

Business Law

DEBSL101

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LOVELY
PROFESSIONAL
UNIVERSITY



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Unit 01: The Indian Contract Act, 1872

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Summary

Keywords

Self Assessment

Answers for Self Assessment

Review Questions

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Objectives

After studying this unit, you will be able to:

- Cognize the concept of Contract
- Comprehend the essentials of a valid contract
- Cognize the essentials of a valid offer and acceptance

Introduction

As you all know that we enter into contracts every day. Some of these are made consciously, for example, purchase or sale of a share of a company or a plot of land. Sometimes we do not even realize that we are making a contract, e.g., hiring a taxi, buying a book, etc. In any case, a contract, howsoever made, confers legal rights on one party and subjects the other party to some legal obligation. In the case of people engaged in business, they carry on business by entering into contracts. Thus, the business executives, corporate counsels, entrepreneurs, and professionals in different fields deal frequently with contracts. At times, they have to draft one such contract or scrutinize it or provide inputs to its making or even interpret it. Therefore, it is necessary for them to know what constitutes a contract. The law relating to contracts is contained in the Indian Contract Act, 1872. For business executives, contract law is tremendously significant because it underlies or is related to all major areas of law affecting business.

1.1 Meaning of Contract

In simple terms, a contract means when two parties put into writing an agreement which contains certain obligations (promises) which are to be performed by such parties, and when such written agreement becomes enforceable by law, it becomes a Contract. Enforceable by law means when the agreement has acquired the force of law only for those who are a party to it and a violation of those obligations would attract legal action, including repudiation of the entire contract. An Agreement is a settlement between two parties, which contains obligations or promises which both parties need to fulfil. When such an agreement is made binding by Law it becomes a Contract. Therefore, an agreement consists of **reciprocal Promises** which are to be performed by parties to the contract. Promises are reciprocal when both parties have to perform something for the other. Contracts in India is primarily governed by Indian Contract act, 1872 ("**Contract Act**"). It contains basic elements of a contract and several general rules which apply to contracts. It does not impose any positive duty on the parties rather, it states various formalities regarding contracts.



Example 1: Andrew contracted with Bobby for purchase of 10 bags of cement of a certain quality, for Rs 1,00,000. In this case, Bobby's promise is to provide Andrew with 10 bags of cement of that quality only for which Andrew has contracted and Andrew's promise is to duly pay Bobby Rs.1,00,000. In this case, both have to perform something for the other, thus it is a case of reciprocal promise.



Note: Charity is not a case of reciprocal promise, because a person doing charity, does not expect anything in return.



Example 2: Shanky enters into a contract with Zaid to sell his house for Rs.2,50,000. Here, Shanky has to sell his house and Zaid has to pay Rs. 2,50,000. This is an example of a valid contract.

Law of contract creates jus in personam and not just in rem. Here jus in rem means the right against a thing at large and jus in personam means the right against a specific person

1.2 Important Definitions

Contract: It is an agreement made between two parties which the law enforces. Section 2 (h) of Indian Contract Act 1872a contract is an agreement enforceable by law. According to **Pollock**- "Every agreement and promise enforceable by law is a contract". As per **Salmund**- "A contract is an agreement creating and defining obligation between two or more persons by which rights are acquired by one or more to acts or forbearance on the part of others". **Anson** defines a contract as - "The law of contract is that branch of law which determine the circumstances in which a promise shall be legally binding on the person making it".

Thus, after analyzing the definitions of a contract above, we can conclude that:

Contract = Agreement + Enforceability

Agreements: Section 2(e) of Indian Contract Act defines an agreement as "every promise and every set of promises, forming consideration for each other." A promise is defined as "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise" [Section 2(b)]. Thus, an agreement when accepted becomes proposal. In order, therefore to form an agreement, there must be a proposal or offer by one party and its acceptance by the other. To sum up:

Agreement = Offer + Acceptance

Consensus ad idem: To form a valid contract, it is necessary that the parties to an agreement must agree upon same thing in same sense and at same time. Where there is no **Consensus ad idem**, a valid contract cannot exist.



Example: Mauli has two pet dogs. The breed of one dog is Pomeranian and the other is a Lebra. She proposes her childhood friend saying that she shall sell one of her dogs to her for Rs. 3,000. Her friend thinks she shall give her a Lebra dog whereas Mauli hands over a Pomeranian dog to her. In this case a valid contract will not occur as parties have no consensus regarding the subject matter.

Agreement is a very wide term: An agreement may be a social or legal in nature. A social agreement does not give rise to any legal obligation and is unenforceable by law. Thus, only those agreements that are legally enforceable can be considered as a valid contract.

1.3 Essentials of a valid Contract

According to Section 10, "All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void". As per the above section, a contract must have the following elements:

1. **Proper offer and its acceptance:** To create a valid contract, there must be two or more parties. One who makes the offer and the other who accepts the offer. One person cannot make an offer and accept it. There must be at least two persons. Also, the offer must be clear and properly communicated to the other party. Similarly, acceptance must be communicated to the other party and the proper and unconditional acceptance must be communicated to the offeror. Proper offer and proper acceptance should be there to treat the agreement as a contract which is enforceable by law.



Case Study:

Issue: Troy intends to sell his old bullock cart for Rs. 1,000. He makes an offer to Leo on a piece of paper that he hides under lock and key in an almirah at his godown in shop. He does not post that piece of paper to Leo. Meanwhile, Leo buys a bullockcart from someone else. Troy gets angry and files a suit against Leo. Decide whether Troy succeed in his suit against Leo?

Rule: To form a valid contract, a proper offer must be made by the offeror to the offeree. Also, the offeree must give the acceptance to an offer so made, else a valid contract cannot be formulated.

Analysis: In this case an offer was never communicated properly by the offeror (Troy) to the offeree (Leo), hence a valid contract could not be formed between the parties. Also, the offeree already bought bullock cart from someone else in absence of any offer made to him.

Conclusion: No, the arrangement of stopping someone from marrying is not valid in eyes of law and hence not enforceable.

1. **Intention to create legal relationship:** The parties entering into a contract must have an intention to create a legal relationship. If there is no intention to create a legal relationship that agreement cannot be treated as a valid contract. Generally, there is no intention to create a legal relationship in social and domestic agreements.



Case study:

Issue: Anahita invites Sargun to dinner in her house on a Sunday. Sargun accepts the invitation but fails to turn up due to fever. Can Anahita sue Sargun for the wastage of time, food and money? Give reasons in support of your answer.

Rule: The parties to a contract must have an intention to create a legal relationship otherwise it cannot be held as legally valid in eyes of law.

Analysis: In this case since a friend is inviting another friend over dinner, it means the invitation is purely social in nature. An agreement wherein parties do not intended to create formal or legal agreement and shall not be subject to legal jurisdiction in the law of courts" and hence cannot be treated as a contract and not valid.

Conclusion: A domestic contract refers to agreement between persons having family relationship and despite the general rule of contract, that parties in social, domestic and family agreements do not have intention to create legal relations, domestic contracts are legally binding. Thus, Anahita cannot sue Sargun for the damage.

3. Lawful consideration: An agreement must be supported by a consideration of something in return. That is, the agreement must be supported by some type of service or goods in return of money or goods. However, it is not necessary the price should be always in terms of money. It could be a service or another goods.



Example: Mrinal agrees to buy some books on Accounting from Yogesh for Rs.1,650. Here the consideration of Mrinal is books and the consideration of Yogesh is Rs. 1,650.

Consideration can be a promise to act (doing something) or forbearance (not doing something). The consideration may be present, future or can be past. But it must be real.



Example: If John agrees to sell his car of Rs. 50,000 to Peter for Rs. 20,000. This is a valid contract if John agrees to sell his car not under any influence or force. It can be valid only if the consideration of John is free.



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Note: An agreement is valid only when the acts are legal. Illegal works like killing another for money, or immoral works or illegal acts are cannot be treated as a valid agreement. So, illegal works will not come under the contract act.

4. Capacity of parties to contract: Parties entering into an agreement must be competent and capable of entering into a contract.



Example: If "A" agrees to sell a Government property to B and B agrees to buy that property, it could not be treated as a valid agreement. It is so because, A is not authorized or owner of the property. If any of the party is not competent or capable of entering into the agreement, that agreement cannot be treated as a valid contract.

According to Section 11 of the Act states that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. So, it is clear that the party must be of sound mind and of age to enter into a valid agreement which can be treated as a valid contract.

5. Free Consent: 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.

If the contract made by any of the above four reason, at the option of the aggrieved party it could be treated as a void contract. If the agreement induced by mutual mistake the agreement would stand void or canceled. An agreement can be treated as a valid contract when the consent of the parties are free and not under any undue influence, fear or pressure etc. The consent of the parties must be genuine and free consent.

6. Lawful Object: The objective of the agreement must be lawful. Any act prohibited by law will not be valid and such agreements cannot be treated as a valid contract.



Example: A rents out his house for the business of prostitution or for making bomb, the acts performing there are unlawful. Hence such agreement cannot be treated as a valid contract. Therefore, the consideration as well as the object of the agreement should be lawful.

**Case study:**

Issue: Jeetu promises to pay Rs. 5,000 to Chandu, if he beats Banku. Chandu beats Banku, but Jeetu refuses to pay him the said amount. Chandu files a suit against Jeetu. Will he succeed? Give reasons in support of your answer.

Rule: The objective of the agreement must be lawful. Any act prohibited by law will not be valid and such agreements cannot be treated as a valid contract.

Analysis: In this case the act of beating Banku is inhuman and anti-social in nature. Hence, such a contract of beating for an amount of Rs. 5,000 cannot be held valid in eyes of law.

Conclusion: The above case is an unlawful contract as per which the object of the contract is illegal and the amount any paid or received under such a contract also assumes the illegal nature. Hence, in this case Chandu cannot claim the amount of Rs. 5,000 from Jeetu.

7. Agreement not expressly declared void: Sections 24 to 30 specify certain types of agreement which have been expressly declared void.

**Case Study:**

Issue: John promises to pay 5 Crores to Mary if she does not marry throughout her life and Mary promise not to marry at all. Can this arrangement be considered as valid in eyes of law?

Rule: Agreements in restraint of marriage are expressly declared void under Section 26.

Analysis: In this case John is stopping Mary from getting married through her entire life for an amount of 5 Crores. She is willing to do so but in eyes of law such an arrangement is void and hence not considered legally valid.

Conclusion: No, the arrangement of stopping someone from marrying is not valid in eyes of law and hence not enforceable.

8. Certainty of meaning: Wording of the agreement must be clear and not uncertain or vague. Suppose John agrees to sell 500 tons of oil to Mathew. But, what kind of oil is not mentioned clearly. So, on the ground of uncertainty, this agreement stands void. If the meaning of the agreement can be made certain by the circumstances, it could be treated as a valid contract.

**Case Study:**

Issue: Ashish agrees to sell to Bankey "a hundred tons of oil." Can a valid agreement formulate?

Rule: According to Section 29 of the Contract Act says that Agreements, the meaning of which is not certain or capable of being made certain, are void.

Analysis: There is no clarity about what kind of oil is to be bought. Also, it is not known what quantity will be bought and what price may be charged?

Conclusion: No, a valid agreement does not gets formed. The agreement is void for uncertainty.

8. Possibility of performance: As per section 56, if the act is impossible of performance, physically or legally, the agreement cannot be enforced by law. There must be possibility of performance of the agreement.

**Case study:**

Issue: Montu tells John that he could run at a speed of 1000 kilometer per hour after eating a bowl of spinach. John gets impressed and agrees to give him an award of Rs. 5,000 if he does so. Montu fails to do. Can John file a case against Montu for non-performance?

Rule: Due to impossible of performance, physically or legally, the agreement cannot be enforced by law.

Analysis: In this case it is physically impossible for a person to run at a speed of 1,000 kilometer per hour. Thus, any agreement between the parties cannot be challenged by

any of them in court.

Conclusion: No, John will not succeed in this case as it is practically impossible for a human to run at a speed of 1,000 kilometers per hour. So, as such a valid contract cannot be formed.

9. Legal formalities: The contract act does not insist that the agreement must be in writing, it could be oral. But, in some cases the laws strictly insist that the agreement must be in writing like agreement to sell immovable property must be in writing and should be registered under the Transfer of Property Act, 1882. These agreements are valid only when they fulfill the formalities like writing, registration, signing by the both the parties are completed. If these legal formalities are not completed, it cannot be treated as a valid contract. These elements should be present in a contract to make it a valid contract. If any one of them is missing we cannot treat that agreement as a valid contract.

1.4 Kinds of Contract

A contract may be classified as:

A. Classification of Contract on basis of its validity

A contract is based on agreement. An agreement becomes a contract when all the essential elements as discussed above exists, otherwise a contract is considered as voidable, void, illegal or unenforceable.

1. Voidable Contract: Section 2(i) of Indian contract Act states that “An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.” This happens when the consent of a party to a contract is not free...i.e it is obtained by applying mental or physical pressure. Such a consent is created by obtaining the consent of a party through coercion, undue influence, misrepresentation or fraud. In such a situation, a contract is voidable at the option of the party whose consent was not free. This means it is the wish of the person whether to remain bounded by the contract or go for rescinding or cancelling the contract.



Example 1: Manju sells her car to Manoj for Rs. 2,00,000 on receiving a threatening from a local goon in her city. In this case the consent of Manju is not free and a valid contract cannot be formed.

Example 2: Gauri contracts with Anuradha, that she shall execute certain work for her for a sum of Rs. 10,00,000. Anuradha arranges the things required for the work but later Gauri tells her not to do the work. Here, the contract is voidable at the option of Anuradha and if she elects to rescind or cancel it, she is entitled to recover a compensation from Gauri for any loss which she incurred due to non-performance of contract.

2. Void Agreement and Void Contract

An agreement not enforceable by law is said to be void. A void agreement does not create any legal relationship and is void ab initio (not valid from the very beginning).



Example: X supplies luxury goods to Y who is a minor for a consideration of Rs. 10,000. Y refused to make payment. X cannot enforce the agreement in the court of law since the agreement is void because Y is minor.

3. Void Contract

A contract that ceases to be enforceable by law is known as a Void Contract. It is important to note here that a contract when originally entered into, may be valid and binding on parties but may subsequently become void, e.g; when law breaks out between importing and exporting countries.

4. Illegal Agreement

An illegal contract is one which transgresses some rule of basic public policy or which is criminal in nature or which is immoral. Such an agreement is not only void but has a further effect that even the collateral transactions to it become tainted with illegality. A collateral transaction is subsidiary/incidental to original or principal contract.



Example: Bonney borrows Rs. 5,000 from Anil and enters into a contract with Chintoo an alien to supply smuggled goods from Bangladesh and China. Anil is aware about the purpose of loan. The transaction between Bonney and Anil is collateral to main agreement. It is illegal since the main agreement is illegal.

5. Unenforceable Contract

When there are some technical defects such as absence of writing or where the remedy has been barred by lapse of time. The contract may be carried out by parties but in case of any repudiation/cancellation or breach of such a contract, aggrieved party will not be entitled to any legal remedy.



Example: On 17th December 2021, Monica entered into a contract in written with Jyotika that she shall buy 10kg strawberries at a rate of Rs. 100 per kg from her after exact 14 days on 1.1.2021. There was a defect in mentioning the year. This makes the contract unenforceable.

B. Classification of Contract on basis of its formation

A contract may be

- (a) made through written words or by speech (word of mouth)
- (b) inferred from conduct of parties or circumstances of the case. Let us look into the details of these modes:

1. **Express Contract:** Express Contract, as the name suggests is the contract, wherein the parties to the agreement, either orally or in written form, states the terms and conditions of the contract. In short, when the offer and acceptance of the agreement are communicated verbally, then the contract is said to be express. Irrespective of the mode of expression, the contract must exhibit the mutual intent of the parties concerned to be bound. Further, the expression must be spelled out and interpreted. It encompasses a certain proposal, unconditional acceptance and adequate consideration.



For Example: John writes a letter to Harry, offering to sell his house to him for 28 lakhs. Harry, by a written letter, gives his acceptance of the proposal. Such a contract is known as an express contract.

2. **Implied Contract:** Implied Contract means a contract which is inferred by the activities and conduct of the parties concerned. In other words, a contract in which the elements, i.e. offer and acceptance is made, without the use of words, then this type of contract is known as implied contract. Such a contract come into being from the assumed intention of the parties. It can be of two types:

a) **Implied by law:** A contract implied by law is one in which the parties have no intention to enter into the contract. However, the law imposes an obligation to perform the contract, irrespective of the consent of the parties.



Example: Roma, gives books to Alen by mistake, which belongs to Sera. Now, it is Alen's obligation to return the books to Roma; even there is no intention to get into the contract.

b) **Implied by fact:** In a contract implied by the fact, the obligation is created between the parties, on the basis of the circumstances and actions.



Example: Purchasing groceries from mall or retail store.

C. Classification of Contract on basis of its performance

1. **Executed and Executory Contracts:** An executed contract is one that has been fully performed. Both parties have done all they promised to do.



Example: Deepu asks a painter to paint meditating Budha in his drawing room for a sum of Rs. 10,000. The painter makes the painting and Deepu pays the price. In this case both parties fulfilled their obligations. This is a perfect example of executed

contract.

An executory contract means that which remains to be carried into effect. An executory contract is one which both parties that have yet to perform their obligations.



Example: Deepu asks a painter to paint meditating Budha in his drawing room for a sum of Rs. 10,000. The painter did not start the work of painting and Deepu has not yet paid the amount. In this case both painter and Deepu are yet to perform their obligations. This is a perfect example of executory contract.

2. Unilateral and Bilateral (Multilateral) Contracts

- a) **Unilateral contract:** the offeror promises something in return for the offeree's performance and indicates that this performance is the way acceptance is to be made.



Example: Pranay enters into a contract with a local farmer that he shall purchase 10 kg potatoes from him at a rate of Rs. 100 per kg. Farmer delivers the potatoes to Pranay but he promises to pay the price after one week. In this case Farmer fulfilled his obligation but Pranay is yet to perform. Thus, the nature of this type of contract is Unilateral contract where one party performed the obligation while the other shall perform in near future.

- b) **bilateral contract:** A contract as per which the obligation of both the parties to the contract is outstanding at the time of formation of contract. In this sense, bilateral contracts are similar to executory contracts with executory consideration.

1.5 Offer and Acceptance

Contracts play an important role in our everyday life ranging from insurance policies to employment contracts. In fact, we enter into contracts even without thinking for example while buying a movie ticket or downloading an app. Contracts are oral or written agreements between two or more parties. Parties entering into a contract might include individual people, companies, non-profits or government agencies. The whole process of entering into a contract starts with an offer by one party, an acceptance by another party, and an exchange of consideration (something of value). Let us take a look at the definition of an offer and the essentials of a valid offer.

1.6 Definition of an Offer

According to Section 2(A) of the Indian Contracts Act, 1872 "When a person expresses his willingness to another person to do or to abstain from doing something and also obtain the consent of such expression, it is called an offer." The person who makes an offer is called "Offerer" or "Promiser" and the person to whom the offer is made is called the "Offeree" or "Promisee".



Example: Mr. A asks Mr. B whether he would like to purchase his car for Rs.1,00,000? In this case, Mr. A is making an offer to Mr. B. Here A is the offeror and B is the offeree.

1.7 Modes of Making an Offer

An offer can be made by any act or omission of party proposing by which he intends to communicate such proposal or which has the effect of communicating it to the other (s.3). An offer can be either express or implied, and specific or general.

1. **Express offer:** It means an offer made by words (whether written or oral). The written offer can be made by letters, telegrams, telex messages, advertisements, etc. The oral offer can be made either in person or over telephone.



Example: Mr. Iqbal types a letter to Mr. Khan asking whether he would like to buy 10 boxes of seedless dates from him for Rs. 5,000? In this case Mr. Iqbal made an offer to Mr. Khan through his written letter.

2. **Implied offer:** It is an offer made by conduct. It is made by positive acts or signs so that the person acting or making signs mean to say or convey something. However, silence of a party can, in no case, amount to offer by conduct.



Case Study:

Issue: Kareem saw Harry mowing his lawn. After the lawn is cleared from unwanted growth of wild plants and is properly mowed, he asks Rs. 100 from Kareem. Kareem refuses to make a payment and as such Harry files a case under Indian Contract Act for not fulfilling his obligation. Decide whether Harry win or lose the case?

Rule: An offer can also get Implied from conduct of parties or circumstance of the case.

Analysis: In this case Kareem remained silent on watching Harry mowing his lawn and made no effort to stop him. This means he accepted the services of Harry and as he shall have to compensate him.

Conclusion: Thus, when a person does not stop the other party from performing an act, it means such an act is accepted. Thus, payment needs to be made to the person who performed a task.

1. **Offer by abstinence:** An offer can also be made by a party by omission to do something. This includes such conduct or forbearance on one's part that the other person takes it as his willingness or assent.
2. **Specific and general offers:** An offer can be made either to (i) A definite person or a group of persons, or to (ii) the public at large. An offer made either to a definite person or a group of persons is a specific offer. The specific offer can be accepted by that person to whom it has been made.



Case Study:

Issue: Sohan offered a reward to anyone who returns his lost dog. Faheem reads the news about the reward and finds the lost dog. After handing over the dog, he asks for the amount of reward but Sohan refuses. Assuming Faheem approaches the court and asks for reward money, decide will he succeed? Give reasons in support of your answer.

Rule: Where an offer is made to the world at large, any person with notice of the offer may accept the offer. When the offer is accepted by a particular person, there is a contract between offeror and that particular person, which becomes legally enforceable.

Analysis: In this case, Sohan has announced to award anyone who finds his lost dog to be rewarded. Since, Faheem read the notice and acted accordingly, he must receive the reward amount.

Conclusion: Yes, Faheem shall succeed in getting the reward money as it was a general offer. A general offer may be accepted by any one by complying with the terms of the offer.

The celebrated case of *Carlill v Carbolic Smoke Ball Co.* (1813) 1 Q.B.256 is an excellent example of a general offer.



Example: A Patent Medicine company advertised that it would give a reward of £100 to anyone who contacted influenza after using smoke balls of the company for a certain period according to the printed directions. Mrs. Carlill purchased the advertised smoke ball and contacted influenza in spite of using the same according to the printed directions. She claimed the reward and received it.

1.8 Essentials of a valid Offer

- 1) **Offer must create Legal Relations:** The offer must lead to a contract that creates legal relations and legal consequences in case of non-performance. So a social contract which does not create legal relations will not be a valid offer. Say for example a dinner invitation extended by A to B is not a valid offer.
- 2) **Offer must be Clear, not Vague:** The terms of the offer or proposal should be very clear and definite. If the terms are vague or unclear, it will not amount to a valid offer.

**Case Study:**

Issue: Andrew offers to sell some fruits to Cain worth Rs 5000. Decide can a valid contract happen in this case? Give reasons in support of your answer.

Rule: The term of an offer must be definite, unambiguous and certain and not loose and vague.

Analysis: In this case, what type of fruits are to be sold and bought are not clear.

Conclusion: No, a valid contract cannot exist in this case as the term of offer is loose and vague. It is not definite, unambiguous and certain.

- 3) **Offer must be Communicated to the Offeree:** For a proposal to be completed it must be clearly communicated to the offeree. No offeree can accept the proposal without knowledge of the offer.

4) Offer must be distinguished from:

i) A declaration of intention and announcement

A declaration by a person that he intends to do something gives no right to another party to take an action. Such a declaration only means that an offer will be made or invited in future but not that the offer is made at that moment.

**Case Study:**

Issue: Malti's father wanted her daughter to get married before his retirement on 31st March 2019. He tells 'Birju', his next-door neighbor that he shall give 50,000 shares of Rs. 100 each to his son-in-law as a gift in marriage. Birju makes his nephew 'Raju' marry Malti and later he claims for the shares from father of Malti. Father of Malti refuses and as such 'Raju' files a case against his father-in-law for non-performance of contract. Decide whether Raju will succeed in getting 50,000 shares or not? Give reasons in support of your answer.

Rule: A declaration by a person that he intends to do something gives no right to another party to take an action.

Analysis: In this case, gifting of 50,000 shares was just a mere declaration by a father of a daughter. It is a statement of intention and not a valid offer.

Conclusion: No, Raju will not succeed in getting 50,000 shares from his father-in-law as he only made a statement of intention to his next door neighbor. It is not at all a valid offer.

ii) An invitation to make an offer or do business

In an invitation to offer, no specific party has the intention to enter into a contract. The seller may enter into a contract with anybody from the public who makes the best offer to him. So, the essence of an invitation to offer is that the offer is actually made by the seller. For instance, a shopkeeper selling antique statues in his store would prefer the buyer who would agree to pay the higher price for his goods. Similarly, a display of clothes in a shop, of goods in an auction, and even advertisements screaming "Offer! 50% Off on Winter Clothes!" is actually an invitation to treat, and not an offer. Therefore, an invitation to offer 'evolves' into a contract in a different manner than an offer. Initially, it is an invitation to offer, say by a display of goods and their prices. When a person makes an offer that is good enough and the seller 'accepts' it, it becomes a contract. Unlike offer, which is made by the seller to the buyer.

Newspaper announcements are not offer

A recognized exception to this is a general offer

**Case Study:**

Issue: Sohan offered in a local newspaper that anyone who returns his lost dog alive, shall get a reward of Rs. 1,000. Faheem reads the information about dog and reward that he may claim. He rescues the dog fallen in a pit and hand it over safely to Sohan.

Then, he claims his money but Sohan refuses. Can Faheem recover his reward from Sohan? Give reasons in support of your answer.

Rule: Newspaper announcements are not offer but as an exception where an offer is made to general public and someone performs an act according to the instructions in offer, he may make the offeror perform his obligation.

Analysis: In this case Faheem acted as per the instructions and found the lost dog fallen in a pit. He rescued the dog alive and handed it over to its master (Sohan).

Conclusion: Yes. Faheem can recover his reward from Sohan as this is a case of General Offer.

- 5) **Offer may be Conditional:** While acceptance cannot be conditional, an offer might be conditional. The offeror can make the offer subject to any terms or conditions he deems necessary.



Example: A can offer to sell goods to B if he makes half the payment in advance. Now B can accept these conditions or make a counteroffer.

If acceptance is not communicated by a certain time it will be considered as accepted.



Example: A offers to sell his cow to B for 5000/-. If the offer is not rejected by Monday it will be considered as accepted. This is not a valid offer.

- 6) **Offer can be Specific or General:** As we saw earlier the offer can be to one or more specific parties. Or the offer could be to the public in general.
- 7) **Offer may be Expressed or Implied:** The offeror can make an offer through words or even by his conduct. An offer which is made via words, whether such words are written or spoken (oral contract) we call it an express contract. And when an offer is made through the conduct and the actions of the offeror it is an implied contract.

1.9 Definition of Acceptance

The Indian Contract Act 1872 defines acceptance in Section 2 (b) as “When the person to whom the proposal has been made signifies his assent thereto, the offer is said to be accepted. Thus the proposal when accepted becomes a promise.” Therefore, once an offer is accepted it cannot be revoked because it has become a promise which creates a legal obligation between the parties.



Example - Anita offers to buy Priya’s car for Rs.10 lakhs and Priya accepts such an offer. Now, this has become a promise.

1.10 Essentials of a Valid Acceptance

1. Must be absolute and unqualified

An acceptance in order to be binding must be absolute and unqualified in respect of all terms of offer, whether material or immaterial or minor. If parties are not ad idem on all matters concerning



Example: Harman says to Deepu, “I offer to sell my car for Rs. 5,00,000 to you. Deepu says he will purchase it for Rs. 4,50,000 only. In this case there is no acceptance as it creates a counter offer.

an offer and acceptance, there is no contract.

1. Must be Communicated to offeror

To formulate a contract, an offeree must give a proper acceptance to the offer made to him. This in acceptance should be as per the prescribed form.



Case Study:

Issue:The Defendant, the Carbolic Smoke Ball Company of London (Defendant), placed an advertisement in several newspapers on November 13, 1891, stating that its product, "The Carbolic Smoke Ball", when used three times daily, for two weeks, would prevent colds and influenza. The makers of the smoke ball additionally offered a 100£ reward to anyone who caught influenza using their product, guaranteeing this reward by stating in their advertisement that they had deposited 1000£ in the bank as a show of their sincerity. The Plaintiff, Lilli Carlill (Plaintiff), bought a smoke ball and used it as directed. Several weeks after she began using the smoke ball, Plaintiff caught the flu. Decide will she succeed in getting the reward money?

Rule:This case considers whether an advertising gimmick (i.e. the promise to pay 100£ to anyone contracting influenza while using the Carbolic Smoke Ball) can be considered an express contractual promise to pay.

Analysis: Mrs. Carlill was entitled to recover 100£.The Court acknowledges that in the case of vague advertisements, language regarding payment of a reward is generally a puff, which carries no enforceability. In this case, however, Defendant noted the deposit of £1000 in their advertisement, as a show of their sincerity. Because Defendant did this, the Court found their offer to reward to be a promise, backed by their own sincerity.

Conclusion: Since the lady acted according to the instructions in the general offer as given in the newspaper, Mrs. Carlill is entitled to claim her reward amount.

2. Expressed in some usual and reasonable manner

If the acceptance is not according to the mode prescribed, or some usual and reasonable mode the offeror may intimate to the offer within a reasonable time that the acceptance is not according to the mode prescribed and may insist that the offer must be accepted in prescribed mode only. If he does not inform the offeree, he is deemed to have accepted the acceptance.



Example: A makes an offer to B and says "If you accept the offer, then reply by a message ". It will be considered as a valid acceptance unless A informs B that the acceptance is not as per prescribed mode.

3. Must be given within a reasonable time

If any time limit is specified, the acceptance must be given within that time. If no time limit is specified, it must be given within a reasonable time.



Case Study:Online shopping site 'Myntra' advertises that there shall be 50% off on winter clothes from 20th December to 23rd December. On 23rd December at 11:30pm, Naina selects the clothes and puts them in virtual cart but before she could proceed towards making payment, a sudden power cut happens. Next day when power supply comes, she rushes to place an order of her selected clothes. When she proceeds to make the payment, it shows actual price of product instead of discounted. Naina files a case against Myntra site for fraud and not performing what it promised. Decide will Naina succeed in case or not?

Rule: Acceptance must be given within a reasonable time.

Analysis: In this case the order for clothes is placed after 23rd, when the offer lapsed. The offer was valid from 20th to 23rd December 2021 only.

Conclusion: No, Naina will not succeed in this case as the time within which she could have got 50% off on winter clothes from 20th to 23rd December. Since, the

order is placed on 24th December, the offer lapsed. Hence, a valid contract cannot be created.

