BUSINESS REGULATIONS

THIRD SEMESTER

CORE COURSE : BCM3 B03

B.COM

(2019 ADMISSION ONWARDS)

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SCHOOL OF DISTANCE EDUCATION

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BCM3 B03 : BUSINESS REGULATIONS

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MODULE - I

BUSINESS LAWS

Business Law is a wide term and embraces all legal principles concerning business transactions. It is also known as the 'Commercial Law', 'Law Merchant' or 'Mercantile Law'.

Business Law consists of those legal rules, which govern and regulate the business activities, transactions and trade. It also encompasses the law relating to regulation of business associations and other incidental matters.

Definition

According to S R Davar, business law "means that branch of law which is applicable to or concerned with trade and commerce in connection with various mercantile or business transactions".

Scope of Business Law

The following legislation enacted by Indian Legislature from time to time is covered in the Indian Business Laws:

a) The Indian Contract Act, 1872.

b) The Negotiable Instruments Act, 1881.

c) The Sale of Goods Act, 1930.

d) The Indian Partnership Act, 1932.

e) The Insurance Act, 1972.

f) The Arbitration & Conciliation Act, 1996.

g) The Law of Insolvency.

h) Law Relating to Carriage of Goods.

Sources of Business Law

The main sources of Indian Business Law are as follows:

a) The English Mercantile Law [Common Laws, Equity, Roman Laws and Case Laws],

b) Statutes of the Indian Legislature [Supreme and Subordinate Legislation],

c) Judicial Decisions & Precedents [Declaratory, Persuasive, Absolutely Authoritative & Conditionally Authoritative Precedents],

d) Customs and Usage.

THE INDIAN CONTRACT ACT, 1872

In India, the law relating to contracts is contained in the INDIAN CONTRACT ACT, 1872. The Act came into force on the 1st day of September 1872, and it applies to the whole of India except the State of Jammu and Kashmir. The act does not deal with all the branches of law of contracts. The contracts relating to Partnership, Sale of Goods Act and Negotiable Instruments Act are outside the scope of the Indian Contract Act. The Indian Contract Act deals with:

1. The general principles applicable to all contracts;

2. The conditions, which are essential for making a valid contract;

3. The principles applicable to quasi contracts;

4. The principles, which are applicable to a few special contracts, namely,

a) *The contracts of indemnity*,

b) *The contracts of guarantee*,

c) *The contracts of bailment and agency,*

d) *The contracts of agency.*

The law of contracts deals with agreements, which can be enforced through law courts. Law of contracts is the most important branch of mercantile law. It affects every person in one way or the other, as all of us enter into some kind of contract everyday. The object of the law of contracts is to introduce definiteness in commercial and other transactions, and to ensure the realization of reasonable expectation of the parties, who enter into a contract.

CONTRACT

The word contract is derived from the Latin word "contractum" which means "drawn together". It denotes a drawing together the minds of two or more persons to form a common intention giving rise to an agreement. A contract is an agreement enforceable by law, which offers personal rights and imposes personal obligations, which the law protects and enforces against the parties to the agreement.

DEFINITION

Section 2 (h) of the Indian Contract Act defines a contract as "an agreement enforceable by law".

Therefore, a contract essentially consists of two elements:

1. Agreement: Section 2 (e) defines an agreement as, *"every promise and every set of promises forming the consideration for each other"*. In other words, an agreement is formed where one party makes the proposal and the other party accepts it.

2. **Enforceability:** Only an enforceable agreement can be called a contract. Section 10 of the Act defines "*All agreements*

are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and a lawful object, and are not hereby expressly declared to be void".

Sir William Anson observes, "A contract is an agreement enforceable at law made between two or more persons, by whom rights are acquired by one or more to acts or forbearances on the part of the other or others".

ESSENTIAL ELEMENTS OF A VALID CONTRACT

The following are the essential elements of a contract, arrived at on the basis of a combined reading of Section 2(h) and Section 10 of the Indian Contract Act:

1. Offer and Acceptance: There must be a 'lawful offer' and 'lawful acceptance' of the offer, thus resulting in an agreement.

For example: *If X offers to sell his Maruti Car to Y for Rs. 2,25,000 and Y agrees to pay X Rs. 2,25,000 for the Maruti Car. Here X is called the offeror or promisor and Y is the offeree or promise.*

2. **Consensus ad idem:** For a valid agreement, there must be a complete identity of minds between the contracting parties.

For example*: A has two buffaloes but B is aware of only one of these. B proposes to buy the buffalo of which he is aware. A's Consents to sell the other buffalo. Since there is confusion in the minds of the parties, there is no consensus and hence no agreement follows.*

3. Free Consent: The contracting parties must give their consent freely. It must not be given due to coercion, undue influence, fraud, misrepresentation or mistake. The absence of free consent would affect the legal enforceability of a contract.

For example: *An illiterate woman executes a deed of gift under the impression that she is executing a deed authorizing her nephew to manage her agricultural land. The deed is not read or explained to her. Here, there is no consent, therefore no contract.*

4. Capacity of the parties: The parties making the contract must be legally competent in the sense that each must be of the age of majority, of a sound mind, and not expressly disqualified from contracting (Section 11). An agreement by incompetent parties shall be a legal nullity.

For example: *A, a minor, borrows Rs. 5,000 from B and executes a promissory note in B's favour. After attaining majority A executes a fresh promissory note in favour of B for this amount. B cannot sue on this promissory note as the agreement is void for lack of consideration.*

5. Lawful Consideration: An agreement to be enforceable by law must be supported by consideration. Without consideration, a contract is regarded as a nudum pactum. Each of the contracting parties must give as well as get something. Moreover, the consideration must be lawful.

For example: *X lets his house for being used as a gambling den. The agreement is illegal as the object of agreement is unlawful.*

6. Lawful object: The object of the agreement must be lawful. It is considered unlawful if it is (i) illegal (ii) immoral, (iii) fraudulent, (iv) of a nature that, if permitted, it would defeat the provisions of any law, (v) causes injury to the person or property of another, or (vi) opposed to public policy.

For example: *A promises to obtain a job for B in government service in consideration of Rs. 50,000. The agreement is void because it is forbidden by law.*

7. Not expressly declared void: The agreement must not have been declared void by any law in force in India. The Act has itself declared void certain types of agreements such as those in restraint of marriage, or trade, or legal proceedings as well as wagering agreements.

8. Intention to create legal relations: There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations.

For example: *A wife withdraws a complaint against her husband under an agreement that husband will pay her allowance. Court held it as a binding contract.*

9. Certainty of meaning: The terms of the agreement must be certain and unambiguous. Section 29 of the Act, "agreements the meaning of which is not certain or capable of being made certain are void".

For example: *A agrees to sell a car to B out of his 5 cars. There is nothing whatever to show which car was intended. The agreement is void for uncertainty.*

10. Legal formalities: The agreement must comply with the necessary formalities as to writing, registration, stamping etc. if any required in order to make it enforceable by law.

CLASSIFICATION OF CONTRACTS

Section of the Act, which is called the 'interpretation clause', besides defining a contract in clause
(h), also provides the basis for the classification of contracts.

Contracts may be classified as follows:

1. On the basis of Enforceability

a) ***Valid Contract:*** A contract which satisfies all the legal requirements laid down in Section 10 of the Act, is a valid contract. Such a contract creates rights in personem and is legally enforceable.

b) ***Void Agreement:*** Section 2(g) defines it as, "an agreement not enforceable by law is said to be void". Such agreements are void ab initio which means that they are unenforceable right from the time they are made.

For example: *X agrees with Y, in consideration of Rs. 100, to draw two parallel lines in such a way as to cross each other. The agreement is impossible to perform and, therefore void.*

c) ***Void Contract:*** Section 2(j) provides that "a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable." Following are the examples of such circumstances which render a contract void:

(i) Supervening impossibility or illegality as described in Section 56.

(ii) In the case of a voidable contract when the party whose consent is not free, repudiates the contract.

(iii) A contingent contract to do or not to do something on the happening of an event becomes void when the event becomes impossible (Section 32).

For Example: *A agrees to sell 1000 tonnes of wheat to B @ Rs. 500 per tonne in case his ship reaches the port safely by 15th February. The ship fails to reach by the stipulated date. The contract between A and B is void.*

d) ***Voidable Contract:*** According to Section 2(i), "An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract."

In a voidable contract, a right or option is open to the aggrieved party i.e., the party whose consent is not free that either to repudiate the contract or to abide by it. Thus, a voidable contract continues to be valid and enforceable till it is repudiated by the aggrieved party.

For example: *A threatens to kill B if he does not give him a loan of Rs. 50,000 for 25 years. B gives the loan. This is a voidable contract as consent of B is obtained by coercion.*

e) Illegal agreement: An agreement which is either prohibited by law or otherwise against the policy of law is an illegal agreement. Such an agreement is a nullity and is void ab intio.

f) Unenforceable Contract: An unenforceable contract is that which is valid and enforceable, but for certain technical defects such as want of proof, expiry of the period within which enforceable, absence of writing, registration and attestation, insufficient stamp etc., it becomes unenforceable.

For example: *If a document embodying a contract is understamped, the contract is unenforceable, but if the requisite stamp is affixed (if allowed), the contract becomes enforceable.*

2. On the basis of mode of creation

a) Express Contract: An express contract is that which is made in writing or by the words of mouth.

For example: *A writes to B, 'I am prepared to sell my horse for a*

sum of Rs. 500. B accepts A's offer by a telegram. The contract will be termed as express contract.

b) Implied Contract: An implied contract is one which arises out of acts or conduct of the parties or out of the dealings between them.

For example: *A takes a seat in a bus. There is an implied contract that he will pay the prescribed fare for taking him to his destination.*

c) Quasi Contract: Under certain circumstances, law itself creates legal rights and obligations against the parties. These obligations are known as quasi contracts.

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

3. On the basis of execution

a) Executed Contract: When a contract has been completely performed, it is termed as executed contract, i.e., it is a contract where, under the terms of a contract, nothing remains to be done by either party.

For example: *X sells a radio set to Y for Rs. 300. Y pays the price. Both the parties have performed their respective obligations, and therefore, it is an executed contract.*

b) Executory Contract: Where one or both the parties to the contract have still to perform their obligations in future, the contract is termed as executory contract.

For example: *A agrees to paint a picture for B and B in consideration promises to pay A a sum of rupees one hundred. The contract is executor.*

c) Unilateral Contract: A unilateral contract is one sided

contract in which only one party has to perform his promise or obligation to do or forebear.

For example: A, a coolie, puts B's luggage in the carriage. The contract comes into existence as soon as the luggage is put. It is now for B to perform his obligation by paying the charges to the coolie.

d) Bilateral Contract: A bilateral contract is one in which both the parties have to perform their respective promises or obligations to do or forbear.

For example: *A promises to sell his car to B after 15 day. B promises to pay the price on the delivery of the car. The contract is bilateral as obligations of both the parties are outstanding at the time of the formation of the contract.*

Distinction between Void Agreement and Voidable Contract

Basis of Distinction	**Void Agreement**	**Voidable Contract**
1. Void/illegal	All void agreements need not necessarily be illegal.	All illegal agreements are always void.
2. Effect on collateral agreements	The collateral agreements do not become void.	The collateral agreements also become void.
3. Restoration of benefit received	If a contract becomes void subsequently, the benefit received must be restored to the other party.	The money advanced or thing given cannot be claimed back.

Distinction between Void Agreement and Voidable Contract

Basis of Distinction	Void Agreement	Voidable Contract
1. Void ab initio	It is void from the very beginning.	It is valid when made and continues to remain valid till it is repudiated by the aggrieved party.
2. Enforceability	It cannot be enforced by any party.	It continues to be enforceable if the aggrieved party does not repudiate the contract.
3. Right of third party	Third party does not acquire any rights.	A third party can acquire a valid title from a person claiming under such a contract.
4. Effect of lapse of reasonable time	Even on the expiry of a reasonable time, it can never become a valid contract.	On the expiry of a reasonable time, it may become a valid contract if the aggrieved party does not repudiate the contract within reasonable time.
5. Damages	The question of damages does not arise.	The aggrieved party can claim damages.

OFFER AND ACCEPTANCE

It is an established principle that an agreement arises only when an offer is made by one person and is accepted by the other person, to whom it is made. Thus, an offer and its acceptance is the starting point in the making of an agreement.

OFFER OR PROPOSAL

According to Section 2 (a) of the Indian Contract Act, 1872 defines a 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".

The person making the proposal is called the 'promisor or offeror'. The person to whom the proposal is made is called the 'promisee or offeree'.

Example:

X says to Y, "I want to sell my car to you for Rs. 1, 00,000". Here, "to sell car" is an offer or proposal. X who has made the offer is called offeror or promisor. Y to whom the offer has been made is called the offeree or promisee.

ESSENTIALS CHARACTERISTICS OF A VALID OFFER

1. The offer must be capable of creating legal relations: An offer must intend to create legal relationship among the parties. If the parties have agreed that the breach of the agreement would not confer any right on either party to go to the court of law for enforcing the agreement, it will not be a valid offer.

2. The offer must be certain, definite and not vague: The terms of the offer must be certain and unambiguous and not vague. If the terms of the offer are vague, no contract can be entered into because it is not clear as to what exactly the parties intended to do.

3. The offer must be communicated to the other party: The offer must be communicated to the person to whom it is made. Thus, an offer accepted without its knowledge, does not confer any legal rights on the acceptor.

4. The offer must be made with a view to obtaining the consent of the offeree: If a person merely makes a statement without any intention to be bound by it, then it is not a valid offer. Merely making an enquiry does not constitute an offer.

5. The offer must be distinguished from an answer to a question: The terms of an offer should be clear so that there is no confusion whether it is a valid offer or an answer to a question. An answer to a question cannot be taken as an offer.

6. Invitation to an offer is not an offer: Price lists, catalogues, display of goods in a show window, tenders, advertisements, prospectus of a company, an auctioneer's request for bids, etc., are instances of invitation to offer. In case of an invitation for an offer, there is no intention on the part of the person sending out the invitation to obtain the assent of the other persons to such an invitation.

7. The offer must be distinguished from mere statement of intention: The terms of an offer should be clear so that there is no confusion whether it is a valid offer or a mere statement of intention. Such statement or declaration merely indicates that an offer may be made or invited in future.

8. Special conditions attached to an offer must also be communicated: In such cases the rule is that the party shall not be bound by the conditions unless conditions printed are properly communicated.

9. The offer may be positive or negative: An offer to do something is a positive offer. And an offer not to do something is a negative offer.

10. The offer may be express or implied: An offer which is expressed by words, written or spoken, is called an express

offer. The offer which is expressed by conduct, it is called an implied offer.

11. The offer may be specific or general: When an offer is addressed to a specific individual or a group of individuals, called it as specific offer. When an offer is addressed to an unascertained body of individuals or to the public at large, it is said to be a general offer.

12. The offer should not contain a term the non-compliance of which would amount to acceptance: One cannot say while making the offer that if the offer is not accepted by a certain time, it will be presumed to have been accepted.

DIFFERENT KINDS OF OFFERS

1. Express offer: An express offer is one which is made by words spoken or written.

2. Implied offer: An implied offer is one which is made otherwise than in words. In other words, it is inferred from the conduct of the person or the circumstance of the particular case.

3. Specific offer: A specific offer can be accepted only by that definite person or that particular group of persons to whom it has made.

4. General offer: A general offer is one which is made to the world at large or public in general.

5. Standing or Open or Continuing offer: An offer for a continuous supply of certain goods and services in any quantity at a certain price as and when required it will be termed as a standing or open offer.

6. Counter offer: A Counter offer is rejecting the original offer and making a new offer. The new offer is the counter offer.

7. Cross offer: Where identical offers are made by parties in ignorance of each other, the offers are said to be cross offers.

Lapses of offer [When does an offer come to an end]

Section 6 of the Act deals with the various modes of revocation of an offer. Accordingly, an offer may come to an end in any of the following ways:

1. By communication of notice of revocation by the proposer: The proposer can revoke or withdraw his offer at any time before the acceptor posts his letters of acceptance. A notice of revocation to be effective must be communicated to the acceptor.

2. By lapse of prescribed time: An offer lapses if acceptance is not communicated within the time prescribed in the offer, or if no time is prescribed, within a reasonable time.

3. By non-fulfillment of a condition by acceptor: A proposal comes to an end when the acceptor fails to fulfill a condition precedent to the acceptance of the proposal.

4. By the death or insanity of the offeror: A proposal comes to an end by the death or insanity of the offeror if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.

5. By counter offer: A proposal lapses if it has been rejected by the other party or a counter offer is made.

6. By subsequent illegality or destruction of subject matter: An offer lapses if it becomes illegal after it is made or which the subject matter is destroyed or substantially impaired before acceptance.

7. By rejection: An offer lapses if it has been rejected by the offeree. The rejection may be express i.e., by words spoken or

written, or implied. Implied rejection is one; (a) where either the offeree makes a counter offer, or (b) where the offeree gives a conditional acceptance.

ACCEPTANCE

An acceptance is the manifestation by the offeree of his willingness to be bound by the terms of the offer. According to Section 2 (b) of the Act, "*When the person to whom the offer is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise".*

Example: *X offers to sell his car to Y for Rs. 1,00,000. Y agrees to buy the car for Rs. 1,00,000. Y's act is an acceptance of X's offer.*

ESSENTIAL AND LEGAL RULES FOR A VALID ACCEPTANCE

1. The acceptance must be communicated: An acceptance to be valid must be communicated to the proposer. If the person to whom the proposal is made remains silent and does nothing to show that he has accepted the proposal, no contract is formed.

2. Acceptance must be absolute or unqualified: Acceptance, in order to be binding, must correspond with all the terms of the offer. Offer must be accepted in toto. A qualified and conditional acceptance amounts to marking of a counter offer which puts an end to the original offer and it cannot be revived by subsequent acceptance.

3. Acceptance may be express or implied: Acceptance given by words is known as express acceptance. But an acceptance given by conduct is said to be implied. Implied acceptance may arise from (a) doing of a particular act as prescribed in the offer, and (b) by accepting a benefit offered by the offeror.

4. The acceptance must be given in some usual and reasonable manner: It is another important legal rule of an acceptance that where no mode is prescribed, acceptance must be given in some usual and reasonable manner.

5. The acceptance must be given before the lapse of offer: A valid contract can arise only when the acceptance is given before the offer has elapsed or withdrawn.

6. The acceptance cannot be implied from silence: The offeror does not have the legal rights to say that if no answer is received within a certain time, the offer shall be deemed to have been accepted.

7. Acceptance means acceptance of all the terms of the offer: When an offer is accepted, it would mean acceptance of all the terms of offer. The acceptance of offer cannot be partial at all.

8. If acceptance has been given conditional there will be no contract: When an acceptance by a person is made conditional i.e., 'subject to a formal contract' or 'subject to approval by certain person – such as solicitors etc', no contract will arise till a formal contract is entered into or consent of such persons is obtained.

COMMUNICATION AND REVOCATION OF OFFER AND ACCEPTANCE

When the contracting parties are facing each other, there is no problem of communication, because there is instantaneous communication of offer and acceptance.

Mode of Communication [Sec. 3]

Section 3 of the Act refers to the two modes of communication:

1. Communication by act, and
2. Communication by omission.

Act includes by conduct or by words, written or oral. So communication can be by letter, telegram, telephone etc. Omission includes conduct or forbearance on the part of one person which has the effect of communication.

When is Communication Complete [Sec. 4]

1. Communication of Offer

The communication of an offer is complete when it comes to the knowledge of the person to whom it is made.

2. Communication of Acceptance

Communication of an acceptance is complete:

a) as against the proposer, when it is put in course of transmission to him so as to be out of the power of the acceptor to withdraw the same; and

b) as against the acceptor, when it comes to the knowledge of the proposer.

3. Communication of Revocation

Revocation means "taking back" or "withdrawal". It may be a revocation of offer or acceptance. The communication of a revocation is complete:

a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; and

b) as against the person to whom it is made, when it comes to his knowledge.

CONSIDERATION

The consideration is one of the essential elements of a valid

contract. The term 'consideration' may be defined as the price of the promise. This term is used in the sense of *quid pro quo* (i.e., something in return). Accordingly, an agreement which is not supported by consideration is a *nudum pactum* (a nude or a bare agreement), and the effect of a nude agreement is expressed in the legal maxim, *ex nudo pacto non orilur actio* meaning no cause of action arises from a bare agreement.

The most popular definition of consideration is given by *Lush J. in Currie vs Misa*. According to him, "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other".

Definition

Section 2 (d) of the Act defines consideration as under:

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises or to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise".

ESSENTIALS OF CONSIDERATION

1. Consideration must move at the desire of the promisor: The act or abstinence of the promisee or any other person must be done at the desire or request of the third party or voluntary acts would not constitute a valid consideration. The desire of the promisor may be express or implied from the conduct of the parties.

2. Consideration may move from the promisee or any other person: It is not necessary that the consideration should proceed

only from the promisee. Consideration furnished by a third party will also be valid if it has been done at the desire of the promisor. This is termed as 'Doctrine of Constructive Consideration".

3. Consideration may be past, present or future: The words, has done or abstained from doing, does or abstains from doing, or promises to do or to abstain from doing; indicate that the consideration may be past, present or future.

a) Past consideration: When the present promise is based on the consideration already taken place (i.e., before the date of the promise), it is termed as consideration.

b) Present consideration: When the promisor receives consideration simultaneously with his promise, it is termed as present consideration.

c) Future consideration: When the consideration for a promise is rendered in future it is termed as future or executory consideration.

4. Consideration need not be adequate: The consideration need not be adequate to the promise but it must be of some value in the eye of the law. According to explanation 2 to Section 25, an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

5. Consideration must be real and not illusory: Consideration must be real and be of some value in the eyes of law. Consideration of the following type are not real:

(a) Physical impossibility: For instance As promising to put life into B's dead wife should B pay him Rs. 500, is void for

lack of physical possibility.

(b) Legal impossibility: If consideration consists of something illegal, the agreement will be void.

(c) Uncertain consideration: An uncertain or vague consideration will make the agreement void.

(d) Illusory consideration: It consists of a promise to do something which a person is already bound to do by law or contract. It must be something more than what a promisee is already bound to do.

6. Consideration must be lawful: Section 23 of the Act which says that "every agreement of which the consideration is unlawful, is void". It means that an agreement must be supported by lawful consideration.

7. Consideration must not be illegal, immoral or opposed to public policy: The consideration of an agreement is unlawful if:

a) it is forbidden by law; or

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

c) it is fraudulent; or

d) it involves or implies injury to the person or property of another; or

e) the court regard it as immoral or opposed to public policy.

