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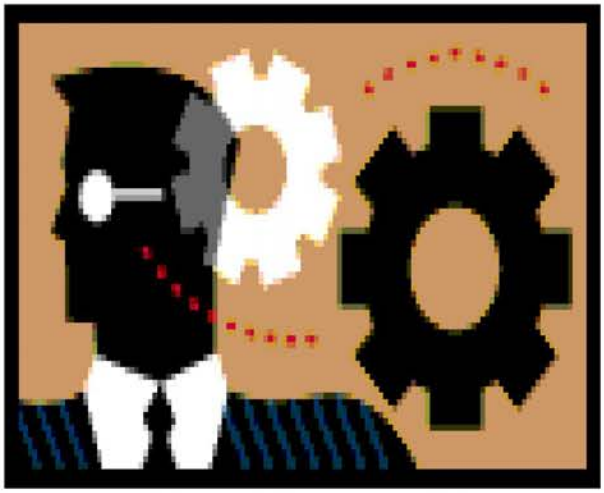

CS EXECUTIVE

MODULE-1

ECONOMIC, BUSINESS AND COMMERCIAL LAWS

BY:-**CS NITESH KR. JAISWAL**

(Company Secretary (FCS), LL.B.)

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with the blessings of

"maa sidhidatri"

Dedicated to

My mother **Late SUNITA JAISWAL**

And father **SHRI SURENDRA PRASAD**

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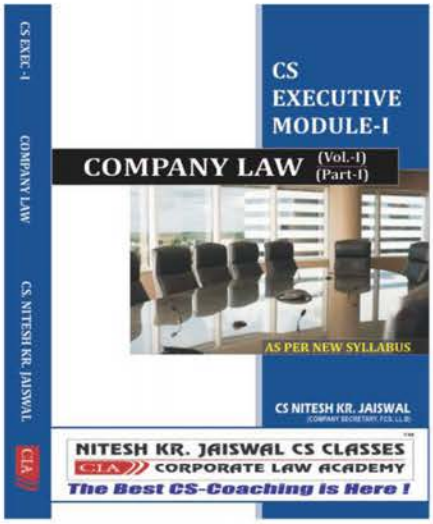

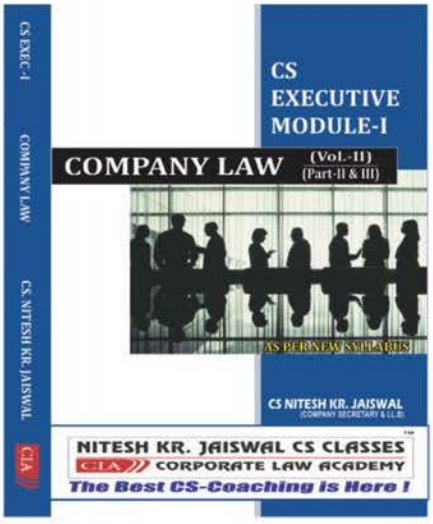

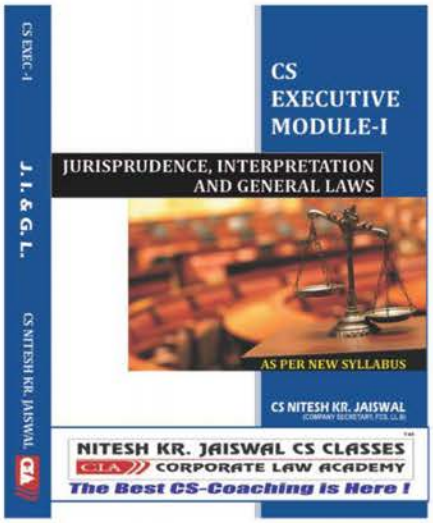

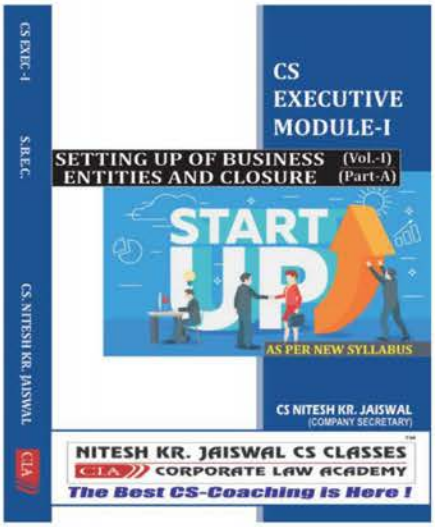

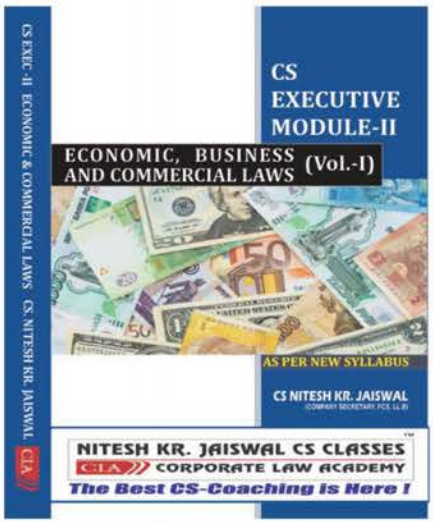

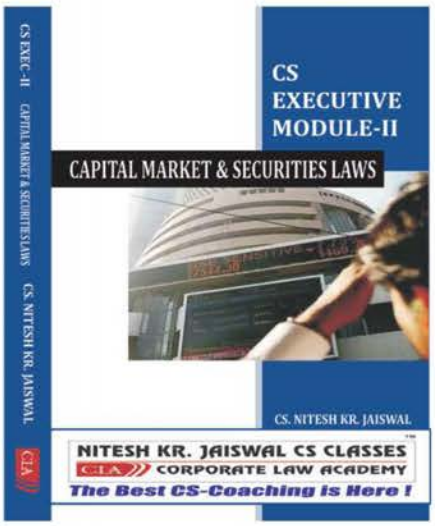

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CS. Sudhir Kumar
CS. Sourabh Raha

And

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Preface

We have great pleasure in placing the book on Economic, Business and Commercial Laws in the hands of students. This book gives a complete and overall prospect about Economic, Business and Commercial Laws from examination point of view and meets the requirements of all levels of students preparing for Company Secretaryship examination. The focus continues on equipping the students with theories, concepts and techniques that can be applied to various spheres of Company Secretary professional.

The important features of this book are as follows:

- It is user friendly and provides information in well structured manner.
- It incorporates latest changes relating to the subject, Economic, Business and Commercial Laws.
- It elaborates the concept through practical problems.
- Tables and diagrams are used for explaining the key concepts.
- Lucid and comprehensive presentation of the complex and advanced subjects matter will help the students in easy understanding.
- **The book is comprehensive and even a student who has not studied the subject earlier can easily understand the concept and system of Economic, Business and Commercial Laws.**

There is no denying the fact that improvement is an unending process.

We look forward to the comments, suggestions and criticisms from the readers for improvement of this book and will be gratefully acknowledged.

However, it becomes necessary for every student to constantly update with legislative changes made as well as judicial pronouncements rendered from time to time by referring to the ICSI's monthly journal 'Chartered Secretary' and e-bulletin 'Student Company Secretary' as well as other law/professional journals and reference books.

Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination.

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CS. NITESH KR. JAISWAL
(Company Secretary (FCS), LL.B.)

EXECUTIVE PROGRAMME
Module 2
Paper 7
Economic, Business and Commercial Laws

SYLLABUS

Objectives

Part I : To provide expert knowledge in Foreign Exchange Management and NBFCs.

Part II : To provide expert knowledge in Competition Law.

Part III : To provide working knowledge in Business and Commercial Laws.

Part – III: Business & Commercial Laws (35 Marks)

Consumer Protection

13. Consumer Protection Act, 1986
14. Essential Commodities Act, 1955
15. Legal Metrology Act, 2009

Property Law

16. Transfer of Property Act, 1882
17. Real Estate (Regulation and Development) Act, 2016

Anti-Corruption Laws

18. Benami Transaction Prohibitions (Act)
19. Prevention of Money Laundering

Business Laws

20. Indian Contracts Act, 1872
21. Specific Relief Act, 1963
22. Sale of Goods Act, 1930
23. Partnership Act, 1932
24. Negotiable Instrument Act, 1881

ECONOMIC, BUSINESS AND COMMERCIAL LAWS (Vol-2)

{Strictly as per new syllabus (2017) prescribed by The Institute of Company Secretaries of India (ICSI)}

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S. No.	CHAPTERS	PAGE No.
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II	ICSI QUESTION PAPER DECEMBER 2018	1-6
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2	CONSUMER PROTECTION ACT,1986	19-58
3	TRANSFER OF PROPERTY ACT,1882	59-98
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6	REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016	131-150
7	THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988	151-164
8	SPECIFIC RELIFE ACT, 1963	165-186
9	PARTNERSHIP ACT, 1932	187-224
10	INDIAN CONTRACTS ACT, 1872	225-378
11	SALE OF GOODS ACT, 1930	379-416
12	NEGOTIABLE INSTRUMENT ACT, 1881	417-448

This book should be read along with "EBCL Vol-1" containing additional 13 Chapters of EBCL Part-I & II

This book is updated
With all amendments
Till 30th December, 2019

(Afterwards amendments will be included / discussed in live lectures at classroom)

ICSI Question Paper June 2019

NEW SYLLABUS **427**

Roll No. .....

Time allowed : 3 hours ***Maximum marks : 100***

Total number of questions : 6 ***Total number of printed pages : 6***

NOTE : *Answer ALL Questions.*

PART–I

1. (*a*) Reserve Bank of India is a banker of banks. Comment.

(*b*) How a person resident in India can hold, own, transfer or invest in any immovable property situated outside India. Comment.

(*c*) Explain under what circumstances the Central Government is empowered to supersede any authority constituted under Special Economic Zones Act, 2005 ? What will be the consequences if such power is exercised by Central Government ?

(*d*) What are the conditions for the Indian Company to allot sweat equity shares of its holding company to its employees, who are resident outside India.

(*5 marks each*)

Attempt all parts of either Q. No. 2 or Q. No. 2A

2. (*a*) Explain the permissible capital account transactions by an individual under the liberalised remittance scheme.

(*4 marks*)

(*b*) Explain the objectives of 'Foreign Trade Policy' under the Foreign Trade Policy for 2015-2020.

(*4 marks*)

(*c*) What do you understand by "Offshore Banking Unit" under Special Economic Zone Act, 2005 ?

(*4 marks*)

(*d*) Whether conversion of 'External Commercial Borrowing' into equity is permissible ? Comment.

(*4 marks*)

(*e*) Discuss the objectives of enacting the Foreign Exchange Management Act, 1999. Explain in brief the scheme of Foreign Exchange Management Act, 1999.

(*4 marks*)

OR (Alternate question to Q. No. 2)

2A. (*i*) State the sources within which the Indian mutual funds registered with SEBI are permitted to invest in overseas direct investment.

(*ii*) What are the reporting requirements for non-banking financial companies ?

(*iii*) Under what conditions 'Foreign Direct Investment' in limited liability partnership is permitted.

(*iv*) How the "Special Economic Zone Authority" is constituted under Special Economic Zone Act, 2005 ? Which are the defects or irregularities for which any act or proceedings of an authority can not be invalidated ?

(*v*) 'Non-Banking Financial Companies' are akin to that of bank, but they differ from banks in certain cases. Explain.

(*4 marks each*)

PART–II

3. (*a*) How the competition commission will determine whether an agreement has appreciable adverse effect on competition ?

(*b*) Whether the jurisdiction of the competition commission of India extends to acts/agreements taking place outside India, which affects competition in India ? Explain.

(*c*) What is the purpose of competition policy of India and Competition Act, 2002 ?

(*d*) What is meant by dominant position under the Competition Act, 2002 ?

(*e*) Discuss the consequences of making false statement by a person being a party to combination under Competition Act, 2002.

(*3 marks each*)

4. (*a*) The Competition Act, 2002 is an improvement on the MRTP Act, 1969. Critically analyse this statement.

(*b*) Explain what is meant by Bid-rigging, tie-in agreement, Exclusive supply agreement, and Refusal to deal.

(*5 marks each*)

PART–III

5. (*a*) Ram employed in Mumbai promised to pay ₹ 8,000 per month to his wife Sunita. She was living in Delhi. On receiving information that she has become unfaithful to him, Ram stopped the payment of ₹ 8,000 to Sunita. Sunita approaches to file a case against Ram. Advise her with reference to the Indian Contract Act, 1872.

(*4 marks*)

(*b*) Rajni got herself operated in the Devashri Hospital for removal of her uterus, as a cyst was found to have developed near one of her ovaries. The surgeon, who performed the operation, left abdominal pack in the abdominal. This caused lot of pain, suffering and uneasiness to her. The abdominal pack was subsequently removed by another surgical operation. It was alleged that due to negligence of the surgeon, the patient suffered all the consequences, therefore it should be treated as negligence in the treatment. But the Hospital authorities contended that the patient's problem was removed by the second operation, hence it is not deficiency. Rajni sought the relief under Consumer Protection Act, 1986 stating that this negligence may be treated as deficiency and compensation may be paid to her. Decide whether Ranji will succeed or not ? Why ?

(*4 marks*)

(*c*) A draws and B accepts the bill payable to C or order. C endorses the bill to D and D to E, who is 'holder in due course'. Decide from whom E can recover the amount under the Negotiable Instrument Act, 1881 ?

(*4 marks*)

(*d*) Sachin made an unconditional gift of property to Amit but continued in possession of gifted property. Sachin revoked the gift deed transferred it to Naresh. Amit wants to recover possession from Naresh. Discuss it in the light of provisions of Transfer of Property Act, 1882 whether Naresh can withhold the gifted property ?

(*4 marks*)

(*e*) A minor fraudulently overstated his age and purchased a motor car after executing a promissory note in favour of the owner of the motor car for its price. The car owner compelled the minor to pay the amount of the promissory note. Whether the car owner will succeed ? Examine it with reference to Indian Contract Act, 1872 and Specific Relief Act, 1963.

(*4 marks*)

Attempt all parts of either Q. No. 6 or Q. No. 6A

6. Distinguish between the following :

(*a*) Contract of service and Contract for service

(*b*) Specific performance and Injunction

(*c*) Cheque and Bill of Exchange

(*d*) Mortgage and Charge

(*e*) Conditions and Warranties.

(*3 marks each*)

OR (Alternate question to Q. No. 6)

6A. (*i*) Explain the salient features of the Benami Transactions (Prohibition) Act, 1998.

(*3 marks*)

(*ii*) What are the effects of Money laundering on the economic development of a country ?

(*3 marks*)

(*iii*) Explain the functions of 'Real Estate Regulatory Authority' under the Read Estate (Regulation and Development) Act, 2016.

(*3 marks*)

(*iv*) Whether a minor may be admitted in the business of partnership firm under the Indian Partnership Act, 1932 ? Whether the minor will have any right in parnership firm ? Explain.

(*3 marks*)

(*v*) Against whom specific performance of a contract may be enforced under the Specific Relief Act, 1963 ? Explain.

(*3 marks*)

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ICSI Question Paper December 2018

NEW SYLLABUS **427**

Roll No. .....

Time allowed : 3 hours ***Maximum marks : 100***

Total number of questions : 6 ***Total number of printed pages : 6***

NOTE : *Answer **ALL** Questions.*

PART–I

1. (*a*) The object of the Foreign Contribution (Regulation) Act, 2010 is to legalise foreign donations and hospitality to office bearers of political parties. Comment.

(*b*) Capital goods and spares that have become obsolete/surplus, may be exported, transferred to another Special Economic Zone unit but law does not permit to dispose of in Domestic Tariff Area on payment of applicable duties. Comment.

(*c*) Prior approval of RBI is not mandatory for transfer of Capital instruments from resident to non-residents by way of sale. Comment.

(*d*) What are the functions of Reserve Bank of India ?

(*5 marks each*)

Attempt all parts of either Q. No. 2 or Q. No. 2A

2. (*a*) What is the object of service export from India Scheme and what are the eligibility conditions of obtaining benefits of the same under Foreign Trade Policy 2015-20 ?

(*4 marks*)

(*b*) What do you mean by Non-Banking Financial company ? Enumerate the powers of Reserve Bank of India vested in the Reserve Bank of India Act for regulating and supervising the Non-Banking Financial companies.

(*4 marks*)

(*c*) Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 deals with limits on possession and retention of foreign currency or foreign coins. What is the limit of possession or retention of foreign currency or foreign coins under Regulation 3 ?

(*4 marks*)

(*d*) What are the eligibility criterias for forming the trust under the Indian Trust Act, 1882 ?

(*4 marks*)

(*e*) Section 34 of Special Economic Zones Act, 2005 casts upon the Authority a duty to undertake such measures for the development, operation and management of Special Economic Zone. Explain.

(*4 marks*)

OR (Alternate question to Q. No. 2)

2A. (*i*) What are the obligations on Indian Party which has made direct investment outside India ?

(*4 marks*)

(*ii*) Which are the organizations and persons who are specifically debarred from receiving foreign contributions under Foreign Exchange Regulation Act, 2010 ?

(*4 marks*)

(*iii*) Who is an authorized person under Foreign Exchange Management Act, 1999 and what are his obligations ?

(*4 marks*)

(*iv*) Who can establish the Special Economic Zone ? Discuss.

(*4 marks*)

(*v*) State to whom the provisions of Non-Banking Financial Company-Systemically Important Non-Deposit Taking Company and Deposit Taking Company (Reserve Bank) Directions, 2016 shall apply ?

(*4 marks*)

PART–II

3. (*a*) What do you mean by Cartel ? Explain it with reference to Competition Act, 2002.

(*b*) What agreements are anti competitive agreements under the Competition Act, 2002 ?

(*c*) What constitutes abuse of dominance under the Competition Act, 2002 ?

(*d*) What do you understand by the term "Combination" under the Competition Act, 2002 ?

(*e*) Who is "consumer" under the Competition Act, 2002 ?

(*3 marks each*)

4. (*a*) What factors have to be taken into consideration by Competition Commission of India for the purpose of determining whether an enterprise enjoys dominant position or not ? Explain.

(*5 marks*)

(*b*) What orders can be passed by Competition Commission of India under section 27 of the Competition Act, 2002 after any inquiry into agreement entered into by any enterprise or association of enterprises or person or association of persons or an enquiry into abuse of dominant position ? Explain.

(*5 marks*)

PART–III

5. (*a*) A contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligations. As registration has not been effected, A the transferor, seeks to evict B from the land. Can he do so ? Explain.

(*4 marks*)

(*b*) The complainant booked a ticked from Delhi to New York by a KLM plane. The airport authorities in New Delhi did not find any fault in his visa and other documents. However, at Amsterdam, the airport authorities instituted proceedings of verification because of which the appellant missed his flight to New York. After reaching New York, the airlines tendered apology to the appellant for the inconvenience and paid as a goodwill gesture a sum of ₹ 2,500. The appellant made a complaint to the National Commission under the Consumer Protection Act, 1986. Whether the complainant will succeed ? Give reasons with the help of decided case law.

(*4 marks*)

(*c*) A contracts to sell B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belongs to A and the two remaining bighas to a stranger, who refuses to part with them. B files the suit for specific performance against A. Decide with the help of the legal provisions, whether the specific performance suit is maintainable.

(*4 marks*)

(*d*) The ABZ company offered by an advertisement, a reward of ₹ 1,000 to anyone who contacted influenza after using smoke ball in the specified manner. Amita used the smoke ball in the specified manner, but was attacked by influenza. She filed the suit against ABZ company and claimed the reward. Decide whether the suit is maintainable.

(*4 marks*)

(*e*) Mohit finds a ring of Shardha and sells it to a third person Prachi who purchases it for value and in good faith. Whether Shardha can file a suit to recover the ring ? Advise with cogent reasons.

(*4 marks*)

Attempt all parts of either Q. No. 6 or Q. No. 6A

6. Distinguish between the following :

(*a*) Mortgage and Charge

(*b*) Sale and agreement to sell

(*c*) Contract of Indemnity and Guarantee

(*d*) Negotiability and Assignability

(*e*) Bill of Exchange and Promissory Note.

(*3 marks each*)

OR (Alternate question to Q. No. 6)

6A. (*i*) Explain the salient features of the Real Estate (Regulation and Development) Act, 2016.

(*ii*) Explain Adjudication of Benami Property under the Benami Transaction Act, 1988.

(*iii*) Explain Seizure and Confiscation under the Essential Commodities Act, 1955.

(*iv*) What do you understand by the term "Money Laundering" under the Prevention of Money Laundering Act, 2002 ?

(*v*) What do you understand by "Holding out" under the Indian Partnership Act, 1932 ? Enumerate the circumstances under which the docrine of "Holding out" is not applicable ?

(*3 marks each*)

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CHAPTER

1

PREVENTION OF MONEY LAUNDERING ACT, 2002

Covering-

- Bare Act
- ABC Analysis
- Money Laundering – Meaning
- Prevention of money laundering – Global Initiatives
- Prevention of money laundering – Indian Initiatives
- Money Laundering - Process
- Impact Of Money Laundering On Development
- Obligation of Banks
- KYC Policy
- Punishment
- Advance Your Knowledge
- Self-Test Questions
  - From Past CS Exam
  - From ICSI Module

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भारत का राजपत्र
The Gazette of India

THE PREVENTION OF MONEY-LAUNDERING ACT, 2002

ACT NO. 15 OF 2003

[17*th January*, 2003.]

An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;

AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme;

AND WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.—(*1*) This Act may be called the Prevention of Money-laundering Act, 2002.

(*2*) It extends to the whole of India.

(*3*) It shall come into force on such date[1] as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Definitions.—(*1*) In this Act, unless the context otherwise requires,—

(*a*) "Adjudicating Authority" means an Adjudicating Authority appointed under sub-section (*1*) of section 6;

(*b*) "Appellate Tribunal" means the Appellate Tribunal established under section 25;

(*c*) "Assistant Director" means an Assistant Director appointed under sub-section (*1*) of section 49;

(*d*) "attachment" means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III;

[2][(*da*) "authorised person" means an authorised person as defined in clause (*c*) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999);]

(*e*) "banking company" means a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act;

(*f*) "Bench" means a Bench of the Appellate Tribunal;

[3][(*fa*) "beneficial owner" means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person;]

CHAPTER II

OFFENCE OF MONEY-LAUNDERING

3. Offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the [1][proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.

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PREVENTION OF MONEY LAUNDERING ACT, 2002

ABC Analysis
(ICSI -Exam Point of view)

A
1. Concept of money Laundering
2. Money Laundering Process
3. Impact of Money Laundering

B
4. Obligation of Banking Companies, Financial Institution & Intermediaries
5. KYC Guidelines

C
6. Punishment
7. Attachment, Seizure and Confiscation of Property, etc.

वित्त मंत्रालय
MINISTRY OF FINANCE
सत्यमेव जयते

Money laundering is the process of conversion of black (tainted) money into white (untainted) money. Money laundering is the processing of criminal proceeds to disguise its illegal origin.

BLACK / TAINTED MONEY → CONVERTED INTO → WHITE / UNTAINTED MONEY

Most fundamentally, money laundering is linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.

IMPACT OF MONEY LAUNDERING ON DEVELOPMENT/ *CONNECTION OF MONEY LAUNDERING WITH SOCIETY AT LARGE*

Economies with growing or developing financial centers, but inadequate controls are particularly vulnerable to money laundering, as against the established financial center countries, which implement comprehensive anti-money laundering regimes.

The gaps in a national anti-money laundering system are exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures.

The funds owned by criminals escape the **government's ability to control and regulate the economy**.

Through the process of money laundering, organised crime can infiltrate financial institutions, **acquire control of large sectors** of the economy through investment, or **offer bribes to public officials and indeed governments**. Thus, the economic and political influence of criminal organisations **can weaken the social fabric, ethical standards** and ultimately the democratic institutions of society.

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PREVENTION OF MONEY LAUNDERING – GLOBAL INITIATIVES

Since money laundering is an international phenomenon, transnational co-operation is of critical importance in the fight against this menace. A number of initiatives have been taken to deal with the problem at international level.

In this context, the **United Nations or the Bank for International Settlements**, took some initiatives in 1980s to address the problem of money laundering. However, with the creation of the **Financial Action Task Force (FATF) in 1989,regional groupings,** such as the European Union, Council of Europe, and organization of American States **also established anti- money laundering** standards for their member countries.

The major international agreements addressing money laundering include the **United Nations Convention against Illicit Trafficking in Drugs and Psychotropic Substances (the Vienna Convention)** and **Council of Europe Convention on Laundering**, Search, Seizure and Confiscation of the Proceeds of Crime. The role of financial institutions in preventing and detecting money laundering has also been the subject of pronouncements by the **Basle Committee on Banking Regulation Supervisory Practices, the European Union and the International Organization of securities Commissions.**

PREVENTION OF MONEY LAUNDERING – INDIAN INITIATIVES

The **United Nation's political declaration of 1998United Nations members to enact specific legislation** for the prevention of money laundering. In India, the Prevention of Money Laundering Act, 2002 was passed to implement the UN resolution.The Act has come in force with effect from July 1, 2005.

Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act, 2002 consists of ten chapters containing 75 sections and one Schedule divided into five parts.

Adjudicating Authority

Section 6 empowers the Central Government to appoint, by notification, one or more persons not below the rank of Joint Secretary to the Government of India as Adjudicating Authority to exercise the jurisdiction, powers and authority conferred on or under the Act.

Appellate Tribunal

Chapter VI of the Act deals with Appellate Tribunal. Section 25 empowers the Central Government, to establish an Appellate Tribunal to hear appeals against the orders of Adjudicating Authority and other authorities under the Act

Special Courts

Sections 43 to 47 of the Act deal with provisions relating to Special Courts. Section 43(1) empowers the Central Government to designate, in consultation with the Chief Justice of the High Court, one or more Courts of Session as Special Courts or Court for such area or areas or for such case or class or group of cases as may be specified in the notification, for trial of offence punishable under Section 4.

MONEY LAUNDERING-MEANING

SECTION 3

Whoever,

(a) acquires, owns, possesses, or transfers any **proceeds of crime** or

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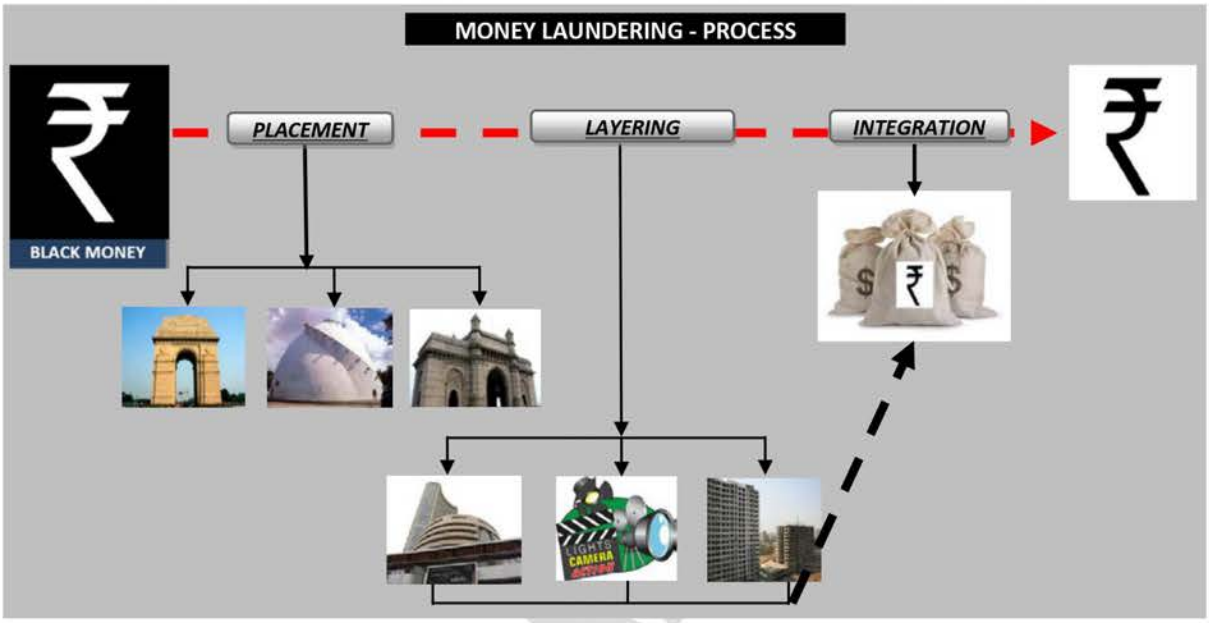

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(b) knowingly enters into any transaction which is related to proceeds of crime directly or indirectly or

(c) conceals or aids in the concealment of the proceeds of crime,

shall be guilty of offence of money laundering.

PROCEEDS OF CRIME

Proceeds of crime mean any property derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a **scheduled offence** or the value of any such property.

SCHEDULED OFFENCE

"scheduled offence" means—

(i) the offences specified under **Part A** of the Schedule,(offences relating to narcotics etc.)

(ii) the offences specified under **Part B** of the Schedule if the total value involved in such **offences is thirty lakh rupees or more**. (Offences relating to murder, kidnapping, Arms).

MONEY LAUNDERING- PROCESS

The process of money laundering can be classified into **three stages**, namely, ***placement, layering*** and ***integration***.

1. PLACEMENT

At this stage, the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into smaller sums.

2. LAYERING

In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source.

3. INTEGRATION

At this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.

OBLIGATION OF BANKING COMPANIES, FINANCIAL INSTITUTIONS AND INTERMEDIARIES

Section 12 requires every banking company, financial institution and intermediary to **maintain a record** of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place **within a month**. Any doubtful transaction is required to be intimated to **authority (director)** under the Act.

Banks and financial institutions are required to verify and maintain the records of the identity of all its clients, for a period of **ten years from the date of cessation** of the transactions between the clients and the banking company, financial institution or intermediary.

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If Banks and financial institutions provides the aforesaid information to the prescribed Authority in time, then no civil proceedings can be taken against them.

Banks should keep in mind that the **information collected from the customer for the purpose of opening of account is to be treated as confidential** and details thereof are not to be divulged for cross selling or any other like purposes.

Banks should ensure that the provisions of Foreign Contribution (Regulation) Act, 2010 as amended from time to time, wherever applicable are strictly adhered to.

KYC) NORMS/ (AML) MEASURES/ (CFT) GUIDELINES – ANTI MONEY LAUNDERING STANDARDS

RBI issued Master Circular on Know Your Customer (KYC) norms/Anti-Money Laundering (AML) standards/Combating of Financing of Terrorism (CFT)/Obligation of banks under Prevention of Money Laundering Act, (PMLA), 2002 and Banks were advised to follow certain customer identification procedure for opening of accounts and monitoring transactions of a suspicious nature for the purpose of reporting it to appropriate authority

All banks are required to put in place a comprehensive policy framework covering KYC standards. KYC enables banks to know/ understand their customers and their financial dealings to be able to serve them better and manage its risks prudently.

Banks should frame their KYC policies incorporating the following **four key elements:-**

1. Customer Acceptance Policy;
2. Customer Identification Procedures;
3. Monitoring of Transactions; and
4. Risk Management.

For the purpose of KYC policy, a 'CUSTOMER' is defined as:

(a)	a person or entity that maintains **an account** and/or has a **business relationship** with the bank;
(b)	one on whose **behalf** the account is maintained (i.e. the beneficial owner);
(c)	beneficiaries of transactions conducted by **professional intermediaries**, such as Stock Brokers, Solicitors etc. as permitted under the law, and
(d)	any person or entity connected with a financial transaction which can pose significant reputational or other risks to the bank, say, a wire transfer or issue of a **high value demand draft** as a single transaction.

OBJECTIVE OF KNOW YOUR CUSTOMER' (KYC) POLICY/ GUIDELINES

The objective of KYC guidelines is to **prevent banks from being used, intentionally or unintentionally, by criminal elements** for money laundering activities. KYC procedures enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently. RBI introduced KYC guidelines for all banks.

PUNISHMENT

Section 4 provides that any person who commits the offence of money laundering shall be punishable with **rigorous imprisonment** for a term which shall not be less than **three years but which may extend to seven years** and also liable to fine.

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However, where the proceeds of crime involved in money laundering relates to any offence specified under the **narcotic drugs and psychotropic substances Act**, the punishment may extend to rigorous imprisonment for **ten years**. Property involved in money laundering will also be **confiscated** by the Central Government.

OFFENCES TO BE COGNIZABLE AND NON-BAILABLE

Section 45 declares every offence punishable under the act to be cognizable and non-bail able.

However the special court shall not take cognizance of any offence punishable under section 4, **except upon a complaint in writing made by**

(i) the director or

(ii) any officer of the central government or state government authorised in writing in this behalf

(iii) by the central government by a general or special order made by that government.

No police officer shall investigate into an offence under this act, unless specifically authorized, by the central government by a general or special order, and subject to such conditions as may be prescribed.

ATTACHMENT, SEIZURE AND CONFISCATION OF PROPERTY, ETC.

Where the **Director or any officer not below the rank of Deputy Director authorized by him,** has reason to believe on the basis of material in his possession that any person is in possession of any proceeds of money laundering; such person has been charged of having committed a scheduled offence and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, such officer may by order in writing, **provisionally attach such property for a period not exceeding 180 days from the date of the order, in the manner provided in the Second Schedule of the Income-tax Act, 1961**. Every order of attachment **shall cease to have effect after the expiry of ninety days** from the date of the order.

Section 60 provides that where the Director has made an order for attachment of any property or where Adjudicating Authority has made an order confirming such attachment or confiscation of any property and such property is suspected to be in a contracting state, **the Special Court on an application by the Director** or the Administrator as the case may be, **may issue a letter of request to a court** or an authority in the contracting state for execution of such order.

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Q. 1. *WHAT IS FINANCIAL ACTION TASK FORCE?*

Ans. Financial action task force was established in 1989. It is an international body which promotes measures taken up to counteract the world wide impact of money laundering. Main tasks/functions of FATF are:-

(a) Review the techniques adopted for money laundering.

(b) Checks the initiatives made by the countries to counteract money laundering.

(c) Spread awareness among non-member countries also.

Thus, FATF study, examines and evaluates the current situation, defines the policy and initiates measures that can act as solution to this problem of money laundering.

Q. 2. *DISCUSS THE OBJECTIVES AND FUNCTIONS OF THE FINANCIAL ACTION TASK FORCE?*

Ans. The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counters and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In collaboration with other international stakeholders, the FATF works to identify national-level vulnerabilities with the aim to protecting the international financial system from misuse.

Q. 3. *WHAT IS THE CONNECTION OF MONEY LAUNDERING WITH SOCIETY AT LARGE?*

Ans. The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organized crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments.

The economic and political influence of criminal organizations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society. In countries transitioning to democratic systems, this criminal influence can undermine the transition. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.

Q. 4. *WHAT INFLUENCE DOES MONEY LAUNDERING HAVE ON ECONOMIC DEVELOPMENT?*

Ans. Launderers are continuously looking for new routes for laundering their funds. Economies with growing or developing financial centres, but inadequate controls are particularly vulnerable as established financial centre countries implement comprehensive anti-money laundering regimes.

Differences between national anti-money laundering systems will be exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures.

Some might argue that developing economies cannot afford to be too selective about the sources of capital they attract. But postponing action is dangerous. The more it is deferred, the more entrenched organized crime can become.

As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organized crime. Fighting money laundering and terrorist financing is therefore a part of creating a business friendly environment which is a precondition for lasting economic development.

Q. 7. *Is the offence committed under Prevention of Money Laundering Act, 2002 is cognizable and bailable? State the law and procedure relating to it.[Dec. 2017]*

Ans. Section 45 of the Prevention of Money Laundering Act, 2002 declares every offence punishable under this Act to be cognizable. It provide that notwithstanding anything contained in the Code of Criminal Procedure, 1973, a person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall not be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release; and where the Public Prosecutor opposes the application, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while in bail.

The Special Court in this respect shall not take cognizance of any offence punishable under Section 4, except upon complaint in writing made by (i) the Director or (ii) any officer of the Central Government or State Government authorized in writing in this behalf by the Central Government by a general or special order made by that Government.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS

1. Write the short notes on "Process of money laundering".
2. Write a note on global initiatives in the prevention of money laundering.
3. How is the property involved in money laundering dealt with under the Prevention of Money Laundering Act, 2002 ?
4. Mention the obligations of banking companies, financial institutions and intermediaries under the Prevention of Money Laundering Act, 2002.
5. Discuss in brief the objectives and scope of the Prevention of Money Laundering Act, 2002.
6. State, with reasons in brief, whether the <u>following statements are true or false.</u>
   (i) Money laundering can provide short-term benefits to the economy.
   (ii) The property confiscated for money laundering vests with the central government.
7. Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :
   (i) Every offence punishable under the Prevention of Money Laundering Act, 2002 is a _____ offence.
   (ii) The process of money laundering can be classified into _____, layering and integration.

FROM ICSI MODULE

Answer the followings:-

1. Define the term money laundering and explain the process of money laundering.
2. Briefly discuss the international efforts in preventing the money laundering.
3. Briefly explain the salient features of Prevention of Money Laundering Act.
4. Write short note on the following:
   (a) Impact of money laundering on the Development.
   (b) Obligation of banking companies, financial institutions and intermediaries.
   (c) Attachment, seizure and confiscation of property etc.
5. What are the objectives of KYC guidelines and when does KYC norms apply?

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

2

CONSUMER PROTECTION ACT, 1986

Covering-

- Bare Act
- ABC Analysis
- Basic Rights of Consumers
- Important Definitions
- Consumer Protection Councils
- Redressal Machinery Under The Act
- Appeals Under The Act
- Powers of the redressal agencies
- Nature and Scope of Remedies Under The Act
- Some Important Cases
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exam
  - From ICSI Module

EXPECTED MARKS COVERAGE (15 to 20)

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भारत का राजपत्र
The Gazette of India

THE CONSUMER PROTECTION ACT, 1986

ACT NO. 68 OF 1986

[24*th December*, 1986.]

An Act to provide for the better 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 consumers' disputes and for matters connected therewith.

BE it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent, commencement and application.—(*1*) This Act may be called the Consumer Protection Act, 1986.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force on such date[1] as the Central Government may, by notification, appoint and different dates may be appointed for different States and for different provisions of this Act.

(*4*) Save as otherwise expressly provided by the Central Government by notification, this Act shall apply to all goods and services.

2. Definitions.—(*1*) In this Act, unless the context otherwise requires,—

[2][(*a*) "appropriate laboratory" means a laboratory or organisation—

(*i*) recognised by the Central Government;

(*ii*) recognised by a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf; or

(*iii*) any such laboratory or organisation established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect;]

[3][(*aa*) "branch office" means—

(*i*) any establishment described as a branch by the opposite party; or

(*ii*) any establishment carring on either the same or substantially the same activity as that carried on by the head office of the establishment;]

(*b*) "complainant" means—

(*i*) a consumer; or

(*ii*) any voluntary consumer association registered under the Companies Act, 1956 (1 of 1956) or under any other law for the time being in force; or

(*iii*) the Central Government or any State Government,

who or which makes a complaint;

3. Act not in derogation of any other law.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

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COPRA, 1986

is based on

" CONSUMER SOVERGNITY"

(a counter doctrine for "Doctrine of Cavet emptor")

PURPOSE OF COPRA

"TO PROMOTE & PROTECT THE RIGHTS/INTEREST OF CONSUMER"

is achieved through

PRO-ACTIVE APPROACH

Means

DEFENSIVE APPROACH

Establishes

" CONSUMER PROTECTION COUNCILS "

Advisory role to C/G)

(CONSUMER EDUCATION-through advts. in T.V, newspapers etc.)

REACTIVE APPROACH

Means

CURATIVE APPROACH

Establishes

" CONSUMER DISPUTES REDRESSAL AGENCIES "

(3-Tier QUASI-JUDICIAL BODIES)

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CONSUMER PROTECTION ACT, 1986

ABC Analysis
(ICSI -Exam Point of view)

A
1. Important Definitions
2. Redressal Machinery Under the Act
3. Some Important Cases

B
4. Appeals under the Act
6. Nature and scope of Remedies under the Act.

C
7. Basic rights of consumers
8. Powers of redressal agencies

DEPARTMENT OF CONSUMER AFFAIRS
(Ministry of Consumer Affairs, Food & Public Distribution,
krishi Bhavan, New Delhi, Government of India)

JAGO GRAHAK JAGO

The need to ensure the basic rights to health, safety, etc. of consumers have long been recognised the world over and various legislations were enacted abroad in this direction. In India, **Consumer Protection Act, 1986** provides for **simple, quick and easy remedy to consumers** under a **three-tier quasi-judicial redressal agency** at the District, State and National levels.

Object of the Act is to provide for **better 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 consumers disputes and for matters connected therewith.

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

BASIC RIGHTS OF CONSUMERS

The basic rights of consumers that are sought to be promoted and protected are:-

(a) the **right to be protected** against marketing of goods and services which are hazardous to life and property;

(b) the **right to be informed** about the quality, quantity, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices;

(c) the **right to be assured**, wherever possible, access to variety of goods and services at competitive prices;

(d) the **right to be heard** and to be assured that consumers interests will receive due consideration at appropriate forums;

(e) the **right to seek redressal** against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and

(f) the **right to consumer education**.

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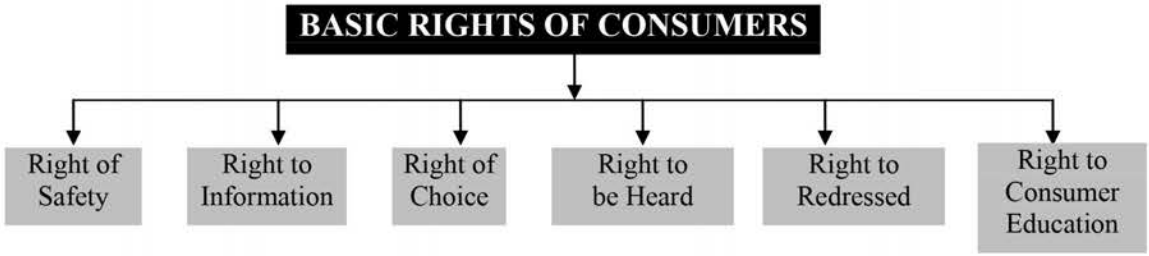

IMPORTANT DEFINITIONS

- **COMPLAINANT**

SECTION 2(1)(b)

Complainant means

(a) a consumer, or

(b) any voluntary consumer association registered under the Companies Act, 1956, or under any other law for the time being in force; or

(c) the Central Government or any State Government, who or which makes a complaint; or

(d) one or more consumers where there are numerous consumers having the same interest;

(e) in case of death of a consumer, his legal heir or representative;

who or which makes a complaint

An association of persons, to have locus stand as consumer, it is necessary that all the individual persons forming the association must be consumers having **purchased the same goods/hired** the same **service** from the **same party** i.e. they should have a common cause of action.

In case the affected consumer is unable to file the complaint due to **ignorance, illiteracy or poverty**, any **recognised consumer association** may file the complaint. The rule of **'privet of contract'** or locus stand which permits only the aggrieved party to take action has very rightly been **set aside** in the spirit of public interest litigation.

- **COMPLAINT**

SECTION 2(1)(c)

Complaint means any allegation in writing made, **with a view to obtaining any relief**, by a complainant that:-

(a) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

(b) the goods bought by him or agreed to be bought by him suffer from one or more defects;

(c) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;

(d) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, **a price in excess of the price -**

(i) fixed by or under any law for the time being in force;

(ii) displayed on the goods or any package containing such goods;

(iii) displayed on the price list exhibited by him by or under any law for the time being force.

(iv) agreed between the parties.

(e) goods which will be hazardous to life and safety when used are being offered for sale to the public,

(f) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider

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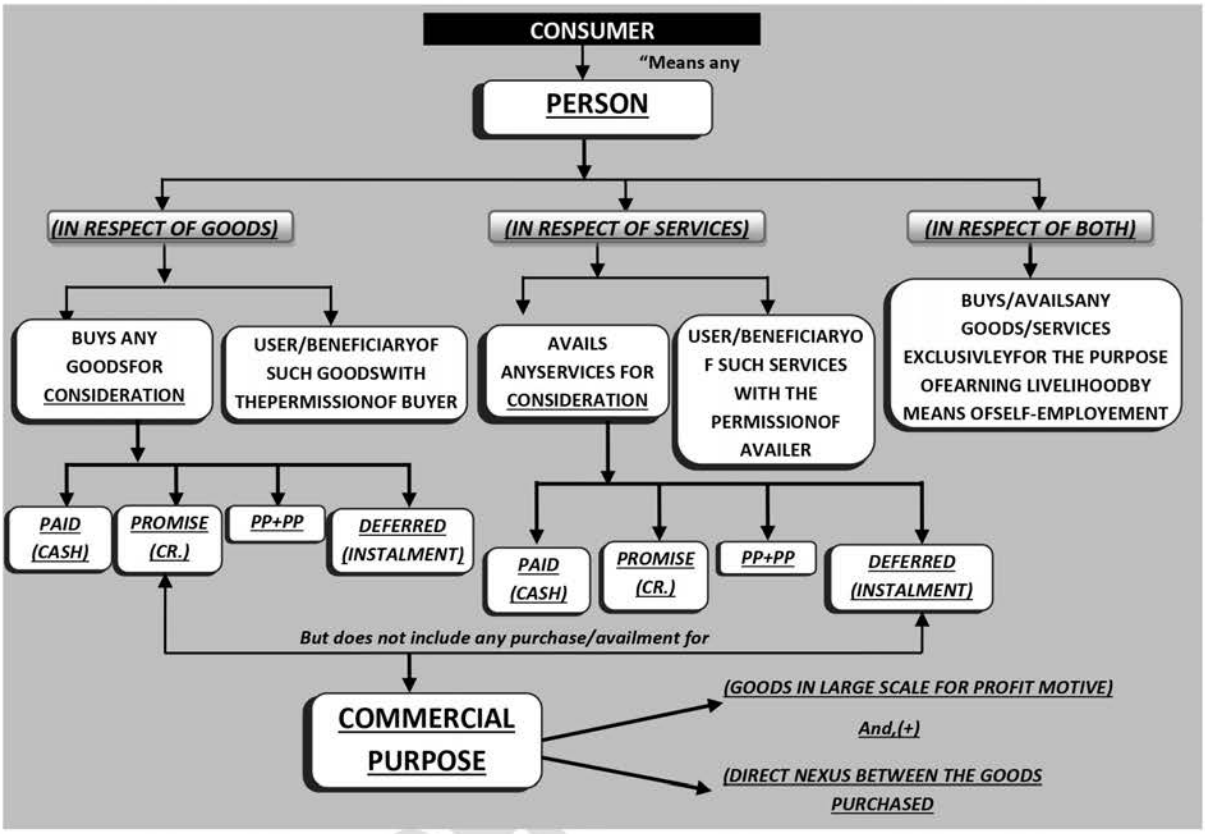

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Time limit for filing the complaint

A complaint has to be made within **2 years** from the date on which **cause of action** has arose. However, the concerned authority may entertain complaint after the said period of 2 years, if it is satisfied that there was sufficient cause for not filling it within the prescribed period.

- ## CONSUMER

SECTION 2(1)(d)

Consumer means any person who

(a) **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 user of such goods** with the permission of the buyer, **but does not include** a person who obtains such goods for resale or for any **commercial purpose**; or

(b) **hires or avails of any services** for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and **includes any beneficiary of such services** with the permission of hirer, **but does not include** a person who avails of such services for any **commercial purpose**.

Commercial purpose

A purchase of goods can be said to be for a 'commercial purpose' only if	**(a)** the goods have been purchased for being used in *some* ***profit making activity on a large-scale***, **and;**
	(b) there is **close and direct nexus** between the purchase of goods and the **profit-making activity**.

It has been clarified that the term commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of **earning his livelihood** by means of **self-employment**.

Decided Cases

Laxmi Engineering Works v. P.S.G. Industrial Institute	Supreme Court held that if a person purchased a machine to operate it himself for earning his livelihood, he would be a consumer. If such person took the assistance of one or two persons to assist him in operating the machine, he would still be a consumer. But if a person purchases a machine and appoint or engage another person exclusively to operate the machine, then such person would not be a consumer.
Bhupendra Jang Bahadur Guna v. Regional Manager and Others	The National Commission held that a tractor purchased primarily to till the land of the purchaser and let out on hire during the idle time to till the lands of others would not amount to commercial use.
A Narasamma v. LIC of India	It was held that the widow being the beneficiary of services is a 'consumer' under the Act and is entitled to be compensated for the loss suffered by her due to negligence of the LIC.
Spring Meadows Hospital v. Harjot Ahluwalia	The Supreme Court held that parents who bring the child to hospital and the child, both are consumers.
Laxmiben Laxmichand Shah v. Sakerben Kanji Chandan	The Supreme Court held that the tenant entering into lease agreement with the landlord cannot be considered as consumer under Section 2(1)(d) of the Act. Where there was **no provision in the lease agreement in respect of cleaning, repairing and maintaining the building,** the rent paid by tenant is not the consideration for availing these services and therefore, no question of deficiency in service.

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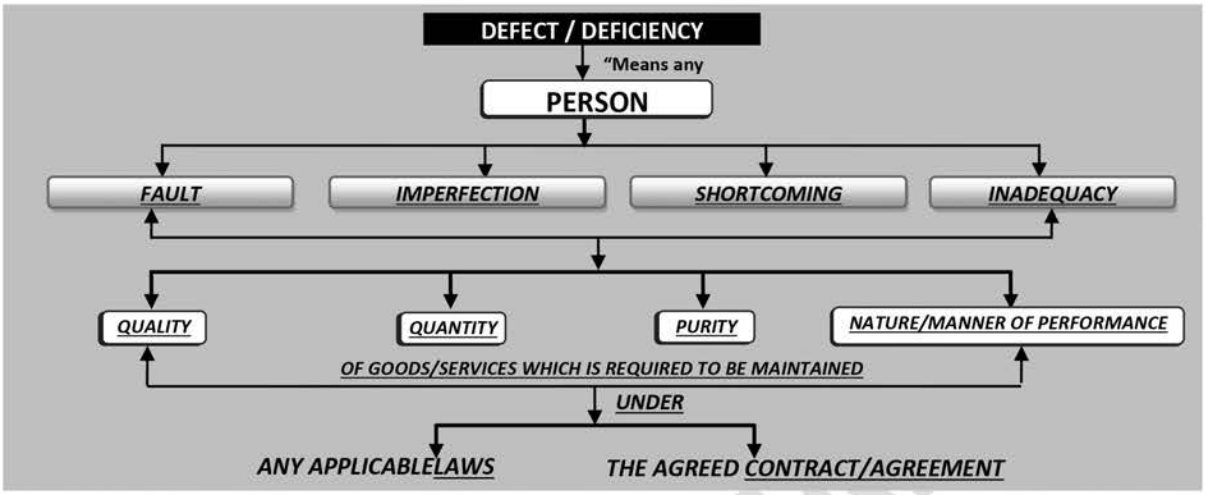

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- **GOODS**

SECTION 2(1)(i)

Goods mean goods as defined in the Sale of Goods Act, 1930.

As per **Sale of Goods Act, 1930,** goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

Morgan Stanley Mutual Fund v. Kartik Das	The Supreme Court held that **shares before allotment cannot** constitute **goods** because at the stage of application there is no purchase of goods for consideration.

- **DEFECT**

SECTION 2(1)(f)

Defect means any fault, imperfection or shortcoming in the quality, quantity, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.

Decided cases

1. ***Dayanand a avasare v. BPCL***.(Gas cylinder with excessive gas)
2. ***Narayan vyankatkrisnan v. shakti foods.***(soft drink not fit for consumption)
3. ***Abhaya kr. Pandya v.Bajaj Auto Ltd.***(vehicles having major manufacturing defects which could not be removed despite several repairs)
4. ***Chitranjan Sahu v. N.C.Jain*** (change in color of white marble supplied)

- **SERVICE**

SECTION 2(1)(o)

Service means service of any description which is made available to 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, amusement or the purveying of news or other information, **but does not include** the rendering of any service **free of charge** or under a **contract of personal service**.

Contract *of* Personal Service and Contract *for* Personal Service

A **contract FOR Personal service** implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion.

A **contract OF Personal service** on the other hand implies relationship of master and servant (employee- employer relationship) and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.

Decided cases

(General Manager v. Anand Prasad Sinha)	Passengers travelling by trains on payment of the stipulated fare charged for the ticket are 'consumers' and the facility of transportation by rail provided by the railway administration is a 'service' rendered for consideration as defined in the Act
Dist. Manager, Telephones Patna v. Lalit Kumar Bajla	Subscribers of telephones would also be 'consumer' under the Act

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Consumer Unity and Trust Society v. State of Rajasthan	It was held that complaints against government hospitals cannot be entertained under the Act on the ground that a person receiving treatment in such hospital is not a 'consumer as the patient does not 'hire the services of the hospital'. Moreover, the treatment provided is free of charge, and therefore, it does **not** amount to service.
Ram Ralsh Pal v. Smt. Ranjana	It was held that Services of Professional like CS, CA, Doctors, Advocates, Engineers are covered under Consumer protection Act.
Centre for Research & Industrial Development v. Madan Lal Sahni	It was held that Professors of Universities or Civil Servants are not covered under Act as they are appointed under Contract of Personal Service.
J. Rebello v. Vice Chancellor, Banglore University	It was held that the University in conducting examination, evaluating answer sheets and publishing the result was not performing any service for consideration and a candidate who appeared for the examination cannot be regarded as a consumer.

- **DEFICIENCY**

SECTION 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 .

Decided cases

Consumer Unity and Trust Society	It was held that in order to be 'deficiency in service' loss or injury must be coupled with **negligence.**
Punjab National Bank v. K.B. Shetty	In ornaments kept in the banks locker were found lost though the certificate recorded by the custodian of the bank on the day the customer operated the locker stated that all lockers operated during the day have been checked and found properly locked. Bank was held guilty of negligence
Lucknow Development Authority v. Roop Kishore Tandon	Failure of a Housing Board to give possession of the flat after receiving the price and after registering it in favour of the allottee was held to be 'deficiency in service
Skypack Couriers Pvt. Ltd. & Another v. Ms.AnupamaBagla	Non-delivery of a video cassette by a courier service company resulting in the complainant losing admission to the desired college was held to be 'deficiency in service'
Special Machines v. Punjab National Bank,	Failure to provide nursing and financing facilities to a small scale industry which consequently became sick cannot be said to constitute 'deficiency in service'
Pradeep Kumar Jain v. Citi Bank	In the appellant purchased a car by taking a loan from the respondent bank, and gave post dated cheques to the bank not only in respect of repayment of loan instalments but also of premium of insurance policy for succeeding years. On the expiry of the policy the bank failed to get the policy renewed. In the meantime the car met with an accident. The Supreme Court held that there is no deficiency in service because the obligation to renew the policy was on the appellant alone.

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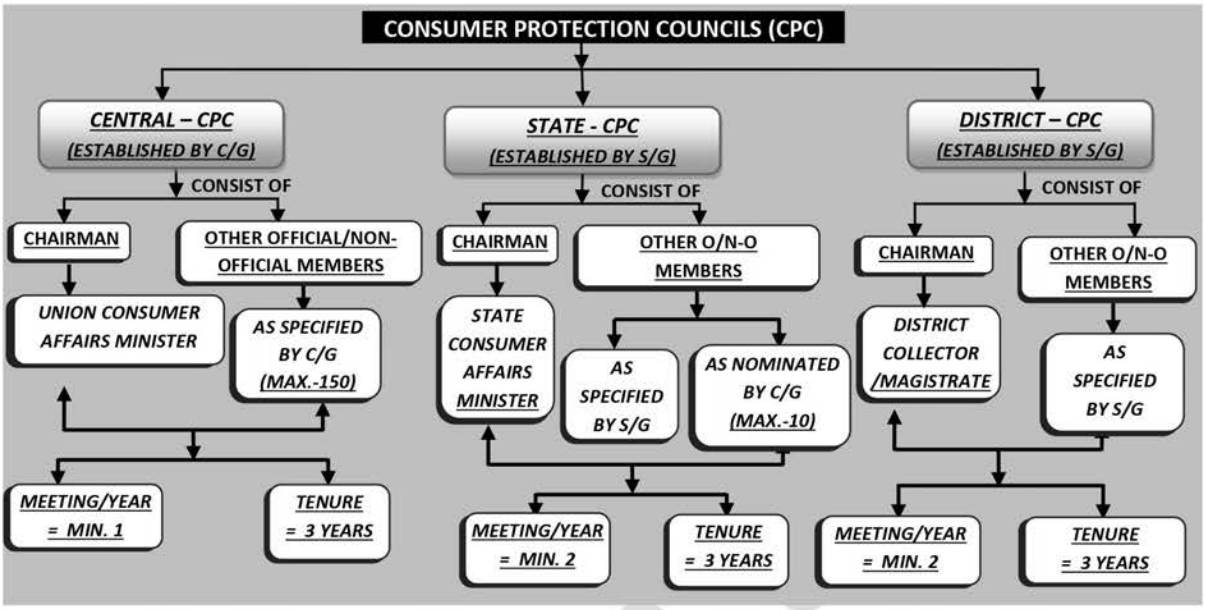

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- **CONSUMER DISPUTE**

SECTION 2(1)(e)

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

CONSUMER PROTECTION COUNCILS

The interests of consumers are sought to be promoted and protected under the Act inter-alia by establishment of Consumer Protection Councils at the Central, State and District Levels.

1. CENTRAL CONSUMER PROTECTION COUNCIL

Section 4 empowers the Central Government to establish a Council to be known as the Central Consumer Protection Council consisting of:-

(a) the Minister in charge of Consumer Affairs in the Central Government, as its Chairman,

(b) such number of other official or non-official members representing such interests as may be prescribed.

However, the Consumer Protection Rules, 1987 restrict the number of members of the Central Council to **150 members**.

Section 5 of the Act requires the Central Council to **meet** as and when necessary, but **atleast once** in every year. The term of the council shall be three years.

2. STATE CONSUMER PROTECTION COUNCIL

Section 7 provides for the establishment of State Consumer Protection Councils by State Governments. The State Council shall consist of:-

(a) the Minister incharge of Consumer Affairs in the State Government as its Chairman

(b) and such number of other official or non-official members representing such interests as may be prescribed by the State Government

(c) and such number of other official or non-official members, not exceeding **ten**, as may be nominated by the Central Government.

The State Council shall meet as and when necessary but not less than **two meetings** shall be held every year.

3. DISTRICT CONSUMER PROTECTION COUNCIL

Section 8A provides for establishment in every district of a council to be known as the District Consumer Protection Council which shall consist of:-

(a) the Collector of the district (by whatever name called), who shall be its Chairman

(b) and such number of other official and non-official members representing such interests as may be prescribed by the State Government.

The District Council shall meet as and when necessary but not less than two meetings shall be held every year.

REDRESSAL MACHINERY UNDER THE ACT

The Act provides for a **three-tier quasi-judicial** redressal machinery at the District, State and National level for redressal of consumer disputes and grievances.

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DISTRICT CONSUMER DISPUTES REDRESSAL

DISTRICT FORUM-COMPOSITION

(TERMS OF OFFICE) 5 YEARS or 65 YEARS (WHICHEVER IS EARLIER)

PRESIDENT

(APPOINTED BY S/G)

Is/has been/qualified to be DISTRICT JUDGE

OTHER MEMBERS

FIXED -2 (1-women)

GRADUATE + AGE>= 35 YEARS

PERSON OF ABILITY, INTEGRITY, STANDING ETC.

DISTRICT FORUM-JURISDICTION

DISTRICT FORUM-COMPOSITION

TERRITORIAL

LOCAL LIMITS OF DISTRICT, WHERE THE DEFENDANT(Resides, works, do business, having branch office etc.)/WHERE THE CAUSE OF ACTION HAS ARISEN

PECUNARY

< RS. 20 LACS

VALUE OF GOODS/SERVICES+COMPENSATION

STATE CONSUMER DISPUTES REDRESSAL COMMISSION (CONSTITUTED BY S/G)

STATE COMMMISSION-COMPOSITION

(TERMS OF OFFICE) 5 YEARS or 67 YEARS (WHICHEVER IS EARLIER)

PRESIDENT

APPOINTED BY S/G (IN CONSULTATION WITHCHIEF JUSTICE OF HC)

Is/has been/HC JUDGE

OTHER MEMBERS

Min. -2 (1-women) (max. as per S/G prescription.)

GRADUATE + AGE>= 35 YEARS

PERSON OF ABILITY, INTEGRITY, STANDING ETC.

STATE COMMMISSION-JURISDICTION

ORIGINAL JURISDICTION

TERRITORIAL

LOCAL LIMITS OF STATE, WHERE THE DEFENDANT(Resides, works, do business, having branch office etc.)/WHERE THE CAUSE OF ACTION HAS ARISEN

PECUNARY

₹ 20 LACS ≤ ₹1 CRORE

OTHER JURISDICTION

APPELLATE

(HEARS APPEAL AGAINST D-FORUM

REVERSIONARY

(STATE COMM. PASSES APPROPRIATE ORDERS TO D-FORUM) { IN CASE OF IRREGULARITIES IN D-FORUM}

1. DISTRICT CONSUMER DISPUTES REDRESSAL FORUM

Section 9 of the Act provides for the establishment of a District Forum by the State Government in each district of the State. However, the State Government may establish more than one District Forum in a district if it deems fit to do so. Section 10 provides that each District Forum shall consist of:-

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

(b) two other members one of whom shall be a woman.