4. Acceptance cannot precede an offer

If acceptance precedes an offer, it is not a valid acceptance and does not result in a contract.



Example: In a company shares were allotted to a Manoj, who never applied for them. Subsequently, when he applied for shares, he was unaware of any previous allotment. The allotment of shares previous to his actual application is invalid.

1. Must show an intention on part of offeree to fulfil terms of promise otherwise acceptance is not valid.
2. It must be given by the party or parties to whom offer is made
3. It must be given before the offer lapses
4. It cannot be implied from silence: Acceptance cannot be implied from silence of offeree or his failure to answer, unless the offeree has by previous conduct indicated that his silence means acceptance.



Jyoti writes a letter to Mitali that she offers to sell her fastrack watch of worth Rs. 1,800 to her for Rs. 1,000. If Jyoti does not hear from Malti that she intends to buy her watch, she will presume that she has accepted the offer. In this case a valid contract cannot be formed.

Summary

A contract is an agreement between two or more parties which the law will enforce. An agreement comes into existence when one party offers another party and that party gives its unqualified acceptance. The parties who enter into an agreement must agree upon same subject matter in same sense and at the same time, i.e; there must be a consus as idem.

To form a valid contract, an agreement must fulfil the given essentials:

- i) There must be an agreement between two parties (Offeror and Offeree)
- ii) The parties must intend to create a legal relationship (Societal and domestic agreements do not formulate valid contracts)
- iii) Parties must be capable of entering into an agreement
- iv) Agreement must be supported by consideration on both sides
- v) Consent of parties must be free and genuine
- vi) Object of agreement must be lawful
- vii) Terms of agreement must be certain and capable of performance
- viii) Agreement must not be expressly declared as void

Offer and acceptance analysis is a traditional approach in contract law used to determine whether an agreement exists between two parties. An offer is an indication by one person to another of their willingness to contract on certain terms without further negotiations. A contract is then formed if there is an express or implied agreement. A contract is said to come into existence when acceptance of an offer has been communicated to the offeror by the offeree.

The communication of an offer is complete when it comes to the knowledge of the person to whom the offer is made and the communication of an acceptance is complete when the acceptance is put in a course of transmission to the offerer. Therefore, Offer and acceptance is the essential elements of a contract and in either case, it should be done out of one's free will and with an intention to enter into a legally binding agreement.

Keywords

- Void agreement: An agreement that cannot be enforced by law.
- Void contract: A contract that ceases to be enforceable by law.
- Voidable contract: A contract that is enforceable law at the option of one party thereto, but not at the option of other.

- Express contract: A contract that is stated in words (written or spoken) by parties.
- Implied contract: A contract that can be inferred from circumstances of the case or from conduct of parties.
- Executed contract: A contract which is wholly performed by the parties.
- Executory contract: A contract in which both parties are yet to perform their obligations.
- Unilateral Contract: The offeror promises something in return for the offeree's performance and indicates that this performance is the way acceptance is to be made.
- Bilateral Contract: A contract as per which the obligation of both the parties to the contract is outstanding at the time of formation of contract. In this sense, bilateral contracts are similar to executory contracts with executory consideration.

Self Assessment

Q1. Sheena invited Meena over a cup of tea at their mutually favourite Cha Cha Chai restaurant on 8th February, 2021. Sheena does not reach the restaurant but Meena kept waiting for her about 2 hours. Meena files a case against Sheena to recover her charges of Mineral Bottle that she purchased while waiting for Sheena and Ola cab charges to reach the restaurant. Decide will she succeed in recovering her expenses?

- A. Yes, as Meena has done those expenses out of her own pocket.
- B. No, as it is a societal agreement, which always have a missing element of intention to create a legal relationship among parties.
- C. No, as Meena must have the bills to show as a proof in the court to make a claim.
- D. Yes, as under the Contract Act, 1872 both parties mutually agreed to get together.

Q2. Jango, a television actor entered into an agreement with Drug Peddler Eagle to supply him 10 kg hash and 30 kg weed for a new year rave party. Jango paid around 1 crore in advance to procure the drugs for party but Eagle does not fulfil his promise. As such Jango comes to you and seeks an advice to recover his money. Decide what will be your answer to Jango out of the given statements?

- A. You can recover your paid amount as it was an express contract and hence very much enforceable.
- B. You cannot recover your amount as the contract is not in written and hence unenforceable.
- C. You cannot recover any amount as the subject matter of contract is illegal and hence the contract is void.
- D. You cannot recover the amount as none of the parties are competent to contract

Q3. Maya runs a Nursery business and mainly deals in indoor plants and vase. Amru comes to buy terracota vase and asks for price. Maya tells her that mostly vase begins from Rs. 150 onwards and generally their price depends upon their size. Aru picks 2 vase thinking he has to pay Rs. 300 only. Can a valid contract formulate between parties?

- A. No, as there is lack of consensus among parties about rate and definite vase size.
- B. Yes, as Amru is willing to pay a sum of Rs.200 to get vase.
- C. Yes, as subject matter of contract is valid.
- D. None of the above

Q4. This Deewali, Ms. Malini made up her mind to buy Vitamin C cream from Khadi Naturals to reverse her ageing after looking at facebook advertisement. As per the offer, the shoppers would get a complimentary Aloe Gel cream on buying any product above Rs. 999. She thought to buy 60 gm of product @ RS. 1,200 and got excited to get a free gift. Decide whether this can result in a valid contract?

- A. Terms and conditions of payment of product price should also be decided
- B. The seller may get out of stock with that product
- C. Friends of Malini can give acceptance to the offered product on her behalf
- D. No, as mental acceptance to buy product is no acceptance of offer

Unit 01: The Indian Contract Act, 1872

- Q5. Harry puts a pistol on his forehead, forcing his wife to transfer all her property in his name. Being scared she does so but later go to court that her consent is not free. Identify the nature of consent so received by Harry.
- A. The contract is voidable since consent received is through coercion.
 - B. The contract is voidable since consent received is through undue influence.
 - C. The contract is voidable since consent received is through mistake.
 - D. The contract is voidable since consent received is through mistake.
- Q6. Every promise and every set of promises, forming the consideration for each other, is called as:
- A. A voidable contract
 - B. A contract
 - C. A void contract
 - D. An agreement
- Q7. An agreement was entered into with the minor. This is agreement is:
- A. Voidable
 - B. Bad
 - C. Void
 - D. Illegal
- Q8. "Alex" took his wife "Bella" to England for vacations. Due to some business emergency Alex had to go back to his place of work immediately while leaving Bella in England owing to her ill-health. Alex promised to pay Bella 300 pounds per week as maintenance during her stay in England, but failed to pay. If Alex is sued by Bella then.....
- A. Alex is liable for breach of contract
 - B. Alex is not liable because he cannot be presumed to have any intention to enter into a contract with his wife
 - C. Alex is not liable because of the lack of consideration on the part of Bella
 - D. Alex is liable because a promise to one's wife result in a binding contract even in the absence of a consideration for the promise
- Q9. "A" telegraphed "B", "Will you sell your house, telegraph the lowest cash price." B also replied by telegram, "lowest price for the house of Rs. 15,00,000/- This is a _____
- A. Complete Agreement.
 - B. Complete Contract
 - C. Voidable Contract
 - D. No Contract
- Q10. A catalogue of books, listing price of each book and specifying the place where the listed books are available is:
- A. An invitation to offer
 - B. A promise to make available the book at the listed price
 - C. An offer
 - D. An invitation to visit the book shop
- Q11. Pawans' son had been missing for some time. Pawan sent his servant Pankaj in search of son. Thereafter, through hand bill Pawan offered a reward of Rs. 5,000/- to whoever was able to trace the whereabouts of his son. Pankaj was successful in tracing the son and brought him to Pawan. Then he came to know of the reward and claimed it. Pawan refused to

pay. In this case:

- A. Pankaj is entitled to the reward because Pawan made a general offer and whoever fulfil the condition of the offer was entitled the reward. Pankaj had, in fact, fulfilled the condition of the offer
- B. Since Pankaj was not aware of the offer at the time when he acted upon it, no valid acceptance could come into existence Thus he is not entitled to the reward
- C. Since Pankaj was Pawan's servant and was sent by him to trace the son, he cannot claim reward
- D. Pankaj is not entitled to the reward. It would be P's grace if he gives him Rs. 501vany amount by way of reward

Q12. Suppose Brownie own 10 acres of land. No one in the general public can enter into his property nor can they use it. What right does Brownie has as per the Indian Contract Act?

- A. Jus in against government
- B. Jus in Personam
- C. Consensus ad idem
- D. Jus in Rem

Q13.Mariya orders a cup of Chocolate Fudge in a local restaurant. After she finishes consuming it, she pays the bill to the waiter including GST. Identify the true nature of this transaction.

- A. It is a bilateral contract as waiter served the coffee and Mariya paid the bill.
- B. It is an unenforceable contract as there is no proof contract between the parties.
- C. It is a unilateral contract as Waiter has not yet served her the coffee.
- D. It is a voidable contract as Mariya may not have liked the Chocolatae Fudge.

Q14.Jagguentered into a contract with Raghu as per which he shall deliver 10 kg rice at his residence for a price of Rs. 70 per kg on 10th October 2020. On the said date he deliver the goods but Raghu does not pay him cash. He promises to pay the money to him after 2 days. Identify the nature of contract between Jaggu and Raghu.

- A. Illegal Contract as Raghu is yet to perform his obligation.
- B. Bilateral Contract as Raghu is yet to perform his obligation.
- C. Unilateral Contract as Raghu is yet to perform his obligation.
- D. Void Contract as Raghu is yet to perform his obligation.

Q15.Mr. Adam owns 5 acres land on which he grows mustard flowers. If a villager from his own village tries to trespass his land, can he become owner?

- A. Yes, as the villager can exercise right of lien
- B. No, as Adam is entitled to exercise jus in Rem and remain protected
- C. No, as Adam is entitled to exercise jus in Personam and remain protected
- D. Yes, as the villager must have paid some consideration to become lawful owner of land belonging to Adam

Answers for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. B | 2. C | 3. A | 4. D | 5. A |
| 6. D | 7. C | 8. B | 9. D | 10. A |
| 11. B | 12. D | 13. A | 14. C | 15. B |

Review Questions

- Q1. Explain the essentials of a valid contract in detail
- Q2. What is an offer? Explain the legal rules of a valid offer?
- Q3. Explain the various kinds of Contract with suitable examples.
- Q4. What is meant by the term acceptance? Explain the legal rules of a valid acceptance?
- Q5. Write a note on:
- i. Voidable Contract
 - ii. General Offer
 - iii. Classification of Contract on basis of its performance
 - iv. Illegal Contract
 - v. Implied Offer

**Further Readings**

1. A Text Book Of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements Of Mercantile Law By N.D. Kapoor, S. Chand & Company
3. A Manual Of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law By S SGulsan, Excel Books
5. Mercantile Law By M C Kuchchal, Vikas Publishing House
6. Legal Aspects Of Business By Daniel Albuquerque, Oxford &Ibh

Unit 02: The Indian Contract Act,1872

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Summary

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Objectives

After studying this unit, you will be able to:

- Comprehend the relevance of free consent and the circumstances when a consent is not free
- Cognize the legal rules for a valid consideration in formation of a contract

Introduction

For a Contract to be valid, the consent of the parties must be genuine. There must be a *consensus-ad-idem* among parties. It means that the parties entering into the contract must mean the same thing in the same sense. The parties to the contract must have the same understanding in regards to the subject matter of the contract. Mere consent is not enough for a contract to be enforceable the consent given must be free and voluntary. The definition of Free consent is provided under the Indian Contracts Act is Consent that is free from Coercion, Undue Influence, Fraud, Misrepresentation or Mistake. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake. This results in the invalidation of a contract. Apart from free consent, Consideration is also necessary for the formation of a valid contract. In the absence of which a promise cannot be enforceable. It may inhere some benefit, right or interest, to be received by the promisor, or loss, detriment, or obligation causing to the promisee. Therefore, consideration can be a promise or performance of an act which the parties to the contract exchange with one another. It is the base of a contract.

2.1 Meaning of Free Consent and Consent

Consent means an act of assenting to an offer. As per the Section 13 of Indian Contract 1872, when both parties agree to a thing in the same sense of mind, it is said that the parties consented to enter into a valid contract. When there is no consent, there is no contract. A Consent is to be free when not caused by Coercion (Section 15); Undue Influence (Section 16); Fraud (Section 17) and misrepresentation (Section 18)

2.2 Elements of free consent

- Consent is considered to be free consent when the following factors are satisfied:
- It should be free from coercion.
- The contract should not be done under the pressure of undue influence.
- The contract should be done without fraud.
- The contract should not be made through misrepresentation.
- The contract should not be made by mistake.

Difference Between Consent and Free Consent

Basis	Consent	Free consent
1. Meaning	When both the parties agree to a thing in the same sense of mind or unison of mind, then the agreement is considered to be done with consent.	When an agreement is done with consent and is free from coercion, fraud, misrepresentation, undue influence, and mistake. Then the agreement is considered to be done with free consent.
2. Essentials	Both parties must be entering into the agreement in the same sense of mind agreeing to the same thing.	Consent should be free from: <ul style="list-style-type: none"> • Coercion • fraud • misrepresentation • undue influence • mistake
3. Voidability	When there is a lack of consent, the contract would be void.	When there is no free consent, then the voidability of the contract depends on the option of the aggrieved party.

2.3 Coercion (Section 15)

When a person is compelled to enter into a contract by the use of force by the other party or under a threat, 'coercion' is said to be applied. A consent is said to be obtained by Coercion by (i) committing or threatening to commit any act forbidden by the Indian Penal Code, 1860 or (ii) the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement. [s.15]. It is important to note here that Coercion includes fear, physical compulsion and threat or menace to goods.



- Examples:** 1. A threatens to kill B if he doesn't transfer his house in A's favour for a very low price. The agreement is voidable for being the result of coercion.
2. A threatens to kill B (C's son) if C does not let his house to A and thereupon C gives his consent. This consent is no consent in the eye of law as the agreement is caused by coercion.

Committing or threatening to commit any act forbidden by the Indian Penal Code, 1860



CaseStudy Analysis: Ranganayakamma v. Alwar Setty, (1889) 13 Mad. 214

Issue: A young 13 years girl was forced to adopt a boy to her husband who had just died by the relatives of the husband who prevented the removal of his body for cremation until she consented. Is the adoption valid? Give reasons in support of your answer.

Rule: an agreement is voidable at the option of the party whose consent was not free. Also, only a party to the contract can avoid or rescind the contract.

Analysis: In the given case the girl is undergoing mental trauma of losing her husband. In order to get his last rituals done she is induced to adopt a boy to him. This clearly indicates her consent is not free.

Conclusion: From the case details we can conclude that since the consent of 13 years old girl is not free, any adoption made is not valid. Such an adoption shall be set aside by law.

Unlawful Detaining or Threatening to Detain any Property



CaseStudy Analysis: Ranganayakamma v. Alwar Setty, (1889) 13 Mad. 214

Issue: Atul, an agent refused to hand over the books of accounts to the new agent unless the owner of business gives him a BMW car. The owner had to give him a BMW car to get his documents released. Later, the owner knocks the doors of court to get his car back from Atul. Will he succeed in getting his car back? Give reasons in support of your answer.

Rule: A party whose consent was not free, can always avoid or rescind the contract. It is voidable at the option of aggrieved party.

Analysis: In the given case the property of the owner is unlawfully detained by his former agent. This clearly indicates his consent is not free while gifting a BMW car.

Conclusion: From the case details we can conclude that since the consent of owner in gifting a BMW car is not free, he can go to the court to obtain orders to recover his car. Thus, in nutshell any handing over of car to get the documents released is voidable at the option of owner.

Effect of Coercion on Contract Validity

Coercion makes a contract voidable. It suggests that at the decision of the party whose consent was not free, the contract is voidable. The aggrieved party will, therefore, determine whether to enforce the contract or to cancel the contract.

Does Threat to commit suicide is a Coercion?

The doubt arises because suicide, though forbidden by the Indian Penal Code, is for obvious reasons not punishable. A dead person cannot be punished. But, since s.15 declares that committing or threatening to commit any act forbidden by the Indian Penal Code is coercion, a threat to commit suicide should obviously be so regarded (suicide being forbidden).

Burden of proof

The burden of proof lies with the party defending the coercion. The burden of proof is heavier on him. This is because pure probability or fear is not a threat. In order to create coercion, a person must show that there was a risk that was prohibited by law and that forced him to enter into a contract that he would not otherwise have.

2.4 Undue Influence (Section 16)

When a contract is made between two parties and one of them is in the position to dominate the will of the other party and takes unfair advantage of the position, then the contract is said to be made out of undue influence.



Example: An old man named Allen appoints his niece, Bella as his attendant to look after him. Bella demands a share of his property and Allen agrees to give her. In this situation, Allen is under the undue influence of Bella.

A person is deemed to be in a position to dominate the will of another:

1. When he holds a real or apparent authority over the other, eg; relationship between a doctor and patient and master and his servant.
2. When he stands in a fiduciary relationship (trust and confidence) to the other. For example, a relationship between a father and son, Lawyer and Client, Trustee and Beneficiary and Promoter and Company.
3. Where he makes a contract with a person whose mental capacity is permanently affected due to any reason or permanently affected by reason of age, illness or mental capacity or bodily distress. Such a relation exists between a medical attendant and his patient.



Case Analysis:

Issue: A Spiritual Guru announces among his disciples that he can make any one meet god provided that there is a surrender of all the property they possess to his trust. Suppose Karamjit transfers his property to meet god but later approaches the court to set aside the transfer of property. Will he succeed?

Rule: an agreement is voidable at the option of the party whose consent was not free. Also, only a party to the contract can avoid or rescind the contract.

Analysis: In the given case, the spiritual guru is in a position to dominate the will of his disciples in the name of god. The property that they may transfer shall be purely on basis of his influence on disciples that he has powers to make them meet god.

Conclusion: Thus, we can conclude from the case details that under the influence of spiritual guru, Mr. Karamjit transferred all his property aiming to meet god. Such a

transfer of property is voidable at his option. Hence, the court may cancel the transfer of property.



Did you know?

The parties that can be affected by undue influence are:

- Adult child and parent
- A person whose mental capacity is low
- Creditor and debtor
- Doctor and patient Fiduciary relationship
- Husband and wife
- Lawyer and client
- Landlord and tenant
- Parent and child
- Real and apparent authority
- Trustee and beneficiary
- Old age
- Tender age

Effect of undue Influence

- When an agreement is caused due to the impact of undue influence, can be considered void at the opinion of the party whose consent was so caused, according to Section 19A of the Indian Contract Act.

Burden of proof

- It is required to prove that the person dominating actually took undue advantage of the person and it should be proved that the person was in such position to dominate.
- Mere transfer of gift from one relative to others would not amount to undue influence.



Case Analysis:

Issue: Hansika sold her gold ring to his teacher Lata for Rs 2,000 after she offered to give good grades to her. Can we say that a valid contract existed between Hansika and Lata?

Rule: an agreement is voidable at the option of the party whose consent was not free. Also, only a party to the contract can avoid or rescind the contract.

Analysis: Here, Hansikas' permission is not given freely as it was given under the influence of promise made by her teacher for the grades.

Conclusion: Thus, we can conclude from the case details that no valid contract.

2.5 Difference between Coercion and Undue Influence

Meaning of Representation

A statement of fact which one party makes in the course of negotiations with a view to induce the other party to enter into a contract is known as a Representation. It must be related to some material fact to the contract. Such a statement can be made by spoken words or written or implied from act and conduct of parties.

Fraud

Fraud exists when:

Basis of difference	Coercion	Undue Influence
1. Definition	Committing, or threatening to commit, any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.	Where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other
2. Nature of force	Physical	Moral force or mental pressure.
3. Burden of Proof	Party whose consent was so caused.	Party who was in a position to dominate the will of other party.
4. Effect	Rescission of contract- return any benefit received by aggrieved party	Court discretion to direct aggrieved party to restore benefit whether in whole or part or set aside the contract with directions for refund of benefit
5. Criminal Liability	Yes, under Indian Penal Code	No

1. A false representation is made (a) knowingly, or (b) without belief in its truth or (c) recklessly, not caring whether it is true or false and the maker intended the other party to act upon it, or
2. There is any concealment of material fact or that there is a partial statement of fact in such a manner that the withholding of what is not stated makes that which is stated false.

Fraud includes any of the following acts committed by a contracting party or its connivance or its agent in order to deceive or induce a party or its agent to enter into the contract:

- The effective concealment of a fact by one who is aware of the fact;
- a promise made without any intention to carry it out;
- any other act fitted to deceive;
- any such act or omission as the law considers to be fraudulent.

Mere silence as to facts likely to affect a person's willingness to enter into a contract is not fraud unless the circumstances of the case are such that, having regard to them, it is the obligation of the silent person to speak or unless his or her silence is, in itself, equivalent to speech.



Example:

'A' sells his horse to 'B' by auction, which 'A' knows to be unsound, 'A' tells 'B' nothing about the unsoundness of the horse. This is a fraud on the part of 'A'.

Effects

- The contract arising from fraud is a null contract.
- The misled party has the right to withdraw from the contract.
- Due to the fraudulent agreement, the party is responsible for recovering the damages.

Evidence and Burden of proof

In a large majority of cases, fraud cannot be proved by concrete and observable proof. It's hidden in its movement by its definition. If the evidence given is such as lead to wrongdoing, it is, therefore, appropriate that fraud must have been committed. In most cases, the only tool for dealing with fraud issues is circumstantial evidence. If this were not allowed, the ends of justice would be constantly, if not invariably, defeated. Simultaneously, fraud involvement is only to be blamed on a deliberate wrongdoer. As a remedy for restitution, any real damages arising from fraud can be recovered, even if they could not have been reasonably foreseen subject to the defrauded party's mitigation law. Due to contributory negligence, the penalties would not be diminished.

2.6 Misrepresentation (Section 17)

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

- A person makes a positive assertion believing it to be true

- Any breach of duty gives the person committing it an advantage by misleading another. But the breach of duty is without any intent to deceive
- when one party causes the other party to make a mistake as to the subject [matter](#) of the contract. But this is done innocently and not intentionally.

Kinds

1. Negligent misrepresentation

- When misrepresentation occurs due to lack of any reasonable ground and carelessness then it is known to be a negligent misrepresentation.
- Negligent misrepresentation is established only when the representative owed a duty to the representee to handle carefully.
- A person would be liable only when he had neglected the duty mentioned in particular.
- The responsibility exists between the two parties even when there is no fiduciary relationship.

2. Innocent Misrepresentation

- When the representation is based on good grounds to believe and it lacks negligence and fraudulent intention, then it is said to be an innocent misrepresentation.
- When a person enters into a contract with innocent misrepresentation has the right to revoke the contract but is not entitled to damages suffered.
- A contract won't be void unless reasonable grounds are provided. Proving innocence in misrepresentation would be enough to establish the fact.

Effect of misrepresentation

When the party who has suffered due to the misrepresentation while entering into a contract, can opt to cease the contract. There are two remedies provided to the party either to rescind the contract or claim damages. The claim of damages means that the contract is left intact and the party is to be subjected to money damages during the suit. Suit for rescission is to cease the performance of the contract that is to restore the party to the original position.

2.7 Mistake of Law

A mistake is an erroneous belief that is innocent in nature. It leads to a misunderstanding between the two parties. Now when talking about a mistake, the law identifies two types of mistakes, namely:

I. Mistake of Law

1. **Mistake of Law of a Country:** Ignorance of law is not an excuse. A party cannot get any relief on grounds that it was done in ignorance of law. Example: Jagat and Manglu makes a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract cannot be considered voidable.

2. **A Mistake of Law of Foreign Country:** Such a mistake is treated as mistake of fact and the agreement in such a case is void.

II. Mistake of Fact

when both the parties misunderstand each other leaving them at a crossroads. Such a mistake can be because of an error in understanding, or ignorance or omission etc. But a mistake is never intentional, it is an innocent overlooking. These mistakes can either be unilateral or bilateral.

Bilateral Mistake

When both parties of a contract are under a mistake of fact essential to the agreement, such a mistake is what we call a bilateral mistake. Here both the parties have not consented to the same thing in the same sense, which is the definition of consent. Since there is an absence of consent altogether the agreement is void. However, to render an agreement void the mistake of fact should be about some essential fact that is of importance in a contract. So if the mistake is about the existence of the subject matter or its title, quality, quantity price etc. then it would be a void contract. But if the mistake is of something inconsequential, then the agreement is not void and the contract will remain in place.



For example, A agrees to sell to B his buffalo. But at the time of the agreement, the buffalo had already died. Neither A nor B was aware of this. And so, there is no contract at all, i.e. the contract is void due to a mistake of fact.

Unilateral Mistake

A unilateral mistake is when only one party to the contract is under a mistake. In such a case the contract will not be void. So, the Section 22 of the Act states that just because one party was under a mistake of fact the contract will not be void or voidable. So if only one party has made a mistake of fact the contract remains a valid contract.

However, there are some exceptions to this. In certain conditions, even a unilateral mistake of fact can lead to a void or voidable agreement. Let's see a few of these exceptions via some examples and case studies.

When Unilateral Mistake is as to the Nature of the Contract: In such a case the contract can be held as void. Let us see the example of *Dularia Devi v. Janardan Singh*. Here an illiterate woman put her thumb impression on two documents thinking they were the same. She thought the document was to gift some property to her daughters. But the other document was a Sale deed to defraud the women out of more of her property. This contract was held void by the courts

When the Mistake is regarding the Quality of the Promise: There was an auction being held by A to sell hemp and tow. B thinking the auction was only for hemp, mistakenly bid for a tow. The amount bid was on par for hemp but very high for a tow. Hence the contract was held as voidable.

Mistake of the Identity of the Person contracted with: For example, when A wants to enter into a contract with B but mistakenly enters into a contract with C believing him to be B.

Meaning of Consideration

'Consideration' means "something in return", i.e. *quid pro quo* that is an essential element to find out the genuine intention of the parties of the promise to create legal relationship. Consideration is an essential component of a valid contract. Consideration is the price for the contract. An agreement without consideration is void and thus not enforceable by law except under certain circumstances. According to Sir Frederick Pollock. Consideration is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." An agreement without consideration is a bare promise and *exnudopacto non aritioactio*, i.e., cannot be held to binding on the parties.

Legal Rules to a Valid Consideration

1. It must move at the desire of Promisor: An act must have been done at the desire or request of the promisor. Voluntary acts or acts done at the desire of the third party is not a consideration in the eyes of law.



Case Analysis

Issue: Bhushan Lalas' house is on fire. Harsh rushes to Bhushans' help and later demanded Rs. 10,000 from him. Is Harsh justified in claiming Rs. 10,000?

Rule: Consideration must move at the desire of Promisor

Analysis: In this case, Harsh helped Bhushan voluntarily. Later, he claims Rs. 10,000 as a reward for helping him.

Conclusion: No, he is not justified as there is no consideration here. It is a voluntary act of Harsh. In case Bhushan had called him for help and promises, to give Rs. 10,000 to Harsh for the help then Bhushan is bound to pay.

It may move from Promisee or another person: Consideration must move from the person to whom promise is made or any other person who can be even a stranger. It means that as long as there is consideration for a promise it is immaterial who has furnished it. A stranger to consideration will be able to sue only if he is a party to the contract.



Example: A, a lady, by a deed of gift, transferred certain property to her daughter with a direction that the daughter should pay an annuity to A's brother as had been done by A. On the same day, the daughter executed a writing in favour of A's brother agreeing to pay the annuity. Afterwards, she declined to fulfill her promise saying that no consideration had moved from A's brother to her. A's brother was held entitled to recover the money (*Chinnayya v. Ramayya*, 4 Mad 137).

It may be an act, abstinence or forbearance or return promise

Sometimes consideration may be paid to stop someone from taking a legal action or to compromise for a dispute etc.

Forbearance to sue: If a person who could sue another person agrees not to pursue his claim, this constitutes a good consideration for a promise by the other person.



Example: Daisy was about to file case in court for her maintenance. Robert, her husband approaches to convince her that from now on he will surely give her maintenance allowance. Held, the forbearance of wife to sue her husband amounts to consideration for the husbands' agreement to pay maintenance allowance to her.

Compromise of a disputed claim: Compromise is a kind of forbearance. As such the same principle as discussed above is applicable on compromise of a disputed claim. It is important to note that the claim must be reasonable.



Example: Birju accidentally hit Sarjus' car. Birju did not accept his mistake. On this carefree attitude, Sarju called the Member of the Legislative Assembly of his area to intervene. When, the dispute got into notice of Member of the Legislative Assembly, he told both parties to compromise on grounds that Birju should pay the amount of damage happened to the car of Sarju. The amount of damage was assessed to be of Rs. 50,000. Thus, the amount of claim as calculated was genuine and valid. Also, when Birju paid the claim he got the consideration from Sarju in terms of his promise not to take further legal action on him.

c) Composition with creditors: A debtors who is financially unable to pay all his dues to the creditors, may call their meeting to request them for accepting lesser amount in satisfaction of their debt. If the creditors accept such a request, it becomes legal binding upon both parties as a compromise.

4. It may be past, present or future: A consideration which moves simultaneously with the promise is called present (or executed) consideration. 'Cash Sales' provides an excellent example of the present consideration. Where the consideration is to move at a future date it is called future or executory consideration. It takes the form of a promise to be performed in the future.

5. It need not be adequate: How much consideration or payment must there be for a contract to be valid, is always the lookout of the promisor. Courts do not see whether a person making the promise has recovered full return for the promise. Thus, if A promises to sell his pen worth ` 80 for ` 20 only the inadequacy of the price in itself shall not render the contract void. But where A pleads coercion, undue influence or fraud, then the inadequacy of consideration will also be a piece of evidence to be looked into.

6. It must be real and not illusory: A consideration for a contract must be real and not illusory. Also, the consideration must be competent, i.e., it must be something to which law attaches some value.



Example: Anju promise to make Gaurav meet the soul of his dead dog by magic. The agreement is void, being illusory.

7. It must be something which the promisor is not already bound to do: A promise to do what one is already bound to do, either by general law or under an existing contract, is not a good consideration for a new promise as it adds to nothing to the pre-existing legal or contractual obligation.



Example: A received summons to appear as a witness at a trial. B, a party to the suit, promises to pay A Rs. 1000 in addition to A's expenses. The promise of B is not enforceable as A was under a legal duty to appear and give evidence. The agreement is void as it is without competent consideration.