PRIVITY OF CONSIDERATION OR STRANGER TO CONSIDERATION

The term 'privity of consideration' means stranger to the consideration, or consideration given by any other person other than the promisee. A promise is enforceable so long as there is some consideration for it, and it is immaterial whether it is furnished by the promisee or other person even a stranger.

Example: *In Subramaniam Iyer vs. Lakshmi Ammal (1973) 2 SCC 54, A borrowed Rs. 40,000 from B as security for the loan. A executed a mortgage of his property in favour of B. Later on, A sold his property to C for Rs. 44,000. Out of this, A received Rs. 4,000 and allowed him to retain the balance of Rs. 40,000 in order to redeem the mortgage by paying the amount to B. B sued C for the recovery of the mortgage money. Held, B cannot succeed as he was not a party to the sale agreement.*

PRIVITY OF CONTRACT OR STRANGER TO CONTRACT

The term 'privity of contract' means stranger to a contract. As per the doctrine of privity of contract, a person, who is not a party to the contract, cannot sue for carrying out the promise made by the parties to the contract.

Example: *In Dunlop Pneumatic Tyre Co. Ltd. vs. Selfridge & Co. (1915), AC. 847, S bought tyres from the Dunlop Rubber Co. and sold them to D, a sub-dealer who agreed with S not to sell below Dunlop's list price and to pay to Dunlop £5 as damages on every tyre undersold. D sold two tyres at less than the list price and thereupon Dunlop sued him for breach. Held, Dunlop cannot maintain the suit as it was a stranger to the contract.*

EXCEPTIONS TO THE RULE OF STRANGER TO CONTRACT

1. In case of Trusts: When a trust is created, the beneficiary can enforce his rights given to him under the trust, even though he was not a party to the contract between the settler and the trustees.

2. In case of marriage settlement, partition or other family arrangements: Where a provision is made in a partition or family arrangement for the benefit of any member of the family, such a member may sue to enforce the agreement even though he is not a party to the agreement.

3. Acknowledgement of payment: Where the promisor acknowledges payment to a third party, either by conduct or otherwise, the latter can sue.

4. In case of agency: A contract entered into by an agent acting within the scope of his authority, can be enforced by the principal.

5. In case of assignment of rights under a contract: The assignee can enforce the benefits of the contract.

6. Agreements relating to the land: When any person purchases such land with the notice of rights and obligations of the owner, then he shall be bound by those rights and obligations although he was not a party to the agreement.

Rule of "No Consideration, No Contract"

According to Section 25, an agreement made without consideration is void. But gratuitous promise shall be enforceable by law if the promisee on the faith of such promise suffered a liability as suffering of detriment forms a valid consideration. According to Salmond and Winfield, a promise without consideration is a gift, one made for a consideration is a bargain.

Exceptions to the General Rule of "No Consideration, No Contract"

The following circumstances under which the agreement is valid and enforceable even if it is made without consideration:

1. Agreements made on account of natural love and affection [Sec. 25 (1)]: This clause lays down four essential requirements for the validity of an agreement made without consideration. They are

a) The agreement must be in writing;

b) It is registered under the law;

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

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

Example:

A, for natural love and affection, promised to give Rs. 1,000 to his son B. A put his promise to B in writing and registered it. This is valid contract.

2. Promise to compensate for past voluntary services [Sec. 25 (2)]: Such promise made without consideration is valid:

a) If the act was done voluntarily;

b) For the promisor or something which the promisor was legally bound to do;

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

d) The promisor must agree now to compensate the promise.

Example:

X finds Y's purse and gives it to him. Y promises to give Rs. 500 to X. This is a valid contract even though the consideration did not move at the desire of Y, the promisor.

3. Promise to pay time-barred debt [Sec. 25 (3)]: When a debtor makes a written and registered promise, under signature of his own or that of his agent, to pay a time-barred debt, no fresh consideration is needed. The following conditions must be satisfied for the application of this exception:

a) The promise to pay must be definite and express;

b) The promise must be in writing;

c) The promise must be signed by the promisor or his authorized agent;

d) The debt must be time-barred, i.e., the limitation period for the recovery of the debt, must be expired.

Example:

X owed Rs. 2,000 to Y. This debt was barred by Limitation Act i.e., the limitation period for the recovery of debt has already expired. X signed a written promise to pay Rs. 1,000 to Y on account of this debt. This is a valid contract.

4. Completed gift [Explanation 1 to Sec. 25]: The gifts actually made by a donor and accepted by the done are valid even without consideration. Thus, a completed gift needs no consideration.

5. Contracts of agency [Sec. 185]: No consideration is necessary to create an agency.

6. Remission [Sec. 63]: No consideration is required for an agreement to receive less than what is actually due.

CAPACITY TO CONTRACT

One of the essential conditions for the enforceability of an agreement is that the concerned parties must be competent to enter into an agreement. The 'capacity to contract' means the competence (i.e., capability) of the parties to enter into a valid contract.

According to Sec. 11 of the Contract Act, *"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 a sound mind, and is not-disqualified from contracting by any law to which he is subject"*.

PERSONS NOT COMPETENT TO CONTRACT

As per the statement of Section 11 of the Indian Contract Act, the following persons are not competent to contract, i.e., they are incapable of entering into a valid contract.

(i) Minors;

(ii) Persons of unsound mind; and

(iii) Persons disqualified for contracting by any other law.

(i) MINORS

According to Section 3 of the Indian Majority Act, 1875, a person who has not completed his age of 18 years (majority), is considered to be a minor. In the following two cases, a person becomes major on completing the age of 21 years:

a) Where a guardian of a minor's person or property has been appointed under the Guardians and Wards Act, 1890; and

b) Where the superintendence of minor's property is assumed by a Court of Wards.

Rules Regarding Minor's Agreements

The law protects minor's rights because they are not mature and may not possess the capacity to judge what is good and what is bad for them. The position of a minor as regards his agreements may be stated as under:

1. **An agreement with or by a minor is void ab initio:** An agreement with a minor has been held to be void ab initio. It is not only void, but is absolutely void.

2. **A minor can be a promisee or a beneficiary:** A promissory note executed in favour of the minor can be enforced. He can draw, negotiate or endorse a negotiable instrument so as not to incur any liability upon himself.

3. **No ratification:** Since a contract with or by a minor is altogether void, he cannot ratify contracts entered into by him during his minority, even after attaining the majority. There can be no ratification of a contract void ab intio.

4. **No restitution:** Sometimes, the minor receives some property or money by falsely representing his age. In such cases, the minor can be asked to restore such property or money so long as the same is traceable in his possession.

5. **The liability of Minor's parents or guardian:** A contract made by the minor's parents or guardian or manager of his estate can be specifically enforced by or against the minor provided: (a) the contract is within the scope of authority of the parent, etc., and (b) it is for the benefit of the minor.

6. **No Estoppel:** Where a minor represents fraudulently or otherwise that he is of age and thereby induces another to enter into contract with him, he in an action founded on the contract, is not estopped from setting up infancy.

7. Minor's property liable for necessaries: Sometimes, a person supplies necessaries to a minor. In such cases, the supplier of necessaries can claim reimbursement from the property of minor.

8. Minor's liability for tort: A minor is liable for negligently causing any injury or damage, or for converting property that does not belong to him. But, he is not liable for a tort directly connected with a contract which as an infant he would be entitled to avoid. In other words, a person cannot convert a contract into a tort to enable him to sue an infant.

9. Minor as an agent: Minor can act as an agent and bind his principal by his acts without incurring any personal liability.

10. Minor as a partner: A minor cannot be a partner in a firm. But under Section 30 of the Partnership Act, he can be admitted to the benefits of partnership with the consent of all the members.

11. Minor as an insolvent: A minor cannot be declared insolvent because he is not competent to contract.

PERSONS OF UNSOUND MIND

According to Section 12 of the Indian Contract Act, defines the term 'Sound Mind' as follows:

"A person is said to be 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 effects upon his interests".

Thus, if a person is not capable of both, he is said to have suffered from unsoundness of mind. Section 11 of the Act also specifically declares that persons of unsound mind are

incompetent to enter into an agreement. The following persons are also considered to be the persons of unsound mind.

1. **Idiot:** An idiot is a person who has completely lost his mental faculties of thinking for rational judgement. All agreements, other than those for necessities of life, with idiots are absolutely void.

2. **Lunatics:** A lunatic is a person who is mentally deranged (disordered) due to some mental strain or other personal experience but who has some lucid intervals of sound mind.

3. **Drunken or intoxicated person:** A drunken or intoxicated person is a sane person who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgement as to its effect on his interest.

PERSONS DISQUALIFIED BY ANY LAW

1. Alien enemy: "Alien" means a person who is not a citizen of India. During the continuance of war with the country to which an alien belongs, he becomes an alien enemy. In that situation, he can neither contract with an Indian subject nor can he file a suit in an Indian court. He can do so only after obtaining the permission of the Central Government. Contracts made before war may either be suspended or dissolved. They are dissolved if found to be against public policy or of benefit to the enemy.

2. Insolvent: When a person is declared as an insolvent, his property vests in the Official Receiver or Assignee. And the insolvent is deprived of his power to deal with the property, and sue and be sued on his behalf.

3. Foreign Sovereigns, their Diplomatic Staff and Accredited representatives of Foreign States: Such persons can enter into valid contracts and can enforce them in Indian courts.

However, a suit cannot be filed again them, in the Indian courts, without the prior sanction of the central government.

4. Joint Stock Company and Corporations incorporated under Special Acts: A corporation or company, being an artificial person, and having a separate legal entity, can hold property; can purchase or sell property; and can sue or be sued in the Courts of Law. But it cannot enter into contracts which are strictly of personal nature.

5. Felons or Convicts: A convict cannot enter into a contract while he is undergoing imprisonment. This inability comes to an end on the expiration of the period of imprisonment or if he has been pardoned.

FREE CONSENT

In order to create a valid contract, there should be perfect identity of mind, i.e., "consensus ad idem" between the contracting parties regarding the subject matter of the contract. Section 10 of the Indian Contract Act laid down in clear terms free consent is one of the essentials of a valid contract.

CONSENT

According to Section 13 of the Act has defined consent as "two or more persons are said to consent when they agree upon the same thing in the same sense". According to this section which has laid down the basic principle of consensus ad idem on which the law of contract is based, the parties to an agreement should have identity of minds regarding the subject matter of the agreement.

FREE CONSENT

If the consent is there but it is not free or real, then the contract

will be voidable at the option of the contracting parties whose consent is not free. The word "free consent" is defined in Section 14 of the Contract Act as follows –

"Consent is said to be free when it is not caused by

1. *Coercion, as defined in Section 15; or*

2. *Undue influence as defined in Section 16; or*

3. *Fraud, as defined in Section 17; or*

4. *Misrepresentation, as defined in Section 18; or*

5. *Mistake, subject to the provisions of Sections 20, 21 and 22.*

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake".

COERCION [SEC. 15]

Coercion means compelling or forcing a person to enter into a contract under a pressure or threat. Section 15 of the Indian Contract Act defines coercion as "*the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatsoever, with the intention of causing any person to enter into an agreement*".

Example: X beats Y and compels him to sell his car for Rs. 50,000. Here, Y's consent has been obtained by coercion because beating someone is an offence under the Indian Penal Code.

ESSENTIALS CHARACTERISTICS OF COERCION

(a) The committing of any act forbidden by 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.

(b) The threatening to commit any act forbidden by Indian Penal Code: If a person attempts to commit an act which is punishable under the Indian Penal Code, it leads to coercion, e.g., consent obtained at the pistol point, or by threatening to cause death or by intimidation.

(c) The unlawful detaining of any property: If a person unlawfully detains the property of another person and forces him to enter into a contract, the consent is said to be induced by coercion.

(d) The threatening to detain any property unlawfully: If a threat is given to detain any property of another person, this amount to coercion.

(e) The act of coercion: It must be done with the object of inducing or compelling any person to enter into an agreement.

EFFECTS OF COERCION

According to Section 19 states that, 'when the consent of a party to an agreement is obtained by coercion, the contract becomes voidable at the option of the party, i.e., such party can put an end to the contract if he so chooses'.

According to Section 72 of the Act, which is based on the principle of equitable restitution, a person to whom anything has been delivered or money paid under coercion must return or repay it.

UNDUE INFLUENCE [SEC. 16]

When a party enters into a contract under any kind of mental pressure, unfair influence or persuasion by the superior party, the undue influence is said to be employed. According to Section 16 (1) of the Act, 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"*.

Presumption of undue influence

Section 16 (2), a person is deemed to be in a position to dominate the will of the other is the following cases:

a) Real or apparent authority: Where he holds a real or apparent authority over the other, e.g., master and the servant, parent and child, Income Tax officer and assessee, etc.

b) Fiduciary relationship: Fiduciary relation means a relation of mutual trust and confidence, e.g., guardian and the ward, solicitor and client, doctor and patient, guru and disciple, trustees and beneficiaries, etc.

c) Mental distress: Where he contracts with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

BURDEN OF PROOF [SEC. 16 (3)]

Where a person who is in a position to dominate the will of another, makes a contract and the transaction appears to be unconscionable, the burden of proving that the contract has not been induced by undue influence shall lie on the person who is in a position to dominate the will of the other.

The presumption of undue influence can be rebutted or opposed by showing the following:

(i) that full disclosure of all material facts was made;

(ii) that the consideration was adequate; and

(iii) that the other party was in receipt of competent independent advice and his consent was free.

Distinction between Coercion and Undue Influence

Basis of Distinction	**Coercion**	**Undue Influence**
1. Nature of force	It involves physical force.	It involves moral pressure.
2. Relationship	Parties to a contract may or may not be related to each other.	Parties to a contract are related to each other under some sort of relationship.
3. Consent	Consent is obtained by giving a threat of an offence or committing an offence.	Consent is obtained by dominating the will.
4. Who can exercise	It can be exercised even by a stranger to the contract.	It can be exercised only by a party to a contract and not by a stranger.
5. Presumption	Coercion has to be proved by the aggrieved party alleging it in. It is not presumed by the law.	There is a presumption of undue influence in the case of certain relationship.
6. Restoration of benefit	The aggrieved party who is rescinding the contract has to return the benefit	The aggrieved party may or may not be required to return the benefit in whole

	received to the other party.	or in part as per Court's direction.
7. Criminal element	It entails criminal liability.	It doesn't involve any criminal liability.
8. Place of use	The act or the threat amounting to coercion may be committed even outside India.	It must have been exercised in India.

FRAUD [Sec. 17]

The term 'fraud' may be defined as an intentional, deliberate or wilful misstatement of facts, which are material for the formation of a contract.

According to Section 17, "*fraud means and includes any of the following acts committed by a party to a contract or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:*

(a) *the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;*

(b) *the active concealment of a fact by one having knowledge or belief of the fact;*

(c) *a promise made without any intention of performing it;*

(d) *any other act fitted to deceive;*

(e) *any such act or omission as the law specially declares to be fraudulent".*

ELEMENTS OF FRAUD

On the basis of aforesaid definition of fraud, the essential

elements of fraud are as follows:

1. **The act must have been committed by a party to the contract:** The fraud must be committed by a party to a contract or by anyone with his connivance or by his agent. Thus, the fraud by a stranger to the contract does not affect the validity of the contract.

2. **Acts committed may be of the following nature:**

a) **Suggestion of an untrue fact:** If a person knowingly states an untrue fact or fact which he does not believe to be true, it will be taken as a fraud on his part.

b) **Active concealment of a fact:** An active concealment is considered as a fraud when (i) there is a concealment of fact, and (ii) the concealment is active (i.e., all efforts are made to conceal fact), and (iii) the concealment is made by a party who has the knowledge of it.

c) **A promise made without any intention of performing it:** If a party while entering into a contract has no intention to perform his promise, it will be taken as a fraud on his part.

d) **Any other act fitted to deceive:** The expression 'act fitted to deceive' means any act which is done with the obvious intention of committing fraud. Thus, this clause covers all tricks and unfair ways which are used by cunning and clever people to cheat others.

e) **Any such act or omission which the law specially declares to be fraudulent:** Under the Transfer of Property Act, any transfer of immovable property with the intention of defrauding the creditors, is taken as a fraud.

3. **The act must have been committed with the intention of inducing the deceived party to act upon it:** It implies that the assertion should be such that it would necessarily influence

and induce the other party to act.

4. **The act must have in fact deceived the other party:** If a person has committed a fraudulent act to deceive the other party, but the other party has not been actually deceived by his act, it will not be taken as a fraud on his part.

5. **Plaintiff must have suffered:** There is no fraud without damages, and therefore, to constitute fraud it is necessary that the plaintiff must have suffered some loss of money or money's worth or some other tangible detriment capable of assessment.

Mere silence is not a fraud

According to explanation to Section 17, "mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud".

Example: *A sells, by auction, to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud by A.*

Exceptions

1. **Duty to Speak:** Mere silence amounts to fraud when the person keeping silent, is under a duty to speak. The duty to speak arises, where one party reposes trust and confidence in the other. The duty to speak arises in the following types of contracts:

a) Contracts uberrimae fidei, i.e., contracts of good faith such as contracts of insurance; contracts for the sale of immovable properties; contracts of marriage; contracts for the purchase of shares; family contracts, etc.

b) Contracts of partnership: Under the Partnership Act, partners are required to observe absolute good faith and to be

just and faithful to each other.

c) Contracts of guarantee: The creditor must disclose all material facts about the debtor to the surety.

d) Where the parties stand in fiduciary relationship to each other.

e) Contracts to marry.

2. Where silence is equivalent to speech: For instance, B says to A, "If you do not deny it, I shall presume that the horse is sound". A says nothing. Here A's silence is equivalent to speech. If the horse turns out to be vicious A can be held liable for fraud.

3. Change of circumstances: Sometimes a statement may be true when it is made but due to change in circumstances, it may become false subsequently. In such a case, it is the duty of the person to communicate the change in circumstances.

Effect of Fraud

1. Right to rescind the contract: The party whose consent was caused by fraud can rescind (cancel) the contract but he cannot do so in the following cases:

a) where silence amounts to fraud, the aggrieved party cannot rescind the contract if he had the means of discovering the truth with ordinary diligence;

b) where the party gave the consent in ignorance of fraud;

c) where the party after becoming aware of the fraud takes a benefit under the contract;

d) where an innocent third party before the contract is rescinded acquires for consideration some interest in the

property passing under the contract;

e) where the parties cannot be restored to their original position.

2. Right to insist upon performance: The party whose consent was caused by fraud may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.

3. Right to claim damages: The party whose consent was caused by fraud, can claim damage if he suffers some loss.

MISREPRESENTATION [Sec. 18]

The term 'Misrepresentation' means a false representation of fact made innocently or non- disclosure of a material fact without any intention to deceive the other party. A false representation made by a person may be either:

1. Innocent or unintentional, i.e., without any intention of deceiving the party.
2. Intentional or wilful or deliberate, i.e., with the intention of deceiving the party. According to Section 18 defines the term 'misrepresentation' as follows: "Misrepresentation" means and includes –

i) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

ii) any breach of duty which, without any intent to deceive, gains an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

iii) Causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

Essentials of Misrepresentation

1. There must be a representation or breach of duty.

2. The representation must be of facts material to the contract.

3. The representation must be untrue.

4. The representation must be made with a view to inducing the other party to enter into contract.

5. The other party must have acted on the faith of the representation.

6. The person making the representation honestly believes it to be true.

Acts Which Constitute Misrepresentation

Thus misrepresentation may be committed in any of the following ways:

1. Unwarranted Statements: If a person makes a statement of fact which is not warranted by his information, he is said to make a misrepresentation.

2. Breach of Duty: When a person commits a breach of duty without any intention to deceive the other party and thereby gains something while the other party loses, it will be termed as misrepresentation.

3. Inducing Mistake about Subject Matter: If a party to an agreement induces the other party, although innocently to commit a mistake as to the nature or quality of the subject

matter of the agreement, he becomes guilty of misrepresentation.

Effects of Misrepresentation

The effect of misrepresentation is that it makes the contract voidable the option of the party whose consent is so obtained. And such party may put an end to the contract if he so chooses.

Exceptions

1. Where the other party had the means of discovering the truth with ordinary diligence: The party cannot complain of misrepresentation if he had the means of discovering the truth with ordinary means.

2. Where the misrepresentation does not induce the other party to enter into contract, the contract is not voidable: If the consent is given independently in spite of misrepresentation, the contract is not voidable.

Difference between Fraud and Misrepresentation

Fraud	Misrepresentation
1. There is misstatement of concealment of fact, deliberately made with the intention to deceive the others party or to induce him to enter into a contract.	**1.** The misstatement of fact is made innocently without any bad intention.
2. The fraud is intentional or wilful wrong. The person making an untrue statement knows that it is not true.	**2.** The misrepresentation is an innocent wrong. The person making the false statement believes it to be true.

3. In case of active fraud, the aggrieved party has a right to rescind the contract.	**3.** The aggrieved party cannot rescind the contract if it was possible for him with ordinary diligence to discover the truth.
4. A fraud is a criminal act too. **5.** Not only is the contract voidable but it also gives rise to an independent action in tort for damages. **6.** The aggrieved party in addition to the normal remedies can claim also damages.	**4.** It is not a criminal act. **5.** It makes the contract voidable at the option of the party misrepresented. 6. The aggrieved party cannot claim to damages.

MISTAKE

A mistake is said to have occurred where the parties intending to do one thing by error do something else. Mistake is an erroneous belief concerning something.

Example: *X engages Y as a teacher for his son appearing for IAS Preliminary. Y agrees to come daily 7. X think 7 a.m. but Y means 7 p.m. This is a bilateral mistake of fact but not essential and can be rectified. Therefore the agreement is valid.*

Kinds of Mistake

Mistake may be of two kinds: (I) Mistake of Law; and (II) Mistake of Fact.

(I) Mistake of Law: It may be of the following types:

a) Mistake of law of the country: It does not render the agreement void. This is based on the well established rule of law

namely, ignorantia juris non excusat (i.e., ignorance of law is no excuse). Section 21 lays down that "a contract is not voidable because it was caused by a mistake as to any law in force in India".

b) Mistake of foreign law: The mistake of the foreign law has the same effect as a mistake of fact. Therefore, it renders the agreement void. Section 21 lays down that "a mistake as to a law not in force in India has the same effect as a mistake of fact".

(II) Mistake of Fact: Mistake of fact may be of two types –

(1) Bilateral mistake; and

(2) Unilateral mistake.

(1) Bilateral mistake: Where both the parties to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void. An agreement shall be void if the following conditions are satisfied:

(i) Both the parties must be under a mistake: This means the mistake must be mutual or common.

