provisions of this Act or 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". Following are the conditions to be satisfied: - if the buyer had made known to the seller the purpose of his purchase, and - the buyer relied on the seller's skill and judgement, and - seller's business to supply goods of that description (Section 16).

Example 1: A sold pigs to B. These pigs being infected, caused typhoid to other healthy pigs of the buyer. It was held that the seller was not bound to disclose that the pigs were unhealthy. The rule of the law being "Caveat Emptor".

Example 2: A purchases a horse from B. A needed the horse for riding but he did not mention this fact to B. The horse is not suitable for riding but is suitable only for being driven in the carriage. Caveat emptor rule applies here and so A can neither reject the horse nor can claim compensation from B.

Exceptions: The doctrine of Caveat Emptor is, however, subject to the following exceptions;

1. **Fitness as to quality or use:** Where the buyer makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment and the goods are of a description which is in the course of seller's business

to supply, it is the duty of the seller to supply such goods as are reasonably fit for that purpose [Section 16 (1)].

Example: An order was placed for some trucks to be used for heavy traffic in a hilly country. The trucks supplied by the seller were unfit for this purpose and broke down. There is a breach of condition as to fitness.

In Priest vs. Last,

P, a draper, purchased a hot water bottle from a retail chemist, P asked the chemist if it would stand boiling water. The Chemist told him that the bottle was meant to hold hot water. The bottle burst when water was poured into it and injured his wife. It was held that the chemist shall be liable to pay damages to P, as he knew that the bottle was purchased for the purpose of being used as a hot water bottle.

Where the article can be used for only one particular purpose, the buyer need not tell the seller the purpose for which he required the goods. But where the article can be used for a number of purposes, the buyer should tell the seller the purpose for which he requires the goods, if he wants to make the seller responsible.

In Bombay Burma Trading Corporation Ltd. vs. Aga Muhammad, timber was purchased for the express purpose of using it as railways sleepers and when it was found to be unfit for the purpose, the Court held that the contract could be avoided.

2. **Goods purchased under patent or brand name:** In case where the goods are purchased under its patent name or brand name, there is no implied condition that the goods shall be fit for any particular purpose [Section 16(1)].

3**. Goods sold by description:** Where the goods are sold by description there is an implied condition that the goods shall correspond with the description [Section 15]. If it is not so then seller is responsible.

4. **Goods of Merchantable Quality:** Where the goods are bought by description from a seller who deals in goods of that description there is an implied condition that the goods shall be of merchantable quality. The rule of Caveat Emptor is not applicable. But where the buyer has examined the goods this rule shall apply if the defects were such which ought to have not been revealed by ordinary examination [Section 16(2)].

5. **Sale by sample:** Where the goods are bought by sample, this rule of Caveat Emptor does not apply if the bulk does not correspond with the sample [Section 17].

6**. Goods by sample as well as description:** Where the goods are bought by sample as well as description, the rule of Caveat Emptor is not applicable in case the goods do not correspond with both the sample and description or either of the condition [Section 15].

7**. Trade Usage:** An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade and if the seller deviates from that, this rule of Caveat Emptor is not applicable [Section 16(3)].

Example: In readymade garment business, there is an implied condition by usage of trade that the garments shall be reasonably fit on the buyer.

8. **Seller actively conceals a defect or is guilty of fraud:** Where the seller sells the goods by making some misrepresentation or fraud and the buyer relies on it or when the seller actively conceals some defect in the goods so that the same could not be discovered by the buyer on a reasonable examination, then the rule of Caveat Emptor will not apply. In such a case the buyer has a right to avoid the contract and claim damages.

TRANSFER OF OWNERSHIP AND DELIVERY OF GOODS

INTRODUCTION

Sale of goods involves transfer of ownership of property from seller to buyer. It is essential to determine the time at which the ownership passes from the seller to the buyer.

Importance of the time of transfer:
The general rule is that risk prima facie passes with the property. In case where goods are lost or damaged, the burden of loss will be borne by the person who is the owner at the time when the goods are lost or damaged. Where the goods are damaged by the act of the third party , it is the owner who can take action. Suit for price by the seller lies only when the property has passed to the buyer.

PASSING OF PROPERTY (SECTIONS 18 – 26)

Passing or transfer of property constitutes the most important element and factor to decide legal rights and liabilities of sellers and buyers. Passing of property implies passing of ownership. If the property has passed to the buyer, the risk in the goods sold is that of buyer and not of seller, though the goods may still be in the seller's possession.