8. It must not be illegal, immoral or opposed to public policy

There are certain cases in which the consideration and the object of an agreement are unlawful, thereby making it unenforceable. Section 23 defines an illegal agreement as one the consideration or object of which (i) is forbidden by law; or (ii) defeats the provisions of any law; or (iii) is fraudulent; or (iv) involves or implies injury to the person or property of another; or (v) the court regards it as immoral or opposed to public policy.



Pankaj offers Rs 10,000 to Dablu to beat up his business rival. Dablu beats him up but Pankaj refuses to pay him. Dablu cannot file a suit for recovery since the consideration is against the law.

2.8 A Contract without Consideration is Void-Exceptions

1. Love and Affection: If an agreement is in writing and registered between two parties in close relation (like blood relatives or spouse), based on natural love and affection, then such an agreement is enforceable even without consideration.



Example, Pankaj and Pawan are brothers. In his will, their father nominates Pankaj as the sole owner of his entire property after his death. Pawan files a case against Pankaj to claim his right to the property but loses the case. Pankaj and Pawan come to a mutual decision where Pankaj agree to give half of the property to his brother and register a document regarding the same. Eventually, Pankaj didn't fulfil his promise and Pawan filed a suit for recovery of his share in the property. The Court held that since the agreement was made based on natural love and affection, the no consideration no contract rule didn't apply and John had the right to recover his *share*.

2. Compensation for voluntary services: If a person has done a voluntary service in the past and the beneficiary promises to pay at a later date, then the contract is binding provided:

- The service was rendered voluntarily in the past
- It was rendered to the promisor
- The promisor was in existence when the voluntary service was done (especially important when the promisor is an organization)
- The promisor showed his willingness to compensate the voluntary service



Example, Ned finds Johns' wallet on the road and returns it to him. John is happy to find his lost wallet and promises to pay Ned Rs 2,000. In this case, too, no consideration no contract rule does not apply. This contract is a valid contract.

3. Promise to pay a time barred debt: If a person makes a promise in writing signed by him or his authorized agent about paying a time-barred debt, then it is valid despite there being no consideration. The promise can be made to pay the debt wholly or in part.



Example: Peter owes Rs 100,000 to John. He had borrowed the money 5 years ago. However, he never paid a single rupee back. He signs a written promise to pay Rs 50,000 to John as a final settlement of the loan. In this case, 'the no consideration no contract' rule does not apply either. This is a valid contract.

4. Gift: The rule of no consideration no contract does not apply to gifts. Explanation (1) to Section 25 of the Indian Contract Act, 1872 states that the rule of an agreement without consideration being void does not apply to gifts made by a donor and accepted by a donee.

5. Agency: According to section 185 of the Indian Contract Act, 1872, no consideration is necessary to create an agency.

6. Charitable Subscription: If a person undertakes a liability on the promise of another to contribute to charity, then the contract is valid. In this case, the no consideration no contract rule does not apply.



Example: Peter is the trustee of his town's charity organization. He wants to build a small pond in the town to enhance greenery and offer the residents a good place to walk around in the evenings. He raises a charity fund where he appeals to people to come ahead and contribute to the cause. Many people come forward as subscribers the fund and agree to pay Peter their share of the amount once he enters into a contract for constructing the pond. After raising half the amount, Peter hires contractors for building the pond. However, 10 people back out at the last moment. Peter files a suit against them for recovery. The Court ordered the 10 people to pay the amount to Peter since he had undertaken a liability based on their promise to pay. Even though there was no consideration, the contract was valid and enforceable by law.

Summary

Consent means an act of assenting to an offer. As per the Section 13 of Indian Contract 1872, when both parties agree to a thing in the same sense of mind, it is said that the parties consented to enter into a valid contract. A Consent is to be free when not caused by Coercion (Section 15); Undue Influence (Section 16); Fraud (Section 17) and Misrepresentation (Section 18). When there is no consent, there is no contract. A contract becomes voidable the option of a party whose consent was not free.

Consideration: 'Consideration' means "something in return", i.e. *quid pro quo* that is an essential element to find out the genuine intention of the parties of the promise to create legal relationship. Consideration is an essential component of a valid contract. Consideration is the price for the contract. An agreement without consideration is void and thus not enforceable by law except under certain circumstances.

Legal rules to Consideration

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

Exception for No Consideration

Section 25 also lists the exceptions under which the rule of no consideration no contract does not hold, as follows:

- Natural Love and Affection
- Voluntary Services
- Promise to pay a Time-Barred Debt
- Creation of an Agency
- Gifts
- Charity

Keywords

1. **Coercion:** When a person is compelled to enter into a contract by the use of force by the other party or under a threat, 'coercion' is said to be applied. A consent is said to be obtained by Coercion by (i) committing or threatening to commit any act forbidden by the Indian Penal Code, 1860 or (ii) the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement. [s.15].

It is important to note here that Coercion includes fear, physical compulsion and threat or menace to goods.

2. **Undue Influence:** When a contract is made between two parties and one of them is in the position to dominate the will of the other party and takes unfair advantage of the position, then the contract is said to be made out of undue influence.

3. **Fraud:** A Fraud exists when:

A false representation is made (a) knowingly, or (b) without belief in its truth or (c) recklessly, not caring whether it is true or false and the maker intended the other party to act upon it, or

There is any concealment of material fact or that there is a partial statement of fact in such a manner that the withholding of what is not stated makes that which is stated false.

4. **Misrepresentation:** It is said to exist when a party makes a representation that is false, inaccurate, incorrect, etc. The difference here is the misrepresentation is innocent, i.e. not intentional. The party making the statement believes it to be true.

5. **Mistake:** A mistake is an erroneous belief that is innocent in nature. It leads to a misunderstanding between the two parties.

Self Assessment

Q1. Xavier forcibly kidnaps the son of David and asks him to execute a promissory note of rupees one lakh in his favour. Now under the threatening David executes a promissory note in favour of Xavier. Is the promissory note enforceable?

- A. No, such a promissory note cannot be enforced in the court of law as the consent was not free and was induced by coercion.
- B. Yes, such a promissory note can be enforced in the court of law as the consent was free
- C. Yes, all essentials of a valid contract can be observed in this case
- D. No, as the person getting kidnapped is a minor

Q2. The contract in which consent is caused by the way of fraud is

- A. Illegal
- B. Voidable
- C. Either (A) or (B)
- D. Valid

Q3. A's threat to kidnap B's daughter if he does not sell his car worth 20,00,000 for 5,00,000. This Contract is void due to –

- A. Inadequacy of Consideration
- B. Incompetence of Parties
- C. Absence of Free Consent
- D. None of the above

Q4. Arjun promises to give his son Bobby a sum of Rs. 5,000. Arjun puts his promise to Bobby in writing and registers it. Can a valid contract get formed?

- A. No, as there is no consideration provided by Bobby to his father
- B. Yes, as a valid contract may form where a father has given a written promise.
- C. No, as Bobby may refuse to take Rs. 5,000
- D. No, as father may change his mind any time

Q5. Identify in which of the given situation, a consent is obtained by Coercion?

- A. Threat to stop talking
- B. Threat to break friendship by a friend
- C. Threat to stop shopping by a customer if a handsome discount is not given by shopkeeper
- D. Threat to commit suicide by a wife if husband does not give her diamond ring

Q6. Aman helped Ankit to reach the office on time where he had an important meeting to attend. Two days later, Ankit promised to pay Rs. 10000 to Aman in gratitude. This contract is:

- A. Void because there is no consideration
- B. Valid as Amit's action of helping amount to past consideration
- C. Valid
- D. Voidable

Q7. The consideration must be:

- A. Adequate
- B. Must be adequate
- C. Need not be adequate
- D. Substantially adequate

Q8. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful:

- A. The agreement is void.
- B. The agreement is voidable.
- C. The agreement is enforceable.
- D. The agreement is unenforceable.

Q9. A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation:

- A. The contract illegal.
- B. The contract is voidable.
- C. The contract is void.
- D. The contract is not voidable.

Q10. Where one party is in position to dominate the will of another and uses his superior position to obtain the consent of the weaker party, the consent is said to be obtained by:

- A. Undue influence
- B. Fraud
- C. Misrepresentation
- D. Coercion

Q11. If there is no consideration, then

- A. The agreement is valid
- B. The agreement is void
- C. The agreement is illegal
- D. The agreement is voidable

Q12. An agreement made with free consent to which the consideration is lawful but inadequate, is

- A. Void
- B. Valid
- C. Voidable
- D. Unlawful

Q13. Which of the following relationships raise presumption of undue influence?

- A. Doctor and Patient
- B. Solicitor and Client
- C. Trustee and Beneficiary
- D. All of the above

Q14. A poor widow was persuaded by a money lender to agree to pay 100 per cent rate of interest on money lent by him to her. She needed the money to establish her right to maintenance. Is it a valid contract?

- A. No, as the money lender should show some humanity towards the women
- B. No, as the money lender has applied undue influence on women inducing her to pay 100 per cent rate of interest.

- C. No, as consideration is not adequate
- D. Yes, as there is a free consent of poor widow women

Q15. In which of the following cases is a contract not voidable at the option of the party whose consent was so caused:

- A. When the consent was caused by coercion when the consent was caused by misrepresentation
- B. When the consent was caused by silence but the party had the means of discovering
- C. the truth
- D. When the consent was caused by fraud

Answers for Self Assessment

1. A 2. B 3. C 4. B 5. D
6. B 7. C 8. A 9. D 10. A
11. C 12. B 13. D 14. B 15. C

Review Questions

- Q1. What is Consideration? Discuss the legal rules to a valid Consideration.
- Q2. What is meant by the term 'Free Consent'? Discuss the situations when the consent of a party to a contract may not be free and what impact may it cause on the validity of a contract?
- Q3. Explain the term Coercion and Influence. How would you differentiate them?
- Q4. What is meant by the term 'Mistake'? Explain its types with relevant examples in detail.
- Q5. Discuss with suitable examples of each such situation when a Contract without Consideration is not Void?



Further Readings

1. A Text Book Of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements Of Mercantile Law By N.D. Kapoor, S. Chand & Company
3. A Manual Of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law By S SGulsan, Excel Books
5. Mercantile Law By M C Kuchchal, Vikas Publishing House
6. Legal Aspects Of Business By Daniel Albuquerque, Oxford & Ibh

Unit 03: The India Contract Act,1872

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Objectives

After studying this unit, you will be able to:

- identify the parties who are competent to enter into a contract
- articulate the provisions of law in the case of entering into a contract with parties who are incompetent to enter into a contract
- understand various modes of performance

Introduction

A contract places a legal obligation upon the contracting parties to perform their mutual promises, and it carries on until the discharge or termination of the contract. It is important that the parties who enter into a Contract must have the capacity of doing so. The term 'Capacity' means Competence of parties to enter into a valid Contract. As per Section 10, an Agreement becomes a Contract if it is entered into between the parties who are competent to Contract. According to Section 11, every person is competent to contract who (i) is of age of majority according to the law to which he is subject, (ii) is of sound mind, (iii) is not disqualified from contracting by any law to which he is subject. Thus, Section 11 declares the following persons to be incompetent to contract:

1. Minor

2. Persons of Unsound Mind
3. Persons disqualified by any law to which they are subject

The most natural and usual mode of discharging a contract is to perform it. A person who performs a contract in accordance with its terms is discharged from any further obligations. As a rule, such performance entitles him to receive the other party's performance. Exact and complete performance by both the parties puts an end to the contract. In expecting exact performance, the courts mean that, performance must match contractual obligations. In requiring a contract to be complete, the law is merely saying that any work undertaken must be carried out to the end of the obligations. A contract should be performed at the time specified and at the place agreed upon. When this has been accomplished, the parties are discharged automatically and the contract is discharged eventually.

3.1 Minor

According to Section 3 of the Indian Majority Act 1875, a person is deemed to have attained majority (i) when he completes 18 years or (ii) where a guardian of person or property or both, has been appointed by a Court of Law (or where his property has passed under the superintendence of the Court of Wards), he attains majority on completion of 21 years. In other words, normally a person shall be treated as minor if he has not attained the age of 18 years. In the following two cases, however, he is treated as minor until he attains the age of 21 years.

- i) where a guardian of a minor's person or property is appointed under the Guardians and Wards Act, 1890, or
- ii) where the superintendence of minor's property is assumed by a Court of Wards

3.2 Legal Status of Contracts with Minor

1. An agreement with or by a minor is void and inoperative ab initio: In the eyes of law, a minor is one who is immature and does not understand the legal obligations arising out of the Contract.



Case Analysis: Mohiri Bibi vs Dharmodas Ghose (1903)

Issue: Dharmodas Ghose, a minor mortgaged his property to the moneylender Brahmo Dutt for getting a loan of Rs. 20,000/- The respondent declared his age of majority in the deed of mortgage. The respondents' mother Mohiri Bibi sent a letter to Brahmo Dutt stating that her son, the defendant is a minor. The contract is made between Dharmodas Ghose and Brahmo Dutt to mortgage the property. The respondents' mother filed a suit for setting aside the mortgage deed. Do you think that she would have succeeded in the given case?

Solution:

Identifying the Rule: A contract with a minor is void ab initio (not valid from the very beginning)

Analyzing the case: In this case, a minor does not tell his real age and consequently get loan by mortgaging his property to a money lender. The mother of minor requests to the court to set aside the mortgaged deed.

Conclusion: The mortgage deed is void and hence, the court shall cancel the same. Further, if the moneylender request for the repayment of the amount advanced to the minor as part of the consideration for the mortgage can also not accepted.

2. He can be a promisee or a beneficiary: A minor is a person declared incapable to enter into a valid contract. However, he can be a promisee or a beneficiary. He may make a contract, but he is not bound by the contract; however, he can make the other party bound by the contract. Thus, a

minor is not bound on a mortgage or a promissory note, but he can be a mortgagee, a payee, or an endorsee. He can derive benefit under the contract.



Case Analysis

Issue: In the morning of 11th January 2021 Mohit saw a red second hand scooter in Pulkit's shop. Mohit tells the owner of shop that he wants to buy the scooter. Pulkit agrees to sell the scooter for Rs. 5,000. Mohit pays Rs. 1,000 and promises to pay the remaining amount next day. However, Pulkit sells the scooter on same day in late evening to Arpit who paid him Rs. 5,000 immediately. Next day when Mohit meets Pulkit to pay the remaining price of scooter and take it home but he comes to know it is already sold. Mohit feels betrayed and files a case on Pulkit for not selling the scooter to him. He requests the court to set aside the sale made by Pulkit to Arpit and that he should be sold the scooter. Decide will Mohit succeed in getting the delivery of scooter?

Solution:

Identifying the Rule: A minor can be a promisee or a beneficiary

Analyzing the case: In this case, a minor enters into an agreement to buy a second-hand scooter. He pays Rs. 1,000 as advance money and promises to pay the remaining amount very next day. But, the shop owner sells the scooter to Arpit who pays full amount immediately. When Mohit comes to pay remaining amount of sale and take delivery, he comes to know the scooter is already sold.

Conclusion: Yes, Mohit will succeed in getting the delivery of scooter. The court can cancel the contract of sale of scooter to Arpit as Mohit was promisee.

3. His agreement cannot be ratified by him on attaining age of majority: An agreement with a minor is always void ab initio. Hence, there can be no question of its being ratified even after he attains majority.



Case: Eudrman Rikamaswamy v. Anthaopa

A person gave a promissory note in satisfaction of one executed by him for money borrowed when he was a minor. The Court held that the claim thereunder could not be enforced because there was no fresh consideration. Consideration given during minority is a good consideration. However, where a person on attaining majority actually pays the debt incurred by him during minority, it is treated as valid. In law it is to be regarded on the same footing as a gift (*Anant Rai v. Whagwan Rai*). You should note that an agreement with a minor is entirely void and not unlawful and so the sum paid cannot be sued for subsequently.

4. If he has received any benefit under a void agreement, he cannot be asked to compensate or pay for it. The law considers a minor as an incompetent person who does not understand the legal implications arising out of a contract.



Example: Jatin, a minor obtains a loan by mortgaging his property. He is not liable to refund the loan amount of Rs. 10,00,000. Even his mortgaged property cannot be used to pay the amount of debt.

5. He can always plead of his minority. Even if he has by misrepresentation induced the opposite party to contract with him, he cannot be sued. In tort for fraud because if the injured party were allowed to sue for fraud it would be giving him an indirect means of enforcing void agreements.



Example: Sarju, a minor fraudulently represents himself to be a major, induced Babban to lend him ₹ 400. He refused to repay it and Babban sued him for the money. The contract considered the contract as void and declared Sarju to be non-liable to repay the amount due [Leslie v. Sheill.]

6. There can be no specific performance of agreements entered into by him as they are void ab initio. A contract entered into on his behalf by his parents/ guardian/ manager of his estate can be specifically enforced by or against the minor provided the contract is (a) within the scope of authority of parent/ guardian/ manager, and (b) for the benefit of minor.
7. He cannot enter into a Contract of Partnership: In a partnership business, a minor cannot be a partner. However, a minor may be admitted to the advantages of partnership with the assent of all partners for the time being (Section 30 of the Partnership Act, 1932). This implies he may profit from the business without being personally liable for damages.
8. A minor cannot be declared insolvent because he is incapable of contracting debts.
9. He is liable for necessities supplied or necessary services rendered to him or anyone whom he is legally bound to support: Section 68 of the Indian Contract Act 1872 states that if a person does not have the capacity of being in a contract receives necessities from another person. He has the power to reimburse from the incapable person. Though section 68 makes minor liable for the necessities, it does not define the necessities. The necessities will be decided upon the case. To have reimbursement for the necessities the party supplying the necessities must prove that the goods are good and reasonable. They have also to confirm that the provided necessities are the only support for the minor and that they do not have any sufficient supply with them.
10. He can be an agent: The minor can become an agent. But he is not responsible to the principal. The contract of apprenticeship is a service contract, and it binds the minors by providing benefits to them. But such an apprenticeship contract is made by a parent or guardian.
11. His parents/ guardian are/ is not liable for the contract entered into by him, even though the contract is for the supply of necessities to the minor. But, if the minor acts as an agent for the parents/ guardian they shall be liable under the act.
12. A minor is liable in a civil wrong or tort but where a tort arises out of a contract a minor is not liable in tort as an indirect way of enforcing an invalid contract.

3.3 Minors' Liability for Necessaries

Section 68 provides that a minor's estate is liable to a person who supplies necessities of life to a minor, or to one whom the minor is legally bound to support, according to his station in life, not on the basis of any contract, but on the basis of an obligation resembling a contract. However, there is no personal liability of a minor for the necessities of life supplied. The definition of a "necessaries of life" depends entirely on the person and the situation. It probably will always include food and probably will never include a car. In order to entitle the supplier to be reimbursed from the minor's estate, the following must be satisfied:

- (i) The goods are 'necessaries', for that particular minor having regard to his conditions in life (or status or standard of living) and that purchase or hire of a car may be 'necessary' for a particular minor;
- (ii) The minor needs the goods both at the time of sale and delivery. What is necessary to see is the minor's actual requirements at the time of sale and at the time of delivery, where these are different. A minor's estate is liable not only for the necessary goods but also for the necessary services rendered to him. The lending of money to a minor for the purpose of defending a suit on

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behalf of a minor in which his property is in jeopardy, or for defending him in prosecution, or for saving his property from sale in execution of a decree is deemed to be a service rendered to the minor.

Other examples of necessary services rendered to a minor are: provision of education, medical and legal advice, provision of a house on rent to a minor for the purpose of living and continuing his studies.

3.4 Necessaries for a Minor

Necessaries for a minor can be:

1. **Necessary Goods:** These are the goods not simply restricted to articles which are required to maintain a bare existence. For example: Food, Clothing and Shelter. Such goods are reasonably necessary to the minor having regard to his station in life.



Case Analysis: Nash Vs Inman (1908)

Issue: Manglu, a minor, ordered 11 fancy coats for about Rs. 4,500 with Nandu, the tailor. He was at the time adequately provided with the clothes. The tailor asked him for the price of coats but Manglu denied. Nandu filed a suit against Manglu for non-payment of coats. Decide will Nandu succeed in getting the price of his coats?

Rule: A contract with a minor for necessary goods is enforceable in the eyes of law. It considers such contracts with minor as valid.

Analysis: In this case Manglu bought 11 fancy coats, which is obviously not a necessity.

Conclusion: In the given case as 11 fancy coats cannot be considered as a necessity for a minor, thus he is not liable to pay for them. So, Nandu will not succeed in getting the price of his coats.

2. **Professional Service:** There are certain services that can help a minor to earn livelihood in future and as such they also become his necessity. For example: Medical advice, Professional training like in dance, games, education etc.



Case Analysis:

Issue: A minor wanted to become a professional billiards player and he enters into a Contract with a famous billiard player and agreed to pay a certain sum of money to learn the game. Is he liable to pay? Give reasons in support of your answer.

Rule: A contract with minor to provide him a service of learning billiards is valid.

Analysis: In the given case, when the minor learns to play billiards from a professional and adopts it as his profession, he can get employed.

Conclusion: Thus, we may conclude that a contract with minor to provide him a service of learning billiards is very much valid. However, in the case, a minor cannot be personally made liable as he does not earn anything on his own. To make a payment to the professional billiards player, his private estate shall be liable.

3.5 Persons of Unsound Mind

Section 12 of Indian Contract Act 1872 discussed about who is a person of sound mind. As per the act, a person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it, he is capable of understanding the terms and conditions that are conferred upon him. He must be able to form a rational judgement as to its effect upon his interests. Section 12 further states that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.



Examples:

- 1) A patient in a lunatic asylum, who is at intervals of sound mind may contract during those intervals.
- 2) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgement as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.

Burden of Proof

The following rules may be noted in this regard:

- 1) Where a person is usually of sound mind, the burden of proving that he was of unsound mind at the time of execution of a document lies on the person who challenges the validity of the contract (Tiliuk Charad v. Mahaadu).
- 2) Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it.
- 3) In cases of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract.

3.6 Position of Agreements by Persons of Unsound Mind

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

2) Idiots: An idiot is a person who is permanently of unsound mind. Idiocy is a congenital defect. Such a person has no lucid intervals. He cannot make a valid contract.

In *Inder Singh v. Parmeshwardhari Singh* a property worth about Rs. 25,000 was agreed to be sold by a person for Rs. 7,000 only. His mother proved that he was a genetically idiot, incapable of understanding the transaction. Holding the sale to be void, Justice Sinha of Patna High Court stated that it is not necessary that a man must be suffering from lunacy to disable him from entering into a contract. A person may, to all appearances, behave in a normal fashion but at the same time, he may be incapable of forming a judgement of his own as to whether the act he is about to do is in his interest or not. In the present case he was incapable of exercising his own judgement."

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



Example: A man delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgement as to its effects on his interest cannot contract while such delirium or drunkenness lasts.



Note: A contract with a person of unsound mind is subject to the same exceptions as the contract with a minor is. Thus, a person of unsound mind (i) may enforce a contract for his benefit, and (ii) his properties, if any, shall be attachable for realization of money due against him for supply of necessaries to him or to any of his dependents.

3.7 Persons Disqualified by Law

A. Alien Enemy: An alien is a person who is the citizen of a foreign country. Thus, in the Indian context an alien may be (i) an alien friend: An alien friend, (i.e., a foreigner) whose country is at

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peace with the Republic of India, has usually the full contractual capacity of a natural born Indian subject. But, he cannot acquire property in Indian ship or be employed as Master or any other Chief Officer of such a ship; or (ii) an alien enemy: In the case of contracts with an alien enemy (i.e., an alien whose country is at war with India) the position may be studied as **(i) Contracts during the war and (ii) contracts made before the war.** During the subsistence of the war, an alien can neither contract with an Indian subject nor can be sued in an Indian Court except by license from the Central Government. As regards contracts entered into before the war breaks out, they are either dissolved or merely suspended. All contracts, which are against the public policy or are such that may benefit the enemy, stand dissolved. The contracts which are not against public policy are merely suspended for the duration of the war and revived after the war is over, provided they have not already become time-barred under the law of limitations. It may be observed that an Indian, who resides voluntarily or who is carrying on business in a hostile territory will be treated as an alien enemy.

B. Foreign Sovereigns and Ambassadors: Foreign sovereigns and accredited representatives of a foreign state (Ambassadors) enjoy some special privileges. They cannot be sued in our courts unless they choose to submit themselves to the jurisdictions of our courts. They can enter into contracts and enforce those contracts in our courts, but they cannot be proceeded against in Indian Courts

without the sanction of the Central Government. The aforesaid immunity of a sovereign continues even if he engages in trade. But, an ex-king is not entitled to this and can thus be sued against in our courts. If, however, a foreign sovereign, etc. enter into a contract through an agent residing in India, the agent shall be held liable on the contract.

C. Convicts: A convict is not competent to contract during the continuance of sentence of imprisonment. This inability comes to an end with the expiration of the period of sentence. A convict can, however, enter into, or sue on, a contract when on parole or when he has been pardoned by the court. **D. Company or a Corporation:** It is an artificial person, that exists only in contemplation of law. Its contractual capacity, is determined by its constitution. The contractual capacity of a statutory corporation is expressly defined by the statute creating it. The contractual capacity of a company registered under the Companies Act is determined by the object clause of its memorandum of association. Any act done in excess of the powers given in the memorandum is

ultra-vires and void.

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

3.8 Performance of Contract

Performance of a contract is one of the various modes of discharge of the contract and this is the most natural, desired and usual mode of discharging an obligation. The term 'performance' means that the parties to the contract have fulfilled or carried out their respective obligations arising out of the contract.



Example: Arjun contract to sell his book to Jamal for Rs. 50. Arjun delivers the book and Jamaal makes the payment, the contract is discharged by performance. Section 37 of the Indian Contract Act lays down the obligations of the parties regarding performance. It provides that the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provision of this Act, or any other law.

3.9 Types of Performance

From Section 37 you can infer that the performance may be either actual or attempted. Let us study them in detail.

Actual performance: When a party to a contract has done, what he had undertaken to do and there remains nothing to be done by him the promise is said to have been actually performed and the liability of such a party comes to an end.



Example: Bojnala is indebted to Manjunath for Rs. 1,000. He promises to repay the amount after two months. Bojnala repays the amount on the due date. This is actual performance.

Attempted Performance: Sometimes, when the performance becomes due, the promisor offers to perform his obligation but the promisee refuses to accept the performance. This is known as 'attempted performance' or 'tender.' In case of an attempted performance, the promisor shall not be held liable for non-performance as an attempted performance or tender is as good as performing the contract.



Example: Anil promises to deliver certain goods to Rohan. Anil takes the goods to the appointed place during business hours but Rohan refuses to take the delivery of goods. Thus, Anil has done what he was required to do under the contract. It is, an attempted performance.

Section 38 of the Contract Act provides. where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Who can demand performance?

1. **Promisee:** Normally, the promisee is the only person who can demand performance of the promise under a contract. A third party cannot demand performance of the contract even if it was made for his benefit.



Example: Anju promises Bobby to pay Rs. 500 to Chandru. The person who can demand performance is Bobby and not Chandru.

2. **Legal Representative:** In the case of death of a promisee, his legal representative can demand performance, unless a contrary intention appears from the contract or the contract is of a personal nature.



Example: Ritu agrees to marry Rahul. However, before marriage takes place. Rahul dies. Since it is a contract, of personal nature the legal representative of Rahul cannot demand performance of the promise from Ritu.

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.
4. **Joint Promisees:** When person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the performance of the promise may be demanded either (i) by all the promises jointly; or (ii) in case of death of any of joint promisees, by the representatives of such deceased person jointly with the surviving promisees, or (iii) in case of death of all joint promisees, by representatives of all of them jointly. Thus, the right of joint promisees is only joint and any of them cannot demand performance unless it was so agreed.



Example: A for a consideration of Rs. 5,000 lent to him by Band C, promises Band C jointly to repay them Rs. 5,000 plus interest on a specified day. B dies. The right to claim performance rests with B's representative jointly with C during his life time, and after C's death it would lie with the representatives of B and C jointly.

Who must perform?

A Contract can be performed by the persons enlisted and discussed below: -

1. **Promisor:** A promisor is a person who makes the promise. If from the nature of the contract it appears that it was the intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor. This usually applies to contracts involving personal skill, taste or art work.



Example: A promises to paint a picture for B. As this promise involves personal skill of A, it must be performed by A.

2. **Promisor or Agent:** Where the contract does not involve personal skill of the promisor, the contract could be performed by the promisor himself or by any competent person employed by him for the purpose.



Example: Adam promises to pay Rs. 10,000 for interior designing of his make-up studio by Charlie. Adam may perform this promise either by paying the money personally to Charlie or by causing it to be paid to Charlie by his authorized agent.

3. **Legal Representatives:** The contracts which do not involve any personal skill or taste, may be performed by his legal representative after the death of the promisor.



Example: Janki promises to deliver goods to Hariya on a certain day on payment of Rs. 2,000. Janki dies before the said day. Janki's legal representatives are liable to deliver the goods to Hariya and he is bound to pay Rs. 2,000 to Janki's representatives. If, however, the contract involves some personal skill or taste, it comes to an end with the death of the promisor.

4. **Third Person:** In some cases, a contract may be performed by a third person provided the promisee accepts such an arrangement. According to Section 41, once the promisee accepts the performance from a third person, he cannot compel the promisor to perform the contract again.

5. **Performance of Joint Promises:** According to section 42, when two or more persons have made a joint promise, the joint promisors must fulfil the promise jointly during their life time. And if any one of them dies, then his legal representatives and survivors must jointly fulfil the promise.



Example: Arti, Jyoti and Meenu jointly promise to pay Rs. 3,000 to Deepika. Arti dies due to heart attack. Jyoti and Meenu along with Arti's legal representative are jointly and severally liable to pay the amount to Deepika.

Time and place for performance?

The rules regarding the time and place of performance are given in sections 46 to 50 of the Contract Act. These are as follows:

1. Performance of a promise within a reasonable time: According to section 46 where the time for performance is not specified in the contract, and the promisor himself has to perform the promise without being asked for by the promisee, the contract must be performed within a reasonable time. The question 'what is a reasonable time' is, in each particular case, a question of fact. Thus, it is clear from this provision that if time for performance is not stated, the contract is not bad for want of certainty.

2. Performance of promise where time is specified: Sometimes, the time for performance is specified in the contract and the promisor has undertaken to perform it without any application or request by the promisee. In such cases, the promisor must perform his promise on that particular day during the usual hours of business and at a place where the promise ought to be performed (section 47).



Example: George promises to deliver 100 kg of rice at Alex's warehouse on January 13, 2022. On that day A brings 100 kg rice to Alex's warehouse, but after the usual hours of closing and they are not received. In this case, George's performance is not valid.