(ii) Mistake must relate to an essential fact: It is necessary that the mistake must relate to a matter of fact which is essential to the agreement.

Types of Bilateral Mistake

The following types of bilateral mistake, which render the agreement void, are important from the subject point of view:

a) Mistake as to subject matter

Where both the parties working under a mistake relating to the subject matter of contract, the contract is void. It may be of the following types:

(i) Mistake regarding existence of the subject matter: Where both the parties are under a mistake regarding the existence of the subject matter, the contract is void.

(ii) Mistake regarding identity of the subject matter: If both, the parties are mistaken about the identity of subject matter, the contract shall be void.

(iii) Regarding the title to the subject matter: If a person buys some property which neither party knew that it already belonged to the buyer, the contract will be void.

(iv) Regarding the quantity of the subject matter: Where the quantity purchased is fundamentally, different from the quantity intended to be sold, there occurs mutual mistake which prevents the formation of an enforceable contract.

(v) Regarding the quality of the subject matter: It occurs, where the subject matter is entirely different from that contemplated by the parties.

(vi) Regarding the price of the subject matter: Where a seller while writing the price of the goods intending to write Rs. 2,250 by mistake writes Rs. 1250, the agreement is void.

b) Mistake as to the possibility of performance

Where the parties to an agreement believe that the agreement is capable of performance, while in fact it is not so, the agreement is treated as void. The impossibility may either be physical or legal.

(2) Unilateral mistake

The term unilateral mistake means where only one party to the agreement is under a mistake. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to matter of fact.

Types of Unilateral Mistake

1. **Mistake about the identity of the parties to an agreement:** If there is a mistake regarding the identity of the person contracted with, even if the mistake is caused by fraud or misrepresentation of another party, the contract will be void.

2. **Mistake about the nature of the agreement:** If a party does not disclose the true nature of the document but fraudulently induces the other party to sign it who believes that he is signing some other document, in such a case there is no real agreement.

LEGALITY OF CONSIDERATION AND OBJECT

For a valid contract it is essential that the object or consideration of the agreement must be lawful. According to Sec. 23 of the Indian Contract Act, the objects and the consideration of an agreement shall be unlawful in the following cases:

1. **Where it is forbidden by law:** As a matter of fact, an act is forbidden by law, when it is punishable by criminal law of the country, or when it is prohibited by special legislation or by the regulations made by a competent authority under power derived from the legislature.

2. **Where it defeats the provision of any law:** It is of such nature that, if permitted, it would defeat the provisions of law, e.g., purchase of land being sold for arrears of land revenue by the defaulter, or an agreement by a debtor not to raise the plea of limitation in a suit by the creditor.

3. **Where it is fraudulent:** If the two parties agree to practice a fraud on third party, then the agreement between the parties is unlawful and void.

4. **Where it is injurious either to the person or his property:** It involves or implies injury to the person or property

of another, e.g., an agreement to indemnify a person against the consequences of publication of a libel.

5. **Where it is regarded as immoral:** The term 'immoral' depends upon the standard of 'morality' prevailing at a particular place and time. If the consideration for the agreement is an act of sexual immorality, for example, illicit co-habitation and prostitution, the agreement is illegal.

6. **Where it is opposed to public policy:** The agreements that are injurious to the public or which are against the public good or public welfare are void.

AGREEMENTS OPPOSED TO PUBLIC POLICY

Public policy is that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public. An agreement is said to be opposed to public policy when it is injurious to the welfare of the society or it tends to prejudice the welfare of the society.

Following agreements have been declared by the Courts as opposed to public policy and they are as follows:

1. **Trading with an alien enemy:** All agreements made with an alien enemy are illegal on the ground of public policy.

2. **Agreement for stifling prosecution:** An agreement which seeks to absolve an offender of criminal liability or excuse him from prosecution or to withdraw a criminal case pending against him is known as an agreement stifling prosecution.

3. **Maintenance and Champerty:** Any agreement which improperly promotes litigation is opposed to public policy. Such agreements may be either maintenance or Champerty.

4. **Agreement for sale of public offices and titles:** The agreements for the sale or trafficking in public offices or to obtain public title like Padma Shree etc., are illegal on the ground of being opposed to public policy.

5. **Marriage brokerage agreements:** Agreements to procure marriages for reward, or agreement to pay money to the parent or guardian of a minor in consideration of his consenting to give the child in marriage, are void.

6. **Agreement in restraint of personal liberty:** An agreement which unduly restricts the personal liberty of any person is void on the ground of being opposed to public policy.

7. **Agreement in restraint of parental rights:** An agreement which is inconsistent with the duties arising out of such guardianship is void as being opposed to public policy.

8. **Agreements tending to create interest opposed to duty:** An agreement with a public servant which obliges him to do something which is inconsistent with his official duty, shall be void as being opposed to public policy.

9. **Agreements interfering with marital duties:** Any agreement which interferes with the performance of marital duties, it is void. For example, an agreement that the husband shall always live at the wife's house was held to be void.

10. **Agreements to vary the period of limitation:** Agreements, the object of which is to curtail or extend the period of limitation prescribed by the law of limitation, are void.

11. **Agreements to defraud creditors or revenue authorities:** The agreements, the object of which is to defraud the creditors or revenue authorities are void as being opposed to public policy.

12. Agreement tending to create monopoly: An agreement, the object of which is to create monopoly is illegal and void as being opposed to public policy.

13. Agreement to commit a crime: An agreement to indemnify a person against consequences of his criminal act is void as opposed to public policy. These act may be grouped under the following heads:

a) Agreements in restraint of marriage [Section 26].

b) Agreements in restraint of trade [Section 27].

c) Agreements in restraint of legal proceedings [Section 28].

All these agreements will be discussed in detail in the next chapter on "Void Agreement".

VOID AGREEMENTS

According to Section 2 (g) of the Indian Contract Act, 1872, a void agreement is an agreement which is not enforceable by law. A void agreement does not create any legal rights and obligations. It is void-ab-initio (i.e., void from the very beginning) and without any legal effect. Agreements, which possess all the essential elements of a valid contract laid down in Section 10, must not have been expressly declares as void by any law in force in any country.

The following agreements have been expressly declared as void by the Indian Contract Act:

1. Agreements by incompetent persons [Section 11].

2. Agreements made under a mutual mistake [Section 20].

3. Agreements, the object or consideration of which is unlawful [Section 23].

4. Agreements, the object or consideration is partly unlawful [Section 24].

5. Agreements made without consideration [Section 25].

6. Agreements in restraint of marriage [Section 26].

7. Agreements in restraint of trade [Section 27].

8. Agreements in restraint of legal proceedings [Section 28].

9. Agreements the meaning of which is uncertain [Section 29].

10. Agreements by way of wager [Section 30].

11. Agreements to do impossible acts [Section 56].

Agreements from 1 to 5 have already been discussed in earlier chapters. The other agreements are discussed below:

AGREEMENTS IN RESTRAINT OF MARRIAGE [SECTION 26]

According to Sec. 26 of the Act, "every agreement in restraint of the marriage of any person, other than a minor, is void". The law regards the marriage as the right of every person. Restriction on the freedom of people shall be against public policy and, therefore, void.

Example: *A promised to marry B only and none else, and to pay Rs. 2000 in default. A married C and B sued A for recovery of Rs. 2000. It was held that B could not recover anything because the agreement was in restraint of marriage. [Lowe vs. Peers]*

It may be noted that an agreement which provides for a penalty upon remarriage may not be considered as a restraint of marriage.

AGREEMENTS IN RESTRAINT OF TRADE [SECTION 27]

According to Sec. 27 of Indian Contract Act, 1872, "every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void". This is because Article 19 (g) of the Constitution of India regards the freedom of trade and commerce as a right of every individual. Therefore, no agreement can deprive or restrain a person from exercising such a right.

Example: *In the case, Madhub Chander vs Raj Coomar, A and B were rival shopkeepers in a locality of Calcutta. A agreed to pay a sum of money to B if he would close his business in that locality. B closes his shop. On A's refusal to pay the amount, the court held that the agreement was void under Sec. 27 of the Act.*

EXCEPTIONS

The following are the exceptions to the rule that 'an agreement in restraint of trade is void'.

1. **Statutory Exceptions**

a) Sale of Goodwill: An agreement which restrains the seller of a goodwill from carrying on a business is valid if all the following conditions are fulfilled:

(i) The seller should be restrained only from carrying on a similar business;

(ii) The restriction shall apply so long as the buyer or any person deriving title from him is carrying on a similar business;

(iii) The restraint should apply only within specified local limits.

(iv) The restraint must be reasonable having regard to the nature of the business.

b) Restrictions under Partnership Act: The following restrictions are provided in the Partnership Act, 1932:

(i) Restriction on existing partner [Section 11(2)]: A partner shall not carry on any business other than that of the firm while he is a partner.

(ii) Restriction on outgoing partner [Section 36(2)]: An agreement by an outgoing partner with the continuing partners not to carry on a business similar to that of the firm within a specified period or within specified local limits shall not be void.

(iii) Restriction in anticipation of dissolution [Section 54]: Agreement amongst partners that upon dissolution of the firm some or all of them shall not carry on similar business within a specified period or within specified local limits shall not be void.

(iv) Restriction in case of sale of goodwill of the firm [Section 55 (3)]: Agreement by a partner upon sale of goodwill of the firm, with the buyer thereof not to carry on any similar business within a specified period or within specified local limits shall not be void.

2. **Under Judicial Interpretations**

a) Trade Combinations: Trade combinations which have been formed to regulate the business or to fix prices are not void, but the trade combinations which tend to create monopoly and which are against the public interest are void.

b) Service Agreements: Agreements of service often contain a clause by which the employee is prohibited from working anywhere else during the term of the agreement, such agreements are valid.

c) Sole Dealing Agreements: An agreement to deal in the products of a single manufacturer or to sell the whole produce to a single dealer is valid if their terms are reasonable.

AGREEMENTS IN RESTRAINT OF LEGAL PROCEEDINGS [SECTION 28]

An agreement by which any party is restricted absolutely from enforcing his legal rights under or in respect of any contract is void to that extent. An agreement which interferes with the course of justice is void on account of its being opposed to public policy.

The following are the four kinds of agreements which are in restraint of legal proceedings, and are therefore, void:

a) Absolute restrictions from enforcing legal rights: Any agreement that absolutely restricts a party to a contract from enforcing his contractual rights in ordinary tribunals is void.

b) Agreements curtailing the limitation period: An agreement which limits the time within which an action may be brought so as to make it shorter than that prescribed by the Law of Limitation, is void because its object is to defeat the provisions of law.

c) An agreement which extinguishes the rights of a party.

d) An agreement which discharges a party from liability.

Exceptions

There are the following two exceptions to the rule laid down in Section 28:

1. Restraints for referring the future disputes to arbitration.

2. Restraints for referring the existing or present disputes to arbitration.

AGREEMENTS THE MEANING OF WHICH IS UNCERTAIN [SECTION 29]

An uncertain agreement is one, the terms of which are uncertain or not capable of being made certain without further agreement between the parties are void. An agreement with uncertain, ambiguous or vague terms is void because in such cases, courts may not give a practical meaning to the contract.

Example: *A agreed to sell to B, 100 tons of oil. There is nothing whatever to show what kind of oil was intended. Therefore, the agreement is void for uncertainty.*

AGREEMENTS BY WAY OF WAGER [SECTION 30]

The term 'wagering agreement' or 'wager' may be defined as an agreement in which one person agrees to pay certain amount of money to the other person on the happening or non-happening of a specified uncertain event.

Sir William Anson defines a wager as "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event" and this definition was quoted by the Supreme Court in *Gherulal Parekh vs Mahadeo Das Maiya.*

Examples:

i) *X agrees with Y that if there is rain on a certain day X will pay Y Rs. 1000. If there is no rain Y will pay X Rs. 1000. The agreement is of a wagering nature.*

ii) *A test match between India and Australia has ended in Kolkata today. Both A and B are ignorant of the result. A agrees with B to pay 1000 in case India wins and B agrees to pay A Rs. 1000 in case India does not win. The agreement is of a wagering nature.*

Essential Features of a Wager Agreement

1. **Promise to pay money or money's worth:** There must be a promise to pay money or money's worth by one party to the other.

2. **Event:** The promise must be conditional on the happening or not happening of an event.

3. **Uncertainty of the event:** The agreement must be conditional upon the determination of an uncertain event. An event may be uncertain not only because it relates to future but because it is not yet ascertained to the knowledge of the parties.

4. **Mutual chances of gain or loss:** Each party must stand an equal chance to win or lose on the determination of the contemplated events.

5. **No control over the event:** Neither party should have control over the happening or non- happening of the event.

6. **Stake as the only interest:** Neither party should have any interest other than the sum or stake that he stands to win or lose.

Effects of Wagering Agreement

a) Agreements by way of wager are void in India.

b) Agreements by way of wager have been declared illegal in the states of Maharashtra and Gujarat.

c) No suit can be filed to recover the amount won on any wager.

d) Transactions which are collateral to wagering agreements are not void in India except the states of Maharashtra and Gujarat (Wagering agreements which are illegal).

Exceptions to Wager

The following transactions are not wagers:

1. **Horse race:** An agreement to contribute or subscribe towards any plate, prize or sum of money, the amount of rupees five hundred or more to be awarded to the winners of any horse race is a valid agreement and not a wager. In 1996, the Supreme Court has held horse races to be "games of skill" and not gambling.

2. **Crossword competitions:** Crossword puzzles are games of skill. But if in crossword competition, the winning of the prize depends upon the tallying of competitors' entry with the solution kept with the editor of the magazine, then it is a wagering transaction. According to the Prize Competition Act, 1955, prize competitions in games of skills are not wagers provided the amount of prize does not exceed Rs. 1000.

3. **Games of skill:** Picture puzzles, literary and athletic competitions, being based on skill and intelligence, are games of skill.

4. **Share market transactions:** In the share market if the intention is to take and give delivery of stocks and shares, it is a valid transaction.

5. **Contracts of insurance:** It is a contract in which an insurer, in consideration of a certain sum of money, undertakes to make good the loss of the insured arising on the happening of an uncertain specified event.

6. **Chit Fund:** In it, a certain number of persons contribute a fixed sum for a specified period which is made over to one of them at the end of a pre-determined period in accordance with an agreed plan. These are not wagers.

Difference Between Wagering and Contract of Insurance

1. Contract of insurance is valid and can be enforced in court of law, where as wagering agreement is void under section 30, without any legal effect.

2. In case of insurance contract, the assured has an insurable interest in the subject matter, while in the wagering agreements the parties have no interest in the agreement except the stake.

3. A contract of insurance except life insurance, is a contract of indemnity i.e., in the event of loss only actual loss is to be made good, whereas in wagering agreements the amount to be paid is decided beforehand.

4. A contract of insurance is based on scientific actuarial calculation of risks while wagering transactions are a pure gamble or game of chance.

5. A wager will arise only if one party losses and another gains while in insurance contract no winning or losing.

6. Insurance contracts are social security measures which are beneficial to the public while wagering transactions do not promote public welfare in any way, rather they encourage gambling which is injurious to the interest of public.

Commercial Transaction and Wager

An agreement for the actual sale and purchase of goods is not a wagering agreement. But sometimes it becomes difficult to determine whether a particular transaction is by way of wager or a genuine business transaction.

Lotteries

A lottery is a game of chance, therefore, an agreement to buy a lottery ticket, is a wagering agreement. If the lottery is authorized by Government, it does not cease to be a wagering transaction, the only effect of such sanction is that the persons conducting the lottery will not be prosecuted under the penal law.

CONTINGENT CONTRACT

A contract may be absolute or contingent.

Absolute Contract

An absolute contract is one in which the promisor binds himself to performance independent of any condition of contingency i.e., the promisor undertakes to perform the contract in all events.

Contingent contract

According to Section 31 of the Contract Act, 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".

The performance of a contingent contract becomes due only upon the happening or non- happening of some future uncertain event. In simple words, it is a conditional contract. Contracts of insurance, indemnity and guarantee etc. are some of the important examples of contingent contracts.

Example: *A contracts to pay Rs. 10,000 to B if his (B's) house is burnt. This is a contingent contract as its performance is dependent upon an uncertain event (i.e., burning of B's house).*

Essentials of a Contingent Contract

A valid contingent contract must satisfy these essential requirements:

1. ***There must be a valid contract:*** It must fulfill the basic requirements of a valid contract between the parties.

2. ***The performance of the contract must be conditional:*** The performance of a contingent contract must depend upon the happening or non-happening of some future event.

3. ***The event must be uncertain:*** The future event, upon which the performance of a contract depends, must be an uncertain event.

4. ***The event must be collateral to the contract:*** The event must be independent or ancillary to the contract.

5. ***The event should not be the discretion of the promisor:*** The 'mere will' or 'discretion' of the promisor is not an event for the purpose of a contingent contract.

RULES REGARDING CONTINGENT CONTRACTS

1. Contingent contracts dependent on the happening of future uncertain event: Sec. 32 provides that "contingent contract to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void.

2. Contingent contracts dependent on the non-happening of future uncertain event: Sec. 33 provides that "contingent contract to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before**.**

3. Contingent contracts dependent on the future conduct of a living person: According to Sec. 34, if a contract is contingent upon how a person will act at an unspecified time, the event shall be considered to become impossible when such person does

anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

4. Contingent contracts dependent on the happening of specified uncertain event within a fixed time: According to Sec. 35 (para. I), if a person is to perform something within a fixed time provided an uncertain event happens, then the person is bound to perform it, if such particular event happens within that time.

5. Contingent contracts dependent on the non-happening of specified uncertain event within a fixed time: Sec. 35 (para. II) provides that contingent contract to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or before the time fixed has expired, if it becomes certain that such event will not happen.

6. Contingent contracts dependent on the happening of an impossible event: Sec. 36 provides that contingent contract 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.

Difference between Wager and Contingent Contract

Contingent Contract	Wagering Contract
1. It is perfectly valid and can be enforced in a Court of Law.	1. It is absolutely void and cannot be enforced in a Court of Law.
2. The parties have insurable interest in the happening or non-	2. The parties do not have insurable interest in the happening or non-happening

happening of the event.	of the event as such. Their main interest is in winning or losing.
3. In this case, the future uncertain event is merely collateral or incidental.	3. In this case, the uncertain event is the only determining factor.
4. There may not be reciprocal promises.	4. It consists of reciprocal promises.
5. All contingent contracts are not of a wagering nature, because all the contingent contracts are not void.	5. All wagering agreements are also contingent contracts because they are dependent on uncertain event.
6. In a contingent contract, the parties are interested in the occurrence or non-occurrence of the event.	6. In a wagering agreement, the parties are interested only for the stake.

QUASI CONTRACTS

Under the Law of Contracts, the contractual obligations are voluntarily undertaken by the contracting parties. However, under certain circumstances, a person may receive a benefit to which the law regards another person as better entitled or for which the law considers he should pay to the other person, even though there is no contract between the parties. Such relationships are called quasi-contracts, because, although there is no contract or agreement between the parties, they are put in the same position as if there were a contract between them.

Definition

Quasi contract is defined as "an obligation to pay a sum of money, whether liquidated or unliquidated, which arises independently of any contract, on the ground that in the circumstances of the case, it is considered by the law to be just debt".

It is a debt or obligation constituted by the act of the law apart from any consent or intention of the parties or any privity of contract. These relationships are termed as quasi-contracts or constructive contracts under the English Law and "certain relations resembling those created by contracts" under the Indian Law.

A quasi-contract rests on the ground of equity that a person shall not be allowed to enrich himself unjustly at the expense of another. That is why the law of quasi-contracts is known as the law of restitution. Strictly speaking, a quasi-contract is not a contract at all. A contract is intentionally entered into. A quasi-contract, on the other hand, is created by law.

BASIS OF QUASI CONTRACTS

The quasi contracts are based on the maxim of '*nemo debet locuplatari ex liena justua'*, i.e., no man must grow rich out of another person's costs. In other words, these are based on the equitable principle that a person shall not be allowed to enrich himself at the expense of another. Lord Mansfield explained the quasi-contracts on the principle that 'Law as well as justice should try to prevent unjust enrichment'. The term 'unjust enrichment' means the enrichment of one person at the cost of another. The principle of 'unjust enrichment' requires, that

1. the defendant (against whom the case is filled) has been enriched by the receipt of a benefit.

2. the enrichment is at the expense of the plaintiff (i.e., who files the case).

3. the retention of the enrichment is unjust.

FEATURES OF QUASI-CONTRACTS

The salient features of a quasi-contract are as under:

a) It is imposed by law and does not arise from any agreement.

b) The duty of a party and not the promise of any party is the basis of such contract.

c) The right under it is always a right to money and generally, though not always, to a liquidatedsum of money.

d) The right under it is available against specific person(s) and not against the world.

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

KINDS OF QUASI CONTRACTS

The quasi contractual obligations are contained in Sections 68 to 72 of the Contract Act, 1872. These have been described below:

1. Supply of necessaries to persons incompetent to contract [Section 68]: The person who has supplied the necessaries to a person who is incompetent to contract or anyone who is dependent on such incompetent person, is entitled to claim their price from the property of such incapable person.

Example: *A supplies B, a lunatic, some necessaries suitable to the maintenance of his life. A is entitled to be reimbursed from B's property.*

The following conditions are necessary for the applicability of the provisions of Section 68:

a) There must be the supply of necessaries to a person who is incompetent to contract such as a minor or a person of unsound mind or dependents of such incompetent person.

b) The term 'necessaries' shall be construed in accordance with the situation in life of the incompetent person, the nature of goods, the extent of supplies, etc.

c) The supplier can claim only reasonable value for the supplies made.

d) The reimbursement of the price of goods supplied can be obtained from the property of the incompetent person who cannot be held personally liable.

2. Payment by an interested person [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: *X is bound by law to make a certain payment. Y is interested in such a payment, and he makes it, there will be a quasi contractual obligation of X to reimburse Y.*

In order to make Section 69 applicable, the following conditions must be satisfied:

a) The plaintiff should be interested in making the payment in order to protect his own interest and the payment should not be voluntary one.

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

c) The payment must not be such as the plaintiff himself was bound to pay.

3. Liability to pay non-gratuitous acts [Section 70]: Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefits thereof, the latter is bound to make compensation to the former in respect of, or to restore, the things so done or delivered.

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

A claim under this Section can be made only when the following conditions are satisfied:

a) The thing must have been done or delivered lawfully;

b) The person who has done or delivered the thing, must not have intended to do so gratuitously; and

c) The person for whom the act is done/to whom thing is delivered must have enjoyed the benefit of the act done/thing delivered.