The members of District Forum should be a graduate and not be of less than **35 years** of age.

They should be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Every member of the District Forum shall hold office for a term of **5 years** or upto the age of **65** years, whichever is earlier, and shall be eligible for reappointment.

Jurisdiction of District Forum

Section 11 provides for the jurisdiction of the District Forum under two criteria pecuniary and territorial.

Pecuniary limits

Section 11(1) empowers the District Forum to entertain complaints where the value of goods or services and the compensation, if any, claimed is **less** than rupees **20 lakhs**.

Territorial limits

Section 11(2) empowers the District Forum to entertain complaints if within the local limits of its jurisdiction the any of the opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or the cause of action arises, wholly or in part.

2. STATE CONSUMER DISPUTES REDRESSAL COMMISSION

Section 16 of the Act empowers the State Government to establish the State Consumer Disputes Redressal Commission consisting of:-

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

(b) not less than two and not more than such number of members, as may be prescribed, one of whom shall be a woman.

The members of state commission should be a graduate and not be of less than thirty-five years of age. They should be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Every member of the State Commission shall hold office for a term of **five years** or upto the age of **67** years, whichever is earlier and shall be eligible for reappointment

Jurisdiction of State Commission

Pecuniary limits

Act empowers the State Commission to entertain complaints where the value of goods or services and the compensation, if any, claimed exceed rupees **20** lakhs but does not exceed rupees **1 crore**;

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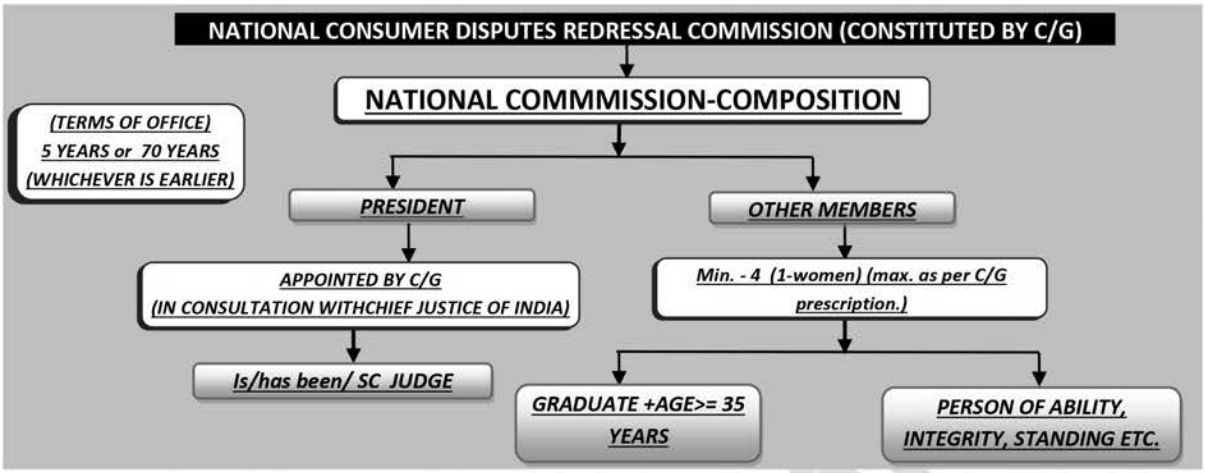

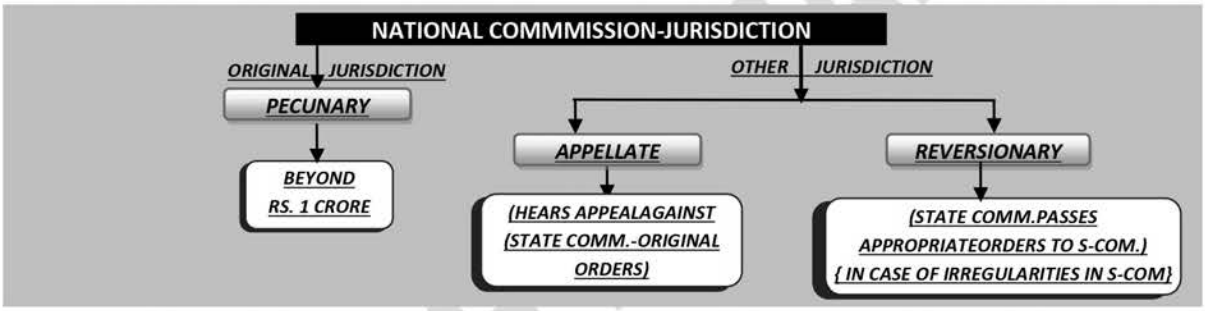

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Territorial limits

Act empowers the State Commission to entertain complaints if within the local limits of its jurisdiction the any of the opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or the cause of action arises, wholly or in part.

Appellate jurisdiction

The State Commission has the jurisdiction to entertain appeals against the orders of any District Forum within the State.

Reversionary jurisdiction

The State Commission has the power 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 if it appears to it that such District Forum has exercised any power not vested in it by law or has failed to exercise a power rightfully vested in it by law or has acted illegally or with material irregularity. The State Commission may reverse the orders passed by the District Forum on any question of fact or law or correct any error of fact or of law made by the Forum.

3. NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Section 9 empowers the Central Government to establish the National Consumer Disputes Redressal Commission which shall consist of:-

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

(b) not less than four and not more than such number of members as may be prescribed one of whom shall be a woman.

The members of state commission should be a graduate and not be of less than thirty-five years of age. They should be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Jurisdiction of National Commission

Pecuniary limits

Act empowers the National commission to entertain complaints where the value of goods or services and the compensation, if any, claimed exceed **exceeds** rupees **1** crore;

Appellate jurisdiction

The National Commission has the jurisdiction to entertain appeals against the original orders of any state commissions. The appellant has to deposit fifty percent of the amount or ₹ thirty-five thousand, whichever is less;

Reversionary jurisdiction

The National commission has power 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.

APPEALS UNDER THE ACT

Act entitles a person aggrieved by an order of the District Forum to prefer an appeal to the State Commission. Similarly any person aggrieved by any **original order** of the State Commission may prefer an appeal to the National Commission under Section 19.

Likewise, any person aggrieved by any **original** order of the National Commission may prefer an appeal to the Supreme Court.

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TIME LIMIT FOR FILING APPEAL

All such appeals are to be made within **thirty days** from the date of the order. However, the concerned Appellate authority may entertain an appeal after the said period of thirty days if it is satisfied that there was sufficient cause for not filling it within the prescribed period.

Further appellant has to deposited in the prescribed manner **50%** of amount required to be paid as per orders of District Forum, State commission, National commission **or₹25,000/ 35,000/ 50,000** respectively, whichever is less.

POWERS OF THE REDRESSAL AGENCIES

The District Forum, State Commission and the National Commission have been vested with the powers of a **civil court under the Code of Civil Procedure, 1908** while trying a suit in respect of the following matters:

(i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
(ii) the discovery and production of any document or other material object producible as evidence;
(iii) the reception of evidence on affidavits;
(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
(v) issuing of any commission for the examination of any witness; and
(vi) any other matter which may be prescribed.

Under the Consumer Protection Rules, 1987, the District Forum, the State Commission and the National Commission have the power to require any person:

(i) to produce before and allow to be examined by an officer of any of these agencies, such books of accounts, documents or commodities as may be required and to keep such book, documents etc. under his custody for the purposes of the Act;
(ii) to furnish such information which may be required for the purposes of the Act to any officer so specified.

These redressal agencies have also been empowered to pass written orders authorising any officer to exercise the power of **entry and search** of any premises where the books, papers, commodities or documents are kept if there is any ground to believe that these may be destroyed, mutilated, altered, falsified or secreted.

NATURE AND SCOPE OF REMEDIES UNDER THE ACT

SECTION 14

Where the allegations contained in the complaint are proved, the District Forum/State Commission/National Commission may pass one or more of the following orders:-

(a) to remove the defects pointed out by the appropriate laboratory from the goods in question;
(b) to replace the goods with new goods of similar description which shall be free from any defect;
(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;
(e) to remove the defects in goods or deficiencies in the services in question;
(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
(g) not to offer the hazardous goods for sale;
(h) to withdraw the hazardous goods from being offered for sale; .

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(i) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

PROCEEDINGS BEFORE CONSUMER FORUMS AND APPLICABILITY OF SECTION 34 OF THE ARBITRATION ACT

According to Section 34 of the Arbitration Act if a contract contains an arbitration clause, the legal proceedings before a judicial authority are liable to be stayed.

The National Commission in ***N.K. Modi v. Fair Air Engineers Pvt. Ltd*** held that the forums under the Consumer Protection Act are not to be construed as judicial authorities and the proceedings before them cannot be taken to be legal proceedings. Though, the consumer forums have powers to adjudicate dispute, they do not have any trappings of a Court, they are **quasi-judicial bodies**. So consumer forums **can entertain** a complaint arising out of the contract which provides for arbitration of disputes, and Section 34 of the Arbitration Act shall not be a bar on the jurisdiction of the forums.

SOME IMPORTANT CASES

J.K. Puri Engineers v. Mohan Breweries & Distilleries Ltd	The company maintained a guest house for use of its **managing director, and other executives**. It entered into a contract with the appellants for the installation of central **air-conditioning system**. The allegation was that the system installed did not function, developed snags, and that there was leakage of water from dusting system. Supreme Court held that guest house was intended only for the residence of the directors, including the Managing Director and other executives of the company during their visits to the city. The system was installed only to provide comfort of these persons and therefore it was not used for a commercial purpose as it had **no close or direct nexus with the commercial activity carried on by the company**. *Even where the goods are purchased for **commercial purpose**, if there is a **warranty**, for its maintenance, the purchaser becomes a **consumer** in respect of the services rendered or to be rendered by the manufacturer or supplier during the warranty period.*
Kerela State Electricity Board v. Raveendran	it was held that **fall in electricity voltage** damaging the machine in a plastic factory and affecting production would amount to deficiency in service.
Zenith Computers v. Venus Compugraphics	it was held that if goods are purchased from an **independent dealer**, complaint has to be lodged against the dealer only.
S.P. Goel v. Collector of Stamps	In the National Commission held the view that **Salaries paid to the government officials in discharge of governmental functions** could in law never be said to be consideration paid by a member of the public for availing the service of the Government.

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➢ *MEDICAL CASES*

Indian Medical Association v. V.P. Shanta & others	It was held that Government/Private hospitals where no fee is charged for consultation and treatment, but only a token registration fee is charged will not be liable under the Act.
Poonam Verma v. Ashwin Patel	In a person had died because of the negligence of the Doctor in administering **allopathic medicines in which he was not qualified to practise**. Supreme Court held that the respondent who had practised in allopathy without being qualified in that system was guilty of negligence and so there was deficiency in service.
Kalpavriksha Charitable Trust v. Toshnival Brothers (Bombay) Pvt. Ltd	The Supreme Court held that in a diagonostic Centre where 90% of the patients are required to pay for the services availed and only 10% of the patients were given free services, the CT scan machine was used for **commercial purpose**.

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➢ *INSURANCE CASES*

L.I.C. v. Mumtaji Begam	In it was held that where the date of birth of the insured was in dispute and not accepted by the insurance company, the forums under the Act had no jurisdiction to entertain any complaint against the insurance company.
Regional Provident Fund Commissioner, Faridabad v. Shiv Kumar Joshi	The complainant had alleged that the appellant had **not settled his provident fund dues within the period**. The Commissioner in reply contended that there was no hiring of service for consideration in this case since he was performing a statutory function. The National Commission observed that the **Administration charges were levied and recovered** by the Commissioner for payment of services rendered by him and his staff. Accordingly National Commission held complainant as a consumer under Act and deficiency in service on part of the Commissioner.
Jyoti Kumar Jain and another v. United India Insurance Co. Ltd	It was held that repudiation of claim on the ground that complainant was **suffering from chronic disease even before the issuance of policy**, amounts to suppression of material facts, cannot be sustained **unless Insurance Company proves** suppression of facts amounted to fraud.
Jitendra Kumar v. Oriental Insurance Company Ltd	The Supreme Court has held that where the fire has occurred due to **mechanical failure and not due to any act or omission of the driver**, the insurance company cannot repudiate the claim because of lack of valid driving license.
Harshad J. Shah v. Life Insurance Corporation of India	It was held that if Premium is paid to the agent of the LIC, but the **agent did not deposit the premium and during that period if the death of the insured takes place**, the complainant cannot claim compensation as there is no deficiency of service on the part of the LIC. Supreme Court held that the agent had no express authority to receive the premium on behalf of the Corporation.
National Insurance Co. Ltd. v. Seema Malhotra	A cheque was issued under a contract of insurance of motor car by the insured for payment of premium to the policy. However, **cheque was dishonoured for want of funds in the account. Meanwhile, the car met an accident** and badly damaged, killing the insured owner. The claim for insured amount was repudiated by the company. The Supreme Court held insurer need not to perform his part of promise when the other party fails to perform his part and thus not liable to pay the insured amount.
Delhi Electric Supply Undertaking v. Basanti Devi	In Premium due on each policy was collected by the employer from the salary of the employee and sent to LIC under a *salary saving scheme*. Employees were kept ignorant of what happens between the employer and LIC. After a few month employer started not depositing the money to LIC but continued the salary deduction. In the meantime an employee died and payment from LIC was sought. LIC repudiated the claim on the ground of non-remittance of the premium. The Supreme Court held that since the **burden of collecting the premium and remitting it to the corporation was on the employer** it was not for the employee to intimate the corporation about non-remittance of the premium, the LIC is liable to pay the claim.
National insurance Co. ltd. v. Sky Gems	Supreme court held that that Insurance Company was right in denying its liability to pay the amount in US Dollar on the ground that the **title in goods had not passed to the consignee** and that consigner continued to be the owner of the goods at the time of loss of goods, and therefore the payment of claim can be made only in Indian rupees.
Abhilash Jwellery v. New India Assurance Co. Ltd.	the complainant took a Jweller's Block Policy. During the currency of the policy the complainant lodged a claim for **loss of gold ornament which was being carried by one of its employees**. The claim was repudiated by the respondent holding that loss of gold occasioned as it was in the **custody of an apprentice and he being not an employee** it was not covered under the policy and as such the claim was repudiated. National Commission held that apprentice should be regarded covered under the policy and the denial of a valid claim itself is a deficiency in service.

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➢ *TRANSPORTATION CASES*

Indian Airlines v. Dr. Jiteswar Ahir	In this case when the complainant-passenger occupied his seat in the aircraft, an announcement was made that his luggage was lying on the ground unidentified and that he should disembark to identify his luggage. Accordingly the complainant moved towards the rear door, and finding that the step ladder was attached to the aircraft door, he stepped out on to the staircase but **before he could actually put his entire body weight on the staircase the ladder was suddenly removed** as a result of which he fell down on the ground and sustained bodily injuries. It was held that there was dangerous deficiency in service
Ravneet Singh Bagga v. KLM Royal Dutch Fintimes	In the complainant booked a ticked from Delhi to New York by a KLM plane. The airport authorities in New Delhi did not find any fault in his visa and other documents. However at **Amsterdam, the airport authorities instituted proceedings of verification** because of which the appellant missed his flight to New York. After reaching New York, the airlines tendered apology to the appellant for the inconvenience and paid as a **goodwill gesture a sum of₹2,500**. The appellant made a complaint to the National Commission under the Consumer Protection Act which was rejected. The Supreme Court held that the respondent could not be held to be guilty of deficiency in service as staff of the airline acted fairly and in a bona fide manner, keeping in mind security and safety of passengers and the Aircraft.
Union of India v. Nathmal Hansaria	In this case the daughter of the complainant, travelling by a train, fell down from the running train while **she was passing through the inter-connecting passage** between two compartments and died as a result of crush injuries on her head. The Railways contended that the Consumer Redressal agencies had no jurisdiction to consider a complaint of this nature in view of Railway Claims Tribunal Act. The State Commission held that a railway passenger travelling in a train on payment of consideration was a consumer and as the death didn't occur because of railway accident, but due to absence of safety device in the vestibule passage way, there was deficiency in service.
General Manager, Southern Railway v. Mrs. A Shamin	In this case Railway was held liable for deficiency in service when some unauthorized passengers who boarded reserved compartments **was not removed by T.T.E despite several complaint of passengers and later passengers were robbed during the night**.

➢ *POST OFFICE CASES*

Devi Engineering Co. v. Union of India	In this case the complainant had alleged that demand drafts sent by him by registered post to an addressee were **misdelivered to someone else**. The State Commission, invoking the provisions of Section 6 of the Post Office Act held that the post office could not be made liable to pay compensation ordered by the District forum.
Presidency Post Master v. Dr. U. Shankar Rao	*Absolute immunity to Post Offices under **Section 6 of Post Office Act*** It was settled by the National Commission in ***Presidency Post Master v. Dr. U. Shankar Rao*** that in view of the clear mandate of Section 6 of the Indian Post Office Act, **the Government shall not incur any liability** by reason of the loss, misdelivery or delay or damage to any postal article in course of transmission by post.
Superintendent of Post Offices v. Upbhokta Suraksha Parishad	*Postal Department cannot take shield of Indian Post Offices Act always* In ***Superintendent of Post Offices v. Upbhokta Suraksha Parishad*** the respondent in its complaint alleged that as a result **of delayed delivery of a postal article the consumer could not get admission to an educational institution** resulting in loss of one year in the educational career. The National Commission held post office liable because delay caused by post office was **wilful**.

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Airpack Couriers (India) Pvt. Ltd. ***v.*** ***S. Suresh***	In this case where a package of important documents entrusted to the courier had not been delivered causing loss to the complainant, the National Commission, on appeal against the State Commissions order awarding compensation of₹1 lakh, reduced it to ₹100 holding that the terms incorporated in the consignment note specifically limited the couriers liability to a maximum of₹100 per consignment for loss in transit. Moreover, as per **IATA regulations**, no important documents may be sent through courier service and the consignee is bound to declare the nature of contents before sending the consignment. Further, if the documents to be consigned were of great value, the consignee ought to have insured them or declared their value in the consignment note.

➢ *EDUCATIONAL CASES*

Sreedharan Nair N. ***v.*** ***Registrar, University of Kerala***	In this the University refused to provide LL.B. degree certificate on completion of course on the ground that the **qualifying examination on the basis of which student was admitted in LL.B. course** in Kerala Law College has not been recognised by it. The National Commission held that this is a clear case of deficiency on part of University.
Isabella Thoburn College ***v.*** ***Ms. Fatima Effendi***	In the State Commission held that **non-refund of admission fee is not a deficiency of service** on the part of the university because admission fee is consideration for admission and respondent herself voluntarily withdrawing admission from one university to join another institute cannot claim refund of admission fee.
IGNOU ***v.*** ***Surender Pal Ahir***	In this case it was held that **delay in supplying the study material** to the students resulting in the loss of one semester is deficiency in service as imparting education is regarded as service.
Sashikant Krishnaji Dole ***v.*** ***Shitshan Prasarak Mandali***	In this case the school owned a swimming pool and offered swimming facilities to the public on payment of a fee. The complainants had enrolled their son for learning swimming under the guidance of the coach. It was alleged that **due to the negligence of the coach the boy was drowned and met with his death**. The school denied that it had engaged the services of a coach and also denied any responsibility on its part. The State Commission held the school and the coach deficient in rendering service to the deceased, that the coach was not fully trained, did not exercise even the basic commonsense needed to counter an accident in swimming and as far as the school was concerned it did not even provide basic facilities nor did it provide any safeguards to prevent accidents. Accordingly it was considered as deficiency in service.
Chairman, Board of examination ***v.*** ***Mohd. Abdul Kader***	In this case it was held that **conduction of examinations by the Boards is a soverign function** and any candidate appearing for exams cannot be regarded as consumers under the Act.

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Q. 1. DISTINGUISH BETWEEN 'CONTRACT OF SERVICE' AND 'CONTRACT FOR SERVICE'.

CONTRACT OF SERVICE	CONTRACT FOR SERVICE
1. In such a case the employer can direct and control the duties and the manner of performance o the employee.	**1.** The person performing such contract enjoys larger autonomy and description in execution of the contract and the other person cannot decided or direct the manner of performance.
2. Thus, there exists an employer-employee relationship	**2.** Employer-employee relationship does not exists in such a case.
3. The employee is always bound to work as per the supervision of the employer as master-servant relationship is present.	**3.** Person himself chalks out the programme and executes them to accomplish the goals. Day to pay control of the party is not seen.
4. Contract of service can thus be seen in case of employment.	**4.** Example-professional contracts.

Q. 2 PANKAJ BOOKED A FLAT IN SAGAR BOARD COLONY. HOUSING BOARD REGISTERED IT AND AGREED TO GIVE POSSESSION WITHIN TWO YEARS. AFTER RECEIVING THE PRICE OF THE FLAT HOUSING BOARD FAILED TO GIVE POSSESSION TO PANKAJ WITHIN THE AGREED PERIOD. IS IT A DEFICIENCY IN SERVICE CONSUMER PROTECTION ACT, 1986? [Dec. 2017]

Ans. The problem asked in the question is related to the deficiency in the services under Consumer Protection Act, 1986. Section 2(1)(g) of this Act lays down that 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.

Failure to maintain the quality of performance required by the law or failure to provide services as per warranties given, by the provider of the service would amount to 'deficiency'.

Failure to maintain the quality of performance required by the law or failure to provide services as per warranties given, by the provider of the service would amount to 'deficiency'.

Failure of a Housing Board to give Possession of the flat after receiving the price and after registering it in favour of the allottee will be treated as deficiency in service. Therefore, Sagar Housing Board Colony shall be liable.

***Q. 3. DISCUSS THE PROCESS OF FILING AN APPEAL BY AN AGGRIEVED PERSON UNDER THE CONSUMER PROTECTION ACT, 1986.* [Dec. 2017]**

Ans. Section 15 of Consumer Protection Act, 1986 entitles a person aggrieved by an order of the District Forum to prefer an appeal to the State Commission. Similarly any person aggrieved by any original order of the State Commission may prefer an appeal to the National Commission under Section 19. Likewise, any person aggrieved by any original order of the Nation Commission may prefer an appeal to the Supreme Court, under Section 23.

All such appeals are to be made within thirty days from the date of the order. However, the concerned Appellate authority may entertain an appeal after the said period of thirty days if it is satisfied that there was sufficient cause for not filling it within the prescribed period. The period of 30 days would be computed from the date of receipt of the order by the appellant.

It may be noted that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum/State Commission, shall be entertained by the State Commission/National Commission respectively unless the appellant has deposited in the prescribed manner fifty percent of that amount or twenty five thousand rupees/thirty-five thousand respectively, whichever is less.

Q. 4. WHAT IS RESTRICTIVE TRADE PRACTICE ?

Ans. ***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 services 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 price;

(b) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent to buying, hiring or availing of other goods or services.[Section 2(1)(nn)].

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Q. 5. SAMIR, ON A HOLIDAY WITH HIS FAMILY, HIRED A TAXI SERVICE. THE TAXI WAS IN A POOR CONDITION AND THE DRIVER HAD NOT ADEQUATE REST AND DROVE RUSHLY. EVENTUALLY, IT WENT BURST IN THE MIDDLE OF THE WAY. AS A RESULT, SAMIR AND HIS FAMILY COULD NOT REACH THE AIRPORT IN TIME TO CATCH THEIR FLIGHT. DECIDE, WHETHER, SAMIR MAY BE TREATED AS A CONSUMER UNDER CONSUMER PROTECTION ACT, 1986 ? **[June. 2017]**

Ans. According to Section 2(1)(d) of the Consumer Protection Act, 1986, consumer means any person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with approval of the first commercial purpose.

In the given case since Samir has hired taxi, it is absolute responsibility of the service provider to maintain the taxi as well as to provide the drive capable of driving with care and responsibility.

Hence Samir, is a consumer as per Section 2(1)(d) of the Consumer Protection Act, 1986 and can take relief under Consumer Protection Act, 1986.

Q. 6. STATE THE COMPOSITION AND JURISDICTION OF NATIONAL COMMISSION UNDER CONSUMER PROTECTION ACT, 1986. **[June. 2017]**

Ans. Composition of National Commission

Section 20(1) of the Consumer Protection Act, 1986 provides that the National Commission shall consist of-

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

(b) Not less than four and not more than such number of members as may be prescribed one of whom shall be a woman, who shall have the following qualifications, namely:-

I. Be not less than thirty-five years of age;
II. Possess a bachelor's degree from a recognized university; and
III. Be person of ability, integrity and standing and have adequate knowledge and experience of at least ten year in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

Jurisdiction of National Commission

Section 21 of the Consumer Protection Act, 1986 provides that the National Commission shall have jurisdiction:

(a) To entertain complaints where the value of the goods or services and the compensation, if any, claimed exceeds rupees on crore;

(b) To entertain appeals against the orders of any State Commission; and

(c) 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 the exercise of its jurisdiction illegally or with material irregularity.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS

1. With reference to the relevant legal enactment, write short notes on the following.
   (i) Basic rights of consumers
   (ii) Commercial purpose
2. Distinguish between the following.
   (i) 'Contract of service' and 'contract for service.
   (iii) 'Pecuniary limits' and 'territorial limits' of consumer disputes redressal forums constituted under the Consumer Protection Act, 1986.
3. Explain the nature and scope of remedies available under the Consumer Protection Act, 1986.
4. Discuss the basic rights of consume under the Consumer Protection Act, 1986.
5. What are the basic right of consumers that are sought to be promoted and protected under the Consumer Protection Act, 1986?
6. What amounts to 'defect in goods' under the Consumer Protection Act, 1986?
7. Ramesh, an industrial employee contributing to ESI Fund was treated in an ESI hospital. Due to negligent diagnosis at the hospital, his condition deteriorated and he had to be shifted to la private hospital. He filed a complaint before the Consumer Disputes Redressal Forum seeking compensation from the ESI hospital. His complaint was dismissed on the ground that medical service rendered by the ESI hospital was gratuitous in nature. The state commission and the national commission upheld the decision of the distract forum. Ramesh intends to prefer an appeal before the Supreme Court. Will he succeed? Give reasons.
8. Mohan was suffering from a serious ailment. He was admitted to a well-known private hospital in Gurgaon. He was subjected to various tests. Even after diagnosis and Subsequent treatment, his condition deteriorated. The doctor advised surgery during which Mohan collapsed and died. Sushma, his wise, preferred a claim for compensation of fifty lakh rupees under the Consumer Protection Act, 1986 for' deficiency in service The hospital authorities contended that medical profession was being unnecessarily hounded.

   Is the contention tenable? Refer to relevant case law lying down the guidelines for medical profession.
9. Ms. Neelam, daughter of Ashok, travelling by train. She fell down from the running train while she passing through the interconnecting passage between two compartments and died as a result crush injuries on her head.

   Ashok claimed compensation from the Railways for deficiency in service The Railways contended that the redressal agencies under the Consumer Protection Act, 1086 had no jurisdiction to consider a complaint of this nature. They also contended that all the coaches of the train had been thoroughly checked at the starting point of the train and no detect was reported.

   Will Ashok succeed in getting compensation? Give reasons and refer to decided case law, if any.

FROM ICSI MODULE

Answer the following:

1. Discuss in detail the objects of Consumer Protection Act, 1986.
2. Briefly discuss the jurisdiction of the various Forums/Commissions under the Consumer Protection Act, 1986?
3. Explain the nature and scope of the remedies under the Act?
4. Write short note on the following:
   (i) Complainant
   (ii) Deficiency in service
   (iii) Power of redressal agencies
   (iv) Consumer.
5. Discuss consumers rights under Consumer Protection Act, 1986.

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10. Raman purchased a car by taking a loan from a bank and gave post-dated cheques to the bank not only in respect of insurance policy for succeeding 3 years. On the expiry of the policy in the first year. In the meantime, the car met with an accident. Raman brought an action against the bank for 'deficiency in service' under the Consumer Protection Act, 1986. Will he succeed?

11. Jolly Ltd. maintained a guest house for the use of its managing director and other executives. It entered into an agreement with a firm for the installation of central air-conditioning system. The system installed did not function, developed snags and there was leakage of water from ducting system. The company filed a complaint claiming compensation fir deficiency in service under the Consumer Protection Act, 1986. Will it succeed? Give reasons with reference to case law, if any.

12. Prakash, aged 37 years, was travelling from Mumbai to Delhi by air. When he occupied his seat in the aircraft, an announcement was made that his luggage was lying on the ground unidentified and that he should disembark to identify has luggage. When Prakash was stepping down from the aircraft, the ladder was suddenly removed as a result of which he fell down sustaining bodily injuries causing 10% disablement. As against the claim of ₹10 lakh filed by Prakash towards compensation, the airlness was willing to pay ₹40,000 which according to it was the maximum statutory liability of the airlines under the carriage by Air Act, 1972. However, the ₹1 lakh for mental agony and distress plus costs. Is the order passed by the State Commission justified? It so, give reasons and refer to the decided case law.

13. Ram Dhenu Ltd. and Diamond Engineers entered into a contact for the supply of electrical equipments. The contract contained an arbitration clause to refer the disputes to an arbitral. Ram Dhenu Ltd. made a complaint to the Consumer Disputes Redressal Forum for 'deficiency in service'. The opposite party opposed the complaint in view of the arbitration clause contained in the contract. Will succeed? Give reasons.

14. Ramesh took out four life insurance policies with double accident benefits, premium payable hald-yearly. When the third premium fell due, the general agent of the Life Insurance Corporation (LIC) met Ramesh and took a bearer cheque towards the premium payable by him in respect of the policies. Although the cheque was enchased immediately, yet the payment of premium was not deposit with the LIC for another three months. In the meantime, Ramesh met with a fatal accident and died. Ramesh's wife filed claim for the sum assured. Will she succeed? Give reasons.

15. A school owned a swimming pool and offered swimming facilities to the public on payment of fees. The school conducted summer swimming training camps to train children in swimming and for this purpose had engaged a trainer/coach.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

3

TRANSFER OF PROPERTY ACT, 1882

EXPECTED MARKS COVERAGE (15 to 20)

Covering-

- Bare Act
- ABC Analysis
- Immovable property-meaning
- Transfer of property
- Who can transfer the property
- Absolute interest
- Vested and contingent interests
- Properties which can be transferred
- Properties which cannot be transferred
- Conditional transfer
- Restraint on transfers / rule against inalienability
- Restraint on enjoyment
- Transfer for benefit of unborn person
- Rule against perpetuity
- Important doctrines
- Modes of transfer
- Leases
- Licence
- Difference between lease and licence
- Mortgages
- Kinds of Mortgages
- Rights of mortgagor
- Sub-mortgage
- Marshalling
- Subrogation
- Charges
- Distinction between mortgage and charge
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exam
  - From ICSI Module

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भारत का राजपत्र
The Gazette of India

THE TRANSFER OF PROPERTY ACT, 1882

(ACT NO. IV OF 1882).

[17th February, 1882]

2 An Act to amend the law relating to the Transfer of Property by Act of Parties.

Preamble WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows:-

CHAPTER I

PRELIMINARY

Short title 1. This Act may be called the Transfer of Property Act, 1882.

Commencement It shall come into force on the first day of July, 1882.

Extent 3[It extends to the whole of Bangladesh.]

Repeal of Acts Saving of certain enactments, incidents, rights, liabilities, etc 2. 4[Nothing herein contained shall be deemed to affect]-

(a) the provisions of any enactment not hereby expressly repealed:

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force:

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability: or

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction:

and nothing in the second chapter of this Act shall be deemed to affect any rule of 5[Muslim] law.

Interpretation-clause
3. In this Act, unless there is something repugnant in the subject or context,-

"immoveable property" does not include standing timber, growing crops or grass:

"instrument" means a non-testamentary instrument:

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TRANSFER OF PROPERTY ACT, 1882

ABC Analysis
(ICSI -Exam Point of view)

A

1. Concept of Vested and contingent interest.
2. Concept of Important Doctrine.
3. Concept of mode of transfer.

B

4. Concept of Mortgages.
5. Distinguish between mortgage and charge.

C

6. Concept of retrain on transfers/ rule against inalienability.
7. Restraint on enjoyment.
8. Concept of Transfer of Property.

The law relating to transfer of **immovable property** is governed by the Transfer of Property Act, 1882. The Act deals with (i) various specific transfers relating to Immoveable property and (ii) lays down general principles relating to transfer of both moveable and immoveable property.

IMMOVABLE PROPERTY-MEANING

The term "immoveable property" is not exhaustively defined under **Transfer of Property Act, 1882**. However, it is negatively defined in section 3 of the Act as *"the immoveable property does not include standing timber, growing crops, or grass"*

The General Clauses Act defines the term "immoveable property" as *"immoveable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth"*

If the definitions of "immoveable property" as given in the Transfer of Property Act, and The General Clauses Act are viewed together, we can say that:-

"Immovable property" includes land, benefits arising out of land, and things attached to the earth, but does not includes standing timber, growing crops, or grass"

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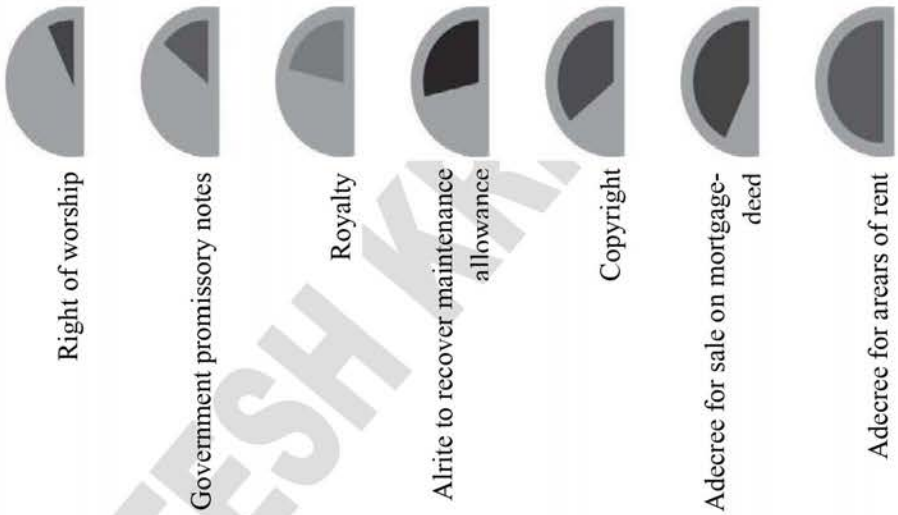
The following have been <u>recognised as immoveable property:</u>

Right to collect rents of immoveable property	A right to way	A right to collect dues from fair on a piece of land	Hereditary offices
The equity of redemption	The interest of mortgagee	Right to collect lac from trees	A right of ferry
A right of fishery	Right to receive future rents and profits of land	Reversion in property leased	A factory

The following have been held not to be immoveable property:



DISTINCTION BETWEEN MOVEABLE AND IMMOVEABLE PROPERTY

The distinction between moveable and immoveable property was explained in the case of Sukry Kurdepa v. Goondakull, as moveability may be defined to be a capacity in a thing of suffering alteration. Immoveablity for such alteration e.g., a piece of land in all circumstances is immoveable. If a thing cannot change its place without injury to the quality it is immoveable. Certain things e.g. trees attached to the ground are so long as they are so attached, immoveable when the severance has been effected they become moveable.

TRANSFER OF PROPERTY

According to Section 5 of the Transfer of Property Act, the term "transfer of property" *means an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself, and one or more other living persons .*

In this section, "living person" includes a company or association or body of individuals whether incorporated or not.

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SUBJECT MATTER OF TRANSFER

Section 6 of the Transfer of Property Act says that property of any kind may be transferred except as provided by this Act or any other law for the time being in force. The words "property of any kind" indicate that transferability is the general rule and the right to property includes the right to transfer the property to another person. Property of any kind excludes from its purview the future property. A transfer of future property can only operate as a contract which may be specifically performed when the property comes into existence.

WHO CAN TRANSFER THE PROPERTY

According to Section 7 of the Transfer of Property Act, every person who is competent to contract and entitled to transferable property, or authorised to dispose of property is competent to transfer such property. Hence, every person **competent to contract and having ownership** can transfer property.

Exception

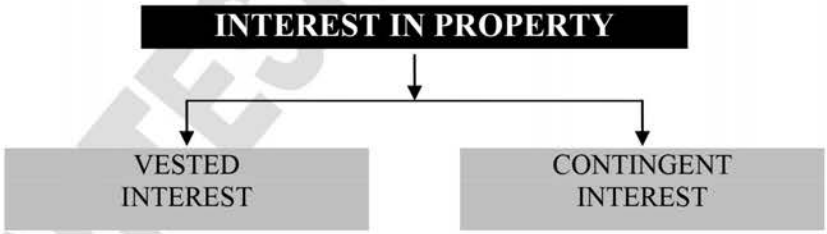
If a person holds himself out is the owner with the consent of the owner i.e. doctrine of holding out or if a person represents to be the owner i.e. **doctrine of feeding the grant by estoppels.**

ABSOLUTE INTEREST

When a person **owns property**, he has an "absolute interest" in the property. Ownership consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property.

For eg:- If A is the owner of a land, he has an absolute interest in the land.

VESTED AND CONTINGENT INTERESTS



➢ VESTED INTEREST

An interest is said to be vested when it is not subject to any condition/event **or** when it is subject to any condition/event, such event is bound to satisfied / happen.

For eg:- if a land is given to A for life with a remainder to B, A's right is vested in possession, B's right is vested in interest.

A vested interest is transferable and heritable. If property is given to A for life and afterwards to B, B gets a vested interest and if B transfers this interest to C, C will take when the life estate of A comes to an end. B's interest, since it is vested, is also heritable. Therefore, if B dies during the lifetime of A, C will get the property after the death of A.

➢ CONTINGENT INTERESTS

A contingent interest, is an interest which takes effect after the condition is satisfied. It is subject to a condition precedent, i.e., unless A marries B's daughter, he will not get the property.

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For example- Property is given to A for life and then to B if he marries C. B should marry C before A dies. If he does so, his interest is converted into vested interest. Before B marries C his interest is contingent.

DISTINCTION BETWEEN A VESTED AND A CONTINGENT INTEREST

The following are the principal points of distinction between a vested and a contingent interest:-

(a) When an interest is vested the transfer is complete. It creates an **immediate** proprietary interest in the property though the enjoyment may be postponed to a future date. A contingent interest on the other hand is dependent upon the fulfilment of some conditions which may or may not happen.

(b) A vested interest **takes effect** from the **date of transfer**. A contingent interest in order to become vested is conditioned by a contingency which may not occur.

(c) A vested interest **cannot be defeated by the death of the transferee** before he obtains possession. A contingent interest may fail in case of the death of transferee before the fulfilment of condition.

(d) Since vested interest is not circumscribed by any limitation which derogates from the completeness of the grant, it logically follows that a **vested interest is transferable as well as heritable**. If, therefore, a transferee of the vested interest dies before actual enjoyment, it will devolve on his legal heirs. A contingent interest, on the other hand, cannot be inherited though it may be transferred coupled with limitation regarding fulfilment of a condition.

Reversion and Remainder

Some interests in the property are called in English Law, reversion and remainders. A "reversion" is the residue of an original interest which is left after the grantor has granted the lessee a small estate. For example, A, the owner of a land may lease it to B for a period of five years. The person who grants the lease is the lessor and the person who takes the lease is called the lessee. Here, after the period of 5 years the lease will come to an end and the property reverts back to the lessor. The property which reverts back to him is called the reversion or the reversionery interest.

When the owner of the property grants a limited interest in favour of a person or persons and gives the remaining to others, it is called a "remainder". For instance, A the owner of a land transfers property to B for life and then to C absolutely. Here the interest in favour of B is a limited interest, i.e., it is only for life. So long as A is alive he enjoys the property. He has a limited right since he cannot sell away the property. His right is only to enjoy the property. If he sells this interest it will be valid so long as he is alive. So after B's death the property will go to C, interest is called a remainder. In the case of a "remainder", the property will not come back to the owner, but it goes over to the other person.

PROPERTIES WHICH CAN BE TRANSFERRED

Section 6 of provides that property of any kind may be transferred.

PROPERTIES WHICH CANNOT BE TRANSFERRED

Section 6 of this Act contains some exceptions to the general rule that property of any kind may be transferred. Consequently, the following properties cannot be transferred, namely:-

1. CHANCE OF AN HEIR APPARENT OR 'SPES SUCCESSIONIS'

'Spes Successionis' is a latin phrase which means the **expectancy of succession**. In other words, it is the possibilities of future interest in a property. The chance of a heir apparent succeeding to the estate of a deceased person cannot be transferred.

For eg"- A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has **only a hope expectancy** that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

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2. RIGHT OF RE-ENTRY

The right which the lessor has against the lessee for breach of an express condition which provides that on its breach the lessor may re-enter is called the right of re-entry.

For eg-, if A leases his property to B and adds a condition that if B sub-lets the leased land, A will have the right to re-enter, i.e., the lease will terminate if the lessee breaks the condition by subletting to a third person.

Thus, right of re-entry being a right for the personal benefit of any party cannot not be transferred.

3. TRANSFER OF EASEMENT

An easement is a right enjoyed by the owner of land over the land of another. Such as, right of way, right of light, right of support, right to a flow of air or water.

For eg;- if A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if he transfers the house itself to C, the easement is also transferred to C.

4. RESTRICTED INTEREST OR PERSONAL INTEREST

An interest restricted in enjoyment to the owner personally is by its very nature and are not transferable.

Example of such restricted interest or property is--The office of a Shebait of a Temple or mohunt of a mutt or mutuwalli of a wakf.

5. RIGHT TO FUTURE MAINTENANCE

This again is a personal right in the property which the law says that it cannot be transferred. The right of a Hindu widow to maintenance is a personal right which cannot be transferred.
However the arrears of past maintenance can be transferred.

6. MERE RIGHT TO SUE AND ACTIONABLE CLAIM

A 'mere right to sue' apart from the interest from which such right accrues cannot be assigned. The 'right to sue' is a personal right annexed to the ownership of property and cannot be served, from it.

7. TRANSFER OF PUBLIC OFFICE AND SALARIES, STIPENDS, ETC.

It is against public policy to transfer the public office, salary etc.

CONDITIONAL TRANSFER

When an interest is created on the transfer of property but is made to depend on the fulfillment of a condition by the transferee, the transfer is known as a conditional transfer. Such a transfer may be subject to a condition precedent or a condition subsequent.

If the interest is made to accrue on the fulfilment of a condition, the condition is said to be condition precedent. For instance, A agrees to sell his land to B if B marries C. This is a **condition precedent**.

Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event.

For example, A transfers a farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm.

RESTRAINT ON TRANFERS / RULE AGAINST INALIENABILITY

Section 10 of the Act says that when property is transferred, the transferee should not be restrained **absolutely** from alienating the property. Any condition restraining alienations of the property is **void**.

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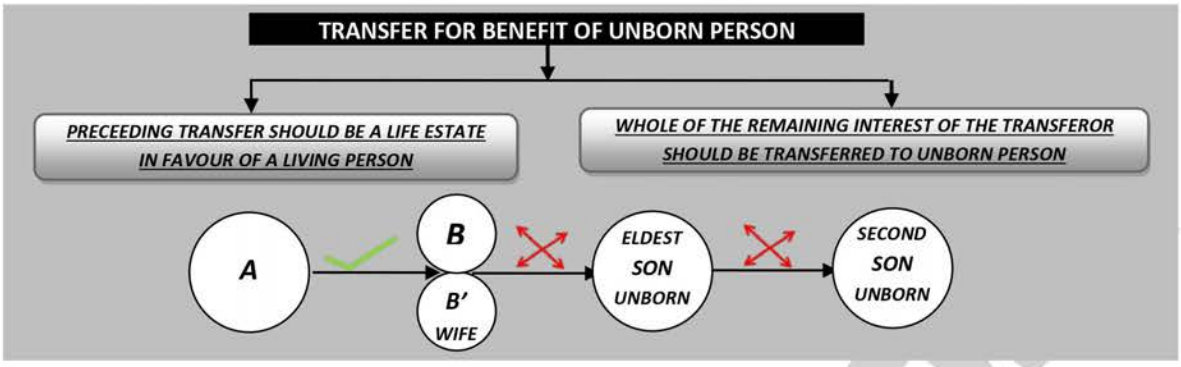

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PARTIAL RESTRAINT VALID

Though absolute restraints are bad in law, partial restraints are valid. For eg- If there are conditions which restrain the **transferee not to alienate the property outside the family**, it has been held by the Courts that they are partial restraints.

RESTRAINT ON ENJOYMENT

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The section lays down that where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property. **For eg-** A sells his house to B and adds a condition that **B only should reside in that house, the condition is invalid.**

Rule under Section 11 is subject to the **exception** that, if a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

For eg- A has properties X and Y. He sells property Y to B and puts a condition that B should not construct on property Y more than one storey so that A's property X which he retains should **have good light and free air**.

TRANSFER FOR BENEFIT OF UNBORN PERSON

Section 13 of the Transfer of Property Act lays down that where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of transfer, **subject to a prior interest created** by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the **whole of the remaining interest** of the transferor in the property.

Thus if a property is given to an unborn person, two **conditions** should be satisfied:-

(a) it should be preceded by a life estate in favour of a **living person**, and

(b) it should comprise the **whole of the remaining interest** of the transferor so that there can be no further interest in favour of others.

For eg:- A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

RULE AGAINST PERPETUITY

According to Section 14, the rule against perpetuity contains two propositions, i.e.:

(1) No transfer is valid after the life-time of one or more persons living at the date of such transfer. Transfer **can remain in effect only during the life time of an existing person**.

(2) Transfer can be extended to a person who is not in existence **but if he is in existence at the time of termination of the period of last transfer**. The moment the person is born he shall have contingent interest and after minority i.e. after the age of 18 years, he shall have vested interest. Barring these two conditions, a restriction on alienation of a property is void.

For example, A transfer may be made to 'A' for life and then to 'B' for life and then to 'C' for life and so on, **provided that A, B and C are all living persons** at the date of the transfer. But if the ultimate beneficiary is someone who is **not in existence at the date of the transfer**, the whole residue of the estate should be transferred to him. If he is **born before the termination** of the last prior estate, he takes a vested interest at birth and takes possession on the termination of the last prior estate but **if he is not born till the termination** of the last prior estate, the transfer to him **fails**.

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The rule against perpetuities is also called the **rule against remoteness.**
The rule against perpetuities applies to both moveable and immoveable property.

Effect of a transfer on failure of prior interest

According to Section 16, where by reason of any rules or the rules contained in **Sections 13 and 14**, interest created for the benefit of a person or class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect or upon failure of such prior interests also fail.

For example, property is transferred to A for life then to his unborn son B for life and then to C, who is living at the date of transfer, absolutely. Here B is given only a life interest. So the transfer to B is invalid under Section 13. The subsequent transfer to C absolutely is also invalid, because according to

So, according to Section 16, **if a prior transfer fails, the subsequent transfer will also fail**.

IMPORTANT DOCTRINES

➢ DOCTRINE OF ELECTION

Section 35 of the Transfer of Property Act deals with what is called doctrine of election.

'**Election**' may be defined as ***"the choosing between two rights where there is a clear intention that both were not intended to be enjoyed".***

The foundation of doctrine of election is that a **person taking the benefit of an instrument must also bear the burden**, and he must not take under and against the same instrument. It is, a general rule that ***no one may approbate and reprobate.***

For eg:- A transfers to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C.

Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election.

The question of Election arises only when a transfer is made by the **same document**. If the transferor makes a gift of property by one deed and by another asks the donee to part with his own property then there is no question of election.

For eg- A transfers his land to B by a document. A by another document transfers B's property to C. In this case B can retain the property given to him and refuse to transfer his property to C as the two transfers do not form part of the same document.

➢ TRANSFER BY OSTENSIBLE OWNER OR DOCTRINE OF HOLDING OUT

The Doctrine makes an exception to the rule that a person cannot confer a better title than he has. An ostensible owner is one who has all the indicia of ownership without being the real owner.

Where, with the consent, express or implied, of the real owners of immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, **the transfer shall not be voidable on the ground that the transferor was not authorised to make it**, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in **good faith**.

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The following conditions are necessary for the application of the transferor is the ostensible owner:-	**(a)**	he is ostensible owner by the consent, express or implied, of the real owner;
	(b)	the transfer is for consideration, and
	(c)	the transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer.

If any one of these elements is absent, the transferee is not entitled to the protection of this section.

➢ DOCTRINE OF FEEDING THE GRANT BY ESTOPPEL

Where, a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this Section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

In order to invoke this section, the transferee must prove that:-	**(a)**	there was a representation, fraudulent or erroneous;
	(b)	it was to the effect that the transferor is entitled to transfer the immoveable property;
	(c)	the transferor is found to have subsequently acquired the interest which he professed to transfer;
	(d)	the transfer of property was for consideration;
	(e)	the transferee has not rescinded the contract;
	(f)	the transferee acted in good-faith for consideration and without notice of the rights under the prior transfer.

➢ DOCTRINE OF FRAUDULENT TRANSFER

Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer.

"Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor **shall be voidable** at the option of any creditor so defeated or delayed."

➢ DOCTRINE OF PART-PERFORMANCE

SECTION 53A

A contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligations. As registration has not been effected A, the transferor, seeks to evict B from the land. **B will not be allowed to suffer simply because the formality of registration has not been through**. The legislature grants some relief to such a transferee under Section 53A, which embodies the doctrine of part-performance.

Followings are the essential conditions for the operation of the doctrine of part-performance according to Section 53A:-	**(a)**	There must be a contract to transfer immoveable property.
	(b)	It must be for consideration.
	(c)	The contract should be in writing and signed by the transferor himself or on his behalf.
	(d)	The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
	(e)	The **transferee should have taken the possession of the property in part performance** of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.
	(f)	The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.

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However, the doctrine of part-performance **will not affect the right of a subsequent transferee for consideration** without notice of the earlier contract and of its being partly performed.

➢ DOCTRINE OF LIS PENDENS

Lis means dispute, Lispendens means a ***pending suit, action, petition or the like***.

Doctrine of Lispendens states that during the pendency of a suit in a Court of Law, property which is subject to a litigation cannot be transferred and if transferred, the transferee will be bound by the result of the suit/proceedings.

For example, A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favour. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.

MODES OF TRANSFER

1. SALE

Under Section 54 of the T.P. Act, "sale" has been defined as a *transfer of ownership in exchange for a price paid or promised or part paid and part-promised.*

Essentials for sale	**(a)**	The seller & buyer must be a person competent to transfer.
	(b)	The subject matter is transferable property.
	(c)	There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.
	(d)	It must be an exchange for a price paid or promised or part paid and part promised.
	(e)	There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

2. EXCHANGE

Sections 118 to 121 of the Transfer of Property Act, 1882 deal with "Exchanges".

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange".

Essentials for exchange	**(a)**	The person making the exchange must be competent to contract.
	(b)	There must be mutual consent.
	(c)	There is a mutual transfer of ownership though things and interests may not be identical.
	(d)	Neither party must have paid money only.
	(e)	This Section applies to both moveable and immoveable property.

3. GIFT

Section 122 of the Transfer of Property Act defines "gift" as follows:-

"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee.

Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

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Essentials for gift	**(a)** There must be a transfer of ownership.
	(b) The subject matter of gift must be a certain existing moveable or immoveable property.
	(c) The transfer must be made voluntarily.
	(d) It must be done without consideration.

LEASES

According to Section 105, a "lease" of immovable property is a **transfer of a right to enjoy** property.

Since it is a transfer to enjoy and use the property, possession is always given to the transferee.

The lease of immoveable property must be made for a certain or in perpetuity period. For example, one may give a lease of property for a definite number of years, or for life, or even permanently.

The essentials of a lease are:-	**(a)** It is a transfer of a right to enjoy immoveable property;
	(b) Such transfer is for a certain time or perpetuity;
	(c) It is made for consideration
	(d) The transfer must be accepted by the transferee.
	(e) The parties to the lease (i.e. lessor and lessee), must be competent to make and to take the lease respectively

LICENCE

A licence *is a right to do or continue to do in or upon the immoveable property of the grantor, something which would, in the absence of such a right, be unlawful.*

DIFFERENCE BETWEEN LEASE AND LICENCE

(a) lease is a transfer of a right to enjoy immoveable property, but licence does not transfer any interest in the property.

(b) In case of lease possession is always given to the transferee but the licencee has no right to possession.

(c) A lease cannot be revoked any time at the will of lessor but a licence can be revoked by the grantor at any time.

(d) The transferee of the lessor is bound by the lease but the transferee of the licensor is not bound by the licence.

(e) in case of death of licencer, licence terminates but in case of lease, it is not so.

ACTIONABLE CLAIMS

Actionable claims are claims, to unsecured debts. A debt is a liquidated money obligation which is usually recoverable by a suit. An essential of an actionable claim is that it is not in possession of a person and the person can claim such a debt by bringing an action in a Court of law.

The Section also says that it must be a claim to any debt which the Civil Courts recognise as affording grounds for relief to the person who claims it.

Illustrations of actionable claims:-

(a) Arrears of rent accrual constitute a 'debt' so it is an actionable claim (***Sheu Gobind Singh v. Gauri Prasad,***).

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(b) Provident Fund that is standing to the credit of a member of the Provident Fund.

(c) Money due under the Insurance Policy.

(d) A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in moveable property not in possession (***Thakardas v. Vishindas***).

MORTGAGES

According to Section 58 of the Transfer of Property Act, a ***"mortgage" is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.***

The transferor is called a mortgagor, the transferee a mortgagee.

Essentials of a mortgage:-	**(a)** Transfer of interest
	(b) Specific immoveable property
	(c) To secure the payment of a loan

KINDS OF MORTGAGES

There are in all **six kinds** of mortgages in immoveable property.

1. SIMPLE MORTGAGE

In a simple mortgage, the ***mortgagor binds himself personally to pay the debt*** and agrees in the event of his failure to pay the mortgage money, the mortgage shall have the right to cause the property to be applied so far as may be necessary by means of a decree for the ***sale of property***. In simple mortgage, *no right of possession or foreclosure is available to the mortgagee.*

2. MORTGAGE BY CONDITIONAL SALE

In this type of mortgage, the mortgagor ostensibly sells the property with the following three conditions:-

(a) If the loan is repaid, the sale becomes void.

(b) If the loan is not repaid at the stipulated time, the sale will become absolute and binding.

(c) When the debt has been repaid at the stipulated time, the mortgagee shall re-transfer the property to the mortgagor.

Unlike in the case of a simple mortgage, *the mortgagor in this case does not bind himself personally to repay the debt.*

The mortgagee is *not given the possession of the property* in this type of mortgage.

In a mortgage by conditional sale, *the mortgagee's remedy is* ***'foreclosure'***, that is he becomes the owner of the property in default of payment of the debt by the mortgagor, he has to institute a regular suit in a Court of law to "foreclose" the mortgage.

3. ENGLISH MORTGAGE

This type of mortgages has features of both,(i) simple mortgage and (ii) mortgage by conditional sale. It is a **combination** of both.

Here the mortgagor *transfers the ownership of the property* as security and the mortgagee promises to re-transfer the ownership, if the money is paid within a definite time.

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There is also a personal covenant as the mortgagor promises to repay within a certain date. The remedy of the mortgagee is *sale of the property* to recover the debt.

4. USUFRACTUARY MORTGAGE

"Where the mortgagor *delivers possession of property* to mortgagee and authorises him to retain such possession until payment of the mortgage money, and to receive profits accruing from the property and to appropriate the same in lieu of interest, or in payment of the mortgage money, the transaction is called an usufractuary mortgage. It is also called a **mortgage with possession**.

The mortgagee in this case has *no remedy* either by forecloser or by sale.

5. MORTGAGE BY DEPOSIT OF TITLE DEEDS/ EQUITABLE MORTGAGE

In this transaction, a person delivers to mortgagee, documents of title of his immoveable property. All the features of simple mortgage applies here.

6. ANOMALOUS MORTGAGE

Transfer of Property Act provides that "a mortgage which is not a simple mortgage, a mortgage by conditional sale, usufrauctuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage".
Thus, an anomalous mortgage is a combination of various other mortgages,

RIGHTS OF MORTGAGOR

By mortgaging the property the mortgagor does not cease to be its owner, he only transfers an interest in it. The law, therefore, grants him the following rights:

1. Right of redemption

Right to redeem means the right to take back the mortgaged property by paying the mortgage money at any time after the stipulated date for repayment.

2. Right against clog on redemption

Any condition which prevents the mortgagor from redeeming the property is called a "clog" on the right of redemption and is void. Right of redemption is the essence of a mortgage, and any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void.

Mohd. Sher Khan v. Seth Swami Dayal	A mortgage deed provided that if the mortgage money **was not paid at a certain time, the mortgagee might enter into possession for a period of twelve years** and that mortgagors right to redeem would remain suspended for that period. It was held the condition was a clog and therefore unenforceable.

A mortgage deed provided that in case the **payment was not made by the mortgagor within the stipulated period**, the mortgagee would become the absolute owner of the property. It was held to be a clog on the equity of redemption.

SUB-MORTGAGE

Where the mortgagee transfers by mortgage his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage.

For example, where A mortgages his house to B for₹10,000 and B mortgage his mortgagee right to C for₹8,000. B creates a sub-mortgage.

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PUISNE MORTGAGE

Where the **mortgagor**, having mortgaged his property, **mortgages it to another person** to secure another loan, the second mortgage is called a puisne mortgage.

For example, where A mortgages his house worth ₹ one lakh to B for ₹40,000 and mortgages the same house to C for a further sum of ₹30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage. C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of ₹40,000 plus interest.

MARSHALLING

According to Section 81, if the owner of two or more properties mortgages them to one person and then sells one of the properties to another person, **the purchaser** is, in the absence of a contract to the contrary, **entitled to have the prior mortgage-debt satisfied out of the property or properties not sold to him,** so far as the same will extend, but not so as to prejudice the rights of the mortgagee.

SUBROGATION

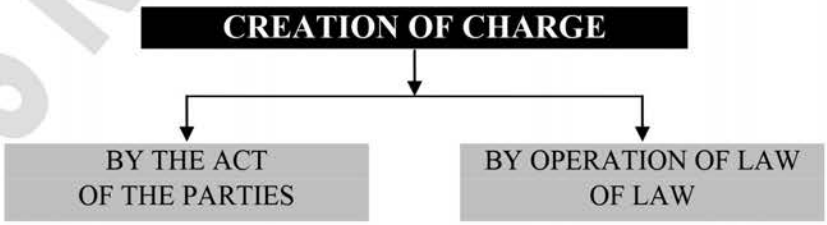
Section 92 incorporates the principle of "subrogation". It provides that any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this Section is called the "right of subrogation", and **a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems**.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

Nothing in this Section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

CHARGES

"Charge" has been defined under Section 100 as follows: *"Where immoveable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property".*'



Illustrations

Charge by the act of parties

'A' inherited an estate from his grandfather and executed an agreement to pay his sister B a fixed annual sum out of the rents of estate. B has a charge on the estate.

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Charge by operation of law

W files a suit against her husband H for maintenance. The Court grants a decree awarding the wife ₹100 per month, and in case of default by the husband makes his property liable for the amount of maintenance. Here a charge is created over the husband's property.

KINDS OF CHARGES

A charge on the property of the company as security for debentures may be of the following kinds, namely:

(1) Fixed or specific charge;

(2) Floating charge.

➢ FIXED OR SPECIFIC CHARGE

A charge is fixed or specific when it is made specifically to cover assets which are **ascertained** and **definite** or are capable of being ascertained and defined, at the time of creating charge e.g., land, building, or heavy machinery.

A fixed charge, therefore, is against security of certain specific property, and the company looses its right to dispose off that property as unencumbered.

➢ FLOATING CHARGE

A floating charge is a charge on a class of assets present and future which in the ordinary course of business is **changing from time** to time and leaves the company free to deal with the property as it sees fit until the holders of charge take steps to enforce their security.

A floating charge is not attached to any definite property but covers property of a fluctuating type e.g., **stock-in-trade** and is thus necessarily equitable.

CRYSTALLISATION OF FLOATING CHARGE

A floating charge attaches to the company's property generally and remains dormant till it crystallises or becomes fixed. The company has a right to carry on its business with the help of assets having a floating charge till the happening of some event which determines this right.

A floating charge crystallises and the security becomes fixed in the following cases:-	**(a)** when the company goes into liquidation;
	(b) when the company ceases to carry on the business;
	(c) when the creditors or the debenture holders take steps to enforce their security.
	(d) on the happening of the event specified in the deed.

EFFECT OF CRYSTALLISATION OF A FLOATING CHARGE

On crystallisation, the floating charge converts itself into a fixed charge on the property of the company. It has priority over any subsequent equitable charge and other unsecured creditors.

DISTINCTION BETWEEN MORTGAGE AND CHARGE

(a) A mortgage is **transfer of an interest** in the property made by the mortgagor as a security for the loan, while the charge is **not the transfer of any interest** in the property though it is security for the payment of an amount.