3. Performance of promise on application by the Promisee: It may also happen that the day for the performance of the promise is although specified in the contract but the promisor has not undertaken to perform it without application or demand by the promisee. In such cases, the promisee must apply for performance at a proper place and within the usual hours of business (Section 48).

4. Performance of promise where no place is specified and also no application is to be made by promisee: When a promise is to be performed without application or demand by the promisee, and no place is specified for performance, then it is the duty of the promisor to apply or ask the promisee to fix a reasonable place for the performance of the promise and to perform it at such place (Section 49).



For example, A undertakes to deliver 1,000 kilos of jute to B on a fixed day. A must apply to B to fix a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

5. Performance of promise in the manner and time prescribed or sanctioned by promisee: Sometimes the promisee himself prescribes the manner and the time of performance. In such cases, the promise must be performed in the manner and at the time prescribed by the promisee. The promisor shall be discharged from his liability if he performs the promise in the manner and time prescribed by the promisee (Section 50).

3.10 Performance of Reciprocal Promises

Section 2(f) of the Contract Act defines a reciprocal promise as promises which form the consideration or of the consideration for each other. In such cases there is an obligation on each party to perform his own promise and to accept performance of the others' promises.

3.11 Types of Reciprocal Promises

Reciprocal promises have been classified by Lord Mansfield in Jones V. Barkley case in the following three categories

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a) **Mutual and independent:** When each party must perform his part of the promise independently without waiting for the performance or readiness to performance by the other party, the promises are called mutual and independent.

b) **Conditional and dependent:** When the performance of one party depends on the prior performance of the other party, the promises are called conditional and dependent.

c) **Mutual and concurrent:** When the parties have to perform their promises simultaneously, they are said to be mutual and concurrent.

3.12 Rules for the Performance of Reciprocal Promises

1. **Mutual and Concurrent:** Section 51 lays down the rule by saying that when reciprocal promises are to be performed simultaneously, a promisor need not perform his part unless the promisee is ready and willing to perform his part.



Example: Lallan and Ballan agree that Lallan shall deliver 5 kg mangoes to Ballan to be paid for by him on delivery. In this case, Lallan need not deliver the goods unless Ballan is ready and willing to pay for the goods on delivery; and Ballan need not pay for the goods unless Lallan is ready and willing to deliver them on payment.

2. **Mutual and Dependent:** In such cases, the performance of promise by one party depends on the prior performance of the promise by the other party. If the party who is liable to perform first, fails to perform it, then he cannot claim performance from the other party. Not only that, the party at fault becomes liable to pay compensation to the other party for any loss which the other party may sustain by the non-performance of the contract (section 54).



Example: A contracts with B to execute certain building work for a fixed price. B is to supply the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber. So, the work cannot be executed. A need not execute the work and B will be bound to make compensation to A for any loss caused to him by the non-performance of the contract.

3. **Mutual and Independent:** The promises that are to be performed by each party independently without waiting for the other party to perform his promise is mutual and independent. 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. In such a situation, the aggrieved party can claim damages from the defaulting party.

3.13 Effects of Preventing the Performance of Reciprocal Promises

Sometimes it may happen that one party to a reciprocal promise prevents the other from performing his promise. In such a situation, the contract becomes voidable at the option of the party so prevented, and he is also entitled to claim compensation from the other party for any loss suffered due to non-performance of the contract.



Example: Garv and Harsh contracted that Harsh shall execute certain work for Angad for Rs. 10,000. Harsh was ready and willing to execute the work accordingly. But, Gaurav prevents him from doing so. The contract is voidable at the option of Harsh and if he decides to rescind it, he is entitled to recover from Angad compensation for any loss which he has incurred due to its non-performance.

Summary

The parties to a contract must be competent to contract, otherwise the contract will not be valid. A person is competent to contract if he (i) is of the age of majority (ii) is of a sound mind, and (iii) has not been disqualified from contracting by any law to which he is subject. A person is deemed to have attained majority when he completes 18 years (it is 21 years in some cases). Any person who has not attained the age of majority is called a minor and the contract with him is regarded void ab-initio. Not only that, an agreement with a minor cannot be ratified even after he attains majority. He cannot become partner in a firm but can be admitted to the benefits of the firm. He can, however, become a shareholder in a company provided the shares held by him are fully paid up and the articles of association do not prohibit it. He can also be a promisee or beneficiary. His guardians can act on his behalf within certain limits. His property can be used for the payment of price of the necessaries supplied to him or his dependents.

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A person is said to be of a sound mind if, at the time of contracting, he is capable of understanding the terms of the contract and of forming a rational judgement as to its effects upon his interests. An idiot, a lunatic and a drunken person are usually regarded as persons of an unsound mind. The position of contracts with persons of unsound mind is similar to that of a contract with a minor. Besides minors and persons of unsound mind, there are others who are disqualified from contracting under the provisions of some other laws. Such persons are: (i) alien enemies (ii) foreign sovereigns, (iii) convicts, and (iv) insolvents. However, though a foreign sovereign or dignitary cannot be sued in our courts for claiming the performance of a contract, he can sue in our courts and claim its performance. The performance of a contract may be either actual or attempted (also known as Tender). When a party offers to perform his promise in accordance with the contract, and the other party refuses to accept it, the contract is discharged. Attempted performance or tender is equivalent to actual performance. The party who offered to perform is discharged from his obligation. The tender to be valid must be unconditional, made at the proper time, place and manner, made to the promisee or his authorized agent, and must be for the whole obligation. Performance can be demanded by the promisee only. In case of his death his representatives can demand performance. In case of contracts of a personal nature, they should be performed by the promisor. In other cases, it may be performed by his agent, and in case of his death by his legal representatives. When two or more persons make a joint promise, then unless a contrary intention appears from the contract, all of them must perform jointly. If any one of the joint promisors dies, his legal representative shall be liable to perform along with other joint promisors. The contract should be performed at the time specified and at the place agreed upon. If no time is specified the promisor must perform the promise within a reasonable time. In case no time and place are fixed for the performance, the promisee must ask the promisor to fix the day and time for performance. In commercial agreements, time is the essence of the contract. Promises which form the consideration or part of the consideration for each other are termed as reciprocal promises. Reciprocal promises may be (a) mutual and independent, (b) conditional and dependent, and (c) mutual and concurrent. Reciprocal promises must be performed in the order specified in the contract.

Keywords

Alien: A resident of a foreign country.

Convict: A person found guilty of an offence.

Idiot: A person so mentally deficient by birth as to be incapable of ordinary reasoning or rational conduct.

Lunatic: A person affected by lunacy or of an unsound mind. A person can become lunatic at any stage of his life.

Minor: A person who has not attained the age of 18 years (21 years in some situations).

Necessaries: Items necessary for living suitable to the condition in life of an individual and to his actual requirement at the time of sale and delivery.

Void-ab-initio: Void from the beginning.

Reciprocal promise: In such cases there is an obligation on each party to perform his own promise and to accept performance of the others' promises.

Mutual and independent Reciprocal Promise: When each party must perform his part of the promise independently without waiting for the performance or readiness to performance by the other party, the promises are called mutual and independent Reciprocal Promise.

Conditional and dependent Reciprocal Promise: When the performance of one party depends on the prior performance of the other party, the promises are called conditional and dependent Reciprocal Promise.

Mutual and concurrent: When the parties have to perform their promises simultaneously, they are said to be mutual and concurrent Reciprocal Promise.

Self Assessment

Q1. Capacity to contract means_____

- A. the parties are financially unsound to make contracts
- B. the parties are physically unable to enter into contracts
- C. the parties are legally competent to enter into contracts
- D. All of the above

Q2. A drunken or intoxicated person falls in the category of:

- A. Persons disqualified by law
- B. Persons of unsound mind
- C. Persons discarded by society
- D. Enemies of society

Q3. Hitesh is 17 years 11 months 15 days old. Legally he can be considered as:

- A. Minor
- B. Major
- C. Adult
- D. Cannot say

Q4. Tony, a minor is an agent of Samantha. She asks him to sell her bicycle for Rs. 2,000. He finds a suitable buyer and sells the bicycle for the said price through a written contract. Can later Samantha get the contract set aside on grounds that agent is minor?

- A. No, as principal is legally responsible for acts of agent
- B. Yes, as minor is incapable to contract
- C. No, as once a minor becomes major the contract can be ratified by him
- D. Yes, as the contract is against sovereignty and integrity of India

Q5. Can a person who is usually of unsound mind, but occasionally of sound mind, make a contract?

- A. No, he cannot make a contract
- B. No, because he is an alien enemy
- C. Yes, he can always make a contract
- D. Yes, but only when he is of sound mind

Q6. Aman and Raman are two childhood friends. However, Aman is undergoing a treatment for intermittent intervals of insanity as medically he is a lunatic. Suppose Raman enters into a contract with Aman to buy his Flat in Jalandhar Heights for Rs. 75,00,000. Decide whether it will be a valid contract between the two friends?

- A. No, as according to law, any contract with lunatic is void.
- B. Yes, as both are childhood friends and can contract.
- C. No, as Aman may demand more consideration.

D. Yes, as it shall become executory valid contract.

Q7. Why a person who is drunk, intoxicated or delirious from fever is incapable to enter into a contract?

A. He lacks an understanding of nature and effect of an agreement or form a rational judgement

B. He understands the nature and effect of an agreement or form a rational judgement and cannot avoid contract later.

C. He may get out of a contract provided he did not have mental capacity to understand what he was doing and to appreciate its effects on his interests at the time when he made the contract

D. He lacks an understanding of nature and effect of an agreement or form a rational judgement and may also get out of a contract provided he did not have mental capacity to understand what he was doing and to appreciate its effects on his interests at the time when he made the contract.

Q8. Manoj, a minor aged 17, broke his right arm in a rugby game. He engaged a physician to set it. Can the physician get his fee for the services rendered by him?

A. No, as a contract with minor is valid in eyes of law

B. Yes, as it is courts' freedom to decide liability of a minor in case of luxury services

C. Yes, as minor is not capable of fixing his broken arm on his own and requires the services of a physician

D. No, as a minors' parents will be liable for his deeds

Q9. If two or more persons have made a joint promise, then, unless a contrary intention appears from the contract, all such persons must fulfill the promise___

A. Severally

B. Jointly and severally

C. Jointly or severally

D. Jointly

Q10. If promisee terminates the contract due to non-performance or part-performance by the promisor, the promisee has to return the benefits, if any, he has received from part performance of the promise

A. Partly True

B. True

C. False

D. Partly False

Q11. If the promisor has offered to perform his promise to the promisee / any one of the joint promisees, and the promisee refuses to accept his performance promisor

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- A. Does not lose his rights under the contract
- B. Is not responsible for non-performance C.
- C. Both A and B
- D. Either A or B

Q12. What happens when at time of performance, a contract is not performed within that time?

- A. The contract is valid
- B. The contract becomes void
- C. The contract is unenforceable
- D. The contract becomes voidable at the instance of the promise

Q13. If performance involves the exercise of personal skills by the promisor, the promise should be performed by

- A. A third person
- B. Promisor himself
- C. Representative of the promisor competent to perform
- D. Any of the above

Q14. X promises to deliver 10 T.V. sets to Y. In case of X's death before performance,, X's representatives _____

- A. Shall be bound to deliver the T.V to Y but their liability is limited to the value of the property inherited from the deceased
- B. Shall be bound to deliver the T.V to Y
- C. Are not bound by the promise
- D. Shall Terminate the contract

Q15. Which of these parties cannot demand performance of a promise?

- A. Promisee
- B. Any of the joint promisees
- C. On the death of a promisee, his Legal Representative
- D. Stranger to the contract

Answers for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. C | 2. B | 3. C | 4. A | 5. D |
| 6. A | 7. B | 8. C | 9. D | 10. B |
| 11. C | 12. D | 13. B | 14. A | 15. D |

Review Questions

Q1. Who is competent to contract? State the position of contracts with a minor.

Business Law

Q2. Answer the following problems giving reasons in support of your answer:
i) Manjunath, a minor was facing a criminal prosecution for dacoity. He borrowed Rs. 50,000 to defend himself from Jyotinanath. Will Jyotinanath succeed in recovering the amount? (Hint: It is loan for necessaries. It can be recovered from Minor's property)
ii) Harris sold some goods to Garvit on credit not knowing that Garvit was a minor. Harris did not receive the payment. Can he sue Garvit on attaining majority? (Hint: No, a contract with a minor is void ab-initio)

Q3. Is it true that a minor's estate is liable for necessaries of life supplied? Explain in detail with suitable examples.

Q4. What is meant by the term 'Performance of a Contract?' Discuss the types and who may demand a performance of a Contract?

Q5. What are reciprocal promises? Discuss the types and rules for the performance of the same.

Q6. What type of persons are treated as persons of unsound mind. State the legal positions of contracts with such persons.



Further Readings

1. A Text Book Of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements Of Mercantile Law By N.D. Kapoor, S. Chand & Company
3. A Manual Of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law By S Gulsan, Excel Books
5. Mercantile Law By M C Kuchchal, Vikas Publishing House
6. Legal Aspects Of Business By Daniel Albuquerque, Oxford & Ibh

Unit 04: The Indian Contract Act,1872

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Objectives

After studying this unit, you will be able to:

- Cognize the concept of discharge of contract
- Comprehend the remedies for discharge of contract

Introduction

In last unit you have studied about the free consent. As you all come to know that the consent of the offeree to the offer by the offeror is necessary. It is essential to the creation of a contract that both parties agree to the same thing in the same sense. When two or more persons agree upon the same thing in the same sense they are said to consent. Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement. Now this provides you knowledge about different modes of discharge of contract and remedies for discharge of contract.

4.1 Meaning of Discharge

Discharge of contract means termination of the contractual relationship between the parties. A contract is said to be discharged when it ceases to operate, i.e., when the rights and obligations created by it come to an end.

4.2 Modes of Discharging a Contract

A contract may get discharged by any of the given modes:

1. **By Performance:** Performance means the doing of that which is required by a Contract. Performance means the doing of that which is required by a contract. Discharge by performance takes place when the parties to the contract fulfill their obligations arising under

the contract within the time and in the manner prescribed. In such a case, the parties are discharged and the contract comes to an end. But if only one party performs the promise, he alone is discharged. Performance of a contract is the most usual mode of its discharge. It may be by:

- A) **By Actual performance:** When both the parties perform their promises, the contract is discharged. Performance should be complete, precise and according to the terms of the agreement. Most of the contracts are discharged by performance in this manner.



Example: Adam goes to a Pizza Parlour and orders for a five pepper Flavour. He paid Rs. 450 for the Pizza. The contract between parties gets discharged by actual performance.

- B) **Attempted performance:** Tender is not actual performance but is only an offer to perform the obligation under the contract. Where the promisor offers to perform his obligation, but the promisee refuses to accept the performance, tender is equivalent to actual performance. The effect of a valid tender is that the contract is deemed to have been performed by the tenderer. The tenderer is discharged from the responsibility for non-performance of the contract without in any way prejudicing his rights which accrue to him against the promisee.

2. Discharge by Agreement

A. **Express Agreement or Consent:** As it is the agreement of the parties which binds them, so by their further agreement or consent the contract may be terminated. The rule of law in this regard is *Eodem modo quo quid constitutor, modum modo destructor*, i.e., a thing may be destroyed in the same manner in which it is constituted.

B. **Implied consent:** A contract may get discharge by agreement or consent through any one of the given ways:

- a) **Novation (Sec. 62):** Novation takes place when (i) a new contract replaces an existing contract between the same parties, or (ii) a contract between two parties is cancelled or rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party. Novation should take place before expiry of the time of the performance of the original contract. If it does not, there would be a breach of the contract. If a new contract is subsequently substituted for the existing contract, it would only be to adjust the remedial rights arising out of the breach of the old contract. If for any reason the new contract cannot be enforced, the parties can fall back upon the old contract.



Example: Anil owed Rs 1,50,000 to Ballu, under contract. Ballu owed Rs 1,50,000 to Chandru. It was agreed among Anil, Ballu and Chandru that Anil would pay Rs 100 to Chandru.

- b) **Alteration:** In a given contract when one or more of the terms of the contract is/are changed by the mutual consent of the parties to the contract, it is known as Alteration of a Contract. It is important to note that a contract will be modified either entirely or partially with the consent of both parties. But the parties won't change, and they can enjoy new benefits either they may have less or more than the old contract. It is important to understand here that in novation, the change in the existing contract is substantial and in alteration it is less than that. In novation parties may change but in alteration they would remain the same.



Example: Harshit agreed with Samuel to supply 100 ACs of 1.5 tonnes at a price of Rs. 25,000 by the end of January. Subsequently, 'Harshit' and 'Samuel' mutually agree that the supply can be made by the end of April. This is an alteration in the terms of the contract by consent of both the parties.



Did you know?

If the parties to a contract are not changed then the fabric terms of the contract must be altered by the new contract because a mere variation of a number of the terms of a contract isn't novation but alteration.

c) Rescission: Rescission of a contract takes place when all or some of the terms of a contract gets cancelled. This may happen by:

i) Mutual consent of parties

ii) Where one party fails to perform his obligation. In such cases the opposite party may rescind the contract without his prejudice of right to claim compensation for breach of contract.



Case Analysis

Issue: Shruti and Aditya decides to get tied in a wedding knot in August of year 2021. Shruti asks her tailor to stitch a wedding gown for her in the month of July for a stitching fee of Rs. 10,000 including accessories. Due to death of his wife in village, the tailor had to leave for his village in Patna. In such a situation, what can Shruti do?

Rule: Where one party fails to perform his obligation. In such cases the opposite party may rescind the contract without his prejudice of right to claim compensation for breach of contract.

Analysis: In the given case, the tailor left for his village due to death of his wife. He does not perform the contract and Shruti is not supplied her wedding gown.

Conclusion: Shruti may discharge the contract by rescission.

d) Remission(Sec. 63): Remission means acceptance of a lesser fulfillment of the promise made, e.g., acceptance of a lesser sum than what was contracted for, in discharge of the whole of the debt. It is not necessary that there must be some consideration for the remission of the part of the debt. Sec. 63 allows the promisee to dispense with or remit the performance of the promise by the promisor, or to extend the time for performance or to accept any other satisfaction instead of performance.



Case Analysis

Issue: Deepak owes Dapish a sum of Rs. 10,000. Deepak enters into an agreement with Dapish, and gives him a mortgage of his estate for 5,000 rupees in place of the debt of 10,000 rupees. Decide whether Deepak still obliged to pay the remaining amount of debt?

Rule: Sec. 63 allows the promisee to dispense with or remit the performance of the promise by the promisor, or to extend the time for performance or to accept any other satisfaction instead of performance.

Analysis: In the given case Deepak mortgages his estate for 5,000 rupees in place of the debt of 10,000 rupees that he took from Dapish.

Conclusion: Thus, we can conclude that Deepak is not obliged to pay the remaining amount of debt to Dapish as he accepted smaller amount for his credit. It means the contract between the parties got discharged due to remission.

e) Waiver: Waiver takes place when the parties to a Contract agree that they shall no longer be bound by the contract. In such a case, consideration is not necessary.



Case Analysis

Issue: Leena borrowed a sum of Rs. 5,000 from her best friend Jyoti to pay her electricity bill. She promises to pay the borrowed amount in ten days. After ten days when Leena calls Jyoti that she is coming to her office to pay her the money so borrowed, Jyoti refuses to take the payment. Is Leena obliged to pay the borrowed amount to Jyoti?

Rule: Waiver takes place when the parties to a Contract agree that they shall no longer be bound by the contract. In such a case, consideration is not necessary.

Analysis: In the given case Jyoti refuses to take the amount that she lent to her best friend Leena after ten days of credit period.

Conclusion: Thus, we can conclude that the contract between the parties got discharged due to waiver and Leena is no more under any obligation to perform the

contract.

f) **Merger** takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under the same or some other contract.



Example: Pinky holds a property under a lease. Later, she buys the same property. It means her right as a lessee merges into superior right of ownership.

3. Discharge by Impossibility of Performance

If an agreement contains an undertaking to perform an impossibility, it is void ab initio. This rule is based on following maxims:

1. Lexicon cogitadimpossibilia, i.e; the law does not recognize what is impossible
2. Impossibilium nulla obligatio est, i.e; what is impossible does not create an obligation.

As per section 56, impossibility of performance may fall under given categories:

A. Impossibility at the time of performance of contract

An agreement to do something already known to parties that it is impossible to perform, makes it void ab initio (not valid from the very beginning). In case at the time of making a contract, both parties are unaware about the possibility of its performance, the contract becomes void. But, if the promisor is already aware about impossibility of a performing a contract, he shall have to compensate the promisee for any loss that he may sustain due to non-performance of promise by promisor.



Example: Maddy tells Addy that he can bring life in the dead body of her pet dog buried in graveyard provided she gives her a Fossil watch. Such an act is impossible. Thus, the agreement between the parties is not valid from beginning itself.

B. Impossibility arising subsequent to the formation of Contract

Discharge by Supervening Impossibility

1. **Destruction of subject matter:** If the subject matter of a contract gets destroyed without the knowledge of parties, it gets discharged.



Case Analysis:

Issue: A farmer named Kishan agreed to sell Bikash, the entire crop of apples growing in his field. Before he could do so, the frost destroyed the apples. Is Kishan relieved from performing the contract? Give reasons.

Rule: If the subject matter of a contract gets destroyed without the knowledge of parties, it gets discharged.

Analysis: In this case the entire crop of apples gets destroyed by the frost. Kishan is unable to perform the contract due to destruction of subject matter.

Conclusion: Kishan gets relieved from performing the contract due to supervening impossibility arising with the destruction of subject matter.

2. **Non-existence of a particular state of things:** When certain things necessary for performance cease to exist, the contract becomes void.



Case Analysis:

Issue: Andrew hired a flat from Kains for January 16th and 17th January 2022 for watching the coronation procession of King Edward II. Kains knew of Andrews' purpose though the contract contained no reference to this. procession got cancelled as the king fell sick. Is Andrew required to pay the rent of flat? Give reasons in support of your answer.

Rule: When certain things necessary for performance cease to exist, the contract becomes void.

Analysis: In this case the coronation ceremony was to be held and for which a room was booked to watch the coronation procession. Since, the procession got cancelled as the king fell sick, the rent for the flat was not paid.

Conclusion: Due to non-happening of an event, the contract gets discharged as it becomes void. The very base of contract was happening of coronation ceremony, which did not occur. Hence, Andrew shall not be obliged to pay the rent of flat.

1. **Operation of Law:-** A contract shall stand discharged by operation of law in the event of any of the following :-

(i) **Death or incapacity of promisor** in case of personal services: In case of contracts involving some personal skill or ability, the contract gets discharged on death of promisor. In other contracts, the rights and liabilities of a deceased person become that of his/her legal representatives.

(ii) **Insolvency:** On insolvency, a person gets discharged from all liabilities incurred prior to adjudication.

(iii) **Merger of Rights & Liabilities (discussed already)**

(iv) **Unauthorised Material Alteration:** In case of any material changes in an agreement without the approval of the other party, such changes are considered invalid in the eyes of law

(v) **Loss of sole evidence of contract:** When rights and liabilities under a contract vest in same person. For example: A bill gets into the hands of acceptor, the other party gets discharged.

4. **By Lapse of Time:** The Limitation Act, 1963 lays down that a contract should be performed within a specified period, called period of limitation. If it is not performed, and if no action is taken by the promisee within the period of limitation, he is deprived of his remedy at law. The Limitation Act, 1963 lays down a period of three years for the enforcement of most types of rights.

5. **By Breach of Contract:** Breach of contract means a breaking of the obligation which a contract imposes. It occurs when a party to the contract without lawful excuse does not fulfill his contractual obligation or by his own act makes it impossible that he should perform his obligation under it. A Breach of contract may be -

A. Actual breach of contract: It may take place -

1. **At the time when the performance is due:** Actual breach of contract occurs, when at the time when the performance is due, one party fails or refuses to perform his obligation under the contract.



Example: Mangla promises to deliver 1,000 customized aroma candles to owner of Hotel Scorpion King on 19th January 2022. She fails to do so. There is a breach.

2. **During the performance of the contract:** Actual breach of contract also occurs when during the performance of the contract, one party fails or refuses to perform his obligation under the contract. This refusal to perform may be by -

a. **Express repudiation (by word or act):** When there has been some performance of contract and one party by its words or act refuses to perform his/her obligation. The other party can treat the contract as no longer binding on him and sue for breach of contract.



Example: On 15th January 2022, a car manufacturing company contracts with Haria to supply 1,000 tyres at a fixed rate of Rs. 1,000 per tyre. Haria supplies 250 tyres on 16th January and promises to deliver the remaining on 17th January. Haria is stopped by the car manufacturing company from delivering the remaining tyres. It is a perfect case of Express repudiation. In this case Haria can sue the car manufacturing company for breach of contract.

b. **Implied repudiation (impossibility created by the act of a party to the contract):** If a party during the performance, makes by his own act the complete performance of the contract impossible, the effect is as if he has breached the contract and the other party is discharged from further performance of contract.

B. Anticipatory or constructive breach of contract: It occurs when a party to an executory contract declares his intention of not performing the contract before the performance is due. He may do so:

1. By expressly renouncing his obligation under the contract.



Example: A contracts to supply B with certain articles on 1st August. On 20th July, he informs B that he will not be able to supply the goods. B is entitled to sue A for breach of promise.

2. By doing some act so that the performance of his promise becomes impossible.



Example: If 'X' promised to assign 'G', within seven years from the date of his promise, all his interest in a lease for the sum of Rs. 80,000/-. Before the end of seven years he assigned his interest to another person. Held, this was anticipatory breach of contract by implied repudiation.

The rights of the promisee (the party not in breach or the aggrieved party) in case of doctrine of anticipatory breach are summarized as below:

1. He can treat the contract as discharged so that he is absolved of the performance of his part of the promise.
2. He can immediately take a legal action for breach of contract or wait till the time the act was to be done.

4.3 Remedies for Breach of Contract

A breach of contract is one party's failure, without a legal excuse, to live up to any of its promises under a contract. A contract terminates by breach of contract. If the promisor has not performed his promise in accordance with the terms of the contract or where the performance is not excused by tender, mutual consent or impossibility or operation of law, then this amounts to a breach of contract on the part of the promisor. The consequence of this is that the promisee becomes entitled to certain remedies. The breach of contract may arise in two ways: (i) anticipatory and (ii) actual.

When someone breaches a contract, the other party is no longer obligated to keep its end of the bargain. From there, that party may proceed in several ways: (i) the other party may urge the breaching party to reconsider the breach; (ii) if it is a contract with a merchant, the other party may get help from consumers' associations; (iii) the other party may bring the breaching party to an agency for alternative dispute resolution; (iv) the other party may sue for damages; or (v) the other party may sue for other remedies. As soon as either party commits a breach of the contract, the other party becomes entitled to certain reliefs. These remedies are available under the Indian Contract Act, 1872, as also under the Specific Relief Act, 1963. There are three remedies under the Specific Relief Act, 1963: (i) a decree for specific performance (S.10); (ii) an injunction (S.38-41); (iii) a suit on quantum meruit (S.30). Remedies under the Indian Contract Act, 1872 are:

I. Rescission of the Contract

When a breach of contract is committed by one party, the other party may treat the contract as rescinded. In such a case the aggrieved party is freed from all his obligations under the contract. A person who rightfully rescinds the contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. Thus, where Mr X promises Mr Y to supply one bag of pulses on a certain date and Y promises to pay the price on receipt of the bag. Mr X does not deliver the bag of rice on the appointed day, Y need not pay the price.

II. Suit for Damages (S.75)

Another relief or remedy available to the promisee in the event of a breach of promise by the promisor is to claim damages or loss arising to him therefrom. Damages under S.75 are awarded according to certain rules as laid down in Ss. 73-74. Section 73 contains three important rules:

- (i) Compensation as general damages will be awarded only for those losses that directly and naturally result from the breach of the contract.
- (ii) Compensation for losses indirectly caused by breach may be paid as special damages if the party in breach had knowledge that such losses would also follow from such act of breach.

(iii) The aggrieved party is required to take reasonable steps to keep his losses to the minimum. It is the duty of the injured party to minimise loss. (*British Westinghouse & Co. v Underground Electric etc. Co. (1915) A.C.673*). He cannot claim to be compensated by the party in default for loss which is really not due to the breach but due to his own neglect to minimise loss after the breach. Thus, the loss or damages caused to the aggrieved party must be such that either (i) it arose naturally or (ii) the parties knew, when they made the contract, was likely to arise. In other words, such compensation cannot be claimed for any remote or indirect loss or damage sustained by reason of the breach of the contract. Section 74 provides that if the parties agree in their contract that whoever commits a breach shall pay an agreed amount as compensation, the court has the power to award a reasonable amount only, subject to such agreed amount.

4.4 Different Types of Damages

There are four types of damages:

(1) Ordinary: These damages are those which naturally arise in the usual course of things from such breach. The measure of ordinary damages is the difference between the contract price and the market price at the date of the breach. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises.



Example: (i) A contracts to deliver 10 bags of rice at Rs. 500 a bag on a future date. On the due date he refuses to deliver. The price on that day is Rs. 520 per bag. The measure of damages is the difference between the market price on the date of the breach and the contract price, i.e., Rs. 200.

(ii) Alex contracts to buy Bob's ship for Rs. 2,00,000 but breaks his promise. Alex must pay to Bob by way of compensation the excess, if any, of the contract price over the price which Bob can obtain for the ship at the time of the breach of promise.

The ordinary damages cannot be claimed for any remote or indirect loss or damages by reason of the breach. The ordinary damages shall be available for any loss which arises naturally in the usual course of things. A railway passenger's wife caught cold and fell ill due to her being asked to get down at a place other than the railway station. In a suit by the plaintiff against the railway company, held that damages for the personal inconvenience of the plaintiff alone could be granted, but not for the sickness of the plaintiff's wife, because it was a very remote consequence.

What is the most common remedy for breach of contracts?

The usual remedy for breach of contracts is suit for damages. The main kind of damages awarded in a contract suit are ordinary damages. This is the amount of money it would take to put the aggrieved party in as good a position as if there had not been a breach of contract. The idea is to compensate the aggrieved party for the loss he has suffered as a result of the breach of the contract. Special damages. These damages are claimed in case of loss of profit, etc. When there are certain special or extraordinary circumstances present and their existence is communicated to the promisor, the non-performance of the promise entitles the promisor to not only the ordinary damages but also damages that may result therefrom. The communication of the special circumstances is a prerequisite to the claim for special damages.