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

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

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

Example: *A paid some money to B by mistake which was in fact due to C. In this case, B must repay the money to C as it had been paid under a bonafide mistake.*

DISCHARGE OF CONTRACT

Discharge of contract means termination of the contractual relations between the parties to a contract. A contract is said to be discharged when the rights and obligations of the contracting parties are extinguished and their relationship comes to an end.

VARIOUS MODES OF DISCHARGE

A contract may be discharged in the following ways:

- By performance of contract.
- By agreement.
- By lapse of time.
- By operation of law.
- By impossibility of performance.
- By committing breach of contract.

(1) DISCHARGE BY PERFORMANCE OF CONTRACT

Performance of a contract is one of the most usual ways of discharge of a contract when the parties to the contract fulfill their obligations under a contract, the contract is said to have been performed and the contract comes to an end. Performance of contract may be classified as:

a) Actual Performance: A contract is said to be discharged by actual performance when the parties to the contract perform their promise in accordance with the terms of the contract.

b) Attempted Performance or Tender: A contract is said to be discharged by attempted performance when the promisor has made an offer of performance (i.e., a valid tender) to the promisee but it has not been accepted by the promisee.

(2) DISCHARGE BY AGREEMENT

As contract emerges from an agreement of both parties, it may also be terminated by another agreement or consent of both parties. A contract can be discharged by mutual agreement in any of the following ways:

a) **By novation (Substitution of a new contract):** Novation means substituting a new contract for the existing one, either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. The novation may be of the following two types i.e., (i) novation involving change of parties, but the contract remaining the same (ii) novation involving substitution of a new contract, but parties remaining the same.

b) **By alteration:** Alteration means change in one or more of the terms of a contract with the consent of all the parties. If any material alterations are made in the contract, the original contract will come to an end and in its place a new contract in an altered form comes into existence.

c) **By rescission:** Rescission means cancellation of the contract. A contract may be rescinded by agreement between the parties at any time before it is discharged by performance or in some other way.

d) **By remission:** The term 'remission' may be defined as the acceptance of lesser fulfillment of the terms of the promise, e.g., acceptance of a less sum of money where more is due.

e) **By waiver:** When both the parties, by mutual consent, agree of abandon their respective rights, the contract need not be performed and the same is discharged. It is called waiver. To constitute a waiver, neither an agreement nor consideration is necessary.

f) **By merger:** It takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under the same or some other contract, e.g., a tenant buying the house in which he is a tenant.

(3) DISCHARGE BY LAPSE OF TIME

The Limitations Act, 1963 provides that a contract must be performed within the period of limitation. If the contract is not performed and the promisee fails to take any action within the period of limitation, then the contract is terminated or discharged by lapse of time.

(4) DISCHARGE BY OPERATION OF LAW

A contract may be discharged by operation of law in the following cases:

a) Death: A contract involving the personal skill or ability of the promisor is discharged automatically on the death of the promisor.

b) Insolvency: When a person is declared insolvent, he is discharged from his liability up to the date of his insolvency.

c) Unauthorized Material Alteration: If any party makes any material alteration in the terms of the contract without the approval of the other party, the contract comes to an end.

d) Merger: Where an inferior right accruing to a party in a contract merges into the superior rights accruing to the same

party, the earlier contract is discharged.

(5) DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

A contract will be discharged when the performance of contract becomes impossible. The effects of impossibility of performance may be of the two types, namely,

a) Initial impossibility: It is the impossibility which exists at the time of formation of contract. It makes the contract *void ab initio, i.e.,* void from the very beginning.

b) Subsequent or supervening impossibility: Supervening impossibility means impossibility which does not exist at the time of making the contract but which arises subsequently after the formation of the contract and which makes the performance of the contract impossible or illegal.

Supervening impossibility is an excuse for the non-performance of the contract in the following cases:

(i) Destruction of subject matter: If the subject-matter of a contract is destroyed after making the contract, without the default of either party, the contract is discharged.

(ii) Death or personal incapacity: The contract is discharged on the death or incapacity or illness of a person if the performance of a contract depends on his personal skill or ability.

(iii) Change of law: The contract is discharged if the performance of the contract becomes impossible or unlawful due to change in law after the formation of the contract.

(iv) Non-occurrence or non-existence of particular state of thing: Where a contract is made on the basis of continued existence or occurrence of a particular state of things, the

contract comes to an end if the state of things ceases to exist or changes.

(v) Outbreak of war: The pending contracts at the time of declaration of war are either suspended or declared as void.

(6) DISCHARGE BY BREACH OF CONTRACT

A contract is said to be discharged by breach of contract if any party to the contract refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. Breach of contract is of two kinds, namely,

a) Anticipatory breach of contract: When a party to a contract refuses to perform his part of the contract, before the due date of performance, it is known as anticipatory or constructive breach of contract.

b) Actual breach of contract: Actual breach of contract occurs in the following two ways:

(i) On due date of performance: If a party to a contract fails to perform his obligation at the specified time, he is liable for its breach.

(ii) During the course of performance: If during performance of a contract, a party to it either fails or refuses to perform his obligation, there is said to be actual breach during performance of the contract.

FRUSTRATION

Frustration may be defined as the pre-mature termination of the contract owing to the change of circumstances which are entirely beyond the control of the parties.

REMEDIES FOR BREACH OF CONTRACT

A breach of contract occurs if any party refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. A breach of contract may arise in two ways, (a) anticipatory breach and (b) actual breach. A remedy is the course of action available to an aggrieved party (i.e., the party not at default) for the enforcement of a right under a contract. The various remedies available to an aggrieved party are as follows:

- Suit for rescission of the contract.
- Suit for damages.
- Suit for specific performance
- Suit for injunction
- Suit upon quantum meruit.
- Restitution.

I. RESCISSION OF THE CONTRACT

Recession of a contract means annulment of it. When all or some of the terms of the contract are cancelled, rescission of a contract takes place. When there is a breach of contract by one party, the aggrieved party may rescind the contract and need not perform his part of the contract. The aggrieved party has to file a suit for rescission. When rescission is granted, the aggrieved party is absolved form all his obligations under the contract.

The court grants rescission in the following cases:

a) Where the contract is voidable at the option of the plaintiff.

b) Where the contract, is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

The court, may, however, refuse to grant rescission, in the following cases:

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

b) Where owing to change in the circumstances of the contract, the parties cannot be restored to their original position; or

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

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

II. SUIT FOR DAMAGES

"Damages" are monetary compensation allowed for loss suffered by the aggrieved party due to breach of contract. The object of awarding damages is not to punish the party at fault but to make good the financial loss suffered by the aggrieved party due to the breach of contract.

Types of Damages

a) General or ordinary damages: These are the damages which are payable for the loss arising naturally and directly, in the usual course, from the breach of contract. In a contract for the sale of goods, the measure of ordinary damages is the difference between the contract price and the market price of such goods on the date of breach.

b) Special damages: These are the damages which are payable for the loss arising due to some special or unus circumstances.

c) Exemplary or punitive or vindictive damages: These are the damages which are in the nature of punishment. The court may award these damages in case of:

i) Breach of contract to marry.

ii) Wrongful dishonour of cheque by a banker in violation of Section 31 of the Negotiable Instruments Act. The damages are estimated on the basis of loss of prestige and goodwill of the customer. The rule applied in this case is that smaller the amount of cheque, the higher shall be the damages.

d) Nominal damages: These are the damages which are very small in amount. Such damages are awarded simply to establish the right of the party to claim damages for the breach of contract even though the party has suffered no loss.

e) Liquidated damages and penalty: When the amount of compensation fixed by an agreement between the parties to be paid in case of breach of contract is in the nature of a fair and honest pre-estimation of probable damages. It is called liquidated damages.

When the amount named in the contract at the time of its formation is disproportionate to the damages likely to accrue in the event of breach, it will be known as penalty.

Rules Regarding Determination of Damages

Section 73 of the Contract Act provides that when a contract has been broken the party who suffers by such breach, is entitled to receive, from the party who has broken the contract.

1. The ordinary damages are recoverable: The aggrieved

party is entitled to receive such damages:

a) as may fairly and reasonably be considered to arise naturally from the breach; or

b) as may reasonably be supposed to have been in the contemplation of both the parties at the time of making of contract as the probable result of breach.

2. Remoteness of damage: Compensation shall not be granted for any remote or indirect damage. Damages are considered to be remote if they are not the necessary or probable consequence of breach or if they were not in the contemplation of the parties at the time when contract was made. Loss of profit is not to be taken in account in estimating damages unless otherwise agreed upon.

3. Primary aim of damages: The primary aim of the law of damages for breach of contract is to place the aggrieved party in the position which he would have occupied if the breach had not occurred.

4. Special damages, i.e., damages in the contemplation of the parties: Special damages which do not arise naturally from the breach cannot be recovered unless these were in the contemplation of the parties.

5. Only compensation, no penalties: Damages are allowed by way of compensation for the loss suffered and not by way of punishment except in the case of (a) breach of promise to marry, and (b) wrongful dishonour of a cheque by a bank.

6. Nominal damages: What the aggrieved party has not suffered any loss, the court may allow him nominal damages, in its discretion.

7. Mental pain and suffering: Damages are not allowed for injured feeling or mental pain except where (i) the breach was reckless, (ii) it caused bodily harm, and (iii) the defaulting party was aware that breach would cause mental suffering.

8. Duty to mitigate the loss: It is the duty of the injured party to take all reasonable steps to mitigate the loss caused by the breach. He cannot seek damages for loss which are not due to breach but due to his own neglect to mitigate the loss.

9. Difficulty of assessment: Any difficulty in assessing damages shall not prevent the injured party from recovering them. The court must do its best to determine the amount of damages.

10. Cost of decree: The aggrieved party can recover the cost of getting the decree along with the damages.

III. SUIT FOR SPECIFIC PERFORMANCE

This means demanding the court's direction to the defaulting party to carry out the promise according to the terms of the contract. Specific performance of the contract may be directed by the court in the following circumstances:

(i) Where actual damages arising from breach are not measurable.

(ii) Where monetary compensation is not an adequate remedy. Specific performance of an agreement will not be granted –

a) Where the damages are considered as an adequate remedy;

b) Where the contract is of personal nature, e.g. contract to marry;

c) Where the contract is made by a company beyond its

powers as laid down in its Memorandum of Association;

d) Where the court cannot supervise the performance of the contract;

e) Where one of the parties is a minor;

f) Where the contract is inequitable to either party.

IV. SUIT FOR INJUNCTION

An injunction is an order of the court requiring a person to refrain from doing some act which has been the subject matter of contract. The power to grant injunction is discretionary and it may be granted temporarily or for an indefinite period.

V. SUIT UPON QUANTUM MERUIT

The word '*quantum meruit'* literally means "as much as is earned" or "according to the quantity of work done". When a person has begun the work and before he could complete it, if the other party terminates the contract or does something which makes it impossible for the other party to complete the contract, he can claim for the work done under the contract.

VI. RESTITUTION

Restitution means 'an act of restoration'. If a person has been unjustly enriched at the expense of the other party, he should restore the benefit received or compensate the other party.

MODULE – II

SPECIAL CONTRACTS

CONTRACT OF INDEMNITY AND GUARANTEE

The Contract of Indemnity and Guarantee are specific types of Contract. Specific provisions have been made in the Contract Act with regard to these types of contracts. The special legal provisions relating to these contracts are contained in Sections 124 to 147 of the Indian Contract Act, 1872.

CONTRACT OF INDEMNITY

The term 'indemnity' means security against hurt, loss or damage. A contract of indemnity refers to promise made by one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit. A contract of Fire Insurance or Marine Insurance is a Contract of Indemnity.

Definition

According to Sec. 124 of the Contract Act, the contract of indemnity has been defined as:

"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".

Indemnifier: The person who gives the indemnity, i.e., who promises to compensate for the loss, is known as indemnifier.

Indemnity-holder: The person, for whose protection the indemnity is given, i.e., who is protected against loss, is known as indemnity-holder or indemnified.

Example

A contract to indemnify B against the consequences of any proceeding which C may take against B in respect of a certain sum of Rs. 200. This is a contract of indemnity. A is the indemnifier (Promisor) and B is the indemnified (Promisee).

Characteristics of a Contract of Indemnity

The important features of an Indemnity Contract are as follows:

1. **Essentials of a valid contract:** It must have all the essential elements of a valid contract, such as agreement, free consent, competency of the parties, legality of object and consideration.

2. **Compensation of loss:** This is the most important element of a contract of indemnity. One party must promise to save the other party from any loss which he may suffer.

3. **Express or Implied:** The promise to indemnify a person against the loss suffered by him, may be express or implied. The express promise is one where a person promises in express terms to compensate the other from the loss. And the implied promise is one where the conduct of the promisor shows that he promised to indemnify the other party against the loss suffered by him.

Rights of Indemnity-Holder

According to Section 125 of the Contract Act, the indemnity holder, when sued, is entitled to recover from the promiser.

1. ***All damages*** which he is compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

2. ***All costs*** which he is compelled to pay, in bringing or defending such suit:

a) he did not contravene the orders of the promiser, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or

b) the promisor authorized him to bring or defend the suit;

3. ***All sums*** which he has paid under the terms of any compromise of any such suit:

a) the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or

b) the promisor authorized him to compromise the suit.

4. ***Suit for specific performance:*** An indemnity holder is entitled to sue the indemnifier even before he has suffered any damage provided an absolute liability has been incurred by him.

Rights of Indemnifier

There is no provision in the Indian Contract Act about indemnifier's rights. The Act is silent on this point. It may, however, be said that indemnifier's rights are the same as those of a surety, which are the essential part of law.

CONTRACT OF GUARANTEE

The term 'guarantee' may be defined as undertaking by one person to pay the amount due from another person. And a contract to pay the amount due from another person, in case the latter fails to pay, is known as contract of guarantee.

Definition

According to Section 126 of the 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." A contract of guarantee involves three parties, the creditor, the surety and the principal debtor.

Surety: The person who gives the guarantee is called the surety.

Principal Debtor: The person in respect of whose default the guarantee is given is called the principal debtor.

Creditor: The person to whom the guarantee is given is called creditor.

Example

X advanced a loan of Rs. 10000 to *Y* at the request of *Z*. And *Z* promised to *A* that if *Y* does not repay the amount then he (*Z)* will pay. This is a contract of guarantee. In this case, *A* is the creditor, *Y* is the principal debtor and *Z* is the surety.

CHARACTERISTICS OF A CONTRACT OF GUARANTEE

The essential features of a contract of guarantee are as follows:

1. **Three parties:** A contract of guarantee is a tripartite agreement between the principal debtor, creditor and surety.

2. **Consent or Identity of mind:** The contract of guarantee requires the identity of mind (concurrence) of all the said three persons in respect of the subject matter of the contract.

3. **Existence of a Liability:** There must be an existing liability or a promise whose performance is guaranteed. Such liability or promise must be enforceable by law.

4. **Primary and secondary liability:** It is an essential requirement of a contract of guarantee that there must be someone primarily liable (i.e., liable as principal debtor) other than the surety. A contract of guarantee presupposes existence of some

liability of the principal debtor to the creditor.

5. Essentials of a valid contract: All the essential elements of a valid contract must be present in a contract of guarantee. However, the following points are worth noting in this regard:

a) The principal debtor need not be competent to contract. In case the principal debtor is not competent to contract, the surety would be regarded as the principal debtor and would be personally liable to pay.

b) Surety need not be benefited. 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.

c) A contract of guarantee may be oral or in writing.

6. No misrepresentation: Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction is invalid.

7. No concealment: Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

8. Surety's liability must be conditional: The liability of surety should arise only when the principal debtor makes a 'default'. If surety's liability arises independent of the default of the principal debtor, it is not a contract of guarantee.

KINDS OF GUARANTEE

1. Specific guarantee: Where a guarantee is given for a single and particular transaction or debt, it is called specific or simple guarantee. Such guarantee comes to an end as soon as the transaction is duly performed or the debt is duly discharged.

2. **Continuing guarantee:** A guarantee which extends to a series of transactions called a continuing guarantee. It is not confined to single transactions.

3. **Retrospective guarantee:** Where a guarantee is given for an existing debt, is called a retrospective guarantee.

4. **Prospective guarantee:** When a guarantee is given for a future debt, it is called prospective guarantee.

5. **Absolute guarantee:** It means a guarantee where the surety unconditionally promises to pay in case of default of the principal debtor.

6. **Conditional guarantee:** It means a guarantee where the surety promises to pay in case of some event, in addition to the default of the principal debtor, happens.

7. **Fidelity guarantee:** A guarantee given for the good conduct or honesty of a person employed in a particular office is called a fidelity guarantee.

8. **Limited or unlimited guarantee:** A limited guarantee is one, restricted to a single transaction. An unlimited guarantee is one which is unlimited either as to time or amount.

Revocation of Continuing Guarantee

A continuing guarantee as to future transactions may be revoked in any of the following ways:

(i) **By notice of revocation by the society [Section 130]:** A continuing guarantee may at any time be revoked by the surety as to the future transactions by notice to the creditor. In such a case the surety would not be responsible for future transactions which may be made by the principal debtor after surety has revoked the contract of guarantee.

(ii) By the death of the surety [Section 131]: In the absence of any contract to the contrary, the death of the surety operates as a revocation of a continuing guarantee as to the future transactions taking place after the death of surety.

(iii) By modes of discharging the surety: A continuing guarantee is also revoked in the same manner in which the surety is discharged such as:

a) By novation [Section 62];

b) By variance in terms of contract [Section 133];

c) By release or discharge of principal debtor [Section 134];

d) By creditors act of omission [Section 139];

e) By loss of security [Section 141].

RIGHTS OF SURETY

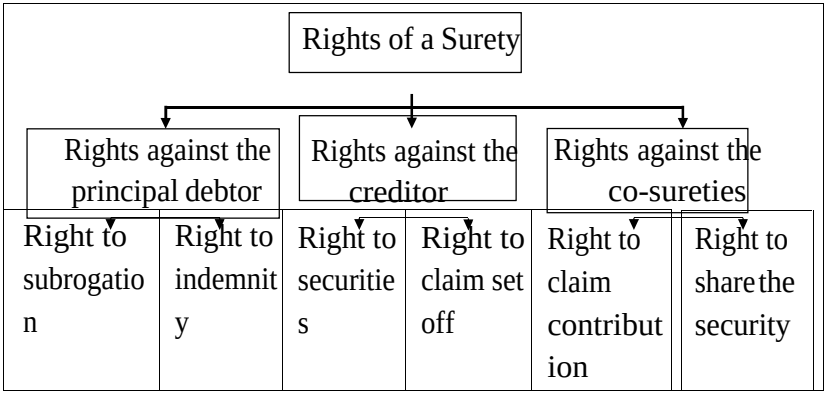
The Act recognizes certain rights of the surety, besides imposing liability on him by virtue of Section 128. This right may be studied under the following three heads:

1. Right against the principal debtor.

2. Right against the creditor.

3. Right against the co-sureties.

4.



1. Rights of the Surety against the Principal Debtor

a) Right of subrogation [Section 140]: On the default of the principal debtor, the surety can, after paying off the creditor, claim all those rights which the creditor had against the principal debtor. In other words, the surety steps into the shoes of the creditor to exercise his rights. There is a need of assignment or transfer of rights from the creditor to the surety.

b) Right to claim indemnity [Section 145]: In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety, and the surety is to recover from the principal debtor whatever sum he has paid rightfully under the guarantee but no sums which he has paid wrongfully, e.g. cost of fruitless litigation.

2. Rights of the Surety against the Creditor

a) Rights to claim securities: A surety is entitled to the benefit of every security which the creditor has against the

principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.

b) Right to claim set-off: The surety is also entitled to the benefit of the principal debtor's set off against the creditor if it arises out of the same transaction.

c) Right to share reduction: The surety is entitled to claim the proportionate reduction of his liability by the amount of dividend claimed by the creditor.

3. Rights of the Surety against the Co-Sureties

Where a debt is guaranteed by more than one surety, they are called co-sureties. In such a case it would be unfair if one co-surety is compelled to pay the entire debt of the principal debtor.

a) Right to contribution [Section 146]: Where co-securities have guaranteed the same debt either jointly or severally, each surety would be liable to contribute equally towards the debt or that part of the debt which unpaid.

b) Right to share benefits of securities: Sometimes, at the time of guarantee, one of the co-sureties receives a security from the principal debtor, or on payment of the debt, he receives security from the creditor. In such cases, the co-sureties are entitled to share the benefit of the securities.

c) Liability of co-sureties bound in different sums [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.

d) Effect of release of a surety [Sec. 138]: Where there are co-sureties, release by the creditor of one of them does not discharge the others nor does it free the surety so released from his liability to other sureties.

NATURE AND EXTENT OF SURETY'S LIABILITY

According to Section 28 of the Contract Act defines the nature and extent of surety's liability as "the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract". The nature s

1. Surety's liability is coextensive: The surety may limit his liability at the time of entering into the contract. In the absence of such express specification, the surety's liability will be coextensive with that of the principal debtor.

2. Secondary liability: The surety's liability arises only when the principal debtor makes a default. In this sense his liability is secondary.

3. Surety's liability arises immediately on default of the principal debtor: Unless specially agreed, the surety cannot demand a notice of the default from the creditor, because it is the responsibility of the surety to see that the principal debtor makes the payment.

4. The creditor need not exhaust his remedies against the principal debtor before he proceeds against the surety.

5. Surety's liability where the original contract between creditor and principal debtor is void or voidable: If the original agreement between the creditor and the principal debtor is void, the surety may still become liable not only as a surety but also as a principal debtor.

6. If the creditor has obtained the guarantee by misrepresentation or by concealing some material information then the guarantee shall be invalid and the surety will not be liable.

DISCHARGE OF SURETY FROM LIABILITY

A surety is said to be discharged when his liability comes to an end. A surety may be discharged from liability by the

I. revocation of the contract of guarantee;

II. conduct of the creditor; or

III. invalidation of the contract.

I. Discharge of Surety by Revocation

a) Revocation by giving notice [Section 130]: A surety may revoke the guarantee, at any time, by giving notice of revocation to the creditor.

b) Revocation by death [Section 131]: In the absence of any contract to the contrary, the death of the surety operates as termination of a continuing guarantee as to future transactions.

c) Revocation by novation: A surety is discharged when a new contract of guarantee is substituted for an old one.