A. Property (Specific or ascertained goods) passes when intended to pass (Section 19):

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. [sub-section (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. [sub-section (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. [sub-section (3)]

Stages of goods while passing of property:

1. Specific goods in a deliverable state
2. Specific goods to be put into a deliverable state
3. Specific goods in a deliverable state when seller has to ascertain

B. Goods must be ascertained

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] The rules in respect of passing of property of unascertained goods are as follow:

1. **Sale of unascertained goods by description [Section 23(1)]:** Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a 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, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

2**. Delivery to the carrier [Section 23(2)]:** Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Example: A bill of lading of railway parcel is made out in the name of the buyer and is sent to him, the ownership in the goods passes from the seller to the buyer. In case the goods are subjected to accidental loss or by theft, the seller will not be liable.

C. Goods sent on approval or "on sale or return" (Section 24)

When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer-

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time; or

(c) he does something to the good which is equivalent to accepting the goods e.g. he pledges or sells the goods.

Example 1: P brought a musical instrument from a musical shop on a condition that he will purchase it, if he likes that instrument. After a week he has informed the shop owner that he has agreed to purchase the musical instrument. The ownership is transferred when he has decided to purchase the instrument as his own.

A buyer under a contract on the basis of 'sale or return' is deemed to have exercised his option when he does any act exercising domination over the goods showing an unequivocal intention to

buy, example, if he pledges the goods with a third party. Failure or inability to return the goods to the seller does not necessarily imply selection to buy.

Example 2: 'A' delivered some jewellery to 'B' on sale or return basis. 'B' pledged the jewellery with 'C'. It was held that the ownership of the jewellery had been transferred to 'B' as he had adopted the transaction by pledging the jewellery with 'C'. In this case, 'A' has no right against 'C'. He can only recover the price of the jewellery from 'B'.

Example 3: A sends to B a water motor on approval or return in March, 2016. B to return it after trial in August, 2016. The water motor has not been returned within a reasonable time, and therefore, A is not bound to accept it and B must pay the price.

Sale for cash only or Return

It may be noted that where the goods have been delivered by a person on "sale or return" on the terms that the goods were to remain the property of the seller till they are paid for, the property therein does not pass to the buyer until the terms are complied with, i.e., cash is paid for.

Example: 'A' delivered his jewellery to 'B' on sale for cash only or return basis. It was expressly provided in the contract that the jewellery shall remain 'A's property until the price is paid. Before the payment of the price, 'B' pledged the jewellery with 'C'. It was held that at the time of pledge, the ownership was not transferred to 'B'. Thus the pledge was not valid to 'A' could recover the jewellery from the 'C'.

D. **Reservation of right of disposal (Section 25)**

Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. [Sub-section (1)]

Where goods are shipped, or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipts, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal. [Sub-section (2)]

Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange; and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him. [Sub-section (3)] erred to 'B'. Thus, the pledge was not valid and 'A' could recover the jewellery from 'C'

RISK PRIMA FACIE PASSES WITH PROPERTY (SECTIONS 26) According to section 26, unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party.

TRANSFER OF TITLE (SECTIONS 27 – 30)

Sale by person not the owner (Section 27): Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

PERFORMANCE OF THE CONTRACT OF SALE (SECTIONS 31 – 44) Definition of Delivery [section 2(2)]: Delivery means voluntary transfer of possession from one person to another.

Thus, if the possession is taken through unfair means, there is no delivery of the goods. Delivery of goods sold may be made by doing anything which the parties agree, shall be treated as delivery or putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

Duties of seller and buyer (Section 31): It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Payment and delivery are concurrent conditions (Section 32): 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.

Rules Regarding Delivery of goods (Section 33-41) The Sale of good Act, 1930 prescribes the following rules of delivery of goods

(i) **Delivery (Section 33):** Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

(ii) **Effect of part delivery:** A delivery of part of goods, in progress of the delivery of the whole has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder. (Section 34)

Example: Certain goods lying at wharf were sold in a lot. The seller instructed the wharfinger to deliver them to the buyer who had paid for them and the buyer, thereafter, accepted them and took away part. Held, there was delivery of the whole.

(iii) **Buyer to apply for delivery:** Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. (Section 35)

(iv) **Place of delivery**: Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell or if not then in existence, at the place at which they are manufactured or produced. [Section 36(1)]

(v) **Time of delivery:** Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. [Section 36(2)]

(vi) **Goods in possession of a third party:** Where the goods at the time of sale are in possession of a third person, there is no delivery unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods. [Section 36(3)]

(vii) **Time for tender of delivery:** Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is reasonable hour is a question of fact. [Section 36(4)].