Example: (i) A, a builder, contracts to erect and finish a house by the 1st of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that before the 1st of January it falls down and had to be rebuilt by B, who in consequence loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost and for the compensation made to C.

(ii) A delivers to B, a common carrier, a machine to be conveyed without delay to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine and A, in consequence, loses a profitable contract with the government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed. But, however, the loss sustained

through the loss of the government contract cannot be claimed.

(iii) X's mill was stopped due to the breakdown of a shaft. He delivered the shaft to Y, a common carrier, to be taken to a manufacturer to copy it and make a new one. X did not make known to Y that delay would result in a loss of profits. By some neglect on the part of Y the delivery of the shaft was delayed in transit beyond a reasonable time. As a result, the mill remained idle for a longer time than otherwise would have been, had the shaft been delivered in time. Held, Y was not liable for loss of profits during the period of delay as the circumstances communicated to Y did not show that a delay in the delivery of the shaft would entail loss of profits to the mill. [Hadley v. Baxendale].

(iv) Where A contracts to sell and deliver to B on the 1st of January certain cloth which B intends to manufacture into caps of a particular kind for which there is no demand except in that season. The cloth is not delivered till after the appointed time and too late to be used that year in making caps. B is entitled to receive from A only ordinary damages, i.e., the difference between the contract price of the cloth and its market price at the time of delivery but not the profits which he expected to obtain by making caps, nor the expenses which he has incurred in making preparation for the manufacture of caps.

(2) Liquidated Damages and Penalty: Sometimes parties themselves at the time of entering into a contract agree that a particular sum will be payable by a party in case of breach of the contract by him. Such a sum may either be by way of 'liquidated damages' or it may be way of 'penalty'. The essence of liquidated damages is a genuine covenanted pre-estimate of the damages. Thus, the stipulated sum payable in case of breach is to be regarded as liquidated damages if it be found that parties to the contract conscientiously tried to make a pre-estimate of the loss which might happen to them in case the contract was broken by any of them. On the other hand, the essence of a penalty is a payment of money stipulated as "in terrorem" of the offending party. Thus, if it is found that the parties made no attempt to estimate the loss that might happen to them on breach of the contract but still stipulated a sum to be paid in case of a breach of it, with the object of coercing the offending party to perform the contract it is a case of penalty. It is obvious that a term in a contract amounts to a penalty where a sum of money, which is out of all proportion to the loss, is stipulated as payable in case of its breach. Where the amount payable, in case of its breach, is fixed in advance whether by way of liquidated damages or penalty, the party may claim only a reasonable compensation for the breach, not exceeding the amount so named or, as the case may be, the penalty stipulated for. (s.74).



Example: (i) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on that day. A fails to pay Rs. 500 on that day. B is entitled to recover from A such compensation not exceeding Rs. 1,000, as the court considers reasonable.

(ii) Ajay contracts with Bijoy that if he practices as a dentist within Phagwara, Bijoy will pay him Rs. 5,000. Ajay practices as a dentist in Phagwara. He is entitled to such compensation not exceeding Rs. 5,000 as the court considers reasonable.

Whether payment of interest at a higher rate amounts to penalty?

Whether an agreement to pay interest at a higher rate in the case of breach of a contract amounts to penalty shall depend upon the circumstances of each case. However, following rules may be helpful in understanding the legal position in this regard. (i) A stipulation for increased interest from the date of default shall be a stipulation by way of penalty if the rate of interest is abnormally high. A gives B a bond for the repayment of Rs. 1,000 with interest at 12% p.a. at the end of six months with a stipulation that in case of default interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty and B is only entitled to recover from A such compensation as the court considers reasonable. (ii) Where there is a stipulation to pay increased interest from the date of the bond and not merely from the date of default; it is always to be considered as penalty. (iii) As regards compound interest, it is not itself a penalty. But it is allowed only in cases where the parties expressly agree to it. However, a stipulation to pay compound interest at a higher rate on default is considered as a penalty. (iv) An agreement to pay a particular rate of interest with stipulation that a reduced rate will be acceptable if paid punctually is not a stipulation by way of penalty. Thus, where a bond provided for payment of interest at 12% p.a. with a provision that if the debtor pays interest punctually at the end of every year the creditor would accept interest at the rate of 9% p.a. Such a clause is not in the nature of penalty and hence interest @ 12% shall be payable.

(3) Vindictive or punitive damages: These damages are awarded with a view to punish the defendant and not solely with the idea of awarding compensation to the plaintiff. These have been awarded (a) for breach of a promise to marry; (b) for wrongful dishonour of a cheque by a banker possessing adequate funds of the customer. The measure of damages in case (a) is independent upon the severity of the shock to the sentiments of the promisee. In case (b), the rule is smaller the amount of the cheque dishonoured larger will be the amount of damages awarded.

(4) Nominal damages: These are awarded in cases of breach of contract where there is only technical violation of the legal right but no substantial loss is caused thereby. The damages granted in such cases are called nominal because they are very small, for example, a rupee. This small amount is awarded as a matter of course.

III. Remedy by way of a Suit on Quantum Meruit

The phrase quantum meruit means as much as is merited (earned). The normal rule of law is that unless a party has performed his promise in its entirety, it cannot claim performance from the other. To this rule, however, there are certain exceptions on the basis of quantum meruit. A right to sue on a 'quantum meruit' arises where a contract partly performed by one party has become discharged by the breach of other party.

IV. Suit for Specific Performance of Contract: There are other remedies in a contract suit besides damages. The main one is specific performance. Where damages are not an adequate remedy, the court may direct the party in breach to carry out his promise according to the term of the contract. This is called specific performance of the contract. Some of the instances where court may direct specific performance are: a contract for the sale of particular house or some rare article (antique) or any other thing for which monetary compensation is not enough because the injured party will not be able to get an exact substitute in the market. However, specific performance may not be granted where (i) monetary compensation is an adequate relief; (ii) the contract is of personal nature, e.g., a contract to paint a picture; (iii) where it is not possible for the court to supervise the performance of the contract, e.g., a building contract; (iv) the contract is made by an incorporated company beyond its object clause as laid down in its memorandum of association.

V. Remedy of Injunction

Injunction means an order of the court prohibiting a person to do something where a party is in breach of a negative term of contract (i.e., where he does something which he promised not to do), the court may, by issuing an order, prohibit him from doing so. Thus, where Nasir, a film star, agreed to act exclusively for a particular producer for one year but she contracted to act for some other producer, she could be restrained by an injunction to do so.



Case Analysis

Issue: Pratima Kakkar signs a contract with Universal Music company that she shall sing for their banner solely for 2 years. After just 2 weeks of signing such a contract, she enters into an exclusive contract with T-series company for a higher fee than Universal Music Company. In such a situation, what remedy may Universal Music Company may obtain against Pratima?

Rule: Where a party is in breach of a negative term of contract, the court may issue a restraining order to stop him for doing what he promised not to do.

Analysis: In the given case, Pratima Kakkar did not follow the instructions of the contract and signs to sing for T-series company for a higher fee than Universal Music Company.

Conclusion: Universal Company may obtain injunction orders from the court, stopping Pratima kakkar from singing for another music recording company for 2 years.

VI. Rectification or Cancellation

When through fraud or a mutual mistake of the parties, a contract or other instrument does not express their real intention, either party may institute a suit to have the instrument rectified. In such a case, if the Court finds that there has been a fraud or mistake, it may ascertain the real intention of the parties, and may, in its discretion, rectify the instrument so as to express

that intention (Sec. 26 of the Specific Relief Act, 1963). But this must not prejudice the rights acquired by third persons in good faith and for value. If rectification is not possible, the Court orders for the cancellation of the contract. A written document which is void or voidable against a person may cause him in some cases or serious injury, if it is left outstanding. In such a case, if he has any such apprehension, he may file a suit to have the document adjudged void or voidable and order it to be delivered up and cancelled (Sec. 31 of the Specific Relief Act, 1963).



Example: A, the owner of a ship, fraudulently representing the ship to be seaworthy induce B, an underwriter, to insure the ship, B may obtain the cancellation of the policy.

Summary

- i. A contract may be discharged by (i) performance; (ii) tender; (iii) mutual consent; (iv) subsequent impossibility; (v) operation of law; (vi) breach.
- ii. If the parties to a contract agree to substitute a new contract for it, or to rescind it or alter it, the original contract is discharged.
- iii. A contract may terminate by mutual consent in any of the six ways viz. novation, rescission, alteration and remission, waiver and merger. Novation means substitution of a new contract for the original one. The new contract may be substituted either between the same parties or between different parties.
- iv. A contract may be discharged because of impossibility of performance. There are two types of impossibility: (i) Impossibility may be inherent in the transaction (i.e., the contract), (ii) Impossibility may emerge later by the change of certain circumstances material to the contract.
- v. The anticipatory breach of contract occurs when a party repudiates it before the time fixed for performance has arrived or when a party by his own act disables himself from performing the contract. As soon as either party commits a breach of the contract, the other party becomes entitled to certain reliefs. These remedies are available under the Indian Contract Act, 1872, as also under the Specific Relief Act, 1963. There are three remedies under the Specific Relief Act, 1963: (i) a decree for specific performance (s.10); (ii) an injunction (s.38-41); (iii) a suit on quantum meruit (s.30).
- vi. Thus, the loss or damages caused to the aggrieved party must be such that either (i) it arose naturally or (ii) the parties knew, when they made the contract, was likely to arise. In other words, such compensation cannot be claimed for any remote or indirect loss or damages sustained by reason of the breach of the contract.
- vii. What is the most common remedy for breach of contracts. The usual remedy for breach of contracts is suit for damages. The main kind of damages awarded in a contract suit are ordinary damages. This is the amount of money it would take to put the aggrieved party in as good a position as if there had not been a breach of contract. The idea is to compensate the aggrieved party for the loss he has suffered as a result of the breach of the contract.
- viii. There are other remedies in a contract suit besides damages. The main one is specific performance. Where damages are not an adequate remedy, the court may direct the party in breach to carry out his promise according to the term of the contract. This is called specific performance of the contract.

Keywords

Alteration: If the parties mutually are to change certain terms of the contract, it has the effect of terminating the original contract. There is, however, no change in the parties.

Appropriation of payments: Means application of payments.

Commercial impossibility: It means that if the contract is performed, it will result in a loss to the promisor.

Performance of joint promises: The Act provides rules for devolution of joint liabilities and rights.

Reciprocal promises: Means a promise in return for a promise.

Remission (s.63): It is the acceptance of a lesser sum than what was contracted for or a lesser

fulfillment of the promise made.

Waiver: It means relinquishment or abandonment of a right.

Nominal damages: These are awarded in cases of breach of contract where there is only technical violation of the legal right but no substantial loss is caused thereby.

Ordinary damages: Cannot be claimed for any remote or indirect loss or damages by reason of the breach.

Special damages: These damages are claimed in case of loss of profit.

Vindictive or punitive damages: These damages are awarded with a view to punish the defendant and not solely with the idea of awarding compensation to the plaintiff.

Self Assessment

Q1. Ordinary damages will be awarded in cases where _____.

- A. The loss naturally flows from the breach of contract
- B. The loss is remotely connected with the breach of contract
- C. The loss is unusual and arises out of special circumstances peculiar to the contract
- D. None of these

Q2. In the case of wrongful dishonour of a cheque by a banker the damages awarded will be _____.

- A. Nominal
- B. Special
- C. Exemplary
- D. Ordinary

Q3. Impossibility of performance occurs due to:

- A. Strike
- B. Lock-out
- C. Partial failure of object
- D. Destruction of subject-matter.

Q4. Specific performance is ordered where:

- A. the contract is of personal nature,
- B. monetary compensation is not an adequate remedy,
- C. monetary compensation is an adequate remedy,
- D. performance is illegal.

Q5. An injunction order is granted by the Court in case:

- A. specific performance of the contract is possible.
- B. specific performance of the contract is impossible.
- C. the contract is against public interest.
- D. the Court wants to restrain a party from committing a breach of contract.

Q6. A borrows 10,000 from B with interest at 12 per cent per annum, with a stipulation that in case of default A shall be liable to pay interest at 75 per cent from the date of default. A commits the default. B is entitled to recover from A _____.

- A. Such compensation as the Court considers reasonable
- B. 12% interest
- C. 75% interest
- D. 87% interest

Q7. Aman lends Rs.500 to Berry. He later tells Berry that he need not repay the amount, the contract is discharged by -

- A. Breach
- B. Waiver
- C. Novation
- D. Performance.

Q8. A creditor agrees with his debtor and a third party to accept that third party as his debtor. The contract is discharged by -

- A. performance.
- B. alteration
- C. novation
- D. remission

Q9. Where a party is entitled to claim compensation in proportion to the work done by him, it is possible by way of _____

- A. Suit for quantum meruit
- B. Suit for damages
- C. Suit for injunction
- D. None of these.

Q10. Generally, ____ damages are irrecoverable.

- A. Special
- B. Nominal
- C. Vindictive
- D. Remote

Q11. If there is change in the nature of obligation of a contract, it is called:

- A. Novation
- B. Alteration
- C. Rescission

D. Repudiation

Q12. Anticipatory breach of contract takes place when there is

- A. Breach of contract when performance is actually due
- B. Breach of contract in the course of performance of the contract
- C. Breach of contract prior to the date of performance
- D. None of the above

Q13. Remedies in case of refusal to share profits in smuggled goods:

- A. No remedy as the contract is illegal.
- B. Agreement can be enforced in the court.
- C. Damages can be claimed.
- D. Agreement can be enforced in the court or Damages can be claimed.

Q14. In case of remote and indirect loss or damage sustained by reason of breach of contract, the aggrieved party is entitled to :

- A. Ordinary damages
- B. Special damages
- C. No damages
- D. Exemplary damages

Q15. In case of impossibility of performance because the subject matter of contract has ceased to exist then:

- A. Both the parties are liable
- B. Neither party is liable
- C. Only offeror is liable
- D. Only acceptor is liable

Answers for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. A | 2. C | 3. D | 4. B | 5. D |
| 6. A | 7. B | 8. C | 9. A | 10. D |
| 11. B | 12. C | 13. A | 14. C | 15. B |

Review Questions

Q1. (a) Zenab enters into a contract with Babban for singing at his theatre for three nights for a fee of Rs. 1,500 for every night. She sings for two nights and is taken ill. Can Babban ask for damages for loss of profit from Zenab. Give reasons.

(b) The unloading of a ship was delayed beyond the date agreed with the ship owners owing to a strike of dock labourers. On a suit by the ship owners for damages, the plea of impossibility of performance was raised. Will they succeed? Give reasons.

Q2. (a) A music hall was agreed to be let out on certain dates but before those dates it was destroyed by fire. Is the promisor absolved from performing the contract? Give reasons in support of your answer.

(b) An artist undertook to paint a masterpiece portrait of the most beautiful lady in Great Britain for a certain price. But, before he could do so, he met with a car accident and lost his vision. Is the promisor absolved from performing the contract? Give reasons in support of your answer.

Q3. Discuss the remedies for breach of contract. Available to an aggrieved party.

Q4. Discuss the ways by which a contract gets discharged in detail.



Further Readings

1. A Textbook of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
3. A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law by S SGulsan, Excel Books
5. Mercantile Law by M C Kuchchal, Vikas Publishing House
6. Legal Aspects of Business by Daniel Albuquerque, Oxford &Ibh



Web Links

http://business.gov.in/manage_business/contract_law.php

<http://lawcommissionofindia.nic.in/1-50/Report13.pdf>

Unit 05: Special Contracts

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Objectives

After studying this unit, you will be able to:

- Comprehend the nature of contingent contract, quasi contract, contract of indemnity and Contract of Guarantee

Introduction

You have so far studied the principles applicable to contracts in general. Let us now take up a particular species of contract viz., Contingent Contracts, Quasi Contracts, Contracts of Indemnity and Contract of Guarantee. Since these are specific types of contract, the general principles of contracts are fully applicable to such contracts. In this unit you will learn these types of special contracts in detail.

5.1 Meaning of Contingent Contract

A contract can be entered into by parties for the performance or non-performance of an action or an event. There are primarily two types of contracts: i) Absolute Contracts and ii) Contingent

Contracts. An absolute contract is one where the promisor performs the contract without any condition. 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.

5.2 Definition of Contingent Contract

Section 13 of Indian Contract Act 1872 defines that "If two or more parties enter into a contract to do or not do something, if an event which is collateral to the contract does or does not happen, then it is a contingent contract."



Example: Prithvi is a private insurer. He enters into a contract with Janak for insuring his house against fire. According to the terms, he agrees to pay Janak an amount of Rs 5 lakh, if his house is burnt against an annual premium of Rs 5,000. This is a contingent contract. Here, the burning of the house is neither a performance promised as a part of the contract nor a consideration. Liability of Prithvi arises only when the collateral event occurs.



Example: Aslam contracts to pay Kashif a sum of Rs.2,500 if Kashif's house is burnt. This is a contingent contract. Until the house does not get burnt, Kashif will not receive any money.

5.3 Essential Characteristics of a Contingent Contract

1. The performance of a contingent contract depends upon the happening or non-happening of some event or condition.

The contract is contingent on the happening or the non-happening of a certain event. These said events can be precedent or subsequent, this will not matter.



Examples: i) Kamla promises to pay Vimla Rs 5,000 if the Shatabdi Express reaches Jalandhar Junction on time. This is a contingent event.

ii) Deepak promises to pay Sameer, a sum of money if his white pearl ship does not return before 31st March 2019. The contract may be enforced if the ship does not return before 31st March 2019. Also, if the ship burnt before the given time, the contract is enforced by law since the return is impossible.

2. The event is referred to as collateral to the contract.

It is important that the event is not a part of the contract. It cannot be the performance promised or a consideration for a promise.



Example: Pritam enters into a contract with Jeetu. As per the contract he was to deliver 5 pieces of dragon fruit to him. Jeetu tells Pritam that he shall pay him Rs. 350 upon delivery. This cannot be considered as a contingent contract as Jeetu's obligation depends on the event which is a part of the contract (delivery of 5 pieces of dragon fruit) and not a collateral event.

3. The contingent event should not be a mere 'will' of the promisor.

The event cannot be a wish of the promisor.



Example: i) Priya enters into a contract with Jyoti and promises to deliver 5 kg rice sets to her if India wins the World Cup provided Jyoti pays her Rs 5,000 before the World Cup begins. This is a contingent contract since Priya's obligation arises only when India wins the Cup which is a collateral event.

ii) Bikram promises to pay Saurabh Rs 50,000 if he leaves Mumbai for Indonesia on January 31, 2022. This is a contingent contract. Going to Dubai can be within Saurabh's will but is not merely his will.

iii) Aman promises to pay Bhaskar Rs. 10,000 if he marries Chanda. This

is not a contingent contract. The contingent event should not be the mere will of the promisor.

(iv) Amar promises to pay Kishan a sum of Rs. 1,000, if he so chooses. It is not a contingent contract. However, where the event is within the promisor's will but not merely his will, it may be a contingent contract.

(v) Haria promises to pay Sameer a sum of Rs. 25,000, if Haria left Delhi for Mumbai, it is a contingent contract, because going to Mumbai is an event within Harias' will, but is not merely his will.

4. The event must be uncertain.

The performance of a contingent contract depends upon happening or non-happening of some future event. The event on which the performance is made to depend, is an event collateral to the contract, i.e. it does not form part of the reciprocal promises which constitute the contract.



Example: Harpriya promises to pay Hardeep a sum of Rs. 500 if it rains in Phagwara in the month of August 2021. This is not a contingent contract because in August rains are almost a certainty in the State of Punjab and so does Phagwara being one of its City.

5.4 Enforcement Rules for a contingent contract

A Contingent Contract may become void. These conditions are discussed below:

1. **Section 32-** If the event on the happening of which the contract is contingent becomes impossible, the contract becomes void.



Example: Montu contracts to pay Rakesh a sum of Money when Rakesh marries Gauri. Gauri dies without being married to Rakesh. The contract becomes void.

2. **Section 34:** If the future event on which a contract is a contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.
3. **Section 35-** contingent contract to do or not to do something, if a specified uncertain event happens within a fixed time, becomes void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.



Example: Captain Jack Sparrow promises to pay 1000 gold coins to Billy Turner, if his Black Pearl ship returns within the year. The contract becomes void if the ship gets destroyed within the year.

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

5.5 Meaning of Wagering Contract
Wagering Contract refers to as a Contract as per which a promisor agrees that upon the occurrence of an uncertain event or condition he or she will render a performance for which there is no agreed consideration exchanged, and under which the promisee or the beneficiary of the contract is not made whole for any loss caused by such occurrence (as in options, insurance contracts, trading in futures, or betting contracts).



Example: Shyamul agrees to pay Yash, Rs. 10,000 if Yash marries his daughter Promila. Promila was dead at the time of the agreement. The agreement is void.

Difference between Contingent Contracts and wagering Contracts

Basis of Difference	Contingent Contracts	Wagering Contracts
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1. Meaning	It is a contract to do or not to do something with reference to a collateral event happening or not happening.	It is a promise to give money or money's worth with reference to an uncertain event happening or not happening.
2. Reciprocal promises	It may not contain reciprocal promises.	It consists of reciprocal promises.
3. Uncertain event	The event is collateral.	The uncertain event is the core factor
4. Nature of contract	Contingent contract may not be wagering in nature.	A wagering agreement is essentially contingent in nature.
5. Interest of parties	Contracting parties has interest in the subject matter in a contingent contract.	The contracting parties have no interest in the subject matter.
6. Mutuality of loss and gain	Contingent contract is not based on the doctrine of mutuality of loss and gain.	A wagering contract is a game, losing and gaining alone matters.
7. Effect of contract	Contingent contract is valid.	A wagering agreement is void.

5.5 Meaning of Quasi Contract

The term 'Quasi' means pseudo. So, a Quasi contract is a pseudo-contract. For a valid contract, we expect it to have certain elements like offer and acceptance, consideration, the capacity to contract, and free will. But there are other types of contracts as well. There are cases where the law implies a promise and imposes obligations on one party while conferring rights to the other even when the basic elements of a contract are not present. These promises are not legal contracts, but the Court recognizes them as relations resembling a contract and enforces them like a contract. These promises/ relations are Quasi contracts. These obligations can also arise due to different social relationships which we will study further. The core principles behind a Quasi Contract are justice, equity and good conscience. It is based on the maxim: "No man must grow rich out of another persons' loss."



Example: Shivjot and Meher enter a contract under which Shivjot agrees to deliver a basket of fruits at Meher's residence and she promises to pay Rs 1,500 after consuming all the fruits. However, Shivjot erroneously delivers a basket of fruits at Poojas' residence instead of Meher's. When Pooja gets home she assumes that the fruit basket is a wedding gift and consumes them. Although there is no contract between Shivjot and Pooja, the Court treats this as a Quasi-contract and orders Pooja to either return the basket of fruits or pay Shivjot.

Features of a Quasi Contract

- i. It is usually a right to money and is generally (not always) to a liquidated sum of money
- ii. The right is not an outcome of an agreement but is imposed by law.
- iii. The right is not available against everyone in the world but only against a specific person(s). Hence it resembles a contractual right.

Cases deemed as Quasi Contracts

1. Supply of Necessaries (Section 68): Minor's agreement being void ab initio, he cannot therefore, as a general rule, be asked to pay for the services rendered or goods supplied to him. Section 68, however, permits reimbursement to a person, who supplies necessaries to a minor or a lunatic person. For reimbursement no personal action can lie against the minor, etc., but reimbursement is permitted from the property or estate of such incapable person.

What are Necessaries?

Necessaries does not mean bare necessities of life (e.g. food, cloth, shelter, etc.), but means such things as may be necessary to maintain a person according to his conditions in life' (i.e. his status and requirements). Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. The infant must not have already a sufficient supply of the necessaries. The following have been held to be necessaries:

- Supply of racing cycle for an infant apprentice.
- Debt incurred for performing the funeral rites of minor's father.
- House given to a minor on rent for living and continuing his studies.
- Wedding presents for a bride of minor.
- Money advanced for defending criminal proceedings.

But where a minor is engaged in trade, contracts entered into by him for trading purposes are not for necessaries and are not binding on him. It may be noted that the necessaries may be supplied to someone whom the minor is legally bound to support, such as his wife and children.

2. Payment by an Interested Person (Section 69): A person who is interested in the payment of money, which another is bound by law pay, and who therefore, pays it, is entitled to be reimbursed by the other. For example, where a party had agreed to purchase certain mills, he was allowed to recover from the seller the amount of already overdue municipal taxes paid by him in order to save the property from being sold in execution. The conditions of liability under Section 69 are:

- The plaintiff should be interested in making the payment. It is not necessary that he should have a legal proprietary interest in the property in respect of which the payment is made.
- The plaintiff himself should not be bound to pay. He should only be interested in making the payment in order to protect his own interest.
- The defendant should be under legal compulsion to pay.
- The plaintiff should have made the payment to another person and not to himself.

3. Liability to Pay for Non-Gratuitous Act: There are three conditions that must be satisfied before Section 70 can be invoked:

- i. A person should lawfully do something for another person or deliver something to him.
- ii. In doing the said thing or delivering the said thing he must not intend to act gratuitously.
- iii. The other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.



Examples: i) Sharry, a tradesman, leaves 10kg mangoes at Garrys' house by mistake. Garry eats all the mangoes on his own. He is bound to pay Sharry for them.

ii) Jagia save Hariyas' property from fire. Jagia is not entitled to compensation from Hariya, if the circumstances show that he intended to act gratuitously.

iii) A shoe-shiner starts shining shoes of the passenger without being asked to do so, and if the passenger does not object to that, then he is bound to pay reasonably for the same as the work was not intended to be gratuitous.



Note: In cases falling under Section 70, the person doing something for another cannot sue for specific performance, nor ask for damages for breach, as there is no contract between the parties. The section provides that if the services or goods are accepted a liability to pay arises. The person for whom the act is done is not bound to pay unless he had the choice to reject the services. It is only where a person voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises.

Further, it is necessary that services should have been rendered without any request. However, reasonable compensation may be recovered for services rendered at request. Services rendered to a person incompetent to contract (e.g. minor) at the time cannot be made the basis of an action under this section. Section 70 applies even if there is a non-compliance of constitutional requirement of contracting with the State (viz. Art. 299 of the Constitution).



Case: State of W. B. v. B.K. Mondal & Sons (AIR 1962 SC 779)

The plaintiff in the case made certain constructions at the request of an officer of State. The State accepted the work but refused to pay pleading that there was no valid contract. The Court held in favour of the plaintiff. Similarly, in another case, the corporation tried to escape liability on the ground that the contract was not made in accordance with Bombay Municipal Corporation Act. The Corporation was held liable under Section 70.

Case:

Mr. 'K' a government servant was compulsorily retired by the government. He filed a writ petition and obtained an injunction against the order. He was reinstated and was paid salary but was given no work and, in the meantime, government went on appeal. The appeal was decided in favour of the government and 'K' was directed to return the salary paid to him during the period of reinstatement. [**Shyam Lal vs. State of U.P.** A.I.R (1968) 130] [11]

1. **Finder of Goods:** A person, who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee (Section 71). Thus, a finder of lost goods has to ensure the given points:
 - i) To take proper care of property as a person of ordinary prudence would take
 - ii) No right to appropriate the goods and
 - iii) To restore the goods if the owner is found.



Case: Hollins vs. Howler L. R. & H. L

Mr 'H' found a piece of diamond fallen on floor of Mr Fs' shop. He hands it over to Mr' F' to keep it with him until the true owner is not found. Despite making good efforts in finding the real owner, the person could not be traced. After the lapse of time, H tendered to F the lawful expenses incurred by him and requested to return the diamond. Mr 'F' refused to return the diamond. It was held that Mr 'F' must return the diamond to him as he was entitled to retain the goods found against everybody (Jus in rem) except the true owner who could not be traced.

2. **Mistake or Coercion:** A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it (Section 72). In fact, every kind of payment of money or delivery of goods for every type of mistake is irrecoverable. [Shivprasad vs Sirish Chandra A.I.R. 1949 P.C. 297].



Examples: i) A and B jointly owe Rs. 100 to C. A alone pays the amount to C, and B, not knowing this fact, pays Rs. 100 over again to C. C is bound to repay the amount to B.

ii) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally

excessive.



Case:i) Sales Tax Officer v. Kanhaiya Lai Sara (AIR 1959 SC 135)

It was held that the money paid under mistake is recoverable whether the mistake is of fact or of law. And the term 'mistake' has been used without any limitation under Section 72. In this case, a certain amount of sales tax was paid by a firm under the U.R Sales Tax laws on its forward transactions. Subsequently to the payment the Allahabad High Court ruled the levy of sales tax on such transactions to be ultra vires. The firm sought to recover back the tax money. The Supreme Court allowed it. The court observed that Payment by mistake in Section 72 must refer to a payment which was not legally due and which could not have been enforced; the 'mistake' is thinking that the money paid was due when, in fact, it was not due.

ii) Tilok Chand Moti Chand v. Commr. of Sales Tax (AIR 1970 SC 898) a firm paid sales tax in respect of sales to consumers outside the State of Bombay and which were, therefore, not liable to any sales tax. The firm had itself collected the tax money from its customers. The amount was ordered to be refunded to the customers. The firm paid back the amount, however, the Act under which the recovery was made from the firm was declared to be ultra vires. The firm sought to recover back the money as having been paid under either mistake of law or coercion. The Supreme Court held that the firm did not suffer from any mistake under Section 72. The court, however, held that the payment was made under coercion and would have been recoverable under Section 72.

iii) Trikamdas Vs Bombay Municipal Corporation A.I.R.1954:Mr T was travelling without ticket in a tram car and on checking he was asked to pay Rs. 5/- as a penalty to compound transactions. He filed a case against the corporation for recovery on the ground that it was extorted from him. The suit was decreed in his favour. In the given case contractual liability arose without any agreement between the parties.

Differences between Contract and Quasi-Contract

A contract is a real agreement between two or more parties, but a Quasi-contract is not an agreement but resembles an agreement or a contract.

Under a contract, both parties give their consents freely, while under quasi-contract, there is no consent of either of the parties, as it is not voluntarily made.

Under a contract, liability exists according to the terms mentioned and agreed upon by both the parties, whereas under quasi-contract, the liability comes into existence through the conduct of the parties and is based on morality, natural justice, equity, and a good conscience.

General Contracts are entered into by interested parties voluntarily without any compulsion, whereas quasi-contracts are imposed by law.

General Contracts can be both rights in Rem (against the whole world) and rights in Personam (against any one person or entity). But quasi-contracts are only rights in Personam, these are only available against a specific person.