II. Discharge of Surety by the conduct of the creditor

a) By variance in terms of contract [Section 133]: If without the consent of the surety, the creditor makes any material change in the nature or terms of his contract with the principal debtor, the surety is discharged from liability.

b) By release or discharge of the principal debtor [Section 134]: If there is any contract between the creditor and the principal debtor by which the debtor is released, then the surety will also be discharged.

c) By compounding with or giving time to the principal debtor [Section 135]: The surety is discharged if the creditor (a) makes a composition with the principal debtor, or (b) gives time to him, or (c) promises not to sue the principal debtor; without the consent of the surety.

d) By Creditor's act or omission impairing surety's eventual remedy [Section 139]: If the creditor does any act which is inconsistent with 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 surety against the principal debtor is thereby impaired, the surety is discharged.

e) By loss of securities [Section 141]: If the creditor loses or parts with the security without the consent of the surety, the surety is discharged from his liabilities to the extent of the value of the security.

III. Discharge of Surety by invalidation of contract

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

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

c) Failure of a person to join as Co-surety [Section 144]: Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another has joined in it as co- surety, the guarantee is not valid if that person does not join.

d) Failure of consideration: The surety will be discharged on a substantial failure of consideration.

e) Lack of essential element of a valid contract: If any of the elements is not present, the contract is void and the surety is discharged.

DIFFERENCE BETWEEN CONTRACT OF INDEMNITY AND GUARANTEE

	Basis	Contract of Indemnity	Contract of Guarantee
1.	**Number of Parties**	There are two parties - indemnifier and the indemnified.	Contract of guarantee has three parties, viz., creditor, principal debtor and surety.
2.	**Number of Contracts**	There is only one contract between the indemnifier and the indemnified.	It has three contracts - Between principal debtor and the creditor, Between the creditor and surety; and Between the surety and principal debtor.
3.	**Nature of Liability**	Liability of indemnifier is primary and unconditional.	Liability of surety is secondary and conditional. It arises only if the principal debtor does not pay.
4.	**Request**	It is not necessary for the indemnifier to act at the request of the indemnified.	It is necessary that surety should give the guarantee at the request of the debtor.
5.	**Existence of Risk**	The liability of the indemnifier arises only on the happening of a contingency.	There is an existing liability the performance of which is guaranteed by the surety.

6.	**Rights of Parties**	Indemnifier cannot bring a suit against a third party in his own name unless there is assignment of claim in his favour.	The surety can proceed against the principal debtor in his own right after he has discharged the liability of the principal debtor.
7.	**Parties Interests**	Indemnifier may have some other interest than indemnity. For instance, a *del credre* agent gets commission for his promise to indemnify the principal against bad debts.	The surety should have no other interest in the transaction apart from guarantee.
8.	**Purpose**	The object of indemnity is to provide security against loss.	The object of guarantee is to provide security to the creditor against default by the principal debtor.

CONTRACT OF BAILMENT AND PLEDGE

The Indian Contract Act, 1872 deals with the general rules relating to bailment but does not deal with all types of bailment for which separates acts have been enacted, for example, The Carrier Act 1865, The Railways Act 1889, The Carriage of Goods by Sea Act, 1925.

CONTRACT OF BAILMENT

The word 'Bailment' has been derived from the French word 'Baillier' which means 'to deliver'. Bailment, therefore, means delivery of property or goods in trust to another for a special purpose and for a limited period

Definition

According to Section 148 of the Contract Act has defined bailment as *"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".*

Bailor: The person delivering the goods is called 'bailor'.

Bailee: The person to whom they are delivered is called "the bailee".

Example

1. ***X*** deposited his luggage in a cloak room at railway station. This is a contract of bailment between **X** and the Railways.

2. ***Y*** who is going out of station delivers a horse to ***Y*** for proper care.

3. ***S*** handsover a piece of cloth to ***B,*** a tailor, for making a shirt.

4. ***A*** gives his book to his friend ***B,*** for preparing lessons of an examination.

5. ***A*** handsover gold ornaments to ***B,*** a bank, as security for loan.

CHARACTERISTICS OF BAILMENT

The requisites or essential features of bailment can be summed up as under:

1. Delivery of possession goods: It is an essential and important element of the bailment that the possession of the goods must be delivered by the bailor to the bailee. Delivery may be either (a) actual, or (b) constructive.

a) ***Actual Delivery:*** A delivery is said to be actual where the goods are physically handed over by the bailor to the bailee. For example, Mr. A delivers a Car for repair to a workshop dealer.

b) ***Constructive Delivery:*** It may not always be possible to give physical possession due to difficulty or inconvenience, or for any other reason. In such cases, delivery may be constructive or symbolic. For example, delivery of railway receipts [*Morvi Mercantile Bank Ltd. vs. Union of India (1965)*].

2. Delivery of goods must be for some purpose and upon a contract: Delivery of goods should be made for some purpose upon an agreement that when the purpose for which the goods are delivered is completed, the goods should be returned to the bailor.

3. Return of goods: In bailment the goods are given on the condition that when the purpose for which they are given, is accomplished they shall be returned to the bailor or disposed of according to his directions. The goods may be returned in their original form or in an altered form.

4. Movable goods: There can be a bailment of movable properties only but money is not included in the category of movable goods.

5. No transfer of ownership: In bailment, the bailor is not transferred the ownership to the bailee. Possession alone is transferred but ownership is retained by the bailor.

CLASSIFICATION OF BAILMENT

The bailment may be broadly classified on the basis of charges (i.e., reward) and benefits as discussed below:

1. Bailment on the basis of Charges or Reward

***a) Gratuitous bailment*:** When the goods are delivered by the bailor to the bailee without any charges or remuneration, it is called gratuitous bailment.

b) Non-gratuitous bailment: Where either the bailor or the bailee gets remuneration, the bailment is termed as non-gratuitous.

2. Bailment on the basis of benefits

a) Bailment for the exclusive benefit of bailor: It is a contract of bailment which is executed only for the benefit of the bailor and the bailee does not derive any benefit from it.

b) Bailment for the exclusive benefit of bailee: It is a contract of bailment which is executed only for the benefit of the bailee and the bailor does not derive any benefit from it.

c) Bailment for the mutual benefit of both bailor and bailee: It is a contract of bailment which is executed for the mutual benefit of both of them.

DUTIES OF BAILOR

1. To disclose known defects in the goods: Under Section 150, the duty of bailor to disclose faults in the goods bailed is different for gratuitous and non-gratuitous bailor. It is described below:

a) Duty of gratuitous bailor: A gratuitous bailor is a bailor who lends his goods to the bailee without any charge. In such a case, the bailor is bound to disclose to bailee the faults in the goods bailed of which the bailor is aware and which materially interfere with the use of them or expose the bailee to extraordinary risks. If the bailor fails to make such disclosure, he

is liable to the bailee for damages.

b) Duty of a non-gratuitous bailor: Since a non-gratuitous bailor delivers goods for a reward, his duty is greater. He must ensure that the goods delivered are reasonably safe. Section 150 provides that if the goods are bailed for hire, the bailor would be liable for such damages, whether or not he was aware of the existence of any faults.

2. To bear ordinary expenses: In a gratuitous bailment, where the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of bailment.

3. To bear extraordinary expenses: In case of non-gratuitous bailment, where the goods are bailed for reward or remuneration, the ordinary expenses are not to be borne by the bailor, but if there are some extraordinary expenses incurred, then it becomes the duty of the bailor to pay such extraordinary expenses.

4. To indemnify bailee: The bailor is responsible to the bailee for any loss which the bailee may suffer because of the defective title of the bailor.

5. To receive back the goods: It is the duty of the bailor to take back the goods when the bailee returns them after the expiry of period of bailment, or the accomplishment of the purpose for which the goods were bailed.

6. To bear the risks: The bailor must bear the risk of loss of goods provided the bailee has taken all reasonable steps to protect the goods from loss.

DUTIES OF BAILEE

1. To take reasonable care of the goods bailed: According to this duty, the bailee is required to take reasonable care of the goods bailed to him. The bailee must take as much care as an ordinary sensible man would take under the similar circumstances, in respect of his own goods of the same type (Section 151). If the bailee is negligent in taking the care of the goods bailed, then he is liable to pay damages for loss or destruction of the goods.

2. Not to make any authorized use of goods bailed: If the bailee makes any use of the goods bailed which is not according to the conditions of bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

3. Not to mix goods bailed with his own goods: It is the duty of the bailee not to mix the bailor's goods with his own goods. If the bailee mixes up his own goods with those of the bailor, the following rules apply:

a) Mixing of goods of bailor with that of bailee with bailor's consent: Bailee cannot mix the goods bailed with his own goods. But with the consent of the bailor, the goods may be mixed and in that case the parties shall have an interest in proportion to their respective shares in the mixture thus produced (Section 155).

b) Mixing of goods without bailor's consent, where the goods can be separated: If the bailee mixes the goods bailed with his own goods without the consent of the bailor, and the goods can be separated, the property in the goods remains in the parties respectively but the bailee must bear the expenses of separation and any damages arising from separating the mixture (Section 156).

c) Mixing of goods without bailor's consent, where goods cannot be separated: 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 them, the bailee shall compensate the bailor for the cost of goods (Section 157).

4. To return the goods: The bailee must return or deliver the goods according to the bailor's directions without demand, after the accomplishment of purpose or after the expiry of period of bailment. If he fails to do so, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

5. Not to set up adverse title: The bailee must not do any act which is inconsistent with the title

of the bailor. He must not set up his own title or a third party's title on the goods bailed to him.

6. To return any accretions to the goods bailed: In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

RIGHTS OF BAILOR

1. Right to terminate the bailment: If the bailee fails to follow the conditions of bailment, the bailor may terminate the bailment.

2. Right to claim damages in case of negligence: If the bailee has not taken reasonable care or special care, the bailor has a right to claim damages for the loss, destruction or deterioration of the goods bailed.

3. **Right to demand return of goods:** The bailor has a right to demand return of goods after the accomplishment of the purpose or after the expiry of period of bailment.

4. **Right to file a suit against wrong-doer:** A wrong-doer is a third person who does some wrongful act and deprives the bailee from the use of goods bailed or does injury to the goods bailed, the bailor has a right to file a suit against that third person and claim compensation from him.

5. **Right to file a suit for the enforcement of the duties imposed upon a bailee:** If the bailee neglects in his duties, the bailor has a right to enforce these duties by filing a suit against the bailee.

6. **Right to claim any increase in value or profits:** In the absence of contract to the contrary, the bailor has a right to demand any increase or profit which may have accrued from the goods bailed.

RIGHTS OF BAILEE

1. **Right to enforce bailor duties:** The bailee can, by a suit, enforce the duties of the bailor towards him.

2. **Right to claim compensation in case of faulty goods:** Bailee can sue the bailor for his failure to disclose faults in the goods bailed which materially interfere with their use or expose the bailee to extraordinary risks.

3. **Right to claim reimbursement of expenses:** The bailee can claim reimbursement of expenses incurred by him in the case of a gratuitous bailment, and of extraordinary expenses in case of non-gratuitous bailment.

4. **Right to return the goods to anyone of the joint bailors:** If several joint owners of goods bail them, the bailee may

deliver them back to, or according to the direction of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

5. **Right to recover agreed charges:** Where there is no such agreement of charges, the bailee has the right to ask the bailor for the payment of necessary expenses incurred by him for the purpose of bailment.

6. **Right to recover loss in case of Bailor's defective title:** The bailee has a right to be indemnified in case he suffers any loss because of the defective title of the bailor.

7. **Right of action against third parties:** If a third person wrongfully deprives bailee of the use of possession of the goods bailed, he has a right of action against such third parties in the same manner as the true owner has against third persons.

8. **Right to interplead:** Where a person other than the bailor claims the goods bailed, bailee may apply to the court to stop delivery of the goods to the bailor and to decide the title to the goods.

9. **Right of lien:** The bailee has a right to claim his lawful charges and if they are not paid, the bailee is given the right to retain the goods until the charges due in respect of those goods are paid. This right is known as bailee's right of lien.

BAILEE'S LIEN

Lien means the right of a person, who has possession of the goods belonging to another person, to retain such possession of the goods until some debt due to him or claim is satisfied. This right is sometimes called "Possessory Lien".

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

a) Particular or Special Lien [Section 170]: A particular lien is a right to retain only those goods in respect of which some charges are due. This right is available only if the following conditions are fulfilled:

(i) The bailee must have exercised labour or skill in respect of the goods bailed.

(ii) The bailee must have rendered the service in accordance with the purpose of the bailment.

(iii) The bailee must be in possession of the goods.

(iv) There must not exist any contract for payment of price in future.

(v) The bailee cannot exercise right of lien if he has agreed to perform the services on credit.

(vi) The bailee can exercise the right of particular lien only if there is no agreement to the contrary.

b) General Lien [Section 171]: A general lien is a right to retain all the goods as a security for the general balance of account until the full satisfaction of the claims due whether in respect of those goods or other goods. The right of general lien is a privilege and is given only to certain kinds of bailee's namely, (i) Bankers, (ii) Factors, (iii) Wharfinger, (iv) Attorneys of a High Court, and (v) Policy brokers.

FINDER OF LOST GOODS

Sec. 71 of the Act clearly lays down that a person, who finds goods belonging to another and takes them into his custody, is called a finder of lost goods. Generally there is no obligation on the part of a person who finds goods, but if he picks them up or to take charge of the goods, he becomes the bailee of those goods.

Rights of the finder of lost goods

1. Right of Lien [Section 168]: The finder of goods has a right to retain the goods found until he receives the compensation for trouble and expenses voluntarily incurred by him-

a) to preserve the goods; and

b) to find out the true owner.

It may be noted that the finder of goods has no right to sue the owner for such compensation.

2. Right to sue for reward [Section 168]: If the owner of the goods lost has offered a specific reward, for the return of goods lost, the finder may sue for such reward, and may retain the goods unless he receives it.

3. Right to sell [Section 169]: A finder of goods has a right to sell the goods found under the following circumstances:

a) If the owner cannot with reasonable diligence be found; or

b) If the owner refuses to pay the lawful charges of the finder; or

c) If the goods are of a perishable nature; or

d) If the lawful charges of the finder in respect of the goods found exceed two-thirds of the total value of goods.

Duties and Liabilities of the Finder of Lost Goods

✓ The finder of goods must take reasonable care of the goods found.

✓ The finder of goods must return the goods to the real owner, who has paid the expenses incurred by the finder.

✓ The finder of goods must not use the goods for his own purpose.

✓ The finder of goods must not mix up the goods with his own goods.

✓ The finder of goods must also return the increase in the goods.

✓ The finder of goods must make efforts to find the true owner.

TERMINATION OF BAILMENT

Every contract of bailment comes to an end under the following circumstances:

1. **On the achievement of the object:** Where the bailment is for a specific purpose, it terminates as soon as the purpose is achieved.

2. **On the expiry of the period:** If the contract of bailment is only for particular period, it is terminated on the expiry of that period.

3. **Inconsistent use of goods:** Where a bailee does something which is inconsistent with the terms of the contract, the bailment is terminated.

4. **Destruction of the subject matter of bailment:** A bailment is terminated if the subject matter of the bailment (a) is destroyed, or (b) becomes incapable of being used for bailment because of some charge in the nature of goods.

5. **Gratuitous bailment:** Where the bailment is gratuitous, the bailor may terminate the bailment even before the specified time or before the purpose is fulfilled.

6. **Death of the bailor or bailee:** A gratuitous bailment is terminates by the death of either the bailor or bailee.

PLEDGE OR PAWN

A pledge is a special kind of bailment. In this case, the goods are delivered as a security for a loan or for the fulfillment of an obligation. According to Sec. 172 of the Indian Contract Act defines pledge as, "the bailment of goods as security for payment of a debt or performance of a promise". The bailor is in this case called the "pawnor" and the bailee is called the "pawnee".

Example: *Y* borrows Rs. 50,000 from Citi Bank and keeps his shares as security for payment of a debt. It is a contract of pledge or pawn.

Pawnor or Pledger:

The person who delivers the goods as security for payment of a debt or performance of a promise is called the pawnor. In the aforesaid example, *Y* is the pawnor.

Pawnee or Pledgee:

The person to whom the goods are delivered as security for payment of a debt or performance of a promise is called the Pawnee or Pledgee. In the aforesaid example, *Citi Bank* is the pawnee.

RIGHTS OF PAWNEE OR PLEDGEE

1. **Right of retainer:** The pawnee may retain the goods pledged not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

2. **Right of retainer for subsequent advance:** When the pawnee lends money to the same pawnor after the date of the pledge, it is presumed that the right of retainer over the pledged

goods extends to subsequent advances also.

3. Right to extraordinary expenses: The pawnee is entitled to recover from the pawnor extraordinary expenses incurred by him for preserving the goods pledged. This right is only a right of action but not a lien.

4. Right in case of default of the pawnor:

(a) To bring a suit on the debt and to retain the goods pledged as a collateral security.

(b) To sell the goods pledged after giving reasonable notice to the pawnor.

DUTIES OF PAWNEE

The pawnee has almost the same duties as those of the bailee. His duties as follows:

1. To take reasonable care of the goods pledged;

2. Not to make any unauthorized use of goods;

3. Not to mix goods pledged with his own goods;

4. To return goods; and

5. To return accretions to the goods.

RIGHTS OF PAWNOR

1. Defaulting pawnor's right to redeem:

The pawnor has an absolute right to redeem the goods pledged, upon the satisfaction of the debt. When the time is fixed for the payment of the debt, the pawnor may redeem the goods even after the expiry of the fixed time.

2. Preservation and maintenance of the goods:

It is implied that the pawnee as a bailee is bound to preserve the goods pledged and properly maintain them.

3. Protection as an ordinary debtor:

It is also implied that a pawnor has the rights of protection as an ordinary debtor by statutes meant for such protection e.g., the Moneylender's Act.

4. Right to receive the increase:

The pawnor has a right to receive any increase of profits from pledged goods.

DUTIES OF PAWNOR

The duties of pawnor are almost similar to those of a bailor which have already been discussed. However, the following are some additional duties of the pawnor.

a) Duty to repay the loan:

If he fails to repay the loan, as per the terms of the contract, the pawnee may bring a legal action against him for the recovery of the loan.

b) Duty to pay the expenses in case of default:

The pawnee must pay the expenses incurred by the pawnee due to default in repaying the loan at stipulated time.

PLEDGE BY NON-OWNERS

According to the general rule, only the true owner can pledge the goods but under the following cases, even a non-owner can make a valid pledge:

1. Pledge by a mercantile agent: The mercantile agent is an agent who has the authority either to sell the goods, or to consign the goods for the purpose of sale, or to buy the goods or to raise money on the security of the good. Following are the conditions for a valid pledge by a mercantile agent:

a) The mercantile agent must be in possession of goods or documents of title to goods.

b) The possession of goods must be with the consent of the owner.

c) The goods most he in the possession of the agent in his capacity as a mercantile agent.

d) The pawnee must act in good faith and should not have notice, at the time of pledge, that pawnor has no authority to sell.

2. Pledge by a person in possession under a voidable contract (Section 178-A): Where a person obtains possession of goods under a voidable contract, the pledge created by him is valid provided (a) the contract has not been rescinded at the time of pledge, and (b) the pawnee acts in good faith and without notice of pawnor's defect of title.

3. Pledge by a pawnor having only a limited interest (Section 179): Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

4. Pledge by co-owner in possession: Where there are several joint owners of goods then pledge by one of them who is in possession of the goods, with the consent of other co-owners, shall be valid.

5. Pledge by a seller in possession after sale [Section 30 (1) of the Sale of Goods Act]: A seller who continues to be in possession of the goods even after their sale, can make a valid pledge provided the pawnee acts in good faith and has no notice of sale.

6. Pledge by a buyer in possession before payment of price [Section 30 (2) of the Sale of Goods Act]: A buyer who obtains possession of goods with the consent of the seller before payment of price and pledges them, the pawnee will get a good t.tle provided he does not have notice of seller's right of lien or any other right.

Difference between Bailment and Pledge

Basis of distinction	Bailment	Pledge
1. Purpose	The bailment can be made for any purpose such as, safe custody, repair, use, transportation etc.	The pledge is made for a specific purpose i.e., repayment of a debt or performance of a promise.
2. Right to use	Bailee can use the goods pledged as per terms of bailment.	Pawnee cannot use the goods pledged. Pawnee can sell the goods
3. Right to sell	Bailee can either retain the goods or sue the bailor for his dues, but he cannot sell it.	pledged after giving notice to the pawnor in case of default by the pawnor.
4. Right to property	Bailee gets only the possession of the goods bailed.	Pawnee acquires a special property in the goods pledged.
5. Consideration	It may or may not exist in bailment.	In pledge, there is always consideration.

CONTRACT OF AGENCY

A person who is competent to make a contract may do so *(i)* either by himself or *(ii)* through another person. When he makes contracts through another person; he is said to be making a contract through an agent. The person who acts on behalf of another or who represents a person in dealing with third parties is called as an 'agent' and the person on whose behalf he acts or who is thus represented, is called as 'principal'. The contract which creates the relationship of principal and agent is known as 'agency'. The legal provisions relating to agency are contained in Chapter X (Sections 182 to 238) of the Indian Contract Act, 1872.

AGENT

According to 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 parties".

PRINCIPAL

The person for whom such act is done, or who is so represented, is called the principal.

AGENCY

The relationship between an agent and the principal is called agency, which may be created by an express or implied agreement.

Example:

X appointed *Y* to purchase 100 bags of rice on his behalf. In this case, *X* is the principal, and *Y*, the agent. And the relationship between *X and Y* is known as agency.

GENERAL RULE OF AGENCY

There are two important rule of agency:

1. **Whatever a person can do personally, he can do through an agent:** Whatever a person competent to contract may do by himself, he may do through an agent except for acts involving personal skill and qualification such as painting, marriage, singing etc.

2. **He who does an act through another does it by himself:** This means that the acts of agent are, for all legal purposes, the acts of the principal (Sec. 226).

ESSENTIALS OF A CONTRACT OF AGENCY

1. Existence of agreement: There must be an agreement by which a person is appointed as an agent by the other. The agreement may be express or implied.

2. Competency of the Principal: According to Section 183, "any person who is of the age of majority according to the law to which he is subject and who is of a sound mind, may employ an agent". An appointment of an agent made by an incompetent person is void. An agent acting on behalf of an incompetent person will be personally liable to third parties.

3. Any person may become an agent: According to Section 184, any person may become an agent and he need not be competent to contract. For instance, a minor can bring about a contractual relation between the principal and third party without that agent being liable to the principal.

4. No consideration is required to create agency (Sec. 185): The detriment to the principal in consenting to be represented by the agent is sufficient to support the promise of the agent.

CREATION OF AGENCY

The creation of an agency, i.e., creation of principal and an agent, may take place in any of the following ways:

1. Agency by express agreement (Sec. 187): An agency by express authority arises when an express authority is given to the agent by spoken or written words.

2. Agency by implied agreement (Section 187): When agency arises from the conduct of the parties, or inferred from the circumstances of the case, it is called an implied agency. Partners, servants and wives are usually regarded as agents by implication.