(b) A charge may be created by **act of parties or by operation of law**. A mortgage can only be created by act of parties

(c) A mortgage deed **must be registered and attested by two witnesses**, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.

(d) In certain types of mortgage, the mortgagor can **foreclose the mortgaged property** but in charge, the charge-holder cannot foreclose though he can get the property **sold** as in a simple mortgage.

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Q. 1. AMRIT (LESSOR) GRANTS HIS IMMOVABLE PROPERTY (PREMISES) ON LEASE FOR 4 YEAR TO SUKANT (LESSEE) COMMENCING FROM 1ST JUNE, 2001. THE LESSOR GIVES A NOTICE TO THE LESSEE ON 1ST FEBRUARY,2008 FOR VACATING THE PREMISES ON 1ST MARCH, 2008:

(a) IS THIS NOTICE A VALID NOTICE?

(b) IF THE LEASE IS CONTINUED AFTER 4 YEARS, WILL THE TENANCY BE ON MONTHLY BASIS OR YEARLY BASIS? DECIDE.

Ans. Under the Transfer of property Act, 1882, in order to be valid, a notice has to be valid, has to be proper notice. There are two things to be kept in mind, so that it can be termed as per proper notice

- It has to clearly specify the intention to terminate tenancy.
- The date of termination of tenancy should be mentioned in it.

Moreover, depending on whether should be fifteen days and six months respectively. In this case, the lease is granted by Amrit to be Sukant for years, w.e.f. 1st June, 2001. This lease ends on 1st June, 2005. Since the tenant has continued residing in the property after this period, we can safely assume that the lease after 1st June,2005 continued as a monthly lease, for which a fifteen days notice suffices.

Hence,

(1) The notice is a Valid Notice.

(2) The tenancy is a Monthly tenancy.

Q. 2. A MAKES A GIFT AF A HOUSE TO BE B WITH WHOM HE HAD ILLICIT RELATION IN THE PAST. IS THIS TRANSFER VALID? WILL IT MAKE ANY DIFFERENCE IF A'S CONSIDERATION FOR THIS TRANSFER IS ADULATOUS RELATIONS OF B WITH A? GIVEN REASON.

Ans. Section 6 of the Transfer of Property Act, inter alia provides that no transfer can be made for an unlawful Object or Consideration within the meaning of Section 23 of the Indian Contract Act, 1872. According, Sec 23, a Consideration or object in unlawful if the court regard it as immoral or opposed to public policy. In the Case **Nagaratnambu vs. Ramavya** the Supreme court held that in such a case past-cohabitation was only motive and not the consideration for the gift, and such a transfer is not hit by Section 6(h) of the Transfer of property Act by reason of the fact that they were motivated by a Desire to compensate the concubine for her past service. Therefore, the gift in Question for past illicit Cohabitation is valid in the eye of law.

Where the illicit connection or adulterous inter course, it is opposed to law and it cannot possibly sustain a transfer of property or constitute a valid consideration in the case of Manicka Gounder v. adulterous cohabitation is an unlawful consideration. Therefore, if 'A' connection with B is adulterous, the gift would be invalid and hit by section 6(h) of the Transfer of property Act.

Q. 3. DISTINGUISH BETWEEN 'MOVEABLE PROPERTY' AND 'IMMOVEABLE PROPERTY'.

Ans. **Moveable Property**

The Transfer of Property Act does not define the term" moveable property". Therefore, itis to be defined with the help of other statutes. For e.g., it has been defined in the General Clauses Act, 1897 as to mean "property of every description exceptim moveable property". The Registration Act defines "moveable property" to include property of every description excluding immoveable property but including standing timber, growing crops and grass.

Moveable property is sometimes regarded as immoveable property. This may happen when a thing of chattel is attached or embedded in earth. If the machinery is fixed on the land permanently then it becomes immoveable property, whereas if the machinery or engine or any other thing is fixed on a temporary basis, then it will be regarded as moveable property.

Immoveable Property

The term "immovable property" is also not defined under the Transfer of Property Act. However, it is defined in the negative sense as "the immoveable property does not include standing timber, growing crops, or grass". Standing timber are trees fit for use for building or repairing houses. This is an exception to the general rule that growing trees are immoveable property.

The General Clauses Act defines the term "immoveable property" but not exhaustively. It states: "Immoveable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth". The Indian Registration Act expressly includes under to immoveable property the benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries.

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Q. 4. WHAT IS MEANT BY 'ONEROUS GIFT' ?

Ans. Several things are transferred as a gift by single transaction. Whereas some of them are really beneficial, the others convey burdensome obligations. The result is that the benefit which it confers is more than counter balanced by the burden it places. For instance, A makes a gift of shares in the companies X and Y. X is prosperous but heavy calls are expected in respect of shares in Y company. The gift is onerous. The rule as laid down in Section 127 of Transfer of Property Act, 1882 is that the done is at liberty to accept one of them and refuse the other.

Q. 5. WHICH SECTION OF THE TRANSFER OF PROPERTY ACT PROVIDES THAT WHEN A PROPERTY IS TRANSFERRED, THE TRANSFEREE SHOULD NOT BE RESTRAINED ABSOLUTELY FROM ALIENATING THE PROPERTY?

Ans. Section 10.

Q. 6. WHICH SECTION OF THE TRANSFER OF PROPERTY ACT DEALS WITH THE VARIOUS CONTINGENCIES IN WHICH A LEASE COMES TO AN END?

Ans. Section 111.

Q. 7. IN WHICH OF THE FOLLOWING MORTGAGES, THE OWNERSHIP IN THE MORTGAGED PROPERTY IS ABSOLUTELY TRANSFERRED TO THE CREDITOR?

Ans. English mortgage.

Q. 8. WHICH OF THE FOLLOWING MORTGAGES IS CALLED EQUITABLE MORTGAGE IN ENGLISH LAW?

Ans. Mortgage by deposit of title deeds.

Q. 7. EXPLAIN THE MEANING OF 'USUFRACTUARY MORTGAGE' AS GIVEN UNDER THE TRANSFER OF PROPERTY ACT, 1882. [Dec. 2017]

Ans. Section 58(d) of the Transfer of Property Act, 1882 defines a "Usufructuary Mortgage" as "where the mortgagor delivers possession or expressly or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufractuary mortgage. It is also called a mortgage with possession.

Q. 7. DIFFERENTIATE BETWEEN VESTED AND CONTINGENT INTEREST UNDER TRANSFER OF PROPERTY ACT, 1882.

Ans. The following are the principal points of distinction between a vested and a contingent interest:

1. When an interest is vested the transfer is complete. It creates an immediate proprietary interest in the property though the enjoyment may be postponed to a future date. A contingent interest on the other hand is dependent upon the fulfillment of some conditions which may or may not happen. In other words, in interest, the title is as yet imperfect but may become perfect on the fulfillment of a stipulated condition.
2. A vested interest takes effect from the date of transfer. A contingent interest in order to become vested is conditioned by a contingency which may not occur.
3. A vested interest cannot be defeated by the death of the transferee before he obtains possession. A contingent interest may fail in case of the death of transferee before the fulfillment of condition.
4. Since vested interest is not circumscribed by any limitation which derogates from the completeness of the grant, it logically follows that vested interest is transferable as well as heritable. If, therefore, a transferee of the vested interest dies before actual enjoyment, it will devolve on his legal heirs. A contingent interest, on the other hand, cannot be inherited though it may be transferred coupled with limitation regarding fulfillment of a condition.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS

1. Write short notes on the following:
   (i) Doctrine of feeding the grant by estoppel
   (ii) Doctrine of lispendens
   (iii) Spessuccenssionis
   (iv) Usufructuary mortgage.
2. Distinguish between the following.
   (i) 'Mortgage' and 'charge'
   (ii) 'Vested interest' and 'contingent interest'.
   (iii) 'Condition restraining alienation' and 'condition restraining enjoyment'.
   (iv) 'Movable property' and 'immovable property'.
   (v) 'Sale' and 'exchange'.
   (vi) 'English mortgage' and 'mortgage by conditional sale'
3. Explain the following:
   (i) Doctrine of part-performance.
   (ii) Doctrine of election.
   (iii) Doctrine of marshalling
4. Attempt the following:
   (i) State the circumstances in which a property may be transferred in favour of an unborn person.
   (ii) Explain the rule of lispendens as provide in the Transfer of Property Act, 1882.
   (iii) Discuss briefly the right of redemption.
5. Exception to the rule that absolute restraint on transfer of property is void. Comment.
6. State the meaning and characteristics of immovable property as per the Transfer of Property Act, 1882.
7. Explain the doctrine of 'clog on equity of redemption' under the Transfer of Property Act, 1882.
8. What do you mean by 'immovable property' under the Transfer of Property Act, 1882?
9. What is the 'doctrine of election' as enunciated under the Transfer of Property Act, 1882.
10. There was a partition between a Hindu father and his five sons. The deed provided that if any one of the sons wanted to sell his shares, he shall sell it to one of his brothers only and not to any stranger. The consideration for that share shall be₹1,000 only. Are these conditions valid? Give reasons.
11. Arjun transfers his property to Bhanu for life and after Bhanu's death to that of his unborn sons as shall fist attain the age of 25 years and if no son of Bhanu shall attain that age, to Chandan who is living at the time of the transfer. Decide the validity of this transfer.
12. Anil has two properties Property-X and Property-Y. He sells Property-Y to Sunil and puts a condition that Sunil should-X which he retains should have good light and free air. Is such a condition valid? Give reasons in support of your answer.

FROM ICSI MODULE

Answer the following:

1. Discuss the object of the Transfer of Property Act. Distinguish between immoveable and moveable property.
2. What is the subject matter of transfer under the T.P. Act? Discuss properties which cannot be transferred.
3. Define a mortgage. Discuss various types of mortgages.
4. What is the rule against perpetuity?
5. Write short notes on
   (i) Puisne mortgage;
   (ii) Charges under the T.P. Act;
   (iii) Vested and contingent interest;
   (iv) Actionable claims.

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13. Ajoy voluntarily makes a gift of his immovable property to Bijoy. Bijoy accepts the gift. The possession of the property was given to Bijoy but the gift deed which required registration under section 123 of the Transfer of Property Act, 1882 was not registered. Whether Ajoy, the donor can revoke the gift? Decide.

14. The managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud against a lady client by fraudulently inducing her to sign documents transferring her property to him. The clerk did so without the knowledge of his principal.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

4

ESSENTIAL COMODITIES ACT, 1955

Covering-

- Bare Act
- Object of the Act
- Definitions
- Power of Central Government Under the Act
- Confiscation of Essential Commodities
- Offences and Penalties
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exam
  - From ICSI Module

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भारत का राजपत्र
The Gazette of India

THE ESSENTIAL COMMODITIES ACT, 1955[1]

ACT NO. 10 OF 1955

[1st *April*, 1955.]

An Act to provide, in the interest of the general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities.

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

1. Short title and extent.—(*1*) This Act may be called the Essential Commodities Act, 1955.

(*2*) It extends to the whole of India [2]***.

2. Definitions.—In this Act, unless the context otherwise requires,—

[3][(*ia*) "Collector" includes an Additional Collector and such other officer, not below the rank of Sub-Divisional Officer, as may be authorised by the Collector to perform the functions and exercise the powers of the Collector under this Act;]

[4]* * * * *

(*b*) "food-crops" include crops of sugarcane;

(*c*) "notified order" means an order notified in the Official Gazette;

[5][(*cc*) "order" includes a direction issued thereunder;]

[6][(*d*) "State Government," in relation to a Union territory, means the administrator thereof;]

[5][(*e*) "sugar" means—

(*i*) any form of sugar containing more than ninety per cent, of sucrose, including sugar candy;

(*ii*) khandsari sugar or bura sugar or crushed sugar or any sugar in crystalline or powdered form; or

(*iii*) sugar in process in vacuum pan sugar factory or raw sugar produced therein.]

[7][**2A. Essential commodities declaration etc.**—(*1*) For the purposes of this Act, "essential commodity" means a commodity specified in the Schedule.

(*2*) Subject to the provisions of sub-section (*4*), the Central Government may, if it is satisfied that it is necessary so to do in the public interest and for reasons to be specified in the notification published in the Official Gazette, amend the Schedule so as to—

(*a*) add a commodity to the said Schedule;

(*b*) remove any commodity from the said Schedule,

3. Powers to control production, supply, distribution, etc., of essential commodities.—(*1*) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, [1][or for securing any essential commodity for the defence of India or the efficient conduct of military operations], it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(*2*) Without prejudice to the generality of the powers conferred by sub-section (*1*), an order made thereunder may provide—

(*a*) for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;

(*b*) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of food-crops generally or of specified food-crops, and for otherwise maintaining or increasing the cultivation of food-crops generally, or of specified food-crops.

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ESSENTIAL COMMODITIES ACT, 1955

DEPARTMENT OF CONSUMER AFFAIRS
(Ministry of Consumer Affairs, Food & Public Distribution,
krishi Bhavan, New Delhi, Government of India)

OBJECT OF THE ACT

The object of the Act is to secure ***equitable distribution and availability at fair prices of essential commodities*** *in the interest of the general public.*Act intends to control the production, supply and distribution of essential commodities in the interest of the general public.

AUTHORITIES RESPONSIBLE TO ADMINISTER THE ACT

Necessary powers have been given to the Central Government under the Act to administer the provisions of the Act by issuing orders/directions notified in the official gazette and by delegating the authority to State Governments and administrators of Union Territories.

The Central Government at its apex level is responsible for achieving the objectives enshrined by the Parliament under this Act for the welfare and general well-being of all the citizens.

DEFINITIONS

➢ ESSENTIAL COMMODITY

Section 2A defines the "essential commodity" as to mean a commodity specified in the Schedule.

The Schedule to the Act lists out following commodities:-	**1)** drugs;
	2) fertilizers, whether inorganic, organic or mixed;
	3) foodstuffs, including edible oilseeds and oils;
	4) hank yarn made wholly form cotton;
	5) petroleum and petroleum products;
	6) raw jute and jute textiles;
	7) (i) seeds of food-crops and seeds of fruits and vegetables; (ii) seeds of cattle fodder; and (iii) jute seeds

In addition to above central government has power to notify any other article as essential commodity which is within the scope of Entry 33 in list III in the Seventh Schedule to the Constitution.

➢ COLLECTOR

"Collector" includes an Additional Collector, and such other officer not below the rank of sub-divisional Officer as may be authorised to perform the functions and exercise the powers of the Collector under the Act

POWER OF CENTRAL GOVERNMENT UNDER THE ACT
SECTION 3

➢ POWER TO ISSUE ORDERS

Act empowers Central Government to issue orders for regulating or prohibiting the production, supply and distribution of essential commodities in the following cases:-

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(a) To secure the equitable **distribution** of essential commodities;
(b) To secure the **availability** of essential commodities at fair price; or
(c) To secure any essential commodity for the **defence** of India.

Contents of order

Central Government may issue an order which may provide for all or any of the following matters:

(a) Regulating the production or manufacture of any essential commodity by licences, permits etc;
(b) Regulating the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity by licences, permits etc;
(c) Bringing under cultivation any waste land for growing thereon of food crops for otherwise maintaining or increasing the cultivation of food crops;
(d) Controlling the price at which any essential commodity may be bought or sold;
(e) Regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs which are likely to be detrimental to the public interest:
(f) For the entry, search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals;
(g) For the seizure of nay articles, premises, aircraft, vessels, vehicles or other conveyances and animals by a person authorized to make such entry, search or examination.

Effect of the Order

Section 6 provides that the order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

➢ POWER TO DO PRICING OF ESSENTIAL COMMODITIES

Act empowers Central Government to fix prices of essential commodities When sold to Central/State Government, the price may be :-

i. **The agreed price**, where the price can be agreed upon consistently with the controlled price fixed under this section.
ii. **Controlled price** where no such agreement can arrive.
iii. **Market price** existing on the date of sale, where the above two clauses can not be applied.

Pricing during Emergency

Central Government can fix prices of essential commodities to be sold to general public in situation of emergency, which shall be effective fo**r 3 months**. The price as fixed may be:-

(a) The **agreed price**, where the price can be agreed upon consistently with the controlled price fixed under this section.
(b) **Controlled price** where no such agreement can arrive.
(c) **Market price** existing on the date of sale, where the above two clauses can not be applied.

➢ POWER TO DO PRICING FOR SUGAR

Act empowers Central Government to fix prices be paid to producers of sugar in case sold to:-

(a) Central government,
(b) State government,
(c) Agent of government,
(d) Any other class of person specified in order of Central government.

➢ POWER TO APPOINT CONTROLLER

Central government can appoint controller to exercise notified function in relation to control as per instruction of central government.

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CONFISCATION OF ESSENTIAL COMMODITIES

➢ SEIZURE AND CONFISCATION OF ESSENTIAL COMMODITIES

The expression ***'seize' means to take possession contrary to the wishes of the owner of the property and that such action is unilateral action of the person seizing.*** The person from whom anything is seized loses, from the moment of seizure, the right or power to control or regulate the use of that thing.

'Confiscation 'is a mode by which Courts can dispose of the property which is seized.

Section 6A provides that where any essential commodity is seized in pursuance of an order made under Section 3, a report of such seizure shall be made, to the collector of the district in which such essential commodity is seized.

if the collector is satisfied that there has been contravention of the order he may pass order for confiscation of:-

(a) the essential commodity so seized,
(b) any package, covering or receptacle in which such essential commodity is found, and
(c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity.

Issue of Show Cause Notice before Confiscation of Essential Commodity/reasonable opportunity

Before passing an order for confiscation the owner of the essential commodity is required to be given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods to provide him an opportunity of making a representation in writing within a reasonable, time and give him a reasonable opportunity of being heard in the matter.

It is not sufficient for the owner to prove that the vehicle carried the essential commodity without his knowledge or concurrence. He must also prove that the vehicle was used without the knowledge, or concurrence of the person in charge of the vehicle. In addition, he must prove that not only he but also the person incharge of the vehicle had taken all reasonable and necessary precautions against such use ***(Shai Rahhimv. State of Andhra)***

➢ SALE OF THE CONFISCATED COMMODITY

Where the collector is of the opinion that the seized essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do he may :-

(a) order the same to be sold at the controlled price
(b) where no such price is fixed, order the same to be sold by public auction.

Provided that in case of **foodgrains**, the collector may, order the same to be sold through **fair price shops** at the price fixed by the Central Government or by the State Government.

➢ DISPOSAL OF SALE PROCEEDS OF CONFISCATED GOODS

The sale proceeds of the essential commodity sold, after deduction of the expenses **shall be paid** to the **owner** or person from whom it is seized in the following circumstances:-

(a) where no order of confiscation is ultimately passed by the Collector;
(b) where an order passed on appeal so requires, or
(c) where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made, the person concerned is acquitted.

➢ APPEAL AGAINST CONFISCATION ORDER

Any person aggrieved by an order of confiscation may appeal to the State Government concerned within **one month** from the date of passing the order. if the appeal has been decided in favour of appellant, he is entitled to the possession of the confiscated goods .

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OFFENCES AND PENALTIES

Section 10A of the Act declares that every offence punishable under the Act shall be **cognizable** and **non-bailable**.

Section 11 lays down that before a Court can take cognizance of any offence punishable under the Act, the following **three conditions** must be satisfied:-

(a) there must be a report in writing,

(b) the report must be made by a public servant,

(c) **Presence of Mens Rea** :-

Mensrea means **guilty mind**. If the dealer did believe bona fide that he could store the foodgrains for instance, without infringing any order under Section 3, there could be no contravention.The legal position is that means rea would be presumed but it is avertable presumption, and the burden is on the accused to revert the said presumption.

OFFENCES BY COMPANIES

In case of contravention by a company, every person who, at the time of the contravention, was **in charge** of the conduct of the business of the company, shall be deemed to be guilty of the contravention, and shall be liable to be punished accordingly.

Wherean offence is committed by a company, if it is proved that the offence had been committed with the consent or connivance of or is attributable to any neglect on the part of any **Director, Manager, Secretary** or other officer of the company, such a person shall be deemed to be guilty of that offence, and is liable to be proceeded against and punished accordingly.

Any such person, can, however, escape liability if he proves that the contravention took place without his knowledge, or that he exercised all due diligence to prevent it.

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Q. 1. WRITE SHORT NOTES ON THE APPLICABILITY OF THE CONCEPT OF MENS REA UNDER THE ESSENTIALS COMMODITIES ACT,1995.

Ans. Applicability of the concept of Mensrea under the Essentials Commodities Act, 1995

(a) Mensrea means guilty mind. It means that whatever wrong is done , it is an international act.

(b) In natulal v/s State of Madhya Pradesh it was held that means rea of guilty mind is an ingredient of an offence punishable under Section 7 of the Essential Commodities Act of 1955 i.e. an intention contravention of an order made Under Section 3 is an essential ingredients of an offence Under Section 7.

Mensrea is an essential ingredient of any criminal offence and it can be excluded from an statute only where it is absolutely clear that the implantation of mensrea would detect the object of the statue.

Q. 2. WHETHER 'TEA' IS A FOOD STUFF UNDER THE ESSENTIAL COMMODITIES ACT, 1955? DOES IT HAVE ANY NUTRITIONAL VALUE? DISCUSS IN REFERENCE WITH LEADING CASE LAW, IF ANY.

Ans. In the case of S. Samuel, AID. Harrisons Malayava v. Union of India, AIR 2004 SC 218, the Supreme Court held that Tea is not foodstuff. Even in a wider sense, foodstuffs will not include tea as tea either in the form of the leaves or in the form of beverage, does not go into the preparation of food proper to make it make it more palatable and digestible. Tea leaves are not eaten. Tea is beverage produced by steeping tea leaves or buds of the tea plants in the boiled water. Such tea is consumed hot or cold for its flavour, taste and its quality as a stimulant. The stimulating effect is caused by the presence of caffeine therein. Tea neither nourishes the body nor sustains nor promotes its growth.

It does not have any nutritional value. It does not help formation of enzymes nor does it enable anabolism. Tea or its beverage does not go into the preparation of any foodstuff. In common parlance, any one has taken tea would not say that he has taken or eaten food.

Thus tea is not a food.

Q. 3. CULPABLE MENTAL STATE.

Ans. Section 10-C provides for a presumption of culpable mental state, which includes intention, motive, knowledge of a fact and the belief in a fact. It is now provided that in any prosecution for an offence under the Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of mental state. Of course, it is open to the accused to prove that he had no such mental state with respect of the act committed by him.

Q. 4. WHO IS EMPOWERED TO APPOINT AUTHORIZED CONTROLLER ? STATE THE FUNCTIONS AND LIABILITIES OF SUCH AUTHORIZED CONTROLLER UNDER ESSENTIAL COMMODITIES ACT, 1955. **[Dec. 2017]**

Ans. Under section 3(4) of the Essential Commodities Act, 1955 the Central Government is empowered to appoint 'Authorised Controller' when it considered necessary for maintaining or increasing the production and supply of essential commodities. The authorized controller shall exercise such powers and functions of control as may be provided in the order with respect to the whole or any part of any such undertaking engaged in the production and supply of the commodity.

The authorized controlled shall exercise his functions in accordance with any instructions given to him by the Central Government. He shall not have any power to give any direction inconsistent with the provisions of any enactment or nay instrument determining the functions of the person in charge of the management of the undertaking except in so far as may be specifically provided by the order. The undertaking shall be carried on in accordance with any directions, given by the authorized controller under the provisions of the order. The person who is responsible to function as a manager of the undertaking or part of it shall comply with such directions.

Q. 5. COMMENT ON THE PRESUMPTION OF CULPABLE MENTAL STATE. WHO CAN AVOID SUCH PRESUMPTION OF CULPABLE MENTAL STATE AS STATED UNDER THE ESSENTIAL COMMODITIES ACT, 1955? **[June. 2017]**

Ans. Section 10-C of the Essential Commodities Act, 1955 provides for a presumption of culpable mental state, which includes intention, motive, knowledge of a fact and the belief in a fact. It is now provided that in any prosecution for an offence under the Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of mental state.

Such presumption may be avoided by the accused. It is open to the accused to prove that he had no such mental state with respect of the act committed by him.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS

1. Is mensrea an essential ingredient in an offence punishable under the Essential Commodities Act, 1955? Discuss.
2. Explain in brief the procedure for seizure and confiscation of essential commodities Act, 1955.
3. "Mensrea is an essential ingredient of an offence punishable under the Essential Commodities Act, 1955." Discuss with case law.
4. Discuss the power of the Central Government to control production, supply and distribution of essential commodities under the Essential Commodities Act, 1955.
5. Distinguish between the following:
   (i) 'Seizure' and 'confiscation' under the Essential Commodities Act, 1955.
   (ii) 'Seizure of an essential commodity' and 'confiscation of an essential commodity'.
6. Mention the provisions of the Essential Commodities Act, 1955 regarding confiscation of essential commodities seized in contravention of section 3 of the Act.
7. Evaluate the efficacy of the Essential Commodities Act, 1955 in controlling the production, supply and distribution of essential commodities in the country.
8. Explain the provisions for confiscation of an essential commodity seized in contravention of the Essential Commodities Act, 1955.
9. "A reasonable opportunity is required to be provided to the person concerned before confiscation of his commodity or vehicle, etc., under the Essential Commodities Act, 1955." Elaborate the statement in the light of relevant legal provisions and decided case law.

FROM ICSI MODULE

Answer the following :

1. What do you understand by essential commodities? What are the commodities termed as essential commodities, under the Essential Commodities Act?
2. Specify the authority responsible for the administration and execution of the Act ?
3. What do you know about an 'order' under the Act? What are the powers of Central Government in issuing the order under the Act?
4. There is difference in seizure and confiscation of commodities under the Act. How can the sale proceeds of confiscated commodities be utilized? What is the procedure for disposal of confiscated goods?
5. A reasonable opportunity is required to be given to the person concerned before confiscation of his commodities or vehicle, etc., under the Act. Elaborate this statement in the light of provisions of the Act.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

5

LEGAL METROLOGY ACT, 2009

Covering-

- Bare Act
- Object of the Act
- Definitions
- Standard Weights and Measures
- Appointment and Power of Director, Controller and Legal Metrology Officers
- Power of Inspection, Seizure
- Forfeiture
- Declarations on Pre-Packaged Commodities
- Approval of Model
- Prohibition on Manufacture, Repair or Sale of Weight or Measure without Licence
- Penalty for Counterfeiting or Seals
- International Organization of Legal Metrology (OIML)
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exam
  - From ICSI Module

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The Gazette of India

THE LEGAL METROLOGY ACT, 2009

ACT NO. 1 OF 2010

[13*th January*, 2010.]

An Act to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Sixtieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.—(*1*) This Act may be called the Legal Metrology Act, 2009.

(2) It extends to the whole of India.

(*3*) It shall come into force on such date[1] as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "Controller" means the Controller of Legal Metrology appointed under section 14;

(*b*) "dealer", in relation to any weight or measure, means a person who, carries on, directly or otherwise, the business of buying, selling, supplying or distributing any such weight or measure, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration, and includes a commission agent, an importer, a manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure manufactured by him to any person other than a dealer;

(*c*) "Director" means the Director of Legal Metrology appointed under section 13;

(*d*) "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(*e*) "import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

(*f*) "label" means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity;

(*g*) "Legal Metrology" means that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements;

(*h*) "legal metrology officer" means Additional Director, Additional Controller, Joint Director, Joint Controller, Deputy Director, Deputy Controller, Assistant Director, Assistant Controller and Inspector appointed under sections 13 and 14;

3. Provisions of this Act to override provisions of any other law.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

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LEGAL METROLOGY ACT, 2009

DEPARTMENT OF CONSUMER AFFAIRS

(Ministry of Consumer Affairs, Food & Public Distribution, krishi Bhavan, New Delhi, Government of India)

Legal Metrology is the name by which the law relating to weights and measures is known in international parlance. Legal Metrology is very vital for scientific, technological and industrial progress of any country.

Legal metrology can be defined as that part of metrology which deals with units of measurement, methods of measurement and measuring instruments in so far as they concern statutory, technical and legal requirements which have the ultimate object of assuring public guarantee from the point of view of security and of appropriate accuracy of measurements.

OBJECT OF THE ACT

Legal metrology Act, 2009 **intend to establish and enforce standards of weights and measures,** regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.

DEFINITIONS

SECTION 2

➢ DEALER

Dealer in relation to any weight or measure, means a person who, carries on, directly or otherwise, the business of buying, selling, supplying or distributing any such weight or measure, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration; **and includes** a commission agent, an importer, a manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure manufactured by him to any person other than a dealer;

➢ LEGAL METROLOGY

"Legal Metrology" means that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements;

➢ MANUFACTURE

"Manufacturer" in relation to any weight or measure, means a person who -	**(i)** manufactures weight or measure,
	(ii) manufactures one or more parts, and acquires other parts, of such weight or measure and, after assembling those parts, claims the end product to be a weight or measure manufactured by himself or itself, as the case may be,
	(iii) does not manufacture any part of such weight or measure but assembles parts thereof manufactured by others and claims the end product to be a weight or measure manufactured by himself or itself, as the case may be,
	(iv) puts, or causes to be put, his own mark on any complete weight or measure made or manufactured by any other person and claims such product to be a weight or measure made or manufactured by himself or itself, as the case may be;

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➢ PRE-PACKED COMMODITY

"Pre-packaged commodity" as to mean a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity;

➢ WEIGHT AND MEASURE

"Weight or measure" means a weight or measure specified by or under this Act and includes a weighing or measuring instrument.

STANDARD WEIGHTS AND MEASURES

Section 5 of the Act provides that the base unit of;-	**(a)** length shall be the metre;
	(b) mass shall be the kilogram;
	(c) time shall be the second;
	(d) electric current shall be the ampere;
	(e) thermodynamic temperature shall be the kelvin;
	(f) luminous intensity shall be the candela; and
	(g) amount of substance shall be the mole

Section 11 of the Act provides that **no person** shall, in relation to any goods, things or service, quote, or make announcement of, whether by word of mouth or otherwise, any price or charge, or issue or exhibit any price list, invoice, cash memo or other document, or prepare or publish any advertisement, poster or other document, or indicate the net quantity of a pre-packaged commodity, or express in relation to any transaction or protection, any quantity or dimension, **otherwise than in accordance with the standard unit of weight, measure or numeration.**

APPOINTMENT AND POWER OF DIRECTOR, CONTROLLER AND LEGAL METROLOGY OFFICERS

Section 13 of the Act empowers the Central Government to appoint (by Notification) a Director of legal metrology, Additional Director, Joint Director, Deputy Director, Assistant Director and other employees for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to inter-State trade and commerce.

The Director and every legal metrology officer, appointed, shall exercise such powers and discharge such functions in respect of such local limits as the Central Government may, by notification, specify. Every legal metrology officer shall exercise powers and discharge duties under the general superintendence, direction and control of the Director.

The Director, the Controller and every legal metrology officer authorised to perform any duty by or under this Act **shall be deemed to be a public servant** within the meaning of section 21 of the Indian Penal Code. **No suit, prosecution or other legal proceeding** shall lie against the Director, the Controller and legal metrology officer authorised to perform any duty by or under this Act in respect of anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder.

Section 14 of the Act, provides that the State Government may, by notification, appoint a Controller of legal metrology, Additional Controller, Joint Controller, Deputy Controller, Assistant Controller, Inspector and other employees for the State for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to intra State trade and commerce.

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POWER OF INSPECTION, SEIZURE BYLEGAL METROLOGY OFFICERS

Section 15 of the Act confer powers of inspection on the Director, Controller or any legal metrology officer may, **if he has any reason to believe,** whether from any information given to him by any person and taken down in writing or from personal knowledge or otherwise, that any weight or measure or other goods in relation to which any trade and commerce has taken place or is intended to take place and in respect of which an offence punishable under this Act appears to have been, or is likely to be, committed are either kept or concealed in any premises or are in the course of transportation.

The powers include entery at any reasonable time into any such premises and search for and inspect and also include seizer of any weight, measure or other goods and any record, register or other document or article which he has reason to believe may furnish evidence indicating that an offence punishable under the Act has been, or is likely to be, committed in the course of or in relation to, any trade and commerce.

Where any goods seized are subject to speedy or natural decay, the Director, Controller or legal metrology officer may dispose of such goods in such manner as may be prescribed.

FORFEITURE

Every non-standard or unverified weight or measure, and every package used in the course of, or in relation to, any trade and commerce and seized under section 15, shall be liable to be forfeited to the State Government.

However, such unverified weight or measure shall not be forfeited to the State Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed.

Every weight, measure or other goods seized under section 15 but not forfeited shall be disposed of by such authority and in such manner as may be prescribed.

DECLARATIONS ON PRE-PACKAGED COMMODITIES

Section 18 states that **no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity *unless***

(a) such package is in such standard quantities or number and
(b) bears thereon such declarations and particulars in such manner as may be prescribed.

Any advertisement mentioning the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.

APPROVAL OF MODEL

Every person, before manufacturing or importing any weight or measure shall seek the approval of model of such weight or measure in such manner, on payment of such fee and from such authority as may be prescribed.

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PROHIBITION ON MANUFACTURE, REPAIR OR SALE OF WEIGHT OR MEASURE WITHOUT LICENCE

Section 23 of the Act provides that no person shall manufacture, repair or sell, or offer, expose or possess for repair or sale, any weight or measure unless he holds a licence issued by the Controller.

However, no licence to repair shall be required by a manufacturer for repair of his own weight or measure in a State other than the State of manufacture of the same.

Section 24 provides for verification and stamping of weight or, measure. Every person having any weight or measure in his possession, custody or control in circumstances indicating that such weight or measure is being, or is intended or is likely to be, used by him in any transaction, shall, before putting

Such weight or measure into such use, have such weight or measure verified at such place and during such hours as the Controller may, by general or special order, specify in this behalf, on payment of such fees as may be prescribed.

The Central Government may prescribe the kinds of weights and measures for which the verification is to be done through the Government approved Test Centre.

PENALTY FOR COUNTERFEITING OR SEALS

*A person is said to **"counterfeit"** who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.*
Section 44 provides that whoever counterfeits any seal specified by or under this Act or the rules made thereunder, or sells or otherwise disposes of any counterfeit seal, or possesses any counterfeit seal, or counterfeits or removes or tampers with any stamp, specified by or under this Act or rules made thereunder, or affixes the stamp so removed on, or inserts the same into, any other weight or measure, shall be punished **with imprisonment for a term which shall not be less than six months but which may extend to one year** and for the second or subsequent offence, with imprisonment for a term which shall not be less than **six months but which may extend to five years**.

INTERNATIONAL ORGANIZATION OF LEGAL METROLOGY (OIML)

The International Organization of Legal Metrology (OIML) is an intergovernmental treaty organization whose membership includes Member States, countries which participate actively in technical activities, and Corresponding Members, countries which join the OIML as observers.

It was established in 1955 in order to promote the global harmonization of legal metrology procedures.

The OIML develops model regulations, International Recommendations, which provide Members with an internationally agreed-upon basis for the establishment of national legislation on various categories of measuring instruments. Given the increasing national implementation of OIML guidelines, more and more manufacturers are referring to OIML International and Recommendations to ensure that their products meet international specifications for metrological performance and testing.

OIML Certificate System for Measuring Instruments

The OIML Certificate System for Measuring Instruments was introduced in 1991 to facilitate administrative procedures and lower the costs associated with the international trade of measuring instruments subject to legal requirements. The System provides the possibility for a manufacturer to obtain an OIML Certificate and a Test Report indicating that a given instrument type (pattern) complies with the requirements of the relevant OIML International Recommendations.

Certificates issued by OIML are accepted by national metrology services on a voluntary basis.

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Q. 1. HEALTHY FOODS GAVE AN ADVERTISEMENT IN THE DAILY NEWSPAPER FOR ITS PRE-PACKED SNACKS, MENTIONING RETAIL SALE PRICE OF THE PACKAGE. HOWEVER, IN THE ADVERTISEMENT, NEITHER THE NET QUANTITY NOR THE NUMBER OF SNACKS CONTAINED IN THE PACKAGE WAS GIVEN. WHAT ARE THE LEGAL PROVISIONS IN THE REGARD AND WHETHER THE ADVERTISEMENT GIVEN BY HEALTHY FOODS IS APPROPRIATE AND SUFFICIENT AS PER RELEVANT LAW?.

Ans. According to provisions contained in Section 18 of the legal metrology Act, 2009, no person shall manufacture, pack sell import distribute, deliver, offer, expose for sale any pre packaged commodity unless such package is in such standard quantities or number and bears there on such declaration and particulars in such manner as may be prescribed. Including the net quantity or number of commodity contained in the package in such form and prescribed manner.

Thus, the advertisement given by Healthy Food is not appropriate and sufficient as per the Legal Metrology Act 2009 as it neither contain the net quantity nor the commodity contained in the package.

Q. 2. DEFINE THE TERM 'STAMP' UNDER THE LEGAL METROLOGY ACT, 2009.

Ans. Section 2(t) of the Legal Metrology Act, 2009 defines "stamp" as to mean a mark, made by impressing, casting, engraving, etching, branding, affixing pre-stressed paper seal or any other process in relation to, any weight or measure with a view to.

(a) Certifying that such weight or measure conforms to the standard specified by or under this Act, or

(b) Indicating that any which mark which was previously made here on certifying that such weight or measure conforms to the standards specified by or under this Act, has been obliterated;

Q. 3. "EVERY NON-STANDARD WEIGHT AND MEASURE USED IN THE COURSE OF TRADE IS LIABLE TO BE FORFEITED". COMMENT. **[Dec. 2017]**

Ans. As per Section 16 of the Legal metrology Act, 2009, every non-standard or unverified weight or measure, and every package made in contravention of section 18 of the Legal Metrology Act, 2009, used in the course of, or in relation to any trade and commerce and seized under section 15 of the Legal Metrology Act, 2009, shall be liable to be forfeited to the State Government.

However, such unverified weight or measure shall not be forfeited to the State Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may prescribed.

Every weight, measure or other goods seized under section 15 but not forfeited shall be disposed of by such authority and in such manner may be prescribed.

Q. 2. DISCUSS THE POWERS OF LEGAL METROLOGY OFFICER REGARDING INSPECTION AND SEIZURE UNDER LEGAL METROLOGY ACT, 2009. **[June. 2017]**

Ans. Every legal metrology officer so appointed shall exercise such powers and discharge such functions in respect of such local limit as the State Government may, be notification, specify. Section 15 of the Legal Metrology Act, 2009 confer the powers of inspection on the Director, Controller or any legal metrology officer may, if he has any reason to believe, whether from any information given to him by any person and taken down in writing or from personal knowledge or otherwise, that any weight or measure or other goods in relation to which any trade and commerce has taken place or is intended to take place and in respect of which an offence punishable under this Act appears to have been, or is likely to be, committed are either kept or concealed in any premises or are in the course of transportation-

- Enter at any reasonable time into any such premises and search for and inspect any weight, measure or other goods in relation to which trade and commerce has taken place, or is intended to take place and any record, register or other document relating thereto.
- Seizer of any weight, measure or other goods any record, register or other document or article which he has reason to believe may furnish evidence indicating that an offence punishable under the Ac has been, or is likely to be, committed in the course of or in relation to, any trade and commerce.

Where any goods sized are subject to speedy or natural decay, the Director, Controller or legal metrology officer may dispose of such goods in such manner as may be prescribed.

SELF TEST QUESTIONS

FROM PAST CS EXAMS

1. Healthy Foods gave an advertisement in the daily newspaper for its pre-packed snacks mentioning retail sale price of the package. However, in the advertisement, neither the net quantity nor the number of snacks contained in the package was given. What are the legal provisions in this regard and whether the advertisement given by healthy foods it appropriate and sufficient as per relevant law?
2. What is meant by the international organization of Legal metrology (OIML) certificate system for measuring instruments?
3 What are the declarations required to be made by the manufacturers on pre-packaged commodities? Also, refer to penalties provided under the Legal Metrology Act, 2009 for the contravention.
4 State the powers of the Director to inspect and seize under the Legal Metrology Act, 2009.
5 Define 'legal metrology' under the Legal Metrology Act, 2009.
6. With reference to the relevant legal enactments, write short notes on the following:
   (i) Salient features of the Legal Metrology Act, 2009.
   (ii) Pre-packaged commodity

FROM ICSI MODULE

Answer the following:

1. What are the objectives of Legal Metrology Act, 2009?
2. Enumerate the powers and functions of Controller and Legal Metrology Officer?
3. Write short note on Counterfeit.
4. Every non-standard weight and measure used in the course of trade is liable to be forfeited. Comment.
5. Briefly explain the provision regarding declaration on pre-packed commodities.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

6

REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

Covering-

- Salient Features of the Real Estate Act, 2016
- Advantages of RERA
- Important Definition
- Responsibilities of the Appropriate Government
- Establishment and incorporation of real estate regulatory authority
- Prior registration of real estate project with real estate regulatory authority
- Projects exempt from the ambit of the act
- Registration of real estate agents
- Functions and duties of promoter
- Rights and suties of allotters
- Eatablishment of central advisory council
- Establishment of real estate appellate tribunal
- Role of Company Secretaries
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exam
  - From ICSI Module

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भारत का राजपत्र
The Gazette of India

THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

NO. 16 OF 2016

[25th *March*, 2016.]

An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Sixty-seventh Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. *(1)* This Act may be called the Real Estate (Regulation and Development) Act, 2016.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Definitions.

2. In this Act, unless the context otherwise requires,—

(a) "adjudicating officer" means the adjudicating officer appointed under sub-section *(1)* of section 71;

(b) "advertisement" means any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot, building or apartment or inviting persons to purchase in any manner such plot, building or apartment or to make advances or deposits for such purposes;

Prior registration of real estate project with Real Estate Regulatory Authority.

3. *(1)* No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

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REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

Real estate sector plays a catalytic role in fulfilling the needs and demand for housing and infrastructure in the country and is an important pillar of the economy. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection.

The objects and reasons for which the Act has been framed are:

SALIENT FEATURES OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

(a)	Establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector
(b)	Ensure sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner
(c)	Ensure protect the interest of consumers in the real estate sector
(d)	Establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority (RERA)
(e)	Regulates transactions between buyers and promoters of residential real estate projects
(f)	Establishes state level regulatory authorities called Real Estate Regulatory Authorities (RERAs)

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ADVANTAGES OF RERA (REAL ESTATE DEVELOPMENT AND REGULATION ACT)

IMPORTANT DEFINITIONS

"Allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

"Carpet area" means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment

Common areas" mean—

(i)	the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;
(ii)	the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;
(iii)	the common basements, terraces, parks, play areas, open parking areas and common storage spaces;
(iv)	the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;
(v)	installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;
(vi)	the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;
(vii)	all community and commercial facilities as provided in the real estate project;
(viii)	all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

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Appropriate Government'

Section 2(g) of the Act defines 'appropriate Government' to mean as follows:

(i)	for the Union territory without Legislature, the Central Government
(ii)	(ii) for the Union territory of Puducherry, the Union territory Government;
(iii)	for the Union territory of Delhi, the Central Ministry of Urban Development;
(iv)	for the State, the State Government.

RESPONSIBILITIES OF THE APPROPRIATE GOVERNMENT

(a) As per section 84 of the Act the appropriate Government is required to notify Rules for the implementation of the Act, within six months of its commencement.

(b) As per section 20 of the Act the appropriate Government is required to establish the Regulatory Authority within 1 year from its commencement i.e. maximum by 30th April, 2017.

(c) As per section 20 of the Act the appropriate Government is required to designate an officer (preferably Housing Secretary) as interim Regulatory Authority, until the establishment of a full time Regulatory Authority.

(d) As per section 43 of the Act the appropriate Government is required to establish the Appellate Tribunal within 1 year from its commencement i.e. maximum by 30th April, 2017.

(e) As per section 43 of the Act the appropriate Government is required to designate an existing Appellate Tribunal (under any other law in force) to be the Appellate Tribunal, until the establishment of a full time Appellate Tribunal.

(f) The Chairperson and Members of the Regulatory Authority and the Members of the Appellate Tribunal are required to be appointed based on recommendations of a Selection Committee, thus the appropriate Government is required to constitute the Selection Committee.

(g) As per section 28 and section 51 the appropriate Government is required to appoint officers and other employees of Regulatory Authority and the Appellate Tribunal. In addition, it is required to identify office space etc. and other infrastructure for its functioning.

(h) As per section 41 the Central Government (i.e. the Ministry of HUPA) is required to establish the Central Advisory Council.

(i) As per section 75 the appropriate Government is required to constitute a 'Real Estate Regulatory Fund'.

ESTABLISHMENT AND INCORPORATION OF REAL ESTATE REGULATORY AUTHORITY

The appropriate Government shall establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under the Act. The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority. Further, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be the Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of the Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

COMPOSITION OF AUTHORITY

The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government.

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Term of office of Chairperson and Members

The Chairperson and Members shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixty-five years, whichever is earlier and shall not be eligible for re-appointment.

FUNCTIONS OF AUTHORITY FOR PROMOTION OF REAL ESTATE SECTOR

The Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government of the competent authority, as the case may be, on,

(a) protection of interest of the allottees, promoter and real estate agent;

(b) creation of a single window system for ensuring time bound project approvals and clearances for timely completion of the project;

(c) creation of a transparent and robust grievance redressal mechanism against acts of ommission and commission of competent authorities and their officials;

(d) measures to encourage investment in the real estate sector including measures to increase financial assistance to affordable housing segment;

(e) measures to encourage construction of environmentally sustainable and affordable housing, promoting standardisation and use of appropriate construction materials, fixtures, fittings and construction techniques;

FUNCTIONS OF AUTHORITY

The functions of the Authority shall include—

(a) to register and regulate real estate projects and real estate agents registered under the Act;
(b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;
(c) to ensure compliance of its regulations or orders or directions made in exercise of its powers under the Act;
(d) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of the Act.

PRIOR REGISTRATION OF REAL ESTATE PROJECT WITH REAL ESTATE REGULATORY AUTHORITY

A promoter shall not advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established.

APPLICATION FOR REGISTRATION OF REAL ESTATE PROJECTS

Step 1

Applicant has to file an application for registration with RERA in prescribed form along with prescribed fees and documents.

Step 2

Application for registration must be either approved or rejected within a period of 30 days from the date of application by the RERA.

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Step 3

On successful registration, the promoter of the project will be provided with a registration number, a login id and password for the applicant.

PROJECTS EXEMPT FROM THE AMBIT OF THE ACT

The following projects do not require to be registered under the Act:

1. Area of land does not exceed 500 Sq. Meters
2. No. of apartments does not exceed 8

REGISTRATION OF REAL ESTATE AGENTS

Real estate broking is one of the easiest business in India as there are no specific qualification or experience requirements and also there is no code of practice which sets accountability, transparency and professional benchmarks. Hence, there are thousands of non-professional agents/ brokers in every city operating without any accountability. Hence, to bring in transparency and accountability, agents have also been covered under the ambit of RERA and registration requirement has been mandatory for them as per section 9 of the Act. Every real estate agent shall make an application to the Authority for registration in such form, manner, within such time and accompanied by such fee and documents as may be prescribed.

FUNCTIONS AND DUTIES OF PROMOTER

1.	No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building in any planning area, without registering the real estate project with the Real Estate Regulatory Authority. **Section 3(1)**
2.	Every promoter shall make an application to the Authority for registration of the real estate project in prescribed form and manner. **Section 4(1)**
3.	The promoter shall enclose the prescribed documents along with the application**. Section 4(2)**
4.	The promoter shall also enclose a prescribed declaration along with application. **Section 4(2)(l)**
5.	The promoter shall keep 70% of the amount received from allottees in a separate bank account in a scheduled bank. **Section 4(2)(l)(D)**

RIGHTS AND DUTIES OF ALLOTTEES

Section 20 provides for the various rights and duties of the allottees.

(1)	The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in the Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.
(2)	The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.
(3)	The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter.

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(4)	The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale.
(5)	Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

ESTABLISHMENT OF CENTRAL ADVISORY COUNCIL

(1) The Central Government may, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Advisory Council.

(2) The Minister to the Government of India in charge of the Ministry of the Central Government dealing with Housing shall be the ex officio Chairperson of the Central Advisory Council.

(3) The Central Advisory Council shall also consist of not more than ten members to represent the interests of real estate industry, consumers, real estate agents, construction labourers, non-governmental organisations and academic and research bodies in the real estate sector.

FUNCTIONS OF CENTRAL ADVISORY COUNCIL

The Central Advisory Council is required to advise the Central Government on matters relating to implementation of the Act, questions of policy, protection of consumer interest, foster growth and development of the real estate sector, and other matters as may be assigned to it by the Central Government.

ESTABLISHMENT OF REAL ESTATE APPELLATE TRIBUNAL

(1)	The appropriate Government shall, establish an Appellate Tribunal to be known as the — (name of the State/Union territory) Real Estate Appellate Tribunal.
(2)	The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.
(3)	Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.
(4)	The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal.
(5)	Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under the Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter.

COMPOSITION OF APPELLATE TRIBUNAL

The Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member.

TERM OF OFFICE OF CHAIRPERSON AND MEMBERS

The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall hold office, as such for a term not exceeding five years from the date on which he enters upon his office, but shall not be eligible for re-appointment.

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RIGHT TO LEGAL REPRESENTATION

Section 56 deals with Right to legal representation. It provides that the applicant or appellant may either appear in person or authorise one or more chartered accountants or **company secretaries** or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may.

APPEAL TO HIGH COURT

Any person aggrieved by any decision or order of the Appellate Tribunal may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908. The High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

ROLE OF COMPANY SECRETARIES

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CHAPTER

7

THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988

Covering-

- The Salient Features of the Benami Transactions Act
- Important Definitions
- Prohibition of benami transactions
- Prohibition of the right to recover property held benami
- Notice and attachment of property involved in benami transaction
- Classification and vesting of benami property
- Appellate tribunal
- Appeal to high court
- Special courts
- Offences and prosecution
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exam

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भारत का राजपत्र
The Gazette of India

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 11*th August,* 2016/*Shravana* 20, 1938 (*Saka*)

The following Act of Parliament received the assent of the President on the 10th August, 2016, and is hereby published for general information:—

THE *BENAMI* TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016

NO. 43 OF 2016

[10*th August*, 2016.]

An Act further to amend the Benami Transactions (Prohibition) Act, 1988.

BE it enacted by Parliament in the Sixty-seventh Year of the Republic of India as follows:—

Short title and commencement.

1. (*1*) This Act may be called the *Benami* Transactions (Prohibition) Amendment Act, 2016.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Insertion of new heading before section 1.

2. In the *Benami* Transactions (Prohibition) Act, 1988 (hereinafter referred to as the principal Act), before section 1, the following heading shall be inserted, namely:— 45 of 1988.

"CHAPTER I

PRELIMINARY."

Amendment of section 1.

3. In section 1 of the principal Act, for sub-section (*1*), the following sub-section shall be substituted, namely:—

"(*1*) This Act may be called the Prohibition of *Benami* Property Transactions Act, 1988.". 45 of 1988.

Substitution of new section for section 2. Definitions.

4. For section 2 of the principal Act, the following section shall be substituted, namely:—

'2. In this Act, unless the context otherwise requires,—

(*1*) "Adjudicating Authority" means the Adjudicating Authority appointed under section 7;

(*2*) "Administrator" means an Income-tax Officer as defined in clause (*25*) of section 2 of the Income-tax Act, 1961; 43 of 1961.

(*3*) "Appellate Tribunal" means the Appellate Tribunal established under section 30;

(*4*) "Approving Authority" means an Additional Commissioner or a Joint Commissioner as defined in clauses (*1C*) and (*28C*) respectively of section 2 of the Income-tax Act, 1961; 43 of 1961.

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THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988

The Benami Transactions (Prohibition) Act, 1988 was enacted to prohibit benami transactions and the right to recover property held benami.

The Salient Features of the Benami Transactions (Prohibition) Act, 1988 are as under:

(a)	It defines a benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami
(b)	It provides the consequences of entering into a prohibited benami transactions
(c)	It lays down the procedure for determination and related penal consequences in the case of a prohibited benami transaction
(d)	It also provides that the powers of civil court shall be available to authorities under the said Act
(e)	Miscellaneous Provisions have been provided for service of notice, protection of action taken in good faith, etc.
(f)	Central Government empowers to make rules for the implementation of the provisions of the Bill
(g)	It enables the Central Government in consultation with the Chief Justice of the High Court to designate one or more Courts of Session as Special Court or Special Courts for the purpose of the Bill
(h)	It provides penalty for entering into benami transactions and for furnishing any false documents in any proceeding under the Bill

IMPORTANT DEFINITIONS

"Benami Property"

Benami Property means any property which is the subject matter of a benami transaction and also includes the proceeds from such property. [Section 2(8)]

"Benami Transaction"

As per Section 2 (9) of the benami transaction means-

(A) a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—

(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

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(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

"Benamidar"

Benamidar means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.[Section 2(10)]

"Beneficial Owner"

"Beneficial Owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar. [Section 2(10)]

PROHIBITION OF BENAMI TRANSACTIONS

As per Section 3 of the Act, no person shall enter into any benami transaction. Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

Where any person enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall be punishable in accordance with the provisions contained in Chapter VII.

Chapter VII deals with offences and prosecution. It provides that if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

PROHIBITION OF THE RIGHT TO RECOVER PROPERTY HELD BENAMI

Section 4(1) provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property Further, Section 4(2) provides that no defense based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

Property held benami liable to confiscation

As per section 5 of the Act any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.

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NOTICE AND ATTACHMENT OF PROPERTY INVOLVED IN BENAMI TRANSACTION

Section 24 relates to notice and attachment of property involved in benami transaction. Sub-section (1) of this section provides that where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to such person to show cause within such time as may be specified in the notice why the property should not be treated as benami property. Sub-section (2) of this section provides that a copy of the notice may also be served upon such other person who is a beneficial owner.

Sub-section (4) of this section provides that the Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under sub-section (1), -

(a) where the provisional attachment has been made under sub-section (3), -

(i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or (ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made under sub-section (3), -

(i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order made by the Adjudicating Authority under sub-clause (3) of section 26; or

(ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

CONFISCATION AND VESTING OF BENAMI PROPERTY

Section 27 deals with confiscation and vesting of benami property. Sub-section (1) of this section provides that where an order is passed in respect of any property under sub-section (3) of section 26 holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property.

Sub-section (3) of this section provides that where an order of confiscation has been made, all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation.

APPELLATE TRIBUNAL

Chapter V deals with the provisions relating to the Appellate Tribunal. Section 30 deals with establishment of Appellate Tribunal. The said section seeks to provide that the Central Government shall, by notification, establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority and the authorities under this Act.

APPEAL TO HIGH COURT

Section 49 relates to appeal to High Court. Sub-section (1) of this section provides that any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

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Sub-section (2) of this section provides that the High Court may entertain any appeal after the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period specified in sub-section (1).

SPECIAL COURTS

Section 50 relates to Special Courts. Sub-section (1) of this section provides that the Central Government, in consultation with the Chief Justice of the High Court, shall for trial of an offence punishable under this Act, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.

OFFENCES AND PROSECUTION

Chapter VII deals with the provisions relating to offences and prosecution. Section 53 relates to penalty for benami transaction. Sub-section (1) of this section provides that where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into such benami transaction, shall be guilty of the offence of benami transaction.

Sub-section (2) of this section provides that whoever is found guilty of the offence of benami transaction referred to above shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent. of the fair market value of the property.

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CHAPTER

8

SPECIFIC RELIEF ACT, 1963

Covering-

- Bare Act
- Specific Performance
- Specific Performance of Part of a Contract
- Who May Sue For Specific Performance
- Persons Against Whom Specific Performance Available
- Persons Against Whom Specific Performance Cannot be Enforced
- Rectification of an Instrument
- Rescission of Contract
- Cancellation of Instruments
- Recovery of Possession of Movable And Immovable Property
- Declaratory Decrees
- Preventive Reliefs
- Injunction
- Advance Your Knowledge
- Self Test Questions

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THE SPECIFIC RELIEF ACT, 1963

ACT NO. 47 OF 1963

[13*th December*, 1963.]

An Act to define and amend the law relating to certain kinds of specific relief.

BE it enacted by Parliament in the Fourteenth Year of the Republic of India as follow:—

PART I

PRELIMINARY

1. Short title, extent and commencement.—(*1*) This Act may be called the Specific Relief Act, 1963.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force on such date[1] as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "obligation" includes every duty enforceable by law;

(*b*) "settlement" means an instrument (other than a will or codicil as defined by the Indian Succession Act, 1925 (39 of 1925), whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of;

(*c*) "trust" has the same meaning as in section 3 of the Indian Trusts Act, 1882 (2 of 1882), and includes an obligation in the nature of a trust within the meaning of Chapter IX of that Act;

(*d*) "trustee" includes every person holding property in trust;

(*e*) all other words and expressions used herein but not defined, and defined in the Indian Contract Act, 1872 (9 of 1872), have the meanings respectively assigned to them in that Act.

3. Savings.—Except as otherwise provided herein, nothing in this Act shall be deemed—

(*a*) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

(*b*) to affect the operation of the Indian Registration Act, 1908 (16 of 1908), on documents.

4. Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws.—Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law.

PART II

SPECIFIC RELIEF

CHAPTER I

RECOVERING POSSESSION OF PROPERTY

5. Recovery of specific immovable property.—A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

6. Suit by person dispossessed of immovable property.—(*1*) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming

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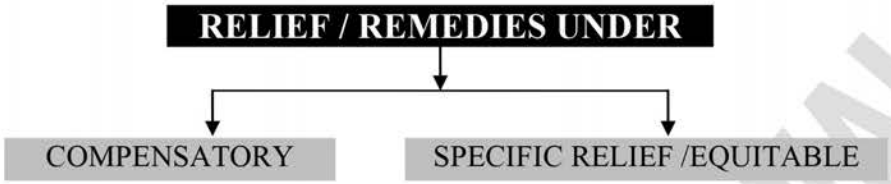
SPECIFIC RELIEF ACT, 1963

The expression **'specific relief'** means a relief in specie. It is a remedy which aims at the exact fulfilment of an obligation.

The law relating to specific relief in India is provided in the **Specific Relief Act, 1963**.



Under the Specific Relief Act, 1963, remedies have been divided as specific relief (Sections 5-35) and reventive relief (Sections 36-42). These are:

(i)	Recovering possession of property (Sections 5-8);
(ii)	Specific performance of contracts (Sections 9-25);
(iii)	Rectification of Instruments (Section 26);
(iv)	Rescission of contracts (Sections 27-30);
(v)	Cancellation of Instruments (Section 31-33);
(vi)	Declaratory decrees (Sections 34-35); and
(vii)	Injunctions (Sections 36-42).

SPECIFIC PERFORMANCE

Specific performance refers to an order for performance of any agreement or contract by the party to the agreement.

➢ CONTRACTS WHICH CAN BE SPECIFICALLY ENFORCED

SECTION 10

The specific performance of any contract **may**, in the **discretion** of the Court, be enforced:-

(a) When there exists **no** standard for **ascertaining** the actual damage caused by the non-performance of the act agreed to be done, or

(b) When the act agreed to be done is such that **compensation** in money for its non-performance would **not** afford **adequate** relief.

The explanation provides that unless and until the contrary is proved, the **Court shall presume**:-

(A) that the breach of a contract to transfer **immovable** property **cannot** be adequately relieved by compensation in **money**,

(B) that the breach of a contract to transfer **movable** property **can be** so relieved **except** in the two cases:-

(a) where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market,

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

Section 11 provides that the specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

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COURT DISCRETION

Section 20 of the Specific Relief Act, 1963 states that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the court is not arbitrary. But is sound and reasonable and is guided by judicial principles and is capable of correction by a court of appeal.

CASES IN WHICH THE COURT MAY EXERCISE DISCREATION NOT TO DECREE SPECIFIC PERFORMANCE

(a) Where the terms of the contract gives the plaintiff an unfair advantage over the defendant.
(b) Where the performance of contract would involve some hardship on the defendant.
(c) Where it not equitable to enforce specific performance.

SPECIFIC PERFORMANCE OF PART OF A CONTRACT

SECTION 12

Section 12 (1) lays down the general principle that except as otherwise provided in this section, the Court shall not direct the specific performance of a part of a contract.

Sub-sections (2)-(4) lay down the exceptions to this general rule (i.e the Court may, at the suit of the either party, direct the specific performance) as follows:-

(a) the part which is left unperformed is only a small proportion to the whole in value and can be compensation in money.

For example;-A contracts to sell B a piece of land consisting of 100 *bighas*. It turns out that 98 *bighas* of the land belongs to A and the two remaining *bighas* to a stranger, who refuses to part with them. The two bighas are not necessary for the use of enjoyment of the 98 *bighas,* nor so important for such use or enjoyment that the loss of them may not be made in goods in money. A may be directed at the suit of B to convey to B the 98 *bighas* and to make compensation to him. For not conveying the two remaining *bighas;* B may be directed at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money less the sum awarded as compensation for the deficiency.

(b) where a party to a contract is unable to perform part which forms a considerable part of the whole, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation

For example, A contracts to sell B a piece of land consisting of 100 bighas for ₹ 1,00,000. It turns out that only 50 bighas of land belong to A. 50 bighas are substantial part of the contract. A cannot demand specific performance of the contract but B can demand specific performance to get 50 bighas of land from A by paying the full consideration i.e. ₹ 1,00,000.