(viii) **Expenses for delivery:** The expenses of and incidental to putting the goods into a deliverable state must be borne by the seller in the absence of a contract to the contrary. [Section 36(5)].

(ix) **Delivery of wrong quantity [Section 37]:** Where the seller delivers to the buyer a quality of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate. [Sub-section (1)]

Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate. [Subsection (2)]

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject, or may reject the whole. [Sub-section (3)]

The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties. [Sub-section (4)] **Example:** A agrees to sell 100 quintals of wheat to B at ` 1,000 per quintal. A delivers 1,100 quintals. B may reject the whole lot, or accept only 1,000 quintals and reject the rest or accept the whole lot and pay for them at the contract of sale.

(x) **Instalment deliveries**: Unless otherwise agreed, the buyer is not bound to accept delivery in instalments. The rights and liabilities in cases of delivery by instalments and payments thereon may be determined by the parties of contract. (Section 38)

(xi) **Delivery to carrier:** Subject to the terms of contract, the delivery of the goods to the carrier for transmission to the buyer, is prima facie deemed to be delivery to the buyer. [Section 39(1)]

(xii) **Deterioration during transit:** Where goods are delivered at a distant place, the liability for deterioration necessarily incidental to the course of transit will fall on the buyer, though the seller agrees to deliver at his own risk. (Section 40)

Example: P sold to Q a certain quantity of iron rods which was to be sent by proper vessel. It was rusted before it reached the buyer. The rust of the rod was so minimal and was not effecting the merchantable quality and the deterioration was not necessarily incidental to its transmission. It was held that Q was bound to accept the goods.

(xiii) **Buyer's right to examine the goods:** Where goods are delivered to the buyer, who has not previously examined them, he is entitled to a reasonable opportunity of examining them in order to ascertain whether they are in conformity with the contract. Unless otherwise agreed, the seller is bound, on request, to afford the buyer a reasonable opportunity of examining the goods. (Section 41)

Rule related to Acceptance of Delivery of Goods (Section 42): The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after

the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Analysis:

Acceptance is deemed to take place when the buyer

a. Intimates to the seller that he had accepted the goods; or
b. Does any act to the goods, which is inconsistent with the ownership of the seller: or
c. Retains the goods after the lapse of a responsible time, without intimating to the seller that he has rejected them.

Buyer not bound to return rejected goods (Section 43): Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Liability of buyer for neglecting or refusing delivery of goods (Section 44): When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and customer of the goods. Provided further that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

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UNPAID SELLER

A contract comprises of reciprocal promises. In a contract of sale, if seller is under an obligation to deliver goods, buyer has to pay for it. In case buyer fails or refuses to pay, the seller, as an unpaid seller, shall have certain rights.

According to Section 45(1) of the Sale of Goods Act, 1930 the seller of goods is deemed to be an 'Unpaid Seller' when

(a) The whole of the price has not been paid or tendered and the seller had an immediate right of action for the price.

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

The term 'seller ' here 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 [Section 45(2)].

Example 1: X sold certain goods to Y for ` 50,000. Y paid ` 40,000 but fails to pay the balance. X is an unpaid seller.

Example 2: P sold some goods to R for ` 60,000 and received a cheque for a full price. On presentment, the cheque was dishonored by the bank. P is an unpaid seller.

RIGHTS OF AN UNPAID SELLER

Unpaid seller's right (Section 46): Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

(a) a lien on the goods for the price while he is in possession of them;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of re-sale as limited by this Act. [Sub-section (1)]

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. [Sub-section (2)]

An unpaid seller has been expressly given the rights against the goods as well as the buyer personally which are discussed as under:

(a) **Rights of an unpaid seller against the goods**: The right of unpaid seller against goods can be categorized under two headings.

RIGHT OF UNPAID SELLER AGAINST THE GOODS

The unpaid seller has the following rights against the goods:

(1) **Seller's lien (Section 47):** According to sub-section (1), subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:-

(a) where the goods have been sold without any stipulation as to credit;

(b) where the goods have been sold on credit, but the term of credit has expired; (c) where the buyer becomes insolvent.

According to sub-section (2), the seller may exercise his right of lien notwithstanding that he in possession of the goods as agent or bailee for the buyer.

Part delivery (Section 48): Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Termination of lien (Section 49): According to sub-section (1), the unpaid seller of goods loses 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.