The Indian contracts act 1872 as a whole, encompasses everything about all kinds of contracts. A contract is defined in section 2(h) and sections 68-72 constitute all the information about Quasi-contracts.

5.6 Meaning of Indemnity

The term 'indemnity' simply means to make good the loss. To compensate the party who has suffered some loss. The term 'contract of indemnity' is defined in Section 124 of the Indian Contract Act as follows, "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person, is called a contract of

indemnity. "The person who promises to compensate for the loss is called the "indemnifier" and the person to whom this promise is made: or whose loss is to be made good is known as Indemnity "indemnity-holder" or "indemnified". For example, A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of money. This is a contract of indemnity, here A is the indemnifier and B is the indemnified.

The above definition restricts the scope of contracts of indemnity as it covers only the losses caused by the conduct of the promisor himself or by the conduct of any other person. If a strict view is taken of this definition, it will exclude the losses caused by accidents. In that case insurance contracts should not fall within the purview of contracts of indemnity. But the fact is that all contracts of insurance (except life insurance) are also contracts of indemnity. The intention of law makers had never been to exclude insurance contracts from the purview of contracts of indemnity. That is why we follow the English definition which states "a promise to save another harmless from loss caused as a result of a transaction entered into at the instance of the promisor". This definition includes a promise to make good the loss arising from any cause whatsoever e.g. fire, perils of sea, accidents etc. When a person expressly promises to compensate the other from loss, it is termed as express indemnity. The contract of indemnity is said to be implied when it is to be inferred from the conduct

of the parties or from the circumstances of the case. Even Section 69 of the Contract Act (discussed in Unit 8) implies a duty to indemnify in case a person who is interested in the payment of money which another is bound by law to pay, has paid the amount. Similarly, in an auction sale there is an implied contract of indemnity between the auctioneer and the person who asks him to sell goods. For example, A, an auctioneer, sold certain goods on the instructions of B. Later on, it is discovered that the goods belonged to C and not B. So, C recovered damages from A for selling the goods belonging to him. Here A is entitled to recover the compensation from B. In this case there was an implied promise to compensate the auctioneer for any loss which he may suffer on account of the defective title of B. As you know that contract of indemnity is a special type of contract, therefore, to enforce such contracts it is necessary that all the essentials of a valid contract (discussed in Unit 1) must be present. In case any one of the essential is missing, the contract cannot be enforced. Thus, if the object or consideration of an indemnity agreement is unlawful, it cannot be enforced. For example, A asks B to beat C, promising to indemnify him against the consequences this cannot be enforced. Suppose B beats C and is fined Ks. 500, B cannot claim this amount from A, because the object of the agreement is unlawful.

Essentials of a Valid Contract of Indemnity

1. The contract of indemnity must contain all the essentials of valid contract.
2. It is contract between two parties one person promises to save the other from any loss, which he may suffer.
3. The loss may be caused by the conduct of the promisor himself or any other person.
4. The contract of indemnity may be express or implied Rights of the Indemnified (i.e., the Indemnity Holder).

Rights of Indemnity Holder and Indemnifier

Rights of an Indemnity Holder are:

1. All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.
2. All costs which he may be compelled to pay, in bringing or defending such suit, if, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity or if the promisor authorized him to bring or defend the suit.
3. All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make the absence of any contract of indemnity or if the promisor authorized him to compromise the suit.

Rights of an Indemnifier

The act makes no mention of the rights of indemnifier. It has been held, however that his rights of a surety, under Sec. 141 of the Indian contract Act. Time of commencement of the indemnifier liability: The Indian contract act 1872 is silent on the time of commencement of liability of indemnifier. On the basis of judicial pronouncement of courts, it can be said that the liability of an indemnifier commences as soon as the liability of the indemnity holder becomes absolute and certain.

5.7 Contract of Guarantee

According to sec 126, "A contract of guarantee is a contract to perform the promise or discharge the liability of third person in case of his default". A guarantee may be either oral or written. The parties to a contract of guarantee includes:

- i. **Creditor:** The person to whom the guarantee is given is called the creditor.
- ii. **Surety:** The person who gives the guarantee is called the surety.
- iii. **Principal debtor:** The person for whom the guarantee is given is called the principal debtor

In a contract of guarantee there are three separate agreements:

- i. One between the principal debtor and creditor
- ii. The second between the creditor and the surety
- iii. The third between the surety and the principal debtor

5.8 Essentials of a Contract of Guarantee

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

2. Consent of three parties: There must be consent of all three parties

3. It may be oral or in writing: A contract of guarantee may be either oral or in writing. Whereas, as per English law, the guarantee must be in writing and signed by the party who offers guarantee.

4. Existence of Liability: There must be an existing liability or a promise whose performance is guaranteed and such liability must be enforceable by law. The exception to this rule is a guarantee given for minor's debt. Though minor's debt is not enforceable by law, yet the guarantee given for minor's debt is valid.

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

A) The principal debtor need not be competent to contract and the surety would be regarded as the principal debtor and would be personally liable to pay.

B) Surety need not be benefited. Anything done or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

6. Guarantee not to be obtained by misrepresentation: Any guarantee which has been obtained by means of misrepresentation made by or with his knowledge and assent, concerning a material part of the transaction is invalid.

7. The contract of guarantee must be supported by consideration: We have discussed above that a contract of guarantee must have all the essential, valid contract. It will be interesting to know that it is not necessary that there be direct consideration between the surety and creditor. The law presumes that consideration received by the principal debtor is the sufficient consideration for the surety.

8. The promise to pay must be conditional: It is another important essential element of a contract of guarantee. There must be a conditional promise to be liable on the default of the principal debtor.

9. There should be no concealment of fact: The creditor should disclose to the surety the facts which are likely to affect the surety's liability. The guarantee obtained by the concealment of such facts is invalid.

5.9 Consideration for Guarantee [Section 127]

What constitutes consideration in a case of guarantee is an important issue and is laid down in Section 127 of the Act. As per Section 127 of the Act, "anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."



Example 1: B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

Example 2: A sell and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

5.10 Types of Guarantee

1. **Simple or Specific Guarantee:** It is one in which guarantee is given for a single specific debt (or) transaction. It comes to an end as soon as the liability under that transaction ends. A specific guarantee once given is irrevocable.
2. **Continuing Guarantee (Section 129):** A guarantee which extends to a series of transactions is called a "continuing guarantee". The essence of continuing guarantee is that it applies not to a specific number of transactions but to any number of transactions and makes the surety liable for the unpaid balance at the end of the guarantee.



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

A continuing guarantee may be revoked in any of the following ways:

By Notice of Revocation: In respect of future transaction the surety may at any time revoke his guarantee by giving a notice to creditor. In such a case, the surety remains liable for the transactions which have already taken place.



Example: A guarantees to B to the extent of Ks. 10,000, that C shall pay for all the goods bought by him during the next three months. B sells goods worth Rs. 6,000 to C. A gives a notice of revocation, C is liable for Rs. 6,000. If any goods are sold to C after the notice of revocation, A shall not be liable for that.

2) By Death of Surety: Unless there is contract to the contrary, the death of surety operates as a revocation of the continuing guarantee in respect to the transaction taking place after the death of surety.

3) In the Same Manner in which the Surety is Discharged: A continuing guarantee is also revoked under all the circumstances under which a surety is discharged from the liability, such as

- i) Novation (Section 62)
- ii) Variance in terms of Contract (Section 133)
- iii) Release or discharge of principal debtor (Section 134)
- iv) When the creditor enters into an arrangement with the principal debtor (Section 135)

- v) Creditor's act or omission impairing surety's eventual remedy (Section 139)
- vi) Loss of Security (Section 141). These grounds will be explained under the heading '**discharge of surety**'.

3. Guarantee for performance of a promise: When a person enters into with another to do something but the promise gets doubt about the capacity of promisor to perform, he can ask him to bring a guarantor. In such cases the surety becomes liable to do the work if the principal debtor fails. It is called "Guarantee for performance of a promise"

4. Guarantee for discharge of liability: When a person lends a loan to another but gets doubt about the intention of the borrower to repay the debt in time, he can ask for a surety. In such cases the surety should repay the loan amount with interest if the principal debtor fails. It is called a guarantee for discharge of a liability.

5. Guarantee for honesty of employee: Sometimes an employer may get a doubt about the employee he had employed as to his honesty and take a guarantor. Such surety becomes liable to compensate the employer for any loss or damage caused by the employee on account of his dishonesty. It is called a fidelity guarantee.

6. Prospective guarantee: The guarantee given for a present transaction is called a prospective guarantee. Generally all guarantees will be prospective.

7. Retrospective guarantee: A guarantee given in respect of a past transaction is called retrospective guarantee. Such guarantees are taken when the original surety dies or becomes insane or insolvent.

5.11 Rights of Surety

I. Against the Principal Debtor

The surety has the following two rights against the principal debtor.

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

2) Right of Indemnity: Section 145 of the Act vests in the surety another right i.e. right of indemnity. In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. The surety is not entitled to claim any sums which he has paid wrongfully.



Example: 1. A guarantees to B to the extent of Ks. 10,000, that C shall pay for all the goods bought by him during the next three months. B sells goods worth Rs. 6,000 to C. A gives a notice of revocation, C is liable for Rs. 6,000. If any goods are sold to C after the notice of revocation, A shall not be liable for that.

2. B is indebted to C, and A is surety for the debt. C demands payment from A and, on his refusal, sues him for the amount, A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

3. A guarantee to C, to the extent of Rs. 2,000, payment for rice to be supplied by C to B. C supplies to B rice for an amount which is less than Rs. 2,000 but obtains from A payment of the sum of Rs. 2,000 in respect of the rice supplied. A cannot recover from B more than the rice actually supplied.

II. Rights against the Creditor

1) Right to Securities: When the surety has paid off the liabilities of principal debtor to the creditor, he becomes entitled to claim all the securities which were given by the principal debtor to the creditor. Surety has right to all securities whether received before or after the creation of the

guarantee (Section 141). It is also immaterial whether the surety has knowledge of those securities or not. For



Examples: 1. A guarantee to C, to the extent of Rs. 2,000, payment for rice to be supplied by C to B. C supplies to B rice for an amount which is less than Rs. 2,000 but obtains from A payment of the sum of Rs. 2,000 in respect of the rice supplied. A cannot recover from B more than the rice actually supplied.

2. A guarantees to B to the extent of Rs. 10,000, that C shall pay for all the goods bought by him during the next three months. B sells goods worth Rs. 6,000 to C. A gives a notice of revocation, C is liable for Rs. 6,000. If any goods are sold to C after the notice of revocation, A shall not be liable for that.

3. B is indebted to C, and A is surety for the debt. C demands payment from A and, on his refusal, sues him for the amount, A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

4. On Mr. C's guarantee A lent Rs. 5,000 to B. This debt is also secured by an assignment by deed as security for the debt, the lease of B's house. R defaults in paying the debt and C has to pay the debt. On paying off B's liabilities, C is entitled to receive the assignment deed in his favour.

2) Right to set off: When the creditor sues the surety for payment of principal debtor's liabilities, the surety can claim set off, or counter claim if any, which the principal debtor had against the creditor.

III. Rights against the Co-sureties

When the repayment of debt to the principal debtor is guaranteed by more than one person, they are called Co-sureties. The co-sureties are liable to contribute, as agreed, towards the payment of guaranteed debt. Section 138 provided that where there are co-sureties, the release by the creditor of one of them does not discharge the others, nor does it free the surety so released from his responsibility to the other sureties. Thus, when the payment of a debt or performance of duty is guaranteed by co-sureties and the principal debtor has defaulted in fulfilling his obligation and thereupon the creditor compels only one or more of the co-sureties to perform the whole contract, the co-surety sureties performing the contract are entitled to claim contribution from the remaining co-sureties. According to Section 146, in the absence of any contract to the contrary, the co-sureties are liable to contribute equally. This principle will apply even when the liability of co-sureties is joint or several, and whether under the same or different contracts, and whether with or without the knowledge of each other.



Example: A, B, C and D are co-sureties for a debt of Rs. 2,000 lent by Z to R. R defaults in repaying the loan. A, B, C and D are liable to contribute Rs. 500 each.

According to Section 147 where the co-sureties have agreed to guarantee different sums, they have to contribute equally subject to the maximum of the amount guaranteed by each one. It is immaterial whether sureties are liable jointly or severally, under one contract or under independent contracts and with or without the knowledge, of each other.



Examples:- 1. A, B, C and D are co-sureties for a debt of Rs. 2,000 lent by Z to R. R defaults in repaying the loan. A, B, C and D are liable to contribute Rs. 500 each.

2. A, B and C, sureties for D, enter into three separate bonds, each in a different penalty, viz., A for Rs. 10,000, B for Rs. 20,000 and C for Rs. 40,000. D makes default to the extent of Rs. 30,000. A, B and C are liable to pay Rs. 10,000 each. Suppose thus default was to the extent of Rs. 40,000. Then A would be liable for Rs. 10,000 and B and C Rs. 15,000 each.

5.12 Sureties Liabilities

1. Surety's liability is coextensive: The liability of surety is coextensive which means that the surety is liable to the same extent to which the principal debtor is liable.

2. Surety's liability may also be limited: The surety may by special agreement limit his liability to a fixed amount. In such cases the surety's liability will not be more than the amount fixed by him.

3. Surety's liability arises immediately on default of principal debtor: The surety becomes liable to pay amount of guarantee as soon as the default is committed by the principal debtor. On default of the principal debtor the surety cannot ask the creditor to exhaust all the remedies open to him against the principal debtor before proceeding against the surety, he may sue the surety without saving the principal debtor. Moreover, he may also sue them jointly.

4. Surety's liability where the original contract between creditor and principal debtor is void or voidable: The contract between the surety and creditor is an independent contract and not a collateral one. Thus, it cannot be said that the surety will be liable only if the principal debtor is liable. Therefore, when the original contract between the principal debtor and creditor is void, the surety will remain liable. When the original contract is voidable at the option of principal debtor who has exercised his option and revoked the contract the surety may not be discharged from his liability. Moreover, the surety is also not discharged where the creditor fails to sue the principal debtor within the period is otherwise available against the surety.

5.13 Discharge of Surety from Liability

A surety is to be discharged when his liability comes to an end. Circumstances in which a surety is discharged are discussed as follows

1. Notice of revocation (Sec 130): A guarantee may be specific or continuing guarantee. A specific guarantee once given is irrevocable. Sec. 130 of the Indian Contract Act provides that, a continuing guarantee may at any time be revoked by the surety, as the future transactions by notice to the creditor. However, surety remains liable for transactions entered into prior to the notice.

2. Death of surety (Sec 131): Sec. 131 of the act provides that the death of the surety operates, in the absence of any contrary as revocation of continuing guarantee so far as regard to future transactions. The deceased surety's estate will not be liable for any transaction entered into after the death, even if the creditor has no notice of the death.

3. Novation (Sec 62): Novation means the substitution of a new contract either between the same parties or parties for the old one. Thus, the novation of a contract of guarantee discharges it

4. Variance in terms of contract (Sec 133): According to Sec. 133 of the act, "any variance, made without surety's consent in the terms of contract between principal debtor and the creditor discharges the surety as to the transactions subsequent to the variance.

5. Release (or) discharge of the principal debtor (Sec 134): The section provides that the surety is discharged by any contract between creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor the legal consequences of which the discharge of the principal debtor.

6. Arrangement by creditor with principal debtor (Sec 135): A contract between the creditor and principal debtor, by which the creditor makes a composition with or promises to give time to or not to sue, the principal debtor discharges the surety unless the surety asserts to such contract. In terms of this section the surety is discharged if the creditor:

- a) Makes a contract with principal debtor
- b) Gives time to him
- c) Promises not to sue the principal debtor, without the consent of the surety.

In the following cases surety is not discharged:

a) According to Sec. 136: When a contract to give time to the principal debtor made by the creditor with a 3rd person and not with the principal debtor the surety is not discharged.

b) According to Sec. 137: Mere forbiddance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not in absence of any provision in the guarantee to the contrary discharge the surety.

c) According to Sec. 138: Where there are co-sureties, a release by the creditor one of them does not discharge the others, neither does it free the surety released from his responsibility to the other sureties.

7. Impairing surety's remedy: According to Sec. 139, if the creditor does any act which is inconsistent with the duty of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

8. Loss of security (Sec 141): It provides, "A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not and if the creditor loses or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. The word "loss" here means loss because of carelessness or negligence.

9. Misrepresentation (Sec 142): According to Sec 142, "any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid".

10. Concealment (Sec 143): According to this section, any guarantee which the creditor has obtained by means of keeping silence to material circumstances is invalid".

11. Failure of co-surety to join (Sec 144): When 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.

12. Lack of essential elements: A contract of guarantee must have all the essential elements of a contract. If it lacks any of the essential, the contract becomes void and the surety is discharged.

Distinction between a Contract of Guarantee and a Contract of Indemnity

1. **Number of Parties:** In a Contract of Indemnity there are two parties, namely: i) indemnifier and ii) Indemnity Holder whereas in a Contract of Indemnity there are three parties, namely: i) Creditor; ii) Principal Debtor; and iii) Surety
2. **Liability:** The liability of the indemnifier is primary. The liability of the primary debtor is primary. The liability of surety in case of Contract of Indemnity is secondary. That is the surety is liable only if principal debtor fails.
3. **Number of Contracts:** There is only one contract in case of Contract of Indemnity. The contract of indemnity involves three contracts in total.
4. **Assurance:** Indemnifier need not act on the request of indemnified. Surety gives guarantee on the request of principal debtor.
5. **Liability of indemnifier:** It arises on the happening of a contingent event. There is an existing debt or duty, the performance of which is guaranteed by the surety.
6. **Sue:** An indemnifier cannot sue a third party for loss in his own name because there is no privity of contract. A surety on discharging the debt due by the principal debtor, can act against the principal debtor for his own recovery.
7. **Reimbursement of loss:** The former is for reimbursement of loss and the latter is for the security of the creditor for ensuring its payment.
8. **Interest of Parties:** The promiser has some interest in the transaction, apart from indemnity. The surety gets nothing substantial for his promise

Summary

- For a contingent contract, there is a certain event which needs to be fulfilled. The terms of these contracts are certain and depend on the occurrence or non-occurrence of a future event.
- A quasi contract is a retroactive arrangement between two parties who have no previous obligations to one another.
- It is created by a judge to correct a circumstance in which one party acquires something at the expense of the other.
- The plaintiff must have furnished a tangible item or service to another party with the expectation or implication that payment would be given.

- The defendant must have accepted, or acknowledged receipt of, the item but made no effort or offer to pay for it.
- A contract implied at law, also called a quasi-contract, is an obligation imposed by a court to do justice between the parties even though they never exchanged, or intended to exchange, promises. In this instance, a court implies a contract to prevent one party's unjust enrichment at the other's expense
- Contract of indemnity is a contract whereby one party promises to save the other from loss caused to him (the promisee) by the conduct of the promisor himself or by the conduct of any other person. The liability of the surety is co-extensive with that of the principal debtor.
- A surety is discharged from liability: (i) by revocation, (ii) by conduct of creditor, or (iii) by Invalidation of contract

Keywords

Contract of indemnity: It is a contract of indemnity is a contract whereby one party promises to save the other from loss caused to him by the conduct of the promisor himself.

Creditor: The person to whom the guarantee is given.

Principal debtor: The person for whom the guarantee is given.

Surety: The person who gives the guarantee.

Indemnity: A promise to save the other party from loss caused to him by the conduct of the promisor himself or by the conduct of any other person.

Indemnifier: The person who promises to indemnify.

Indemnified Indemnity-holder: The person for whom the promise to indemnify is given.

Guarantee: A contract to perform the promise, or discharge the liability, of a third person in case of his default.

Surety: The person who gives the guarantee.

Continuing Guarantee: A guarantee which extends to a series of transactions.

Self Assessment

Q1. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person is called _____

- Surety contract
- Simple contract
- Contract of Indemnity
- None of the above

Q2. On M's recommendation S, a wealthy landlord, employs P as his estate manager. It was the duty of P to collect rent every month from the tenants of S and remit the same to S before till 15th of each month. M, guarantee this arrangement and promises to make good any default made by P. This is _____

- a contract of continuing guarantee
- contract of specific guarantee
- either a contract of continuing or specific guarantee
- neither a contract of continuing or specific guarantee

Q3. In case of contract of guarantee, what is the liability of the surety against the principal debtor is _____

- A. Primary
- B. Secondary
- C. No liability
- D. None of the above

Q4. When A requests B to lend Rs. 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 _____

- A. Sale of Goods
- B. contract of indemnity
- C. contract of guarantee
- D. None of the above

Q5. When a guarantee extends to a single transactions or debt it is called _____

- A. Retrospective guarantee
- B. Specific guarantee
- C. Prospective guarantee
- D. Fidelity guarantee

Q6. Assume that a surety named Mr. Kumar dies. What will happen to a continuing guarantee?

- A. A Indemnification from the property of the surety with regard to future transactions
- B. The continuing guarantee shall be continued by any other person
- C. The continuing guarantee shall continue in the name of the surety's heirs
- D. Revocation of the continuing guarantee with regard to future transactions

Q7. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is _____

- A. valid
- B. considered to be his approval
- C. invalid
- D. considered to be his denial

Q8. X transfers possession or custody of the farmland to his son, S. S shall pay rent or a lease fee in return. S only receives custody and control of the property, but X still owns it. X is thus responsible for paying the property taxes and is liable for what happens on the land. This kind of contract or arrangement is called:

- A. contract of indemnity
- B. contract of guarantee
- C. contract of sale of goods act
- D. None of the above

Q9. Angel becomes surety to Chandru for Bishnus' conduct as a manager in Chandrus' bank. Afterwards Bishnu and Chandru contract, without consent of Angel that Bishnus' salary shall be raised and that he shall become liable for one-fourth of losses on overdraft. Bishnu allows a customer to overdraw, and the bank loses a sum of money. Is Angel liable in this situation?

- A. Yes, as she gave consent
- B. No, Chandru shall have to bear the losses
- C. Nothing can be received from Angel
- D. Angel is discharged from his suretyship by variance made without his consent, and is not liable in such a situation

Q10. Angad, Virendar, Cikandar are securities to Dholu for the sum of Rs. 3,00,000 lent to Erica. Erica makes default in payment. Angad, Virendar and Cikandar are _____

- A. not liable any more
- B. liable to pay Rs. 1,00,000 each
- C. liable to pay Rs. 3,00,000 each
- D. Erica is liable

Q11. About Quasi obligation, which of the following is correct?

- A. There is no real contract in existence
- B. There is no offer and acceptance.
- C. There is no intension to make contract.
- D. All of these.

Q12. Which of the following is not a quasi contract?

- A. Obligation of a person enjoying benefit of non gratuitous acts
- B. Responsibility of finder of goods
- C. Quantum merit
- D. Novation

Q13. It is the duty of the finder of goods to trace the true owner of the goods, and if does not do so, he shall be guilty of ---

- A. Extortion
- B. No default
- C. Criminal misappropriation of property
- D. Theft

Q14. A quasi contract is a contract --- by law.

- A. Made
- B. Not enforceable
- C. Imposed
- D. Voidable

Q15. Quasi contracts are imposed upon the parties on the ground of principle of ---

- A. Dignity
- B. Equity

- C. Quality
- D. Honesty

Answer for SelfAssessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. C | 2. A | 3. B | 4. C | 5. B |
| 6. D | 7. C | 8. A | 9. D | 10. B |
| 11. D | 12. D | 13. B | 14. C | 15. A |

Review Questions

Q1. (a) Mr. X, is employed as a cashier on a monthly salary of ₹2,000 by ABC bank for a period of three years. Y gave surety for X's good conduct. After nine months, the financial position of the bank deteriorates. Then X agrees to accept a lower salary of ₹1,500/- per month from Bank. Two months later, it was found that X has misappropriated cash since the time of his appointment. What is the liability of Y?

(b) A contracts with B for a fixed price to construct a house for B within a stipulated time. B would supply the necessary material to be used in the construction. C guarantees A's performance of the contract. B does not supply the material as per the agreement. Is C discharged from his liability.

Q2. Discuss the various types of Guarantee in detail.

Q3. Discuss the rights of Surety in detail.

Q4. Write a detailed note on Discharge of Surety from Liability.

Q5. a) Differentiate between a Contract of Guarantee and a Contract of Indemnity

b) Differentiate between contract and quasi-contract.



Further Readings

1. A Textbook of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
3. A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law by S. S Gulsan, Excel Books



Web Links

<https://gacbe.ac.in/pdf/ematerial/18BCO35S-U5.pdf>

<http://www.legalservicesindia.com/article/379/Indemnity-in-a-contract.html>

<https://egyankosh.ac.in/bitstream/123456789/13402/1/Unit-9.pdf>

<https://mohitagarwalclasses.com/download/INDEMNITY%20and%20GUARANTEE.pdf>

Unit 06: Special Contracts

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Objectives

After studying this unit, you will be able to:

- Comprehend the nature of contract of bailment and its kinds
- Understand the duties of bailee and pledge as a special kind of bailment
- Cognize the different kinds of agencies
- Understand right and liability of agent and principle
- Comprehend the circumstances and modes by which an agency terminates

Introduction

In the last unit, you studied about Contingent Contracts, Quasi Contracts, Contracts of Indemnity and Contracts of Guarantee. At one time or another, we enter into a legal relationship, called bailment and agency. The sections quoted in this unit refer to the Indian Contract Act, 1872.

6.1 Meaning and Definition of Bailment and its Kinds

Meaning of Bailment

The word 'bailment', is derived from 'bailler', a french word which means 'to deliver'. Bailment has been defined under the Section 148 of the Indian Contract Act, 1872, according to which Bailment involves the delivery of goods from one person to another for a specific purpose and upon a contract, when the purpose is fulfilled, the good has to be returned or dealt with on the direction of the person who has delivered the goods.

Definition of Bailment (S.148)

Bailment is defined as 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 person delivering them". The person delivering the goods is called the 'bailer' and the person to whom the goods are delivered is called the 'bailee'. The explanation to the above Section points out that delivery of possession is not necessary, where one person, already in possession of goods contracts to hold them as bailee. The bailee is under an obligation to re-deliver the goods, in their original or altered form, as soon as the time of use for, or condition on which they were bailed, has elapsed or been performed. Let's



Examples:

1. Ankita delivers her wedding Lehanga to Chopra Dry Cleaners for dry cleaning
2. Deepu delivers his fossil wrist watch to Kapils' shop for repairs.
3. Shivjot lends his Statistics book to Rehmat for reading.
4. Reshma delivers 5 metres silk fabric to her tailor for stitching.
5. A delivers some gold biscuits to B, a jeweller, for making jewellery.

From the definition of bailment, the following characteristics should be noted:

1. **Delivery of Possession:** There must be a delivery of goods, which means, delivery of possession of the goods by the bailor to the bailee to fulfil the purpose of bailment. Possession refers to exercising control over the good and excluding any other person to do the same. Section 149 of the Indian Contract Act, 1872 talks about the same. The delivery of possession can either be actual or constructive. It means that either the good can directly be put in the actual physical possession of the bailee or put the bailee in a position of power over such goods that can be physically possessed later, if possible. In constructive delivery, the bailor gives the bailee means of accessing the custody of the good and not its actual delivery.



Example:-

1. Harris, an owner of a scooter, sells it to Marley, who leaves the scooter in the possession of Harris. Harris becomes a bailee, although originally, he was the owner.
2. **Delivery upon Contract:** There must be a contract between the bailor and the bailee for such transfer or good and its return. If there is no contract, there cannot be bailment. Moreover, the contract can either be expressed or implied.

Exception: If the good is lost, the finder of good will be seen as the bailee even if there was no contract of Bailment or delivery of goods under a contract. A finder of goods is a person who found a lost good belonging to someone else and keeps it under his possession until the owner of the good is found. This leads to an involuntary form of Bailment contract between them. The finder has all rights and duties that of a bailee.

3. **Delivery must be for some purpose:** It is essential that there must be a purpose for which the delivery of the goods takes place. If after the completion of the purpose of bailment the good is

not accounted for, then bailment cannot arise. This is an important feature as it separates it from other relations like agency, etc.

4. Return of goods: After the completion of the purpose, the good must be delivered to the bailor or dealt with as per his instructions. If he/she is not bound to return the good then there is no bailment. Even if there is an agreement to return an equivalent and not the same good, it will not amount to bailment.

Example: A tailor receives a saree for stitching as he is the bailee. After the saree has been stitched, the tailor is supposed to return it to the bailor. Moreover, it is necessary for the bailee to follow the instruction given by the bailor for the purpose of the return of the good if any.



Case study: Secy of state v. Sheo Singh Rai

A man, for the purpose of cancelling and consolidating nine government promissory notes into a single note of Rs. 48,000 went to a Treasury Officer. Later, the notes were misappropriated by a servant at the treasury and the man filed a suit against the State to hold it responsible as a bailee. He failed as there is no Bailment without delivery of good and a promise to return the same and the government was not bound to return the same notes or deal with them in accordance with the wishes of the man.

6.2 Kinds of Bailments

A. On the basis of Remuneration

Gratuitous Bailment: When a bailment is made without any consideration of benefit to the bailor or to the bailee, it is referred to as gratuitous bailment. In simple terms, it is a bailment without any consideration. Example, when one lends a book to a friend free of cost.

Non-Gratuitous Bailment: When generally there is a consideration for bailment between the bailor and the bailee then it is referred to as non-gratuitous bailment. Example, when someone gets a book issued from a library in exchange for a fee.

B. On the basis of benefits to the parties

For the exclusive benefit of the bailor: In this case, the bailor delivers his/her good to the bailee for safe custody. There is no benefit/benefit for the bailee. For example, leaving a pet with a neighbour when going out. For the exclusive benefit of the bailee: In this case, the bailor delivers a good for the benefit of the bailee. For example, a friend borrowing our car for a week.

For the mutual benefit of them both: In this case, the bailor delivers his good to the bailee for consideration and both the parties get benefit out of bailment. For example, giving a bike for repair to a mechanic, for which the mechanic gets paid.

6.3 Duties and Rights of Bailer and Bailee

After understanding term bailment, let us start with duties and right of parties involved in bailment. These parties are bailer and bailee. Bailee is also termed as finder of goods.

Duties of a Bailer

1. *To disclose know faults in the goods (S.150)*: The bailer is bound to disclose to the bailee faults in the goods bailed, of which the bailer is aware and which materially interfere with the use of them or expose the bailee to extraordinary risks. If he does not make such disclosure, he is responsible for the damage arising to the bailee directly from such faults. If the goods are bailed for hire or reward, the bailer is responsible for such damage whether he was or was not aware of the existence of such faults in goods bailed.