(c) when a part of a contract which stands on a separate and independent footing from another part of the same contract .

CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED

SECTION 14

Section 14 lays down the contracts which cannot be specifically enforced. They are:-

(a) A contract for the non-performance of which compensation in **money is an adequate relief**;

(b) A contract which runs into **such minute and numerous details** that the Court cannot enforce specific performance of its material terms or which is dependent upon the personal qualification or volition of the parties or a contract from its nature is such that the Court cannot enforce specific performance;

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(c) A contract which is in its nature **determinable**;

(d) A contract, the performance of which involves the performance of a **continuous duty** which the court cannot supervise.

(e) A contract to refer present or future difference to **arbitration** unless otherwise provided in Arbitration Act.

WHO MAY SUE FOR SPECIFIC PERFORMANCE

SECTION 15

Section 15 lays down that specific performance of a contract may be obtained by:-

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such a contract is warranted by the terms of the incorporation of the company provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

PERSONS AGAINST WHOM SPECIFIC PERFORMANCE AVAILABLE

SECTION 19

According to Section 19, specific performance of a contract may be enforced against:-	**(a)**	either party thereto,
	(b)	any person claiming under him,
	(c)	any person claiming under a title which though prior to the contract, and known to the plaintiff, might have been displaced by the defendant, Examples - joint tenants claiming survivorship and remainder man.
	(d)	when a company has entered into a contract and subsequently becomes amalgamated with another company — the new company which arises out of the amalgamation,

PERSONS AGAINST WHOM SPECIFIC PERFORMANCE CANNOT BE ENFORCED

SECTION 16

Under Section 16, specific performance of a contract cannot be enforced in favour of a person:-	**(a)**	who would not be entitled to recover compensation for its breach, or
	(b)	who has became incapable of performing,
	(c)	who fails to perform the essential terms of the contract.
	(d)	who acted in fraudulent manner.

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RECTIFICATION OF AN INSTRUMENT

According to **section 26** of the Specific Relief Act, 1963, when, through fraud or mutual mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which Company Act, 1956, applies) **does not express their real intention, then**: -

(a) either party or his representative-in-interest may institute a suit to have the instrument rectified; or

(b) The **plaintiff** may, in any suit in which any right rising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) A **defendant** in any such suit as is referred to in above clause, may in addition to any other defence open to him, ask for rectification of the instrument.

If, in any suit the Court finds that the instrument through fraud or mistake, does not express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

No relief for the rectification of an instrument shall be granted to any party **unless it has been specifically claimed**.

RESCISSION OF CONTRACT

According to Section 27 of the Specific Relief Act 1963, **Rescission** ***means making a contract void ab initio.*** It is not applicable to void contracts. It goes along with a suit for specific performance.

The main purpose of granting rescission is to bring **all the parties in their original position**.

- The court **may recent** a contract in the following cases:-
  - **(a)** If the contract is terminable by plaintiff.
  - **(b)** In case of unlawful contracts.
- The court may **refuse to** recent a contract in the following cases:-
  - **(a)** contract has been rectified by the plaintiff.
  - **(b)** the parties to the contract cannot be brought to the same position as they were in the beginning of the contract.
  - **(c)** third parties have a acquit rights for value and in good faith.
  - **(d)** if contract cannot be partly rescinded.

  A person suing for rescission cannot in the alternative sue for specific performance, but a person suing for specific performance can sue of rescission.

CANCELLATION OF INSTRUMENTS

Section 31 provides that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may in its discretion, so adjudge it and order it to be delivered up and cancelled.

Relief of cancellation under Section 31 would be available in the following conditions are satisfied:

(i) an instrument id void or voidable against the plaintiff;

(ii) the plaintiff may apprehend serious injury if the instrument is left outstanding; and

(iii) it is proper under the circumstances of the case to grant the relief.

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Anglo Daubing Co. V. Roberson	A agrees to sell and deliver a ship to B, to be paid by B's acceptance of four bills of exchange, for sums amounting to `30,000 to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills.

RECOVERY OF POSSESSION OF MOVABLE AND IMMOVABLE PROPERTY

SECTION 5-8

Sections 5 to 8 deal with recovery of possession of property. Sections 5 and 6 deal with recovery of possession of immovable property while Sections 7 and 8 deal with movable property.

➢ RECOVERY OF POSSESSION OF SPECIFIC IMMOVABLE PROPERTY

SECTION 5

According to Section 5, a person, entitled to the possession of specific immovable property may recover the same in the **manner** provided by the **Code of Civil Procedure, 1908**. The action under Section 5 arises when claim is made on the basis of **"title"**.

➢ RECOVERY OF POSSESSION OF DISPOSSESSED IMMOVABLE PROPERTY

SECTION 6

The Act provides another relief under Section 6 for the recovery of possession of immovable property where the claim is based merely on **'possession'**. Section 6 provides that if any person is dispossessed without his consent, of immovable property **otherwise than in due course of Law**, he or any person claiming through him may be suit recover possession thereof.

There are **two restrictions**; no suit under Section 6 shall be brought:-

(i) after the expiry of **6 months** from the date of dispossession

(ii) against the Government.

No appeal or review is allowed of any order of decree passed under this Section. A suit under Section 6 is maintainable between landlords and tenants. Heirs are also entitled to sue for recovery of possession.

RECOVERY OF SPECIFIC MOVABLE PROPERTY

SECTION 7-8

➢ *(SECTION 7)*

A person is entitled to recover the **possession** of specific **movable property** in the manner provided by the **Code of Civil Procedure, 1908**. A trustee may sue for possession of movable property of which he is a trustee.

A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

Movable property to be recovered should be capable of being ascertained/identified.

➢ *(SECTION 8)*

Section 8 lays down that any **person having the possession** or control of a particular article of movable property of which he is **not** the **owner**, may be **compelled** specifically, to **deliver** it to the person entitled to its immediate possession in any of the following four cases:-

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(a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff,

(b) when the compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed,

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss,

(d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

DECLARATORY DECREES

SECTION 34

A declaratory decree is a decree whereby any right as to any property or the legal character of a person is **judicially ascertained**. Declaratory decree merely declares the right of the decreehoder vis-a-vis the judgement debtor and does not in terms direct the judgement debtor to do or refrain from doing any particular act or thing.

The **object** of declaratory decree is to **remove doubt** by having legal status of any rights declared by the Court. The relief by way of declaration is purely discretionary.

To maintain a suit under this Section following **conditions** must be fulfilled:-

(a) The plaintiff must be a person entitled to any property;

(b) The defendant must be a person denying plaintiff's title to such right;

(c) The declaration issued for must be a declaration that the plaintiff is entitled to property

(d) Where the plaintiff is not able to seek further relief than a mere declaration

The relief by way of declaration is purely discretionary. Instances of legal characters are —

(1) Divorce on the ground of impotency
(2) Legal character by marriage
(3) Legitimacy or illegitimacy
(4) Status of an adopted son
(5) Priest of temple

Effect of Declaration

Declaration is binding on:-

(i) the parties to the suit,

(ii) persons claiming through them respectively

PREVENTIVE RELIEFS

Preventive Relief are those reliefs which prevent a party from doing that which he is under an obligation not to do. Preventive relief is granted at the **discretion** of the **court** by way of an injunction.

INJUNCTION

An injunction is a specific **order** of the Court whereby a party is ordered to refrain from doing or to do a particular act or thing".

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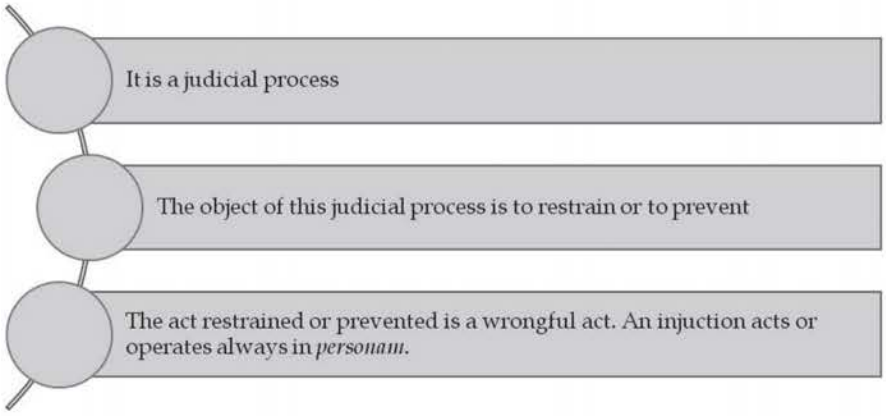
Characteristics of an injunction

An injunction has three characteristic eatures;



TYPES OF INJUCTION

1. TEMPORARY INJUNCTION

Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

2. PERPETUAL / PERMANENT INJUNCTION

Perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of right, or from the commission of an act, which would be contrary to the rights of the Plaintiff.

3. MANDATORY INJUNCTION

Mandatory injunctions are granted to prevent the breach of an obligation, when it becomes necessary to compel the performance of certain acts which the Court is capable of enforcing. The Court may in its discretion grant mandatory injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

DIFFERENCE BETWEEN THE REMEDIES OF SPECIFIC PERFORMANCE AND INJUNCTION

(a) Specific performance is decreed to **compel** the performance of an active duty, while injunction is decreed to **prevent** the violation of a negative duty.

(b) Normally, the former deals with **contracts**, while the latter with **torts** and other subjects of equitable nature.

(c) If a contract is **positive** in its nature, it calls for the relief of **specific performance**, On the other hand, if it is **negative** in its nature, it calls for relief of **injunction**.

INJUNCTION WHEN REFUSED

SECTION 41

Section 41 provides that an injunction cannot be granted —

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought,

(b) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought;

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(c) to restrain any person from applying to any legislative body;
(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
(e) to prevent the breach of a contract the performance of which would not be specifically enforced.

INJUNCTION TO PERFORM NEGATIVE AGREEMENT

SECTION 42

Where a contract **comprises** an **affirmative agreement** to do a certain act, coupled with **negative agreement**, express or implied, not to do a certain act, the circumstance that the **Court** is **unable** to compel specific performance of the **affirmative** agreement, the Court **may** grant an injunction to **perform** the **negative agreement**.

Conditions necessary for the applicability of this situation are:-	**(i)**	The contract should comprise of two agreements, one affirmative and another negative.
	(ii)	Both the agreements must be divisible.
	(iii)	The negative agreement must relate to a specific act.
	(iv)	The Court should be unable to compel specific performance of the affirmative agreement.

Illustration

Sangini, a singer agreed to sing at Lakshmi theatre from January to April, and not to sing anywhere else during that period. Afterwards she entered into contract to sing at Kamala's theatre during the said period and refused to sing at Lakshmi theatre during that period. Lakshmi theatre filed an application in appropriate court against Sangini.

In this case the court may grant an injuction restraining Sangini from singing in any other theatre but, it cannot grant an injuction directing her to sing at Lakshmi theatre. ***(Lumley v. Wagner)***

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

9

PARTNERSHIP ACT, 1932

Covering-

- Unit 1 General Nature of a partnership
- Essential elements of partnership
- Partners, firm and firm name
- Types of partners
- Unit-2 Relation of partners
- Right of partners
- Duties of partners
- Minor's position in partnership firm
- Authority of a partner
- Reconstitution of a Firm
- Unit-3 Registration and dissolution of a firm
- Registration of firm
- Dissolution of firm
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exam
  - From ICSI Module

EXPECTED MARKS COVERAGE (5 to 10)

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PARTNERSHIP ACT, 1932

UNIT- 1 : GENERAL NATURE OF A PARTNERSHIP

What is partnership (Section 4):

Partnership is the **relation between persons** who have agreed to **share the profits** of a **business** carried on by **all or anyone of them acting for all**.

Thus, partnership consists of the following essential elements:

(a) There must be an agreement.
(b) There must be two or more persons.
(c) There must be some business
(d) There must be sharing of profits of the business.
(e) There must be mutual agency between partners

ESSENTIAL ELEMENTS OF PARTNERSHIP

1. Agreement	The partnership comes into existence only by an **agreement** between all the partners and **not by status or operation of law**. The agreement may be **written or oral.**
2. Two or more persons	There must be **atleast two persons** to form partnership and they must be competent to contract. There is no limitation on the maximum number of partners in Partnership Act, but Sec 11 of Companies Act, 1956, provides that: • Where a firm is carrying on **banking business**, the number of partners should not exceed **10**, and • Where a firm is carrying on **any other business**, the number of partners should not exceed **20**.
3. Business	A partnership can be formed only to carry on a business. • Where there is **no business**, there is **no partnership**. • Business includes every **trade, occupation or profession**. • The business must be carried on with the view to **earn profits**. • It is not necessary that the business should consist of a long and permanent undertaking. A partnership may exist in a **single business venture or undertaking.**
4. Sharing of profits	There must be an agreement between **all** the partners to **share the profits** of the business. • No person can claim to be a partner in a business unless he has a **right to share in the profits** of the business. • The partners may share the profits in **any proportion**. • However, the **sharing of losses is not an essential** element of partnership. Thus, the partners may agree that one or more of them shall not be liable for losses.
5. Mutual agency	The agency relationship means that **the business** of partnership must be **carried on by all or any one of them acting for all**. • The partners carrying on business of the firm are **agents as well principal** of each other. • A partner is an **agent** of other partners in a sense that he **binds the other partners by his acts.** • A partner is a **principal** in a sense that he is liable for the acts of the other partners.

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Test of partnership: To test whether partnership exists, it is to be checked whether all essential elements of partnership exists or not. The most important element of partnership is the agency relationship between the partners. The partners should be representative of each other and should be able to bind each other by their acts.

Sharing of profits is not a real test of partnership:

A person who receives the profits of business is not necessarily a partner. Thus, sharing of profits is not the final test of partnership. In some cases, the persons are not partners but they still share the profits of the business, such as:

- Joint owners sharing profits or gross returns.
- Where profits are received by the creditor in payment of a debt or as interest on loan.
- Where profits are received as wages by an employee.
- Where profits are received as an annuity by a widow or representative of a deceased partner.
- Where profits are received as consideration of the sale of property.

PARTNERS, FIRM AND FIRM NAME

Sec 4 of the Partnership Act provides; "Persons who have entered into partnership with on another are individually called **'partners'** and collectively **'a firm'** and the name under which their business is carried on is called the '**firm name'**.

The partners of a firm may carry on business under any name which they please to adopt. However the following factors should be kept in mind while choosing the name of the firm:

- The firm's name should be similar or identical to the name of existing firms.
- A firm name shall not contain any of the following words, namely- 'Crown', 'Emperor', 'Empress', 'Imperial', 'King', 'Queen', 'Royal' or words implying or expressing the sanction, approval or patronage of Government except where the Government signifies its consent to the use of such words as part of the firm name by order in writing.

BASIS	PARTNERSHIP	JOINT STOCK COMPANY
Formation	It is formed by agreement between parties.	It is formed by getting it registered under the Companies Act, 1956.
Separate entity	It has no separate legal entity apart from its members. It is simply a collection of members.	It has a legal entity of its own separate from its members.
Number of members	Maximum number of members allowed is 10 in a banking firm and 20 in a non-banking firm.	Maximum number of members in private company is 50, and in a public company there is no limit.
Liability	Liability of partners is unlimited.	Liability of members is limited to the extent of the value of their shares.
Agency relationship	Every partner is an agent of the other partner as well as of the firm.	A member is neither an agent of other members nor of a company unless specifically appointed so.
Right to manage	Every partner has a right to take part in the management of the affairs of the firm.	Its management is entrusted to elected members of the company known as directors.
Ownership of property	The partners are joint owners of the property of the firm.	The members of a company are not joint owners of its property.

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Transfer of share	A partner cannot transfer his share in the firm without consent of all the partners.	A member can transfer his shares in the company at his own will without taking consent from anybody.
Dissolution	It is dissolved on the death or insolvency of any of the partner.	A Company has a perpetual succession which is not affected by the death or insolvency of any members.
Governing Act	Itis governed by the Indian Partnership Act, 1932.	It is governed by the Companies Act, 1956.

BASIS	PARTNERSHIP	HINDU UNDIVIDED FAMILY
Position of females	Females can be full-fledged partners.	Membership is restricted to the male members only.
Agency relationship	Every partner is an agent of the other partner as well as of the firm.	There is no agency relationship.
Right to manage	Every partner has a right to take part in the management of the affairs of the firm.	It generally vests with Karta, the governing member of the family.
Liability	All the partners are personally liable for the debts of partnership.	Only Karta is personally liable for the debts of the HUF. Liability of other members is limited to the extend of his share in the property of the family.
Share in partnership	The share of each partner is defined by agreement.	Share of each member keeps fluctuating with the births and deaths of male members in the family.
Partition of property	A partner cannot sue for the partition of partnership property. However, he can sue for dissolution.	A co-member can demand partition of HUF property.
Right to see accounts	A partner has a right to demand, inspect, and copy the accounts of the firm.	A member has no right to ask for any accounts of the past dealings of the family.
Registration	The partnership may be registered or unregistered.	There is no concept of registration of HUF.
Dissolution	It is dissolved on the death or insolvency of a partner.	It is not dissolved on the death or insolvency of a member.
Governing law	It is governed by the Indian Partnership Act, 1932.	It is governed by the Hindu Law.

BASIS	PARTNERSHIP	CO-OWNERSHIP
Formation	It is constituted by two or more persons.	Co-ownership arises only when two or more persons jointly own a property.
Formation	It is created by an agreement.	It may be created by an agreement or by any other way like inheritance.
Number of members	Maximum 10 in case of a banking firm, and 20 in case of a non-banking firm.	There is no statutory limit on maximum number of co-owners.
Business	Carrying on of a business is necessary for existence of a partnership.	It can exist with or without business.

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Agency relationship	Every partner is agent of other partners as well as of the firm.	Co-owners are not agents of each other.
Profits sharing	Profit sharing is must.	It does not necessary involves sharing of profits and losses.
Transfer of share	A partner cannot transfer his share without consent of all the partners.	A co-owner can transfer his share without the consent of other co-owners.
Partition of property	A partner cannot sue for partition of partnership property. However he can sue for dissolution.	A co- owner can sue for the transfer of joint property.
Right of lien	A partner has a right to retain the partnership property for the expenses incurred by him.	A co-owner has no such right to retain the property.

BASIS	PARTNERSHIP	CLUB
Objective	It is formed to earn profits by carrying out a business activity.	It is formed for recreation or such other activities like games, social services, etc.
Agency relationship	Every partner is an agent of the other partner as well as of the firm.	No such agency relationship exists between members inter se and members and club.
Liability	All the partners are personally liable for the debts of partnership.	A member of a club is not liable for the debts of the club unless he had participated in the transaction.
Admission	A person may be admitted to partnership with the consent of all.	For admission to a club, consent of other members is not required.
Death	Death or insolvency of a partner dissolves a partnership.	Death or resignation of a member does not affect the existence of club.

TYPES OF PARTNERSHIP:

a) **Particular partnership:** When a partnership is formed for a **particular period or for particular purpose**, it is called a particular partnership. A particular partnership comes to an end at the expiry of the fixed period or on completion of the venture. However, if all the partners consent to dissolve the partnership before the expiry of the fixed period, the particular partnership will dissolve accordingly. Similarly, if the partners agree to continue the partnership even after the expiry of the fixed term, they can do so. In this case the particular partnership will convert in partnership at will.

b) **Partnership at will:** It is a partnership where no provision is made in the contract between the partners for the duration of their partnership or for the determination of their partnership. Such partnership **depends on the will** of the partners. It can be dissolved by any partner at any time by giving notice to other partners.

TYPES OF PARTNERS

1. Active Partner	Partner who actively **participates in the conduct of the partnership business**. Also known as actual or ostensible partner. He is liable to third party for the acts of the firm done in ordinary course of business.
2. Dormant (sleeping) partner	Partner who **does not take an active part** in the conduct of the partnership business and is not known to the outsiders. He becomes partner by investing money in the firm. He is also liable to third party for the acts of the firm done in ordinary course of business whether or not his existence is known to third party.

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3. Nominal partner	Partners who have **no real interest** in the firm. They neither invest nor participate in the business of the firm. They only **give their name** to a firm. He is also liable to the third party like active partner.
4. Partner in profits only	Partners who are entitled to **share only the profits** of the firm and is not liable for losses. Generally, such partners do not take part in the management of the firm. But they are liable to third parties like active partners.
5. Sub partner	When a partner of a firm agrees to share his own share in profits with an outsider, a sub-partnership comes into existence between the contracting partner and the outsider. Such outsider is known as sub partner. • Sub partner is not a partner in the main firm. • A sub partner can claim the agreed share only from the partner with whom he has entered into an agreement. • A sub partner has no right against the main firm or to take part in its business or to examine its accounts.
6. Partner by holding out (by estoppel)	A partner by holding out or estoppel is one who; i) Represents himself, or ii) Knowingly permits himself to be represented as a partner in the firm, though in reality **he is not a partner** in the firm. Where an outsider deals with the firm believing him to be a partner in the firm, he is stopped from denying that he is not a partner. It is only the person to whom the representation has been made and who has acted thereon has the right to enforce liability arising out of "Holding Out".

PARTNERSHIP DEED

A written partnership agreement between the partners is called **'partnership deed'.** When a partnership business is started usually the partners make a properly drafted deed and get it stamped according to the provisions of Indian Stamp Act. Each partner keeps a copy of the deed. In case of registered firm, a copy of partnership deed is filed with the Registrar of Firms.

Contents of partnership deed:

(a) Name and address of the firm.
(b) Nature of business to be carried on.
(c) Name and addresses of the partners.
(d) Date of commencement and duration of partnership.
(e) That capital to be contributed by each partner.
(f) The profit sharing ratio and the ratio in which losses will be borne by the partners.
(g) Interest on capital and loan given by partners.
(h) The salary, commission, drawings etc of each partner.
(i) Rights and duties of each partner.
(j) Method and arrangement of keeping goods.
(k) The circumstances in which the partnership firm will be dissolved.

Where partnership deed is silent regarding any issue, rules contained in Partnership Act will apply. The partnership deed is to be signed by all the partners.

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UNIT 2: RELATION OF PARTNERS

Mutual Rights and Duties of Partners

Partnership is formed by an agreement, express or implied, between two or more persons. The rights and duties of partners are usually determined in accordance with the terms and conditions of an agreement. However, where such rights and duties are not decided they are governed by the Indian Partnership Act. The rights and duties of the partners according to the Act are:

RIGHTS OF PARTNERS

(1) Right to take part in the conduct of the business

Every partner has the right to take part in the management of the business of the firm. However, where the partnership agreement provides that this right will not available to some of the partners then they will not have any right to take part in the management of the business. A partner who has been wrongfully deprived of the right of participation in the management can take legal action against the other partners.

(2) Right to be consulted

It is the right of every partner to be consulted in all important matters affecting the business of the firm. Thus, every partner has a right to express his opinion before any decision is taken by the other partners. Where any difference arises between the partners with regard to the business of the firm, unless there is an agreement to the contrary, it shall be determined by a majority of the partners. However, fundamental matters such as change in the nature of business, admission of new partners etc. has to be decided with the consent of all the partners.

(3) Right of access to books

Unless there is an agreement to the contrary, every partner has a right to access to and to inspect and copy any of the books of the firm.

(4) Right to remuneration

No partner is entitled to receive any remuneration in addition to his share in the profit of the firm for taking part in the business of the firm. However, the partnership agreement may expressly provide for the payment of remuneration to active partners.

(5) Right to share profits

In the absence of an agreement to the contrary, every partner is entitled to share the profits equally. The partners may however, agree to share the profits in different proportions.

(6) Interest on capital

Generally the partners are not entitled to charge any interest on the capital contributed by them. However, the interest on capital may be paid to them if there is:

(i) An express agreement to pay interest on capital, or

(ii) Any trade custom to that effect

However, such interest will be payable only out of profits.

(7) Interest on advances

Where a partner makes an advance to the firm in addition to the amount of capital he has agreed to subscribe, he is entitled to claim interest thereon @ 6% per annum. Interest on advance is payable even if the firm suffers losses.

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(8) Right to be indemnified

Every partner has the right to be indemnified by the firm in respect of payments made and liabilities incurred by him:

- In the ordinary and proper conduct of the business of the firm
- In the performance of an act in an emergency for protecting the firm from any loss, as would be done by a prudent man under similar circumstances.

(9) Right to stop admission of a new partner:

Every partner has the right to be consulted at the time of admitting a new partner in the firm. A new partner cannot be admitted without the consent of all the existing partners.

(10) Right to retire:

Every partner has the right to retire from firm when he feels so.

(11) Right not to be expelled:

Every partner has the right to continue in the firm and cannot be expelled from the firm by other partners. However, the partnership agreement may provide for expulsion of a partner by majority and such right can be exercised only in the good faith.

(12) Right of outgoing partner to carry on competing business:

An outgoing partner may carry on business competing with that of the firm but without using the firm name or representing himself as carrying on the business of the firm or soliciting the firm's parties.

(13) Right of outgoing partners to share subsequent profits:

If continuing partners carry on the business of the firm with the property of the firm without any final settlement of account as between them and the outgoing partner, the outgoing partner or his estate has at his or his representative's option, has the right to such share of the profit made since he ceased to be a partner.

(14) Right to use partnership property:

Every partner is a joint owner of partnership property. He has a right to use partnership property exclusively for the purpose of the partnership business.

DUTIES OF PARTNERS

Duties of partner may be put into two categories:

I. Mandatory duties: Relation of partners is based on mutual trust and confidence. Every partner should act in good faith and carry on the business of the firm for mutual benefit and common interest of all partners. Thus, the mandatory duties of partners are:

(i) To carry on the business of the firm to the **greatest common advantage**.

(ii) To be **just and faithful** to each partner.

(iii) To render **true account and full information** of all things affecting the firm, to any partner or to his legal representative.

(iv) To **indemnify the firm for any damage** caused to it by **reason of his fraud** in the conduct of the business of the firm.

II. Duties subject to agreement:

(1) Duty to work diligently: Every partner is bound to diligently attend to the affairs of the business of the firm. Thus, he must perform his duties in reasonable manner with full care and required efforts.

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(2) **Duty to indemnify for willful neglect:** Where a firm suffers due to willful neglect of the partner in the conduct of the business of the firm, the partner is bound to compensate the firm for the loss suffered. However, the partner will not be liable for cats done in good faith.

(3) **Duty to share losses:** Unless there is an agreement to the contrary, it is the duty of every partner to share equally the losses suffered by the firm.

(4) **Advantage to other partners of personal skill:** It is a duty of every partner to let his partners have the advantage of his knowledge and skill.

(5) **Duty not to do any competing business:** The partnership agreement may restrict the partners to carry on similar business to that of the firm, so long as he is partner in the firm. If a partner carry on business competing with the business of the firm then all profits are to be surrendered to the firm but firm is not liable to any loss.

(6) **Duty to account for personal profits:** If a partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection of the firm or firm's name then he is bound to account for that profit and refund it to the firm.

(7) **Duty to use firm's property exclusive for the firm:** It is the duty of every partner to use the partnership property exclusively for the business of the firm. If a partner makes any personal profit by using the partnership property, he will have to give full account of profits arising out of such use to the firm.

MINOR'S POSITION IN PARTNERSHIP FIRM

Minor has no contractual capacity and cannot be a partner in a firm. But, he can be admitted to the benefits of partnership with the consent of all the other partners. Thus, a minor can be admitted to the benefits of the partnership by an agreement executed through his guardian with other partners. However, a minor can be admitted to the benefits of the partnership only if there are atleast two major partners in the firm. Thus, there cannot be partnership with one major and all other minors. Further, the partnership must be in existence before the minor is admitted to the partnership.

Rights of a minor:

(a) Right to share property and profits of the firm in accordance with the agreement.

(b) Right to have access to and inspect and copy any of the accounts of the firm. But he can access only account books and not the other books of the firm.

(c) Right to file suit for accounts or for demand of his share in profits and property of the firm. However, he can exercise this right only when he leaves the firm.

(d) Right to exercise the option to leave or remain in the partnership on attaining the age of majority within 6 months of such attaining.

Liabilities of minor

(1) The minor is liable to the firm to the extent of his share in the property and profits of the firm, but he is not personally liable for the debts of the firm.

(2) No right to participate in the management of the business of the firm.

(3) When the firm is declared insolvent, minor's share in the firm is vested in official receiver or assignee.

(4) Within 6 months from the date of attaining majority, the minor has to elect whether he wants to continue with the partnership or not.

Position of minor on attaining majority

Within 6 months of the date of attaining majority, the minor has to decide whether he will remain in the firm or leave the firm. Within the period of 6 months, the minor has to give public notice of his decision. If the minor fails to give such public notice within the said time he will be deemed to have chosen to become a partner in the firm.

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Rights and liabilities when he becomes partner:

(i) His rights and liabilities will be similar to a full fledged partner.

(ii) He will be personally liable for all acts of the firm done from the date he was admitted as a minor to the benefits of partnership.

(iii) His share in the property and the profits of the firm remains the same to which he was entitled as a minor.

Rights and liabilities when he dose not become partner:

(i) His rights and liabilities will continue to be those of a minor up to the date of giving public notice.

(ii) His share shall not be liable for any acts of the firm done after the date of the notice.

(iii) He shall be entitled to sue the partners for his shares of the property and profits.

Relation of partners to third parties:

Every partner is an agent as well as principal of other partners. Thus, a partner binds all the other partners by his acts done on behalf of the firm provided such acts are done in the ordinary course of the business and in the name of the firm. Therefore, all partners are liable for such acts to third parties.

AUTHORITY OF A PARTNER

The authority of a partner means the capacity of a partner to bind the firm by his acts. The authority of the partner may be express or implied.

a) Express authority of a partner: The authority which is given to a partner by an express agreement between the partners is called express authority. The partners are free to give any authority to any partner by a mutual agreement. The firm is bound by the acts of a partner done within the scope of his express authority.

b) Implied authority of a partner of the firm: A partner has an authority to bind the firm by the acts done by him, provided that the act is done in the ordinary course of the firm's business and in the firm name. This authority is the implied authority. Thus, the firm will be binded by the acts of a partner done within his implied authority provided:

- The act is done to carry on the normal business of the firm.
- The act is done in the usual way of carrying on the firm's business.
- The act is done in the name of the firm (where an act is done in the personal name of a partner, the firm will not be liable for such acts).

Acts within the implied authority:

- To buy and sell goods in which the firm deals.
- To hire servants to perform the business of the firm.
- To engage a lawyer to defend a suit filed against the firm.
- To settle accounts with persons dealing with the firm.
- To receive debts due to the firm and give receipts for the same.
- To contract debts and pay debts on behalf of the firm.
- To borrow money for the purpose of the firm and pledge the goods of the firm as security of the loan.
- To make, draw and accept and endorse negotiable instruments in the name of the firm.

Acts beyond implied authority: In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not allow him to:

(a) To submit a dispute relating to the business of the firm to arbitration.

(b) To open a bank account on behalf of the firm in his own name;

(c) To compromise or relinquish any claim or portion of a claim by the firm against a third party

(d) To withdraw a suit or proceedings filed on behalf of the firm;

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(e) To admit any liability in a suit or proceedings against the firm;
(f) To acquire immovable property on behalf of the firm;
(g) To transfer immovable property belonging to the firm; and
(h) To enter into partnership on behalf of the firm.

Extension and restriction of partner's implied authority (Section 20):

The partners, by contract between them (with consent of all the partners), can extend or restrict the authority of any partner. Inspite of such restriction if a partner does, on firm's behalf, any act which falls within his implied authority, the firm will be bound unless person known about such restriction. Thus, a third party is not affected by a secret limitation of a partners implied authority unless he has actual notice of it.

Admission by a partner:

Every partner is an agent of the firm. Thus, any admission or representation made by a partner about the affairs of the firm is sufficient evidence against the firm provided it is made in the ordinary course of business of the firm and is made regarding an affair related to firm's business.

Notice to an acting partner:

A notice, on any matter related to the firm's business, given to any partner of the firm who receives it in the ordinary course of business of the firm is taken to be the notice to the firm. However, in case of fraud committed by a partner, the notice should be given to any partner other than the partner committing the fraud.

Liability of a firm and its partners to a third party:

(i) **Contractual Liability**: Every partner is jointly as well as severally liable to the third party for all the acts of the firm done while he is a partner. The expression 'act of firm' connotes any act or omission by all the partners or by any partner or agent of the firm, which gives rise to a right enforceable by or against the firm.

(ii) **Liability for wrongful act of a partner**: A firm will be liable to the third party for the wrongful acts of a partner. However, the firm will be liable only if the wrongful acts are done by the partner either in the ordinary course of the business of the firm or with the authority of all the other partners.

(iii) **Liability for misappropriation of money or property by a partner:**

The firm is liable to make good the loss to the third party caused
(a) When a partner, acting within his apparent authority, receives money or other property from a third person and misapplied it or
(b) Where a firm, in the course of its business, receives money or property from a third person and the same is misapplied by a partner, while it is in the custody of the firm,

RECONSTITUTION OF A FIRM

ADMISSION OF A PARTNER

Unless there is an agreement to the contrary, a new partner can be admitted in an existing firm only with the consent of all the other partners. An incoming partner is not liable for the acts of the firm done before his admission in the firm. Thus, the liability of an incoming partner starts from the date of his admission into the firm. However, by mutual agreement, such partner may undertake to share the liability for the past acts of the firm also.

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RETIREMENT OF A PARTNER

A partner may retire;

(i) With the consent of all other partners.

(ii) In accordance with an express agreement between the partners; or

(iii) Where the partnership at will, by giving notice in writing to all other partners of his intention to retire.

In case of retirement of a partner, public notice of such retirement is required to be given.

RIGHTS OF A RETIRING PARTNER

1) Unless there is an agreement to the contrary, a retiring partner may start a business in competition to the firm's business and he may also advertise the same. However, he cannot use the name of the firm or solicit customers of the firm.

2) Right to receive his share of the property of the firm, including goodwill.

3) If continuing partners carry on the business without any final settlement of account, the outgoing partner or his representative has option to share of the profit made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest @ 6% on amount due.

LIABILITIES OF A RETIRING PARTNER

- A retiring partner continues to be liable to third parties for the acts of the firm done before and upto the date of his retirement. He will also be liable for the acts which started but were unfinished at the time of his retirement.
- A retiring partner continues to be liable for acts of the firm to 3rd parties until a public notice of his retirement is given.

EXPULSION OF A PARTNER

A partner cannot be ordinarily expelled from a firm. However, a partner may be expelled by a majority of partners if the following conditions satisfy:

a) The power of expulsion must be given to the partners by an express agreement between the partners;

b) The power has been exercised by a majority of the partners; and

c) The power of expulsion must have been exercised in good faith.

A partner who is expelled from the firm will have same rights and liabilities as those of a retiring partner.

INSOLVENCY OF A PARTNER

On being adjudicated insolvent, the partner ceases to be a partner from the date of the order of insolvency. Under ordinary circumstances, the firm is automatically dissolved as one of its member ceases to be a partner due to insolvency. However, the remaining partners may specifically decide that the firm will not dissolve. In case the firm is not dissolved:

a) The estate of the insolvent partner ceases to be liable for any act of the firm done after the date of the order of insolvency.

b) The firm is also not liable for any act of such a partner done after the date of the order of insolvency.

The share of an insolvent partner in the assets of the firm will be first used for the payment of the debts of the firm and then for his personal debts.

DEATH OF A PARTNER

Usually, death of a partner results in dissolution of the firm. However, the remaining partners may expressly decide not to dissolve the firm but to continue it.

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If a firm is not dissolved by the death of partner, the estate of the deceased partner is not liable for acts of the firm after his death. In case of death of a partner, public notice is not required to be given.

TRANSFER OF PARTNER'S INTEREST

The interest of a partner in a firm means the value of his share in the assets and profits of the firm. If a partner wants to dispose off his partnership interest otherwise than by way of retirement, there are two options open to him. He may ask his Company partners to buy his interest or he may sell his interest to a third person. When the interest is sold to a third person, it is open to the partners of the firm to accept him as a partner or not. If all the members of the firm consent for his becoming a partner, the transferee will be a full fledged partner. But if the members of the firm do not accept such transferee as a partner, his rights will be as follows:

- The transferee has a right to receive the share of profits of the transferring partner.
- On dissolution, he will have a right to receive the share in assets of the transferring partner.

However, the transferee will not have any right to interfere in the management of the business and also the right to access or inspect the books of account.

REVOCATION OF CONTINUING GUARANTEE BY CHANGE IN THE FIRM

Continuing guarantee means a guarantee which extends to a series of transactions. A continuing guarantee given to a firm or to a third party in respect of the transaction of a firm is, in the absence of an agreement to the contrary, revoked (taken back) as to future transactions from the date of any change in the constitution of the firm.

PARTNERSHIP PROPERTY

The expression 'property' of the firm, also referred to as partnership assets, joint stock, common stock or joint estate. It denotes all property, right and interests to which the firm may be entitled. The property of the firm in the absence of a contract to the contrary includes:

(i) All property, rights and interests which partners may have brought into the common stock as their contribution to the common business;
(ii) All the property, rights and interests acquired or purchased by or for the firm, or for the purposes and in the course of the business of the firm; and
(iii) Goodwill of the business

All partners of the firm are joint owners of its property. They have a right to hold and use the firm's property exclusively for the business of the firm.

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UNIT-3 REGISTRATION AND DISSOLUTION OF A FIRM

REGISTRATION OF FIRM

Registration of a firm means the recording of the firm's name, along with prescribed particulars, in the register of firms kept in the office of the registrar of firms. The firm is registered with the registrar of the area in which the place of business of the firm is situated.

The registration of the firm is not compulsory. It is optional for the firm to get itself registered or not. There is no penalty for non-registration of the firm. Further, the non-registration does not effect the partnership agreement or any transaction between the partners and the third party.

However, Indian Partnership Act attaches certain disabilities with the unregistered firm to encourage the registration of the firms.

Time for registration:

The Act does not provide for any specific time for registration of the firm. A firm may be registered at any time, either at the time of its formation or any time thereafter during its existence.

Procedure for registration:

The registration of a firm is obtained by filling an application for registration with the Registrar of Firms. The registration of a firm is affected by sending, to the Registrar of Firms of the state in which the place of business of the firm is situated, an application for registration on the prescribed form along with the prescribed fees.

The application for registration may be given by hand or sent by post. The application for registration contains the following particulars:

(i) The firm's name
(ii) The principal place of business
(iii) The names of its other places of business
(iv) The date of joining of each partner
(v) The names in full and the permanent addresses of the partners and
(vi) The duration of the firm.

The application form should be **signed by all the partners** or by their agents specially authorized in this behalf.

When the registrar is satisfied that the provision of section 58 have been duly complied with, he shall **record an entry** of the statement in a register called the register of firms and shall issue a **Certificate of Registration**.

Registration is deemed to be complete as soon as an application the prescribed form with the prescribed fee and necessary details concerning the particular of the partnership is delivered to the Registrar. The recording of an entry in the register of firms is a routine duty of registrar.

After a firm is registered, changes may take place in its particulars from time to time, i.e, change in the name, place of business, names and addresses of partners etc. If **any change** takes place it should be **notified to the registrar** who shall there upon record it in the register of firms.

EFFECTS OF NON-REGISTRATION

Although registration of firms is not compulsory, yet the consequences or disabilities of non-registration have a persuasive pressure for their registration. These disabilities briefly are as follows:

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(i) An unregistered firm cannot file a suit against any third party for the enforcement of any right arising out of some contract.

(ii) If an action is brought against the firm by a third party then neither the firm nor the partner can claim any set off, if the suit be valued for more then ₹ 100.

(iii) A partner of an unregistered firm cannot file a suit against the firm or any other present or past partners for the enforcement of any right.

No effect of non-registration

Non registration of a firm does not affect the following:

(a) A third party can file a suit against the Firm whether it is registered or not.

(b) The partner of an unregistered firm may sue for dissolution of the firm or for accounts of the dissolved firm and realization of his share in the firm's property where the firm is dissolved.

(c) The official assignee or receiver or court may sue bring an action to realize the property of an insolvent partner.

(d) The unregistered firm or its partners may sue or enforce a claim of set off if the subject matter of the suit or set off does not exceeds ₹ 100.

(e) The rights of an unregistered firm or of its partners are not affected if the firm has no place of business in India.

DISSOLUTION OF FIRM

MEANING

The Dissolution of firm means putting an end to partnership relationship between all the partners. In this case, the business of the firm is closed down.

Dissolution of partnership means change in the relations of partners. In this case, the business of the firm is not closed down but only there is change in relationship of the partners.

MODES OF DISSOLUTION OF A FIRM

(a) Dissolution by agreement: A firm may be dissolved at any time with the consent of all the partners even in case of particular partnership.

(b) Compulsory dissolution

- **(i) Insolvency** of all the partners or of all but one partner
- **(ii)** When **business** of the firm becoming **unlawful**

(c) On the happening of certain contingencies such as;

- **(i) Expiry of fixed time-** Where the firm is constituted for fixed term; the firm is dissolved at the expiry of the fixed period.
- **(ii) Completion of the venture for which it was entered into-** Where the firm is formed to carry out a particular venture, the firm gets dissolved on the completion of such venture.
- **(iii) Death of a partner-** Unless there is an agreement to the contrary, the firm gets dissolved at the death of a partner.
- **(iv) Insolvency of a partner-** Unless there is an agreement to the contrary, the firm gets dissolved at the insolvency of a partner.

(d) Dissolution by notice: Where the partnership is at will, a partner can dissolve the firm after giving notice to other partners of his intention to dissolve the firm.

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(e) **By Court:** Where a partner wants to dissolve the firm and the other partners do not agree for dissolution, the desiring partner may go to the Court of Law and file a suit for dissolution. On hearing the application, the Court may or may not allow the dissolution of the firm. A partner may file a suit for dissolution of the firm on anyone of the following grounds:

(i) **A partner becoming of unsound mind-** The suit for dissolution may be filed either by any other partner or the legal representative of the insane partner.

(ii) **Permanent incapacity of a partner-** Where a partner becomes permanently incapable of performing his duties, the Court may allow dissolution of the firm. The incapacity may be due to illness, mental or physical or disablement of any kind. However, it should be of permanent nature. The suit for dissolution may be filed by any of the other partners in the firm.

(iii) **Misconduct of a partner-** Where a partner is guilty of misconduct which is likely to affect prejudicially the business of the firm, the court may allow dissolution of the firm. It is not necessary that the misconduct should be related to the business of the firm, it is sufficient if it is capable of damaging the goodwill or business prospects of the firm.

(iv) **Willful persistent breaches of agreement by a partner-** Where a partner willfully or persistently commits a breach of agreements relating to the management of the affairs of the firm, or conducts the partnership business in such a manner that the other partners finds it difficult to carry on the partnership business with him, any of the other partner may file a suit for the dissolution of the firm.

(v) **Transfer or sale of the whole interest of a partner-** Where a partner transfers his whole interest in the partnership firm to a third party without the consent of his Company-partners, the Court may allow dissolution of the firm.

(vi) **Perpetual losses-** Where the business of the firm cannot be carried on, except at a loss, the Court may allow the dissolution of the firm.

(vii) **Other just and equitable grounds-** The court may dissolve the firm on any ground which is fair and reasonable according to the opinion of the Court.

CONSEQUENCES OF DISSOLUTION

(a) **Continuing liability of partners after dissolution**: On dissolution the partners are bound to give public notice of dissolution. The partners will continue to be bound by the acts of the firm after dissolution till a proper public notice is given. However, this rule does not apply to a deceased partner, insolvent partner or retiring dormant partner.

Till the affairs of the dissolved firm is in the process of winding up, it is the duty of every partner not to make any personal profits out of the transaction of the firm. in case any partner makes personal profit, he must surrender it to the firm.

(b) **Right for utilization of assets**: On a partnership being dissolved, any partner or his representative shall have right, against the other

(i) To have property of the firm applied in payment of the debts and liabilities of the firm.

(ii) To have the surplus distributed among all the partners or their representatives according to their respective rights.

(c) **Continuing authority of partners:** The authority of a partner to bind the firm and other partners by his act ceases except for the acts necessary:

(i) For winding up of partnership affairs.

(ii) To complete the unfinished transactions pending at the date of dissolution.

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(d) Return of premium on premature dissolution:

Where a partner pays any premium on entering into partnership for fixed term, and the firm dissolves the expiry of fixed time, such a partner shall be entitled for a rateable return of his premium.

However, no return of premium is made in the following cases:

(i) Where the firm is not constituted for fixed term.

(ii) Where the firm is dissolved by the death of a partner.

(iii) Where the dissolution is mainly due to the misconduct of the new partner himself.

(iv) Where the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

(e) Right to make an agreement in restraint of trade:

Either before or after the dissolution of the firm, the partners may agree between themselves that some of them would not carry on a business similar to that of the firm.

SETTLEMENT OF ACCOUNTS UPON DISSOLUTION

The mode of settlement of accounts between partners upon dissolution of the firm is determined by the partnership agreement. In the absence of such an agreement, the following shall apply:

(i) Payment of losses: Losses of the firm including deficiency of capital shall be paid in the following manner:

(a) First, the losses shall be paid out of profits.

(b) Secondly, if the profits are insufficient to pay losses, then the balance of loss shall be paid out of capital.

(c) If still some balance of losses remains, it shall be paid by the partners individually in the proportions in which they were entitled to share profits.

(ii) Application of assets: The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital shall be applied in the following manner and order:

(a) In paying the debts of the firm to third parties;

(b) In paying to each partner rateable what is due to him from the firm for advances as distinguished from capital.

(c) In paying to each partner rateably what is due to him on account of capital and;

(d) The residue, if any, shall be divided among the partners in the proportion in which they are entitled to share profits.

(iii) Firm debts v. Private debts: Where there are both debts due from the firm and also personal debts of a partner, the following rules will apply:

(a) The property of the firm shall be applied first for the payment of firm's debts and if there is any surplus then the share of each partner shall be applied to the payment of his separate debts.

(b) The separate property of a partner shall be applied first in the payment of his separated debts and if any surplus is left, then it is applied in the payment of debts of the firm.

GOODWILL ON DISSOLUTION

Goodwill is the value of reputation of the business of the firm. Goodwill can be sold like any other asset of the firm. The partners may decide to sell it separately or along with the other assets of the firm. The purchaser of the goodwill of the firm has:

(i) The right to carry on the same business under the old name and

(ii) The right to represent himself to the customers of the old firm as the successor in the business of the old firm.

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However, the partners selling the goodwill of a firm can:

(i) carry on a similar business

(ii) also compete with the business sold by them to purchaser and

(iii) advertise their business in such manner as they deem fit but subject to an agreement to the contrary they:

- **(a)** Should not use the firm name
- **(b)** Should not represent themselves as carrying on the old business and
- **(c)** Should not solicit the customers of the old firm.

PUBLIC NOTICE

Public notice is required to be given:

(a) When a minor admitted to the benefits of partnership elects, on attaining majority, to become or not to become a partner in the firm.

(b) When a partner retires from partnership firm.

(c) When a partner is expelled form partnership business.

(d) When partnership is dissolved.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

10

INDIAN CONTRACTS ACT, 1872

Covering-

- Meaning and nature of contract
- Offer and Acceptance
- Considerations
- Fraud
- Misrepresentation
- Illegal Agreements
- Uncertain Agreements
- Distinction between a wagering agreement and a contingent contract
- Meaning of discharge of a contract
- Breach of Contract
- Actual breach of contract
- Remedies for breach of contract
- Contracts of Guarantee
- Bailment & Pledge
- Rights of a finder
- Pledge
- Rights and Duties of Pawnor
- Pledge by non-owners
- Contract of Agency
- Rights of an agent
- Liability of principal to third parties
- Agency coupled with interest
- Performance of contract
- Reciprocal promises
- Advance Your Knowledge
- Self Test Questions

EXPECTED MARKS COVERAGE (1 to 5)

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भारत का राजपत्र
The Gazette of India

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 11*th August,* 2016/*Shravana* 20, 1938 (*Saka*)

The following Act of Parliament received the assent of the President on the 10th August, 2016, and is hereby published for general information:—

THE *BENAMI* TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016

NO. 43 OF 2016

[10*th August*, 2016.]

An Act further to amend the Benami Transactions (Prohibition) Act, 1988.

BE it enacted by Parliament in the Sixty-seventh Year of the Republic of India as follows:—

Short title and commencement.

1. (*1*) This Act may be called the *Benami* Transactions (Prohibition) Amendment Act, 2016.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Insertion of new heading before section 1.

2. In the *Benami* Transactions (Prohibition) Act, 1988 (hereinafter referred to as the principal Act), before section 1, the following heading shall be inserted, namely:— 45 of 1988.

"CHAPTER I

PRELIMINARY."

Amendment of section 1.

3. In section 1 of the principal Act, for sub-section (*1*), the following sub-section shall be substituted, namely:—

"(*1*) This Act may be called the Prohibition of *Benami* Property Transactions Act, 1988.". 45 of 1988.

Substitution of new section for section 2. Definitions.

4. For section 2 of the principal Act, the following section shall be substituted, namely:—

'2. In this Act, unless the context otherwise requires,—

(*1*) "Adjudicating Authority" means the Adjudicating Authority appointed under section 7;

(*2*) "Administrator" means an Income-tax Officer as defined in clause (*25*) of section 2 of the Income-tax Act, 1961; 43 of 1961.

(*3*) "Appellate Tribunal" means the Appellate Tribunal established under section 30;

(*4*) "Approving Authority" means an Additional Commissioner or a Joint Commissioner as defined in clauses (*1C*) and (*28C*) respectively of section 2 of the Income-tax Act, 1961; 43 of 1961.

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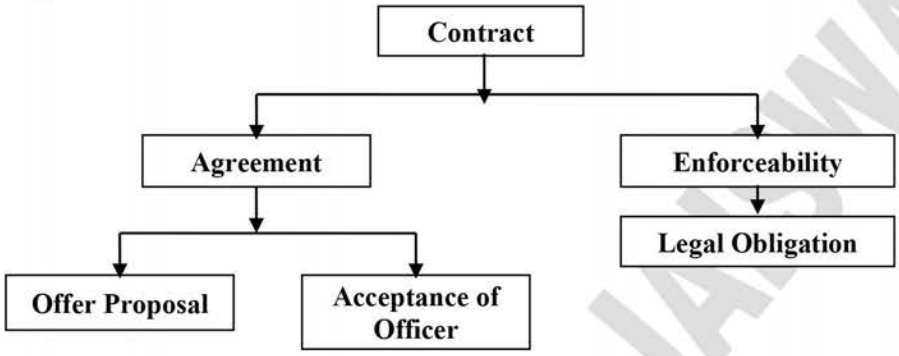
INDIAN CONTRACTS ACT, 1872

MEANING AND NATURE OF CONTRACT

- The law of contract is contained in Indian Contract Act, 1872.
- It extends to throughout India except the State of **Jammu and Kashmir**.
- It came into force on **1st September 1872.**
- There are separate Acts related to Negotiable Instruments, Transfer of Property, Sale of Goods, Partnership, Insurance etc.



ESSENTIALS OF A VALID CONTRACT

1. **Offer and Acceptance**
   There must be lawful offer and lawful acceptance.
   Lawful implies that both must satisfy the requirements of Contract Act.

2. **Intention to Create Legal Relations:**
   Agreement should be attached by legal consequences & create legal obligation.
   - Duties and rights should be legal and not merely moral.

3. **Lawful Consideration:** Price paid by one party forth promise of the other is known as consideration.

   It is referred to as "quid pro quo" means something in return.

4. **Free Consent:** There must be free consent of the parties to the contract. According to Section 14., consent is said to be free when it is not caused by (i) coercion, (ii) undue influence, (iii) fraud, (iv) misrepresentation, or (v) mistake.

   Example: X threatens to kill Y if he does not sell his house to X. Y agrees to sell his house to X, In this case, Y's consent has been obtained by coercion and therefore, it cannot be regarded as free.

5. **Capacity of Parties:** The parties to an agreement must be competent to contract. According to Section 11 of Indian Contract Act, 1872, "every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which is subject."

Example: X, a minor borrowed ₹8000/- from Y and executed mortgage of his property in favour of the lender. This was not a valid contract because X is not competent to contract. Therefore, the mortgage was not valid and the money advanced to minor could not be recovered.

Lawful Object: The object of an agreement must be lawful. According to Section 23 "the object is considered lawful unless it is forbidden by law or is fraudulent or involves or implies injury to the person or property of person or is immoral or is opposed to public policy."
Example I: X, Y and Z enter into an agreement for the division among them y fraud. The agreement is void because its object is unlawful.

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Agreement not Expressly Declared Void: The agreement must not have been expressly declared void under the provision of Sec 24 to30 of Indian Contract Act, 1872. Under these provisions, agreement in restraint of marriage, agreement is restraint of legal proceedings, and agreement in restraint of trade and agreement by way of wager have been expressly declared void.

Example I: X and Y carried on business in Chandni Chowk area of Delhi. X promised to sop business in that locality if Y paid ₹1,00,000/-. X stopped his business but Y did not pay hi the promised money. It was held that X was not entitled to recover anything because the agreement was in restraint of trade and as such void.

Certainty of Meaning: The terms of the agreement must be certain and unambiguous. **According to Section 29 of the Indian Contract Act, 1872** agreements the meaning of which is not certain or capable of being made certain are void.

Example I: X a dealer in different types of oils agreed to sell 100 tones of oil to Y. This agreement is void on the ground of uncertainty because it is not clear what kind of oil is intended to be sold.

Possibility of Performance: The terms of the agreement must be such as are capable of performance. According to **Section 56,** "an agreement to do an impossible act is void."

Example I: X agrees with Y to discover treasure by magic and Y agrees to pay Rs,1000/- D X. This agreement is void because it is an agreement to do an impossible act.

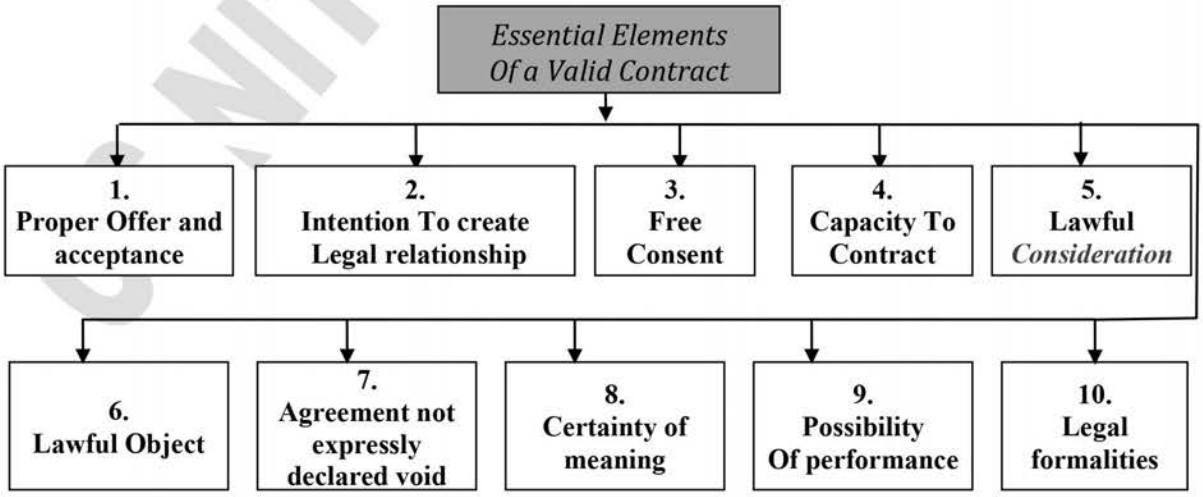
Example II: X agrees with Y to enclose some area between two parallel lines and Y agrees to pay ₹1000/- to X. This agreement is void because it is an agreement to do an impossible act.

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

Example I: An oral agreement for arbitration is unenforceable because the law requires that arbitration agreement must be in writing.

Example II: An oral agreement for sale of immovable property is unenforceable because the law requires that such agreement must be in writing and registered.

Conclusion:-All the aforesaid elements must be present in an agreement in order to create a valid contract. If anyone of them is missing or absent, the agreement will not be enforceable by law.



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OFFER AND ACCEPTANCE

Meaning: An offer is starting point in the making of an agreement. An offer is also called 'proposal'. According to **Section 2(a)** of The Indian Contract Act, 1872. **"A person is said to have made the proposal when he signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that offer to such act or abstinence."**

Essential Elements: An offer involves the following essential elements:

(a) It must be made by one person to another person. In other words, there can be no proposal by a person to himself.

Example: X says to Y that he wants to sell his car to himself for ₹1 lakh. There is no proposal because there can be no proposal by a person to himself.

(b) It must be an expression of or willingness to do **(i.e. positive act)** or to abstain from doing something **(i.e. negative act).**

Example I: X offers to sell his car to Y for Rs, 1 lakh. It is a positive act on the part of X.

Example II: X offers not to file a suit against Y if Y pays X the outstanding amount of Rs,1 lakh. It is a negative act on the part of X.

It must be made with a view to obtain the consent of that other person to proposed act or abstinence.

Example: X jokingly ways to Y "I am ready to sell my car for ₹1,000." Y, knowingly that X is not serious in asking the offer, says "I accept your offer." In this case, X's offer was not the real offer, as he did not make it with a view to obtain the consent of Y,

OFFERER (or 'PROMISOR') AND OFFEREE (or PROMISEE)

Meaning of Offer: The person making the proposal is called the 'offer or' or 'proposer'.

Meaning of Offeree: The person to whom the proposal is made is called the **'offeree'** or **'proposee'.**

Example: X says to Y, "I want to sell my car to your for ₹1 lakh." 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 proposee.

On the basis of

HOW TO MADE AN OFFER

An offer can be made by any act, which has the effect of communicating it to another person. An offer may, either be an **'express offer'** or **'implied offer'**.

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

Example I: X says to Y, "Will you purchase my car for ₹1 lakh?

Example II: X writes to Y in a letter, " I want to sell my house for ₹1 lakh".

Example III: X advertises in a newspaper, "I will pay ₹1,000/- to anyone who traces my missing nephew".

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 circumstances of the particular case.

Example I: A transport company runs buses on different routes to carry passengers. This is an implied offer by the transport company to carry passengers for a certain fare.

Example II: A bid at an auction is an implied offer to buy.

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TO WHOM AN OFFER IS MADE

An offer may be 'specified' or 'general'.

Specific Offer: A specific offer is one, which is made to a definite person or particular group of persons. A specific offer can be accepted only by that definite person or that particular group of persons to whom it has been made.

Example: X offers to buy car from Y for ₹1 lakh. This offer is a specific offer, which has been made to a definite person Y. No person other than Y can accept this offer. **{Boulton v. Jones}**

Similarly, an offer made to a company is an offer to a group of persons and hence a specific offer.

General Offer: A general offer is one, which is not made to a definite person, but to the world at large or public in genera. A general offer can be4 accepted by a person by fulfilling the terms of the offer. In case of general offer, the contract is made with person who having the knowledge of the offer comes forward and acts according to the conditions of the offer.

Example : Carbolic Smoke Ball Co. advertised in the newspaper that it would pay ₹1000/- to anyone who contracts influenza after using the smoke ball of the company according to the printed instructions. Mrs. Carlil uses the smoke ball according to the printed directions but subsequently contracted influenza. On a suit for the reward she was held entitled to recover the same because she had accepted the offer by fulfilling the terms of the offer. **{Carlil v. Carbolic Smoke Ball Co.}.**

LEGAL RULES FOR A VALID OFFER

An offer to be valid must fulfill the conditions discussed below:

1. **Intention to Create Legal Relationship:** An offer must intend create legal relations. An offer must be such that when accepted, it will create legal relationship among the parties.

2. **Certain and Unambiguous Terms:** 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. **Different from a Mere Declaration of Intention:** The offer must be distinguished from a mere declaration of intention. Such statement or declaration merely indicates that an offer will be made or invited in future.

4. **Different from an Invitation to an Offer:** An offer must be distinguished from an invitation to offer. In case of an invitation to offer, the person making an invitation invites others to make an offer to him. It is prelude to an offer inviting negotiations or preliminary discussions.

5. **Communication:** An offer must be communicated to the person to whom it is made. An offer is complete only when it is communicated to the offeree. One can accept the offer only when he knows about it. Thus, an offer accepted without its knowledge does not confer any legal rights on the acceptor.

   Example I: G sent his servant L to trace his lost nephew. When the servant had left. G announced a reward of ₹500 to anyone who traces the missing boy. L found the boy and brought him home. When L came to know about reward, he filed a suit against G to recover the reward. It was held that L was not entitled the reward because he did not know about the reward when he found the missing boy. **{Lalman Shukla v. Gauri Dutt}.**

   Example II: S offered a reward to anyone who traces his lost dog. F brought the dog without any knowledge of the offer of reward. It was held that F was not entitled to the reward because F cannot be said to have accepted the offer, which he did not know. **{Fitch v. Snedakar}.**

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6. **No Term the Non-compliance of which Amounts to Acceptance:** The offer must not contain a terms the non-compliance of which would amount to accept an. It means that while making the officer, the offeror cannot say that if offer is not accepted before a certain date, it will be presumed to have been accepted.