The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods. [Sub-section (2)]

RIGHTS OF UNPAID SELLER AGAINST THE BUYER (SECTIONS 55-61) Rights of unpaid seller against the buyer: An unpaid seller can enforce certain rights against the goods as well as against the buyer personally. Rights of unpaid seller against the buyer are otherwise known as seller's remedies for breach of contract of sale. The rights of the seller against the buyer personally are called rights in person amand are in addition to his rights against the goods.

The right against the buyer are as follows:

1. Suit for price (Section 55)

(a) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods. [Section 55(1)]

(b) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract. [Section 55(2)].

2. Suit for damages for non-acceptance (Section 56): Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. As regards measure of damages, Section 73 of the Indian Contract Act, 1872 applies.

3. Repudiation of contract before due date (Section 60): Where the buyer repudiates the contract before the date of delivery, the seller may treat the contract as rescinded and sue damages for the breach. This is known as the 'rule of anticipatory breach contract'.

4. Suit for interest [Section 61]: Where there is specific agreement between the seller and the buyer as to interest on the price of the goods from the date on which payment becomes due, the seller may recover interest from the buyer. If, however, there is no specific agreement to this

effect, the seller may charge interest on the price when it becomes due from such day as he may notify to the buyer.

In the absence of a contract to the contrary, the Court may award interest to the seller in a suit by him at such rate as it thinks fit on the amount of the price from the date of the tender of the goods or from the date on which the price was payable.

REMEDIES OF BUYER AGAINST THE SELLER

1. **Damages for non-delivery [Section 57]:** Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

Example: 'A' a shoe manufacturer, agreed to sell 100 pairs of shoes to 'B' at the rate of ` 1050 per pair. 'A' knew that 'B' wanted the shoes for the purpose of further reselling them to 'C' at the rate of ` 1100/- per pair. On the due date of delivery, 'A'failed to deliver the shoes to 'B. In consequence, 'B'could not perform his contract with 'C'for the supply of 100 pairs of shoes. In this case, 'B'can recover damages from 'A'at the rate of ` 50/- per pair (the difference between the contract price and resale price).

2. **Suit for specific performance (Section 58):** Where the seller commits of breach of the contract of sale, the buyer can appeal to the court for specific performance. The court can order for specific performance only when the goods are ascertained or specific.

Example: 'A' agreed to sell a rare painting of Mughal period to 'B'. But on the due date of delivery, 'A' refused to sell the same. In this case, 'B' may file a suit against 'A' for obtaining an order from the Court to compel 'A' to perform the contract (i.e. to deliver the painting to 'B' at the agreed price).

3. Suit for breach of warranty (section 59): Where there is breach of warranty on the part of the seller, or where the buyer elects to treat breach of condition as breach of warranty, the buyer is not entitled to reject the goods only on the bases of such breach of warranty. But he may –

(i) set up against the seller the breach of warranty in diminution or extinction of the price; or

(ii) sue the seller for damages for breach of warranty.

4. Repudiation of contract before due date (Section 60): Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as

subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

5. Suit for interest: (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages, in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller-from the date on which the payment was made.

Example 1: In case of a sale of cigarettes which turned out to be mildewed and unfit for consumption, damages were awarded on the basis of the difference between the contract price and the price released.

Example 2: In case of absence of transfer of title or registration the purchaser cannot claim damages for breach of conditions and warranties relating to sale.

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THE LIMITED LIABILITY PARTNERSHIP ACT, 2008

Introduction

The Parliament passed the Limited Liability Partnership Bill on 12th December, 2008 and the President of India has assented the Bill on 7th January, 2009 and called as the Limited Liability Partnership Act, 2008, and many of its sections got enforced from 31st March 2009.

This Act have been enacted to make provisions for the formation and regulation of Limited Liability Partnerships and for matters connected there with or incidental thereto.

The LLP Act, 2008 has 81 sections and 4 schedules.

The First Schedule deals with mutual rights and duties of partners, as well limited liability partnership and its partners where there is absence of formal agreement with respect to them.

The Second Schedule deals with conversion of a firm into LLP.

The Third Schedule deals with conversion of a private company into LLP.

The Fourth Schedule deals with conversion of unlisted public company into LLP.

The Ministry of Corporate Affairs (MCA) and the Registrar of Companies (ROC) are entrusted with the task of administrating the LLP Act, 2008. The Central Government has the authority to frame the Rules with regard to the LLP Act, 2008, and can amend them by notifications in the Official Gazette, from time to time. It is also to be noted that 'The Indian Partnership Act, 1932 is not applicable to LLPs.