Examples: -1. Peter lends a horse, which he knows to be vicious, to Luke. He does not disclose the fact that the horse is vicious. The horse runs away. Luke is thrown and injured. Peter is responsible to Luke for damage sustained. 2. Merry hires a carriage of Santa. The carriage is unsafe though Santa is not aware of it. Merry is injured. Santa is responsible to Merry for injury.

2. Liability for breach of warranty as to title: The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them (s.164).



Examples:- 1. A gives B's car to C without B's knowledge and permission. B sues C and receives compensation. A, the bailor, is responsible to make good this loss to C, the

bailee.

3. To bear expenses in case of gratuitous bailments: Regarding bailments under which bailee is to receive no remuneration, s.158 provides that in the absence of a 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 bailments, the bailor is held responsible to bear only extraordinary expenses.



Examples:- 1. Alena leaves her dog with Derrick, a professional dog trainer, for a week as he is going out of town. Derrick is being paid for the same so Alena is not required to bear the ordinary expenses. However, the dog suffered from high fever and Derrick had to call a doctor. Alena has to repay all the medical expenses borne by Derrick. 2. Helens' car is lent for a journey. The ordinary expenses like petrol, etc., shall be borne by the bailee but in case the car goes out of order, the money spent in its repair will be regarded as an extraordinary expenditure and borne by the bailor.



Case Analysis:

Issue: Ms. Zenab lent a dog to Mr. Yousuf for ten days. On the expiry of ten days, Ms. Zenab refused to receive back the dog but after a week, she received back the dog. During these 7 days, Mr. Yousuf incurred Rs. 500 as feeding expenses and claims it from Ms. Zenab. Can Mr. Yousuf get his money?

Rule: If the bailor wrongfully refuses to receive back the goods, he shall be liable to pay necessary expenses incurred by the bailee for keeping those goods safely.

Analysis: Mr. Yousuf fed the dog for 7 days when it was in his custody. He claims the feeding expenses from Ms. Zenab.

Conclusion: We can conclude that of course Mr. Yousuf must repay Rs. 500 to Mr. Yousuf as Ms. Zenab wrongfully refused to receive back the goods. She is liable to pay necessary expenses.

3. If the bailor does not have any title to deliver the goods to the bailee, he would be liable to indemnify to the bailee for any loss which the bailee has paid to the original owner.



Example:- A asks his friend B to give him cycle for one hour. B instead of his own cycle gives C's cycle to A. While A was riding, the main owner of the cycle catches A and surrenders him to police custody. A is entitled to recover from B all costs, which A had to pay in getting out of this situation

4. If the bailor wrongfully refuses to receive back the goods, he shall be liable to pay necessary expenses incurred by the bailee for keeping these goods safely.



Example: - Mr. X lent a dog to Mr. Y for ten days. On the expiry of ten days, Mr. X refused to receive back the dog but after five days, he received back the dog. During these five days, Mr. Y incurred Rs. 500 as feeding expenses. Mr. X must repay Rs 500 to Mr. Y.

5. It is the duty of bailor to bear the risk of loss, deterioration and destruction, of the things bailed, provided that bailee has taken reasonable care to protect the goods from loss. *red* by the Mr. Yousuf for keeping those goods safely.

6.4 Duties of Bailee

1- The bailee should take reasonable care of the goods which are in his possession. The degree of care required by the bailee is similar to that of a man of ordinary prudence would take of his own goods under the similar circumstances. If he has taken such care, he is not liable, even if the goods are lost or damaged. He is also not liable for the destruction or the loss of goods due to an act of god.

2- The bailee should not use the goods for an unauthorized purpose. He can use the goods as per the terms and condition of the bailment. If the bailee makes any unauthorized use of goods he shall be liable for any loss on any unauthorized use of goods. The bailor may terminate the contract of bailment. In other words the contract of bailment becomes voidable.

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

(b) 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 expense of separation or division, and any damages arising from the mixture.

(c) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back. It was held that the bailor was entitled to refuse to take delivery and claim compensation for loss or damage.

4- The Bailee must return the goods without waiting for demand from bailor:

- the time specified in the contract has expired or the purpose specified in the contract is accomplished,
- if the goods are not returned, then:
- the goods shall be at risk of the bailee,
- the bailee shall be liable for any loss or damage, even if such loss is caused without any fault or negligence of the bailee or due to an act of god or other unavoidable reasons.

5- In the absence of any contract to contrary, the bailee is bound to return any extra profit occurred from goods bailed.

6- The bailee must not do any act which is inconsistent with the title of the bailor. He must not set up his own title or a third party's title on the goods bailed to him.

6.5 Duties of a Finder of Goods

Duties of a finder of goods are as follow:

1. To take care of the goods bailed (S.151): In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. 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 (S.152).

2. Not to make unauthorized use of goods (S.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 damages arising to the goods from or during such use of them.



Examples: (i) Andrew lends a car to John for his own driving only. John allows Christina, his wife, to drive the car. Christina drives with care, but the car is damaged in an accident. Andrew is

liable to make compensation to John for the damage done to the car. (ii) Joseph hires a car in Calcutta from Thomas expressly to drive to Goa. Joseph drives with due care, but drives to Kerala instead. The car meets with an accident and is damaged. Thomas is liable to make compensation to Joseph for the damage to the car.

3. Not to mix bailer's goods with his own (Ss. 155-157): If the bailee without the consent of the bailer, mixes the goods of the bailer with his own goods and the goods can be separated or divided, the bailee shall be bound to bear the expense of separation or division and any damages arising from the mixture.



Examples: - 1. A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 100 bales returned, and B is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

2. A bails a barrel of flour worth Rs. 450 to B. B without A's consent mixes the flour with flour of his own, worth only Rs. 250 a barrel. B must compensate A for the loss of his flour.

If the bailee, without the consent of the bailor mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and to deliver them back, the bailor is entitled to compensation by the bailee for loss of the goods (Sec. 157).



Example: A bails a barrel of Cape flour worth Rs. 4,500 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 2,500 a barrel. B must compensate A for the loss of his flour.

4. To return the goods bailed without demand (S.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. If the bailee fails to return the goods at the proper time, he is responsible to the bailer for any loss, destruction or deterioration of the goods from that time (S.161).



Example: Xaala delivered books to Yaala to be bound. Yaala promised to return the books within a reasonable time. Xaala pressed for the return of the book. But Yaala, failed to deliver them back even after the expiry of reasonable time. Subsequently the books were burnt in an accidental fire at the premises of Yaala. In this case Yaala was held liable for the loss.

5. To return any accretion to the goods bailed (S.163): In the absence of any contract to the contrary, the bailee is bound to deliver to the bailer, or according to his directions, any increase or profit which may have accrued from the goods bailed.



Example: Manav leaves a cow in the custody of Pranav to be taken care of. The cow gives birth to a calf. Pranav is bound to deliver the cow as well as the calf to Manav.

6. Not to question the title of bailer (S.167): In cases of conflicting claims as to title to the goods are to be decided by the court and unless the court grants an injunction against the delivery of goods to the bailer, the bailee is under duty to return it to bailer at proper time or within the reasonable time.

6.6 Rights of a Bailee

Following are the rights of a Bailee:

1. Right to Deliver the Goods to any one of the Joint Bailors [Section 165]: If several joint owners bailed the goods, the bailee has a right to deliver them to any one of the joint owners unless there was a contract to the contrary.



Example: A, B and C are the joint owners of a harvesting combine. They delivered it on hire to D for one month. After the expiry of one month, D may return the "combine" to any one of the joint owners namely, A, B or C.

2. Right to indemnity (Sec. 166): Bailee is entitled to be indemnified by the bailor for any loss arising to him by reasons that the bailor was not entitled to make the bailment or to receive back the goods or to give directions in respect to them. If the bailor has no title to the goods, and the bailee in good faith, delivers them back to, or according to the directions of the bailor, the bailee shall not be responsible to the owner in respect of such delivery. Bailee can also claim all the necessary expenses incurred by him for the purpose of gratuitous bailment.

3. Right to claim compensation in case of faulty goods (Sec. 150): A bailee is entitled to receive compensation from the bailor or any loss caused to him due to the failure of the bailor to disclose any faults in the goods known to him. If the bailment is for hire, the bailor will be liable to compensate even though he was not aware of the existence of such faults.

4. Right to claim extraordinary expenses (Sec. 158): A bailee is expected to take reasonable care of the goods bailed. In case he is required to incur any extraordinary expenses, he can hold the bailor liable for such expenses.

5. Right to Apply to Court to Decide the Title to the Goods [Section 167]: If the goods bailed are claimed by the person other than the bailor, the bailee may apply to the court to stop its delivery and to decide the title to the goods.



Example: A, a dealer in T.V. delivered a T.V. to B for using in summer vacation. Subsequently, C claimed that the T.V. belonged to him as it was delivered only for repairs, to A and thus, B should deliver it to him. In this case, B may apply to the Court to decide the question of ownership of the T.V. so that he may deliver it to the right owner.

6. Right of particular lien for payment of services [Section 170]: Where the bailee has (a) in accordance with the purpose of bailment, (b) rendered any service involving the exercise of labour of skill, (c) in respect of the goods, he shall have (d) in the absence of a contract to the contrary, right to retain such goods, until he receives due remuneration for the services he has rendered in respect of them. Bailee has, however, only a right to retain the article and not to sell it. The service must have entirely been formed within the time agreed or a reasonable time and the remuneration must have become due. This right of particular lien shall be available only against the property in respect of which skill and labour has been used.

7. Right of general lien (Sec. 171): Bankers, factors, wharfingers, attorneys of a High Court and policy brokers will be entitled to retain, as a security for a general balance of amount, any goods bailed to them in the absence of a contract to the contrary. By agreement other types of bailees excepting the above given five (Bankers, factors, wharfingers, attorneys of a High Court and policy brokers) may also be given this right of general lien.



Did you know?

Suit by bailor & bailee against wrong doers [Section 180]: If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does 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 either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief or compensation obtained by such suits [Section 181]: Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Difference between General Lien and Particular Lien

Basis of Difference	General Lien	Particular Lien
Meaning	General lien alludes to the right to keep possession of goods belonging to other against general balance of account.	Particular lien implies a right of the bailee to retain specific goods bailed for non-payment of amount.
Availability	Any goods, in respect of which the	Only against the goods, in which skill

	amount is due to another person.	and labor is exercised.
Automatic	No	Yes
Right to sale goods	No right to sale the goods.	In general, there is no right to sell goods, however, the right can be conferred to bailee in special circumstances.
Exercised by	Bankers, Wharfingers, factors, policy brokers, attorneys etc.	Bailee, pledgee, finder of goods, agent, partner, unpaid seller etc.

6.7 Rights of Bailor

1. Right to terminate the bailment [Section 153]: A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.



Example: George lets to Dennis, for hire, a horse for his own riding. Dennis drives the horse in his carriage. This is, at the option of George, a termination of the bailment.

2. Premature Termination (Section 159): When the goods are lent gratuitously, the bailor can demand back the goods at any time even before the expiry of the time fixed or the achievement of the object.



Example: Topsy, while going out of station delivered her Pearl ornaments to Sophi for safe custody for one month. But Topsy returned to station after one week. She may demand the return of her ornaments even though the time of one month has not expired.

6.8 Rights of Bailee

- Right to claim damages [section 150]
- Right to claim reimbursement of expenses [section 158]
- Right to be indemnified in case of premature termination of gratuitous bailment [section 159]
- Right to recover loss in case of bailor's defective title [section 164]
- Right to recover loss in case of bailor's refusal to take the goods back [section 164]
- Right to deliver goods to any of the joint bailors [section 165]
- Right to deliver goods to bailor in case of bailor's defective title [section 166]

6.9 Termination of Bailment

A contract of bailment terminates or comes to an end under the following circumstances:

1. *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.

Example: Mohini took a Gown and Saree on rent for 3 days. She wanted to wear them on different functions of her cousin sisters' wedding. Mohini must return the dresses after 3 days.

2. *On the accomplishment of the specified purpose:* In case, bailment is for specific purpose it terminates as soon as the purpose is accomplished.



Examples: (i) Kavita gives 5-meter-long Banarasi saree to be stitched into a Lehanga to her Tailor. The tailor is bound to return it as soon as the cloth is stitched into Lehanga.

(ii) Jannat hires from Iqbaal certain tents and crockery on marriage of her son. The same must be returned as soon as marriage is accomplished.

3. **By bailee's act inconsistent with conditions of bailment:** If the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment, the bailor may terminate the bailment (S.153).



Example: Asha lets to Garvit for hire a horse for his own riding. Garvit drives the horse in his carriage. Asha shall have the option to terminate the bailment.

4. **A gratuitous bailment may be terminated at any time (s.159):** In case of any premature termination resulting into any loss to the bailee exceeding the benefit derived from the bailment, the bailor must indemnify. Further, a gratuitous bailment terminates by the death of either the bailor or the bailee (S.162).

6.10 FINDER OF LOST GOODS

Finding is not owning. 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. However, he enjoys certain rights also. His rights are summed up hereunder.

Right to retain the Goods (S.168)

A finder of lost goods may retain the goods until he receives the compensation for money spent in preserving the goods and/or amount spent in finding the true owner. A finder, however, cannot sue for such compensation. But where, a specific reward has been offered by the owner for the return of the goods lost, the finder may sue for such reward and may retain the goods until he receives it.

Right to Sell (S.169)

When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it:

- i. when the thing is in danger of perishing or of losing the greater part of its value;
- ii. when the lawful charges of the finder in respect of the thing found, amount to two-thirds of its value.

6.11 Definition of Agency

Agency can be defined as the relationship between two persons, wherein a person has the authority to act on behalf of another, bind him/her into a legal relationship with the third party. There are two parties in a contract of agency – principal and agent. Contract of Agency is based on the fact that one person cannot perform all the transactions and so he can appoint another person to perform or act on his behalf. Any person who employs another person to perform an act and who is being represented by another person in dealing with the third party is the Principal.

From the above discussion it can be understood that a person employed by the Principal, to act on his behalf, represent him in the dealings with the third party and also to bring him into a contractual relationship with the third party, is called an Agent. In a contract of agency, the agent is not just the bridge between the principal and the third party, but he can also make the principal answerable for the acts performed by him. Here it must be noted that while the agent is acting for the principal, he works in the capacity of principal.

Who can Appoint an Agent?

Section 183 provides as follows: Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Thus, a minor, or a person of unsound mind cannot act as a principal. Though this section prohibits a minor from appointing an agent, does not prevent the guardian of a minor from appointing an agent to the minor (Reference: Madanlal v. Bherulal)

Who may be an Agent?

Section 184 of the Act provides answer to this question, which says as between the principal and the third persons any person; may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained. From this section it becomes clear that "as between the principal and third persons, any person may become an agent". Now the question arises, can a minor or a person of unsound mind also become an agent? The answer is yes. In view of the language used by this section even a minor or person of unsound mind is not debarred from being appointed as an agent. But as a rule of caution, they should not be appointed as agent because if the principal appoints them, he undertakes a great risk. Because whatever such incompetent person does shall be binding on the principal, but the principal shall not be able to proceed against the agent for his misconduct or negligence. Thus, any person can be appointed as an agent.



Example: A is a principal who entrusts to B, a minor a diamond ring worth Rs. 11,000 and instructs him not to sell the same for credit or for any amount less than Rs. 9,000. If B sells the same to C on credit for Rs. 5,000, this transaction will certainly be binding as between A and C but A will have no right to claim damages as against B for his misconduct, since B happens to be a minor. But, if B were an adult, he would be liable to A for damages sustained due to his misconduct.

6.12 Consideration for Agency

As you know, consideration is essential for the validity of every contract, and consideration, in the sense of detriment, is sufficient to support a contract. Section 185 expressly provides that no consideration is necessary to create an agency. The fact that the principal has agreed to be bound by the acts of the agent is a sufficient detriment to the principal. Therefore, it is not necessary that there should be a separate consideration.

6.13 Constitution and Proof of Agency

The relationship of principal and agent may be created by (i) express appointment by the principal, or by a person duly authorised by the principal to make such appointment; (ii) by implication of law, from the conduct or situation of the parties or from the necessity of the case; or (iii) by subsequent ratification by the principal of the acts, done on his behalf. As to proof of agency, the actual status of the parties must be determined with reference to all the circumstances and not merely with reference to the words used. The crucial test of the status of an agent is that his acts bind the principal.

Features of Law of Agency

- i. **Legal Binding:** The crux of the contract of agency is that the principal is legally bound by the acts performed by the agent.
- ii. **Consideration is not mandatory:** There is no legal requirement of consideration, to support the relationship between the principal and agent.
- iii. **Capacity of Principal:** One who is legally competent to contract is eligible to employ an agent, i.e. he should have attained the age of 18 years and of sound mind.
- iv. **Authority to contract:** Authority to contract is the basic requirement to become an agent. So a minor can also act as an agent, though he is not having the capacity, however, he can

have the authority to act as agent. This is due to the fact that an agent initiates a contractual relationship amidst the principal and third party, and so the contractual capacity of the agent is irrelevant.

Creation of Agency

The relationship of principal and agent may be created by: 1) Express Agreement; 2) Implied Agreement; 3) Ratification; and 4) Operation of Law. These are discussed in detail below:

- 1) **Express Agreement:** One can enter into the contract of agency through an express agreement, i.e. oral or written. In a written contract of agency, the power of attorney is transferred in the name of the agent, conferring him the authority and power to act on behalf of the principal, subject to the terms and conditions specified in the contract. When the purpose of creation of agency is to transfer the immovable property, it is required to be registered.



Example: Agam resides in Jalandhar and he has an agriculture farm at Ambala. He appoints Angad, by a deed called the power of attorney, as a caretaker of his farm. In this way, the relationship of principal and agent has been created between Agam and Angad by an express agreement (power of attorney).

2. **Implied Agency:** When something is not directly or clearly stated, it is said to be implied. Therefore, the implied agency is created by way of conduct, the situation of the parties, i.e. principal and agent, or necessity of the case.



Example: Arjuna has a car, but he cannot drive it. He allows his neighbour Krushna to drive it. Krushna while driving the car with Arjuna meets with an accident and injures Chintu. Chintu can sue Arjuna for damages because Krushna is his implied agent.

Implied Agency includes the following:

- a) **Agency by Estoppel:** When a person has, by his conduct or statements, induced others to believe that a certain person is his agent, he is estopped from subsequently denying it. The principal is precluded from denying the truth of agency which he himself has represented as a fact, although it is not a fact.



Examples: - 1. Prakash allows Anand to represent as his agent by telling Cooper that Anand is Prakash's agent. Later on, Cooper supplied certain goods to Anand thinking him to be Prakash's agent. Prakash shall be liable to pay the price to Cooper. By allowing Anand to represent. 2. Parker, an owner of a house held out that Smith, the auctioneer had authority to sell the house. Smith sold the house by auction to a third party for an amount less than the amount authorized by Parker. It was held that the purchaser is not affected by Parker's instructions to the auctioneer not to sell below a certain price.

- b) **Agency by Holding Out:** Agency by holding out is a type of agency by estoppel. Here, the alleged principal by his affirmative or positive conduct leads others to believe that person doing some act on his behalf is doing with his authority.



Example: A allows his servant to purchase goods on credit from a nearby shop, and later on he pays for such goods. Later on, when the servant was not in A's employment, he buys goods on A's credit from the same shop. The shopkeeper can recover the price from A, because A had held out the servant as his agent on earlier occasions, so A will be bound for subsequent transactions entered into under similar circumstances.

- c) **Agency by Necessity:** It emerges under the following circumstances: first, when acting on behalf of the principal is an actual and concrete necessity. Second, if communicating with the principal and obtaining his approval is impossible, and third, when the conduct is done in the

principal's best interests. However, before an agency of necessity can be inferred, the following conditions have to be satisfied:

- (i) There should be an actual and definite necessity for acting on behalf of the principal;
- (ii) within the available time it should be impossible to obtain the principal's instructions;
- (iii) the person acting as agent must have acted bonafide. In such situations, the principal is bound by the acts of the agent.



Example: Some milk was consigned from Bombay to Delhi. The tanker carrying the milk met with an accident. The milk being perishable was sold by the transporter, the sale is binding upon the principal. In this case, the transporter became an agent by necessity.

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



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

Ratification is not allowed in the following cases

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

Express and Implied Ratification

The ratification may be express or implied.



Example: Amar without Saumyas' authority lends her money to Kamal. Later Saumya accepts interest on the money from Kamal. Saumyas' conduct implies ratification of the loan.

Requisites of a Valid Ratification

To be valid, ratification must fulfil certain conditions. These conditions are:

1. The agent must contract as agent; he must not allow the third party to imagine that he is the principal. A person cannot enter into a contract at his own and later shift it to another.
2. The principal must have been in existence at the time the agent originally acted. This condition is significant in case of a company. The preliminary contracts entered into by promoters of a company on its behalf cannot be ratified by the company after incorporation because, if permitted, ratification will relate back to the point of time when promoters originally acted and at that time the company was not in existence. How can a person, not in existence, be a party to a contract?
3. 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.
4. Ratification must be made within a reasonable time. What is a reasonable time shall vary from case to case?
5. 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.
6. The principal should have full knowledge of the facts (S.198).
7. Ratification must be of the contract as a whole. The principal cannot reject the burden and accept only the benefits.

8. Ratification of acts not within the principal's authority is ineffective. This again is basically relevant in case of companies. The acts of directors which are ultra vires the powers of a company cannot be ratified by the company.

9. Ratification cannot be made so as to subject a third party to damages or terminate any right or interest of a third person (S.200).



Examples:-1. Amar, not being authorised thereto by Bharat, demands on behalf of Bharat, the delivery of some property of Bharat, from Cooper, who is in possession of it. This demand cannot be ratified by Bharat, so as to make Cooper liable for damages for his refusal to deliver.

2. Amar holds a lease from Bharat terminable on three months' notice. Cooper, an unauthorised person, gives notice of termination to Amar. The notice cannot be ratified by Bharat, so as to be binding on Amar.

4) By operation of Law: Without any special agreement or legal necessity to enter any formalities, the law establishes the connection between Principal and Agent. The Partnership Act is the best example, in which each Partner acts as the firm's agent.



Example: When a partnership is formed, each party becomes the agent of the other partner. By operation of law, such an agency is said to have arisen. By law, the promoters of a corporation are its agents when it is founded.

When a partnership contract is signed, a fiduciary duty is created automatically. Each partner is now responsible for managing the firm's business and accounting for its activities. Any failure on the part of the partner on these fronts constitutes a violation of fiduciary duty.

5) Agency Coupled with Interest: Agency is said to be coupled with interest when authority is given for the purpose of securing some benefit to the agent. In other words, where the agent has himself an interest in the subject matter of the agency, the agency is one coupled with interest.



Example: 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. The authority of the agent is agency coupled with interest.

6.14 Kinds of Agent

- **General agents** have the authority to act in all matters concerning a trade or profession, or of a particular nature or to do some act in the ordinary course of his trade or profession. A general agent has the authority to do all legal acts for the purpose of carrying on that trade or business, on behalf of his principal.
- **Special agents** are those who have authority only to act in a particular transaction, for example, when an agent is appointed to sell a car or sell a house. The authority of a special agent is limited to that particular act only and his authority comes to an end when the work is over. Thus, the persons dealing with such agent are under an obligation to correctly ascertain from the principal the extent of his authority. The most important classification of agents, however, is based on the nature of work performed by them. They can be classified as:
 - **Broker:** A broker is one who makes bargains for another, and receives commission (brokerage) for so doing. He is an agent whose ordinary course of business is to negotiate and make contracts for the sale and purchase of goods etc., of which he has neither possession nor control. He acts in the name of his principal.
 - **Factor:** A factor is a person who is entrusted with the possession of goods, and who has the authority to buy, or sell or otherwise deal with the goods or merchandise, or to raise money on their security. A factor, usually, sells goods in his own name, he has a general lien on the goods.

- **Auctioneer:** An auctioneer is an agent who is entrusted with the possession of goods for sale to the highest bidder at a public auction. He has the authority to deliver the goods on receipt of the price. He can sue for the price in his own name. However, unlike a factor, he has only a particular lien on the goods for his charges.
- **Del Credere Agent:** A del credere agent is one, who in consideration of an extra remuneration called the Del Credere Commission, guarantees to his principal that the third person with whom he enters into contracts shall perform their obligations. Thus, such an agent guarantees to his principal the payment of the price.
- **Commission Agent:** A mercantile agent who buys and sells goods on behalf of his principal and receives commission for his services. Actually, it is not a different category agent because brokers, factors may also act as commission agent.
- **Banker:** Generally, the relationship between a banker and customer is that of a creditor and debtor. However, when he collects cheques or buys or sells securities on behalf of his client, he acts as an agent of the customer. A banker has the right of general lien in respect of the general balance of account.

6.15 Rights and Duties of an Agent

Rights of an Agent

An agent has the given rights:

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

6.16 Duties of an Agent

1. Duty to Act According to the Instructions or Custom of Trade: Section 211 lays down that it is the duty of an agent to conduct the business of the agency strictly according to the directions given by the principal.



Example: Shinda is asked by his principal to insure the goods, he failed to do so and the goods are destroyed by the fire. In this case Shinda is liable to compensate the principal for the loss.

However, when the principal has not given any directions, in that case the agent should conduct the business according to the custom of the trade.

Example: B, a broker in whose business it is not the custom to sell goods on credit, sells goods of his principal on credit. Before making the payment, the buyer becomes insolvent. The broker, B is liable to pay for the loss.

When the agent acts otherwise, if any loss incurred, the agent must make it good to the principal, and if any profit accrues, the agent must account for it.



Example: Andrew, the principal, instructed his agent Bobby to put certain goods in a particular warehouse. Ignoring Andrew's directions, Bobby puts the goods in another equally safe warehouse. The goods were destroyed by fire without any negligence on the part of Bobby. Here the agent was held liable to make good his principal's loss.

- 2) **Duty to Act with Reasonable Care and Skill:** It is the duty of an agent to conduct the business of the agency with reasonable care and skill. The degree of care and skill required from the agent depends upon the nature of business and circumstances of each case.



Example: A, living in Bombay asked B at Delhi, to collect Rs. 10,000 from C. B collects the money and sends the amount by bank draft, placed in a letter sent by register post to A. B has done his duty as a man of ordinary prudence would have done in his own case. However, if instead of sending the draft by registered post, B sends the draft by ordinary post, B would be responsible for acting negligently. The agent is required to act with reasonable diligence, to use skill as he possesses and to compensate the principal in respect of the direct consequence of agent's own neglect, want of skill or misconduct. For example, A, an insurance broker, was employed by B to effect an insurance on a ship. A insured the ship but failed to see that 'usual clauses' are inserted in the policy. The ship was lost in storm. Due to omission of the 'usual clauses' in the policy, nothing could be recovered from the insurance company. A is liable to make good the loss suffered by B. It follows from the above that the agent is not liable to compensate the principal in respect of loss or damage which are indirect or remotely caused by such neglect, want of skill, or misconduct.

- 3) **Duty to Render Accounts:** An agent is bound to render proper accounts to his principal on demand and to pay overall sums received on principal's behalf subject to any lawful deduction for remuneration or expenses properly incurred by him.

- 4) **Duty to Communicate with the Principal:** Section 214 enjoins an agent, in case of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

- 5) **Not to deal on his own Account:** An agent is not to deal on his own account in the business of agency, as no agent is permitted to put himself in the position where his interest conflicts with his duty. If an agent desires to deal on his own account in the business of agency, he must make a full and frank disclosure of all the material circumstances, which have come to his knowledge on the subject, to the principal and obtain his consent (*Lever Bros. v. Bell*). If, however, he fails to obtain such consent, and carries on the said business on his own account, or after giving the consent, the principal finds that either any material facts have been dishonestly concealed from him by the agent to his interests, the principal has two options. He may (i) repudiate the transactions entered into by agent and disclaim all losses, or (ii) claim from the agent benefit resulting from the transaction. For example, A directs B to sell his estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option. Take another example. A directs R, his agent, to buy a certain house for him. B tells A that the house cannot be bought and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he (B) gave for it.

- b) **Not to Use Information Obtained in the Course of the Agency against the Principal:** Where an agent has obtained information during the course of the agency, it is the duty of the agent not to use the same prejudicially to the interests of the principal. Where an agent does make use of such information, the principal may restrain him from doing so by an injunction.

7) Not to Set Up Adverse Title: Where an agent has obtained goods or property from the principal as an agent, it is his duty not to set up his own title or the title of a third person. In other words, the agent should not dispute the ownership of the principal.

8) Not to Make Secret Profits: As you know that the relationship of principal and agent is based on mutual confidence, it is the agent's duty not to make any secret profits in the business of agency.



Example, A appointed B, an auctioneer to sell certain goods belonging to him. B sold the goods to C, and received some secret commission from C in addition to the commission from A. It was held that B was bound to hand over the secret commission to A.

9) Duty to Exercise His Authority Personally: Section 190 of the Act requires an agent to perform acts personally which he has expressly or impliedly undertaken to perform personally. In other words, an agent must not delegate the authority given to him. However, under certain circumstances, this authority can be delegated.

10) Duty on the Death or Insanity of the Principal: Section 209 requires that when an agency is terminated by the principal dying or becoming of unsound mind. 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.

Summary

In this Unit, you studied about contract of bailment and agency. Bailment is defined as 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 the goods are delivered is called the 'bailee'.

Contract of bailment involves the transfer of possession of the good from the bailor to the bailee for the specific purpose and both, the bailor and the bailee, have been confronted with some rights and duties which are necessary for them to follow whenever seem suitable. Also, for the contract of bailment to be valid, all the essential features need to be fulfilled. Moreover, bailment of goods is different from the sale of goods as bailment is involved with the transfer of possession while the sale is involved with the transfer of ownership.

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

Keywords

General Lien: 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: The right to retain the particular goods in respect of which the claim is due.

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

Ostensible Authority of an Agent: When a person is held out as an agent for a particular purpose or business, persons dealing with him are entitled to presume that he has the authority to do all such acts as are necessary or incidental to such a business.

Special Agent: One who has authority to act in a particular transaction.

Sub-agent: A person who is employed by and acting under the control of the original agent.

Substituted Agent: An agent who is named by the original agent and he acts directly under the control of principal.

Self Assessment

Q1. An example of bailment without a contract is:

- A. Giving a vehicle in a workshop for repair
- B. Giving something in courier
- C. Finder of the lost goods
- D. None of these

Q2. A finder of goods is:

- A) Entitled to retain the goods
- B) Entitled to claim compensation when specific reward is offered
- C) Not entitled to claim compensation and thus not entitled to retain the goods
- D) Both (A) and (B)

Q3. Which of the following is not an example of bailment?