   Example: X writes a letter to Y. If offer to sell my car for ₹ 1 lakh. If I do not receive your reply by Friday next, I shall assume that you have accepted the offer. Here if Y does not reply, it does not mean that he has accepted the offer.

7. **Communication of Special terms or Standard Form Contracts:** The special terms of the offer must also be communicated along with the offer. If the special terms of the offer are not communicated, the offeree will not be bound by those terms. The question of special terms arises generally in case of standard form of contracts. Standard contracts are made with big companies such as insurance companies, railways, shipping companies, banking companies, hotel companies, and dry cleaning companies. Since such companies, are in position to exploit the weakness of general public by including certain terms I the contract which may limit their liabilities, it is provided that the special terms of the offer must be brought to the notice of general public.

CROSS OFFERS

Meaning: Two offers, which are similar in all respects made y two parties to each other, in ignorance of each other's offer are known as **'cross offers'**.

Effect: Cross offers do not amount to acceptance of one's offer by the other. Hence, no contract is entered into on cross offer.

STANDING OFFER/OPEN OFFER/CONTINUING OFFER:

Meaning: An offer of a continuous nature is known as **'standing offer'.**

A standing offer is in the nature of a tender. It is the same thing as n invitation to an offer.

A contract is said to have been entered into only when an order is placed on the basis of the tender.

Example: Z Ltd. requires a large quantity of certain goods during the 12 months period and gives an advertisement inviting tender in the leading newspaper. Z submitted the tender to supply those goods at a specific rate. Z's tender is accepted or approved. Now, Z's tender becomes a standing offer. Each order given by X Ltd., will be an acceptance of the offer.

MEANING OF ACCEPTANCE

Acceptance means giving consent to the offer. It is an expression by the offeree of his willingness to be bound by terms of the offer. According to **Section 2(b)** of the Indian Contract Act, 1872, **"A proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. A proposal when accepted becomes a promise".**

Example: X offers to sell his car to Y for ₹1 lakh. Y agrees to buy the car for ₹ 1 lakh. Y's act is an acceptance of X's offer.

WHO CAN ACCEPT AN OFFER

In General, an offer can be accepted only by the person or persons to whom it is made. The Specific Answer To This question can be given with reference to type of offer as under:

1. **In case of Specific Offer:** An offer made to a definite person or particular group of persons (called specific offer) can be accepted only by that definite person or that particular group of persons to whom it has been made and none else.

3. **In case of General Offer:** General offer) can be accepted by any person having knowledge of the offer by fulfilling the terms of the offer.

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HOW TO MAKE AN ACCEPTANCE

1. **Express Acceptance:** An express acceptance is one, which is made by words spoken or written.
2. **Implied Acceptance:** An implied acceptance is one which is made otherwise than in words. In other words, it is inferred from the conduct of the person or the circumstances of the particular case.

LEGAL RULES FOR A VALID ACCEPTANCE

An acceptance to be valid must fulfill certain conditions, which are discussed below:

1. **Absolute and Unqualified:** According to Section 7(1) of the Indian Contract Act, 1872, **"In order to convert a proposal into a promise, the acceptance must be absolute and unqualified."**It means, that an offer must be accepted as it is without any reservation, variation or conditions. 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 acceptance.

   Example I: X offered to sell his car for ₹1 lakh to Y. B agreed to buy it for ₹90,000/- Y's act is a counter offer and not an acceptance of X's offer. Now if Y accepts the original offer to buy the car for ₹1 lakh X will not be bound to sell the car because Y's counter offer has put an end to the original offer. **{Nihal Chand v. Amar Nath}**

2. **Manner of Acceptance:** According to Section 7(2) of the Indian Contract Act, 1872, the acceptance of an offer must be given in the following manner.

(a) If the proposal does not prescribe the manner in which it is to be accepted.	The offer must be accepted in some usual and reasonable manner.
(b) If the proposal prescribes the manner in which it is to be accepted.	The offer must be accepted in the prescribed manner.

   Consequences of not accepting the offer in the prescribed manner: If the offer is not accepted in the prescribed manner, the offeror may approve or reject such acceptance. If the offeror wants to reject it, he must inform the acceptor within a reasonable time that he is not bound by acceptance because it is not in the prescribed manner. If he does not do so within a reasonable time the presumption will be that he doesn't mind the offer being accepted in a different mode and will be bound by such acceptance.

3. **Communication Of Acceptance:** The acceptance must be signified (i.e. Indicated or declared).In other words , the acceptance is complete only when it has been communicated to the offeror. A mere mental determination to acceptance in eyes of law unless there is some external manifestation of that determination by words or conduct.

   Example: X offered to supply coal to a Railway Company. The manager of the company accepted the offer and put it in the drawer of his table and forgot all about it. It was held that no contract was made because acceptance was not communicated.**{Brogden V. Metropolitan Railway Co}**.

4. **By whom** Acceptance must be communicated by the offeree himself or by a person who has the authority to accept. In other words, if acceptance is communicated by an unauthorized person, it will not given rise to legal relations.

   Example: P applied for the post of headmaster in a school. The managing committee passed a resolution approving P to the post but this decision was not communicated to P. But one member of managing committee in his individual capacity and without any authorized informed P about the decision. Subsequently, the managing committee cancelled its resolution and appointed someone else. P filed a suit for breach of contact. It was held that P's suit was not maintainable because there was no communication of acceptance, as he was not informed about his appointment by some authorized person. **{Powell v. Lee}.**

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5. **To Whom** Acceptance must be communicated to the offeror himself. In other words, if acceptance is communicated to an unauthorized person, it will not give legal rise to relations.

6. **Time Limit:** The acceptance must be given within the time prescribed (if any) or within reasonable time (if no time is prescribed). What is reasonable time depends upon the facts and circumstances of case.

   Example: An offer to buy shares of a company was made in June but the acceptance was communicated in November, it was held that the offeror was not bound by the acceptance because the acceptance was not given within a reasonable time. **{Ramsgate Victoria Hotel Co. v. Montefiore}.**

7. **Before Lapse of Offer:** The acceptance must be given before the offer lapses or is withdrawn. In other words, if an acceptance is made after the lapse or withdrawal of the offer, it will not give rise to legal relation.

   Example: X offered by a letter to sell his car for ₹1 lakh. Subsequently, X withdrew his offer by a telegram, which was duly received by Y. After the receipt of telegram, Y sent his acceptance to X. In this case, the acceptance is invalid because it was made after the effective withdrawal of the offer.

PROVISIONS RELATING TO COMMUNICATION OF OFFER AND ACCEPTANCE

The communication of offer and acceptance must complete so as to bind the concerned parties because as soon as the communication is complete the parties loose the right of withdrawal or revocation. The legal provisions relating to communication of offer and acceptance are as under:

1. **When is Communication of Offer Complete?** The communication of offer is complete when it comes to knowledge of the person to whom it is made. In case an offer is made by post, its communication will complete when the letter containing the offer reaches the offeree.

   Example: X of Agra sends a letter by post to Y of Delhi offering to sell his car for ₹1 lakh. The letter is posted on 1st January and this letter reached on 7th January. The communication of the offer is complete on 7th January.

   Note: An offer accepted without its complete communication does not bind the offerer.

2. **When is Communication of Acceptance Complete:** The communication of acceptance is complete at different times for the proposer and acceptor. The rules regarding the communication of acceptance are as under:

The communication of acceptance is complete…	When does the communication of acceptance complete?
(i) As against the proposer	When it is put in a course of transmission to him, so as to be out of the power of the acceptor. In case of acceptance made by post, the proper becomes bound by the acceptance as soon as the properly addressed and stamped letter of acceptance is duly posted even if such letter of acceptance is lost or delayed in post.
(ii) As against the accepter	When it comes to the knowledge of the proposer. In case of acceptance made by post, the acceptor becomes bound by the acceptance only when the letter of acceptance is actually received by proposer.

Example: X of Agra sends a letter by post to Y of Delhi offering to sell his car for ₹1 lakh. The letter is posted on 1st January and this letter reaches Y on 7th January. Y sends his acceptance by post on 10th January but X receives this letter of acceptance on 15thJanuary. In this case the legal position relating to the communication of offer and acceptance is as under:

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Communication	When does the communication	*Reason*
(a) Communication of offer.	7th January	The letter containing the offer reaches the offeree on 7th January.
(b) Communication of acceptance as against the proposer	10th January	The letter of acceptance is posted on 10th January.
(c) Communication of acceptance as against the acceptor	15th January	The letter of acceptance is received by the proposer on 15th January.

After posting the letter of acceptance on 10th January, Y can withdraw his acceptance by a speedier mode of communication so that the revocation notice reaches the proposer before the letter of acceptance.

3. **Position of Contracts over telephone/telex/fax** A contract by telephone/telex/fax is treated on the same principle as n oral agreement made between two parties when they are face to face with other. In such case, the will complete only when the acceptance is received by the proposer and not when it is transmitted by the acceptor. Therefore, the acceptor must ensure that his acceptance is properly received by the proposer.

Example: X made on offer to Y over telephone. While Y was conveying his acceptance, the line went dead and X could not hear anything. In this case, there was no contract at that merchant.

PROVISIONS RELATING TO REVOCATION OF OFFER AND ACCEPTANCE

1. **Meaning of Revocation:** The terms 'revocation' means **'taking back'** or **'withdrawal'.**
2. **What is the Time Limit within which Offer can be Revoked:** According to **Section 5** of the Indian Contract Act, a o may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. We know that communication of acceptance is complete as against the proposer when a properly addressed and stamped letter of acceptance is duly posted by the acceptor. Hence, an offer can be revoked at any time before the letter of acceptance is duly posted by the acceptor. Thus the proposer may revoke is offer by a speedier mode of communication which will reach before the letter of acceptance is posted by the acceptor.

   Example: X of Agra offers by a letter dated 1st January sent by post to sell his car to Y of Delhi for ₹1 lakh. Y accepts the offer on 7th January at 1 p.m. by letter sent by post. Here, X may revoke his offer at any time before 1 p.m. on 7th January but not afterwards.

   Notes:

   (i) Revocation must always be expressed.

   (ii) Revocation must move from the offeror himself f or a duly authorized agent.

   (iii) Notice of revocation of a general offer must be give through the same channel by which the original offer was made.

   (iv) Offer cannot be revoked even if the letter of acceptance is lost or delayed in transit.
3. **What is the Time Limit within which Acceptance can be Revoked:** According to **Section 5** of the Indian Contract Act, "An acceptance **may be** revoked at any time **before** the communication of the **acceptance** is complete as **against** the acceptor, but not afterwards." We know that communication of acceptance is complete as against the acceptor when the letter of acceptance is actually received by the proposer. Hence, an acceptance can be revoked at any time before the letter of acceptance is actually received by the proposer. Thus an acceptor may revoke his acceptance by a speedier mode of communication, which will reach before the letter of acceptance is received by the proposer.

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Example: X of Agra offers by a letter dated 1st January sent by post to sell his car to Y of Delhi for ₹1 lakh. Y accepts the offer on 7th January at 1 p.m. by a letter sent by post. X receives the letter of acceptance on 15th January at 3 p.m. Here, Y may revoke his acceptance at any time before 3 p.m. on 15th January but not afterwards.

Acceptance is to Offer what a Lighted Match is to a Train of Gunpowder: The position relating to revocation of proposal and acceptance has been described by the following words

"Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone."

This statement primarily holds good under English law.

Here, **gunpowder** = **offer** and **lighted match** = **acceptance.**

When a lighted match is shown to a train of gunpowder, it explodes and something happens which cannot be undone. Similarly, an offer once accepted cannot be revoked. But so long a lighted match is no shown, the gunpowder remains inert and can be removed, similarly an offer can be revoked before it is accepted.

Similarly, once acceptance is given it cannot be revoked. But under Indian Contract Act, acceptance can be revoked by resort in to quicker means of communication so that the offeror learns about it before acceptance. Thus, the above statement doesn't hold in relation to revocation of acceptance under Indian law.

4. **Simultaneous delivery of Letter of Acceptance and the telegram Containing Revocation of Acceptance:** In case the letter of acceptance and the telegram containing revocation of acceptance are delivered to the proposer at the same time, the formation of contract depends upon the fact which one is read first by the offeror. The contract shall be said to have been formed if the letter of acceptance is read first but shall not be said to have been formed if the telegram containing revocation of acceptance is read first. Generally, it is presumed that a man of ordinary prudence will first read the telegram. Hence the revocation will be quite effective.

5. **No Revocation in case of Contract over Telephone or Telex or Fax:** In case of contracts over telephone or telex or fax, the question of revocation does not arise because there is instantaneous communication of the offer and its acceptance (i.e. the offer is made and accepted at the same time).

6. **When is Communication of Revocation Complete [Section 4]:** The communication of revocation is complete at different times for person who makes it and the person to whom it is made. The rule regarding the communication revocation are as under:

The communication of revocation is complete…	When does the communication of revocation complete?
(i) As against the person who makes it	When it is put in 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.
(ii) As against the person to whom it is made	When it comes to his knowledge.

Lapse of an Offer: An offer must be accepted before it lapses (i.e. comes to an end). An offer may come to end in any of the following ways:

1. **By Revocation:** An offer lapses if the offeror revokes the offer before its acceptance by the offeree. According to Section 5 of the Indian Contract Act, a proposal may be revoked at any time before the communication of acceptance is complete as against the proposer but not afterwards.

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Example I: X of Agra offers by a letter dated 1st January sent by post to sell his car to Y of Delhi for ₹1 lakh. Y accepts the offer on 7th January at 1 p.m. by a letter sent by post. Here, X may revoke his offer at any time before 1 p.m. on 7th January but not afterwards.

2. **By Lapse of Time:** An offer lapses if it is not accepted within the fixed time (if any prescribed in the offer) or within reasonable time (if no time is prescribed in the offer).

   Example: an offer to buy shares of a company was made in June but the acceptance was communicated in November. It was held that offer to buy shares had lapsed because it was not accepted within a reasonable time. **{Ramsgate Victoria Hotel Co. v. Montefiore}**

3. **By Death or Insanity of the Offeror or Offeree:** An offer lapses by the death or insanity of the offeror if the fact of his death or insanity comes to the knowledge of the acceptor before he makes his acceptance. In other words, if the offer is accepted in ignorance of the death or insanity of the offeror, there will be a valid contract. It may be noted that in English law the death of the offeror terminates the offer even if acceptance is made in ignorance of the death.

4. **By Failure of Accept condition Precedent:** An offer lapses if it is accepted without fulfilling the conditions of the offer.

   Example: X offered to sell his car to Y for ₹1 lakh subject to the condition that Y should pay an advance of ₹20,000/- before certain date. Y accepted the offer but did not send an advance of ₹20,000/-. In this case, the offer has lapsed because the advance was not paid.

5. **By Counter Offer:** An offer lapses if the counter offer is made because a counter offer amounts to rejection of the original offer. Counter means making a fresh offer instead of accepting the original offer.

6. **By not Accepting in the Prescribed Mode or usual Mode:** An offer if it is not accepted in the specific manner (if any, prescribed in the offer) or in some usual and reasonable manner (if no manner has been prescribed in the offer).

7. **By Rejection of Offer by Offeree:** An offer lapse if it is rejected by the offeree. An offer is said to be rejected if the offeree expressly rejects it or accepts it subject to certain conditions. It may be noted that once an offer is rejected, it cannot be revived subsequently.

8. **By Subsequent illegality or Destruction of Subject Matter of the Offer:** An offer lapses if it becomes illegal or the subject matter is destroyed before its acceptance by offeree.

   Example I: X of Delhi offered supply of 100 tones of sugar to Y at Mumbai a certain date. Before Y accepts this offer, the Central Government issued an order prohibiting the inter-state movement of sugar. Here, X's offer has come to an end.

CONSIDERATIONS

MEANING OF CONSIDERATION

Consideration is one of the essential elements of a valid Contract. The term 'Consideration' means something in return, i.e. quid-pro-quo. What is 'something' has been explain by Justice lush J. in a leading English case **Currie v. Misa** as under:

"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."

Section 2**(d)** of the Indian Contract Act, 1872 defines consideration as under;
'When, at the desire of the promissory, the promise or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

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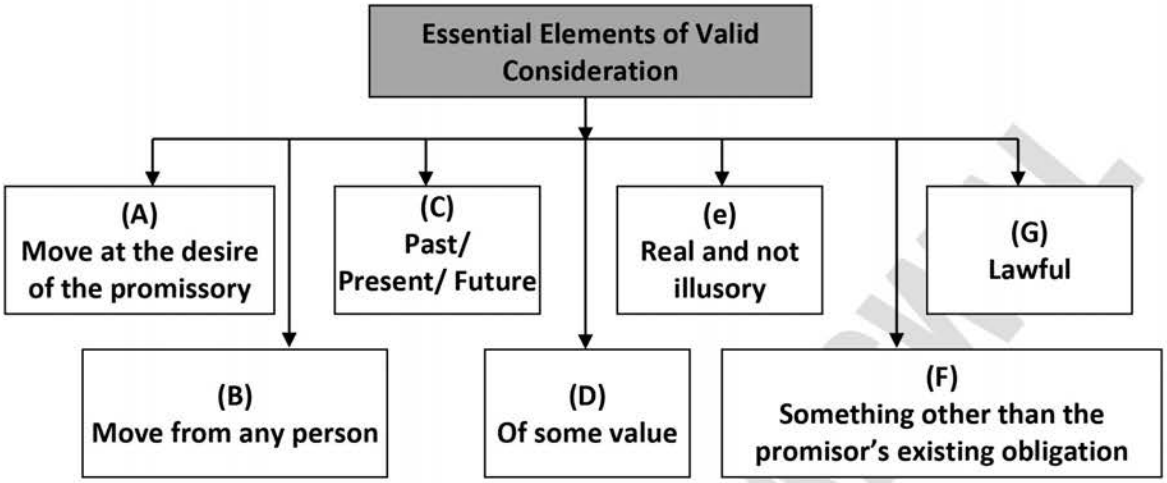
ESSENTIAL ELEMENTS OF VALID CONSIDERATION

On the basis of definition of consideration as per Section 2**(d)**, the essential elements of valid consideration are shown below:



Let us discuss them one by one.

(a) **It must be given only at the Desire of the Promisor:** An act constituting consideration must have been done at the desire or request of the promisor. Thus, an act done at the desire of a third party or without the desire of the promisor cannot constitute a valid consideration.

(b) **It may Move from any Person:** An Act constituting consideration may be done by the promise himself or any other person (i.e. stranger to consideration). Thus, it is immaterial who furnishes the consideration and therefore, may move from the promise or any other person.

Example: X, by a deed of gift transferred certain property to her daughter Y with a direction that Y should pay Z an annuity. On the same day, Y executed a deed in writing in favor of Z and agreed thereby to pay the annuity. Later, Y refused to pay the annuity on the please that no consideration had moved from Z. **It was held** that Z was entitled to maintain suit because a consideration need not necessarily move from the promise, it may move from any other person. (i.e. X in the present case.

(c) **It may be Past or Present or Future:** The consideration may be past, present or future.

Past Consideration	The consideration, which has already moved before the formation of agreement. **Example**: X renders some service to Y at Y's request in the month of May. In June, Y promises to pay X ₹1000/- for his past services. Past services amount to past consideration. X can recover A's 1000/- from Y.
Present Consideration.	The consideration, which moves simultaneously with promise, is called present consideration. **Example:** In case of cash sale, promise to pay the price and promise to deliver the goods are performed simultaneously.
Future Consideration.	The consideration, which is to be moved after the formation of agreement, is called future consideration. **Example:** X promises to deliver certain goods to Y after 10 days and Y promises to pay after 10 days from the date of delivery.
Tutorial Note: - The English Law does not recognize the past consideration.	

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(d) **It must be of some Value:** The consideration need not be adequate to promise but it must be of some value in the eye of the law. It is understood in the sense of something in return and that something can be anything, adequate or grossly inadequate. **According to Explanation 2 of Section 25,** an agreement to which the consent of the promisor is freely given in 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 promissory was freely given.

Example: A agrees to sell a horse worth ₹1000/- for ₹10/-. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should taken into account in considering whether or not A's consent was freely given.

(e) **It must be Real and non-Illusory:** The consideration must be real and not illusory.

Example: X engages Y for doing a certain work and promises to pay reasonable remuneration. This promise is not enforceable because the consideration is uncertain.

(f) **Something other than the Promisor's Existing Obligation:** The act constituting consideration must be something which the promisor is not already bound to do because a promise to do what a promisor is already bound to do adds nothing to the existing obligation.

Example: X promises Y, his advocate, t pay an additional sum of the suit was successful. The suit was declared in favour of X but X refused to pay additional sum. It was held that Y could not recover additional sum because the promise to pay additional sum was void for want of consideration as Y was already bound to render his best services under the original agreement. **{Ramchandra Chintamana v. Kalu Raju}**

(g) **Lawful:** The consideration must neither be unlawful nor opposed to public policy.

Example I: X promises Y to pay ₹1000/- to beat Z, Y beats Z and claims ₹1000/- from X, X refuses to pay. Y cannot recover because the agreement is void on the ground of unlawful consideration.

STRANGER TO A CONTRACT

Though a stranger to consideration can sue because the consideration can be furnished or supplied by any person whether he is the promisee or no, but a stranger to a contract cannot sue because of the absence of privity of contract (i.e. relationship' subsisting between the parties to a contract).

Example: X owes Y ₹ 1 lakh and sells his property to Z. Z promises to payoff Xs debt to Y. Z fails to pay. Y cannot sue Z because he is a stranger to a contract.

Exceptions:

The rule that a **stranger to a contract cannot sue,** is subject to the following **exception:**

(a) **In case of Trusts:** The beneficiary (i.e. the person for whose benefit the trust has been created) may enforce the contract.

Example: X transferred certain properties to be held by Y for the benefit of Z. Z can enforce the agreement even though he is not a party to the agreement. **{M. K. Rapsi v. John}**

(b) **In case of Family settlement:** The person for whose benefit the provision is made under family arrangement may enforce the contract.

Example: A provision of marriage expenses of a female member was made in a Joint Hindu Family. On partition, the female member sued for such expenses. It was held that she was entitled to sue. **{Rakhmanbai v. Govind}**

(c) **Acknowledgement:** The person who becomes an agent of third part by acknowledgment or otherwise, can be sued by such third party.

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Example: X receives ₹1000/- from Y for paying the same to Z. X acknowledges this receipt to Z. Z an recover the amount from X because X will be regarded as Z's agent.

(d) Assignment of a Contract: Where a benefit under a contract has been assigned, the assignee can enforce the contract subject to all equities between the original parties to the contract e.g. the assignee of an insurance policy.

CONTRACTS WITHOUT CONSIDERATION

General Rule According to Section 10, consideration is one of the essential elements of a contract. According to Section 25, an agreement made without consideration is void. For example, X promises to pay ₹5000/- to his girlfriend Y. Y cannot enforce this promise because she is not giving anything to X for this promise.

Exceptions to the General Rule No Consideration, No Contract

The following are the exceptions to the general rule No Consideration, No Contract:

(a) Agreements Made on Account of Natural Love and Affection [Section 2(1)]. Such agreement made without consideration is valid if;

(i) it is expressed in writing,
(ii) it is registered under the law,
(iii) it is made on account of love and affection, and
(iv) it is between parties standing in a near relation to each other.

Note: Nearness of relation by itself does not necessarily import love and affection.

Example: A Hindu husband by a registered document promised to pay his wife ₹1000/- per month as her pin-pocket money. This agreement is valid.

(b) Promise to Compensate [Section 25(2)]: Such promise made without consideration is valid if;

(i) it is a promise to compensate (wholly or in part); and
(ii) the person who is to be compensated has already done something voluntarily or has done something which the promisor was legally bound to do.

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

(c) Promise to Pay Time Bared Debt [Section 25(3)]: Such promise without consideration is valid if;

(i) it is made in writing,
(ii) it is signed by the debtor or his agent, and
(iii) it relates to a debt which could not be enforced by a creditor because of limitation.

Note:

According to the law of limitation, a debt that remains unpaid or unclaimed for a period of 3 years becomes a time barred debt, which is legally not recoverable. But a promissory note issued in personal capacity b the wife of a debtor to pay his time barred debt of her husband is not enforceable. **{Pestonjee v. Bai Meharbai}**

(d) Completed Gifts [Explanation to Section 25]: The gifts actually made by a donor and accepted by the donor are valid even without consideration. Thus a completed gift needs no consideration.

Example: X transferred some property to Y by a duly written and registered deed as a gift. This is a valid contract even though no consideration moved.

(e) Agency [Section 185] No consideration is necessary to create an agency.

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FREE CONSENT

CONSENT

Meaning of Consent:

The consent means an act of assenting to an offer. According to Section 13, **"Two or more person are said to consent when they agree upon the same thing in the same sense".** Thus, consent involves identity of minds in respect of the subject matter of the contract. In English Law, this is called **'Consensus-ad-idem'.**

Effect of Absence of Consent:

When there is no consent at all, the agreement in void ab-initio, i.e. it is not enforceable at the option of either party.

FREE CONSENT

Meaning of Free Consent [Section 14]

Free consent is one of the essential elements of a valid contract as it is evidenced by Section 10, which provides that all agreements are contract if they are made by the free consent of the parties. According to Section 14, Consent is said to be free when it is not caused by (a) coercion, or **(b)** under influence, or (c) fraud, or **(d)** misrepresentation, or (e) mistake.

Effect of absence of Free Consent [Section 19]

When there is consent but it is not free (i.e. when it is caused by coercion or undue influence or fraud or misrepresentation), the contract is usually voidable at the option of the party whose consent was so caused.

Example – X threatens to kill Y if he does not sell his house to X. Y agreed to sell his house to X. In this case, Y's consent has been obtained by coercion and therefore, it cannot be regarded as free.

COERCION

Meaning of Coercion [Section 14]

Coercion means compelling a person to enter into contract under a pressure or a threat. According to Section 15, a contract is said to be caused by coercion when it is obtained by (a) committing any act which is forbidden by the Indian Penal Code; or **(b)** threatening to commit any act which is forbidden by the Indian Penal Code; or (c) unlawful detaining of any property; or **(d)** threatening to detain any property.

Example I - X beats Y and compels him to sell his car for ₹50000/-. Here, Y's consent has been obtained by coercion because beating someone is an offence under the Indian Penal Code.

Note: The Indian Penal Code need not be in force in place where the coercion is employed.

Against Whom/by Whom Coercion may be exercised

Coercion may proceed from any person, and may be directed against any person, even a stranger.

Example – X threatens to kill Z, Y's son, if Y refuses to sell his house to him. Y agrees to sell his house. Here, Y's consent has been obtained by coercion though Z is a stranger to the contract.

Effect of threat to File a Suit

A threat to file a suit (whether civil or criminal) does not amount to coercion unless the suit is on false charge. Threat to file a suit on a false is an action forbidden by the Indian penal code and thus will amount to an act of coercion.

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Effect of threat to commit suicide

A suicide and a 'threat to commit suicide' are not punishable under the Indian Penal Code. It does not mean that 'suicide and threat to commit suicide are permitted by Indian Penal Code. The question whether a threat to commit suicide amounts to coercion or not was considered by Madras High Court in case of Chickham Ammiraju v. Seshamma. In case, a person threatened to commit suicide if his wife and son did not execute a release deed in a favour of his brother in respect of certain property .It was held that through a threat to commit suicide is not punishable under the Indian Penal Code, it is deemed to be forbidden by that code. Hence, the treat to commit suicide amounted to coercion and the release deed was therefore, voidable.

Duress V. Coercion: The English law uses the term 'duress' for coercion. However, the two are different in the following way:

a) Duress does not include detaining of property or threat to detain property.
b) Duress can be employed only by a party to the contract or his agent.

Effects of Coercion [Sections 19, 64, 72]

The effects of coercion are as follows:

Effects	Provision
(a) Option of aggrieved party to avoid the contract.	When consent to an agreement is obtained by coercion, the agreement is a contact voidable a the option of the party whose consent was obtained by coercion (also called aggrieved party), [Section 19].
(b) Obligation of aggrieved party to restore benefit.	The party rescinding a voidable contract shall restore the benefit received by him under the contract, to the person from whom the benefit was received. [Section 64].
(c) Obligation of other party to repay or return	A person to whom money has been paid or anything delivered under coercion must repay or return it. [Section 72]

Burden or Onus of Proof

The burden of providing that consent was obtained by coercion, and the aggrieved party would not have entered into contract had coercion been employed, lies on the party intending to avoid the contract.

UNDUE INFLUENCE

Meaning of Undue Influence [Section 16(1)]

The term 'undue influence' means dominating the will of the other person to obtain an unfair advantage over the other. According to Section 16(1), a contract is said to be induced by undue influence.

(a) Where the relations subsisting between the parties are such that on of them is in a position to dominate the will of the other, and
(b) The dominant party uses that position to obtain an unfair advantage over the other.

Presumption of Domination of Will [Section 16(2)]

According to Section 16(2), a person is deemed to be in a position to dominate the will of another in the following three circumstances:

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Circumstances	Examples
(a) Where he holds a real or apparent authority over the other.	Master and servant, parent and child, Income Tax Officer and assessee, Principal and a temporary teacher.
(b) Where he stands in a fiduciary relation to the other.	Trustee and beneficiary, spiritual adviser (Guru) and his disciples, solicitors and client, guardian and ward.
(c) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.	Medical attendant and patient.

No Presumption of Domination of Will

According to judicial decisions held in various cases, there is no presumption of undue influence in the following relationships:

(a) Husband and wife 9(other than pardanashin)
(b) Landlord and tenant
(c) Creditor and debtor

Effect of Undue Influence [Section 19A]

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

Discretion of Court: Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any such benefit there under, upon such terms and conditions as the court may seem just.

Burden of Proof

When a contract is avoided on the ground of undue influence, the liabilities of dominant party and weaker party to prove are as under:

The weaker party has to prove (a) That the other party was in a position to dominate the will. (b) That the other party actually used his influence to obtain an unfair advantage. (c) That the transaction is unconscionable (unreasonable)	In case of unconscionable transaction the dominant party has to prove that such contract was not induced by undue influence. **Note:** A transaction is said to be unconscionable if the dominant party makes an exorbitant profit of the other's distress.

Example – X was in great need of money. The market rate of interest prevailing at that time was 15% to 24%. A lender agreed to grant the loan at 30% because of stringency in the money market. This cannot be called as unconscionable transaction merely because of an unusual high rate of interest. However, f the lender agreed to grant the load at a rate, which is so high (say 75% or 100%) then the court considers it unconscionable, and the transaction will be called unconscionable.

Contracts with Pardanashin Woman

Meaning of Pardanashin Woman: A woman who observes complete seclusion (i.e. who does not come in contract with people other than her family members) is called pardanashin woman.

Legal Presumption: A contract with a pardanashin woman is presumed to have been included by undue influence.

Burden of Proof: The other part who enters into contract with a pardanashin woman must prove;
(a) that he made full disclosure of all the facts to her;
(b) that she understood the contracts and the implications of the contract;
(c) that she was in receipt of competent independent advice before entering into the contract.

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Comparison between Coercion and Undue Influence Similarities: In case of both coercion and undue influence, the consent is not free and the contract is voidable at the option of the aggrieved party.

Distinction: Coercion differs from the undue influence in the following respects:

Basis of Distinction		Coercion	Undue Influence
1.	Relationship	Parties to contract may or may not be related to each other.	Parties to a contract are related to each other under some sort of relationship.
2.	Consent	Consent is obtained by giving a threat of an offence or committing an offence.	Consent is obtained by dominating the will.
3.	Nature of pressure	It involves physical pressure.	It involves moral pressure.
4.	Who can exercise	Even a stranger to the contract can exercise it.	It can be exercised only by a party to a contract and not by a stranger.
5.	Restoration of benefit	The aggrieved party has to restore the benefit received under Section – 64.	The party avoiding the contract may or may not return the benefit under Section 19A.
6.	Presumption	Coercion has to be proved by the party alleging it, in no case it is presumed by the law.	The law under certain circumstances may presume it. The party against whom such presumption lies must disprove it.
7.	Nature of Liability	The party committing the crime make be punishable under I. P. C.	It doesn't involve any criminal liability.

Rebutting Presumption:

The presumption of undue influence can be rebutted by showing;

(a) That the dominant party has made a full disclosure of all the facts to the weaker party before making the contract.

(b) That the price was adequate; and

(c) That the weaker party was in receipt of competent independent advice before entering into the contract.

FRAUD

Meaning and Essential Elements of Fraud [Section17]

Meaning: The term 'fraud' means a false representation of fact made willfully with a view to deceive the other party. Section 17 defines the fraud as follows:

'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 partly thereto or his agent or to induce him, to enter into the contract:

(a) **The suggestion,** as to a fact, of threat which is not true, by one who does not believe4 it to be true, e.g. X sells to Y locally manufactured goods as imported goods charging a higher price. It amounts to fraud.

(b) The **active concealment** of a fact y one having knowledge or belief of the fact. Mere concealment is no fraud. But where steps are taken by a seller concealing some material facts so that the buyer even after a reasonable examination cannot trace the defects, it will amount to fraud, e.g. X a furniture dealer, conceals the cracks in furniture sold by him by using some packing material and polishing it in such a that the buyer even after reasonable examination cannot trace the defect, it would tent amount to fraud through active concealment.

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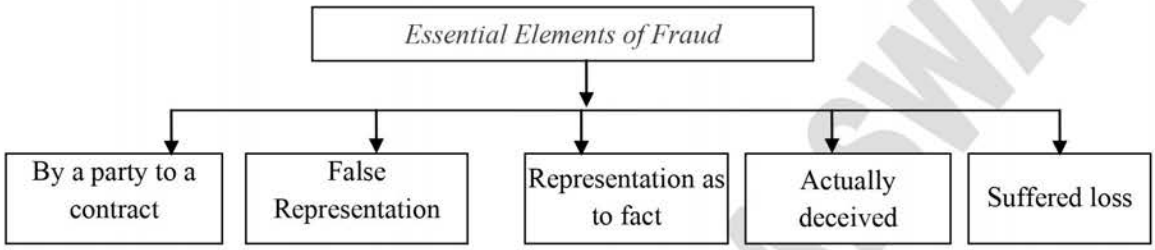
(c) A **promise** made **without** any intention of performing it; e.g. in Shireen v. John, AIR (1952) Punj 227, a man and a woman underwent a ceremony of marriage with the husband not regarding it as a real marriage. Held, the husband had no intention to perform the promise from the time he made it and hence the consent of the wife was obtained under fraud.

(d) Any such **act** or omission as the **law** specially **declares** to be **fraudulent**,.

(e) **Any** other **act** fitted to **deceive**. It covers those acts, which deceive but are not covered under any other clause.

(b) **Essential Elements:** on the basis of aforesaid definition of fraud, the essential elements of fraud are shown below in Figure.



Let us discuss them one by one:

(i) **By a party to a 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.

Example – The directors of a company issued a prospectus containing false statements. A shareholder who had subscribed for the shares on the faith of the prospectus wanted to avoid the contract. It was held that he could not do so because the false statement made y directors amounted to fraud. **{Reese River Silver Mining Co. v. Smith}**

(ii) **False Representation:** There must be a false representation and it must be made with the knowledge of its falsehood. Where the representation was true at the time when it was made but becomes untrue before the contract is entered into and the party who made the representation knows this fact, it must be corrected. If it is not so corrected, it will amount to a fraud.

Example - X fraudulently informs Y that X's estate is free from encumbrance. On the faith of X's statement, Y buys the estate. Actually the estate is subject to mortgage. Here, Y may avoid the contract because X with the intention to deceive Y induced Y to enter into a contract.

(iii) **Representation as to Fact:** The representation must relate to a fact. In other words, a mere opinion, a statement of expression or intention does not amount to fraud.

(iv) **Actually deceived:** The fraud must have actually deceived the other party who has acted on the other party is not actually deceived is not a fraud.

Example – X had defective cannon. In order to conceal the defect, he put a metal plug on it. Y bought this cannon without examining. When Y used it, it burst. Y refused to pay the balance. It was held that Y was liable to pay, as he was not actually deceived by fraud because he would have bought it even if no deceptive plug were inserted. **{Horsefull v. Thomas]**

(v) **Suffered Loss:** The party acting on the representation must have suffered some loss.

Effects of Fraud [Section 19]

The effects of fraud are as follows:

(a) The party whose consent was caused by fraud can rescind (cancel) the contract but he cannot do so in the following cases;

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(i) Where silence amounts to fraud, the aggrieved party cannot rescind the contract if he had the means of discovering the truth with ordinary diligence;
(ii) Where the party gave the consent in ignorance of fraud;
(iii) Where the party after becoming aware of the fraud takes a benefit under the contract;
(iv) Where an innocent third party before the contract is rescinded acquired for consideration some interest in the property passing under the contract;
(v) Where the parties cannot be restored to their original position.

(b) 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 representation made had been true.

Example – A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(c) The party whose consent was caused by fraud, can claim damage if he suffers some loss.

Silence as to Fraud

General Rule: 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

Example – In shri Krishna v. Kurukshetra University AIR 1975 SC 376) a candidate failed to mention the fact of shortage of attendance in the examination form. Held, no fraud.

Exceptions to the General Rule: The general rule that silence doesn't amount to fraud has the following exceptions;

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

(i) Where parties stand in fiduciary relationship like parent-child, trustee-beneficiary.

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

(ii) Where the silence itself is equivalent to speech.

Example - B says to A, "If you do not deny it, I shall assume 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.

(iii) Half Truth: Half-truth is worse than a blatant lie. Partial truthful disclosures may easily deceive the other party, e.g., prospectus of a company disclosing only average dividend declared by the company in the last 5 years instead of the actually dealing dividends over that period is a glaring example of half truth amounting to fraud.

MISREPRESENTATION

Meaning and Essential Elements of Misrepresentation [Section 19]

(a) Meaning: 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. Section 18 defines the term 'misrepresentation' as follows:

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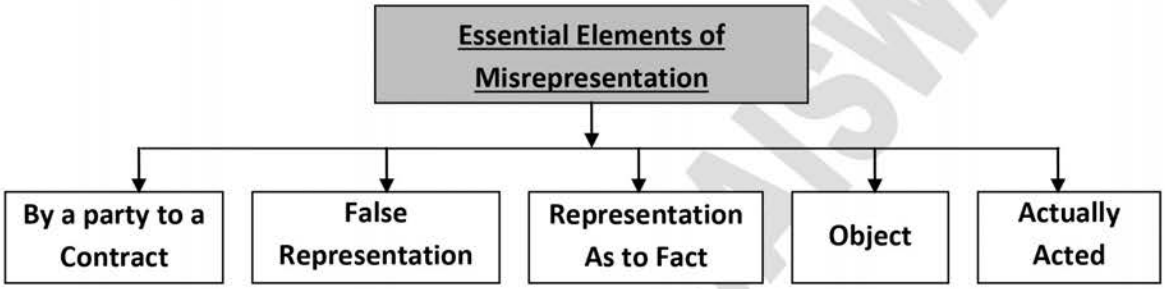
"Misrepresentation" means as includes –

(a) 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;

(b) Any breach of duty which, without an 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 anyone claiming under him;

(c) 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.

(b) Essential Elements: On the basis of the aforesaid definition of misrepresentation, the essential elements of misrepresentation are shown below in Figure.



(i) By a party to a contract: The representation must be made by a party to a contract or by anyone with his connivance or by his agent. Thus, the representation by a stranger to the contract does not affect the validity of the contract.

(ii) False representation: There must be a false representation and it must be made without the knowledge of its falsehood i.e. the person making it must honestly even it is to be true.

(iii) Representation as to Fact: The representation must be related to a fact. In other words, a mere opinion, a statement of expression or intention does not amount to misrepresentation.

Example - X sold his Hotel to Y and stated that a tenant who is most desirable occupies a part of the hotel. In fact the rent from the tenant could only be recovered under pressure and was currently much in arrear. It was held that Y was entitled to avoid the contract because X's statement amounted to misrepresentation. **{Smith's Case}.**

(iv) object: The representation must be made with a view to including the other party to enter into contract but without the intention of deceiving the other party.

(v) Actually Acted: The other party must have acted on the faith of the representation.

Effects of Misrepresentation [Section 19]

The effects of misrepresentation are as follows: -

(a) Right to Rescind the Contract: The party whose consent was caused by misrepresentation can rescind (cancel) the contract but he **cannot** do so in the following cases:

(i) Where the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence;

(ii) Where the party gave the consent in ignorance of misrepresentation;

(iii) Where the party after becoming aware of the misrepresentation take a benefit under the contract;

(iv) Where an innocent third party, before the contract is rescinded, acquired for consideration some interest in the property passing under the contract;

(v) Where the parties cannot be restored to their original position.

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Example - X, leads Y erroneously to believe that 1000 mounds of indigo are made annually at X's factory. Y examines the accounts of X's factory which shows that only 800 mounds of indigo have been made. After this Y buys the factory. Here, the contract is not voidable on account of X's misrepresentation because Y after becoming aware of misrepresentation take the benefit under the contract.

(b) Right to Insist upon Performance: The party whose consent was caused by misrepresentation 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.

MISTAKE

Meaning of Mistake [Section 20]

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. The mistake can be of two types shown below:

Let us discuss them one by one:

1. Mistake of Law [Section 21]

Type of Indian Law	Effect
(a) Mistake of Indian Law	The contract is not voidable because everyone is supposed to know the law of his country.
(b) Mistake of Foreign Law	A mistake of foreign law is treated as mistake of fact, i.e. the contract is void if both parties are under a mistake as to a foreign law because on cannot be expected to know the law of other country.

II Mistake of Fact: Mistake of fact can be either bilateral mistake or unilateral mistake.

(a) Bilateral Mistake [Section 20]: The term 'bilateral mistake' means where both the parties to agreement are under a mistake. According to Section 20, "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." Thus, the following three conditions must be satisfied before declaring a contract void under this section:

(i) Both the parties must be under a mistake.

(ii) Mistake must be of fact but not of law.

According to explanation to Section 20, "An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact."

Example - X buys a painting believing it to be worth ₹50000/- while in fact it is worth only ₹5000/-. The contract is not void.

(iii) Mistake must relate to an essential fact.

Example - A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Mumbai. It turns out that, before the date of the bargain, the shop conveying the cargo had been cast away and the goods lost. Neither party was aware of facts. The agreement is void.

Bilateral Mistake as to the Subject Matter: An agreement is void where there is a bilateral mistake as to the subject matter. A bilateral mistake as to the subject matter includes the following:

(i) Mistake as to the existence of subject matter.
(ii) Mistake as to the quantity of subject matter.
(iii) Mistake as to the quality of subject matter.
(iv) Mistake as to the price of subject matter.
(v) Mistake as to the identity of subject matter.
(vi) Mistake as to the title of subject matter.

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Example I - A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain though neither party was aware of the fact. The agreement is void because there is bilateral mistake as to the existence of subject matter.

Example II- A, agrees to buy from B all his horses believing that B has two horses but B actually has three horses. The agreement is void because there is bilateral mistake as to the quantity of subject.

Example III- A agrees to buy a particular horse from B. Both believe it to be a racehorse but it turns to be a carthorse. The agreement is void because there is bilateral mistake as to the quantity of the subject matter.

Example IV-A agrees to buy a particular horse from B who mentioned in his letter the price as ₹1150/- instead of 5150/-. The agreement is void because there is bilateral mistake as to the price of the subject matter.

Example V –A agrees to buy from B a certain horse. B has one racehorse and one carthorse. A thinks that he is buying racehorse but B thinks that he is selling carthorse. The agreement is void because there is bilateral mistake as to the identity of subject matter.

Example VI - A agrees to buy a particular horse from b. A already owns that horse. The agreement is void because there is bilateral mistake as to the title of the subject matter.

Bilateral Mistake as to the Possibility of Performance: The agreement is void where there is a bilateral mistake as to the possibility of performance. In other words, 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.

(b) Unilateral Mistake [Section 22]: The term 'unilateral mistake' means where only one party to the agreement is under a mistake. According to Section 22, "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."

Exceptions: The agreement is void where a unilateral mistake relates to the identity of the person contracted with or as to the nature of contract.

Effects of Mistake

The effects of mistake are as follows:

(a) In case of Bilateral Mistake as to essential fact.	The agreement is void.
(b) In case of Unilateral Mistake (i) As to the identity of the person contracted with (ii) As to the nature of contract **(iii)** As to other matter	The agreement is void. The agreement is void. The agreement is not void.
(c) Obligation of aggrieved party	He must restore any benefit received by him under the contract to the other party from whom the benefit had been received [Section 64].
(d) Obligation of other party	The person to whom money has been paid or anything delivered by mistake must repay or return it. [Section 72]

CIRCUMSTANCES UNDER WHICH THE OBJECT OR CONSIDERATIONS IS DEEMED TO BE UNLAWFUL

The object and the consideration of an agreement must be lawful; otherwise, the agreement is void. According to Section 23 of The Indian Contract Act, 1872, the consideration or the object of an agreement is unlawful in the following cases:

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(a) If it is forbidden by Law: If the object or the consideration of an agreement is the dong of an act, which is forbidden (i.e. prohibited) by the law, the agreement is void. An act is said to be forbidden by law when it is punishable either by the criminal law of the country or by special legislation.}

Example – X granted a loan to the guardian of a minor to enable him to celebrate the minor's marriage. It was held that X could not recover back because agreement is void as its object (i.e. minor's marriage) is illegal. {C. Srinivas v. K. Raj Rama Mohana Rao}

(b) If it Defeats the Provisions of any Law: If the object or the consideration of an agreement is of such nature that, if permitted, it would defeat the provisions of any law, the agreement is void.

(c) If it is Fraudulent: If the object of an agreement is to defraud others, the agreement is void.

Example – A, B and C enter into an Agreement of the division among them of gains acquired, or be acquired, by them by fraud. The agreement is void, as its object is unlawful. If the object of an agreement is to be defraud other, the

Example II – A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(d) If it involves or Implies Injury to a Person or Property of Another: If the object of an agreement is to injure a person or the property of another, the agreement is void.

Example – X promised to pay ₹10,000/- to Y when he agreed to publish a libel (i.e. defamatory article against someone). It was held that Y could not recover the amount because the agreement was void as it involved injury to someone. {Clay v. Yates}

(e) If the Court Regards it as Immoral or Opposed to Public Policy: If the object or consideration is immoral or is opposed to the public policy, the agreement is void.

Example – A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay ₹1000/- to A. The agreement is void, because it is immoral.

Example V – Agreements for past or future cohabitation are void because the consideration, which is immoral at the time when it passes, cannot become legal by passage of time. {S. Yellappa v. Y. Sabu (Bombay High Court)}

ILLEGAL AGREEMENTS

Meaning of Illegal Agreements:

Illegal agreements are those agreements, which are:

(a) The collateral transactions to an illegal agreement also become illegal and hence, cannot be enforced.

(b) No action can be taken for the recovery of money paid or property transferred under an illegal agreement and for the breach of an illegal agreement.

(c) In case of an agreement containing the promise, some part of which is legal and other part illegal, the legal position is as under:

Case	Provision
1. If the illegal part cannot be separated from the legal part.	The whole agreement is altogether illegal.
2. If the illegal part can be separated from the legal part.	The Court will enforce the legal part and Reject the illegal part.

Example – X lent Rs1 lakh to Y to enable him to purchase certain smuggled goods from Z. X cannot recover the amount from Y if he knows the Y's purpose of borrowing.

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VOID AGREEMENTS IF CONSIDERATION OR OBJECTS UNLAWFUL IN PART

According to Section 24, if one of the several considerations or objects of an agreement is unlawful, the agreement is void.

AGREEMENTS OPPOSED TO PUBLIC POLICY

It is not easy to define the term 'Public Policy' with any degree of precision because 'public policy' by its very nature, is highly uncertain and keeps on fluctuating with the passage of time. An agreement, which conflicts with morals of the time and contravenes any, established interest of society might be said to be opposed to public policy. In India, it has been left to Court to hold any contract as unlawful o the ground of being opposed to public policy.

The following agreements have been held to be opposed to public policy:

(a) Agreements of Trading with Enemy: Agreements made with an alien enemy are illegal on the ground of public policy.

(b) Agreement for Stifling Prosecution: An agreement for stifling prosecution is illegal on the ground of public policy.

Example: X, who knows that Y has committed a murder, receives ₹7 lakh from Y in consideration of not exposing Y. This agreement is illegal.

(c) Agreements in the Nature of Maintenance and Champerty: Maintenance is an agreement whereby one party having no interest in suit, agrees to assist another to maintain suit. For example, X promises t pay Y ₹5000/- if Y files a suit against Z. H is a maintenance agreement. Champerty is an agreement whereby one party agrees to assist another in recovering property and in turn is to share in the proceeds of the action.

Example – X, agreed to pay ₹10,000/- to Y to enable him to file a suit for the recovery of his property and Y promised to give him 314 share I the property, if recovered. The agreement was held to be champertous and void. **{Nuthahi Venkataswami v. Katta Nagl}**

Position in England: Both of these agreements are declared illegal and void.

Position in India: All of these agreements are not illegal. The Court will refuse to enforce such agreements if its object is not bonafide or the terms of reward are unreasonable in the opinion of court.

(d) Agreement for the Sale/Transfer of Public Offices and Titles: The agreements for the sale or transfer of public offices or to obtain public titles like Padma Shree are illegal on the ground of public policy.

Example – X promises to pay Y ₹50,000/- if Y secures him an employment in Government Service. This agreement is opposed to public policy.

Agreements in Restraint of Parental Rights: An agreement, which prevents a parent to exercise his right of guardianship, is void on the ground of public policy.

Example – G, a father having two sons, agreed to transfer guardianship in favour of A and also agreed not to revoke the transfer during his life. Subsequently, G filed a suit for the recovery of boys. It was held that he had a right to revoke his authority and get back his children.

(e) Agreement in Restraint of Personal Liberty: An agreement that unduly extracts the personal liberty of any person is void on the ground of public policy.

Example – X borrowed ₹1 lakh from Y on the promise that he would not, without the Y's written permission leave his job, borrow money, dispose of his property or change his residence. It was held that the agreement was illegal on the ground of public policy. **{Harwood v. Miller's Timber and Trading Co.}**

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(f) **Agreement Tending to Create monopoly:** An agreement, which tends to create monopoly, is void on the ground of public policy.

Example – A local body granted a monopoly to X to sell vegetables in a particular locality. This agreement is void on the ground of being opposed to public policy.

(g) **Agreements Interfering with Course of Justice:** An agreement which interferers with course of justice is void on the ground of being opposed to public policy.

(h) **Marriage Brokerage Contracts:** A marriage contract is one whereby one or more persons receive money or money's worth in consideration of marriage.

(i) **Agreement in Restraint of Marriage {Section 26}:** Every agreement is restraint of marriage of any person other than a minor is void.

(j) **Agreement in Restraint of Trade {Section 27}:**Every agreement, by which any one is restraint from exercising a lawful profession trade or business of any kind, is to the extent void.

(k) **Agreement in Restraint of Legal Proceeding {Section 28}:** An agreement which restraints a party absolutely from enforcing his legal rights arising under a contract or an agreement which curtails the period of limitation within which the legal rights may be enforced is void.

VOID AGREEMENTS AND CONTINGENT CONTRACTS

Meaning of Void Agreements

According to Section 2(g) of the Indian Contract Act, 1872, a void agreement is an agreement, which is not enforceable law. The agreements, which are not enforceable by law right from the time when they are made, are void-ab-initio.

The following types of agreements have expressly been declared void under various sections of the Indian Contract Act.

1. Agreements by or with person's incompetent to contract(Section 10 & 11).
2. Agreements entered into through a mutual mistake of fact between the parties (Section 20).
3. Agreement, the object or consideration of which is unlawful (Section 23)
4. Agreement, the consideration or object of which is partly unlawful (Section 24).
5. Agreement 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 29).
9. Wagering agreement (Section 30).
10. Impossible agreements (Section 56).
11. An agreement to enter into an agreement in the future.

Agreements from No 1 to 5 have already been discussed in earlier chapters. The other agreements are discussed this chapter.

AGREEMENTS IN RESTRAINT OF MARRIAGE

According to Section 26 of the Indian Contract Act, every agreement in restraint of the marriage of any person other than a minor is void.

Example I – X promised to marry Y only and none else, and to pay ₹2000/- in default. X married Z and Y sued X for recovery of ₹2000/-. It was held that Y could not recover anything because the agreement was in restraint of marriage. **{Lowe v. Peers}**

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

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Example II - An agreement between two co-widows that if one of them remarried, she should forfeit her right to her share n the deceased husband's property, was not void because no restraint was imposed upon either of the two windows from remarrying.

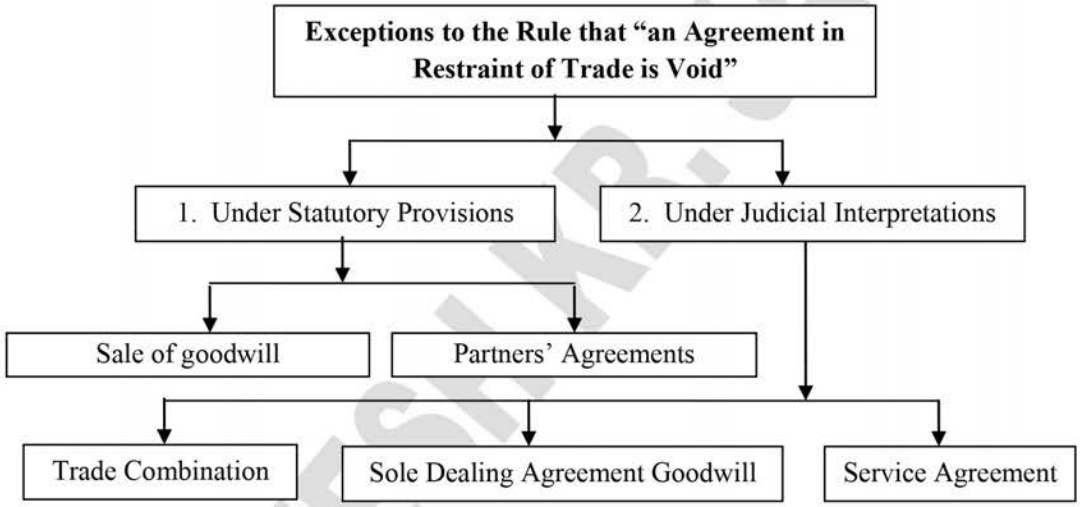
Example III - Nkah Nama (i.e. a marriage agreement in Muslims) which authorizes wife to divorce herself and to claim maintenance from the husband on his marrying a second wife, was not void because no restraint was imposed upon husband from marring a second wife. **{Badu v. Badarannessa}.**

AGREEMENTS IN RESTRAINT OF TRADE

According to Section 27 of Indian Contract Act, 1872, "every agreement y which anyone is restrained from exercising a lawful profession, trade or business of an kind, is to that extent void." This is because Article 19 (9) of the Constitution of Indian 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.

Onus of Proof: Where an agreement is challenged on the ground of its being in restraint of trade, the party supporting the contract must show that the restraint is reasonably necessary to protect his interests, and the party challenging the contract must show that the restraint is injurious to the public.

Let us discuss them one by one:-



Exceptions to the Rule that **"An Agreement in Restraint of Trade is Void."**

I. Exceptions Under Statutory Provisions:

(a) Sale of Goodwill [Exception 1 to Section 27]: An agreement, which restrains the seller of goodwill from carrying on a business, is valid if all the following conditions are fulfilled:

(i) Such restrictions must relate to a similar business.

(ii) Such restriction must be within specified local limits.

(iii) Such restriction must be for the time so long as the buyer or any person deriving title to the goodwill from him carries on a like business in the specified local limits.

(iv) Such specified local limits must be reasonable having regarded to the nature of the business. Thus, the buyer of good will may restrain the seller for carrying on any business similar to the one sold by him within certain vicinity and for a certain period of time provided the restrictions in regard to time and vicinity are found reasonable.

(b) Partners Agreements: The Indian Partnership Act, 1932, recognizes the following agreements in restraint of trade as valid:

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(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 outgoing partner may agree with his partners that he will not carry on any business similar to that of the fir within a specified period or within specified local limits. Such agreement shall be valid only if the restrictions are reasonable.

(iii) **Restriction on partners upon or in anticipation of the dissolution of the firm[Section 54]** - Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within specified period or within specified local limits. Such agreement shall be valid only if the restrictions are reasonable.

(iv) **Restriction in case of sale of goodwill[Section 55(3)]** – a partner ma upon the sale of the goodwill of a firm, make an agreement that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits. Such agreement shall be valid if the restrictions are reasonable.

II. Exceptions Under Judicial Interpretations:

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

Example –: An agreement by two firms to avoid competition is void because it tends to create monopoly and is against the public interest. **{Jai Ram v. Kahna Ram}**

(b) Sole Dealing Agreements: Agreements to deal in the products of a single manufacturer or to sell the whole procedure to a single dealer are valid if their terms are reasonable.

Example –: An agreement by a person to sell all the mica produced by him to the plaintiffs and not to an other firm, and not to keep any in stock, is valid. **{Subha Naidu v. Har Badsha Sahib}**

(c) Service Agreements: A clause in service agreement may or may not be in restraint of trade. An analysis of some of the clauses of service agreement is a sunder:

Clause	Whether held as restraint of Trade
(i) A clause to serve the employer for a stipulated period.	Such agreements if reasonable, do not amount to restraint of trade and hence, are enforceable.
(ii) A clause to prevent the employee from accepting any other engagement during his employment.	Such agreements do not amount to restraint of trade and hence, are enforceable.
(iii) A clause to prevent the employee from accepting a similar engagement after the termination of his services.	
(a) If a restraint is intended only to protect an employer against an employee making use of trade secrets learned by him in the course of his employment.	**(a)** Such agreements do not amount to restraint of trade and hence, are enforceable by law. **Example:** An employee who possesses certain trade secrets, agreed not to carry on the similar business during 5 years after termination of service **{Forster & Sons Ltd. V. Sugget}**
(b) If a restraint is intended to serve any other purpose (say to avoid competition).	**(b)** Such agreements amount to restrain of trade and hence, are not enforceable by law. **Example:** an agreement to restraint a servant from completing for 5 years after the period of service, is void. **{Brahamputra Tea Co., v. E. Scarth}**

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AGREEMENTS IN RESTRAINT OF LEGAL PROCEEDINGS:

According to Section 28, the following two agreements amount to restraint of legal proceedings and are thus void to the extent.

(a) Agreements Restricting Enforcement of Right: 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.

Example: A clause in a contract provided that no action should be brought upon it in case of breach. Such a clause is void because it restricts both parties from enforcing their legal rights.

Note: - where two courts have jurisdiction to try a suit, an agreement between th4e parties that the suit should be filed in one of those courts alone and not in the other in not invalid. **[CO Milton & Co. & v. Ojha Automobile Co.]**

(b) Agreements Limiting the Period of Limitation: 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.

Example: A clause in a contract provides that no action should be brought after two years. Such a clause is void because it limits the period of limitation to two years w3hich is less than the period of limitation (Le: three year) prescribed by the law of limitation.

UNCERTAIN AGREEEMTNS

An uncertain agreement means an agreement the meaning of which is not certain or capable of being made certain. Such agreements are void.

Example: A agrees to sell **B** a hundred ton of **oil**. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

WAGERING AGREEMENTS (SECTION 30)

Meaning of Wagering Agreements

An agreement between two person under which money or money's worth is payable by one person to another on the happening or non-happening of a future uncertain event is called a wagering event. Such agreements are chance or oriented and therefore, completely uncertain.

Essentials of Wagering Agreement

The aforesaid definition highlights the following essentials of wagering agreement:

(a) Promise to pay Money or Money's Worth: The wagering agreement must contain a promise to pay money or money's worth.

(b) Uncertain Event: The performance of the promise must depend upon the determination of an uncertain event. An event is said to be uncertain when it is yet to take place or it might have already happened but the parties are not aware of its result.

(c) Mutual Chances of Gain or Loss: Each party must stand to win or lose upon the determination of an uncertain event. If either of parties may win but cannot lose or may lose but cannot win, it is not a wagering agreement.

(d) Neither Partly to have Control over the Event: neither party should have control over the happening of the event one-way or the other.

(e) No other Interest in the Event: Neither party should have interest in the happening or non-happening of the event other than the sum or stake he will win or loose.

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Example of Wagering Agreements

(a) An agreement to settle the difference between the contract price and market price of certain goods or shares on a particular day.

(b) A lottery (i.e. a game of change), but parties running a Govt. approved lottery cannot be prosecuted.

(c) An agreement to buy a lottery ticket.

(d) A crossword puzzle in which prizes depend upon correspondence of the competitor's solution with previously prepared solution kept with the editor of newspapers is a lottery and hence a wagering transaction **[State of Bombay v. R.M.D. Chamarbaughwala]**. But a crossword puzzle is generally a game of skill and intelligence and hence nor a wager.

Effect of Wagering Agreement (Section 30) The effects of wagering agreements are given as under:

(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 in the State of Maharashtra and Gujarat.

(e) Transactions, which are collateral to wagering agreements, are illegal in the states of Maharashtra and Gujarat.

Example: A Cricket match is to be held between India and Pakistan. **X** agrees to pay ₹1 lakh to **Y** if India wins the match and agrees to deposit the money with **Z** a third person of confidence for this purpose. **X** borrows ₹1 lakh from **W**. The implications of this case are summarized as under:

(a) The agreement between **X** and **Y** is a wagering agreement because the performance of an agreement depends upon the happening or non-happening of a future uncertain event and each party stands to win or loose.