Need of new form of Limited Liability Partnership

The lawmakers envisage the needs for bringing out the new legislation for creation of the Limited Liability Partnership to meet with the contemporary growth of the Indian economy. A need has been felt for a new corporate form that would provide an alternative to the traditional partnership with unlimited personal liability on the one hand and the statute-based governance structure of the limited liability company on the other hand, in order to enable professional expertise and entrepreneurial initiative to combine, organize and operate in flexible, innovative and efficient manner.

The Limited Liability Partnership (LLP) is viewed as an alternative corporate business vehicle. It provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. The LLP form enables entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements. Owing to flexibility in its structure and operation, the LLP is a suitable vehicle for small enterprises and for investment by venture capital.

LIMITED LIABILITY PARTNERSHIP - MEANING AND CONCEPT

Meaning: A LLP is a new form of legal business entity with limited liability. It is an alternative corporate business vehicle that not only gives the benefits of limited liability at low compliance cost but allows its partners the flexibility of organising their internal structure as a traditional partnership. The LLP is a separate legal entity and, while the LLP itself will be liable for the full extent of its assets, the liability of the partners will be limited.

LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership.

Since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership.

Characteristic/Salient Features of LLP

1. LLP is a body corporate: Section 3 of LLP Act provides that a LLP is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners.

2. Perpetual Succession: The LLP can continue its existence irrespective of changes in partners. Death, insanity, retirement or insolvency of partners has no impact on the existence of LLP. It is capable of entering into contracts and holding property in its own name.

3. Separate Legal Entity: The LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP. In other words, creditors of LLP shall be the creditors of LLP alone.

4. Mutual Agency: Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct. In other words, all partners will be the agents of the LLP alone. No one partner can bind the other partner by his acts.

5. LLP Agreement: Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners. The LLP Act, 2008 provides flexibility to partner to devise the agreement as per their choice. In the absence of any such agreement, the mutual rights and duties shall be governed by the provisions of the LLP Act, 2008.

6. Artificial Legal Person: A LLP is an artificial legal person because it is created by a legal process and is clothed with all rights of an individual. It can do everything which any natural person can do, except of course that, it cannot be sent to jail, cannot take an oath, cannot marry or get divorce nor can it practice a learned profession like CA or Medicine. A LLP is invisible, intangible, immortal (it can be dissolved by law alone) but not fictitious because it really exists.

7. Common Seal: A LLP being an artificial person can act through its partners and designated partners. LLP may have a common seal, if it decides to have one [Section 14(c)]. Thus, it is not mandatory for a LLP to have a common seal. It shall remain under the custody of some responsible official and it shall be affixed in the presence of at least 2 designated partners of the LLP.

8. Limited Liability: Every partner of a LLP is, for the purpose of the business of LLP, the agent of the LLP, but not of other partners (Section. 26). The liability of the partners will be limited to their agreed contribution in the LLP.

9. Management of Business: The partners in the LLP are entitled to manage the business of LLP. But only the designated partners are responsible for legal compliances.

10. Minimum and Maximum number of Partners: Every LLP shall have least two partners and shall also have at least 2 individuals as designated partners, of whom at least one shall be resident in India. There is no maximum limit on the partners in LLP.

11. Business for Profit Only: The essential requirement for forming LLP is carrying on a lawful business with a view to earn profit. Thus LLP cannot be formed for charitable or non-economic purpose.

12. Investigation: The Central Government shall have powers to investigate the affairs of an LLP by appointment of competence authority for the purpose.

13. Compromise or Arrangement: Any compromise or arrangement including merger and amalgamation of LLPs shall be in accordance with the provisions of the LLP Act, 2008.

14. Conversion into LLP: A firm, private company or an unlisted public company would be allowed to be converted into LLP in accordance with the provisions of LLP Act, 2008.

15. E-Filling of Documents: Every form or application of document required to be filed or delivered under the act and rules made thereunder, shall be filed in computer readable electronic form on its website www.mca.gov.in and authenticated by a partner or designated partner of LLP by the use of electronic or digital signature.