3. Agency by estoppel (Section 237): Where a person, by his words or conduct has wilfully led another person to believe that certain set of circumstances or facts exists, and that other person has acted on that belief, then he is estopped from denying the truth of such statements subsequently.

4. Agency by holding out: Agency by holding arises when a person by his past affirmative or positive conduct leads third person to believe that person doing some act on his behalf is doing with authority.

5. Agency by necessity: In certain circumstances, a person may be compelled to act as an agent of the other. In order to protect the interests of another, it may become necessary to take some action without waiting for the instructions of the owner. But the following conditions must be fulfilled before a person may act as an agent of necessity:

(a) There must be a real emergency to act on behalf of the principal,

(b) It may not possible for the agent to communicate with the principal or to obtain his instruction,

(c) The person acting as agent must act bonafide and in the interest of the parties concerned,

(d) The agent must adopt a reasonable and practical course under the circumstances of the case.

6. Husband and Wife relations: The wife is considered an implied agent of the husband for the purpose of buying household necessaries on credit, and the husband becomes bound to pay for the same.

7. Agency by operation of law: An agency may also come into existence by operation of law. In certain circumstances, the law treats one person as an agent of another. Example: Every partner is an agent of the partnership firm. Similarly, a legal advisor is the agent of his client.

8. Agency by ratification: Ratification means subsequent acceptance and adoption of an act by the principal originally done by the agent without authority. This is agency ex-post facto or agency arising after the event.

SUB-AGENT [SECTION 191]

A sub-agent is a person who is employed by the original agent and who acts under the control of the original agent in the business of agency.

Agent can appoint a sub-agent in the following circumstances:

1. If such appointment is permitted by the custom of the trade.

2. If the nature of the business makes such appointment necessary.

3. If the act to be done is purely ministerial and involves no exercise of discretion.

4. If principal agrees to such appointment.

5. In case of an unforeseen emergency.

SUBSTITUTED AGENT [SECTION 194]

A substituted agent is a person who, named by the original agent on the basis of an express or implied authority from the principal. He is taken as an agent o the principal for such part of the business of agency which is entrusted to him. A privity of contract is established between the principal and substituted agent.

DIFFERENT KINDS OF AGENTS

The relationship between the principal and agent and the extent of the authority of the latter are matters to be determined by agreement of the parties. A general classification of agents is as follows:

1. **General Agent:** A general agent is one who has authority to do all acts in the ordinary course of trade or profession. The authority of a general agent is continuous unless it is terminated.

2. **Special Agent:** A special agent is one who has authority to do a particular act in a particular transaction.

3. **Universal Agent:** A universal agent is one who has authority to do all acts which the principal can lawfully do and delegate. He has an unlimited authority to bind the principal.

4. **Commercial or Mercantile Agent:** A mercantile agent is a person having authority either to sell the goods or to consign the goods or to raise money on the security of goods. Mercantile agents may be of several kinds which are as follows:

a) Broker: He is an agent employed to make bargains and contracts in matters of trade, commerce, or navigation between other parties for a compensation commonly called brokerage.

b) Factor: A factor is one who is entrusted with the possession of goods and who has the authority to buy, sell or otherwise deal with the goods or to raise money on their security.

c) Auctioneer: An auctioneer is one who is entrusted with the possession of goods for sale at a public auction.

d) Commission Agent: The term 'commission agent' is a general term which is used in practice even for a factor or broker.

e) Banker: Banker acts as an agent of the customer when he collects cheques or drafts or bills or buys or sells securities on behalf of his customers.

f) Del-credere Agent: A del-credere agent is one who gives guarantee to his principal to the effect that the third person with whom he enters into contracts shall perform his obligation.

5. **Non-mercantile Agent:** An agent who does not deal in mercantile transactions. These include attorneys, solicitors, guardian, promoters, wife, etc.

DUTIES OF AN AGENT

The duties of an agent to his principal are as follows:

1. To conduct business as per directions or custom of trade [Section 211]: An agent is bound to conduct the business of his principal according to principal's directions or the custom of trade (in the absence of principal's directions).

2. **To act with reasonable care, skill and diligence [Section 212]:** An agent is bound to conduct the business of the agency with reasonable care and skill.

3. **Duty to render proper records [Section 213]:** An agent is bound to render proper accounts to his principal on demand.

4. **To communicate with principal [Section 214]:** It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal and obtain his instructions.

5. **Duty not to deal on his own account [Section 215 & 216]:** An agent is bound to disclose all material circumstances which have come to his knowledge on the subject, to the principal and obtain his consent if he desires to deal on his own account in the business of agency.

6. **Duty to pay sum received [Section 218]:** It is the duty of the agent to pay sum received on behalf of the principal subject to any lawful deductions for remuneration or expenses properly incurred.

7. **To protect and preserve the interest [Section 209]:** When an agency is terminated by the principal dying or becoming of unsound mind, the agent must take all reasonable steps for the protection and preservation of the interest entrusted to him.

8. **Not to delegate authority [Section 190]:** An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless custom of trade or the nature of the agency so requires.

9. **Duty not to set up adverse title.**

10. **Duty to pass the information to the principal.**

11. **Duty not to make any secret profit from agency.**

RIGHTS OF AN AGENT

1. Right of Retainer [Section 217]: An agent has the right to retain, out of any sum received on account of the principal in the business of the agency such as remuneration and advances made or expenses properly incurred.

2. Right to receive remuneration [Section 219 & 220]: The agent has the right to receive agreed remuneration or usual remuneration as per the custom of the trade in which he has been employed.

3. Right of lien [Section 221]: An agent has a right to retain goods, papers and other movable or immovable property of the principal received by him until the amount due to him had been paid or accounted for.

4. Right to indemnification [Section 222]: The agent has a right to be indemnified against the consequences of all lawful acts done by him in exercise of the authority conferred upon him.

5. Right to be indemnified against consequences of facts done in good faith [Section 223]: An agent has right to be indemnified by the principal against the consequences of act done in good faith that causes an injury to the rights of third person.

6. Right to compensation [Section 225]: The agent has a right to be compensated for injuries sustained by him by neglect or want of skill on the part of the principal.

DUTIES OF PRINCIPAL

The main duties of principal are as follows:

1. To remunerate the agent for his services;

2. To indemnify the agent against the consequences of all lawful acts;

3. To indemnify the agent against the consequences of an act done in good faith, even though the act causes an injury to the rights of third persons; and

4. To make compensation to the agent in respect of injury caused to such agent by his negligence or want of skill.

RIGHTS OF PRINCIPAL

1. To get proper accounts on demand from his agent.

2. To see that the agency business is conducted according to his instructions, or in their absence, according to the custom which prevails in the place where similar business is conducted.

3. To be entitled to compensation in respect of the direct consequences of the agent's negligence, want of skill, or misconduct.

4. To give instructions in cases of difficulty, when contracted by the agent.

5. To be entitled to compensation for loss, or any profit accruing, owing to departure from instructions.

6. To claim the benefit, if any, arising from a transaction entered into by the agent on his agent on his own account.

7. To repudiate the transaction, if a material fact is concealed or the dealing by the agent on his own account is disadvantageous to him.

8. To receive all moneys due to him, subject to such deductions by the agent as are permissible.

9. To remunerate the agent only after the completion of the act.

10. To refuse to pay the remuneration if the agent is guilty of misconduct.

LIABILITY OF AGENT TO THIRD PARTIES [Agent Personally Liable]

In the absence of any contract to that effect, an agent cannot personally enforce contract entered into by him on behalf of his principal, nor is he personally bound by them. The circumstances under which an agent becomes personally liable are as follows:

1. **Where the agent acts for a foreign principal [Sec. 230 (l)]:** The agent will be personally liable if he acts for a merchant who is resident abroad unless there is an intention to the contrary.

2. **Where the agent acting for a principal who cannot be sued [Sec. 230 (2)]:** The instances of principals who cannot be sued are sovereigns and their accredited agents, a company before its incorporation, or an incompetent person, etc. In such cases, the agent is personally liable.

3. **Where the agent acts for a principal who cannot be sued [230(3)]:** The instances of principals who cannot be sued are sovereigns and their accredited agents, a company before its incorporation, or an incompetent person, etc. In such cases, the agent is personally liable.

4. **Where an agent acts for a non- existent principal:** If the agent contracts for a fictitious principal, he shall incur personally liability.

5. **Where the agent acts for an undisclosed principal [Sec. 231]:** When the agent does not disclose that he is acting as an agent for someone and he contracts in his own name, he becomes personally liable to third parties.

6. **Where the agent expressly provides [Sec. 230]:** The personal liability of agent may arise from express agreement to that effect.

7. **Where the agency is one coupled with interest:** If the agent has an interest in the subject matter of the contract, he will be personally liable thereon to the extent of his interest in the contract.

8. **Where the agent exceeds his authority:** If an agent exceeds his authority, or represents to have some kind of authority which he does not have, he commits breach of warranty of authority and is personally liable to third parties who have acted under such false representation.

9. **Where there is trade usage or custom:** The agent is personally liable where there is trade usage or custom to that effect.

10. **Where an agent receives money by mistake or fraud:** Where a third party pays to an agent under a mistake, there can be suits personally against the agent for the refund of the amount.

11. **Where the agent signs the negotiable instrument in his own name:** If an agent puts signature on a negotiable instrument, etc., without making it clear that he is signing on behalf of the principal, the agent will be personally liable.

12. **Pretended agent [Section 235]:** If he induces a third party to enter into a contract with him, he will be personally liable to compensate the third party in case his alleged employer does not ratify his acts.

LIABILITIES OF PRINCIPAL TO THIRD PARTIES

In the following cases the principal is liable to third parties for the acts done by his agent:

1. **Where the agent acts within the scope of his authority [Sec. 226]:** When an agent is appointed, then his principal is bound by the acts of the agent within the scope of his real or apparent authority. Such acts of the agent may be enforced in the same manner and will have the same legal effect as if they were the acts of the principal.

2. **Where the act within agent's authority is separable from that which is beyond his authority (Sec. 227):** In case the act which is within the agent's authority, can be separated from that which lies beyond his authority, only the act which is within his authority is binding between him and the principal.

3. **Liability of principal for misrepresentation or fraud of the agent (Sec.238):** The principal is liable for and is bound by misrepresentation or fraud committed by the agent in respect of matters falling within his authority.

4. **Where the Agent Acts for an Unnamed Principal:** Where the agent discloses that he is an agent but does not disclose the name of the principal, the acts of the agent shall be binding on the principal. However, the agent will become personally liable if:

(a) the agent declines to disclose the identity of the principal, or

(b) the agent does not disclose his representative character, or

(c) there is a trade custom to the contrary.

5. **Responsibility of principal even where the agent is personally liable:** In cases where the agent has rendered himself personally liable in respect of the transactions, a third person dealing with him may hold either him or his principal, or both of them, liable.

6. Bound by notice given to agent [Section 229]: Notice given to agent, in the course of business of agency is considered as a notice to the principal.

TERMINATION OF AGENCY

A contract of agency may be terminated in one of the following two ways:

1. Termination by the act of parties:

A contract of agency may come to an end either on account of the act of the principal or agent or both. Thus, agency may be terminated.

a) By agreement between the parties: An agency is terminated if the principal and agent mutually agree to do so.

b) By revocation of authority by the principal: The principal has the power to revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

c) By renunciation of agency by the agent: An agency may also be terminated by the agent by an express renunciation, but a reasonable notice must be given to the principal.

2. Termination by operation of law:

An agency will come to an end by operation of law in the following cases:

a) Completion of the business of agency: When the purpose for which the agency was created is completed, the agency comes to an end automatically.

b) Expiry of time: Where the agent is appointed for a fixed period it will terminate on the expiry of that period, it is immaterial whether the purpose of agency has been accomplished or not.

c) Death or insanity of the principal or agent: An agency comes to an end automatically on the death or insanity of the principal or agent.

d) Insolvency of the principal: An agency comes to an end automatically on the insolvency of the principal.

e) Destruction of the subject matter: If the subject matter of the agency is destroyed, the agency comes to an end.

f) Dissolution of company: When the principal or agent is an incorporated company, the agency will come to an end on the dissolution of the company.

g) Principal becoming an alien enemy: If the principal and the agent belong to two different countries, and war breaks out between the two countries, the authority of the agent ceases.

h) Termination of the sub-agent's authority: The termination of the authority of an agent causes the termination of the authority of all sub-agents appointed by him.

MODULE – III

THE SALE OF GOODS ACT 1930

The law relating to the sale of goods or movables in India is contained in the Sale of Goods Act, 1930 which came into force on 1st July, 1930. Prior to the enactment of the Sale of Goods Act, 1930, the law of sale of goods was contained in Chapter VII of the Indian Contract Act 1872. The Act contains sixty-six sections and extends to the whole of India, except the State of Jammu and Kashmir.

Contract of sale

Under Section 4 (1) of the Sale of Goods Act, 1930, the contract of sale of goods is defined as follows:

"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."

A contract of sale may provide for:

a) Sale: A contract of sale may be absolute or conditional. Where the right of ownership in the goods is transferred from the seller to the buyer, the contract is sale.

b) Agreement to sell: Where under a contract of sale the transfer of 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.

Essentials of a Valid Contract of Sale

1) Contract: All the essential elements of a contract must be present in a contract of sale.

2) Two parties: There must be two parties to constitute a contract of sale namely; a buyer and a seller. The same person cannot both be a seller and a buyer.

3) Goods: The subject matter of a contract of sale will always be goods. The goods may be either existing goods, future goods or contingent goods.

4) Transfer of property: In a contract of sale, the seller must transfer or agree to transfer property in the goods to the buyer.

5) Price: The consideration for a contract of sale must be money called the price.

Distinction between Sale and Agreement to Sell

Basis	Sale	Agreement to Sell
1. Transfer of property	The property or ownership in the goods immediately passes from seller to buyer.	The property in goods transfers on some future date or subject to fulfillment of some conditions. The seller continues to be the owner of goods.
2. Kinds of goods	Sale is always of existing, specific or ascertained goods.	An agreement to sell may relate to existing goods, unascertained goods and mostly to future or contingent goods.
3. Type of contract	Sale is an executed contract.	It is an executor or future contract.

4. Risk	The goods belong to the buyer even if they remain in the possession of seller. In case of loss or damage, the buyer will suffer the loss.	The goods belong to the seller and he will suffer the loss if goods are destroyed, even if these are in the possession of the buyer.
5. Remedy for breach of contract	If the buyer fails to pay the price, the seller can sue him for price, but cannot resell the goods.	The seller can recover the goods, can sue for damages and can resell the goods, but cannot sue the intended buyer for recovery of price.
6. Insolvency of buyer	If buyer gets insolvent before he pays the price, the seller cannot retain the goods. He must return the goods to the buyer's Official Receiver and shall be entitled only to a reteable dividend.	The seller can recover the goods, can sue for damages and can resell the goods, but cannot sue the intended buyer for recovery of price.
7. Insolvency of seller	If seller gets insolvent, the buyer can recover goods from seller's Official Receiver.	If the buyer has already paid the price, buyer cannot recover the goods. He can only claim reteable dividend.

CONDITIONS AND WARRANTIES

Stipulation

'Stipulation' means a requirement or a specified item in an agreement". In a contract of sale of goods, stipulation refers to representations made by the buyer and the seller reciprocally as a part of negotiation between them before they enter into a contract.

Meaning of Conditions and Warranties

Condition: According to Section 12(2), a condition is a stipulation essential to the main purpose of the contract, the breach of which gives a right to repudiate the contract.

For example: *B wanted to purchase a car, suitable for touring purpose and M suggested him a 'Burgatti' car. B purchased the car from M, a car dealer. After some use, car was found unfit for the touring purpose. Held there was a breach of condition.*

Warranty: According to Section 12(3), a warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives a right to a claim for damages but not a right to reject goods and to treat the contract as repudiated.

For example: *X purchased a car from a dealer with assured gifts and discount schemes. Dealer defaulted in delivery of these schemes as intended. There is a breach of warranty.*

Express and Implied Conditions and Warranties

The conditions and warranties may be express or implied. 'Express' conditions and warranties are those, which have been expressly agreed upon by the parties at the time of the contract of sale. 'Implied conditions and warranties are those, which the law incorporates into the contract unless the parties stipulate to the contrary. They may be cancelled, or varied by an express agreement or by the course of dealing or by usage and custom.

Implied Conditions

1) Condition as to title [Sec. 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 sale, the seller has a right to sell the goods, and

b) In case of an agreement to sell, the seller will have the right to sell at the time when the ownership is to pass from the seller to the buyer.

Example: *If the goods can be sold only by infringing the trademark, the seller shall be deemed to have broken the condition that he has a right to sell the goods. [Niblett vs. Confectioners Materials Co. Ltd (1921) 3KB 387]*

2) Sale by description [Sec. 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 term 'sale by description' includes the following:

a) Where the buyer has never seen the goods and buys them on the basis of the description given by the seller.

b) Where the buyer has seen the goods but he relies not on what he has seen but what was stated to him and the deviation of the goods from the description is not apparent.

c) Packing of goods may sometimes be a part of description.

d) Brand may also form part of the description.

For example: *A sold B 'a new Maruti 800 car'. On delivery, the buyer finds that it is an old car. The buyer may reject the sale.*

3) Sale by sample [Sec. 17]: In the case of contract for the sale of goods by sample, there is an implied condition:

a) that the goods must correspond with the sample in quality;

b) that the buyer must have reasonable opportunity of comparing the bulk with the sample.

c) that the goods must be free from any defect which renders them unmerchantable and which would not be apparent on reasonable examination of the sample.

For example: *A seller undertakes to supply 100 tonnes of Java sugar warranted to be equal to the sample. The sugar when supplied corresponds to the sample but is not Java sugar. The buyer can repudiate the contract.*

4) Sale by sample as well as 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 must correspond with the sample and the description.

5) Condition as to quality or fitness [Sec. 16 (1)]: Usually in a contract of sale, there is no implied condition as to quality or fitness of the articles for any particular purpose. It is the duty of the buyer to see and satisfy himself whether the article will be suitable for the purpose for which he requires them (Caveat Emptor). Section 16 constitutes an exception to the rule of caveat emptor in the following circumstances:

(i) the buyer makes the seller know, whether expressly or by implication, the purpose for which the goods are required,

(ii) the buyer relies on the skill and judgement of the seller, and

(iii) it is the business of the seller to supply goods of that kind in the ordinary course of his business.

For example: *A contracts to make and deliver a set of false teeth to B. The false teeth did not fit in the mouth of B. B is entitled to reject the goods.*

6) Condition as to merchantability [Sec. 16 (2)]: Where the 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.

For example: *A agreed to sell B some motor horns. Goods were to be delivered by instalments. The first instalment was accepted but the second contained a substantial quantity of horns which were damaged owing to bad packing. Held, the buyer was entitled to reject the whole instalemnt, as the goods were not of a merchantable quantity.*

7) Condition as to Wholesomeness: This condition applies in the case of provisions and foodstuffs which must not only be merchantable but also be wholesome and suitable for consumption.

For example: *X purchased milk from Y, a milk dealer. The milk contained typhoid germs. X's wife, on taking the milk, got infection and died. Held, X was entitled to get damages.*

Implied Warranties

1. ***Warranty of quiet possession [Sec. 14 (b)]:*** Under the circumstances are such as to show a different intention there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The buyer, therefore, will be entitled to recover compensation for breach of both, a condition as well as a warranty.

For example: *Anil purchased a secondhand typewriter from Rahul. Anil spent some money on its repairs but was dispossessed of it after six months by the true owner. It was held that Anil was entitled to recover from Rahul not only the price paid but also the cost of repair.*

2. ***Warranty of freedom from encumbrances[Sec. 14 (c)]:*** There is an implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party not declared or

known to the buyer before or at the time when the contract is made.

For example: *A borrowed Rs. 500 from B and hypothecated his radio with B as security. Later on A sold this radio to C who bought in good faith. Here, C can claim damages from A because his possession is distributed by B having a charge.*

3. ***Warranty implied by usage of trade [Sec. 16 (3)]:*** An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

For example: *There was a sale of drugs by auction. It was a trade usage to declare any sea damage in such cases. It was held that it could be implied that drugs so sold without any such declaration were free from sea damage.*

4. ***Warranty to disclose dangerous nature of goods:*** Where the goods are dangerous to the knowledge of the seller and the buyer is ignorant of the same, there is an implied warranty that the seller should warn the buyer about the probable danger.

For example: *X sold a tin of disinfectant powder to Y, X knew that the tin was to be opened with special care otherwise it might prove dangerous. He also knew that Y was ignorant about it. He did not warn Y. C opened the tin and his eyes were injured by the powder. It was held that A was liable as he should have warned Y of the probable danger.*

Doctrine of Caveat Emptor

The term 'caveat emptor' is a Latin word which means 'let the buyer beware' i.e., a buyer purchases the goods at his own risk. The doctrine of caveat emptor means that 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 him before buying the goods that the

goods will serve the purpose for which they are being bought.

Section 16 of the Sale of Goods Act has enunciated the rule of caveat emptor as follows:

"Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale".

Exceptions to the Doctrine of Caveat Emptor

The doctrine of caveat emptor is, however, subject to the following exceptions:

1) ***Fitness for buyer's purpose [Section 16(1)]:*** Where buyer lets the seller know the particular purpose and depends on the seller's skill and judgement who deals in goods of that kind, the condition is that the goods must be fit for that purpose.

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.

3) ***Condition as to merchantability [Section 16(2)]:*** This condition applies (i) where goods are sold by description, (ii) the seller deals in those goods, and (iii) the buyer has no opportunity to examine the goods being bought.

4) ***Good sold by sample as well as description [Section 15(1)]:*** Where the goods are sold by sample as well as by description, the doctrine does not apply if the bulk of the goods supplied do not correspond with the sample and the description.

5) ***Goods sold by sample [Section 17]:*** Where the goods are bought by sample the doctrine does not apply if the bulk does not correspond with the sample.

6) ***Condition implied by usage or custom of trade:*** Where trade usage attaches an implied condition or warranty regarding the quality of fitness of goods for a particular purpose, the doctrine of caveat emptor does not apply.

7) ***Goods sold by Misrepresentation:*** Where the seller sells the goods by making some misrepresentation or fraud and the buyer relies on it or where the seller knowingly conceals defects not discoverable on reasonable examination, then the rule of caveat emptor will not apply.

TRANSFER OF OWNERSHIP (PROPERTY) IN GOODS

In a contract of sale of goods, there are three stages in the performance of contract by a seller:

- Transfer of property in the goods;
- Transfer of possession of the goods; and
- Passing of the risk.