(b) If India wins the match, **Y** (a winner) cannot recover the amount but **X** (a looser) can recover if the amount has not been paid to **Y**. Thus, a winner cannot recover the amount but a looser can if the amount has not been paid to the winner.

(c) If India wins the match and **Z** (a stakeholder) pays the money to **y** (a winner), **X** (a looser) cannot recover it from **Z[Bridger v. Savage].**

DISTICTION BETWEEN CONTRACTS OF INSRANCE AND WAGERING AGREEMENT

The contracts of insurance differs from the wagering agreements in the following respects:

Basis of distinction	Contracts of Insurance	Wagering agreement
1. Insurable Interest	Person having an insurable interest can insure his life or property.	Parties to a wagering agreement need not have insurable interest.
2. Actual amount payable.	In case of contracts of insurance except life insurance, the actual amount payable need not necessarily be the full amount for which the property is insured.	In case of wagering agreements, the actual amount payable is usually fixed.
3. Beneficial/against the public policy.	These are regarded as beneficial to the public policy.	These are considered to be against public policy.
4. Gamble	Such agreements do not tantamount to gambling as they involve the element of investment and protection.	Being chance oriented, these are closer to gambling.

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AGREEMENTS CONTINGENT ON IMPOSSIBLE EVENTS (SEC - 36)

According to Section 36 of the Indian Contract Act, 1872 contingent agreements to do or not to do anything, if an impossible event happens are void whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Example: A agrees to pay ₹1000/- if **B** marries **C** (a Hindu) who is already married to **D**. This agreement is void.

AGREEMENTS TO DO IMPOSSIBLE ACTS (SEC - 56)

According to Section 56 of the Indian Contract Act, 1872, **"An agreement to do an impossible act is void".**

Example: A undertakes to put life into the dead wife of **B**. This agreement is void.

RESTITUTION [SEC – 64 & 65]

Restitution means **'return or restoration of benefit'.** The provisions relating to 'restitution' are given below:

Case	Provision
(a) When a person at whose option a contract is voidable rescinds it [Section – 64].	The party rescinding a voidable contract must restore the benefit to the person from whom he has received it.
(b) When an agreement is discovered to be void or the contract becomes void [Section – 65].	The person who has received any benefit or advantage under such agreement of contract must restore it or compensate for it to the person from whom he has received it.

Example: A, a lady singer contracts with B the manager of a theatre to sing at his theatre for two nights every week during the next two months and B agrees to pay her ₹100 for each night's performance. On the sixth night, A wilfully absents herself form the theatre and B in consequence rescinds the contract, B must pay to A for the five nights on which she has sung.

Non-applicability of the Principle of Restitution

The principle of restitution does not apply to contacts, which are void ab-initio with the exception where the minor has entered into agreement by misrepresenting his age.

Example: X pays ₹1000/- to Y to beat Z. Y does not beat Z. X claims ₹1000/- from Y. X cannot recover anything because this agreement is void ab-initio.

MEANING AND ESSENTIAL FEATURES OF A CONTINGENT CONRACT

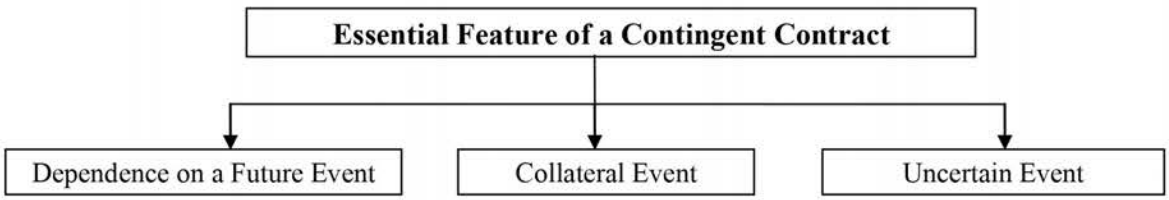
A **'contingent contract'** is a contract to do or not to do something if some event, collateral to such contract, does or does not happen. Insurance contracts provide the best example of contingent contracts.

Example - I: A contracts to pay B ₹10,000/- if B's house is burnt. This is a contingent contract.

Example – II: A promises to pay B ₹1 crore if a certain ship does not return within a year.

Essential Features of a Contingent Contract

The essential features of a Contingent Contract are shown below;



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Let us discuss them one by one.

(a) Dependence on a Future Event: The performance of a contingent contract depends upon the happening or non-happening of some future event.

(b) Collateral Even: The event must be collateral to the contract.

(c) Uncertain Event: The event must be uncertain.

Note: The performance of a contingent contract must depend upon the happening or non-happening of an event and not on the mere will of the promisor. For **Example:-** If A promises to pay to B ₹10,000/- if he so chooses, it is not a contingent contract.

RULES REGARDING CONTINGENT CONTRACTS [SEC – 32 TO 36]

The various rules regarding the enforcement of contingent contract are given below:

Kind of contingent Contract	Rule Regarding Enforcement
1. Contracts contingent upon the happening of an uncertain future event. **(Section – 32)**	Law cannot enforce such contracts unless and until that event has happened. If the vent becomes impossible, such contracts become void. **Example:** A makes a contract with B to buy B's horse if A survives C. Law cannot enforce this contract unless and until C dies in A's lifetime. **Example:** A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contact cannot be enforced by law unless and until C refuses to buy the horse.
2. Contracts contingent upon the non-happening of a certain future event. **(Section-33)**	Such contracts can be enforced when the happening of that event becomes impossible and not before. **Example:** A agrees to pay B a sum of money if a certain ship does not return. This ship is sunk. The contract can be enforced when the ship sinks.
3. Contracts contingent upon the future conduct of a living person **(Section – 34).**	If the uncertain event is the future conduct of a living person, such event shall be considered impossible if that such person does anything by which it becomes impossible to perform the contract within any definite time. **Example:** A agrees to pay to B a sum of money if B marries to C. C marries to D. The marriage of B to C must now be considered impossible, although it is possible that D may dies, and that C may afterwards marry to B.
4. Contracts contingent upon the happening of an uncertain specified event within a fixed time **(Section 35).**	Such contracts become void if before the expiry of fixed time; **(a)** Such event does not happen, or **(b)** Such event becomes impossible. **Example:** A promises to pay to B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and become void if the ship is burnt within the year.

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5.	Contracts contingent upon the non-happening of an uncertain specified event within a fixed time. **(Section – 36).**	Such contracts can be enforced by law if before the expiry of fixed time; **(a)** Such event does not happen, or **(b)** It becomes certain that such event will not happen. **Example:** A promises to pay to B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.
6.	Agreements contingent upon impossible events. (Section – 36)	Such agreements 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.

DISTINCTION BETWEEN A WAGERING AGREEMENT AND A CONTINGENT CONTRACT

A wagering agreement differs upon a contingent contract in the following ways:

Basis of Distinction		Wagering Agreement	Contingent Contract
1.	Reciprocal promises	It consists of reciprocal promises.	It may or may not consist of reciprocal promises.
2.	Void /valid	It is void.	It is void.
3.	Main/Collateral Future Event.	Future event is essential to the contract.	Future event is collateral to the contract.
4.	Nature	It is always of a contingent nature.	It may not be of a wagering nature.
5.	Interest of Parties	Its parties have no other interest in the subject matter of the agreement except wining or losing of wagering amount.	Its parties may have other interest as well.

MEANING OF DISCHARGE OF A CONTRACT

Discharge of a 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 parties under the contract come to an end.

Modes of Discharge of Contract

A contract can be discharged by performance in any of the following ways:

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

(b) By attempted Performance or Tender: So far as the tenderer of performance is concerned, a contract is said to be discharged by attempted performance when the promisor has made an offer of performance to promisee but it has not been accepted by the promisee.

Discharge by Mutual Agreement

Since a contract is created by mutual agreement, it can also be discharged by mutual agreement. A contract can be discharged by mutual agreement in any of the following ways:

(a) Novation (Section – 62): Novation means the substitution of a new contract for the original contract. Such a new contract may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the original contract. Such a new contract may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the original contract.

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Example: A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B no longer exists and a new debt from C to B has been contracted.

(b) Rescission (Section 62) Rescission means cancellation of the contract by any party or all the parties to a contract.

Example: X promises Y to sell and deliver 100 bales of cotton on 1st October at his godown and Y promises t pay for goods on 1st November. X does not supply the goods. Y may rescind the contract.

(c) Alteration (Section 62) Alteration means a change in the terms of a contract with mutual consent of the parties. Alteration discharges the original contract and creates a new contract. However, parties to the new contract must not change.

Example: X promises to sell and deliver 100 bales of cotton on 1st October and Y promises to pay for goods on 1st November. Afterwards, X and Y mutually decide that the goods shall be delivered in five equal instalments at Z's godown.

(d) Remission (Section 63) remission means acceptance by the promisee of a lesser fulfilment of the promise made. According to Section 63, 'Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for which performance, or may accept instead of it any satisfaction which he thinks fit.'

Example: A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(e) Waiver: Waiver means intentional relinquishment of a right under the contract. Thus, it amounts to releasing a person of certain legal obligation under a contract.

Example: A promises to supply goods to Y. Subsequently, Y exempts X from carrying out the promise. This amounts to waiving the right of performance on the part of Y.

Discharge by Operation of Law

A contract may be discharged by operational of law in the following cases.

(a) By Death of the Promisor: A contract involving the personal skill ability of the promisor is discharged o the death of the promisor.

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

(c) By Unauthorised 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 and end.

(d) By the Identity of Promisor and Promisee: When the promisor becomes the promisee, the other parties are discharged.

Example: X draws a bill receivable on Y who accepts the same. X endorses the bill in favour of Z who in turn endorses in favour of Y. Here, Y is both promisor and promisee and hence the other parties are discharged.

Discharge by Impossibility of Performance

The effects of impossibility of the performance of a contract ma be discussed under the following two heads:

(a) Effects of Initial Impossibility

(b) Effects of Supervening Impossibility

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(a) Effects of Initial Impossibility (Section 56 Para's 1 and 3): Initial impossibility means the impossibility existing at the time of making the contract. The effects of initial impossibility are as under;

Case		Effects
1.	Where both the promisor and promisee know about the initial impossibility.	Such agreement is void ab-initio. **Example:** X undertakes to put life into the dead wife of Y. This agreement is void.
2.	Where both the promisor and promisee do not know the initial impossibility.	Such agreement is void on the ground of mutual mistake. **Example:** X agrees to sell his horse to Y. Unknown to both the parties, the horse was dead at the time of making the agreement. This agreement is void.
3.	Where the promisor a lope know about the initial impossibility.	Such promisor must compensate for any loss, which such promsee sustains through the non-performance of the promise.
4.	Where an act becomes unlawful by reason of some even beyond the control of promisor.	The contract to do such an act becomes void when the act becomes unlawful. (Section – 56 Para 2).
5.	Where the promisor alone knows about the impossibility.	Such promisor must compensate the promisee for any loss, which such promisee might have suffered on account of non-performance of the promise. (Section – 56 Para 2).
6.	Where an agreement is discovered to be void or where a contract becomes void.	Any person who has received any benefit under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it. (Section 65). **Example:** X contracts to sign for Y at a concert for ₹1000/-, which is paid in advance. X is too ill to sign. X must refund ₹1000/- to Y.

(b) Effects of Supervening Impossibility (Sec –56 Para 2): Supervening impossibility means impossibility which does not exists at the time of making the contract but which arises subsequently after formation of the contract. The effects of supervening impossibility are as under:

Case	Effect
1. Where an act becomes impossible after the contract is made.	The contract to do such an act becomes void when the act becomes impossible. (Section – 56 Para 2).

Cases when a Contract is discharged on the Ground of Supervening Impossibility:

A contract is discharged by supervening impossibility in the following cases:

(a) Destruction of Subject Matter: The contract is discharged if the subject matter of the contract is destroyed after the formation of the contract without any fault of either party.

Example: X agreed to sell his cop of wheat. The entire crop was destroyed by fire though no fault of the party. The contract was discharged.

(b) 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.

Example: X agreed to sign on a specified day. X fell seriously ill and could not perform on that day. The contract was discharged.

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(c) **Declaration of War:** The pending contracts at the time of declaration of war are either suspended or declared as void.

Example: X contracts to take in cargo for Y at a foreign port. X's government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared.

(d) **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.

Example: X agreed to sell his land to Y. After the formation of the contract the Government issued a notification and qcqui8red the land. The contract was discharged. **{Shyam Sunder v. Durga}.**

(e) **Non-Existence or Non-Occurrence of a Particular State of Things Necessary for Performance:** The contract is discharged if that particular state of thing, which forms the basis of a contract, ceases to exist or occur.

Example: The contract is discharged if that particular state of thing, which forms the basis of a contract, ceases to exist or occur.

Cases when the Contract is not discharged on the Ground of supervening Impossibility: Impossibility of performance is, as a rule, not an excuse for non-performance. It means that when a person has promised to do something, he must perform his promise unless the performance becomes absolutely impossible. A contract is not discharged by the supervening impossibility in the following cases:

(a) **Difficulty of Performance:** A contract is not discharged simply on the ground that its performance has become more difficult, more expensive or less profitable than that agreed at the time of its formation.

Example: X agreed to supply coal within a specified time. He failed to supply in time because of government's restriction on the transport of coal from collieries. Here X will not be discharged because the coal was available in the open market from where X could have obtained.

(b) **Commercial Impossibility:** A contract is not discharged simply on the ground of commercial impossibility, i.e. when the contract becomes commercially unviable or unprofitable.

Example: X, a furniture manufacturer agreed to supply certain furniture to Y at an agreed rate. Afterwards, there is sharp increase in the rates of the timber and rates of wages. Since, it was no longer profitable to supply at the agreed rate, X did not supply. X will not be discharged on the ground of commercial impossibility.

(c) **Default of a Third Party:** A contract is not discharged if it could not be performed because of the default of third party on whose work the promisor relied.

Example: X entered into a contract with Y for the sale of goods to be manufactured by Z, a manufacturer of those goods. Z did not manufacture those goods. X will not be discharged and will be liable to Y for damages.

(d) **Strikes, Lockouts and Civil Disturbances:** A contract is not discharged on the grounds of strikes, lockouts and civil disturbances unless otherwise agreed by the parties to the contract.

Example: X agreed to supply to Y certain goods to be imported from Algeria. The goods could not be imported due to riots n that country. It was held that his was no excuse for non-performance of the contract. **[Jacobs v. Credit Lyonnais].**

(e) **Partial Impossibility:** A contract is not discharged simply on the ground of impossibility of some of the objects of the contract.

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Example: X agreed to let a boat to H **(i)** to w the naval review at the coronation of king and **(ii)** to cruise round the fleet. Due to illness of the king, the naval review was cancelled but the fleet was assembled and the boat could have been used to cruise round the fleet. It was held that the contract was not discharged.

Discharge by Lapse of Time

A contract is discharged if it is not performed or enforced within a specified period, called period of limitation. The Limitation Act, 1963 has prescribed the different periods for different contracts, e.g. period of limitation for exercising right to recover a debt is 3 ears, and to recover an immovable property is 12 years. The contractual parties cannot exercise their right after the expiry of period of limitation.

Example: On 1st July 2011 X sold goods to Y for ₹1 lakh and Y has made no payment till Aug 2014. State of legal position as on 1st Aug 2014 **(a)** if no credit period was allowed **(b)** if 2 months credit period was allowed.

Solution:

Case (a) The contract is discharged by lapse of time (i.e. 3 years) from 1st July 2011 because the debt has become time barred and hence X cannot exercise his right to recover this debt.

Case (b) The contract is not discharged by lapse of time because the period of limitation is year to expire on 31st Aug 2014 (i.e.3 year from the expiry of the credit period).

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. A breach of contract may occur in two ways.(refer to next chapter)

BREACH OF CONTRACT

MEANING OF BREACH OF CONTRACT

A breach of contract occurs if any party refuses or fails to perform his art of contract or h his act makes it impossible to perform his obligation under the contract. In case of breach, the aggrieved party (i.e. the party not at fault) is relieved from performing his obligation and gets a right to proceed against the party at fault. A breach of contact may arise in two ways: - **(a)** Anticipatory breach and **(b)**Actual breach.

ANTICIPATORY BREACH OF CONTRACT

Meaning of Anticipatory Breach of Contract (Sec – 39)

Anticipatory breach occurs when the party declares his intention of not performing the contract before the performance is due. Thus, when a party refuses to perform a contract eve before it is due for performance, it is called anticipatory breach.

Modes of Declaring an Intention not performing the Contract (Section - 39)

A party may declare his intention of not performing the contract in the following ways:

(a) When a party to a contract has refused to perform his promise.

Example: X, a farmer agrees to sell to Y his entire crop of 10 tons of wheat @ ₹8000/- per ton to be delivered on 20th October. On 1st October, X informs Y that he is not going to supply the goods. X has committed anticipatory breach of contract b express repudiation.

(b) When a party to a contract has disabled himself from performing his promise in it, entirely.

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Example: X, a farmer agrees to sell t Y his entire crop of 10 tones of wheat @ ₹8000/- per ton to be delivered on 20th October. On 1st October, X sold his entire crop to Z @ 10000/- per ton. X has committed anticipatory breach of contract by implied repudiation.

Options Available to Aggrieved Party (Section – 39)

In case of anticipatory breach, the aggrieve party has the following two options:

(a) He can rescind the contract and claim damages for breach of contract with out waiting until the due date for performance, or

(b) He may treat the contract as operative and wait till the due date for performance and claim damages if the promise still remains unperformed.

Consequences of Treating Contract as Operative

In case of anticipatory breach, if the aggrieved party treats the contract as operative and waits till the due date for performance, the consequences will be as follows:

(a) The promisor ma performs his promisor or before the due date of performance and the promisee will be bound to accept the performance.

(b) The promisor may take advantage of the discharge by supervening impossibility arising between the date of breach and the due date of the performance and in such a case, the promisee shall lose his right to sue for damages.

Example: X, a farmer agreed to sell to Y his entire crop of wheat @ ₹8000/- per ton to be delivered on 20th October. On 1st October, X informed Y that he was not gong to supply the goods. Y decided not to rescind the contract on 1st October and to wait till 20th October. On 19th October, the entire crop was destroyed by fire without the fault of either party. Since the contract had become void on the ground of impossibility of performance, Y had lost his right to sue X for damages.

Amount of Damages

The amount of damages in each of the options exercised by an aggrieved party will be calculated as under

Option Exercised	Amount of Damages
I. When the aggrieved party rescinds the contract at the date of breach.	The amount of damages will be equal to the difference between the price prevailing on the date of breach and the contract price.
II. When the aggrieved party does not rescind the contract at the date of breach.	The amount of damages will be 3equal to the difference between the price prevailing on the due date of performance and the contract price.

Example: X, a farmer, agreed to sell t Y his entire crop of 10 tons of wheat @ ₹8000/- per ton to be delivered on 20th October. On 1st October X informed Y that he was not going to supply the goods. Calculate the amount of damages, which could be recovered by Y from X **(a)** If Y rescinded the contract on 1st October when the market price of wheat was ₹10000/- per ton, **(b)** If Y did not rescind the contract on 1st October and waited till 20th October when the market price of wheat was ₹12000/- per ton.

Solution:

Case	A Market price Per ton	B Contract price per ton	C = (A-B) Difference per ton	D Quantity in tons	E = (C*D) Amount of
1. If Y rescinded the Contract.	₹10000/-	₹8000/-	₹2000/-	**10**	₹20000/-
2. If Y did not rescinded the Contract.	₹12000/-	₹8000/-	₹4000/-	**10**	₹40000/-

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ACTUAL BREACH OF CONTRACT

Meaning of Actual Breach of Contract

Actual breach of contract may take place in any of the following two ways:

(a) On Due Date of Performance: If any party to contract refuses or fails to perform his part of the contract at the time fixed for performance, it is called an actual breach of contract on due date of performance.

Example: X agreed to sell to Y 10 tons of wheat @ ₹8000/- per ton to be delivered in two equal instalments on 20th October and 21st October. On 20th October, x refused to deliver the goods. It is an actual breach of contract on due date of performance.

(b) During the Course of Performance: If any arty has performed a part of the contract and then refuses or fails to perform the remaining part of the contract, it is called breach of contract during the course of performance.

Example: X agreed to sell to Y 10 tons of wheat @ ₹8000/- per ton t be delivered in two equal instalments on 20th October and 21st October.

On 20th October, X delivered 5 tons and refused to deliver remaining 5 tons. It is an actual breach of contract during the course of performance.

Consequences of Actual Breach (Section – 55)

The consequences of actual breach depend upon whether the time was the essence of the contract or not. The consequences I both the cases may be summarised as under:

Case	**Where time is the essence of a contract.**	**Where time is not the essence of a contract**
I. Whether the contract becomes voidable at the option of the promisee?	**Yes**	**No**
II. Whether the promsee is entitled to claim compensation for any loss occasioned to him by the non-performance of the promise at the stipulated time?	**Yes**	**Yes**
(i) Where performance beyond the stipulated time is not accepted.		
(ii) Where performance beyond the stipulated time is accepted.	No Unless the promsee gives notice to the promisor of his intention to do so.	No Unless the promisee give notice to the promisor of his intention to do so.

Example: X, a singer, enters into a contact with Y, the manager of a theatre, to sign at his theatre two nights in every week for the next two months. Y agrees to pay her ₹100/- for each performance. On the sixth night, X wilfully absents herself from the theatre. In this case, Y has the following two potions:

(a) Y may rescind the contract and claim compensation for the loss occasioned to him by Xs failure to sing on the sixth night.

(b) Y may permit X to sing on the seventh night and claim compensation for loss from X by giving a notice to X of his intention to do so.

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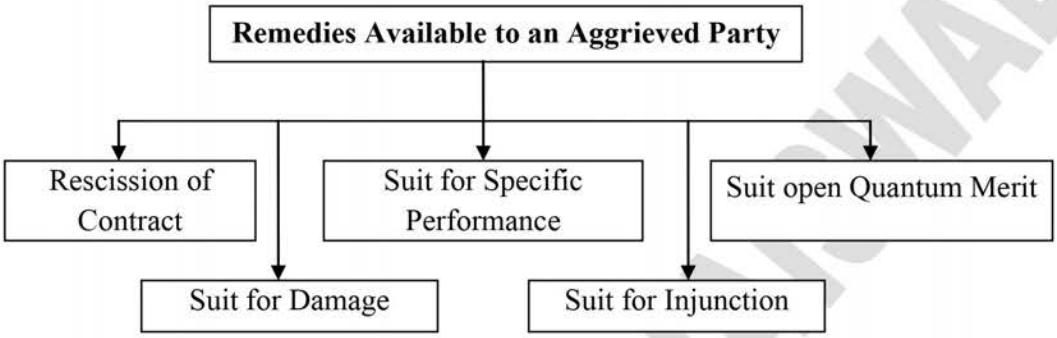
REMEDIES FOR BREACH OF CONTRACT

Meaning of Remedy

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.

Remedies for Breach of Contract

The various remedies available to an aggrieved party are as shown below in the figure:



Let us discuss them one by one:

1. **Rescission if contract (Section – 39):** In case of breach of a contract, the promise may put an end to the contract. In such a case, the aggrieved party is discharged from all the obligations under the contract and is entitled to claim compensation for the damage, which he has sustained because of the non-performance of the contract.

   Example: X agrees to supply 10 tons of wheat to Y on 20th October. Y promises to pay for the goods on its receipt. X does not supply the goods on the due date. Here, Y is discharged from the liability of paying the price. Y is entitled to rescind the contract and to claim compensation for the damage, which he has sustained because of non-supply of goods on the due date.

2. **Suit for Damages:** damages are monetary compensation allowed for loss suffered by the aggrieved party due to breach of a 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.The types of Damages as follows

   (a) Ordinary Damages: Ordinary damages are those, which naturally arise, in the usual course of things from such breach. These damages can be recovered if the following two conditions are fulfilled:

   (i) The aggrieved party must suffer by breach of contract, and

   (ii) The damages must be proximate (i.e. direct) consequences ofthe breach of contract and no the indirect consequences.

   Measures of Ordinary Damages: In a contact 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.

   Example: On 1st December, X contracted to sell and deliver 50 tons of wheat @ Rs,8000/- per ton to Y on 1st January. On 20th December Y, afterwards, contracted to sell those goods to Z at ₹10000/- per tons. X failed to deliver goods on 1st January when the price of the wheat was ₹9500/- per ton. Y is entitled to recover ₹75000/- [Le (₹9500 – ₹8000) x 50]. Y is not entitled to recover ₹1,00,000/- as profit which would have arisen to Y from the sale to Z because the profit is the indirect consequences of the breach of contract.

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(b) Special Damages: Special damages are those, which may reasonably be supposed to have been in the contemplation of both parties as the probable result of the breach of contract. These damages can be recovered if the special circumstances, which would result in a special loss in case of breach of a contract, are communicated to the promisor, e.g. loss of profit on account of default by the other party to the contract can be claimed only when an advance notice of such damages has been given before.

Example: A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contract to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January it falls down, and has to re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to made compensation to C for the breach of his contact. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(c) Exemplary or Punitive or Vindictive Damages: Exemplary damages are those, which are in the nature of punishment. The court may award these damages in case of **(i)** a breach of promise to marry, where damages shall be calculated on the basis of mental injury sustained by the aggrieved party, and **(ii)** Wrongful dishonour of a cheque by a banker. In case of wrongful dishonour of a cheque, the rule is smaller the amount of the cheque, larger will be the amount of damages awarded. A trader may recover such damages as wrongful dishonour of cheque shall adversely affect his goodwill but a non-trader whose cheque is wrongfully dishonoured will have to prove the losses of goodwill before claiming such damages.

(d) Nominal Damages: Nominal damages are those, which are awarded where there is only a technical violation of a legal right but the aggrieved party has not in fact suffered any loss because of breach of contract. These damages are called nominal because they are very small, say, one rupee. The court may or may not award these nominal damages.

(e) Damages for Inconvenience and Discomfort: If a party have suffered physical inconvenience and discomfort due to breach of contract, that party can recover the damages for such inconvenience and discomfort.

Example: H with his wife and children booked a ticket for a midnight train, to be transported to a particular place where he lived. They were, however, transported to a wrong place and they had to walk several miles on a drizzling night and as a result, his wife caught cold and he had to incur some medical expenses. It was held that he could recover compensation for inconvenience and not for medical expenses for the sickness of his wife because it was very remote consequence.

(f) Liquidated Damages and Penalty: When the parties to a contract at the time for formation of contract, specify a sum which will become payable by the party responsible for breach, such specified sum is called:

(i) Liquidated Damages: If the specified sum represents a fair and genuine pre estimate of the damages likely to result due to breach;

(ii) Penalty: If the specified sum is disproportionate to the damages likely to result due to breach.

In India, there is no distinction between penalty and liquidated damages. The Courts in India allow only reasonable compensation not exceeding the specified sum **(Section – 74).But** under English law, liquidated damages are enforceable and not penalty.

(g) Forfeiture of Security deposit (or Earnest Money): A clause in a contract, which provides for forfeiture of security deposit in the event of failure to perform is in the nature of a penalty. In such cases, the court may award reasonable compensation only.

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3. **Suit for Specific Performance:** Suit for specific performance means demanding the court's direction to the defaulting party to carry out the promise according to the terms of the contract.

   Example: X agreed to sell an old painting to Y for ₹50000/-. Subsequently, X refused to sell the painting. Here, Y may file a suit against X for the specific performance of the contract.

   Cases where suit for specific performance is not maintainable.
   - Where the damages are considered as an adequate remedy.
   - Where the contract is of personal nature, e.g. contract to marry.
   - Where a company beyond its powers makes the contract as lay down in its Memorandum of Association.
   - Where the court cannot supervise the performance of the contract.
   - Where one of the parties is a minor.
   - Where the contract is inequitable to either party.

4. **Suit for Injunction:** suit for injunction means demanding court's stay order. Injunction means an order of the court, which prohibits a person to do a particular act. Where a party to a contract does something, which he promised not to do, the court may issue an order prohibiting hi from doing so.

   Example: W agreed to sing at L's theatre only during the contract period. During the contract period, W made contact with Z to sing at another theatre and refused to perform the contract with L. It was held that W could be restrained by injunction from singing from Z **[Lumely v. Wagner].**

5. **Suit for Quantum Merit:** quantum Merit means a s much as is earned. Right to Quantum Merit means a right to claim the compensation for the work already done.

   Example: C an owner of a magazine engaged P to write a book to be published by instalments in his magazine. After a few instalments were published, the publication of the magazine was stopped. It was held that P could claim payment for the part already published **[Planche v. Calbum].**

Contracts of Indemnity & Guarantee

Contracts of Indemnity

- **Meaning and Definition**

  The term **'indemnity'** means to **make good** the loss suffered by a **party**. <u>According to sec.124</u>

  "**A contract** by which one party promises to **save** the other from **loss** caused to him **by** the conduct of the Promissory himself **or** by the conduct of any **other** person, is **called** a contract of indemnity." The **person**who promises to **compensate** for the loss is called the "**indemnifier" and** the person **to whom** this promise is made or whose loss is to be made good is known as **"indemnity-holder" or "indemnified".**

  Example:' A' contracts to indemnify 'B' against the consequences of any proceedings which 'C' may take against 'B' in respect of a certain sum of money. This is a contract of indemnity.

  <u>ESSENTIALS OF VALID CONTRACT OF INDEMNITY</u>

  Under a contract of indemnity, **loss to promisee** is essential.

  The law relating to indemnity is **not exhaustive** and hence Courts **in India** shall **follow the English Law** in this regard. In English Law, indemnity is **defined** as a "promise to save another harmless from the loss caused as a result of a transaction entered into at the instance of the Promisor". Thus, the contract of **indemnity** must **specify** that indemnity holder shall be protected from the **losscaused due to:**

  1. Action of the **promissory** himself. Or
  2. The action of any **other person**.or

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3. **Any event** or accident which is **not** in the control of the parties.

A contract of **indemnity** like any other contract may be **express or implied.**

In a contract of indemnity, all the **essentials of a valid contract** must be present. Thus, if the object or consideration of an indemnity agreement is unlawful, it cannot be enforced.

Example

'A' asks 'B' to beat 'C' promising to indemnify him against the consequences. The promise of 'A' cannot be enforced. Suppose 'B' beats 'C' and is fined ₹1000, 'B' cannot claim this amount from 'A' because the object of the agreement is unlawful.

- **Rights of Indemnity-holder**

As per Section 125 of the Indian Contract Act, the indemnity-holder is entitled to recover from the Promisor:

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

All costs of suit which he has paid in bringing or defending the suit provided: (a) he acted under the authority of the indemnifier and; **(b)** he acted in such away as a prudent man would act in his own case.

All sums, which he may have paid under the terms of any compromise of any, such suit, if which it would have been prudent for the promisee to make.

- **Rights of Indemnifier**

The Act makes no mention of the rights of am indemnifier. It has been held in Jaswant Singh v. Section of State that his rights, in such cases, are similar to the fights of a surety under Section 141, viz., he becomes entitled to the benefits of all the securities which the creditor has against the principal debtor whether he was aware of them or not.

- **Commencement of Indemnifier's Liability**

An important question with respect to contracts of indemnity is as to when does the indemnifier become liable to pay, or, when is the indemnity-holder entitled to recover on his indemnity? The indemnity-holder is entitled to above-mentioned rights as soon as his liability has become certain although he has himself paid nothing. Indemnity is not necessarily repayment after payment. Indemnity-holder has incurred an absolute liability, he is entitled to ask the indemnifier to save him from that liability and pay it off. In simple words, the liability of indemnifier commences as soon as the liability of the indemnity-holder becomes absolute.

CONTRACTS OF GUARANTEE

- **Meaning and Definition**

According to Section 126 of the Indian Contract Act, 'A contract of guarantee's a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called 'the principal debtor'; and the person to whom the guarantee is given is called 'the creditor'.

Example

When 'A' requests 'B' to lend ₹10, 000 to 'C' and guarantees that 'C' will repay the amount within the agreed time and that on 'C' failing to do so, he will himself pay to 'B', there is a contract of guarantee.

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In the above example, 'B' is the creditor, 'C 'the principal debtor and 'A', the surety or guarantor.

In India a contract of guarantee may dither be oral or in writing, but under English Law it must be in writing.

From the above definition, it is clear that in a contract of guarantee there are, in effect, three contracts, a principal contract between the principal debtor and the creditor, and a secondary contract between the creditor and the surety.

Then, there is a third implied contract between the surety and the principal debtor where by principal debtor is under an obligation to indemnify the surety; if the surety is made to pay or perform.

- **Essential Features of Guarantee**

Following are the requisites of a valid guarantee:

- **Existence of a debt**

The purpose of a guarantee being to secure a debt, the existence of a recoverable debt is necessary. It is of the essence of a guarantee that there should be someone liable as a principal debtor and the surety undertakes to be liable on his default. If there is no valid existing debt, there can be no valid guarantee.

Example

'A' gives the guarantee to 'B' for the payment of a time-barred debt due from 'C'. This is not a valid contract of guarantee because the primary liability between 'B' and 'C' is not enforceable by law. In case 'A' pays the amount, he cannot recover it from 'C'.

- **Consideration [Section 127]**

Like every other contract, a contract of guarantee should also be supported by some consideration. But there need not be direct consideration between the surety and the creditor. Section 127 clearly says that anything don, or any promise made, for the benefit of a principal debtor, may be sufficient consideration to the surety for giving the guarantee.

Examples

'B' requests 'A' to sell and deliver to him goods on credit. 'A' agrees to do so provided 'C' will guarantee the payment of the price of the goods. 'C' guarantees the payment in consideration of 'A' s promises to delicate goods. This is a sufficient consideration for 'C's promise.

'A' sells and delivers goods to 'B'. 'C' afterwards requests 'A' not to sue 'B' for the debt for a year, and premises that if he does so, 'C' will pay in default of payment by 'B'. 'A' agrees not to sue as requested. This is a sufficient consideration for 'C' s promise.

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

- There should be no misrepresentation or concealment [Section 142-143]

A contract of guarantee is not a contract " uberrimae fidei" (requiring utmost good faith). Nevertheless, the suretyship relation is one of trust and confidence, and the validity of the contract depends upon good faith on the part of the creditor. A creditor must disclose all those facts, which, under the circumstances, the surety would expect not to exist. So where guarantee is given for goods conduct of an employee, will discharge the surety.

Example

'A' employs 'B' as clerk to collect money for him. 'B' fails to account for some of his receipts, and 'A' in consequence, calls upon him ('B') to furnish security for his duly accounting. 'C' gives the guarantee for 'B' s duly accounting. 'A' did not inform 'c' about 'B' s previous conduct. 'B', afterwards, makes default. Here the guarantee given by 'C' is invalid because it was obtained by concealment of facts by 'A'

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- **Writing not necessary [Section 126]**

  Section 126 expressly declares that a guarantee may be either oral or written. However, in England under the provisions of Section 4 of the Statute of frauds, a guarantee is not enforceable unless it is "in writing and signed by the party to be charged".

- **Distinction between Contract of Indemnity and Contract of Guarantee**

  L.C. Mather in his book "Securities Acceptable to the Lending Banker" has very briefly, but excellently, brought out the distinction between indemnity and guarantee by the following illustration. A contract in which 'A' says to 'B', 'If you lend ₹ 20,000 to 'C', I will see that your money comes back is an indemnity. On the other hand, an undertaking in these words, 'If you lend ₹ 20,000 to 'C', and he does not pay you, I will' is a guarantee.

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

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

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

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

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

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

- Extent of Surety's Liability (Section 128)

  Unless the contract provides otherwise, in liability of the surety is co-extensive with that of the principal debtor (Section 128). In other words, the surety is liable for all those amounts; the principal debtor is liable for.

  Example

  'A' guarantees to 'B' the payment of a bill of exchange by 'C', the acceptor. 'C' dishonors the bill. 'A' is liable not only for the amount of the bill but also for any interest and charges which may have become due thereon.

  The liability of a surety is called as secondary or contingent, as his liability arises only on default by the principal debtor. But as soon as the principal debtor defaults, the liability of the surety will be liable for all those sums for which the principal debtor is liable. The creditor may file a suit against the surety without suing the principal debtor. Further, where the creditor holds securities from the principal debtor for his debt, the creditor need first exhaust his remedies against the securities before suing the surety, unless the contract specifically so provides.

  The creditor is even not bound to give notice of the default to the surety, unless it is expressly provided for.

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- **Condition precedent to Liability**

  Where there is a condition precedent to the surety's liability, he will not be liable unless that condition is first fulfilled.

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

- **Surety's right to limit his liability**

  The above principal, viz., the liability of surety is co-extensive with that of principal debtor, applies only where the surety undertakes to be liable for the whole debt. But it is open to him to place a limit upon his liability. He may expressly declare his guarantee to be limited to a fixed amount, for example that "my liability under this guarantee shall not at any time exceed the sum of ₹ 5 laces. In such a case, wherever may be due against the principal debtor, the liability of the surety cannot go beyond the sum so specified.

- **Position of Surety in case of a Minor Principal Debtor**

  According to the decision of the Bombay High Court in Kashiba v.Shripat (1927) the surety can be held liable, though a minor debtor is not liable. But, the later decisions of the Bombay High Court have taken a contrary view. In Manju Mahadeo v. Shivappa Manju and in Pestonji Mody v. Meherbai, it was held that as, under Section 128, the liability of the surety is co-extensive with that of the principal debtor; it can be no more than that of the principal debtor. The surety, therefore, cannot be held liable on a guarantee given for the default by a minor. If a minor cannot be held liable for any amount, the liability of the guarantor being secondary liability does not arise at all. The same view was endorsed by the Madras High Court in the case of E. Nambiar v. Moolaki Raman (1957). It was held that unless the contract otherwise provides, a guarantor for a minor cannot be held liable.

- **Surety a Favoured Debtor**

  Surety has always been considered a 'Favoured Debtor'. Surety is liable only when principal debtor does not pay, i.e., liability is of secondary nature, the primary liability that of the principal debtor. Surety is considered with favour both in law and equally. This fact is brought out by the following provisions contained in law of indemnity and guarantee.

  Surety is liable only for the unpaid balance.

  Surety is not liable for fruitless litigation that the creditor may bring against the principal debtor the creditor has given a sufficient notice to this effect to the surety.

  Surety is not bound by admissions and acknowledgements made by the principal debtor before the creditor nor is he liable for judgements obtained against the principal debtor.

  The surety will not be liable where the creditor has obtained guarantee by misrepresenting a material fact relating to the contract or by keeping silent as to material circumstances, e.g., obtaining a guarantee for the good conduct of an employee without disclosing to the surety his previous dishonestly.

  The liability of a surety can in no case be more than that of the principal debtor. It may however, be restricted by a special term to that effect.

- **Kinds of Guarantees**

  Contract of guarantee may be classified into two types: (i) Specific guarantee; and (ii) Continuing guarantee.

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- **Specific Guarantee**

  When a guarantee is given in respect or a single debt or specific transaction and is to come to an end when the guaranteed debt is paid or the promise is duly performed, it is called a specific guarantee. A specific guarantee, once given, cannot be revoked. Even the death of the surety will not result in revocation of specific guarantee and the legal successor shall continue to remain liable, lf corse, up to the net value of the assets inherited by him.

- **Continuing Guarantee (Section 129)**

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

  Examples

  'A', in consideration that 'B' will employ 'C' in collecting the rents of 'B' s zamindari, promises 'B' to be responsible, to the amount of ₹5,000, for the due collection and payment to 'B' of those rents. This is a continuing guarantee/

  'A' guarantees payment to 'B', a tea-dealer, to the amount of ₹ 50,000, for any tea he may from time to time supply to 'C'. 'B' supplies 'C' with tea to the value of ₹ 50,000, and 'C' pays 'B' for it. Afterwards, 'B' supplies 'C' with tea to the value of ₹ 1,00,000. 'C' fails to pay. The guarantee given by 'A' was a continuing guarantee, and he is accordingly liable to 'B' to the extent of ₹50,000.

- **Revocation of continuing guarantee [Section 130]**

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

  Examples

  'A', in consideration of 'B' s discounting bills of exchange for 'C', guarantees to 'B', for twelve months, the due payment of all such bills to the extent of ₹ 50,000. 'B' discounts bills for 'C' to the extent of ₹ 20,000. Afterwards at the end of three months, 'A' revokes the guarantee. This revocation discharges 'A' from all liability to 'B' for any subsequent discount. But 'A' is liable to 'B' for ₹ 20,000, on default of 'C'.

  'A' guarantees to 'B', to the except of ₹ 10,000, that 'C' shall pay all the bills that 'B' shall draw upon 'C' a bill for ₹10, 000, 'C' accepts the bill. 'A' gives notice of revocation, 'C' dishonors the bill at maturity, 'A' is liable upon his guarantee.

- **Joint Debtor and Suretyship**

  Where two persons contract with third person to undertake a certain liability, and also contract with each other that one of them be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the e second the third person under the first contract is not affected by the existence of the second contract (amongst themselves), although such third person may have been aware of its existence (Section 132).

  Example

  'A' and 'B' make a joint and several promissory note to 'C'. 'A' makes it, in fact, as surety for 'B'. 'C' knows this at time when the note is made. The fact that 'A', to the knowledge of 'C', made the note as surety for 'B', is no answer, to a suit by 'C' against 'A' upon the note.

- **Guarantee When Invalid**

  A guarantee shall be invalid in the following cases:

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Guarantee obtained by misrepresentation (Section 142): Any guarantee which has bee n obtained by mains of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by concealment (Section 143): Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance, is invalid.

Example

'A' guarantees to 'C' payment for iron to be supplied by him to 'B' to the amount of 2,000 tonnes. 'B' and 'C' have privately agreed that 'B' should pay five rupees per ton beyond the market price, such excess to be applied in liquidation for an old debt. This agreement is concealed from 'A'. 'A' is not liable as a surety.

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

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

- **Rights of a Surety**

Rights of a surety may be classified under three heads:

Rights against the creditor,

Rights against the principal debtor, and

Rights against co-sureties.

- **Rights against the Principal debtor**

The surety has the following two rights against the principal debtor:

Right of subrogation: Section 140 lays down that Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the fights which the creditor had against the principal debtor. This right of the surety is called 'subrogation'. It means that on payment of the guaranteed debt, or performance of the guaranteed duty, the surety steps into the shoes of the creditor.

- **Right of Indemnity:** Section 145 of the Act vest in the surety another right i.e., right of indemnity. It every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. The surety is, however, not entitled to claim any sums, which he has paid wrongfully.

Example

'B' is indebted to 'C', and 'A' is surety for the debt. 'C' demands payment from 'A' and, on his refusal, sues him for the amount, 'A' defends the suit, having reasonable grounds for doing so, bur he is compelled to pay the amount of the debt with costs. He cam recover from 'B' the amount paid by him for costs, as well as the principal debt.

- **Rights against the Creditor**

Against the creditor, surety has the following three rights:

- **Rights to securities:** When the surety has paid off the liabilities of principal debtor to the creditor, he becomes entitled to claim all the securities which were given by the principal debtor to the creditor at the time when the contract of suretyship was entered into (Section 141). It is immaterial whether the surety has knowledge of those securities or not. 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.

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Examples

'C' advances to 'b', his tenant, ₹ 50,000 on the guarantee of 'A'. 'C' has also further security for the ₹ 50,000 by a mortgage of 'B' s furniture. 'C', cancels the mortgage 'B' becomes insolvent and 'C' sues 'A' on his guarantee. 'A' is discharged from liability to the amount of the value of the furniture.

'A', as surety for 'B', makes a bond jointly with 'B' to 'C', to secure a loan from 'C' to 'B'. Afterwards, 'C' obtains from 'B' a further security for the same debt. Subsequently, 'C' gives up the further security. 'A' is not discharged.

- **Right to set off:** When the creditor sues the surety for payment of principal debtor's liabilities, the surety can claim ser off, or counter claim, if any, which the principal debtor had against the creditor.
- **Right to seek dismissal of employee in case of fidelity Guarantee:** In case of fidelity guaranteed, the surety can direct creditor to dismiss the employee whose honesty he has guaranteed, in the event of proved dishonesty of the employee. The creditor's failure to do so will exonerate the surety from his liability.
- **Right to file Quia timet action:** At any time before the guaranteed debt has become due and before the surety is called upon to pay the amount he has guaranteed, he has the right to file a "Quia timet action" against the debtor. However, in such a case, the surety must undertake to indemnity the creditor for the risk, delay and expense, which he may incur in doing so.
- **Rights against co-sureties**

In case of joint guarantee, unless otherwise agreed, liability of co-sureties is joint as well as several. A co-surety has following right of contribution from the other sureties:

- **Right of Contribution**

Section 146 provides for a right of contribution between co-sureties is joint as well as several. A co-surety has following rights against other co-sureties:

Examples

'A', 'B' and 'C' who are sureties to 'D', enter into three several bonds, each in a different penalty, namely, 'A' in the penalty of ₹ 10,000. 'B' in that of Rs 20,000.

If one of the sureties becomes insolvent, the solvent co-sureties shall have to contribute the whole amount equally.

- **Liability of co-sureties who have guaranteed different sums (Section 147):** Co-sureties who have guaranteed different sums are bound under Section 147 to contribute equally, subject to the limit fixed by their guarantee, and not proportionately to the liability undertaken.

Examples

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

In the above example, if 'D' makes default to the extent of ₹ 40,000, 'A' shall be liable to pay rs. 10,000 (the maximum amount guaranteed by him), and 'B' and 'C' ₹15, 000 each.

- **Discharge of Surety**

A surety is discharge from liability on a guarantee under the following circumstances:

- by revocation from liability on a guarantee,
- by the conduct of the creditor, or
- by the invalidation of the contract of guarantee.

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- **By Revocation of the Contract of guarantee**

  Notice by Surety (Section 130): The liability of a surety under a contract of guarantee may at any time be revoked by the surety, as to the future transactions, by notice to the creditor.

  Example

  'A', in consideration of 'B' s discounting, at 'A' s request, bills of exchange for 'C, guarantees to 'B', for twelve months, the due payment of all such bills to the extent of rs. 50,000. 'B' discounts bills for 'C' to the extent of ₹ 20,000. Afterwards, at the end of three months. 'A' revokes the guarantee. The revocation discharges 'A' from liability to 'B' for any subsequent discount. But 'A' is liable to 'B' for Rs20, 000 on default of 'C'.

  However, where one of the co-sureties informs the creditor that the debtor is likely to wind-up his business and withdraws his guarantee and the other surety does not take such step, the Himachal Pradesh High Court in Anil Kr. And Others v. Central Bank of India (1997) has held that the other surety shall be liable along with principal debtor for the repayment of the loan.

- **Death of Surety (Section 131):** In the absence of a contract to the contrary, a continuing guarantee is revoked by the death of the surety as to the future transactions. The estate of deceased surety is, however, liable for those transactions which had already taken place during the lifetime of the deceased. Surety's estate will not be liable for the transactions talking place after the death of surety even if the creditor had no knowledge of surety's death.

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

- **By Conduct of the Creditor**

  By Variance in terms of Contract (Section 133): Any variance made without the surety's consent, in terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

  Example

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

- **Release or discharge of the Principal debtor (Section 134):** The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

  Example

  'A' contract with 'B' for a fixed price to build a house for 'A' within a stipulated time, 'B' supplying the necessary timber. 'C' guarantees 'A' s performance of the contract. 'B' omits to supply the timber. 'c' is discharged from his suretyship.

- **By Invalidation of the Contract**

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

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- **Guarantee obtained by misrepresentation:** When a misrepresentation is made by the creditor or with his knowledge or consent, relating to a material fact in the contract of guarantee, the contract is invalid (Section 142).
- **Guarantee obtained by concealment:** when a guarantee is obtained by the creditor by means of keeping silence regarding some material part of circumstances relating to the contracts, the contract is invalid (Section 143).
- **Failure of co-surety to join a surety:** When a contract of guarantee provides that a creditor shall not act on it until another person has joined I it as a co-surety, the guarantee is not valid if that other person does not join (Section 144).

Contracts of Indemnity and Guarantee

A contract by which one party promises to the other party from loss caused to him by the conduct of promiser or any other person is called a contract of indemnity. Such contract can be express or implied. The person who promises to indemnify is called indemnifier and the person to whom the promise is made is called indemnity-holder.

The indemnity-holder, when sued, is entitled to recover from the indemnifier: (i) all damages which he may be compelled to pay; (ii) all costs of suit which he may have to pay; and (iii) all sums which he may have paid under the terms of the compromise of any such suit. He can recover from the indemnifier

A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the Surety, the person for whom the guarantee is given is called the Principal Debtor, and the person for whom the guarantee is given is called the Creditor.

A contract of guarantee can be specific or continuing. Specific guarantee relates to a single transaction while continuing guarantee extends to a series of transactions. A specific guarantee cannot be revoked but a continuing guarantee can be revoked: (i) by notice to the creditor, (ii) by death of the surety, and (iii) by variance in the terms of the contract between the principal debtor and the creditor.

BAILMENT & PLEDGE

Bailment implies a sort of relationship in which the personal property of one person temporarily goes into the possession of another. The ownership of the articles or goods is in one person and the possession with another. Delivering a watch or any other article for repair, or leaving a scooter or car at a parking lot, depositing luggage in a cloakroom, delivery of gold to a goldsmith for making ornaments or delivering cloth to a tailor for stitching, are familiar situations which create the relationship of bailment.

- **Definition of Bailment**

Sec 146 According to sec-146 Bailment in "The **delivery** of goods by one to another person **for some purpose,** upon a contract that they shall, **when** the purpose is **accomplished,** be **returned** or otherwise **disposed** of **according** to the **directions** of the person delivering them." The **person delivering** the goods **is** called the **'Bailor'**, and the **person to whom** goods are **delivered** is called the **'Bailee'**. The explanation to Sec 146 clarifies that delivery of possession is not necessary where one person, already in possession of goods, contracts to hold them as bailee.

- **Essentials of valid Contract of Bailment:-**

For creating a relationship of bailment the following features must be present.

1. **Contract:-:**Contract between the bailor and bailee, may be **either** express or implied.

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2. **Delivery of Goods:** The essence of bailment is delivery of goods by one person to another. Delivery of goods may, however, be actual of constructive. Handing over goods to the bailee may make actual delivery. Constructive delivery may be made by doing something, which has the effect of putting the goods in the possession of the intended bailee or any person authorized to hold them on his behalf (Sec- 149).

   Example

   'A', holding goods on behalf of 'B', agrees to hold them on behalf 'C', there is constructive transfer of possession

   'A', a seller of TVs, sells a Samsung TV to 'B' who leaves the in the possession of 'A' to be collected after sometime, 'A' becomes a bailee, although originally he was the owner.

   'A' keeps certain valuables in a locker with a bank. Arrangement is not bailment; since valuables remain in the possession of the owner because the key to the locker remains in his possession.

   It needs to be noted that bailment is concerned with only goods. Currency, i.e., the legal tender (and not old coins), is not goods. 'A' deposit of money', therefore, is not bailment.

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

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

- **Kinds (Forms) of Bailment**

In Coggs v. Bernard (1703), Lord Holt, Chief Justice, classified bailment's into six kinds as follows

- **Deposit.** Delivery of goods by one man to another to keep for the use of the bailor.
- **Commodatum.** Goods lent to friend gratis to be used by him.
- **Hire.** Goods lent to the bailee for hire, i.e., in return for payment of money.
- **Pawn or Pledge.** Deposit of goods with another by way of security for money borrowed.
- Delivery of goods for being transported, or something to be done about them, by the bailee for reward.
- Delivery of goods as in (5) above, but without reward.

- **Duties of Bailor**

A bailor has the following duties:

1. **Duty to disclose faults in the goods (Section 150).** The bailor is bound to disclose to the bailee 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 does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

   Example

   'A' the owner of a motorcycle allows 'B', his friend, to take his motorcycle for a joy ride. 'A' knows that the brakes of the motorcycle were not working well. 'A' does not discloses this fact to 'B', consequently, 'B' meets with as accident. 'A' is liable to compensate 'B' for damages.

   'A' delivers to 'B', certain chemicals, to be carried to Mumbai. These chemicals have a tendency to burst, if not kept below a certain temperature. 'A' does not tell 'B', to take this precaution. While carrying the chemicals, the chemicals burst and injure 'B'. 'A' is liable for all the damages.

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In case of gratuitous bailment the bailor is responsible only for those defects, which he was aware of and did not disclose to the bailee.

If the goods are bailed for hire, the bailor is responsible for such damage whether he was or was not aware of the existence of such faults in goods bailed. The logic behind holding the bailor liable even for defects not known to him is that since the bailment is for a price, it is the duty of the bailor to keep the goods in a fit and defect-free condition.

Example

A' hires a VCP from 'B'. VCP has developed short-circuit but 'B' is not aware of it. The moment 'A' plugs VCP, it explodes damaging his TV set as well as wiring. 'B' is liable for 'A' s loss.

- Duty to bear expenses (Section 158)

  In case of gratuitous bailment

  In the absence of contract to the contrary, the bailor must repay to the bailee all necessary expenses incurred by him for the purpose of the bailment.

  In case of non-gratuitous bailment, the bailor is liable for only extra-ordinary expenses.

  Examples

  'A' horse is taken on hire for a journey. The ordinary expenses like feeding the horse etc. shall be borne by the bailee but in case horse falls ill, the money spent in his treatment will be regarded as an extra-ordinary expenditure and borne by the bailor.

  'A' lends his car to a friend 'B'. The car runs out of petrol. 'B' has the right of recover the amount paid by him for petrol (ordinary expenses). In case, the car breaks down, he can also recover the repair charges paid by jim (extra-ordinary expenses).

- **Duty to indemnify the bailee (Section 164):** It is the duty of the bailor to indemnify the bailee, for any loss, which the bailee may suffer because of the bailer's title being defective. The reason for this is that the bailor was not entitled to make the bailment or to receive back the goods bailed or to give directions regarding the goods bailed.
- **Duty to bear risks:** It is the duty of bailor to bear the risk of loss, deterioration and destruction of the things bailed, provided the bailee has taken reasonable care to protect the goods from loss, etc.
- **Duty to receive back the goods:** It is the duty of the bailor that when the bailee, in accordance with the terms of bailment, returns the goods to him, the bailor should receive them. If the bailor without any reasonable reason, refuses to take the goods back, when they ate offered at a proper time and at a proper place, the bailee can claim compensation from the bailor for all necessary and incidental expenses, which the bailee might have incurred in keeping the goods safely.
- **To compensate bailee for loss for termination of bailment before time (Section 159):** The bailor must compensate the bailee for the loss or damage suffered by the bailee that is in excess of the benefit received, where he had lent the goods gratuitously and decides to terminate the bailment before the expiry of the period of bailment.
- **Duties of Bailee**
  Duties of a bailee include:
- **To take care of he goods bailed (Section 151).** In case of bailment the bailee is bound to take as such care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

  In case, bailee has taken the amount of care as described above, he shall not be responsible, in the absence of any special contract, for the loss, destruction or deterioration of the thing bailed (Section 152).

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Thus, where 'A' lends his car to 'B'. 'B' is under obligation to park the car at a parking place, if any, and to roll-up all the windows and lock all the doors. If inspite of such an amount of care, the car is stolen, 'B' shall not be liable for the loss.

However, the burden of proof that bailee had exercised reasonable care shall always on the bailee [R.C. Deboo v. M.V. Hindlaker (1995)]

- **Not to make unauthorized use of goods (Section 154).** In case the bailee makes unauthorized use of goods, i.e., uses them in a way not warranted by the terms 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.

  Examples

  'A' lends a horse to 'B' for his own riding only 'B' allows 'C', his wife, to ride the horse, 'c' rides with care, but the horse accidentally falls and is injured. 'A' is liable to make compensation to 'B' for the injury done to the horse.

  'A; hires a horse in Calcutta from 'B' expressly to march to Banaras. 'A' rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. 'B' is liable to make compensation to 'A' for the injury to the horse.

- **Not to mix bailer's goods with his own goods.** Bailee is under a duty to keep the goods of the bailor separate from his own. Sections 155 to 157 of the Act lays down this duty in the following ways:

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

  If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expenses of separation or division, and any damages arising from the mixture (section 156).

  If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own n goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods (section 157).

- **To return the goods bailed (section 160).** It is the duty of the bailee to return, or deliver, according to the bailer's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose, for which they were bailed, has been accomplished.

- **To return any accretion to the goods bailed (section 163).** In the absence of ay 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.

  Example

  'A' leaves a cow in the custody of 'B' to be taken care of. The cow gives birth to a calf. 'B' is bound to deliver the cow as well as the calf to 'A'.

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

- **Right of Bailor**

  The rights if a bailor are;

- **Enforcement of bailee's duties:** Duties of the bailee, looked fron bailor's point of view, are the rights of a bailor. A bailor can thus enforce, by suit, all duties of the baliee.

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- **To claim damages:** it is an inherent right of the bailor to claim damages for any loss that might have been caused to the goods bailed, due to the bailee's negligence (Section 151).
- **To terminate the contract of bailment (section 153).** The bailor has a right terminate the contract of bailment if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

  Example

  'A' lets to 'B', for hire, a horse for his own riding. 'B' drives the horse in his carriage. 'A' has a right to terminate the bailment.
- **To claim compensation:** If any damage is caused to the goods bailed because of the unauthorized use of the goods, the bailor has a right to claim compensation from the bailee. In the same way the bailor has a right to claim compensation, if some loss is caused to the goods bailed, due to unauthorized mixing by bailee, of bailee's own goods with the goods of the bailor (Section 154, 155 and 156).
- **To demand return of goods (Section 159).** In case of gratuitous (without reward bailment of goods, the bailor can demand back the goods at any time even though the goods were bailed for a specified time or purpose. But, if the bailee had acted in such a manner that the return of the goods before the stipulated time would cause loss exceeding the benefit which he has derived from using the goods, the bailor is duty bound to compensate the bailee.

  Example

  'A' lends a book to 'B', for examinations. Before 'B' has taken his examinations, 'A' seeks return of his book. 'A' must compensate 'B' for any loss occasioned to him.
- **To claim increase or profit from goods bailed.** In the absence of any contract to the contrary, the baliee is bound to deliver to the bailor, any increase or profit, which may have accrued from the goods bailed.

  Example

  'A' pledges certain shares with 'B', Company issues bonus shares against the same. 'B' must not only return original shares but also bonus shares.
- **Rights of Bailee**
- **To enforce bailor's duties.** The duties of the bailor are, in face, if looked from the point of view of bailee, the bailee's the bailee's rights. Thus, bailee can sue bailor for (a) claming damages resulting from non-disclosure of faults in the goods, **(b)** seeking indemnity for loss because of defective title of the bailor, (c) for extraordinary expenses; etc.
- **To deliver goods to any one of the of joint bailors (Section 165):** If the goods are owned and bailed by more than one person, the bailee has a right, in the absence of a contrary contract, to delivery back the goods to any one of the joint owners, or may deliver the goods back according to the directions of, one joint owner, without the consent of all.
- **Delivery of the goods to bailor even if his title is defective (Section 166):** If the title of bailor is defective and the bailee, in good faith, returns the goods to the bailor or according to the directions of bailor, the bailee is not liable to the true owner in respect of a such delivery.
- **Right of Lien (Section 170-171).** The bailee has a right to claim his lawful charges and if they are not paid, 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. Lien may be of two types:
- General Lien
- Particular Lien

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- **General Lien** means the right to retain goods not only for demands arising out of the goods retained but for a general balance of account in favour of certain persons.
- **Particular lien**, on the other hand, means the right to retain the particular goods in respect of which the claim is due.

  Bailee's right of lien is particular in certain cases whereas general in other cases.
- **Particular lien** is conferred upon a bailee by virtue of the provisions of Section 170. It reads:

  Where the baliee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives the remuneration for the services he has rendered in respect of them."

  Example

  'A' delivers a rough diamond to 'B', a jeweler, to be cut and polished, which is accordingly done. 'B' is entitled to retain the stone till he is paid for the services he has rendered.
- **Bailee's General lien.** The peovisions of Section 171 empower certain categories of bailees to exercise a general lien. These include: bankers, factors, wharfingers, attorneys of High court and policy case brokers. These bailees can retain all goods of the bailor so ling as anything is due to them, unless there is contract to the contrary. Any other bailee can have general lien, only if expressly so authorized (Section 171).
- **Rights against wrongful deprivation or injury to goods (Section 180-81).** If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or causes them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made, and dither the bailor or the bailee may bring a suit against a third person for such deprivation or injury. Now, whatever is obtained by way of relief or compensation in such a suit shall, as between the bailor and the bailee, be dealt with according to their respective interest.
- **Finder of Goods**
- **Duties of a Finder**

  Finding is not keeping. A finder of lost goods is treated as the bailee of the goods found as such and is charged with the responsibilities of a bailee, besides the responsibility of exercising reasonable efforts in finding the real owner.

  Thus, the duties of a finder include:

  - The finder should take reasonable care of the goods found.
  - He should not put the goods for his personal use.
  - He should not mix the goods found with his own goods.
  - He should find the real owner of the goods and entrust the goods to him.