DIFFERENCES WITH OTHER FORMS OF ORGANISATION

Distinction between LLP and Partnership Firm: The points of distinction between a limited liability partnership and partnership firm are tabulated as follows:

BASIC	LLP	PARTNERSHIP FIRM
Regulating Act	The Limited Liability Partnership Act, 2008.	The Indian Partnership Act, 1932
Body corporate	It is a body corporate.	It is not a body corporate.
Separate legal entity	It is a legal entity separate from its members.	It is a group of persons with no separate legal entity
Creation	It is created by a legal process called registration under the LLP Act, 2008.	It is created by an agreement between the partners.
Registration	Registration is mandatory. LLP can sue and be sued in its own name.	Registration is voluntary. Only the registered partnership firm can sue the third parties.
Perpetual succession	The death, insanity, retirement or insolvency of the partner(s) does not affect its existence of LLP. Members may join or leave but its existence	The death, insanity retirement or insolvency of the partner(s) may affect its existence. It has no perpetual succession.

	continues forever.	
Liability	Liability of each partner limited to the extent to agreed contribution except in case of willful fraud.	Liability of each partner is unlimited. It can be extended upto the personal assets of the partners.
Common seal	It may have its common seal as its official signatures	There is no such concept in partnership.

Distinction between LLP and Limited Liability Company (LLC)

BASIS	**LLP**	**LLC**
Regulating Act	The LLP Act, 2008.	The companies Act, 2013.
Members/Partners.	The persons who contribute to LLP are known as partners of the LLP.	The persons who invest the money in the shares are known as members of the company
Internal governance structure	The internal governance structure of a LLP is governed by agreement between the partners.	The internal governance structure of a company is regulated by statute (i.e., Companies Act, 2013)
Name	Name of the LLP to contain the word "Limited Liability partnership" or "LLP" as suffix.	Name of the public company to contain the word "limited" and Private company to contain the word "Private limited" as suffix
Liability of members/partners.	Liability of a partners is limited to the extent of agreed contribution except in case of willful fraud	Liability of a member is limited to the amount unpaid on the shares held by them.
Management	The business of the company managed by the partners	The affairs of the company are managed by board of directors

	including the designated partners authorized in the agreement.	elected by the shareholders.
Minimum number of directors/designated	Minimum 2 designated partners	Private Co. – 2 directors Public Co. – 3 directors

UNIT – V

Elements of Law Relating to Negotiable Instruments under Negotiable Instruments Act, 1881

In India, the law relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881. It deals with Promissory Notes, Bills of Exchange and Cheques, the three kinds of negotiable instruments in most common use. The Act applies to the whole of India and to all persons resident in India, whether foreigners or Indians. The act also applies to 'hundis', other documents such as treasury bills, dividend warrants, bearer debentures, etc. These instruments are also recognised as negotiable instruments, either by mercantile customs or under other act like the Companies Act, 1956.

Definition of Negotiable Instruments

The word meaning of 'negotiable' is being transferable by delivery, and the word 'instrument' means a written document by which a right is created in favour of some person. Thus, negotiable instrument means a written document transferable by delivery. According to Section 13 of the Act, a negotiable instrument means 'a promissory note, bill of exchange or cheque payable either to order or to bearer'. The two main aspects of a negotiable instrument thus are that it is payable to order and is payable to bearer.

1. Payable to order: According to this, a note, bill or cheque is payable to order which is expressed to be 'payable to a particular person or his order'. A document that contains express words prohibiting negotiability is a valid document but they are considered as negotiable instruments since they cannot be negotiated further. However, a cheque is an exception to this. A cheque crossed 'account payee only' is considered negotiable.

2. Payable to bearer: This means 'payable to any person whosoever bears it'. A note ,bill or cheque is payable to a bearer which is expressed to be so payable.

Elements of Negotiable Instruments

The essential elements of a negotiable instrument are as under:

1. Negotiability: The instruments are transferable from one person to another without any further formality.

2. Transferee can sue in his own name without giving notice: A bill, note or a cheque represents a debt and implies the right of the creditor to recover it from his debtor. The creditor has the right to either recover this amount himself or he can transfer this right to another person.

3. Better title to a bonafide transferee for value: A bonafide transferee of a negotiable instrument gets the instrument free from all defects. He is not affected by any defect of title of the transferor or any prior party.

4. Presumptions: There are certain presumptions that apply to all negotiable instruments, which are contained in Sections 118 and 119. Some of the presumptions are as follows:

a) Every negotiable instrument was made, drawn, accepted, indorsed or transferred for consideration.

b) A negotiable instrument bearing a date was made or drawn on the date mentioned.

c) Every bill of exchange was made and accepted at a reasonable time and before its maturity.

d) That the holder of a negotiable instrument is a holder in due course.