The expression 'transfer of property' means the transfer of ownership of goods from seller to buyer so as to constitute the buyer, the owner thereof. The time at which property passes from seller to buyer is important due to the following reasons:

1) Risk prima facie passes with property: Sec. 26 provides that "unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, the goods are at buyer's risk whether delivery has been made or not."

2) Action against third parties: When the goods are in any way damaged or destroyed by the action against them.

3) Right of resale: To determine whether buyer can resell the goods to a third party without incurring any liability is linked with transfer of ownership.

4) Suit for the price: Transfer of property confers upon the seller the right to sue the buyer for price.

5) Insolvency of the seller or the buyer: On the insolvency of a person, the Official Receiver or Assignee takes the possession of the property belonging to the insolvent.

Rules regarding Transfer of property

The rules for the transfer of ownership are contained in Sections 18 to 24 of the Sale of Goods Act. These rules determine the time at which the ownership of the goods is transferred from the seller to the buyer. As the general rule, the "transfer of ownership depends upon the intention of both the parties".

1) Transfer of property in case of Specific or Ascertained Goods –

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

b) When goods are not in a deliverable state (Sec. 21): Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

c) When price of goods is to be ascertained (Sec. 22): Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining price, the property does not pass until such thing is done and the buyer has notice thereof.

2) Transfer of property in case of Unascertained Goods –

a) Goods must be ascertained (Sec. 18): Where there is a contract for the sale of unascertained goods, no title of property in the goods is transferred until the goods are ascertained.

b) Appropriation of goods to the contract (Sec. 23): The term 'appropriation' means the process by which the goods to be delivered under the contract are identified and set apart with the consent of the seller as well as buyer. The seller may appropriate the goods in one of the following ways:

(i) By separating the contracted goods from the other with the consent of the buyer.

(ii) By putting the contracted quantity in suitable receptacles with the consent of the buyer.

(iii) By delivering the contracted goods to the common carrier for transmission to the buyer without reserving the right of disposal.

3) When goods are sold on approval (Sec. 24) – When the goods are sent to the buyer on 'approval' or on 'sale or return basis', the property in the goods will pass from seller to buyer when any of the following conditions are satisfied:

a) *When he accepts the goods;*

b) *When he adopt the transaction; or*

c) *When he fails to return the goods.*

Sale by Non-owners

The general rule is that if a person, who has no right or title to the goods, sold the same, the buyer, cannot obtain any right or title to the goods which he purchased even though he may have

acted honestly and paid the value for the goods. Thus a buyer cannot get a good title to the goods unless he purchases the goods from a person who is the owner thereof or who sells them under the authority or with the consent of the owner.

This is based on the following important Latin maxim, "Nemo dat quod non habet," which means that 'no one can give what he has not got'. Section 27 of the Sale of Goods Act also provided that "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. . ."

Exceptions to the Rule 'Nemo dat quod non habet'

1) **Title by estoppels [Sec. 27]:** When the owner of goods, by his conduct or by statement, wilfully leads the buyer to believe that the seller has the authority to sell, then he is stopped (i.e., prevented) from denying the seller's authority to sell.

2) **Sale by merchantable agent [Sec. 27 (2)]:** This exception will apply if the following conditions are satisfied:

a) The goods must have been sold by a mercantile agent;

b) He must be in possession of the goods or any document of title to the goods with the consent of the real owner;

c) The sale should be in the ordinary course of business;

d) The buyer must act in good faith; and

e) The buyer should not have, at the time of contract, notice that seller had no authority to sell.

3) Sale by a joint owner (co-owner) [Sec. 28]: In order to get a valid title to the buyer who buys the goods from one of the co-owners, the following conditions should be satisfied:

a) The co-owner must be in the sole possession of goods with the consent of other co-owners.

b) The buyer should purchase the goods for consideration and in good faith.

c) The buyer should not have notice or suspicion, at the time of sale, of any defect in seller's authority to sell.

4) Sale by person in possession under voidable contract [Sec. 29]: when the seller of goods has obtained possession of the goods under a voidable contract and he sells those goods before the contract is repudiated, the buyer of such goods acquires a good title provided the buyer acts in good faith and without notice of the seller's defect of title.

5) Sale by seller in possession after sale [Sec. 30 (1)]: Where a person, having sold the goods, continues to be in possession of the goods or of the documents of title, and sells them over again to a buyer, the buyer gets a better title provided he has acted in good faith and without notice of the previous sale.

6) Sale by buyer in possession after sale [Sec. 30 (2)]: Where by the buyer has bought or agreed to buy the goods, with the consent of the owner obtains possession of the goods or documents of title to the goods, but the seller still has some lien or right over the goods, if the buyer sells the goods to a second buyer, who buys them in good faith, the second buyer gets a better title.

7) Sale by unpaid seller [Sec. 54 (3)]: Where an unpaid seller who is in possession of goods after having exercised the right of lien or stoppage in transit, resell the goods the buyer gets a good title there to as against the original buyer.

8) Exceptions under the provisions of other Acts: The following are valid transactions:

a) Sale by finder of lost goods u/s 169 of Contract Act;

b) Sale by pawnee or pledgee u/s 176 of the Contract Act;

c) Sale by an Official Receiver or Assignee in case of insolvency of an individual and Liquidator of companies.

d) The legal maxim 'nemo dat quod non habet' does not apply to negotiable instruments.

PERFORMANCE OF THE SALE OF CONTRACT

A contract of sale consists of two reciprocal promises:

(i) The seller's duty to deliver the goods; and

(ii) The buyer's duty to accept the goods and pay the price.

It may be noted that the delivery of goods and the payment of their price are the concurrent conditions, i.e., both these conditions should be performed simultaneously.

Delivery of Goods

Section 2 (2) of the Act defines, delivery to mean "voluntary transfer of possession from one person to another." Such voluntary transfer can, as Sec. 33 states, be made by doing anything which has the effect of putting the goods in the possession of the buyer or his authorized agent.

Modes of Delivery

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

a) Actual delivery: Where the goods are physically handed over by the seller to the buyer, the delivery is said to be actual.

b) Symbolic delivery: Where the goods are bulky and incapable of actual delivery, there are other means of obtaining possession of goods are delivered by the seller to the buyer.

c) Constructive or Delivery by attornment: Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf."

Rules Regarding Effective Delivery of Goods

1) ***Delivery and payment are concurrent conditions [Sec. 32]:*** The seller shall be ready and willing to give possession of 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.

2) ***Delivery may be either actual, symbolic or constructive [Sec. 33]:*** The delivery of goods must have the effect of putting the goods in the possession of buyer or his authorized agent.

3) ***Effect of part delivery [Sec. 34]:*** A delivery of part of the 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.

4) ***Buyer should apply for delivery [See. 35]:*** Apart from any express contract the seller is not bound to make delivery until the buyer applies for delivery.

5) ***Place of delivery [Sec. 36 (I)]:*** The goods must be delivered at the specified place during the business hours and on a working day. But where no place is specified in the contract, the following rules contained in Section 36(1) shall apply:

(a) In case of sale, the goods sold are to be delivered at the place where they are, at the time of sale;

(b) In case of an agreement to sell, the goods are to be delivered at the place where they are, at the time of agreement to sell;

(c) If at the time of agreement to sell, the goods are not in existence they are to be delivered at a place where they are manufactured or produced.

6) ***Time for delivery of goods [Sec. 36(2)]:*** 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 the reasonable time. Demand for and the making of delivery must be done at reasonable hours [Sec. 36(4)].

7) ***Effect of goods in possession of a third party [Sec. 36(3)]:*** Where the goods at the time of sale are in the possession of a third person, effective delivery takes place when such person acknowledges to the buyer that he holds the goods on his behalf. However, if goods are sold by transfer of documents to title, the consent of third person having possession of the goods is not required.

8) ***Expenses of delivery [Sec, 36(5)]:*** Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

9) ***Delivery of wrong quantity [Sec. 37]:*** "Wrong quantity" may include short or excess delivery of goods than the agreed quantity,

and also the delivery of agreed quality mixed with another quality. Section 37 deals with the following three cases:

a) Short delivery [Sec. 37(1)]: If the seller delivers a quantity less than he has contracted to sell, the buyer may reject them. But if he accepts the goods so delivered, he shall pay for them at the contract price.

b) Excess delivery [Sec. 37(2)]: If the seller delivers a larger quantity than he contracted to sell, the buyer has the option of accepting the quantity as per the contract and reject the rest or he may reject the whole. It he accepts the entire quantity, he has to pay for the excess at the contract price.

c) Mixed delivery [Sec. 37(3)]: If the seller delivers the goods mixed with the goods of a different description, the buyer may accept the contracted goods or reject the whole quantity of goods.

10) ***Instalment deliveries [Sec. 38(1)]:*** Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

11) ***Delivery to carrier or wharfinger [Sec. 39]:*** Where, in pursuance of a contract of sale, goods are delivery to a carrier for the purpose of transmission to the buyer or to a wharfinger for safe custody, delivery of goods to them is prima facie deemed to be a delivery of the goods to the buyer. In addition to delivery to the carrier or wharfinger, the seller has to perform the following duties:

(a) To make a suitable contract with the carrier or wharfinger [Sec. 39(2)]: The seller shall make a suitable contract with carrier or wharfinger for safe transmission or custody of goods as may be reasonable keeping in view the nature of goods and other circumstances. If the seller fails to do so, the buyer may refuse

to treat the delivery to himself, or may hold the seller liable for damages.

(b) To give notice to the buyer to enable him to insure the goods [Sec. 39(3)]: This duty attaches when the goods are to be sent by a sea route.

12) ***Deterioration of goods during transit [Sec. 40]:*** Where the seller agrees to deliver the goods at his own risk at a place different from that where they were at the time of sale, the buyer shall bear the risk of deterioration of goods incidental to the course of transit.

UNPAID SELLER

According to Sec. 45 of the Sale of Goods Act, the seller of goods is deemed to be an unpaid seller:

(a) when the whole of the price has not been paid or tendered;

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

Rights of an Unpaid Seller

An unpaid seller has two-fold rights, viz:

I. Right of an Unpaid Seller against the goods; and

II. Rights of an Unpaid Seller against the buyer personally.

I. Right of an Unpaid Seller against the goods

An unpaid seller has the following rights against the goods notwithstanding the fact that the property in the goods has passed to the buyer:

1. Right of lien;

2. Right of stoppage of goods in transit;

3. Right of resale.

1) Right of Lien [Sec. 47 to 49]

Lien is the right of an unpaid seller to retain the goods in his possession and refuse to deliver them to the buyer until the full payment of the price is made to him, or the price is offered to him. The unpaid seller can exercise lien only in the following cases:

a) Where the goods have been sold without 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 even though the period of credit may not have yet expired;

d) Where the unpaid seller has delivered a part of the goods, he may exercise his lien on the remaining part of the goods.

Termination of Lien or Loss of Lien

An unpaid seller of goods loses his right of lien on the goods in the following cases:

(i) By delivery to the carrier: 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.

(ii) By delivery to the buyer: When the buyer or his agent lawfully obtains possession of goods, unpaid seller losses his right of lien.

(iii) ***By waiver:*** When the seller expressly or impliedly waives his right of lien, the right of lien is terminated.

(iv) ***By tender of price:*** Where the buyer tenders price for the goods purchased by him, seller's

lien is lost.

2) Right of stoppage of goods in transit [Sec. 50 to 52]

The right of stoppage in transit means the right of stopping further transit of the goods while they are with a carrier for the purpose of transmission to the buyer, resuming possession of them and retaining possession until payment or tender of the price. The right of stoppage can be exercised only when the following conditions are satisfied:

a) The seller should be an unpaid seller;

b) The buyer must have become insolvent;

c) The seller must have parted with the possession of the goods; and

d) The goods must be in the course of transit.

Duration of transit

The goods are deemed to be in transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer or his agent takes delivery of them.

Termination of transit and Right of Stoppage

The transit comes to an end in the following cases:

(i) ***Delivery to the buyer:*** When the buyer or his agent obtains delivery of the goods before their arrival at the appointed destination.

(ii) Interception by the buyer: When the buyer or his agent takes delivery after the goods have reached destination.

(iii) Acknowledgement to the buyer: When the goods have arrived at their destination and the carrier acknowledges to the buyer or his agent that he holds the goods on his behalf.

(iv) Goods delivered to buyer's carrier: When the goods are delivered to a carrier, who acting as an agent of the buyer, the transit ends as soon as the goods are delivered to the carrier.

(v) Wrongful refusal to deliver: When the carrier wrongfully refuses to deliver the goods to the buyer or his agent.

(vi) Part delivery of goods: When part delivery of the goods has been made to the buyer with an intention of delivering the whole of the goods, transit will be at an end for the remainder of the goods also which are yet in the course of the transit.

3) Right of Resale [Sec. 54]

If the buyer fails to pay or offer the price within a reasonable time, the unpaid seller has the right to resell the goods in the following circumstances:

a) Where the goods are of a perishable nature;

b) Where the unpaid seller has exercised his right of lien or of stoppage in transit and gives notice to the buyer of his intention to resell the goods;

c) Where the seller expressly reserve his right of resale.

II. Rights of an Unpaid Seller against the Buyer Personally

On breach of the contract of sale due to seller's default, the buyer has the following remedies (i.e.,rights) against the seller.

1) Suit for price [Sec. 55]: When the property has passed to the buyer, and the buyer wrongly neglects or refuses to pay, the seller can sue him for the price.

2) Suit for damages [Sec. 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.

3) Suit for repudiation [Sec. 60]: The repudiation of the contract of sale by the seller before the date of delivery entitles the buyer to treat the contract as rescinded and sue the seller for damages for the breach.

4) Suit for interest [Sec. 61(2)]: In case of breach of contract on the part of the buyer, while filing a suit for the price, the seller may sue the buyer for interest from the date of the tender of the goods or from the date on which the price was payable.

MODULE -IV

THE CONSUMER PROTECTION ACT, 1986

Objects of the Act

The Preamble to the Consumer Protection Act, 1986 reads as under:

"An Act to provide for the protection of the interests of consumers and for that purpose to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer's disputes and for matters connected therewith."

The rights given to the consumers under the Act are based on the basic rights as defined by the International Organization of Consumers (IOCU) i.e., the Rights to Safety, Information, Choice, Redressal, Hearing, Education and Healthy environment.

Scope and Applicability

The Consumer Protection Act, 1986 extends to the whole of India except the State of Jammu and Kashmir. It applies to all types of goods and services, public utilities and public sector undertakings. Complaints of all types whether relating to goods, services or unfair trade practices have been brought within the purview of the Act. The provisions of the Act are in addition to and not in derogation of provision of any law for the time being in force (Sec. 3).

The Act may be regarded as a highly progressive social welfare legislation which provides more effective protection to the consumers than any corresponding legislations.

Definition of Terms Complainant [Sec. 2 (l) (b)]

The person who can make a complaint before a Consumer Redressal Forum may be:

i. a consumer, or

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

iii. the Central or State Government, or

iv. one or more consumers, where there are numerous consumers having the same interest, or

v. in case of death of a consumer, his legal their or representative.

The persons falling within the ambit of Section 2 (l) (b) are considered complainants and have a *locus standi* to file" a complaint under the Act. A public cause can be taken up by an association in the form of public interest litigation.

Complaint [Sec. 2 (1) (c)]

It means a written allegation by a complainant that:

i. **A**n "unfair trade practice or a "restrictive trade practice" has been provided by any trader or service provider,

ii. **T**he goods bought by him or agreed to be bought by him, suffer from one or more 'defects'.

iii. **T**he services hired or availed or agreed to be hired or availed of by him suffer from "deficiency in any respect;

iv. **A** trader or the service provider has charged for the goods or for the service mentioned in the complaint, a "price in excess" of the price:

a) fixed by or under any law for the time being in force

b) displayed on the goods or any package containing such goods;

c) displayed on the price list established by him or under any Jaw for the time being in force;

d) agreed between the parties;

v. **G**oods which will be 'hazardous to life and safety' when used, are being offered for sale to the public:

a) in contravention of any standards relating to safety of such goods as required to be complied with by or under any law for the time being in force;

b) if the trader could have known with due diligence that the goods so offered are unsafe to the public;

vi. **S**ervices which are hazardous or are likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety.

Consumer [Sec. 2 (1) (d)]

A consumer means:

(i) any person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any person who uses such goods with the approval of the buyer. It does not include a person who buys goods for resale or for any commercial purpose; *or*

(ii) any person who hires or avails any services for a consideration which has been paid or promised or partly paid

and partly promised, or under any system of deferred payment, and includes any person who is a beneficiary of such services with the approval of the hirer. It does not include a person who avails of such services for any commercial purpose.

Consumer Dispute [Sec. 2(1) (e)]

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

The allegations referred to may relate to any unfair trade practices adopted by a trader, or any defects in goods or any deficiency in services or against charging exorbitant price.

Defect [Sec. 2 (1) (f)]

Defect means "any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being force, or under any contract, express or implied or as is claimed by the trader, in any manner whatsoever in relation to any goods".

Imperfection or shortcoming as claimed by the trader is to be determined with reference to the warranties or guarantees expressly given by a trader.

Deficiency [Sec. 2 (1) (g)]

Deficiency means "any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force, or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service".

Goods [Sec. 2 (1) (i)]

Goods means "every kinds of movable property other than actionable claim and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

Services [Sec. 2 (1) (o)]

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

Unfair Trade Practices [Sec. 2 (1) (r)]

Unfair Trade Practice means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adopts any unfair method or unfair or deceptive practice. The following six categories of such practices have been declared as unfair trade practices:

(1) False Representation and Misleading Advertisements[Sec. 2 (1) (r) (1)]:

a) **F**alse representation as to standards, etc., of goods: It consists of a written, oral or visible representation which falsely represents the goods to be of particular standard, quality, quantity, grade, composition, style or model.

b) **F**alse representation as to standard, etc., of services: It consists of making false representation as to standard,

quality or grade of service such as an assertion about professional qualifications which one does not possess. [R vs. Breeze (1973) 2 All ER 1143].

It may also consist of falsely representing any rebuilt, second-hand, renovated or reconditioned goods as new.

c) **M**aking false representation as to sponsorship, approval, performance, characteristics, accessories, users or benefits of such goods or services.

d) **M**isleading representation concerning the need for usefulness, etc., of any goods or services: It may consist of giving the public any warranty or guarantee of performance, etc., of any goods that is not based on adequate or proper test; or misleading promise to replace, maintain or repair an article, etc.,

e) **M**isrepresentation as to price.

f) **D**isparagement of goods, services or trade of others.

(2) False offer of Bargain Price [Sec. 2 (1) (r) (2)]: Explanation appended to *sub-clause (2)*has defined "bargain price to mean:

a) **a** price that is stated in any advertisement to be a bargain price by reference to an ordinary price or otherwise, or

b) **a** price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which like products are sold.

(3) Offer of Gifts, prizes, etc., [Sec. 2 (1) (r) (3)]: This type of unfair trade practice may consist of:

a) **O**ffer of any gifts or other items with the intention of not providing them.

b) **C**reating an impression that something is being given free of charge when it is fully or partly covered by the amount charged in the transaction,

c) **C**onducting of any contest, lottery, game of chance or skill for the purpose of promoting

- directly or indirectly - the sale, use or supply of any product or any business interest.

(4) Withholding any scheme [Sec. 2 (1) (r) (3A)]: It will be an unfair trade practice for a trader to withhold from the participants of any scheme offering any gifts, etc., information about final results of the scheme on its closure. The participants are deemed to have been informed of the final results of the scheme if the results are published prominently in the newspaper in which the scheme was originally advertised within a reasonable time.

(5) Sale or supply of goods not complying with prescribed standard [Sec. 2 (1) (r) (4)]: The prescribed standards may relate to performance, composition, contents, design, packaging, etc., as are necessary to prevent or reduce the risk of injury to the person using the goods.

(6) Hoarding destruction or refusal to sell [Sec. 2 (1) (r) (5)]: Hoarding, destruction or refusal to sell the goods which raises or tends to raise the cost of those or other similar goods or services shall amount to an unfair trade practice.

(7) Manufacturing or sale of spurious goods [Sec. 2 (1) (r) (6)]: 'Spurious goods and services' means such goods and services which are claimed to be genuine but are not so.

Restrictive Trade Practices [Sec. 2 (1) (nn)]

Restrictive Trade Practice means a trade practice which tends to

bring about manipulation of price, or its conditions of delivery or to affect flow of supplies in the market relating to goods or in such a manner as to impose on the consumers unjustified costs or restrictions and shall include:

a) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the prices.

b) any trade practice which requires a consumer to buy, hire or avail or any goods or services as a condition precedent to buying, hiring or availing of other goods or services.

Rights of Consumers

According to Section 6 of the Consumer Protection Act, the following rights are available to consumers.

1) Right to be protected or right to safety: Every consumer has the right to be protected against the marketing of goods and services which are spurious or hazardous to life and property.

2) Right to be informed: The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services as the case may be, so as to protect the consumers against unfair trade practices.

3) Right to be assured/choose: Every consumer has a right to be assured, wherever possible, access to a variety of goods and services at competitive prices.

4) Right to be heard: The right to be heard and to be assured that consumers interest will receive due consideration at appropriate forums.

5) Right to seek redressal: The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers.

6) Right to consumer education: The responsibility of creating awareness amongst the consumers has been assigned to the Central Consumer Protection Council.

7) Right to Basic Needs: The basic needs mean those goods and services which are necessary for a dignified living of people. It includes adequate food, clothing, shelter, energy, sanitation, health care, education and transportation. All the consumers have the right fulfil these basic needs.

8) Right to healthy environment or quality of life: This right provides the consumers, protection against environmental pollution so that the quality of life is enhanced. Not only this, it also stresses the need to protect the environment for the future generations as well.

Consumer Protection Councils

The Consumer Protection Councils are established at Central Level, State Level and District Level. These councils work towards the promotion and protection of the rights of the consumers. They give publicity to the matters concerning consumer interests; take necessary steps for consumer education and protecting consumers from exploitation.

Central Consumer Protection Councils

Section 4 provides that:

(1) The Central Government shall, by notification, establish a council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council).

(2) The Central Council shall consist of the following members, namely:

a) the Minister-in-charge of Consumer Affairs in the Central Government, who shall be its Chairman, and

b) such number of other official or non-official members representing such interests as may be prescribed.

State Consumer Protection Councils

Section 7 provides that:

(1) The State Government shall, by notification, establish a council to be known as the State Consumer Protection Council (hereinafter referred to as the State Council).

(2) The State Council shall consist of the following members, namely:

a) the Minister-in-charge of Consumer Affairs in the State Government, who shall be its Chairman, and

b) such number of other official or non-official members representing such interests as may be prescribed by the State Government.

c) such number of other official or non-official members, not exceeding 10, as may be nominated by the Central Government.