RIGHTS OF A FINDER

A finder enjoys certain rights also. His rights include:

- **Right of lien (Section 168):** A finder of goods has the right keep the goods in his possession till he is paid his expenses. This right to retain goods is available against the true owner until the finder receives compensation for expenses and trouble incurred by him in finding the true owner and in preserving the goods found. However, he has no right to sue owner for such compensation.

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- **Right to sue for reward (Section 168):** If the true owner of goods has declared some reward for the return of lost goods, the finder can sue the owner for declared some. He will have the right of lien, over the goods till he receives the reward.
- **Right of sale:** A finder of goods has a right to sell the goods found by him under the following circumstances:
  - The goods found are commonly the subject of sale; and
  - The owner cannot, with reasonable diligence, be found and if found, refuses to pay the lawful charges to the finder; or
  - The thing is in danger of perishing or of losing the greater part of its value; or
  - When the lawful charges of the finder for preservation and finding out the owner, amount to two-third or more of the value of the thing.
- **Termination of Bailment**

A contract of bailment terminates or comes to an under the following circumstances:

- **On the expiry of the stipulated period.** Where bailment is for a specific period, it comes to an end on the expiry of the specified period.
- **On the accomplishment of the specified purposes.** In case, bailment is for a specific purpose it terminates as soon as the purpose is accomplished.

Example

'A' lets to 'B' certain tents and crockery on marriage of his daughter. The same must be returned as soon as marriage function is over

- **By bailee's act inconsistent with conditions.** If the bailee does any act, with regards to the goods bailed, inconsistent with the conditions of the bailment may be terminated any time (Section 159).

Example

'A' lets to 'B' for hire, a horse for his own riding. 'B' drives the horse in his carriage 'A' shall have the option to terminate of the bailment.

- **Termination of Gratuitous Bailment.** A gratuitous bailment may be terminated any time (Section 159).

However, the Section provides that if premature termination causes any loss to the bailee exceeding the benefit derived from the bailment, the bailor must indemnify.

- **By death.** A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162)

PLEDGE

- **Meaning and Definition of Pledge**

Pledge (or Pawn) is a special kind of bailment. Section 172 defines pledge as "the bailment of goods as security for payment of a debt or performance of promise". The bailor is, in this case called, the 'pawnor' and the bailee is called 'pawnee'.

- **Right of Duties of a Pawnee**
- **Right of retainer (Section 173):** The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest due on the debt, and all necessary expenses incurred by him with respect to the possession or for the preservation of the goods pledged.

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- **Right of retention in regard to subsequent advances (Section 174):** Subject to a contract to the contrary, the pawnee would not be entitled to retain the goods with respect to subsequent advances made by the pawnee, provided this has not been expressly surrendered by a contract.
- **Right to extraordinary expenses incurred (Section 175):**The pawnee is entitled to receive from the pawner extraordinary expenses for the preservation of the goods of the pledged.
- **Rights where pawnor makes default (Section 176):** According to Section 176, in case the pawnor fails to pay his debt or complete the performance of obligation at the case the pawnor fails to pay his debt or complete the performance of obligation at the stipulated time, the pawnee can exercise any of the following rights:
- Bring suit against the pawnor upon the default in redemption of the debt or performance of promise; and retain possession of goods pledged as collateral security; or
- Sell the things pledged on giving the pawnor reasonable notice of sale.

  In case, the goods pledged when sold do not fully meet the amount of the debt, pawnee can proceed for the balance. If, on the other hand, there is any surplus that has to be accounted for to the pawnor.

  Before, sale can be executed, a reasonable notice must be given to pawnor so that:
  - The pawnor may meet his obligation as a last chance;
  - He can supervise the sale to see that it fetches the right price.
  - In Prabhat Bank Ltd. v. Babu Ram (1966), the learned judge observes that – "What is contemplated by Section 176 is not merely a notice but a 'reasonable notice', meaning there by a notice of intended sale of the security by the creditor within a certain date so as to afford an opportunity to the debtor to pay the amount with the mentioned in the notice."
- **Notice of sale is essential even where the agreement specifically excludes it.** In the above case, the Allahabad High Court held that such a clause I the agreement would be inconsistent with the provisions of the Act and as such void and unenforceable.
- **Effect on validity of sale where reasonable notice is not given. The sale made by the aside.** The pawnee without giving a reasonable notice to he pawnor is not void, i.e., cannot be set aside. The pawnee will be liable to the pawnor for the damages.
- **Right against the true owner of goods (Section 178A):** When a Pawnor has acquired possession of pledged goods, under a void able contract, but the contract has not been rescinded, at the time of pledge, the pawnee acquires a good tit6le to the goods, even against the true owner, provided the pawnee had no notice of the pawnor's defect in title and he acts in good faith [See Philips v. Brooks (Page31-32)]
- Duties
- A pawnee has the following duties:
- Duty to take reasonable care of the pledged goods.
- Duty not to make unauthorized use of goods pledged.
- Duty to return the goods when the debt has been repaid or the promise has been performed.
- Duty not to mix his own goods with the goods pledged.
- Duty not to do any act, which is inconsistent with the terms of pledge.
- Duty to deliver increase (if any), to the goods pledged.

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RIGHTS AND DUTIES OF PAWNOR

Rights

- **Right to redeem goods**. The pawnor has a right to claim back the security pledged on repayment of the debt with interest and other charges (Section 177). The period for a suit against a pawnee the recover the things pledged is 3 years from the date of pawnee's refusal to do so after demand.(The Limitation Act, 1963).
- **Right to reasonable notice.** The pawnor has a right to receive a reasonable notice in case the pawnee intends to sell the goods and in case he does not receive the notice, he shall have a right to claim any loss that may result on such sale.
- **Right to surplus.** In case of sale, the pawnor is entitled to receive from the pawnee any surplus that may remain with him after the debt is completely paid-off.
- **Right to accretion.** The pawnor has a right to claim any accruals to the goods pledged.
- **Right to compensation.** If any loss is caused to the goods because of mishandling or negligence on the part of the pawnee, the pawnor has a right to claim the same.

Duties

- To disclose faults. A panor must disclose to the pawnee ay material faults or expenditure incurred by the pawnee for the preservation of the goods.
- To pay extraordinary expenses. A pawnor is responsible to meet any extraordinary expenditure incurred by the pawnee for the preservation of the goods.
- To bear deficiency on sale. Where the pawnee has exercised his right of sale of goods, any shortfall has to be made good by the pawanor.
- To indemnify. The pawnor is liable for any loss caused to the pawnee because of defects in his (pawnor's) title to the goods.

PLEDGE BY NON-OWNERS

Normally, only the owner of goods can effect a valid pledge. However, the Indian Contract Act recognizes pledge by the following also as valid:

- **Pledge by a mercantile agent:** Where a mercantile agent is with the consent of the owner, in possession of goods or, the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be valid, provided that the pawnee acts in good faith and has at the time of pledge, no notice of the fact that the agent has no authority to pledge. The necessary conditions of validity under the Section are as follows:
  - The person pledging the goods must be a mercantile agent.
  - Mercantile agent must be in possession either of the goods or the documents of title to goods,
  - Such possession must be with the consent of the owner.
  - Pledge must have been made by the mercantile agent in the ordinary course of business.
  - The pawnor must act in good faith; and
  - The pawnee should have no notice of the pawnor's defect of tile, if any.
- **Pledge by 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:
  - The contract has not been rescinded before the contract of pledge, and
  - The pawnee acts in good faith and without notice of the pawnor's defect of title.

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- Pledge by co-owner in possession. One of several joint owners of goods in sole possession there of with the consent of the test may make a valid pledge of the goods [Shadi Ram v. Mehtab Chand 1895]
- Pledge by a person having limited interest (Section 179). Where a person pledges goods in which he has only a limited interest, the pledge goods to the extent of the amount advanced thereupon.

Example

'X' pledges certain gold ornaments worth ₹ 1,00,000 with 'Y' against an advance or ₹60,000. 'Y' pledges the same for ₹90,000 with 'Z'. The pledge by 'Y' with 'Z' is valid only to the extent or ₹60,000 plus interest due thereon.

- **Pledge by seller or buyer in possession.** A seller, in whose possession, the goods have been left after sale or a buyer who with the consent of the seller, obtains possession of the goods, before sale, cam make a valid pledge, provided the pawnee acts in goods faith and he has no knowledge of the defect in title of the pawnor.

Example

'A' buys a TV from 'B', but leaves the TV with the seller. 'B' then pledges the TV with 'C', who does not know of sale to 'A'. This is a valid pledge.

CONTRACT OF AGENCY

Contract of Agency. According to Section 182 of the Contract Act "An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'." Thus, an agent is a connecting link between his principal and third parties.

Who can appoint an Agent

Section 183, in this regard, provides "Any person who is of the age of majority according to law to which he is subject, and whop is of sound mind, may employ an agent." Thus a minor, or a person of unsound mind cannot appoint an agent.

Who may be an Agent

Since agent is a mere connecting link or a conduit between the principal and the third party, it is immaterial whether or not the agent is legally competent to contract. Thus, there is no bar to the appointment of a minor as an agent. However, in considering the contract of agency itself (i.e., the relation between principal and agent), the contractual capacity of the agent becomes important. Section 184 reads, "As between the principal and third persons any person may become an agent, but no person who is not of the age of majority persons any person may become an agent, so as to be responsible to his principal according to the provisions in that behalf." Thus, if the agent happens to be a person incapable of contracting, then the principal cannot hold the agent liable, in case he misconducts or has been negligent in performance of his duties.

Example

'X' appoints 'Y', a minor, to sell his car for not less than ₹ 50,000. 'Y' sells it for ₹ 40,000. 'X' will be held bound by the transaction and further shall have no right against 'Y' for claiming the compensation for having not obeyed the instructions, since 'Y' is a minor and a contract with a minor is 'void – ab – initio.

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Distinction between Agent and Servant

There is similarity between an agent and a servant in as much as both are employed to act for and on behalf of principal. However, there is a lot of difference between the two. An agent has the authority to create contractual relationship between the principal and third party, but a servant ordinarily has no such authority. A servant usually serves only one master but an agent may work for several principals at the same time. A servant is generally paid salary or wages, whereas an agent may be paid on commission basic. Thus we find that an agent is not a servant though a servant may be authorised to serve as an agent.

Modes of Creation of Agency

- Express agreement,
- Implied agreement,
- Ratification, and
- Operation of Law

Express Agreement (Section 186 and 187). As per Section 186, a contract of agency may be express or implied. As per section 187, an authority is express when it is given by words, spoken or written. A person may be appointed agent, either by words of mouth or by writing. No particulars form is required for appointing an agent. The usual form of a written contract of agency is the power of attorney on a stamped paper.

Example

'A' is residing in Delhi and he has a house in Kolkata. 'A' appoints 'B', by a deed called the power of attorney, as caretaker of his house. Agency is created by express agreement.

Implied Agency (Section 187). An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealings.

Example

'A' owns a shop in Noida, living himself in Delhi, and visiting the shop occasionally. The shop is managed by 'B', and he is in the habit of ordering goods from 'C' in the name of 'A' for the purposes of the shop, and of paying for them out of 'A' s funds with 'A' s knowledge. 'B' has an implied authority from 'A' to order goods from 'C' in the name of 'A' for the purpose of the shop.

Implied agency included:

- Agency by estoppel
- Agency by holding out, and
- Agency by necessity

Agency by Estoppel (Section 237). When a person has, by his conduct or statement, induced others to believe that a certain person is his agent, he is estopped from subsequently denying it, Lord Halsbury says, "Estoppel arises when you precluded from denying the truth of anything which you have represented as fact, although it is not a fact."

Example

'P' allows 'A' telling 'C' that 'A' is 'P's agent. Later on, 'C' supplies certain goods to 'A' thinking him to be 'P' agent. 'P' shall be held liable to pay the price to 'C' By allowing 'A' to represent himself as his agent, 'P' leads 'C' to believe that 'A' is really his agent.

Agency by Holding Out. Though part of the law of estoppel, some affirmative conduct by the principal is necessary in creation of agency by holding out.

Example

'P' allows his servant 'A' to buy goods for him on credit from 'C' and pays for them regularly. On one occasion, 'P' pays his servant cash to purchase the goods on credit pocketing the money, 'C' can recover the price from 'P' since through previous dealings 'P' has held out his servant 'A' as his agent.

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Agency of Necessity (Section 189). An agent has authority, in an emergency, to do all such acts, for the purpose of protecting the principal from loss, that would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Example

A horse was sent by rail and at the destination it was not taken delivery of by the owner. The station master had to feed the horse. Held, the station master became the agent by necessity and hence the owner must compensate him. [Great Northern Railway V. Swafield].

To constitute a valid agency of necessity, following condition must be satisfied:

- Agent should not be in a position or have any opportunity to communicate with his principal within the time available.
- There should have been actual and definite commercial necessity for the agent to act promptly.
- The agent should have acted bonafide and for the benefit of the principal.
- The agent should have adopted the most reasonable and practicable course under the circumstances, and
- The agent must have been in possession of the goods belonging to his principal and which are the subject of contract.

Agency by Ratification (Section 196 – 200). Section 196 recognizes the creation of agency by subsequent ratification by the principal of the contracts entered into by the agent on his behalf but without his authority. Where a person acts for someone but without his knowledge or authority and the other person subsequently accepts or ratifies the act, agency by ratification arises and the ratifier is bound by the act on his behalf. Thus, agency by ratification tantamounts to prior authority.

Example

The case of Bolton Partners v. Lambert is a good illustration on the point. In this case, 'L' made an offer to 'X' managing director of a company. 'X' accepted the offer through he had no authority to do so. 'L' subsequently withdrew the offer, but the company ratified 'X' s acceptance. Held, 'L' was bound. The ratification related back to the time 'X' accepted the offer, thus rendering the revocation of the offer inoperative. An offer once accepted cannot be withdrawn.

Ratification may be expressed or implied (Section 197).

Also called Agency by Ostensible Authority. Another situation for agency by ostensible authority is that of agency by legal presumption. For instance, where a married woman is cohabiting with her husband, there is a presumption of the fact that she has authority to pledge his credit for necessaries.

Example

'A' without authority, buys goods, for 'B' Afterwards 'B' sells them to 'C' on his own account; 'B's conduct implies a ratification of the purchase made for him by 'A'.

'A' without 'B's authority, lends 'B' s money's to 'C'. Afterwards 'B' accepts interest on the money from 'C'. 'B' s conduct implies a ratification of the loan.

Requisites of a valid ratification

- The agent must be contract as agent; he must not allow the third party to believe that he is the principal. A man cannot enter into a contract at his own and later shift it to another.
- The principal must have been in existence at the time the agent originally acted. This condition is significant in case of joint stock companies.

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- The principal must not only be in existence but must also have contractual capacity at the time of the contract as well as at the time of ratification. Thus, a minor on whose behalf a contract is made cannot ratify it on attaining majority.
- Ratification must be made within a reasonable. What is reasonable time shall very from case to case?
- The act to be ratified must be a lawful one. There can be no ratification of an illegal act or an act, which is void – ab – initio.
- The principal should have full knowledge of the facts. Section 198 states " No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective".
- Ratification, if made, shall be of the contract as a whole (Section 199). The principal cannot reject the burdens and accept only the benefits.
- Ratification of a contract not within the principal's authority is ineffective. This again basically is relevant in case of companies. Acts of directors which are ultra virus the power of a company cannot be ratified by the company.
- Ratification cannot be made so as to subject a third party to damages or terminate any right or interest of a third person (Section 200).

Examples

'A' not being authorized thereto by 'B', demand on behalf of 'B', the delivery of some property of 'B', from 'C' who is in possession of it. This demand cannot be ratified by 'B', so as to be binding on 'A'.

'A' holds a lease from 'B', terminable on three months notice. 'C', an unauthorized person, gives notice of termination to 'A'. The notice cannot be ratified by 'B', so as to be binding on 'A'.

Agency by Operation of Law

A pretended agent is one who represents to be an agent of another. For example, in case of partnership, every partner, as per the provisions of the partnership Act, automatically becomes the agent of other partners.

Pretended Agent

A pretended agent is one who represents to be an agent of another when in reality he has no such authority from him at all. Section 235 provides that a person untruly representing himself to be an authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, it his alleged employer does not ratify his acts, to make compensation to the other, in respect of any loss or damage which he has incurred by so dealing. The agent has, however, no right to proceed against that person for the performance of the contract.

Agency Relationship between Husband and Wife

Marriage does not of itself create the relation of agent and principal. A wife, in order to bind her husband by her dealing, must receive authority from the husband either expressly or implication from his conduct. The following principles may be noted in this connection

- If husband and wife are living together, and the wife is charged with the duty of looking after the household, presumption is raised that she has got the authority to pledge her husband's credit for necessaries (Dagenham v. Mellon). Authority of a wife in such cases is called ostensible authority. However, a wife shall not have the ostensible authority to bind her husband.
- Where the wife is forbidden from purchasing anything on credit or from contracting debts.
- Where the goods purchased on credit are not necessaries.
- Where the wife is given sufficient money for purchasing necessaries, or she has means of her own, either in money or in earning capacity;

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- Where the trader has been expressly warned by the husband not to give credit to his wife.
- When the wife live apart from the husband under justifiable circumstances, the husband would, in law, be liable to maintain her, and he would be bound to pay her bills for maintenance during that period. But, if she is living separately without any valid reasons, then she cannot pledge her husband's credit even for necessaries.

Scope and Extent of Agent's Authority

Scope and extent of an agent's authority is determined by:
- Actual authority
- Apparent or Ostensible authority

Actual authority is created by agreement between principal and the agent. The agreement may be expressed or implied.

Apparent or Ostensible Authority. Section 188 that an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business?

Example

'A' employs 'B' as his agent to carry on his business of a ship builder. 'B' may purchase timber and other materials, and hire workmen for the purpose of carrying on the business.

Again, Section 237 provides that " When an agent has, without authority, done acts or incurred obligations to third person on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority".

Example

'A' consigns goods to 'B' for sale, and gives him instructions not to sell below a fixed price. 'C', being ignorant of 'B' s instructions enters into a contract with 'B' to buy the goods at a price below the reserved price. 'A' is bound by the contract.

Though the scope of authority of an agent under normal circumstances is defined in Section 188, still, in cases of emergency he would have larger powers. Section 189, in this regard, enacts as follows; " An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances". In such cases the authority is deemed to be conferred by what has been described above as agency by necessity.

Sub – Agent and Substituted Agent

The general rule is that an agent cannot appoint an agent. ' Delegatus no potest delegare' is the governing rule. It means a delegate cannot further delegate. An agent being a delegate cannot transfer his duties to another. The principle underlying the rule is that the principle engages an agent ordinarily on personal consideration and thus may not have the same confidence in the person appointed by the agent. Hence, sub – agency is not generally recognized. However, Section 190 deals with the circumstances as to when and how far an agent can delegate his duties. An agent may appoint an agent in the following circumstances:

- Where expressly permitted by the principal; Where the ordinary custom of trade permits delegation : The nature of agency is such that it cannot be accomplished without the appointment of a sub – agent: Where the nature of the job assigned to the agent is purely clerical and does not involve the exercise of discretion; In an unforeseen emergency.

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- Under the above mentioned circumstances, if an agent appoints another person in the matter of the agency, that other person may assume the position of either a sub – agent or a substituted agent.

Sub – Agent

Section 191 states that a 'sub – agent' is a person employed by, and acting under the control of the original agent in the business of the egency.

Since the sub – agent is appointed by the act and under the control of the agent, there is no privities of contract between the sub- agent and the principal. The sub – agent therefore, cannot sue the principal for remuneration and similarly, the principal cannot sue the sub – agent for any moneys due from him. Each of them can proceed only against his immediate contract party, viz., the agent except. Where the sub – agent

A sub – agent properly appointed can, however, represent the principal and bind him for his acts as if he were an agent originally appointed by the principal. But where an agent, without having authority to do so, has appointed a sub – agent, the principal is not represented by or responsible for the acts of such a sub – agent. He (the sub –agent) can only bind the agent by contracts entered into with third parties.

Termination of sub – agent's authority (Section 210). The termination of the authority of an agent causes the termination of the authority of all sub – agents appointed by him.

Substituted Agent

Where an agent appoints or names another person for being appointed as an agent in his place, such person is called a substituted agent. According Section 194, " where an agent, holding an express or implied authority to name another persons has named another person accordingly, such person is not a sub – agent but an agent of the principal for such part of the business of the agency as is entrusted to him."

Examples

'A' directs 'B', his seller, to sell his estate by auction, and to employ an auctioneer for the purpose. 'B' names 'C', an auctioneer, to conduct the sale. 'C' is not a sub – agent, but is 'A' s agent for the conduct of the sale.

'A' authorizes 'B', a merchant in Kolkata to recover the moneys due to 'A' from 'C & Co.'. 'B' instructs 'D', a solicitor to take proceedings against 'C & Co.', for the recovery of the money. 'D' is not a sub – agent but is solicitor for 'A'.

DUTIES OF AN AGENT

The duties of an agent towards his principal are:

- To conduct the business of agency according to the principal's directions (Section 211). **This duty of the agent has to be literally compiled with i.e., the agent is not supposed to deviate from the directions of the principal event for the principal's benefit. If he does so, any loss occasioned thereby shall have to be borne by the agent, whereas, any surplus must be accounted for to the principal.**

  Examples

  In lilley v. Doubleday (1881), 'A' was directed by his principal to warehouse the goods at a particular warehouse. 'A' warehoused a portion of the goods at another place, equally good but cheaper. These goods were destroyed by fire. Held, the agent 'A' was liable to make good the loss.

  The principal instructed his agents to deliver goods only against cash but the agent delivered them on credit, he was held liable for the price which the purchaser failed to pay [Paul Bier v. Chottalal].

  In the absence of instructions from the principal, however, the agent should follow the custom of the business at the place where it is conducted (Section 211).

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Example

'A' an agent engaged in carrying on for 'B' a business in which it is custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. 'A' must make good to 'B' the interest usually obtained by such investment.

- The agent should conduct the business with the skill and diligence that is generally possessed by person engaged in similar business**, except where the principal knows that agent is wanting in skill (Section 212).**

  Example

  'A', an agent for the sale of goods, having authority to sell on credit, sells to 'B' on credit, without making the proper and usual enquiries as to the solvency of 'B'. 'B' at the time of such sale, is insolvent. 'A' must make compensation to his principal in respect of any loss thereby sustained.

  'A' an insurance broker, employed by 'B' to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequences of the omission of the clauses nothing can be recovered from the underwriters. 'B' is bound to make good the loss to 'A'.

- **To render proper accounts (Section 213).** Rendering accounts does not mean showing the accounts but the accounts supported by vouchers – (Anandprasad V. Dwarkanath).

- **In case of difficulty to communicate with the principal (Section 214).** It is the duty of an agent, in case of difficulty, to use all reasonable diligence, in communicating with his principal, and in seeking to obtain his instructions. In case of emergency, however the agent can do all that reasonable man would under similar circumstances do with regard to his own goods, he becomes an agent by necessity.

- **Not to make any secret profits.** An agent, except the lawful deduction towards his remuneration and expenses, should deliver to the principal all moneys including secret commission received by him.

- **Not to deal on his own account.** An agent should not deal on his own account without first obtaining the consent of his principal. If he does so,the principal can claim from the agent any benefit which he might have obtained [H. Wilson & Co. v. Bata (1927)].

  Further, in case an agent deals on his own account, he shall cease to be entitled for his remuneration.

- **Agent not entitled to remuneration for business misconducted.** An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which has been misconducted (section 220).

  Examples

  'A' employs 'B' to recover ₹ 1,00,000 from 'C' and to lay it out on good security. 'B' recovers ₹ 1,00,000 and lays out ₹90.000 on good security, but lay out ₹ 10,000 on security which he ought to have known to be bad whereby 'A' loses ₹2,000. 'B' is entitled to remuneration for recovering the ₹1,00,000 and for investing the ₹90,000. he is not entitled to any remuneration for recovering ₹10,000 and he must make good the ₹2,000 to 'A'

  'A' employs 'B' to recover ₹1,00,000 from 'C'. Through 'B's misconduct the money is not recovered. 'B' is entitled to no remuneration for his services, and must make good the loss.

- **An agent should not disclose confidential information supplied to him by the** principal [Weld Blundell V. Stephens (1920)].

  When the principal dying or becoming of unsound mind terminates an agency.the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him (Section 209)

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RIGHTS OF AN AGENT

An agent has the following rights

- **Right to remuneration (Section 219).** An agent is entitled to his agreed commission or remuneration and if there is no agreement, to a reasonable remuneration.

  But, the remuneration does not become payable unless he has carried out the object of agency, except where there is a contract to the contrary. Now, when shall the object of agency be deemed to have been carried out or the act assigned to the agent completed, shall depends on the terms of the contract. Thus, commission becomes payable to the broker, when he has procured a party who is willing to negotiate on reasonable terms and is desirous of entering into a contract with the principal [Sheikh Farid Baksh V. Hasgulal Singh(1937)].

  However, an agent who is guilty of misconduct in the business of agency is not entitled to any remuneration in respect of that part of the business which he has misconducted (Section 220).

- **Right of Retainer (Section 217).** Section 217 of the Contract Act empowers the agent to retain, out of any sums received on account of the principal in the business of the agency for the following payments:
  - All money due to himself in respect of advances made,
  - In respect of expenses properly incurred by him in conducting such business, and
  - Such remuneration as may be payable to him for acting as agent.

- **Right of Lien (Section 221).** Besides, the right of retainer, agent has another right, i.e., right to retain his principals goods, papers and other movable or immovable properties service charges. This lien of the agent is the particular lien. Since the lien is a possessory right, it cannot be exercised once the possession is lost.

- **Right of Indemnification.** Section 222 provides that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

  Example

  'B' at Indonesia, under instructions from 'A' of Kolkata contracts with 'C' to deliver certain goods to him. 'A' does not send the goods to 'B', and 'C' sues 'B' for breach of contract. 'B' informs 'A' of the suit, and 'A' authorizes him to defend the suit. 'B' defends the suit, and is compelled to pay damages and costs, 'A' is liable to 'B' for such damages, costs and expenses.

  Agent's right to be indemnified extends even for those acts which are apparently lawful but are injurious to a third person (Section 223). However, the right to indemnify is not available against those acts which on the face of it are unlawful or are criminal in nature.

- **Right to Compensation.** The agent has the right to receive compensation for the injuries or losses suffered due to the principals neglect or want of skill (Section 225).

  Example

  'A' employs 'B' as a brick layer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put and 'B' is, consequence, hurt, 'A' must pay compensation to 'B'.

  It should, however, be noted that if the injury is caused by negligence of the agent himself, then he cannot claim any compensation.

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LIABILITY OF PRINCIPAL TO THIRD PARTIES

- **Agent acting within authority.** An agent being a mere connecting links binds the principal for all his acts done within the scope of his authority. Section 226 provides that "Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person."
- **Agent acting within ostensible authority.** The principal is liable for the acts of the agent falling not only within the actual authority but also with the scope of his apparent or ostensible authority.
- **Where an agent exceeds his authority** and the part of what he does, which is within is authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and the principal(Section 227).
- **Where an agent** does more than he is authorized to do and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound by the transaction (Section 228).
- **Misrepresentation by the agent.** The principal will be liable even for misrepresentations made or frauds committed, by an agent in matters beyond his authority, do not effect the principal (Section 238).
- **Undisclosed Principal.** The principal remains liable to the third parties even where his name was not disclosed. The third parties can, on discovering his name, proceed against him on the contract.
- **The principal is bound** by any notice or information given to the agent in the course of business transacted by him.
- **The liability of the principal** continues even in cases where agent is held personally liable. Section 233 provides an option to the third parties to either sue the principal or agent or both.

Personal Liability of an Agent

An agent is held personally liable to the third parties in the following cases:

- **Foreign principal.** Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad (Section 230).
- **Undisclosed Principal.** Where the agent does not disclose the name of his principal (Section 230).
- **Principal cannot be sue.** Where the principal, though disclosed, cannot be sued (Section 230). For instance, where principal is minor.
- **Exceeds authority.** Where an agent acts either without any authority or exceeds his authority, he will be held personally liable if his acts are not ratified by the alleged principal.
- **Where an agent expressly agrees to be personally bound.**
- Where an agent signs a negotiable instrument in his own name. In case an agent signs a negotiable instrument without making it clear that he is signing it as an agent only, he may be held personally liable on the same. He would be personally liable as the maker of the note, even though he may be described in the body of the note as the agent.
- Agent with special interest. An agent with special interest or with a beneficial interest, e.g., a factor or auctioneer, can sue and be sued personally (Subramanaya v.Narayana)
- Guilty of fraud. When an agent is guilty of fraud or misrepresentation in matters which so not fall within his authority (Section 138).
- Trade usage. Where trade usage or custom makes an agent personally liable.
- Agency coupled with interest. Where the agency is one coupled with interest (Section 202).

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AGENCY COUPLED WITH INTEREST

Agency is said to be coupled with interest where the agent has himself an interest in the subject-matter of the agency (Section 202).

Example

Where an agent is appointed to sell properties of the principal and to pay himself out of such sale proceeds the debt due to the agent.

TERMINATION OF AGENCY (SECTION 201)

- **By revocation by the Principal.** The principal may, by notice, revoke the authority of the agent at ay time. Where the agent is appointed to do a single act, agency may be revoked any time before the commencement of the act. In case of a continuous agency, notice of revocation is essential to the agent as well as to the third parties who have acted on the agency with the knowledge of the principal.

  However, where an agency is for a fixed period of time, and contact of agency is revoked without sufficient cause, compensation must be paid to the agent (Section 205).

  The Agency is irrevocable in the following two cases:

- Where the authority of the agent is one coupled with interest; i.e., the agent has an interest in the subject-matter of the contract.
- After the authority has been partly exercised, so far as regards such acts and obligations already done in the agency (Section 204).

  Examples

  'A' authorizes 'B' to buy 1,000 bales of cotton on account of 'A', and to pay for it out of 'A' s money remaining in 'B' s hands. 'B' buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. 'A' cannot revoke 'B' s authority to pay for the cotton.

  'A' authorizes 'B' to guy 1,000 bags of cottons on account of 'A' and to pay for it our of 'A' s money remaining in 'B' s hands. 'B' buys 1,000 bales of cotton in 'A' s name, so as not to make himself personally liable for the price. 'A' can revoke 'B' s authority to pay for the cotton.

- On the expiry of fixed period of time. When the agency is for a fixed period of time, it comes to an end on the expiry of that time.
- On the performance of the specific purpose. Where an agent is appointed to do a particular act, it terminates when that act is done or when the performance becomes impossible.
- Insanity or Death of the principal or agent. Death or insanity of the principal or the agent, terminates the agency. But an agent, in such a case, should take all reasonable steps for the preservation of property, on behalf of the principal or the legal representatives of the principal, as the case may be (Section 209).
- An agency shall also terminate in case subject-matter is either destroyed or rendered unlawful.
- Insolvency of the Principal. Insolvency of the principal, not of the agent, terminates the agency.
- By renunciation of agency by the Agent. If principal, can cause termination of agency by revocation, an agent may renounce his agency by giving a sufficient notice to that effect. Where, however, an agency is for affixed period and the agency is renounced without a sufficient cause, the principal must be compensated (Section 205).

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- **When Termination of agency takes effect**
- **As regards the agent.** The termination of the authority of an agent does not, so far as regard the agent take effect before it becomes known to him (Section 208).
- **As regards third parties.** As regards third parties, they can continue to deal with the agent till they come to know of the termination of the authority (Section 208).

Examples

'A' directs 'B' to sell goods for him, and agrees to give 'B' five 'B' percent (5%) commission on the price fetched against the goods. 'A' afterwards, by letter revokes 'B' s authority. 'B' after the letter is sent, but before he receives it, sells the goods for ₹10,000. The sale is binding on 'A', and 'B' is entitled to ₹500 as his commission.

'A' at Chennai, by letter directs 'B' to sell for him some cotton lying in a warehouse in Mumbai, and afterwards, by letter, revokes his authority to sell, and directs 'B' to send the cotton to Chennai. 'B', after receiving the second letter, enters into a contract with 'C' who knows of the first letter, but not of the second. For the sale to him of the cotton 'C' pays 'B' the money, with which 'B' absconds, 'C' s payment is good as against 'A'.

'A' directs 'B', his agent, to pay certain money to 'C'. 'a' dies and 'D' takes out probate (confirmation by the court) to his will. 'B' after 'A' s death, but before hearing of it, pays the money to 'C'. The payment is good as against 'D', the executor.

UNNAMED AND UNDISCLOSED PRINCIPAL

- **UNNAMED PRINCIPAL**

Where an agent, though discloses the fact that he is an agent working for some principal conceals the name of the principal, such a principal may be called an unnamed principal.

The liability of an unnamed principal is similar to that of a disclosed principal must exists and must also be the principal at the time the contract is made. He cannot be into existence as a principal after the contract has been concluded.

- **UNDISCLOSED PRINCIPAL**

Where an agent not only conceals the name of the principal but the very fact that there is a principal, the principal is called as an undisclosed principal. In such a case the third parties are not aware of the existence of the principal and regard the agent as the person contracting for himself. The third parties, thus, must look to the agent for repayment or performance and the agent may sue or be sued on the contract legal position in this regard may be noted as follows

If the principal wishes to intervene he may repuire the performanse of the contract but the other party has as against him (principal) the same rights as he would have had as against the agent if the agent had been pricipal (section 231)

Para II of section 231 provides that in such a case if the principal discloses himself before the contract is completed the other contracting party may refuse to fulfil the contract if he can show that if he had known who was the principal in the contract, or if he had known that the agent was not the principal, he would not have entered into the contract.

The principal, if he requires performance of the contract, can only obtain such performance subjects to the rights and obligations subsisting between the agent and the other party to the contract (Section 232).

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Example

'A' who owes ₹ 10,000 to 'B' sells ₹20,000 worth of wheat to 'B'. 'A' is acting as agent for 'C' in the transaction, but 'B' has no knowledge nor reasonable ground of suspicion that such is the case. 'C' cannot compel 'B' to take the wheat without allowing him to set off 'A's debt.

In contracts with a concealed principal, the agent is, in the absence of a contract to the contrary, personally liable to the third party. The third party may hold either the agent or principal or both liable (Section 233).

Example

'A' enters into a contract with 'B' to sell him 100 bales of cotton and afterwards discovers that 'B' was acting as agent for 'C'. 'A' may sue either 'B' or 'C' or both, for the price of the cotton.

PERFORMANCE OF A CONTRACT

Performance of a contract takes place when the parties to the contract fulfill their obligations arising under the contract within the time and in the manner prescribed. Section 37 provides that the parties to the contract **must either perform or offer to perform** their respective promises unless such performance is dispensed with or excused under the provisions of the Contract Act or of any other law.

TYPES OF PERFORMANCES: According to Section 37, there can be two types of performances:

1. **Actual performance:** When a party to the contract has done what he had undertaken to do and there remains nothing to be done by him, the promise is said to have been actually performed and the liability of such a party comes to an end.
2. **Attempted performance:** Sometimes, when the performance of the contract becomes due, the promisor is ready and willing to perform his promise, and offers to perform the same, but the promisee refuses to accept the performance. This is known as **attempted performance** or **tender.**

TYPES OF TENDERS:

1. **Tender of goods and services:** In case of tender of goods and services the promisor is discharged from his obligation and is not required to offer again. The promisor is not responsible for non performance of the contract and can sue the other party for non performance.
2. **Tender of money:** In case of tender of money, the debtor is not discharged from his obligation and is liable to pay the debt. However, the debtor is not liable to pay any interest from the date of tender.

WHO CAN DEMAND PERFORMANCE?

The following persons can make a valid demand for performance:

1. **Promisee:** Normally, promisee is the only person who can demand performance of the promise under a contract. A third party, being stranger to the contract, cannot demand performance of the contract.
2. **Legal representative:** In case of death of the promisee, his legal representative can demand performance, unless a contrary intention appears from the contract or the contract is of personal nature.
3. **Third party:** In some exceptional cases, the third party can also demand performance of the contract even though he is not a party to the contract.

WHO MUST PERFORM?

1. **Promisor himself:** Section 40 of Indian Contract Act, 1872, provides that, "If it appears from the nature of the contract that it was the intention of the parties that the promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In such cases, death of the promisor puts an end to the contract.

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2. **Agent:** Where the contract does not involve personal skill of promisor, the promisor or his representative may employ a competent person to perform it.
3. **Legal representative:** The contracts which do not involve any personal skill may be performed by his legal representative after the death of the promisor.
4. **Third persons:** A contract may be performed by a third person provided the promisee accepts the arrangement. According to Section 41, if the promisee accepts performance of the promise from a third party, he cannot afterwards compel the promisor to perform the contract again.
5. **Joint promisors:** When there are joint promisors to a contract, the promisee may, if not contrary provided in the contract, compel any one of them to perform the promise.

PERFORMANCE OF JOINT PROMISES:

When two or more persons have made a joint promise, they are known as joint promisors. Unless a contrary intention appears from the contract, all joint promisors must jointly fulfill the promise. If anyone of them dies, his legal representative must, jointly with the surviving promisors, fulfill the promise. If all of them die, the legal representatives of all of them must fulfill the promise jointly.

If joint promisor doesn't discharge their obligation as per section 42 then provisions of Section 43 will apply. Section 43 lays down three rules as regards performance of joint promise:

(i) **Any one of the joint promisors may be compelled to perform:** When there is no express agreement to the contrary, the promisee **may compel any one or more** of such joint promisors to **perform the whole** of the promise.

(ii) **A joint promisor compelled to perform may claim compensation:** When one of the joint promisors has been compelled to perform the whole of the promise, he may compel every other joint promisor to **contribute equally** with himself to the performance of the promise, unless a contrary intention appears from the contract.

(iii) **Sharing of loss arising from default of joint promisors:** If any one of the joint promisor makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

RELEASE OF JOINT PROMISOR (Section 44):

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors neither does it free the joint promisors so released from responsibility to the other joint promisor or promisors.

RIGHT OF JOINT PROMISEES (SECTION 45):

"When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests with them during their joint lives, and after the death of any of them with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly.

TIME AND PLACE FOR PERFORMANCE OF THE PROMISE (SECTION 46 TO 50):

(i) **Where no time of performance is specified:** If no time is specified in a contract for the performance of the promise, the promise must be performed within a reasonable time. (Section 46)

(ii) **Where time of performance is specified:** If a promise is to be performed on a specified date, the promisor must perform the promise on the day fixed during the usual business hours and at the place at which the promise ought to be performed. (Section 47)

(iii) **Where no place of performance is fixed:** When no place is fixed for the performance of a promise, it is the duty of the promisor to ask the promisee to fix a reasonable place for the performance of the promise and perform it at such place. (Section 49)

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(iv) **Where performance on application by the promisee:** Where the promisor has not undertaken to perform the promise without an application by the promise, and the promise is to be performed on a certain day it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business. (Section 48)

DISTINCTION BETWEEN SUCCESSION AND ASSIGNMENT:

Succession:When the benefits of a contract are given by succession then both burden and benefits attaching to the contract are passed to the successor. However, the liability of the successor will be limited to the extent of the property inherited by him and no further.

Assignment:When the benefits are given by assignment only benefits are passed and not the burdens. Also burdens of a contract cannot be assigned to anyone.

EFFECT OF REFUSAL TO ACCEPT OFFER OF PERFORMANCE (SECTION 38):

Where a promisor has made an offer of performance to the promisee and the offer is not accepted, then the promisor is not responsible for non performance; nor does he lose his rights under the contract. Such offer must fulfill certain conditions:

(i) It must be unconditional

(ii) It must be made at a proper time and place under such circumstances that the persons to whom it is made, may have a reasonable opportunity of ascertaining that the person by whom it is made is able of and willing, there and then to do the whole of what he is bound by his promise to do.

(iii) If an offer is an offer to deliver any thing to the promisee, then the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promises has the same legal consequences as an offer to all of them.

EFFECT OF A REFUSAL OF PARTY TO PERFORM PROMISE:

When a party to a contract has refused to perform or has disabled himself from performing his promise in entirety, the following two rights accrue to the aggrieved party:

(a) Right to terminate the contract;

(b) Right to indicate by words or by conduct that he is interested in its continuance.

If he chooses to terminate then the loss suffered by him will have to be made good by the promisor. If he chooses to continue then he would be entitled to claim damages which accrue on the date the contract is due to be performed.

If contract is rescinded then aggrieved party is to give back all the benefit he may have received, but is entitled to receive compensation for all damages that he has sustained by the breach.

RECIPROCAL PROMISES

Promises which form the consideration or part of consideration for each other are called **reciprocal promises**. Thus, where a contract consists of promise by one party in consideration of a promise by other party, the promises are called reciprocal promises.

Types of reciprocal promises:

1. **Mutual and independent:** When each party must perform his part of the promise independently without waiting for the performance or readiness to perform by the other party, the promises are called mutual and independent.

2. **Conditional and dependent:** When the performance of one depends on the prior performance of the other party, the promises are called conditional and dependent.

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3. **Mutual and concurrent:** When the parties have to perform their promises simultaneously, they are said to be mutual and concurrent.

Rules for performance of reciprocal promises:

1. **Mutual and concurrent:** Where reciprocal promises are to be performed simultaneously, the promisor need not perform his promise unless the promisee is ready and willing to perform his promise.
2. **Mutual and dependent:** Where the performance of promise by one party depends upon the prior performance of the promise by the other party, if the party who is liable to perform first, fails to perform, then he cannot claim performance from the other party. Also the defaulter becomes liable to pay compensation to the other party for any loss sustained by the non performance of the contract.
3. **Mutual and Independent:** In this case, if a party fails to keep his promise, the other party cannot excuse himself from performance on the ground of non-performance by the defaulting party. However, the aggrieved party can claim damages from the defaulting party.
4. **Order of performance of reciprocal promises:**Where the order in which the reciprocal promises are to be performed is not expressly fixed by the contract, they must be performed in the order which the nature of the transaction requires.
5. **Effect of one party preventing another from performing promise:** When the contract contains reciprocal promises, one party may prevents the other from performing his promise, then the contract becomes voidable at the option of the party so prevented. Also, he can claim compensation from the other party for any loss sustained due to non-performance of the contract.

Reciprocal promises to do certain things that are legal, and also some other things that are illegal:

When persons reciprocally promise, first to do certain things which are legal and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

TIME AS THE ESSENCE OF THE CONTRACT (SECTION 55):

"Time is the essence of the contract" means that the time is an essential factor and the concerned parties must perform their respective promises within the specified time.

1. **Time is essence:** In a contract, in which time is of the essence of the contract, if there is a failure on the part of the promisor to perform the obligation within the fixed time, the contract becomes voidable at the option of the promisee. If, in such case, the promisee accepts the offer after the fixed time, he cannot claim any compensation for the loss sustained due to non-performance of the promise at the agreed time. However, where at the time of accepting the delayed performance he gives notice to the promisor of his intention to claim compensation, he can do so.
2. **Time is not of essence:** In a contract, in which time is not of the essence, failure on part of the promisor to perform his obligation within the fixed time does not make the contract voidable, but the promisee is entitled to compensation for any loss sustained to him by such failure.

APPROPRIATION OF PAYMENTS:

(i) ***Application of Payment where debt to be discharged is indicated (Section 59):***

Quicquid soivitur, sovitur secundum modum solventis". It means that whatever is paid; is paid according to the intention or manner of the party paying.

(ii) ***Application of payment where debt to be discharged is not indicated:***

f the debtor owing several debts to the creditor has not intimated, which debt is to be adjusted, at the time of payment, the creditor is entitled to appropriate it to the debt first in time.

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(iii) ***Application of payment where neither party appropriates****:*

here neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time; whether they are or not barred by the law in force. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

***Effects of neglect of promisee (Section* 67):** If any promisee neglects or refuses to afford the promisor facilities for the performance of a promise, the promisor is discharge

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

11

SALE OF GOODS ACT, 1930

Covering-

- Introduction
- Definitions
- Contract of sale
- Distinction between sale and agreement to sell
- Distinction between sale and hire purchase agreement
- Implied Conditions
- Implied warranties
- Transfer of ownership and delivery of goods
- Unpaid seller and his rights
- Advance Your Knowledge
- Self Test Questions

EXPECTED MARKS COVERAGE (1 to 5)

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SALE OF GOODS ACT, 1930

INTRODUCTION

Till 1930, transactions relating to sale and purchase of goods were regulated by the Indian Contract Act, 1872. In 1930, Sections 76 to 123 of the Indian Contract Act, 1872 were repealed and a separate Act called **"The Indian Sale of goods Act, 1930"** was passed. It came into force on **1st July 1930**. With effect from 22nd September, 1963, the word "Indian" was also removed to make the present Act, "The Sale of Goods Act, 1930". This Act extends to **whole of India except the State of Jammu and Kashmir**. This Act deals with goods and not other movable property. It covers both a sale as well as agreement to sell goods.

DEFINITIONS

Section 2 of The Sale of Goods Act, 1930, defines the following terms:

- **Buyer and Seller: "Buyer"** means 'a **person who buys** or agrees to buy goods. The **"Seller"** means 'a **person who sells** or agrees to sell goods'.
- **Mercantile agent:** Mercantile agent means 'an agent having in the customary course of business **an authority either to sell goods or to consign goods** for the purpose of the sale or to buy goods or to raise money on the security of the goods.
- **Property:** It means 'the **general property right** of ownership in goods and not merely a special property.
- **Insolvent:** A person is said to be insolvent when he **ceases to pay his debts** in the ordinary course of business, or **cannot pay his debts** as they become due.

GOODS:

"Goods" means 'every kind of **movable property.** Sale and purchase of immovable property is not covered by this Act.

IT INCLUDES	IT EXCLUDES
• Stock and shares • Growing crops • Grass and things attached to or forming part of land, which are agreed to be severed before sale. • Rare, old and antique coins • Goods like patents, copyright, trademark, goodwill, license, water, gas, electricity.	• Actionable claims • Money • Immovable property

TYPES OF GOODS:

Existing goods	These are goods which are in existence at the time of contract of sale. Such goods are in the ownership and in possession of the seller at the time he makes sale.	
	Specific Goods	Goodswhich areidentified and agreed by the parties at the time of the contract of sale are specific goods. Thus, the goods have been separated from the lot.
	Generic or Unascertained Goods	Generic or unascertained goods are 'goods defined only by description or sample and not specifically identified and separated at the time of the formation of contract.
	Ascertained Goods	Goods which are ascertained and identified in accordance with the agreement after the formation of the contract are called ascertained goods.

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Future Goods	"Future Goods" means 'goods which are not in existence at the time of contract. These goods are to be manufactured or acquired by the seller after the contract of sale is made'. Since, these goods are not in ownership and possession of the seller, the seller cannot make sale of these goods. Rather, agreement to sell is made for these goods.
Contingent Goods	These are goods which are also not in existence at the time of contract like future goods. The acquisition of contingent goods by the seller depends upon happening or non-happening of an uncertain event which may or may not happen.

CONTRACT OF SALE (SECTION 4):

Section 4 defines contract of sale as "a contract whereby the seller **transfers** or **agrees to transfer** the **property in goods** to the buyer for a **price**".

Essentials of contract of sale:

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

Two parties	There must be atleast two parties, one seller and the other buyer.
Subject matter	Subject matter of a contract of sale must necessarily be goods.
Transfer of property	In every contract of sale, the ownership of goods must be transferred by the seller to the buyer. Property means the general property in goods and not merely special property.
Price	Price means the money consideration for sale of goods paid by the buyer to the seller. The consideration in a contract of sale must be money. However, it may be partly in cash and partly in kind.
Essentials of a valid contract	The contract of sale must possess all essential elements of a valid contract.

SALE AND AGREEMENT TO SELL:

Sale: Where under a contract of sale, the property in the goods is transferred from the seller to the buyer **immediately** at the time of making the contract, it is called sale.

Agreement to sell: Where under a contract of sale the transfer of the property in the goods is to take place at a **future time** or subject to fulfillment of some conditions, it is called an agreement to sell.

DISTINCTION BETWEEN SALE AND AGREEMENT TO SELL

BASIS OF DISTINCTION	SALE	AGREEMENT TO SELL
Transfer of ownership	Transfer of ownership of goods take place immediately at the time of making the contract.	Transfer of ownership take place at a future time or subject to fulfillment of certain conditions.
Type of contract	Executed contract	Executory contract
Nature of right	Jus in rem	Jus in personam
Risk of loss	Risk of loss or damage of goods is transferred to the buyer immediately.	Risk of loss or damage of goods is not transferred to the buyer immediately as ownership has not transferred.
Right of seller against buyer's breach	Seller can sue the buyer for the price of goods even though the goods are in his possession.	Seller can sue the buyer for damages only.

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Right of buyer against seller's breach	Buyer can sue the seller for damages and also the third party who bought the goods.	Buyer can sue the seller for damages only.
Effect of insolvency of seller	Buyer can claim the possession of goods from the official assignee as the ownership in goods has transferred to him.	Buyer cannot claim goods even though he has paid the price. He can claim the rateable dividend for the price paid by him.
Effect of insolvency of buyer	Seller must deliver the goods to the official assignee as the ownership has transferred to the buyer. He can claim only rateable dividend for the unpaid price.	Seller is not required to deliver the goods to official assignee even if the buyer has paid the full price for the goods.

DISTINCTION BETWEEN SALE AND BAILMENT:

A "bailment" is a transaction under which goods are delivered by one person (the Bailor) to another (the bailee) for some purpose, upon a contract that they be returned or disposed of as directed after the purpose is accomplished.

BASIS OF DISTINCTION	SALE	BAILMENT
Parties	Parties involved in a sale contract are called **seller** and **buyer.**	Parties involved in a bailment agreement are called **bailor** and **bailee.**
Transfer of ownership	The ownership of the goods is transferred from the seller to the buyer.	Only possession of the goods is transferred from the bailor to the bailee and not ownership.
Transfer of possession	Possession of goods may or may not be transferred immediately at the time of contract.	Possession of the goods is immediately given to the bailee at the time of the contract.
Return of goods	Goods are not returned to the seller in sale.	When the purpose of bailment is over, the goods must be returned by the bailee to the bailor.
Consideration	Consideration is price in terms of money.	Bailment may be gratuitous or non-gratuitous.
Use of goods	Buyer may use the goods according to his own choice.	Bailee must use the goods in accordance with the terms and conditions of bailment.

Sale And Contract For Work And Labour:

In a contract of work and labor, the rendering of the service and the exercise of skill is the essence of the contract even though there may be delivery of goods.

In a contract of sale, the essence is transfer of ownership as well as possession of goods from the seller to the buyer. The Sale of Goods Act, 1930 does not apply to contracts for skill and labor.

DISTINCTION BETWEEN SALE AND HIRE PURCHASE AGREEMENT

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

A "**hire purchase agreement**" is basically a **contract of hire**, but in addition, it gives the **hirer an option** to **purchase the goods** at the end of the hiring period. Consequently, until the final payment, the hirer is merely a bailee of goods and ownership remains vested in the bailor. Under such a contract, the owner of goods delivers the goods to person who agrees to pay certain stipulated periodical payments as hire charges. Through the possession is with the hirer, the ownership of the goods remains with the original owner.

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BASIS OF DIFFERENCE	SALE	HIRE-PURCHASE AGREEMENT
Governing law	Governed by The Sale of Goods Act, 1930	Governed by Hire Purchase Act, 1972
Transfer of ownership	Ownership is transferred immediately.	Ownership is transferred on the payment of the last installment.
Nature	Executed contract	Executory contract
Possession of the goods	Possession of the goods need not be transferred immediately.	Possession of the goods is transferred immediately.
Right to terminate	The buyer has no right to terminate the contract of sale by returning the goods.	The hirer has right to terminate the agreement at any time by returning the goods.
Right to repossess the goods	The seller has no right to repossess the goods on breach. He can sue for the price only.	The hire-vendor has a right to repossess the goods if the hirer defaults in the payment.
Resale	The buyer can resale the goods as he is the owner of goods.	Hirer cannot resale goods before the payment of last installment.
Formalities	A contract of sale need not necessarily be in writing.	The hire-purchase agreement must be in writing.
Payment made by installment	The payment made by the buyer in installment is treated as payment of price of the goods.	Installment paid by the hirer is treated as hire charges for use of goods.

DESTRUCTION OF SUBJECT MATTER OF A CONTRACT:

1. **Goods perishing before the contract are made:** Where the contract for sale is made for **specific goods**, if the goods have without the knowledge of the seller, destroyed or so damaged as no longer answer to the description in the contract, then the contract of sale is **void**.
2. **Goods' perishing after the contract is made:** Where there is an **agreement to sell specific goods**, the goods without any fault of the seller or the buyer perish or suffer such damages as not to answer the description in the agreement before the risk passes to the buyer, the **agreement becomes void**. When the property in the goods has passed to the buyer, the buyer bears the risk of subsequent destruction of or damage of goods.

ASCERTAINMENT OF PRICE:

Pricemeans the money consideration for sale of goods. No sale can take place without a price. Price of the goods has to be paid in money. The price may be paid by the buyer to the seller either at the time of making the contract or at some future date.

Modes of Fixing Price(Section 9 and 10)

The price may be:

a) Fixed at the time of contract by the parties themselves
b) Fixed in a manner provided in the contract of sale
c) Fixed by usage
d) Fixation of reasonable price(Usually the price prevailing in the market on the date of sale).
e) Fixed by some third-party

Price fixed by third party:

- Where the third party is not willing or unable to fix the price of the goods and the goods have not been delivered to the buyer, the contract will become void.

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- Where the third party is not willing or unable to fix the price but the goods have already been delivered to the buyer and he has has already taken the benefit of the goods, he must pay a reasonable price for them.
- Where the third party is prevented from valuing the price as a result of the fault of seller or the buyer, then the party in fault is liable to pay damages to the other party.

STIPULATION AS TO TIME:

Unless a different intention appears from the terms of the contract:

- Stipulation of the time for the payment of price is not deemed to be of essence of a contract of sale.
- The time stipulated for the delivery of goods is considered to be of essence of the contract. non performance at the stipulated time will render the contract voidable at the option of the buyer.

EARNEST MONEY OR SECURITY DEPOSIT:

Sometimes, the buyer pays some money to the seller in advance. Such payment may be earnest money or security deposit.

- When such payment is made as a part of price in advance, then if the contract is not performed it is to be refunded to the buyer. However, if the contract is performed, it will be adjusted in the total price of the goods purchased.
- When such payment is made as a guarantee for the performance of a contract by the buyer, then on his failure to perform the contract the seller can forfeit the amount.

DOCUMENT OF TITLE OF GOODS:

A document of title is any written document that is treated in the regular course of business as adequate evidence that the person in possession of the document is entitled to receive, hold and dispose of the document and a right to transfer or receive goods thereby represented'. Bill of Lading, railway receipt, warehouse receipts are types of document of title of goods.

CONDITIONS AND WARRANTIES (SECTIONS 10-17)

The parties are at liberty to enter into a contract with any terms and conditions they please. During sale, the seller makes various claims regarding the goods to be sold. These cliams may amount to a condition, forming part of the contract or a mere expression of opinion, which is not part of the contract. If it is a statement by the seller on the reliance of which the buyer makes the contract, it will amount to a stipulation. If it is a mere recommendation by the seller of his goods it does not amount to a stipulation and does not give the right of action.

The stipulation may either be a condition or a warranty. Section 12 draws a clear distinction between a condition and a warranty. Whether a stipulation is a condition or only a warranty is a matter of substance rather than the form of the words used. A stipulation may be a condition through called a warranty and *vice versa.*

CONDITIONS

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

WARRANTIES

If the **stipulation is collateral to the main purpose of the contract,** i.e., is a subsidiary promise, it is a warranty. The breach of a warranty gives the aggrieved party a right to claim damages but not the right to reject goods or to terminate the contract. Thus, if the seller does not fulfill a warranty, the buyer must accept the goods and claim damages for breach of warranty.

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

DISTINCTION BETWEEN CONDITION AND WARRANTY:

BASIS OF DIFFERENCE	CONDITION	WARRANTY
1. Nature	Essential to the main purpose of the contract.	Collateral to the main purpose of the contract.
2. Right in case of breach	The aggrieved party can terminate the contract.	The aggrieved party can claim damages only.
3. Treatment	A breach of condition can be treated as a breach of warranty	A breach of warranty cannot be treated as breach of condition.

WHEN A CONDITION MAY BE TREATED AS WARRANTY:

In the following three cases, a breach of a condition is treated as a breach of a warranty:

Waiver by the buyer	The buyer may waive a condition. Once the buyer waives a condition, he cannot insist on its fulfillment.
Treatment by buyer	The buyer may elect to treat breach of the condition as a breach of warranty. Thus, he may claim damages instead of repudiating the contract.
Compulsory treatment by buyer	Where the contract is indivisible and the buyer has accepted the goods or part thereof, the breach of condition can only be treated as breach of warranty. Thus, the buyer cannot terminate the contract but can only claim damages from the seller.

In a contract of sale of goods, conditions and warranties may be express or implied:

- ***Express conditions and warranties:*** These are stipulations which are agreed upon between the parties at the time of contract and are expressly provided in the contract.
- ***Implied conditions and warranties:*** These are implied by law in every contract of sale of goods unless a contrary intention appears from the terms of the contract. These implied conditions or warranties can be altered or negated by an express agreement between the seller and the buyer.

IMPLIED CONDITIONS

The implied conditions are those which are presumed by law to present in the contract. However, an implied condition may be negated or waived by an express agreement. The following conditions are implied in a contract of sale of goods unless the circumstances of the contract show a different intention:

Condition as to title	In every contract of sale, there is an implied condition on part of the seller that: a. In case of sale, he has ownership and **right to sell** the goods, and b. In an agreement to sell, he **will have a right to sell** the goods at the time when the property is to pass.
Sale by description	Where there is a contract of sale of goods by description, there is an implied condition that goods delivered by seller shall **correspond with such description**. If the goods does not correspond with the description, the buyer is not bound to accept and pay for the goods.
Sale by sample	In a contract of sale by sample, there is an implied condition that: • The bulk should **correspond with the sample** in quality; • The buyer shall have **reasonable opportunity of comparing the bulk** with the sample; and • The goods shall be **free from any defect** rendering them un- merchantable, which would not be apparent on reasonable examination of the sample.

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Sale by sample as well as by description	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 both with the sample and the description**. In case the goods correspond with the sample but do not tally with the description or vice versa, the buyer can repudiate the contract.
Condition as to quality or fitness	There is **no implied condition** as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. There is an implied condition as to the reasonable quality or fitness of goods if: a) The particular **purpose** for which goods are required must have been **disclosed** by the buyer to the seller. b) The buyer must have **relied upon the seller's skill** or judgment of the seller to select the best goods and c) The seller has **ordinarily** been **dealing** in those goods. However, there is no implied condition where: a) The buyer has **not disclosed** to the seller any abnormal circumstances or b) The buyer buys a specified article under its **patent** or other **trade name** and c) Buyer has **not relied upon the skill** and judgment of seller.
Condition as to merchantable quality	*Merchantable quality* means that the goods should be resalable in the market under the particular description by which they are known. They are not merchantable if they have defects which make them **unfit for ordinary use**, or are such that a reasonable person knowing of their condition **would not buy them**. Where the goods are bought be description from a seller who deals in that type of goods, there is an implied condition that the goods shall be merchantable quality.
Condition as to wholesomeness	In a contract of sale of provisions and eatables, there is an implied condition that the goods shall be wholesome or sound, i.e. goods should be fit for human consumption.

IMPLIED WARRANTIES

Implied warranties are those which **the law presumes** to have been incorporated in the contract of sale inspite of the fact that the **parties havenot expressly included** them in a contract of sale. Subject to the contract to the contrary, the following are the implied warranties in the contract of sale:

Warranty as to undisturbed possession	There is an implied warranty that the buyer shall have and **enjoy quiet possession** of the goods'. If the buyer's possession is disturbed by anyone having superior title than that of the seller, the buyer may sue the seller for the breach of warranty.
Warranty as to freedom from encumbrances	There is an implied warranty that the goods shall be so **free from any charge or encumbrances** in favor of any third party. If the goods are found subject to some charge in favor of third party, the buyer may sue the seller for damages. However, this warranty is not applicable where the buyer has been informed of such charge or has notice of the same.
Warranty to disclose dangerous nature of goods	If the goods are inherently **dangerous** or likely to be dangerous to the buyer, it is the duty of the seller to **warn the buyer** of the probable danger which may arise out of its use.
Warranty as to quality or fitness by usage of trade	There is an implied warranty as to **quality of fitness** for a particular purpose may be annexed by the **usage of trade.**

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Doctrine of Caveat Emptor

The term *caveat emptor* is a Latin word which means "**let the buyer beware**". It implies that while purchasing the goods, the buyer must be cautious. This principle states that, at the time of buying goods, the buyer must make reasonable examination of the goods to satisfy himself that the goods are suitable for his purpose. Section 6 provides that "subject to the provisions of the 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** for which the goods are supplied under a contract of sale". In simple words, it is not the seller's duty to give to the buyer the goods which are fit for a suitable purpose of the buyer. It is up to the buyer to make proper selection of goods according to his needs. If he makes a wrong selection, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose.