Types of Negotiable Instruments

The following are the main types of Negotiable instruments:

1. **Promissory Notes:** Section 4 of the Act defines 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 a certain person or to the bearer of the instrument.* Any promissory note will have two parties, the maker who makes the promissory note and the payee to whom the payment is to be made. Based on the definition, the essential features of promissory note include the following:

I. It must be in writing.

II. It must contain a promise or undertaking to pay.

III. The promise to pay must be unconditional.

IV. The maker must be a certain person.

V. They payee must be certain.

VI. The sum payable must be certain.

2. Bills of Exchange

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

Parties to a Bill of Exchange

A bill of exchange will have three parties – the drawer, drawee and payee. The person who makes the bill is called the 'drawer'. The person who is directed to pay is called the 'drawee' and the person to whom the payment is to be made is called the 'payee'. If the bill is endorsed to another person, the endorsee who is in possession of the bill is called the 'holder'. The holder must present the bill to the drawee for his acceptance. When the drawee accepts the bill, by writing the word 'accepted' and then signing it, he is called the 'acceptor'.

Essential Characteristics of a Bill of Exchange

An instrument to be considered a valid bill of exchange should comply with the following conditions:

I. It must be in writing.

II. It must be definite and should contain an unconditional order to pay.

III. It must be signed by the drawer.

IV. All the parties must be certain.

V. The sum payable on the instrument must be certain.

VI. It must contain an order to pay money only.

VII. It must also comply with the formalities with respect to date, consideration, stamps etc.

3. **Cheque**

A cheque is defined as 'a 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'. From the definition it can be seen that a cheque is a bill of exchange with two distinctive features:

1. It is always drawn on a bank.

2. It is always payable on demand.

Crossing of Cheques

Cheques may be open cheques or crossed cheques. An open cheque is one that is payable across the counter of a bank. Crossing helps in preventing any probable loss that may occur, in the event of an open cheque getting into the hands of a wrong person. Crossing is a unique feature associated with a cheque that affects a certain obligation of the paying banker and also its negotiable character. Crossing of a cheque is effected by drawing two parallel transverse lines with or without the words 'and company' or any abbreviation. If a cheque bears across its face and addition of the words 'and company' or any abbreviation between two parallel transverse lines or transverse lines simply, either with or without the words 'not negotiable' that shall be deemed a crossing and the cheque shall be deemed to be crossed. Since the payment cannot be claimed across the counter on a crossed cheque, crossing of cheques serves as a measure of safety against theft or loss of cheques in transit.

According to Section 126 of the Act, a cheque can be crossed by any of the following persons:

1. The drawer of a cheque

2. The holder of the cheque

3. The banker

Parties to Negotiable Instruments

Holder:

The 'holder' of a negotiable instrument means any person entitled to the possession of the instrument in his own name and to receive or recover the amount due thereon from the parties liable thereto (Sec.8). Thus, in order to be called a 'holder' a person must satisfy the following two conditions:

I. He must be entitled to the possession of the instrument in his own name.

II. He must be entitled to receive or recover the amount due thereon from the parties liable thereto.

Holder in due course

The 'holder in due course' means any person who for consideration becomes the possessor of a negotiable instrument if payable to bearer, or the payee or indorsee thereof if payable to order, before the amount mentioned in it became payable, and without sufficient cause to believe that any defect existed in the title of the person from whom he derived his title (Sec. 9). Thus, in order to be called a 'holder in due course' a person must possess the following specifications:

1. *He must be a 'holder'*. i.e., he must be entitled to the possession of the instrument in his own name under a legal title and to recover the amount thereof from the parties liable thereto.

2. *He must be a holder of valuable consideration,* i.e., there must be some consideration to which law attaches value. The consideration, however, need not be adequate.

3. *He must have become the holder of the negotiable instrument before its maturity.*

4. *He must take the negotiable instrument complete and regular on the face of it.*

5. *He must have become holder in good faith.*

Liabilities of parties to Negotiable Instruments

The provisions of law regarding the liability of parties to negotiable instruments are as follows:

1. Liability of drawer: The drawer of a bill of exchange or cheque is bound, in case of dishonor by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonor has been given to, or received by, the drawer as hereinafter provided (Sec.30). Thus, the drawer of a bill or cheque is liable to the holder only of (i) the instrument has been dishonored, and (ii) due notice of dishonor has been given to him.