(3) The State Council shall meet as and when necessary but not less than 2 meetings shall be held every year.

(4) The procedure to be observed in regard to the transaction of its business at such meetings shall prescribed by the State Government.

District Consumer Protection Council

Section 8-A provides that:

(1) The State Government shall establish for every district, by notification, a council to be known as the District Consumer

Protection Council (hereinafter referred to as the District Council).

(2) The District Council shall consist of the following members, namely:

a) the Collector of the District (by whatever name called), who shall be its chairman; and

b) such number of other official or non-official members representing such interests as may be prescribed by the State Government.

(3) The District Council shall meet as and when necessary but not less than 2 meetings shall be held every year.

(4) The procedure to be observed in regard to the transaction of its business at such meetings shall prescribed by the State Government.

Consumer Disputes Redressal Agencies

Consumer Protection Act, 1986 has set up a three-tier quasi-judicial redressal machinery for expeditious and inexpensive settlement of consumer disputes. It is an active to the ordinary process of instituting actions before a civil court. According to Section 9, there shall be established for the purpose of the Act, the following agencies, namely:

- ***Consumer Disputes Redressal Forum*** to be known as the "**District Forum**". The State Government shall establish a District Forum ach district of the state. However, more than one District Forum may be established strict if it is deemed fit.

- ***State Consumer Disputes Redressal Commission (SCDRC)*** to be known as "**State Commission**". This is also to be established by the State Government in the state by notification.

➢ ***National Consumer Disputes Redressal Commission (NCDRC)*** to be known as "**National Commission**". This is to be established by the Central Government by notification.

District Forum

The District Forum shall have jurisdiction to entertain complaints where the value of goods and services complained against and the compensation claimed, if any, is less than Rs. 20 Lakhs.

Composition of District Forum

According to Section 10 (1), each District Forum shall consist of the following:

a) President: He shall be a person who is, or has been or is qualified to be a District Judge.

b) Members: There shall be two other members, one of whom shall be a woman. A member must have the following qualifications:

(i) be not less than 35 years of age;

(ii) possess a bachelor's degree from a recognized university;

(iii) must be a person of ability, integrity and standing and have adequate knowledge and experience of at least 10 years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs, or administration.

Jurisdiction

The District Forum shall have jurisdiction to entertain complaints where the value of goods and services and the compensation, if any claimed, does not exceed Rs. 20 Lakhs. A complaint shall be filed in district forum within the local limits of whose jurisdiction the opposition party (or parties) reside or carry

on business or the cause of action has arisen.

The complaint may be filed by any of the following persons:

- ✓ The consumer concerned;
- ✓ Any recognized consumer association;
- ✓ One or more consumers for the benefit of all consumers;
- ✓ The Central or the State Government.

State Commission

The State Commission shall have jurisdiction for such complaints and claims if the value thereof is exceeding Rs. 20 Lakhs but not exceeding Rs. 1 Crore.

Composition of State Commission

According to Section 16 (1), each State Commission shall consist of the following:

a) President: He shall be a person who is or has been a judge of the High Court. His appointment shall not be made except after consultation with the Chief Justice of the High Court.

b) Members: There shall be not less than two or not more than such number of members as may be prescribed, who shall be the person of ability, integrity and standing and have adequate knowledge or experience of at least 10 years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs, or administration, one of whom shall be a women.

Jurisdiction

The State Commission shall have the jurisdiction:

(i) to entertain:

✓ complaints where the value of the goods or services and compensation, if any claimed exceeds rupees 20 Lakhs but does not exceed rupees one crore; and

✓ appeals against the orders of any District Forum within the State; and

(ii) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

National Commission

The National Commission shall have jurisdiction for complaints and claims of the value exceeding Rs. 1 Crore.

Composition of National Commission

Section 20 (1) provides that the National Commission shall consists of:

a) President: He shall be a person who is or has been judge of the Supreme Court, to be appointed by the Central Government (in-consultation with the Chief Justice of India.

b) Members: There shall be not less than four and not more than such number of members as may be prescribed, possessing the qualifications as are prescribed for a member of the State Commission.

Jurisdiction

The National Commission shall have the jurisdiction: (iii)to entertain:

- ✓ complaints where the value of the goods or services and compensation, if any claimed exceeds rupees one crore; and
- ✓ appeals against the orders of any State Commission; and

(iv)to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in exercise of its jurisdiction illegally or with material irregularity.

Manner of Making the Complaint who can file a complaint? (Sec. 12]

The following may file a complaint before the District Forum:

(a) the consumer to whom the goods are sold or delivered, or agreed to be sold or delivered, or the service has been provided, or agreed to be provided

(b) any recognized consumer association, regardless of whether the consumer is a member of such association or not,

(c) one or more consumers, where there are numerous consumers having the same interest with the permission of the District Forum on behalf of or for the benefit of all consumers so interested,

(d) The Central or State Government, either in its individual

capacity or as a representative of the interests of consumers in general.

Every complaint shall be accompanied with such amount of fee and payable in such manner as may be prescribed. The District Forum may, on receipt of the complaint, allow it to be proceeded with or rejected. However, the complaint shall not be rejected unless an opportunity of being heard has been given to the complainant. The admissibility of the complaint shall ordinarily be decided within 21 days of its receipt. On its admission, the complaint shall not be transferred to any other court or tribunal or any other authority. In case a consumer cannot file the complaint due to ignorance, illiteracy or poverty, any recognized consumer association may be file a complaint.

Procedure on Receipt of Complaint [Sec 13]

[A] Complaints where laboratory testing is possible or required [Sec. 13 (1)]

(i) Referring a copy of complaint to the opposite party: Within 21 days of admission of complaint, a copy thereof shall be referred to the opposite party mentioned in the complaint, directing him to file his version of the case within 30 days or such extended period not exceeding

15 days. If the opposite partly admits the allegations contained in the complaint, the matter will be decided on the basis of materials on the record.

(ii) Denial of allegations or failure to take action to represent the case by the opposite party: Where the opposite party denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the specified time, the dispute will be settled as follows:

a) **R**eference of sample to appropriate laboratory: Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, a sample of the goods shall be obtained from the complainant, sealed, and authenticated in the prescribed manner. The sample shall be referred to appropriate laboratory for analysis or test. The report of the appropriate laboratory shall be sent to the referring authority (District Forum or State Commission) within 45 days of receipt of reference or within the extended period prescribed by the District Forum.

b) **D**eposit of fees by complainant for payment to appropriate laboratory: The complainant shall deposit the fee to the credit of District Forum. The amount so deposited shall be remitted to the appropriate laboratory.

c) **F**orwarding of report of analysis or test to the opposite partly.

d) **O**bjections to the laboratory/test report: If any of the parties disputes the correctness of the methods of analysis/ test adopted by the appropriate laboratory, the concerned partly will be required to file his objections in writing in regard thereto.

e) **P**roviding reasonable opportunity of hearing to the parties: Both the parties shall be provided with a reasonable opportunity of being heard as to correctness or otherwise of the report made by the appropriate laboratory and the objections made in relation thereto. After such hearing, appropriate orders shall be made under Section 14.

[B] Complaints relating to services, i.e., where laboratory testing is not possible or required [Sec. 13(2)]

(i) ***Reference of complaint to opposite party:*** The opposite party is directed to give his version within 30 days or an

extended period of 15 days.

(ii) ***Denial or disputing of allegation or failure of opposite party to take action to represent his case:*** In such a case, the District Forum shall proceed to settle the consumer dispute as under:

(a) **o**n the basis of evidence brought to its notice by the parties to the dispute; or

(b) **d**ecide the matter ex parte on the basis of evidence brought to its notice by the complainant;

(c) **o**n failure of complainant to appear on the date of hearing, either to dismiss the complaint for default or decide it on merits.

A proceeding complying with the above procedure cannot be called in question on the ground that principles of natural justice have not been complied with.

Nature and Scope of Remedies under the Act [Sec. 14]

In case the goods complained against suffer from any defect specified in the complaint, or any of the allegations contained in the complaint about the services are proved the District Forum/State Commission/National Commission may pass one or more or the following orders:

(1) to remove the defects pointed out by the appropriate laboratory from all the goods in question;

(2) to replace the goods with new goods of similar description which shall be free from any defect;

(3) to return to the complainant the price or the charges paid by him;

(4) to pay such amount, may be awarded by it as

compensation to the consumer for any loss orinjury suffered by the consumer due to the negligence of the opposite party.

(5) to remove the defects m goods or deficiencies m the services in question;

(6) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(7) not to offer the hazardous goods for sale;

(8) to withdraw the hazardous goods from being offered for sale;

(9) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

(10) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of opposite party responsible for issuing such misleading advertisement; to provide for adequate costs to the parties.

MODULE – V

LIMITED LIABILITY PARTNERSHIP ACT 2008

Limited liability partnership

Limited liability partnership is a combination of both partnership and corporation. It has the features of both these forms. This form of business becomes very popular now a days as many entrepreneur are opting this. All limited liability partnership is governed under the limited liability partnership act 2008. However in india LLP was introduced in april 2009.

This form of organization would be quite useful for small and medium enterprises in general and for the enterprises in service sector in particular. Internationally, it is a common type of business particularly for service industry or for activities involving professionals.

Limited liability partnership Act: as per the Act, LLP means a partnership formed and registered under the act. This act extends to the whole of india. Generally and LLP is a corporate business vehicle that enables professional expertise and entrepreneurial initiative to combine and operate in flexible, innovative and efficient manner, providing benefits of limited liability while allowing its members the flexibility for organizing their internal structure as partnership.

Salient features or nature and characteristics

1. **Legal entity**: the LLP shall be a body corporate formed and incorporated under the LLP Act 2008, and is a legal entity separate from that of its partners. Any two or more persons, associated for carrying on a lawful business with a view to profit, may be subscribing their names to an incorporation document and filing the same with the registrar, from a limited liability partnership.

2. **Continuous existence: an LLP** shall have perpetual succession. Any change in the partners of LLP shall not affect the existence, rights and liabilities of the LLP.

3. **Number of partners:** every LLP shall have atleast two partners and shall also have atleast two individuals as designated partners of whom at least one shall be resident in india. There is no maximum limit to the number of partners are concerned.

4. **Type of partners**: any individual or body corporate may be a partner in LLP.

5. **Rights and duties of partners:** mutual rights and duties of the partners are governed by the agreement between the partners or between the LLP and the partners subject to theprovisions of the LLP Act 2008.

6. **Partners as agent:** every partner of a LLP is for the purpose of the business of the LLP, the agent of the LLP but not of other partner.

7. **Limited liability:** the liability of the partners of LLP are limited only the amount contributed by them. No partners will be individually liable for any wrongful acts of other partners.

8. **Name of the firm:** every LLP shall use the words "limited Liability partnership or its acronym "LLP" as the last words of its name.

9. **Financial disclosure:** every LLP is under an obligation to maintain annual account reflecting true and fair view of its state of affairs. A statement of accounts and solvencymust be filed with the registrar every year.

10. **Winding up:** an LLP may be wound up either voluntary or by the tribunal and an LLPso wound up may be dissolved.

Formation: an LLP is a body corporate formed and incorporated under the LLP Act, 2008. It has legal entity separate from that of its partners and have perpetual succession. Every limited partnership shall have at least two partners and there is no maximum limit. Any individual or body corporate may be a partner in a limited liability partnership. The following entities and /or persons can become a partner in the LLP.

a. An LLP incorporated in and outside india.

b. A company incorporated in and outside india.

c. Individuals resident in and outside india.

An individual shall not be capable of becoming a partner in a limited liability partnership if

a. He has been found to be of unsound mind by a court of competent jurisdiction and the finding is in force.

b. He is an undischarged insolvent

c. He has applied to be adjudicated as an insolvent and his application is pending

Capital contribution

In case of LLP, there is no concept of any share capital, but every partner is required to contribute towards the LLP in some manner as specified in the LLP agreement. The contribution of the partner may consist of tangible, movable or immovable or intangible property or other benefit to the LLP including money, promissory notes, other agreements to contribute cash or property, and contracts for services performed or to be performed.

LLP agreement

LLP means any written agreement between the partners of the limited liability partnership or between the limited liability partnership and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that limited liability partnership. So the agreement contains name of LLP, name of partners and designated partners, form of contribution, profit sharing ratio and rights and duties of partners.

Partners and designated partners

Partners in relation to a limited liability partnership means any person who becomes a partner in the limited liability partnership in accordance with the limited liability partnership agreement. And every limited liability partnership shall have at least two partners; and shall also have atleast two individuals as designated partners of whom at least one shall be resident in india. "designated partners" means a partner who is designated as such in the incorporation documents or who becomes a designated partner by and in accordance with the LLP agreement.

In case of an LLP in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominee of such body corporate shall act as designated partners. Every designated partners shall obtain a designated partner identification number (DPIN) from the central government and for this the provisions of the Companies Act also is applicable.

Incorporation by Registration

In order to incorporate an LLP, two or more persons associated for carrying on a lawful business with a view to profit shall subscribe their names to an incorporation document. It shall be

filed with the prescribed fees, and in the manner prescribed by the Registrar of the state where the registered office of the LLP is situated. A statement in the prescribed form should also be filed along with the incorporation document, which states that all the requirements of the Act and Rules have been complied with in the case of incorporation. The statement should be made by either an advocate or a company secretary or a chartered accountant or a cost accountant, who is engaged in the formation of the LLP and by anyone who subscribed his name in the incorporation document. The incorporation document contains the following matters.

a) the name of the limited liability partnership;

b) the nature of the proposed business;

c) the address of the registered office;

d) the name and address of the partners

e) the name and address of the designated partners;

f) other matters incidental thereto.

When all the formalities are complied with the Registrar will register the LLP in the name specified there in. Every LLP shall have either the words "limited liability partnership or the acronym "LLP as the last words of its name. The name selected shall not be undesirable in the opinion of the Central Government or identical or too nearly resemble to that of any othe partnership firm or limited liability partnership or body corporate or a registered trade mark, or a trade mark which is the subject matter of an application for registration of any other person under the Trade Marks Act, 1999.

Effect of Registration: On registration, an LLP shall, by its name, be capable of

a) Suing and being sued

b) Acquiring ,owing , holding and developing or disposing of property, whether movable or immovable, tangible or intangible

c) Having a common seal, if it decides to have one: and

d) Doing and suffering such other acts and things as body corporate may lawful do and suffer

Penalty for improper use of words "limited liability partnership" or "LLP"

If any person or persons carry on business under any name or title of which the words "limited liability partnership" or "LLP" or any contraction or imitation thereof is or are the last word or words, that person or each of those persons shall, unless duly incorporated as limited liability partnership, be punishable with fine which shall be less than fifty thousand rupees but which may extended to five lakh rupees.

Partners and their relation

On the incorporation of an LLP the person who subscribed their names to the incorporation document shall be its partners and any other person can become a partner according to the LLP agreement. The rights and duties of the partners, and the partnership and the partners are according to the terms and condition of the partnership agreement between the partners or between the LLP and its partners.

Cessation of partnership interest

A person may cease to be a partners of LLP in accordance with agreement with the other partners or , in the absence of agreement with the other partner as to cessation of being a partner, by giving a notice in writing of not less than thirty days to the other partners of his intention to resign as partner.

a person shall cease to e a partner in the following circumstances also

a. On his death or dissolution of the LLP. Or

b. If he is declared to be of unsound mind by a competent court, or

c. If he has applied to be adjudged as an insolvent or declared as an insolvent The ceased partner is referred as a former partner of LLP

Liability of a former partner

The former partner is to be regarded as still being a partner of the LLP in relation to any person dealing with the LLP unless

a. The person has notice that the former partner has ceased to be a partner of the LLP or

b. Notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.

The former partner also is responsible for all the obligation of the partnership during the period of his partnership.

Rights of a former partner

Where a partner of an LLP ceases to be a partner, unless otherwise provided in the LLP agreement, the former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be entitled to receive from the LLP.

A. An amount equal to the capital contribution of the former partner actually made to the LLP; and

B. His right to share in the accumulated profits of the LLP, after the deduction of accumulated losses of the LLP, determined as at the date the former partner ceased to be a partner.

Extent and liability of LLP and partners

1. Every partner of an LLP is treated as the agent of the LLP but not of other partners for the purpose of doing the business.

2. An LLP Is not bound by anything done by a partner in dealing with a person if

a. The partner in fact has no authority to act for the LLP in doing a particular act: and

b.The person knows that he has no authority or does not know or believe him to be a particular of the LLP

3. The LLP is liable if a partner of an LLP is liable to any person as a result of a wrongful act or omission on his part in the course of the business of the LLP or with its authority.

4. An obligation of the LLP whether arising in contract or otherwise, shall be solely the obligation of the LLP.

5. The liability of the LLP shall be met out of the property of the LLP

6. A partner of an LLP shall not be personally liable for the wrongful act or omission of any other partner of the LLP.

7. Any person, who by words spoken or written or by conduct, represents himself or knowingly permits himself to be represented to be a partner in an LLP is liable to any person who extends credit to the LLP. the LLP also is liable for such credit received by the firm.

8. Where after a partners death the business is continued in the same LLP's name, the continued use of that name or of the deceased partners name as a part thereof shall not be of itself make his legal representative or his estate liable for any act of the LLP done after his death.

Unlimited liability in case of Fraud

If any act is done or carried out by the LLP or any of its partners with the intent to defraud the creditors of the LLP, the liability of the partners and LLP becomes unlimited for all or any of the debts or other liabilities of the LLP. even if the act is done by the partner, the LLP is liable to the same extent as the partner, unless it is established by the LLP that such act was without the knowledge or the authority of the LLP. for this act, the partner or partners are also be punishable with imprisonment for a term which may extent to two years and with fine which shall not be less than fifty thousand rupees but which may extend to five lack rupees.

Assignment and transfer of partnership rights

The right of a partner to a share of the profits and losses of the LLP and to receive distribution in accordance with the LLP agreement are transferable either wholly or in part, provided such transfer does not causes any disassociation of partners or a dissolution and winding up of the LLP. but such transfer does not give any right to the transferee or assignee to participate in the management or conduct of the activities of the LLP or access information concerning the transactions of the LLP.

Conversion into limited liability partnership

A firm, private company or an unlisted public company is allowed to be converted into LLP in accordance with the provisions of the act. Upon such conversion, on and from the date of certificate of registration issued by the registrar, all tangible and intangible property vested in the firm or the company: all assets, interest, rights , privileges, liabilities, obligations relating to the firm or the company and the whole of the undertaking of the firm or the company shall be transferred to and shall vest in the LLP without further assurance , act or deed and the firm or the company shall be deemed to be dissolved and removed from the records of the registrar of firms or registrar of companies, as the case may be.

Distinction between LLP and partnership

Features	LLP	Partnership
1. Formation	Formed as per LLP act 2008 Registration is compulsory	For as per the partnership act act1932
2. Registration	with the registrar of companies	Not compulsory but an unregistered partnership won't have the ability to sue.
3. Legal entity	A separate legal entity	Not a separate legal entity
4. Perpetual succession	LLP has a perpetual succession	Comes to an end at the death, retirement or insolvency of the partners.
5. Capital contribution	Not mentioned	Not mentioned
6. Number of partners	Minimum two and there is no maximum limit	Two to twenty partners
7. Name	Name the end word limited liability partnership or the acronym LLP	No rules for the name.
8. Liability	Limited to the extent of the contribution to the LLP.	Unlimited liability and personal property of the partners are liable for the debts of the firm.

9. Foreign nationals as partners	Foreign nationals can be partners.	Foreign national cannot form partnership firm.
10. Annual return	Annual statement of accounts and annual returns has to be filed with the ROC.	No necessity of filing returns to the registrar of firms.
11. Meeting	Not required	Not required
12. Dissolution	Voluntary or by order of the tribunal	By agreement of the partners insolvency or by court order.

Distinction between LLP and company

Features	Company	LLP
Formation	Formed as per the companies act 2013 and various rules made there under	Formed by the limited liability partnership act 2008 and various rules made therunder
Registration	Registration is compulsory and it is registered with the registrar of companies who issues the certificate of incorporation	Registration is compulsory with the registrar of companies
Legal entity	A separate legal entity	A separate legal entity
Perpetual succession	Company has a perpetual succession	LLP has a perpetual succession

Capital	The minimum and maximum amount of paid up capital of public and private companies are clearly be specified in the companies act	Not specified
Minimum number of members	Two in the case of a private company and seven in the case of a public limited company	Minimum two partners
Maximum numberof members	Maximum 200 in the case of a private company and there is no maximum limit for a public company	No limit to the maximum number of partners
Name	Public company uses the word ltd at its end name and private company use the word pvt.ltd at its end name	Use either the word limited liability partnership or the Acronym LLP at its end name.
Liability	Limited to the extent of the value of shares	Limited to the extent of the contribution to the LLP.
Minimum number of directors or partners	Minimum two in the case of a private company and three in the case of a public company	Minimum tow designated partners required

Memorandum of association and articles of association	Very important documents which mentions everything about the company	No such document but LLP agreement
Transferability of interest	Shares of public company are transferable, but share transfer is restricted in private company	Rights and interest of partners are transferable according to the LLP Agreeement.

Winding up and dissolution

The winding up of an LLP may be either voluntary or by the tribunal and LLP, so wound up maybe dissolved.

Voluntary winding up

Any LLP may be wound up voluntarily if the LLP passes a resolution to wind up the LLP with approval of at least three fourth of the total number of its partners, but if the LLP has creditors, whether secured or unsecured, the approval of such creditors are also be required for its winding up. A copy of the resolution shall be filed with the registrar within third party days of passing of such resolution. The voluntary winding up shall be deemed to commence on the date of the resolution for voluntary winding up.

The tribunal may woundup the LLP in the following circumstances

1. If the LLP decides that the LLP be wound up by the tribunal
2. If for a period of more than six months, the number of partners of the LLP is reduced below two;
3. If the LLP is unable to pay its debts

4. If the LLP has acted against the interests of the sovereignty and integrity of india, the security of the state or public order.
5. If the LLP has made a default in filing with the registrar the statement of account and solvency or annual return for any five consecutive financial year; or
6. If the tribunal is of the opinion that, it is just and equitable that the LLP be wound up.

Advantages of LLP

1. Easy formation
2. Separate legal entity
3. Limited liability
4. Perpetual succession
5. Combined benefit of partnership and company
6. Flexibility
7. Easy transferability of ownership
8. Lower rate of taxation

Disadvantages

1. Public disclosure
2. Less credibility
3. Retaining profit
4. Unlimited liability
5. Joint liability