Exceptions to the doctrine of *Caveat Emptor:*

Misrepresentation by seller	Where the seller makes a false representationand the buyer relies on it and makes the contract, the rule of caveat emptor will not apply and the contract will become voidable in the hands of buyer.
Concealment of defects	When the seller actively conceals a defect in the goods which is not visible on a reasonable examination, it will amount to fraud and the above rule will not apply.
Condition as to fitness for purpose	Where the seller is a dealer of the type of goods sold by him and the buyer has disclosed the purpose for which goods are required and relied upon the seller's skill or judgment, the above rule will not apply.
Sale by description	Where goods are sold by description and the goods supplied by the seller do not correspond to the description.
Sale by sample	Where the goods are sold by sample and the goods supplied by the seller do not correspond with the sample.
Sale by sample and description	Where the goods are sold by sample as well as description and the goods supplied do not correspond with the sample as well as description.
Merchantability	Where the goods are bought by description from a seller who deals in goods of that description and the goods are not of **merchantable quality**, the rule of caveat emptor does not apply.

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UNIT-2 TRANSFER OF OWNERSHIP AND DELIVERY OF GOODS

PASSING OF PROPERTY:

Passing of property means transfer of ownership and not the physical possession of goods. Transfer of ownership is different from transfer of possession. On sale, the ownership of the goods transfer from the seller to the buyer but the goods may remain in the possession of the seller. If the ownership has passed to the buyer, the risk in the goods sold is that of buyer and not of seller, though the goods may be in the seller's possession.

Significance of Passing of Property:

The time of transfer of ownership of goods decides various rights and liabilities of the seller and the buyer. Thus, it becomes very important to know the exact time of transfer of ownership of goods from seller to buyer to answer the following questions:

1. Who shall bear the risk?
2. Who can take action against the third party?
3. Whether a seller can sue for price?
4. In case of insolvency of a buyer whether the official receiver or assignee can take the possession of the goods from the seller?
5. In case of insolvency of a seller whether the official receiver or assignee can take the possession of the goods from the buyer?

Transfer of Ownership of Specific or Ascertained goods:

No property in the goods is transferred to the buyer, unless and until the goods are **ascertained**. Where there is a contract of sale of specific or ascertained goods, property passes to the buyer at the time when parties intend to pass it. For the purpose of ascertaining intention of the parties regard shall be had to the terms of the contract, conduct of parties and circumstances of the case.Unless a contrary intention appears, the following rules are applicable for ascertaining the intention of the parties:

SITUATION	TIME WHEN OWNERSHIP IS TRANSFERRED
1. Where there is an **unconditional** contract for the sale of specific goods in a **deliverable state**	At the time of making the contract
2. Where there is a contract for the sale of specific goods **not in a deliverable state**	When the goods are put into deliverable state and the buyer has notice of it.
3. Where there is a sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of **ascertaining the price**	Where the seller has done the act to ascertain the price and the buyer has notice thereof.

Transfer of Ownership of Unascertained goods and Future goods:

Unascertained goods mean goods which have not been identified and agreed upon at the time when contract of sale is made. Future goods mean 'goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.The property in unascertained or future goods does not pass until the goods are ascertained.

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

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

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

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

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

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

Appropriation of goods:

Appropriation of goods involves selection of goods with the intention of using them in performance of the contract and with the mutual consent of the seller and the buyer. The essentials of appropriation are:

(i) The goods should conform to the description and quality stated in the contract.

(ii) The goods must be in a deliverable state.

(iii) The goods must be unconditionally appropriated to the contract either by delivery to the buyer or his agent or the carrier.

(iv) The appropriation must be made by:

i. The seller with the assent of the buyer; or

ii. The buyer with the assent of the seller.

(v) The assent may be express or implied.

(vi) The assent may be given either before or after the appropriation.

Rules relating to the transfer of ownership of goods sent 'on approval' or 'on sale or return' basis:

Goods sent 'on approval' or 'on sale or return' basis means those goods in respect of which the buyer has the option either to return or retain the goods. The various rules relating to transfer of ownership of such goods are:

SITUATION	TIME WHEN THE OWNERSHIP IS TRANSFERRED
When the buyer signifies his approval	When the approval is communicated to the seller.
When the buyer does not actually communicates his acceptance but does some act adopting the transaction	When the act representing the adoption has been done.
When the buyer fails to return the goods **a) If the time has been expired for return of goods** **b) If no time has been fixed for the return**	 On the expiry of the fixed time. On the expiry of the reasonable time period.

Reservation of Right of Disposal:

Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, the ownership of goods will not be transferred to the buyer until the conditions imposed by the seller are fulfilled even if the goods have already been delivered to the buyer or to a carrier or other bailee for the purpose of transmitting the same to the buyer. The seller may reserve the right of disposal of goods either expressly or by implication. The seller is deemed to have reserved the right of disposal to himself in the following two cases:

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(i) **In case of goods deliverable to the order of seller or his agent:** Where the goods are shipped or delivered to a railway administration for carriage and by the bill of lading or the railway receipt, they are deliverable to the order of the seller or his agent.

(ii) In case of drawing a Bill of Exchange: Where the seller draws a bill of exchange on the buyer for the price of the goods and sends the bill of exchange together with the bill of lading or railway receipt, the ownership of the goods will not be transferred to the buyer until the buyer honors the bill of exchange. The buyer must return the bill of lading or the railway receipt if it does not honor the bill of exchange, and if he wrongfully retains the bill of lading or the railway receipt, the ownership of goods will not be transferred.

Passing of Risk:

Risk means the **liability to bear the loss** if the goods are lost or damaged. The general rule is that the risk follows the ownership. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether the delivery has been made or not. However, Section 26 provides that where delivery of the goods has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. Also, the duties and liabilities of the seller or the buyer as bailee of goods for the other party remain unaffected even when the risk has passed generally.

Transfer of the Title:

The general rule is that only the owner of goods can sell the goods. The rule is expressed by the maxim; "Nemo dot quod non habet" i.e. no one can pass a better title than what he himself has. It means that a seller of goods cannot give a better title to the buyer than he himself possess. Thus, even *bona fide* buyer who buys stolen goods from a thief or from a transferee from such a thief cannot get a valid title to them, since the thief has no title, nor could he give one to any transferee.

Exception of the General Rule:

In the following cases, a non-owner can convey better title to the bona fide purchaser of goods for value:

(a) ***Sale by a mercantile agent:*** In a sale by a mercantile agent, the agent can pass a good title to the buyer in the following circumstances:

(i) The seller must be in the **possession of either the goods or documents of title of goods** with the consent of the owner;

(ii) The sale was made by him in the **ordinary course of his business**.

(iii) The **buyer must have acted in good faith.**

(iv) The buyer must have **no notice of the fact that the seller has no authority** to sell the goods.

(b) ***Sale by a co-owner:*** In a sale by a co-owner, the co-owner can pass a good title to the buyer in the following circumstances:

(i) The joint owner must be in the **sole possession of the goods with the permission of other co-owners;**

(ii) The **buyer must have bought the goods in good faith.**

(iii) The buyer must have **no notice of the fact that the seller has no authority** to sell the goods.

(c) ***Sale by a person in possession under a voidable contract:*** A good title to the buyer in the following circumstances:

(i) The seller must have obtained the possession of goods under a contract which is voidable on the ground of **coercion, fraud, undue influence or misrepresentation.**

(ii) The goods must have been sold **before the contract is rescinded.**

(iii) The **buyer must have bought the goods in good faith.**

(iv) The buyer must have **no notice of the fact that the seller's title is defective.**

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(d) ***Sale by seller who has already sold the goods but is still in possession of them:***Where a seller, after having sold the goods, sells them again to a new buyer, he can transfer a good title if the following conditions are fulfilled;

(i) The seller must be in the **possession of goods or of documents of title** to the goods, in the capacity of a seller and not in any other capacity.

(ii) The buyer must have bought the goods in **good faith.**

(iii) The buyer must have **no notice of the previous sale**.

(e) ***Sale by buyer in possessionbefore the property in the goods has vested in him****:* A good title is passed to the buyer if the following conditions are fulfilled:

(i) The buyer must be in the **possession of the goods or a document of title** to the goods, with the consent of the original seller and must have bought or agreed to buy the goods.

(ii) The buyer must have bought the goods in **good faith**.

(iii) The new buyer must have no notice of the lien or other right of the original seller in respect of the goods.

(f) ***Estoppel:***Where the owner of the goods by his statement or conduct have lead the buyer to believe that the seller has the authority to sell, then the buyer will get a good title of the goods against the true owner.

(g) ***Sale by an unpaid seller:***Where an unpaid seller who has exercised his right of lien or stoppage in transit and is in possession of the goods, resells them, the second buyer will acquire good title to the goods as against the original buyer.

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

Rules regarding Delivery of the Goods:

Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic.

(i) ***Actual or physical delivery:*** Actual deliverytakes place where the goods are physically handed over by the seller to the buyer or his authorized agent.

(ii) ***Constructive*** **delivery**: Constructive delivery takes place when the person in possession of the goods acknowledges that he holds the goods on behalf of and at the disposal of the buyer.

(iii) ***Symbolic*** **delivery:** Symbolic delivery takes place where some symbol of the real possession or control over the goods is handed over to the buyer. e.g, by delivering the key of the warehouse where the goods are stored or bill of lading which will entitle the holder to receive the goods on the arrival of the ship.

RULES AS TO DELIVERY

The following rules apply regarding delivery of goods:

(a) **Effect of part delivery:** A delivery of part of goods, taking place in the course of the delivery of the whole, has the same effect for the purpose of passing the property in such goods as delivery of the whole.

(b)Buyer to apply for the delivery: The seller of the goods is not obliged to deliver them until the buyer has applied for delivery, unless otherwise agreed.

(c) **Goods in possession of a third party:** Where the goods at the time of the sale are in the possession of a third person, there is no delivery unless and until such third person acknowledges to the buyer that he holds the goods on his behalf.

(d)Time of delivery: When the time of sending the goods has not been fixed by the parties, the seller must send them within a reasonable time.

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(e) **Time for tender of delivery:** The demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour.

(f) **Place of delivery:** The place of delivery is usually stated in the contract. Where it is so stated, the goods must be delivered at the specified place during working hours on a working day. Where no place is mentioned, the goods are to be delivered at a place where they were at the time of the sale, and if not then in existence, at the place where they would be manufactured or produced.

(g) **Expenses for delivery:** The seller has to bear the cost of delivery unless the contract otherwise provides. While the cost of obtaining delivery is said to be of the buyer, the cost of the putting the goods into deliverable state must be borne by the seller.

(h) **Delivery of wrong quantity:** In case of delivery of wrong quantity of goods, the following rules are observed:

(i) In case of delivery of **lesser quantity** of goods: The buyer may either accept the goods and pay for it at the contract price or reject it.

(ii) In case of delivery of **larger quantity** of goods: The buyer may either accept the goods and pay for it at the contract price or reject it.

(iii) In case of delivery of goods **contracted mixed with goods of different description**: The buyer may accept the relevant goods and reject the rest or reject the whole. However, mixing of goods of inferior quality does not amount to mixing of goods of different description.

(i) **Installment deliveries:** Unless otherwise agreed, the buyer is not bound to accept delivery in installments. The rights and liabilities in case of delivery in installments and payment thereon may be determined by the parties to the contract.

(j) **Delivery to carrier:** Subject to the terms of the contract, the delivery of the goods to the carrier for transmission to the buyer is prime facie deemed to delivery to the buyer.

i. **Deterioration during transit:** Where goods are delivered at a distant place, the liability for deterioration necessarily incidental to the course of the transit will fall on the buyer.

ii. **Buyer' right to examine the goods:** Where goods are delivered to the buyer, who has not previously examined them, is entitled to a reasonable opportunity of examining them in order to ascertain whether they are in conformity with the contract.

Acceptance of the Delivery of Goods:

Acceptance of the goods by the buyer is deemed to take place when the buyer:

(a) Intimates to the seller that he has accepted the goods; or

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

(c) Does any act on the goods which is inconsistent with the ownership of the seller, e.g., pledges or resells

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

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

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UNIT-3 UNPAID SELLER AND HIS RIGHTS

UNPAID SELLER: The unpaid seller is the seller to whom the full price of the goods sold has not been paid. Thus, a seller is an unpaid seller if:

a) The whole price has not been paid or tendered,
b) If a bill of exchange or other negotiable instrument is received, which has been dishonored.

Rights of an Unpaid Seller:

1) **Rights against the goods:**
   a) **Where the ownership of the goods has transferred to the buyer:**
      i) Rights of lien
      ii) Right of stoppage the goods
      iii) Right of resale
   b) **Where the ownership of the goods has not been transferred to the buyer:** In this case, the unpaid seller has the right of withholding the delivery of goods sold. Thus, the seller is under no obligation to deliver the goods to the buyer and he will not be liable for non-delivery until the price of the goods is tendered to him by the buyer.
2) **Right against the buyer**
   a) Suit for price
   b) Suit for damages
   c) Suit for interest
   d) Suit for repudiation of contract

RIGHT OF LIEN:

The right of lien is the right to retain possession of the goods. An unpaid seller of the goods who is in possession of them, has a right to retain goods in his possession until the full payment of the price is made or tendered to him in the following cases:

a) Where the goods have been **sold without any stipulation as to credit,**
b) Where the goods have been sold on credit, but the **term of credit has expired**, and
c) Where the **buyer becomes insolvent**

An unpaid seller can exercise his right of lien if:

a) He is in **actual possession** of the goods sold. However, it is not necessary that he should possess the goods as owner. An unpaid seller can exercise the right of lien, even if he possesses the goods as agent or bailee for the buyer.
b) He can retain goods only if the **price of goods** is unpaid and **not other expenses** i.e., maintenance charges, repair charges etc.

The right of lien is indivisible in nature. An unpaid seller can exercise the right of line on the whole goods in possession of him, even if part payment for the same has been made by the buyer. Thus, a buyer cannot demand proportionate delivery of goods for the part payment made by him.

Termination of the right of lien:

Unpaid seller losses his right of lien in the following cases:

a) Where the goods are delivered to the carrier or other bailee by the seller for the purpose of transmission to the buyer, without reserving the right of disposal of the goods.
b) Where the buyer or his agent lawfully obtains possession of the goods.
c) Where the seller waives off his right of lien. Waiver may be express or implied.

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RIGHT OF STOPPAGE IN TRANSIT:

'Stoppage in transit' means stopping the goods while they are in the course of transmission to the buyer. Where the **buyer has become insolvent** and the **unpaid seller** has **parted with the possession of the goods**, the seller can stop the goods in transit **until the price is paid or tendered** (offered) to him.

Thus, the right of stoppage in transit can be used only if the following conditions are fulfilled:

a) The seller must be unpaid.
b) The buyer must be insolvent.
c) The property in goods has already passed to the buyer.
d) The goods must be in transit.

To exercise the right of stoppage in transit, the goods must neither be with the seller nor with the buyer or with their agent. They should be in custody of a carrier who must hold the goods in his own name, i.e. as independent middlemen. However, transit does not mean that the goods should be actually moving.

Duration of transit:

The duration of transit is the period between the commencement and end of transit. The transit commences from the time when the goods are delivered to the middlemen (carrier or other bailee) and it continues till the buyer or his agent takes the delivery of the goods.

Transit comes to an end in the following cases:

a) Where the buyer or his agent obtains delivery of the goods before they arrive at the appointed destination.
b) Where after the arrival of the goods at the appointed destination, the carrier or the other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf.
c) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent.
d) Where after the arrival of the goods at the appointed destination, the buyer further directs the carrier to take the goods somewhere on behalf of the buyer.
e) Where the goods are delivered to a ship chartered by the buyer and the ship's acting as an agent of the buyer.

The unpaid seller may exercise his right of stoppage in transit either:

a) By taking actual possession of the goods.
b) By giving notice of his claim to the carrier or the other bailee in whose possession the goods are.

RIGHT OF RE-SALE:

Where the buyer fails to pay or offer the price to the seller within the reasonable time, an unpaid seller can exercise his right to resell the goods in the following circumstances:

a) Where the goods are of perishable nature.
b) Where the seller has expressly reserved his right of resale. In such case, the seller is not required to give any notice of resale to the buyer. Any loss on resale can be recovered form the original buyer even if notice of resale is not given to him.
c) Where the seller has exercised his right of lien or right of stoppage in transit and gives a notice to the buyer of his intention to resell the goods.

Where the seller gives notice to the buyer of his intention to resell the goods in case of non-payment of price within the reasonable time and even after the receipt of such notice, the buyer does not pay or offer to pay the price within the reasonable time, the seller may resell the goods. In such case, the seller is entitled to:

a) Recover any shortage between the contract price and resale price from the original buyer.
b) Retain the profits if the resale price is higher than the contract price.

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However, if the goods are resold by the seller without giving any notice to the buyer, the seller:

a) Cannot recover any loss suffered on resale from the original price.
b) Must return the profits, if any, on resale to the original buyer.

RIGHTS AGAINST THE BUYER:

An unpaid seller has the following rights against the buyer:

a) Suit for price: The seller can sue the buyer for the price in the following cases:

(i) Where property in the goods has passed: Where under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay the price.

(ii) Where property in the goods has not passed: Where under a contract of sale, the property in the goods has not passed to the buyer but according to the contract the buyer is to pay the price at a certain date irrespective of the day of delivery and the buyer wrongfully neglects or refuses to pay the price.

b) Suit for damages for non-acceptance of the goods: Where the seller is ready and willing to deliver the goods to the buyer, but the buyer wrongfully neglects or refuses to accept the goods and pay for them, the seller may sue the buyer for the recovery of damages suffered due to non acceptance of the goods.

c) Suit for damages for repudiation of the contract before the due date: Where the buyer repudiates the contract before the due date of delivery of goods, the seller has the following options:

(i) He may immediately treat the contract as repudiated and sue the buyer for the recovery of damages.

(ii) He may not immediately treat the contract as repudiated but wait till the due date and sue the buyer for the recovery of the price on the due date.

d) Suit for special damages and interest: In the absence of the contract to the contrary, the seller can claim special damages and reasonable interest from the buyer in case of repudiation of contract by the buyer.

REMEDIES TO THE BUYER IN CASE OF SELLER'S BREACH:

The buyer has the following remedies against the seller for breach of contract by the seller:

a) Suit for breach of condition: Where there is a breach of condition by the seller, the buyer can treat the contract as repudiated and sue the seller for the recovery of price paid by the buyer.

b) Suit for breach of warranty: Where there is a breach of warranty by the seller, the buyer can sue the seller for the recovery of damages sustained by the buyer.

c) Suit for damages of non-delivery: Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages of non-delivery.

d) Suit for special damages and interest: The buyer can recover the special damages form the seller provided the seller knew about the special circumstances at the time of the contract. Where the buyer has already paid price to the seller, he claim interest form the seller on the price so paid. The rate of interest is at the discretion of the court and is to be calculated from the date on which the payment is made by the buyer.

e) Suit for specific performance: Where the monetary compensation is not an adequate remedy, the buyer may sue for specific performance of the contract.

AUCTION SALE:

An auction sale is a special mode of sale in which the sale is made in public and different intending buyers try to outbid each other. The goods are sold to the higher bidder. The auctioneer who sells the goods by auction is an agent of the seller. The auctioneer makes wide publicity of auction by way of advertisement. On the appointed day and time, the intending buyers assemble and the auctioneer puts the different goods to auction and invites bids from the intending buyers. The auction goes in favor of highest bidder. The highest bid is accepted by the auctioneer by the fall of the hammer or in some other customary method.

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Rules regarding auction sale:

1. **Completion of sale:** The sale is completed when the auctioneer announces it by the fall of hammer or in other customary manner. Till such completion any bidder can revoke his bid.
2. **Seller's right to bid:** Where a seller expressly reserves his right to bid, he may do so either by himself or by appointing a person to bid on his behalf. Where a seller does not expressly reserve his right to bid, the buyer has an option to treat the sale as fraudulent. Further, he can appoint only one agent to bid on his behalf.
3. **Reserve price:** The seller may notify that the sale be subject to reserve price or upset price below which the goods will not be sold even to the highest bidder.
4. **Pretended bidding:** If the seller appoints puffers (people who do not intend to purchase the goods but make bids in order to raise the bid in the auction) to bid in the sale, the sale is voidable at the option of the buyer.
5. **Knock out agreement:** It is an agreement between the bidders not to bid against each other. Such agreements are made by the bidders with a view to prevent competition among them. There is an arrangement that only one of them will bid and the goods so purchased will be disposed off privately among themselves. Such agreement is valid and not illegal.
6. **Damping:** It is an unlawful act by which an intending buyer is prevented from bidding. This is done in any of the following ways:
    a. By pointing out defects in the goods put up in the auction.
    b. By taking or scaring the intending buyers away from the place of auction by some other devise.

    Damping is illegal and the auctioneer has a right to withdraw goods from the auction sale in case where damping is observed.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

12

NEGOTIABLE INSTRUMENT ACT, 1881

Covering-

- Meaning
- Characteristics of negotiable instruments
- Presumptions as to negotiable instruments
- Promissory note
- Maturity of a negotiable instruments
- Negotiation and endorsement
- Endorsement and its types
- Difference between holder and holder in due course
- Payment in due course
- Acceptance for honour
- Rights of an acceptor for honour
- National electronic fund transfer and RTGS
- Advance Your Knowledge
- Self Test Questions

EXPECTED MARKS COVERAGE (1 to 5)

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NEGOTIABLE INSTRUMENT ACT, 1881

The law relating to 'negotiable instruments' is contained in Negotiable Instruments Act, 1881. It extends to the whole of India. It came into force on first day of March, 1882. The Act, has been amended for more than a dozen times so far.

MEANING

The word **'instrument'** means a **written document** by which a **right is created** in the favour of a person and **'negotiable'** means **transferable** by delivery. Negotiable Instrument means an instrument, the property in which is acquired by anyone who takes it – bonafide and for value, notwithstanding any defect in the title of the transferor.

According to **Sec. 13**, a negotiable instrument means a promissory note, bill **of exchange or cheque** payable either to order or to the bearer.

CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS (SEC.- 13)

- **Freely Transferable:** Negotiable Instruments are freely transferable from one person to another. In other words, the property in these instruments passes by either endorsement and delivery or by delivery merely, and no further evidence of transfer is needed.
- **Transferable infinitum:** i.e. indefinitely
- **Holder in due course** gets good title to negotiable instrument even though the title of transferor is defective.
- A Negotiable Instrument may name more than one payee jointly or alternatively.

PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENTS (SEC. 118)

Until the contrary is proved, the following <u>presumptions shall be made:</u>

(i) **As to consideration**: that every N.I. was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed or negotiated has been for consideration.

(ii) **As to date**: It is presumed that every N.I. bearing a date was made or drawn on such date.

(iii) **As to time of Acceptance:** That every accepted bill of exchange was acceptedwithin a reasonable time after its date and before its maturity.

(iv) **As to time of Transfer**: that every transfer of Negotiable Instrument was made before its maturity.

(v) **As to order of endorsement**: that endorsement appearing upon a negotiable instrument were made in the order in which they appear thereon.

(vi) **As to Stamps**:that a lost promissory note, bill of exchange or cheque was dulystamped.

(vii) The holder is a holder in due course:that the holder of a negotiable instrument is a holder in due course.

PROMISSORY NOTE (SEC. 4)

MEANING: A promissory note is an instrument in writing **(not being a bank note or a currency note)** containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of a certain person, or to the bearer of the instrument.

Essential Characteristics Of A Promissory Note (Sec.- 4)

(1) **In writing:** It must be in writing. An oral promise does not result in an instrument.

(2) **Promise to Pay:** There must be an express promise to pay. A mere acknowledgement of a debt is not a promissory note.

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(3) **Unconditional:Promise** to pay must be unconditional or subject to condition which according to ordinary experience of mankind is bound to happen.

i.e. I promise to pay 'X' ₹5,100 on Y's death. In this case the promise is not conditional, but definite since death of Y is certain. Therefore, promissory note is valid.

(4) **Certain sum of money only: Sum of money** promised must be certain and should be in terms of money and money only. If the instrument contains a promise to pay something other than money or something in addition to money, it will not be a promissory note.

(5) **Signed by the maker:The maker** of the promissory note must sign the instrument and it is incomplete till it is so signed. The signature may be made on any part of the document.

(6) **Payee must be certain:**Theperson by whose order and to whom the payment is to be made must be definite. The payee must be a certain person and where the name of the payee is not mentioned as a party the instrument becomes invalid. If the payee is designated by description (Secretary, ICAI) the promissory note is valid if the payee is ascertained by evidence.

(7) **Not payable to maker himself:**Generally speaking a pro-note cannot be made payable to maker himself. However, it would become valid when it is endorsed to maker. This is so because it becomes payable to bearer, if endorsed in blank or it becomes payable to endorsee or his order, if endorsed specifically.

(8) **Stamped:** A promissory note must be stamped.

PARTIES TO PROMISSORY NOTE:

(i) **Maker:** The person who makes the promissory note is called, the maker. His liability is primary and unconditional.

(ii) **Payee:** The person to whom money is to be paid is named in the promissory note. He is known as payee.

The words 'or to the bearer of the instrument' is inoperative in the view of Sec. 31 of the RBI Act.

Bill of Exchange (Sec.5)

Meaning: A 'Bill of Exchange' is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

Essential Characteristics of Bill of Exchange

(1) **In Writing:** Bill of Exchange must be in writing.

(2) **Order:** It must contain an order to pay. Order to be made by drawer to drawee to pay money.

(3) **Unconditional Order:** the order must be unconditional. An order does not become conditional by reason of time for payment of the amount being expressed to be on the lapse of a certain period or after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

(4) **Payment of Money only:** the order must be to pay money and money only. The sum of money payable must also be certain.

(5) **Three Parties:** The three parties (namely drawer, drawee and payee) are to specified in the instrument with reasonable certainty. Usually, same person is drawer and payee.

(6) **Stamping:** The bill of exchange must be stamped.

PARTIES TO A BILL OF EXCHANGE (SEC.7)

A. **Drawer:** The maker of the Bill of Exchange or cheque is called drawer. His liability is secondary and conditional. His liability is primary and conditional till the bill is accepted.

B. **Drawee:** The person thereby directed to pay is called drawee. After acceptance the "drawee" becomes "acceptor", he becomes liable for the payment of the bill and his liability is primary and unconditional.

C. **Payee:** the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid is called the "payee".

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CHEQUE (SEC.6)

Meaning: A cheque is a bill of exchange, drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes electronic image of a truncated cheque and a cheque in the electronic form.

❖ **Meaning of Truncated Cheque:** Truncated cheque means a cheque which is truncated during the course of clearing cycle, either by the clearing house or bank whether paying or recovering payment immediately on generation of electronic image for transmission, substituting the further physical movement of cheque in writing. **e.g.** A physical cheque deposited at bank, scanned electronically for processing.

❖ **Meaning of A Cheque in Electronic form:** It means a cheque which contains the exact mirror image of a paper, and is generated, written and signed in a secure system ensuring minimum safety standards. With the use of digital signature (with or without biometrics signature) and asymmetric crypto system. E.g. online payment instruction in net banking.

Distinguish between electronic cheque and truncated cheque	
Electronic Cheque	**Truncated Cheque**
(1) Paper is not used at any stage in creation of an electronic cheque.	**(1)** A truncated cheque is nothing, but a paper cheque, which is truncated during the clearing cycle.
(2) Digital signature must be used to create an electronic image of a cheque. Thus, an electronic cheque contains digital signature.	**(2)** The paper cheque, which is afterwards truncated, contains no Digital Signature. The signatures in ink appear on the truncated cheque.
(3) The original writing of an electronic cheque is in electronic form.	**(3)** The original writing of a truncated cheque is on paper, duly signed in ink. After the paper cheque is converted into electronic form, it is truncated, and thus, it becomes a truncated cheque.

ESSENTIAL CHARACTERISTICS OF CHEQUE:

(1) Writing: Cheques must be in writing.
(2) Order: It must contain an express order to pay.
(3) Definite and unconditional: the order to pay must be definite and unconditional.
(4) Sign: It must be signed by the drawer.
(5) Certainty of sum of money: the sum contained must be certain and in terms of money only.
(6) Bank as drawee: It is always drawn upon a specified banker.
(7) A cheque, prima facie, is a bill of exchange and hence must satisfy the essential conditions of bill of exchange under Sec. (5).
(8) A cheque is an exception to the general rule that a bill of exchange cannot be drawn payable to bearer on demand – **Sec. 31 of Reserve Bank of India Act, 1934.**i.e. cheques are always payable on demand.

(9) A cheque does not require → **(I)** Stamping or **(II)** Acceptance

PARTIES TO A CHEQUE (SEC.- – 7)

(1) Drawer: The person who draws or makes a cheque.
(2) Drawee: the bank on whom the cheque is drawn is called drawee.
(3) Payee; The person to whom money is to be paid is named in the cheque. He is called payee. The payee may be the drawer himself or a third party.

CAPACITY OF A PARTY TO N.I. (SEC. 26)

(1) Contractual Capacity: Every person capable of contracting may bind himself and be bound by the making, drawing, acceptance, endorsement, delivery and negotiation of promissory note, bill of exchange or cheque.
(2) Minor and Negotiable Instruments: A minor may draw, endorse, deliver and negotiate such instruments so as to bind all parties except himself.

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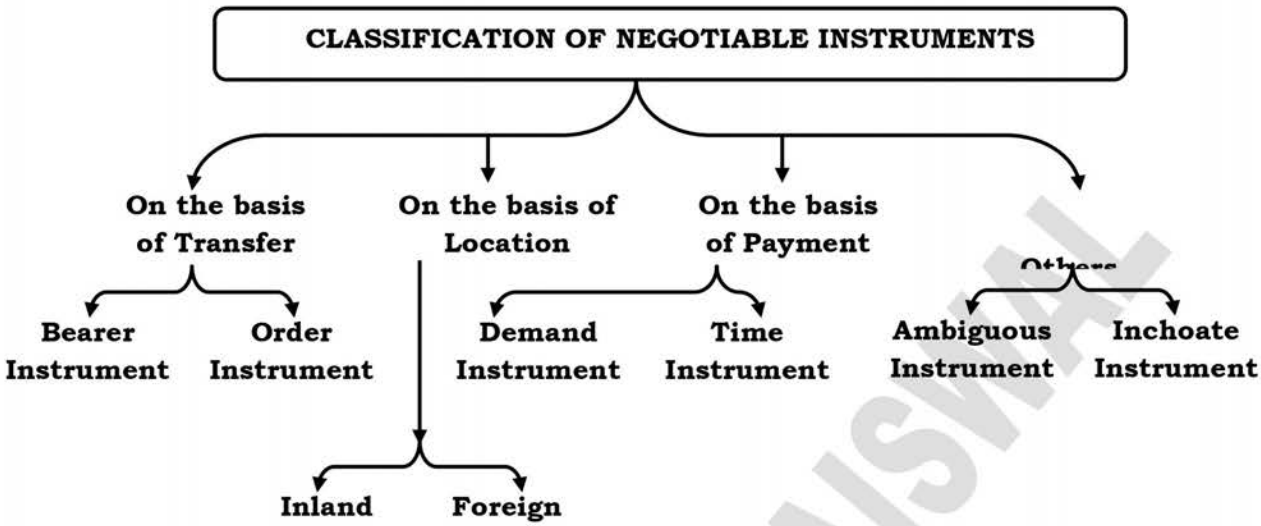
CLASSIFICATION OF NEGOTIABLE INSTRUMENTS (SEC.13, 19 AND 21)



A. On the basis of Transfer:

1) **Order Instrument (Sec. 13):** An instrument is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

2) **Bearer Instrument (Sec. 13):** An instrument is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

B. On the basis of Location:

1) **Inland Instrument (Sec. 11):** A negotiable instrument drawn or made in India and made payable in, or drawn upon any person resident in India shall be deemed to be an inland instrument.

2) **Foreign Instrument (Sec. 12):** Any such instrument not so drawn, (as an inland instrument) made or made payable shall be deemed to be a foreign instrument.

C. On the basis of Payment Procedure:

1) **TimeInstrument :** An instrument in which time for payment, i.e. "maturity" is specified and may be payable –

- ❖ After a specified period, or
- ❖ On a specified date
- ❖ Certain period after sight, or
- ❖ On the happening of certain event.

2) **Instrument Payable on Demand (Sec.19):** A promissory note or bill of exchange, in which no time for the payment is specified, and are payable on demand. A cheque is always payable on demand.

D. Others:

(1) Accommodation Bill (Sec.43): A negotiable instrument made without consideration. Such negotiable crates no obligation of payment between the parties if it was made, drawn, accepted, endorsed or transferred without consideration. If the accommodated party pays the amount due, it cannot recover such amount from accommodating party, and vice versa. A holder for value and every subsequent holder deriving title from him can recover the payment of negotiable instrument from all the prior parties except from the party whom such holder derived title without consideration

(2) Incomplete/Inchoate Instruments (Sec. 20): where one person signs and delivers to another, a paper stamped in accordance with the law relating to negotiable instruments then in force in India and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount.

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MATURITY OF A NEGOTIABLE INSTRUMENTS

Maturity (Sec.22)
The maturity of a promissory note or bill of exchange is the date at which it falls due.
Days of Grace:
Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day on which it is expressed to be payable.
Calculating maturity of a bill or note payable so many months after date or sight (Sec. 23) : In calculating the date at which a promissory note or a bill of exchange, made payable at stated number of months after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the months which corresponds with day on which the instrument is dated or presented for acceptance or sight, or noted for non-acceptance, or protested for non acceptance, or the event happens, or, where the instrument is a bill of exchange made payable a stated number of months after sight and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month.
Example:
(a) Negotiable instrument dated 29th January, 2009, is made payable at one month after date. The instrument is at maturity on the third day after 28th February, 2009.
(b) A negotiable instrument dated 30th August, 2009 is made payable three months after date. The instrument is at maturity on the 3rd December, 2009.
(c) A promissory note or bill of exchange, dated 31st August, 2009 is made payable three months after date. The instrument is at maturity on the 3rd December, 2009.

Calculating maturity of bill or note payable so many days after date or sight (Sec. 24): In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of the presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded.

When day of maturity is a holiday (Sec. 25): when the day on which a promissory note or bill of exchange is at maturity is public holiday, the instrument shall be deemed to be due on the next preceding business day.

- The expression **"public holiday"** includes Sundays and any other day declared by the C.G., by notification in the Official Gazette, to be a public holiday.

NEGOTIATION AND ENDORSEMENT

Negotiation Sec. 14: When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.
Methods of Negotiation:

(1) Negotiation by delivery: A negotiable instrument payable to bearer is negotiable by delivery thereof **(Sec. 47)**. Thus, a bearer instrument may be negotiated by delivery only. It does not require signature of the transferor (i.e. endorsement) and the transferee becomes the holder thereof by mere possession. The transferor of a bearer instrument is not liable on its dishonour because by not signing as endorser he has not added his credit to the instrument.

(2) Negotiation by endorsement and delivery: A negotiable instrument payable to order is negotiable by the holder by endorsement and delivery thereof **(Sec. 48)**. Thus the negotiation of an order instrument requires two formalities :
(i) First, the holder should endorse it; and
(ii) Then deliver to his endorsee.

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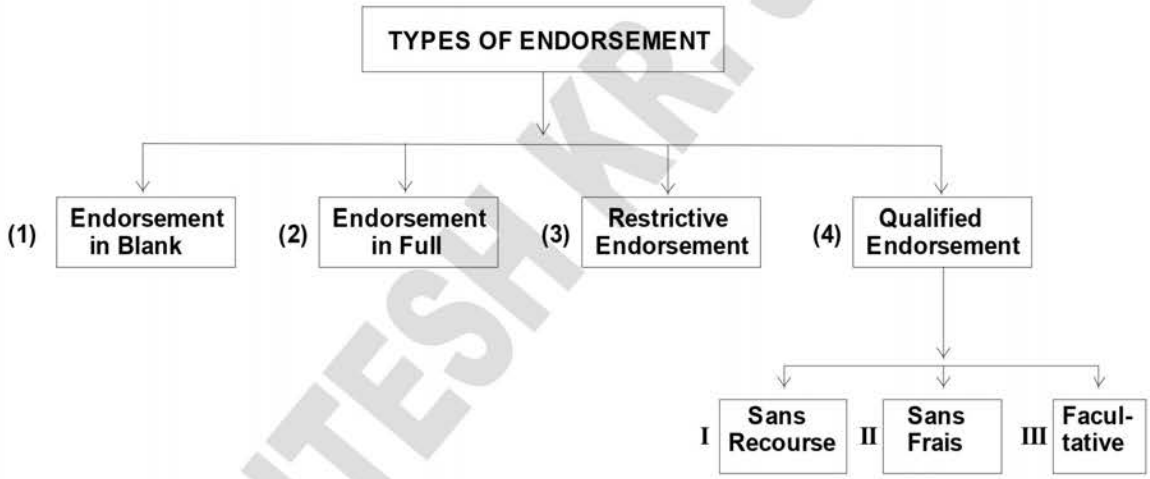
Rules of Delivery:

- **Delivery:** The making, acceptance or endorsement of pro-note, bill or cheque is completed by delivery, actual or constructive, **(Sec. 46)**.
- **Mode of Delivery:** As between parties standing in immediate relation, delivery to be effectual must be made by the party making or endorsing the instrument, or by a person authorized by him in that behalf.
- **Conditional or unconditional delivery:** an instrument may be delivered conditionally or only for a special purpose and not for the purpose of transferring absolutely the property in the instruments. A bill delivered conditionally is **ESCROW.**

A bill may be drawn and a note must be made unconditionally. When an instrument is delivered conditional or for special purpose only, the property in the instrument does not pass on to the transferee until the condition is fulfilled and the transferee holds such instrument in law as trustee or agent of the transferor.

ENDORSEMENT AND ITS TYPES

Endorsement: When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker for the purpose of negotiation, on the back or fact thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to **ENDORSE** the same, and is called the **ENDORSER**. The person in whose favour the endorsement made is called **ENDORSEE.**



1) **Endorsement in blank:** It is an endorsement wherein the endorser signs his name only. A negotiable instrument endorsed in blank is payable to the bearer thereof. **(Sec.16854).**
2) **Endorsement in full:** It is an endorsement, where the endorser signs his name and adds a direction to pay the amount mentioned to or to the order of, a specified person and the person so specified is called as endorsee of the instrument **(Sec. 16).**
3) **Restrictive Endorsement:** It is an endorsement which has the effect of restricting further negotiation and transfer **(Sec. 50)**.
4) **Qualified Endorsement:(Sec. 52)**
   - **(i) Sans recourse endorsement:** It is an endorsement where the endorser excludes his own liability or makes it conditional.
   - **(ii) Sans Frais Endorsement:** Such an endorsement indicates that endorser is not liable for expenses incurred on account of bill.
   - **(iii) Facultative Endorsement:** It is an endorsement wherein certain rights are waived and suitable words to this effect are indicated.

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Negotiation Back:

An instrument is said to have been negotiated back to him and he is said to have taken up or taken back the negotiable instrument when a person who has been a party to the negotiable instrument takes it again.

Example: The endorsements on a negotiable instrument are as under:

P, A, B, X, Y, A

Here A is a person who is a prior party to the instrument. He negotiated it to B, B to X, X to Y and Y again to this very A resulting in 'negotiation back'.

This will lead to a circuitry of action. Thus A, in the above case cannot sue Y, X or B. But A can sue P since the latter is prior to A's original endorsement. If however A, in original endorsement, had signed "sans recourse" there could be no circuitry of action and A could sue Y, X or B.

ASSIGNMENT

Meaning of Assignment: A person transfers his right to receive the payment of a debt. Then it can be said that'assignment of debt' takes place. Where the holder of an instrument transfers it to another so as to confer a right on the transferee to receive the payment of the instrument, transfer by assignment takes place. Negotiable Instrument are chose in action. Chose in action includes all debts and all claims which can not be enforced without action. Therefore, the ownership of N.I. as chose in action can be transferred by assignment. Assignment takes place by writing a separate transfer deed.

In case of assignment the little of the assignee shall be the same as that of the assignor and the Negotiable Instrument Act does not deal with transfer of Negotiable Instruments by assignment. The act only deals with negotiation.

Difference between Negotiation and Assignment:

Basis	Negotiation	Assignment
Notice of transfer	Not necessary	Notice must e served by assignee on his debtor
Consideration for transfer	Presumed	To be proved
Mode	❖ Barer instruments – delivery ❖ Order instrument – Endorsement & Delivery	Document to be reduced into writing and signed by transferor
Rights	Transferee acquires all rights of a holder in due course.	Assignee has only the right, title and interest of the assignor.
Title	The title of the transferee (ie., the holder in due course) is better than that of the transferor.	The title of the assignee is subject to the defects in the title of the assignor.

Crossing of Cheque:

1) Whena cheque bears across its face two parallel transverse lines, (usually on the top left corner of cheque) the cheque is said to be crossed.
2) Crossing affects mode of payment of cheque. Cheque is not payable to payee or holder at Bank. Payment is to be obtained only through Bank. Crossed Cheque can be negotiated similar to an open cheque.
3) The **objective of crossing** is to enable tracing the recipient of money, if an unauthorised person receives it.

Types of Crossing:

1) **General Crossing: (Sec. 123)**
   Where a cheque bears across its face an addition of –
   ❖ The words 'and company' or any abbreviations thereof between two parallel transverse lines, or

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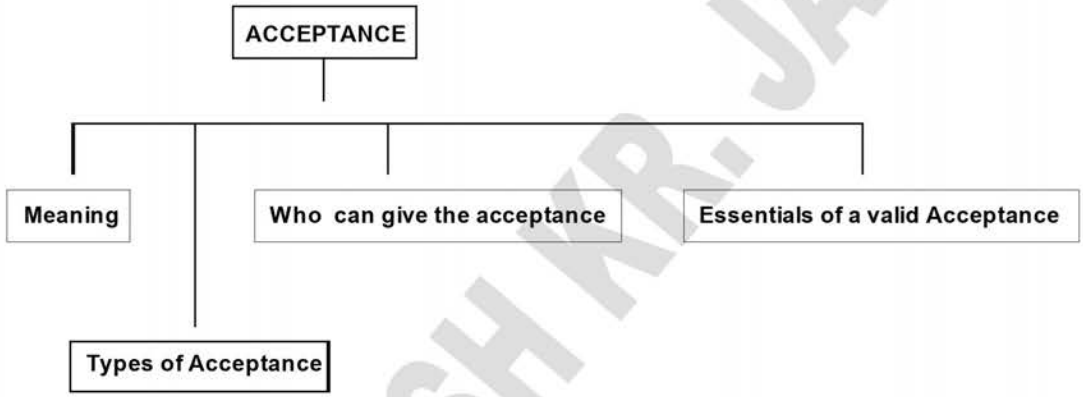
❖ Two parallel transverse lines simply.
Either with or without the words 'not negotiable', the addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.
Where a cheque is cross generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

2) Special Crossing: (Sec. 124)
Two parallel transverse lines are not a must. Where a cheque is crossed specially, the banker on whom it is crossed shall not pay it, otherwise than to the banker to whom it is crossed or his agent for collection.

3) 'Account Payee' Crossing/Restrictive Crossing:
The purpose of this crossing bearing the words "A/c Payee" is to obviate the risk of a wrong person obtaining payment on a cheque.

It is a direction to banker to credit the proceeds only to the account of the payee.
The cheque remains legally negotiable but "A/c Payee" crossing hinders the negotiability of the cheque in practice.



MEANING:
When the drawee of the bill signifies his assent in writing to the drawer's order in the, by signing across the face of the bill with or without the word "accepted" and delivers back the bill to the holder or gives notice of acceptance to the holder, the bill is said to have been accepted.

TYPES OF ACCEPTANCE:

1) General Acceptance: When the drawee gives the acceptance to pay the sum in full and without any conditions or qualification, the acceptance is said to the general, absolute or unqualified.

2) Qualified Acceptance (Sec.86): When the drawee accepts the bill subject to some condition or qualification, thereby varying the terms as expressed in the bill, it is said to be a qualified acceptance. An acceptance is qualified –
(i) Where it is conditional, declaring the payment to be dependent on the happening of an event therein stated;
(ii) Where it undertakes the payment of part only of the sum;
(iii) For a period longer than that specified in the bill;
(iv) Where acceptance to pay only at a specified place and not elsewhere.

EFFECT OF QUALIFIED ACCEPTANCE

(i) The holder may object to the qualified acceptance. It may also be treated as the bill of exchange to be dishonoured.

(ii) If the holder has consented to a qualified acceptance without the consent of previous parties it discharges the previous parties.

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Who can give the Acceptance:

(i) Drawee
(ii) All or some of the several drawees, when bill is addressed to more than one drawee.
(iii) Drawee in case of need.
(iv) An acceptor for honour
(v) Agent of any of the persons mentioned above.

Essentials of a Valid Acceptance:

(1) By a person having capacity to contract.
(2) In writing
(3) Signed
(4) It must be signed on the bill
(5) Acceptance must be completed by delivery.

HOLDER AND HOLDER IN DUE COURSE

Holder (Sec. 8): The 'holder' of promissory note, bill of exchange or cheque means any person, entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Holder in Due Course (Sec. 9): the 'holder in due course' means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount mentioned in it became payable and having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

RIGHT AND PRIVILEGES OF HOLDER IN DUE COURSE

(1) Presumption: Every holder is presumed to a holder in due course. (Sec. 118).
(2) Privilege in case of inchoate instrument (Sec. 20): In the case of inchoate instrument, if the holder or original payee fills more amount than that was authorized, he cannot enforce the instrument for the whole amount (only authorized amount can be recovered). If such an instrument is transferred to a holder in due course, he can claim the whole of the amount so entered provided that the amount is covered by the stamp affixed thereon.
(3) Liability of Prior Parties (Sec. 36): All parties to a negotiable instrument continue to remain liable to a holder in due course both jointly and severally (i.e. he can hold any or all prior parties liable) until the instrument is duly satisfied.
(4) Instruments obtained by unlawful means or for unlawful consideration (Sec. 58): The person liable in negotiable instrument can not set up against the holder in due course the defence that the instrument had been lost or obtained from him by means of an offence or fraud or for an unlawful consideration.
(5) Negotiable Instrument without consideration (Sec. 43): No prior party can set up a defence that the negotiable instrument was drawn, made or endorsed by him without any consideration.
(6) Conditional Delivery (Sec. 46): In case a bill or note is negotiated to a holder in due course, the other parties to the bill or note cannot avoid liability on the ground that the delivery of the instrument was
(i) conditional
(ii) for a special purpose only
(7) Acceptance of Bill drawn in fictitious name (Sec. 42): An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an endorsement.

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DIFFERENCE BETWEEN HOLDER AND HOLDER IN DUE COURSE

Basis of Difference	Holder	Holder in Due Course
Consideration	Holder may become possessor or payee of instrument even without consideration	Holder in due course acquires possession only for consideration
Time of Possessing	No restriction as in case of holder in due course	Must possess instrument before amount thereon becomes payable
Good faith	A person becomes a holder, even if he does not obtain the N.I. in good faith.	For being a holder in due course a person must obtain the N.I. in good faith.
Privileges	A holder is not entitled to the privileges, which are available for Holder in Due course.	A Holder in Due Course is entitled to various privileges.
Right to sue	A holder cannot sue all the prior parties	Can sue all the prior parties

PAYMENT IN DUE COURSE (SEC. 10)

Payment in due course means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

Liability of the Paying Banker:

Any banker paying cheque crossed generally otherwise than to a banker, or
A cheque crossed specially otherwise than to a banker to whom the same (cheque) is crossed,
Shall be liable to the true owner of the cheque for any loss he may sustain.

Cases in which a banker must refuse to honour a cheque:

(1) Stop payment
(2) If a cheque undated
(3) If it stale (outdated)
(4) When cheque is presented before the date (post-dated)
(5) When the customer's funds are not properly applicable.
(6) Cheque drawn upon another branch.
(7) Notice of customer's insolvency or lunacy
(8) If the court has given order to the banker not to make payment, i.e. 'GARNISHEE'
(9) There is a notice to the banker of death of the customer.
(10) Application of closure of account is served on the bank.
(11) Cheque contains unauthorized material alteration.
(12) Mutilated cheque.
(13) Difference in signature of the drawer
(14) Defect in title of the holder
(15) If the instrument is inchoate or doubtful.

CASES IN WHICH BANKER MAY REFUSE TO HONOUR A CHEQUE

(1) Insufficiency of the fund
(2) Funds not applicable
(3) Presentment of different branch
(4) Presentment after usual banking hours.

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EFFECT OF CHEQUE NOT DULY PRESENTED & DRAWER DAMAGED

When the drawer has sufficient balance in his account and the cheque is to be presented for the payment, where cheque is not presented within a reasonable time of its issue, during the same period the bank fails and consequently the drawer suffers actual damages.

There is no liability of the drawer if bank fails for that above mentioned condition must be fulfilled.

ACCEPTANCE FOR HONOUR (SEC. 108)

Generally a stranger, cannot give the acceptance to a bill. In case where a bill is dishonoured by non-acceptance, the holder may allow any other person to accept it for the honour of the drawer. The person so accepting the bill is called "acceptor for honour".

Legal Requisites for a valid Acceptance for Honour:

(i) A bill must have been noted or protested for non-acceptance or for better security.
(ii) It can take place with consent of the holder
(iii) Must be in writing
(iv) An acceptor for honour is a person who is not already liable on the bill.
(v) Acceptance for honour can be for the honour of any party already liable on the bill.

RIGHTS OF AN ACCEPTOR FOR HONOUR (SEC. 111)

On paying the bill, the acceptor for honour can sue the party for whose honour the bill is accepted and all prior parties. Such parties are liable to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance.

LIABILITIES OF AN ACCEPTOR FOR HONOUR (SEC. 112)

An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill

The acceptor for honour has to pay only if the following conditions are fulfilled:

- The bill should once more be presented to the drawee for payment at maturity
- If the drawee still refuses to pay, the bill should be noted or protested for payment.
- The bill should be presented or forwarded to the acceptor for honour not later than the day next after the day of its maturity.

PAYMENT FOR HONOUR (SEC. 113)

When a Bill of Exchange has been noted and protested for non-payment, any person can volunteer to pay it. Such a payment will be called payment for honour.

The conditions essential for such payment are:

- That the bill must have been noted or protested for non-payment;
- That the person paying or his agent declares before Notary Public, the party for whose honour he pays;
- That such declaration has been recorded by such Notary public;
- That the payment must be made for the honour of any party liable to pay the bill;
- That the payment may be made by any person whether he is already liable on the bill or not.

Right of payer for honour (Sec.114):

The person who pays a bill for honour is sugrogated to the position and rights of the holder. He is entitled to all the rights of the holder at the time of such payment. He can recover from the party for whose honour he made the payment:

- All sums paid by him for the satisfaction of the liability under the instrument.

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- ❖ The interest on such sums; and
- ❖ All expenses properly incurred by him in making the payment of the bill.

Drawee In Case Of Need:

Where the drawer of a bill is afraid that the drawee may not accept the bill, he may mention the name of an additional drawee who may be resorted to in case the original drawee declines his acceptance. Such an additional drawee is called the "drawee in case of need".

On being dishonoured by the original drawee, the bill is carried to the drawee in case of need and if he also dishonours, then only the bill can be taken to be dishonoured. The drawee in case of need is not liable unless the bill has been present to him and he has accepted it. A drawee in case of need can accept and pay the bill of exchange without the need for any protest (Sec. 116).

The failure to present the bill to the "drawee in case of need" absolves the drawer from liability.

DISHONOUR:

A bill may be dishonoured by non-acceptance or non-payment. A promissory note and a cheque are dishonoured only by non-payment.

Dishonour by non-acceptance (Sec. 91)

A bill of exchange is said to be dishonoured by non acceptance, when the drawee, or one of the several drawees not being partners, makes default in acceptance upon being duly required to accept the bill or whose presentment is excused and the bill is not accepted.

Where the drawee is incompetent to contract, or the acceptance is qualified the bill may be treated as dishonoured:

- ❖ Where a bill is not accepted by the drawee within 48 hours of presentment or refuses to accept it.
- ❖ Where the drawee is a fictitious person, or after reasonable search cannot be found.

Effects of dishonour by non-acceptance:

It amounts to a final dishonour of the bill. The holder gets an immediate right to sue all parties. He can not be compelled to wait for maturity of the instrument or to present it for payment at maturity.

☞ **Sec. 91** is not applicable to promissory and cheque as the two require no acceptance.

Dishonour by non-payment (Sec. 92):

A promissory note, bill of exchange or a cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of bills and drawee of the cheque makes default in payment upon being duly required to pay the same.

Notice of Dishonour (Sec. 93):

When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment, **the holder – thereof, or some other party thereto who remains liable thereon** must give notice that the **instrument has been so dishonoured** to all the **prior parties whom the holder seeks to make severally liable** thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Effects of non-service of Notice:

A party (except the party primarily liable on the N.I.) to whom notice of dishonour is not given is discharged from the liability on the Negotiable Instrument.

When the notice of dishonour is unnecessary (Sec. 98):

(1) When the necessity of notice is dispensed with by the party entitled thereto; e.g. when the drawer of a bill informs the holder that the bill will be dishonoured on presentment, the notice of dishonour is said to have been dispensed with.

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(2) In order to charge the drawer, when he has countermanded payment
(3) When the party charged could not suffer damage for want of notice
(4) When the party entitled to notice cannot be found after due search
(5) When the drawer himself is an acceptor, no notice is necessary to charge the drawer.
(6) When the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

NOTING AND PROTESTING

Noting: It is a mode authenticating the fact that a bill or note has been dishonoured.

❖ It is not mandatory to get the fact of dishonour NOTED*.

(i) When promissory note or a bill of exchange has been dishonoured by non-acceptance or non-payment in order to create a proof of this fact, the holder may approach a Notary Public and have the fact of dishonour noted either on the instrument itself or on a separate piece of paper or partly upon both;

(ii) Noting must be made within a reasonable time after dishonour. Upon such request being received the notary inquiries from the party liable to pay and if he still dishonour, the notary makes a note of the fact of dishonour.

(iii) The note should contain –

(a) The fact that the instrument has been dishonoured
(b) The date of dishonour
(c) The reason, assigned for dishonour
(d) If the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured
(e) Notary's charges

Protest (Sec. 100):

Protest is one step further to noting. According to this Sec.- –

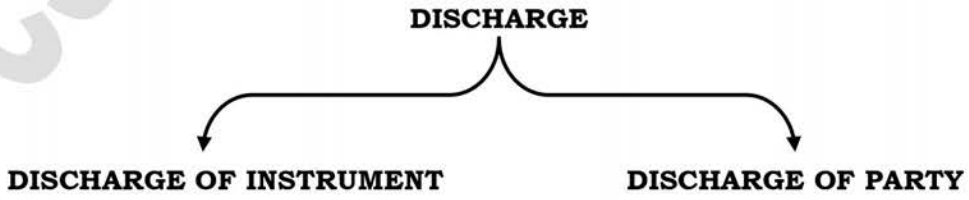
When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, causes such dishonour to be noted and **Certified by a Notary Public.** Such certificate is called a protest.

Protest for better Security:

Protest for better security is a measure of protection against the consequences of the acceptor's insolvency.

⇨ When the acceptor of bill of exchange becomes insolvent or his credit has been publicly impeached, and this has happened **before the maturity** of the bill, the holder may approach a notary public and ask him to demand from the acceptor a better security than the mere bill.

⇨ If the acceptor refuses to oblige with any security, the holder should have the fact of refusal noted and certified by the notary. Such certificate is called a **Protect for better Security**. This should be done within reasonable time after the acceptor's refusal to provide security.



The term '**discharge**' in the context of Negotiable Instruments has two senses:

⇨ Discharge of Instrument, and

⇨ Discharge of one or more parties from liability on the instrument.

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Discharge of Negotiable Instrument:

An instrument is said to be discharged when it becomes such that no action on the instrument will lie and it cannot be negotiated further discharge of the party primarily and ultimately liable on the instrument results in the discharge of the instrument itself. Discharge of Instrument takes place in the following manner:

1) **Payment in due course:** when the party primarily liable on the instrument makes the payment in due course to the holder at or after the maturity.
2) **Cancellation:** If the holder of an instrument cancels acceptor's or maker's name with an intention to discharge him, the instrument is discharged.
3) **Release:** if the holder of an instrument renounces his right against all the parties to the instrument, the instrument is discharged.
4) **By Negotiation back of a bill:** when the acceptor of a Bill of Exchange becomes the holder at or after the maturity in his own right, the instrument in discharged.

Discharge of a Party:

(1) **By Cancellation [Sec. 82(a)]:** When the holder of a negotiable instrument deliberately cancels the name of any of the party liable on the instrument with an intent to discharge him from the liability thereon, such party and all endorser subsequent to him are discharged from liability.

(2) **By release [Sec.82(b)]:** If the holder of the instrument releases any of the parties to the instrument by any method other than cancellation of names (i.e. a separate agreement of waiver, release or remission) the party so released and all parties subsequent to him are discharged from liability.

(3) **By Payment [Sec.82(c)]:** When the party primarily liable on the instrument makes the payment in due course to the holder at or after the maturity all the parties to the instrument stand discharged.

(4) **Discharge by allowing drawee more than forty eight hours to accept:** If the holder of the bill allows the drawee more than exclusive of public holidays, to consider, whether he will accept the same, all the previous parties not consenting to such allowance are thereby discharged from the liability to such holder.

- ❖ According to Sec.- 63 the drawee is entitled to be allowed a period of 48 hours at the most (exclusive public holidays) to consider whether he will accept the bill or not.

(5) **By taking qualified Acceptance [Sec.86]:** If the holder of a bill agrees to a qualified acceptance all prior parties whose consent is not obtained to such an acceptance are discharged from liability.

(6) **By non-presentment of Acceptance [Sec. 61]:** when a bill of exchange is payable certain period after sight, its holder must present it for acceptance to the drawee within a reasonable time after it is drawn. If he makes a default in making such presentment the drawer and all endorsers who were liable towards such a holder are discharged from their liability towards him.

(7) **By delay in presenting cheque (Sec. 84):** It is the duty of the holder of a cheque to present it for the payment within reasonable time of its issue. If he fails to do so and in the meantime the bank fails causing damage to the drawer, the drawer is discharged as against the holder to the extent of the actual damage suffered by him.

HUNDIS

Hundis refer to a bill of exchange in a vernacular or local language. They are governed by and subject to local customs and usage. The parties are free to exclude any prevalent custom or usage. The provision of Negotiable Instrument Act, 1881 shall apply where there is no custom or usage on a certain period.

Types of Hundis:

(1) **Darshani Hundi:** Hundis payable to sight. It is transferable by endorsement. Similar to bill of exchange payable on demand.

(2) **Mudath Hundis or Miadi Hundi:** Payable after a specified period of time.

(3) **Shah Jog Hundis:** there are three parties namely drawer, drawee and Shah i.e. Financier. It is payable to Shah, who presents it on maturity. It is transferable by delivery.

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(4) **Nam Jog Hundis:** Same as Shah Jog except that the name of the person to whom or to whose order payable is clearly mentioned. It is payable only to or to the order of a person named in the hundi. It is negotiated by endorsement and delivery.

(5) **Dhani Jog Hundi:** Dhani refers to Holder. It is self-explanatory as such it is payable to a holder or bearer. It is negotiated by mere delivery.

(6) **Firman Jog Hundi:** Firman means order. Hence payable to order. Negotiated by endorsement and delivery.

(7) **Jokhami Hundi:** documentary bill drawn by consignor on consignee in respect of goods shipped by consignor. Consignee is required to pay only on goods reaching destination. The name of the vessel by which goods are shipped is mentioned in the hundi.

(8) **Jawabi Hundi:** It is an instrument for remitting money through banker. The remitter hands over hundi to banker. Banker endorses hundi to a correspondent residing in the town in which payer is resident. Correspondent forwards Hundi to payer. Payee on presenting letter collects amount from correspondent.

Other Terms:

(i) **Zikri Chit:** Issued by some party liable thereon to the holder of hundi. Letter of protection addressed to a merchant in town where hundi is payable requesting acceptance of the hundi in case of dishonour. It is intended to be used by holder if hundi is dishonoured by non-acceptance.

(ii) **Peth:** When a hundi is lost, a duplicate called **PETH** is issued. A triplicate of hundi given on loss of duplicate hundi. So, duplicate of duplicate is **PERPETH**.

(iii) **Khokha:** A hundi paid and cancelled.

NATIONAL ELECTRONIC FUNDS TRANSFER (NEFT) AND REAL TIME GROSS SETTLEMENT (RTGS)

National Electronic Funds Transfer (NEFT) is a nation-wide payment system facilitating one-to-one funds transfer. Under this Scheme, individuals, firms and corporates can electronically transfer funds from any bank branch to any individual, firm or corporate having an account with any other bank branch in the country participating in the Scheme. NEFT is an electronic fund transfer system that operates on a Deferred Net Settlement (DNS) basis which settles transactions in batches. In DNS, the settlement takes place with all transactions received till the particular cut-off time.

These transactions are netted (payable and receivables) in NEFT whereas in RTGS the transactions are settled individually. For example, currently, NEFT operates in hourly batches. Any transaction initiated after a designated settlement time would have to wait till the next designated settlement time Contrary to this, in the RTGS transactions are processed continuously throughout the RTGS business hours.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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