2. Liability of drawee of cheque (Sec. 31): The drawee of the cheque (i.e., the paying banker) must pay the cheque when duly presented for payment provided he has sufficient funds to the drawer applicable to the payment of such cheque. If the drawee banker wrongfully dishonors the cheque he can be made liable to pay exemplary damages to the drawer. Notice that when the banker makes a default he is liable not towards the payee or the holder but towards the drawer. This is so because there is no privity of contract between the holder and the banker. The holder has a remedy against the drawer and not against the banker.

3. Liability of 'maker' of bill and 'acceptor' of bill (Sec.32): The maker of a promissory note and the acceptor of a bill of exchange are the principle debtors and hence they are primarily liable for the amount due on the instrument according to its apparent tenor, in the absence of a contract to the contrary. There may be a contract to the contrary, for instance, in the case of an 'accommodation bill' the acceptor may be exempt from liability as per contract.

4. Liability of endorser (Sec. 35): When an endorser endorses and delivers a negotiable instrument before maturity he impliedly undertakes to be liable to every subsequent holder for the loss caused to him if the instrument is dishonoured by the party primarily liable thereon. Thus, the endorser stands in the position of a 'drawer' to all the subsequent holders.

Liabilities of paying banker

The paying banker (drawee of the cheque) must pay the cheque when duly presented for payment provided he has sufficient funds to the drawer applicable to the payment of such

cheque. If the drawee banker wrongfully dishonors the cheque he can be made liable to pay exemplary damages to the drawer. Notice that when the banker makes a default he is liable not towards the payee or the holder but towards the drawer. This is so because there is no privity of contract between the holder and the banker. The holder has a remedy against the drawer and not against the banker.

Dishonor of instruments

A negotiable instrument may be dishonored by (i) non – acceptance or (ii) non – payment. As presentment for acceptance is required only in case of bills of exchange, it is only the bills of exchange which may be dishonored by non – acceptance. Of course any type of negotiable instrument – promissory note, bill of exchange or cheque – may be dishonored by non – payment.

1. **Dishonor by Non – acceptance** *:* A bill of exchange is said to be dishonored by non – payment in the following cases:

a. When the drawee or one of several drawees (not being partners) makes default in acceptance upon being duly required to accept the bill.

b. Where the presentment for acceptance is excused and the bill is not accepted, i.e., remains unaccepted.

c. Where the drawee is incompetent to contract.

d. Where the drawee makes the acceptance qualified.

e. If the drawee is a fictitious person or after reasonable search cannot be found.

2. **Dishonor by Non – payment**

A promissory note, bill of exchange or cheque is said to be dishonored by non – payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same (Sec. 92). Also, a promissory note or bill of exchange is dishonored by non – payment when presentment for payment is excused expressly by the maker of the note or acceptor of the bill and the note or bill remains unpaid at or after maturity (Sec. 76).

Bouncing of Cheque

A cheque is said to be bounced or dishonored by non – payment when the drawee of the cheque makes default in payment upon being duly required to pay the same. With a view to enhancing the acceptability of cheques in settlement of liabilities, it is necessary that the cheques drawn are honored and not bounced.

To amend 'the law of dishonor of a cheque', the Negotiable Instrument Act, 1881 has been amended again by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, which has been made effective from February 6, 2003. The Amendment Act, 2002, *inter alia*, has amended Sections 138, 141 and 142 and also inserted five new Sections – Section 143 to 147. The salient features of the provisions of Sections 138 to 147 are discussed below:

A drawer of the dishonored cheque shall be deemed to have committed an offence and shall, without prejudice to any other provisions of the Negotiable Instruments Act, be punishable with imprisonment for a term which may extend to two years, or with a fine which may extend to twice the amount of the cheque, or with both. However, before the panel provisions can be invoked against the drawer of a cheque which has bounced, the following requirements should be satisfied:

1. The cheque should have been dishonored due to insufficiency of funds standing to the credit of the account on which the cheque was drawn or for the reason that the amount of cheque drawn on the account exceeds the sanctioned limit of overdraft.
2. The cheque should have been issued by the drawer in favour of another person for the discharge of legally enforceable debt or other liability, in whole or in part. Therefore, when any cheque issued for meeting social obligations, such as charity, marriage presents, birthday gifts etc. is dishonored for want of funds the drawer would not be deemed to have committed an offence.

3. The cheque should have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

4. The payee or holder in due course of the cheque should have made 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 the information by him from the bank regarding the return of the cheque as unpaid/bounced.

5. The drawer of such cheque should have failed to make the 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 of demand. If the drawer does not pay till the expiry of 15 days time, the cause of action arises on the 16th day.