- A) Giving clothes for dry-cleaning
- B) Keeping property in mortgage
- C) Giving clothes for tailoring
- D) Giving book for reading

Q4. Which of the following is the Effect of ratification?

- A. Ratification is started from the time of making a contract between the ratifier of the act and the person who did of the act.
- B. A contractual relationship is started between the ratifier and the third party.
- C. Both A&B
- D. None of these

Q5. ____ entitles the bailee to retain those goods of the bailor for a general balance of the account.

- A. Particular lien
- B. General lien
- C. Ownership
- D. Pledge

Q6. An agent can be appointed by ----

- A. A major of sound mind
- B. A minor of sound mind
- C. Any person of sound mind
- D. Any major of sound or unsound mind

Q7. Who is Sub-agent?

- A. Who works under the main agent
- B. Employed by and acting under the control of the original agent in the business of agency
- C. Who works on behalf of the main agent
- D. Who carries out the order and direction of a person under whom he works directly

Q8. ----- is an agent who sells goods or other property by auction.

- A. Auctioneer
- B. Del credere agent
- C. Factor
- D) Broker

Q9. ----- is a mercantile agent who guarantees the performance of the contract by the third person on the payment of some extra commission.

- A. Broker
- B. Factor
- C. Auctioneer
- D. Del credere agent

Q10. Martin, who wants to sell a house he owns, authorizes his concierge, Wilhelm, to find a potential buyer, and finalize a deal above a stipulated price. Wilhelm contracts Chris, a real estate broker, and instructs him to only find a potential buyer and send them over to Wilhelm for the sale. Martin then contracts ReNowaitGoodhouses, a home improvement company to renovate the house. ReNowait completes its work and Martin pays them. Chris then searches for a suitable buyer and finds one in George. George buys the house and Chris is paid for his services. Who performs the role of the agent in this land sale transaction?

- A. Wilhelm
- B. Chris
- C. Martin
- D. George

Q11. Greg, who wants to sell a car he owns, authorizes his concierge, Walter, to find a potential buyer, and finalize a deal above a stipulated price. Walter contracts Jacob, an independent car sales broker, and instructs him to only find a potential buyer and send them over to Walter for the sale. Greg then contracts CarWreckers, an automobile modification company to renovate his car. CarWreckers completes its work and Greg pays them. Jacob then searches for a suitable buyer and finds one in Carl. Carl buys the car and Jacob is paid for his services. Who is the principal during the car sale transaction?

- A. Car Wreckers
- B. Walter
- C. Greg
- D. Carl

Q12. A principal owes a duty to _____ the agent for any losses the agent suffers because of the principal. This duty usually arises where an agent is held liable for the principal's misconduct.

- A. indemnify
- B. vilify
- C. rectify
- D. ratify
- E.

Q13. When agent is liable to pay compensation to principal ?

- A. Negligence
- B. Giants of skills
- C. Misconduct
- D. All the choices incorporated here

Q14. Which Guarantee is given by Del - creder agent ?

- A. Own Solvency
- B. Solvency of purchaser
- C. Solvency of Agent
- D. Solvency of seller

Q15. According to Section 71 of the Contract Act, a person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a -----

- A. Bailee
- B. Bailor
- C. Surety
- D. Pawnor

Answer for SelfAssessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. C | 2. D | 3. B | 4. C | 5. B |
| 6. A | 7. B | 8. A | 9. D | 10. A |
| 11. C | 12. A | 13. D | 14. B | 15. A |

Review Questions

1. Discuss the various kinds of Agent in detail.
2. What are the rights of an Agent as per the Contract of Agency?
3. Write a detailed note on creation of Agency.
4. Discuss the rights and duties of a Bailee in detail.
5. Discuss the rights and duties of a Bailer in detail



Further Readings

<https://keydifferences.com/difference-between-general-and-particular-lien.html>

<https://blog.ipleaders.in/bailment-meaning-introduction/>

https://static.careers360.mobi/media/uploads/froala_editor/files/Part-2-Unit-2%3A-Bailment-and-Pledge.pdf

https://static.careers360.mobi/media/uploads/froala_editor/files/Part-2-Unit-2%3A-Bailment-and-Pledge.pdf

<https://blog.ipleaders.in/law-of-agency-what-is-principal-agent-relationship/>

<https://egyankosh.ac.in/bitstream/123456789/13392/1/Unit-11.pdf>

<https://www.legalserviceindia.com/legal/article-7665-understanding-contract-of-agency.html>

Unit 07: Sale of Goods Act

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Objective

After this lecture you will be able to:

- Comprehend the concept of sale and agreement to sell
- Identify the types of goods
- Comprehend the essentials of a valid contract of sale

Introduction

In last unit, you studied about the Indian Contract Act, 1872. Transactions in the nature of sale of goods form the subject matter of the Sale of Goods Act, 1930. The Act covers topics such as the concept of sale of goods, warranties and conditions arising out of sale, delivery of goods and passing of property and other obligations of the buyer and the seller. It also covers the field of documents of title to goods and the transfer of ownership on the basis of such documents. The Act came into force on 1st July, 1930. It extends to the whole of India, except Jammu and Kashmir. The sections quoted in this unit refer to the Sale of Goods Act, 1930, unless otherwise stated. This unit deals with the specific types of contract, i.e., sale of goods. In looking at this topic we see how the principles of contract form its basis.

7.1 Definition (S. 2)

Buyer: "Buyer" means a person who buys or agrees to buy goods.

Seller: "Seller" means a person who sells or agrees to sell goods.

Delivery: "Delivery" means voluntary transfer of possession from one person to another.

Deliverable State: Goods are said to be in a deliverable state when they are in such state that the buyer would, under the contract, be bound to take delivery of them.

Document of title to goods: "Document of title to goods" includes a bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing the possessor of the document to transfer or receive goods thereby represented.

A railway receipt is a document issued by the Railway Company which is to be handed over at the destination of the goods, in return for the delivery of the goods named in such document.

A bill of lading has been defined by Scrutton as "a receipt for goods shipped on board a ship, signed by the person who contracts to carry them or his agent, and stating the terms on which the goods were delivered to and received by the ship."

A dock-warrant is a document issued by a dock or wharf owner setting out the detailed measurements (or weight) of a specific parcel of goods, and declaring or certifying that the goods are held to the order of the person named therein.

A warehouse-keeper's certificate or a wharfinger's certificate is a document which is issued by the warehouse-keeper or wharfinger, stating that certain goods which are specified in the certificate are in his warehouse. However, such a certificate, to be a document of title, must be in the nature of a warrant.

Future goods: "Future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.

Specific goods: "Specific goods" means goods identified and agreed upon at the time a contract of sale is made.

Insolvent: "Insolvent" A person is said to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.

Mercantile agent: "Mercantile agent" means a mercantile agent having in the customary course of business as such agent, authority (i) to sell goods, or (ii) to consign goods for the purpose of sale, or (iii) to buy goods, or (iv) to raise money on the security of goods.

Price: "Price" means the money consideration for a sale of goods.

Property: "Property" means the general property in goods, and not merely a special property.

Quality of goods: "Quality of goods" includes their state or condition.

7.2 Contract of Sale

Sec.4 of a contract of sale defines it as 'a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price'. From the definition, the following essentials of the contract emerge:

1. There must be at least two parties: A sale has to be bilateral because the property in goods has to pass from one person to another. The seller and the buyer must be different persons. A person cannot buy his own goods. However, a part-owner may sell to another part-owner.



Examples: 1. A partnership firm was dissolved and the surplus assets, including some goods, were divided among the partners in specie. The sales-tax officer sought to tax this transaction. Held, this transaction did not amount to sale. The partners were themselves the joint owners of the goods and they could not be both sellers and buyers. Moreover, no money consideration was promised or paid by any partner to the firm as consideration for the goods allotted to him.

2. Miss. Rina enters into contract of sale of horse to Mr. Guru against Rs. 30,000. Mr. Guru pays Rs. 30,000 to Miss. Rina and she delivers her horse to Mr. Guru. Hence, it is an actual sale involving two parties.

2. Transfer or agreement to transfer the ownership of goods: In a contract of sale, it is the ownership that is transferred (in the case of sale), or agreed to be transferred (in the case

of agreement to sell), as against transfer of mere possession or limited interest (as in the case of bailment or pledge).

3. The subject matter of the contract must necessarily be goods: The sale of immovable property is not covered under Sale of Goods Act. The expression 'goods' is defined in Sec.2(7).

4. Price is the consideration of the contract of sale: The consideration in a contract of sale has necessarily to be 'money', (i.e., the legal tender money). If for instance, goods are offered as the consideration for goods, it will not amount to sale. It will be called 'barter'.

5. Payment by installments: In the case of sale of goods, the parties may agree that the price will be payable by installments. Also, the terms may stipulate some amount by way of down payment and the balance by installments.

7.3 Sale and Agreement to Sell

Where under a contract of sale, the property (ownership) in the goods is transferred from the seller to the buyer, it is called a sale [Sec.4(3)]. Thus, sale takes place when there is a transfer of ownership in goods from the seller to the buyer. A sale is an executed contract.



Examples:- 1. A partnership firm was dissolved and the surplus assets, including some goods, were divided among the partners in specie. The sales-tax officer sought to tax this transaction. Held, this transaction did not amount to sale. The partners were themselves the joint owners of the goods and they could not be both sellers and buyers. Moreover, no money consideration was promised or paid by any partner to the firm as consideration for the goods allotted to him.

2. Miss. Rina enters into contract of sale of horse to Mr. Guru against Rs. 30,000. Mr. Guru pays Rs. 30,000 to Miss. Rina and she delivers her horse to Mr. Guru. Hence, it is an actual sale involving two parties.

3. Ramanathan sells his car to Bhim for Rs. 1 lakh. If all essential elements of a valid contract are present, it is a sale and therefore the ownership of the car stands transferred from Ramanathan to Bhim. This is so even where the payment of the price or the delivery of the car or both have been postponed.

Agreement to sell means a contract of sale under which the transfer of property in goods is to take place at a future date or subject to some conditions thereafter to be fulfilled.

7.4 Difference between Sale and Agreement to Sale

The two terms can be differentiated as:

Sale	Agreement to Sell
In the contract of sale, the exchange of goods takes place immediately.	In the agreement to sell the parties agree to exchange the goods for a price depending on the fulfilment of certain conditions at a future specified date.
The nature in the sale is absolute.	The nature of the agreement to sell is conditional.
It is an executed contract.	It is an executory contract.
Transfer of risk takes place immediately.	Transfer of risk doesn't take place, until and unless the goods are transferred.
The right to sell remains with the buyer	The right to sell remains with the seller.

Here the seller has the right to sue for the price.	Here the seller has the right to sue for damages.
It creates a right in rem.	It creates a right in personam.
The seller has no right to resell.	The seller has the right to resell the same goods if the conditions are not fulfilled.
On the off chance that the products are annihilated, the misfortune is borne by the buyer despite the fact that the merchandise is in the ownership of the seller.	The loss falls on the seller despite the fact that the merchandise is in the ownership of the buyer.

7.5 Goods and their Classification

Meaning of Goods

'Goods' means every kind of movable property, other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Thus, things like trademarks patents, copyright, goodwill, water, gas, electricity are all goods and therefore, maybe the subject matter of a contract of sale. In general, it is only the movables, i.e., things which can be carried from one place to another that form 'goods'. Landed property, therefore, does not constitute goods.

Classification of Goods

Goods may be classified as existing, future and contingent. Existing goods are those which are owned or possessed by the seller at the time of the contract (Sec.6). Instances of goods possessed but not owned by the seller are sales by agents and pledges. Existing goods may be either (a) specific or ascertained; or (b) generic and unascertained.

Specific goods means goods identified and agreed upon at the time a contract of sale is made [Sec.2(14)].

Ascertained goods, though normally used as synonym for specific goods may be intended to include goods which have become ascertained subsequently to the formation of the contract. Generic or unascertained goods are goods indicated by description and not specifically identified.



Example: Anthony, who owns a TV show room, has 20 TV sets and agrees to sell any one of them to Bharti. The contract is for unascertained goods, since which particular TV set shall become the subject matter of sale is not individualized at the time of the contract of sale.

Future goods means goods to be manufactured or produced or acquired by the seller after making the contract of sale [Sec.2(6)].



Example: Kulkarni agrees to sell future crop of a particular agricultural field in the next season. This is an agreement to sell future goods.

Contingent goods are the goods the acquisition of which by the seller depends upon a contingency which may or may not happen [Sec.6(2)]. Contingent goods are a part of future goods.



Example: Alka agrees to sell to Bhola a certain painting only if Chetan, its present owner, sells it to her. This painting is classified as contingent goods.

7.6 Meaning of Price

Meaning

Price means the money consideration for the sale of goods. Price is an integral part of a contract of sale. If price is not fixed, or is not capable of being fixed, the contract is void ab initio. As to how the price is to be fixed Secs.9 and 10 lay down certain rules. According to Sec.9, the price may (i) either be fixed by the contract, or (ii) agreed to be fixed in a manner provided by the contract, e.g., by a valuer, or (iii) determined by the course of dealings between the parties.



Example: In a particular trade, there is a usage to deduct discount in determining the price. The usage is implied by the course of dealings between the parties.

Mode of Payment of the Price

The seller is not bound to accept any kind of payment – except in legal tender money unless there is an agreement express or implied to the contrary or unless the seller is estopped from disputing the mode of payment. Thus, he is not bound to accept payment by cheque.

Earnest money also known as deposit, it is paid by the buyer in advance as security for the due performance of his part of the contract. It is not paid as part payment of price. If the transaction goes through, the earnest money is adjusted against the price. But if the sale goes off through buyer's fault, the deposit unless otherwise agreed is forfeited to the seller; and where it goes off by the seller's default he must return the earnest money.

7.7 Passing of Property in Goods

Meaning of 'Property in Goods'

The phrase 'property in goods' means ownership of goods. The 'ownership' of goods is different from 'possession' of goods. The 'possession' of goods refers to the custody of goods, though normally a person who is in possession of the goods shall also be its owner but it need not necessarily be so.

Rules regarding Passing of Property in Goods from the Seller to the Buyer

Secs.18 to 25 lay down the rules which determine when property passes from the seller to the buyer. These rules for different kinds of goods are summarized below:

Specific or ascertained goods. In a sale of specific or ascertained goods, the property in them is transferred to the buyer at such times as the parties to the contract intend it to be transferred. The intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case. Unless a contrary intention appears, the undermentioned rules are applicable for ascertaining the intention of the parties (Secs.20-24).

1. Specific goods in a deliverable state: In the case of specific goods in a deliverable state, the property passes at the time the contract (unconditional) is made (Sec.20). The fact that the time of payment or the delivery of the goods or both are postponed does not affect the passing of the property. Sec.2(3) states that goods are said to be in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them.

2. Specific goods not in a deliverable state: In the case of specific goods to which something has to be done by the seller to put them in a deliverable state, property passes only when such thing is done and the buyer has notice thereof (Sec.21).

3. Unascertained or future goods: When there is a contract for the sale of unascertained goods, property in the goods is not transferred to the buyer unless and until the goods are ascertained (Sec.18). Sec.23 provides that in the case of sale of unascertained goods or future goods

by description, property passes to the buyer when goods of that description in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller.

4. Unconditional appropriation: The unconditional appropriation of goods may be made either by the seller with the buyer's assent or by the buyer with the seller's assent. Normally goods shall be appropriated by the seller. Where he appropriates the goods to the contract, the property shall pass to the buyer only when the latter has assented to the appropriation. The assent, however, may be given before or after appropriation. Whether the appropriation is done by the seller or the buyer, the assent of the other party must be obtained. Where goods are in the possession of the buyer, he may do the appropriation.

Keywords

Contract of sale: A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

Delivery: It is defined as a voluntary transfer of possession from one person to another.

Goods: Goods mean every kind of movable property other than actionable claims and money.

Summary

A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Sale is to be distinguished from an agreement to sell. Where under a contract of sale, the property in goods is transferred from the seller to the buyer, it is called a sale.

Sale and Agreement to sell, as effectively expressed, appears to be under a similar nonexclusive name yet at the same time it is to be treated under various classifications. Along these lines so as to set up a deal there must be an understanding communicated or inferred relating to the idea of items and satisfaction of the condition would result in going off the title in the very products contracted to be sold. These two ideas of offer and consent to deal is itself a powerful idea.

Self Assessment

Q1. A farmer was sowing crops for growing potatoes in his farm. Krishna saw him sowing seeds and entered into a contract that he shall buy 50 kg potatoes as it gets ready to be plucked. Here, strawberry is ____

- A. Expired good
- B. Future good
- C. Specific goods
- D. Impossible goods

Q2. Malti goes to a local mobile shop and selects apple iphone 11 for her which is black in shade. Here, apple handset is a perfect example of _____

- A. Future goods
- B. Contingent goods
- C. Ascertained goods
- D. Generic goods

Q3. X agrees to sell Y one bag of wheat out of the hundreds of bags placed in his/her godown. In this case, the goods in sale are basically _____

- A. unascertained goods
- B. specific goods

- C. ascertained goods
- D. generic goods

Q4. Assume that you sell apples from your orchard when the trees are yet to produce apples, the apples are:

- A. Past goods
- B. Contingent goods
- C. Generic goods
- D. Specific goods

Q5. Anthony, who owns a TV show room, has 20 TV sets and agrees to sell any one of them to Bharti. The contract is for _____

- A. future goods
- B. ascertained goods
- C. unascertained goods,
- D. contingent goods

Q6. The term 'Goods' in the Sale of Goods Act means:

- A. subject matter of the contract of sale
- B. specific goods only
- C. ascertained goods only
- D. unascertained goods only

Q7. Where no price is fixed by express agreement, the buyer shall pay the seller _____

- A. lowest price
- B. reasonable price
- C. suitable price
- D. adhoc price

Q8. As per-section 2(1), a person who buys or agrees to buy goods is called

- A. Buyer
- B. Seller
- C. Both (a) and (b)
- D. None of above

Q9. Which of the following cannot be said to be included in the term as goods, defined under the Sale of Goods Act, 1930?

- A. Fruits
- B. Vegetables
- C. Typewriter
- D. Actionable Claim

Q10. The voluntary transfer of possession from one person to another is called

- A. Transfer
- B. Change of possession
- C. Delivery
- D. None of above

Q11. As per section 2, sub section 7 every kind of moveable property other than actionable claim and money is called as _____

- A. Goods
- B. Future goods
- C. None of above
- D. Both (a) and (b)

Q12. As per section 4(2), of The Sale of Goods Act, a contract of sale may be

- A. Absolute
- B. Conditional
- C. Both (a) and (b)
- D. None of above

Q13. According section 5(2) Subject to provision of any law for the time being in force a contract of sale may be _____

- A. Made in writing
- B. By words of month
- C. Partly in writing or partly in words of month
- D. All of above ways

Q14. A contract of sale may be

- A. Oral
- B. Written
- C. Neither (A) nor (B)
- D. Either (A) & (B)

Q15. The term 'possession of goods' means

- A. ownership of goods
- B. custody of goods
- C. Either (a) & (b)
- D. None of these

Answers for Self Assessment

- | | | | | |
|------|------|------|------|-------|
| 1. B | 2. C | 3. A | 4. B | 5. C |
| 6. A | 7. B | 8. A | 9. D | 10. C |

11. D 12. C 13. D 14. D 15. B

Review Questions

- Q1. Discuss the essentials of a valid contract of sales in detail.
- Q2. Discuss the types of goods with the help of suitable example of each.
- Q3. Write a note on:
- Price as per Sale of Goods Act
 - Mode of Payment under Sale of Goods Act
- Q4. Discuss the rules regarding Passing of Property in Goods from the Seller to the Buyer.
- Q5. What do you mean by the term Sale and Agreement for Sales. Also, differentiate the two terms.



Further Readings

- A Textbook of Mercantile Law By P.P.S. Gogna, S. Chand & Company
- Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
- A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
- Mercantile Law by S SGulsan, Excel Books
- Mercantile Law by M C Kuchchal, Vikas Publishing House
- Legal Aspects of Business by Daniel Albuquerque, Oxford &Ibh



Web Links

- http://business.gov.in/manage_business/contract_law.php
- <http://lawcommissionofindia.nic.in/1-50/Report13.pdf>

Unit 08: Sale of Goods Act

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Objectives

After studying this unit, you will be able to:

- Comprehend the concept of conditions and warranties
- Understand the express and implied conditions and warranties

Introduction

As you are all aware, before entering into a contract of sale, a seller usually makes claims or assertions about the items in order to persuade the buyer to complete the transaction. The type and relevance of such representations or declarations varies. The structure of the contract determines whether any statement or representation made by the seller with regard to the products is a stipulation forming part of the contract or a simple representation (such as an expression of an opinion) comprising no part of the contract. If no such assurances are made, the general rule of law, caveat emptor, or "let the buyer beware," prevails. This concept shall be discussed in detail in upcoming chapter.

8.1 Meaning of Conditions

The term condition is defined in Section 12(2) of the Sale of Goods Act of 1930 as a requirement that is necessary to the contract's fundamental purpose. An offended party has the right to regard the contract as rejected or cancelled if it is breached. Furthermore, if any one believes that the entire contract has been breached and the seller is guilty of non-delivery, the party may bring an action for damages for the loss sustained. As a result, a condition may be defined as one of the most important conditions in a sales agreement that the buyer mentions to the seller, either implicitly or explicitly. In the event that the buyer fails to meet the seller's condition, the buyer has the right to terminate the proposal. It's possible to express or infer a condition. The offended party has the right to regard the contract as repudiated if there is a breach of terms. If the buyer has paid, he has the right to collect the payment and to sue for breach of contract damages.



Examples: - 1. If the buyer expressly mentions that good should be delivered before stipulated date, then that date will be taken as condition as buyer expressly mentioned it

at the time of contract.

2. Ramson consults Shamack, a motor car dealer for a car suitable for touring purposes to promote the sale of his product. Shamack suggest Maruti 800 car and accordingly he buys it from Sham. The car turns out to be unfit for touring purposes. Here the term that the car should be suitable for touring purposes is a condition of a contract. It is so important that it's non-fulfillment defects the very purpose for which Ramson purchases the car. Ramson is therefore entitled to reject the car and have refund the price.



Case Analysis (Reference Baldry v. Marshall)

Issue: Mr A consulted Mr B, a car dealer and told him that he wanted to purchase a car for touring purposes. Mr B suggested that a Buggati car will be fit for the purpose. Relying upon the statement, he bought the Buggati car. Later on, the car turned to be unfit for the purpose of touring. Mr A aks Mr B to take away the car as it was not serving his purpose.

Rule:A condition is an essential requirement of the contract on which the whole contract depends and if that requirement of contract is breached then the sufferer has an absolute right to reject the contract itself.

Analysis: In this case the buyer informs his purpose for buying a car. The seller provides him a Buggati car that is deemed to be fit for touring purpose.

Conclusion:The Court observed that the suitability of the car for touring purpose was a condition because, it was so important that the non- fulfilment defeated the very purpose of purchasing the car. It was held that A was entitled to return the car and get back the price paid.

8.2 Meaning of Warranty

The warranty is an additional provision and written promise that is attached to the contract's principal purpose. The impact of a warranty violation is that the offended party cannot reject the whole contract, but can seek damages. In contrast to a breach of condition, the customer cannot treat the items as repudiated if the guarantee is breached.

"A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to the right to reject the products and regard the contract as repudiated," says Section 12(3) of the Sale of Goods Act of 1930. In nutshell, an aggrieved party has a right to sue for damages only and not to avoid the contract itself.



Example: Rajesh buy a new Maruti car from the showroom and the car is guaranteed against any manufacturing defect under normal uses for a period of one year from the date of original purchase and the event of the manufacturing defect there is a warranty for replacement of defective part if it cannot be properly repaired. After 6-month Rajesh finds that the horn of the car is not working, he cannot terminate the contract. The manufacturer can either get it repaired or replaced it with a new horn. Thus, Rajesh gets a right to claim for damages only.



Note: 1. Whether a stipulation is a condition or a warranty depends in each case, on the construction of contract. A stipulation described in the contract as a warranty, may nonetheless a condition.

2. If there is a breach of a warranty, the aggrieved party can only claim damages and it has no right to treat the contract as repudiated.

8.3 Difference between Condition and Warranty

Basis for Comparison	Condition	Warranty
1. Definition	A requirement or event that should be performed before the completion of another action, is known as Condition.	A warranty is an assurance given by the seller to the buyer about the state of the product, that the prescribed facts are genuine.
2. Section defining	Section 12 (2) of Indian Sale of Goods Act, 1930.	Section 12 (3) of Indian Sale of Goods Act, 1930.
3. Association	It is directly associated with the objective of the contract.	It is a subsidiary provision related to the object of the contract.
4. Violation	Violation of condition can be regarded as a violation of the warranty.	Violation of warranty does not affect the condition.
5. Consequences of breach	Termination of contract.	Claim damages for the breach.
6. Remedy available to the aggrieved party on breach	Repudiate the contract as well as claim damages.	Claim damages only.

When Condition is treated as Warranty (Sec 13)

1. **Voluntary waiver of condition.** Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may (a) waive the condition, or (b) elect to treat the breach of the condition as a breach of warranty [Sec. 13(1)]. If the buyer once decides to waive the condition, he cannot afterwards insist on its fulfilment.

2. **Acceptance of goods by buyer.** Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, unless there is a term of the contract, express or implied, to the contrary [Sec. 13(2)]. The provisions of Sec. 13 do not affect the cases where the fulfilment of any condition, or warranty is excused by law by reason of impossibility or otherwise [Sec. 13(3)].

Express Condition and Warranty

The stipulations as to any Implied conditions and warranties may be either:

- i) **Express** - They are "Express" when the terms of the contract expressly state them.
- ii) **Implied** - They are "Implied" when not being expressly provided for.

The law implies them in any particular contract on operation of its own rules. It should however be kept in mind that as per section 16(4) an express condition or a warranty does not contradict a condition or warranty implied by law unless it is incompatible there with. Therefore, it follows that a condition or warranty implied by law may be negative or varied by an express agreement or by the course of dealing between the parties or by trade usage.

8.4 Implied Conditions

Implied conditions are dealt with in Sections 14 to 17 of the Sale of Goods Act, 1930. In every contract of sale, the first implied condition on the part of the seller is that-

- (a) in case of a sale, he has a right to sell the goods, and
- (b) in the case of an agreement to sell, he will have right to sell the goods at the time when the property is to pass. A Buyer is entitled to reject the goods and to recover the price, if the title turns out to be defective [Section 14(a)].

Various implied conditions are discussed below:

1. Sale by description

A condition of a sale by description is that the items must conform to the description, and if the sale is by sample and description, the goods must not only correspond to the sample but also to the description. If something is necessary, and the items presented do not match the description, it is a violation of condition, and the buyer has the right to reject the goods. It is a contract condition that, if broken, empowers the buyer to reject the products regardless of whether or not the buyer is able to inspect them. As a result, it must be established if the buyer decided to acquire items based on their description, that is, whether the description was necessary for recognising the commodities that the buyer agreed to buy.



Example: Anahita at Sarojini Market, New Delhi sells 20 pieces of 5-meter sarees of Manglore silk fabric to Sangmitra on her way from Punjab. There is an implied condition that the silk shall be such as known in the market as Manglore silk. If it's not, she is entitled to reject the goods.

2. Condition as to Title (Section 14(a))

Section 14(a) states that, unless the contract's circumstances indicate otherwise, there is an implied condition on the seller's part that, in the case of a sale, he has the right to sell the goods, and that, in the case of an agreement to sell, he will have the right to sell the goods at the time when the property passes. As a result, if the title turns out to be faulty, the buyer has the right to reject the goods and receive a refund of the purchase price plus damages. This will be allowed even if the buyer has utilised the items.



Example: A purchased 3,000 tins of condensed milk from the United States of America. The tins had been labelled in a way that violated Nestle's trademark. As a result, the customs officers detained them. A had to remove the labels and sell the tins at a loss to obtain the clearance certificate from the customs officials. [Niblett Ltd. v. Confectioners' Materials Co., (1921) 3 K.B. 387] The seller had breached the condition that he had the right to sell [Niblett Ltd. v. Confectioners' Materials Co., (1921) 3 K.B. 387].



Case Analysis:

Issue: Shagun purchases a car from Yogesh. After 2 months Yakub, the true owner of the car demanded it from Shagun. Shagun had to return it to its true owner. Can Shagun get any justice in the given situation?

Rule: There is an implied condition on the part of the seller that in the case of a sale, he must have a right to sell the goods. In the case of an agreement to sell, he must have a right to sell the goods at the time when the property is to pass.

Analysis: In the given case, the Seller sells a stolen car

Conclusion: Since, the seller had no right to sell the stolen car, Shagun is entitled to recover the full price even though several months had passed.

3. Condition as to Merchantability (Section 16(2)):

The term merchantable quality refers to the quality and condition of commodities that would convince a prudent person to accept them as goods of that sort. When items are purchased by description from a seller who trades in products of that description, it is assumed that the commodities are of merchantable quality. Goods must be devoid of any concealed flaws.



Examples:-1. Where the gloves supplied contained certain chemicals which could cause skin disease to a person wearing them next to skin, it was held that because of such a defect in the gloves were not of merchantable quality and the buyer was entitled to reject the goods.

2. A firm of Liverpool merchants contracted to buy from a London merchant a number of bales of Manilla hemp to arrive from Singapore. The hemp was damaged by sea water in such a way that it would not pass in the market as Manilla hemp. *Held*, the goods were not of merchantable quality [*Jones v. Just*, (1868) L.R. 3 Q.B. 197].

3. There was a sale by a grocer of tinned salmon which was poisonous. It resulted in the death of the wife of the buyer. *Held*, the buyer could recover damages including a sum to compensate him for being compelled to hire services which were rendered by his wife [*Jackson v. Watson & Sons*, (1909) 9 K.B. 193 c.A.].

4. P sold a plastic catapult to G, a boy of six. While G was using it in the proper manner, the catapult broke due to the fact that tile material used in its manufacture was unsuitable. result, the boy was blinded in one eye. *Held*, P was liable as the catapult was not of merchantable quality [*Cod ley v. Perry*, (1960) 1 All E.R. 36].



Case Analysis:

Issue: A manufacturer supplied 600 horns under a contract. The horns were found to be dented, scratched and otherwise of faulty manufacture. Can the seller claim the price of horns from the buyers?

Rule: Where the goods are bought by description from a seller who deals in goods of the description, there is an implied condition that the goods shall be merchantable quality. Goods must be free from any hidden defect.

Analysis: In the given case, the horns had dent and scratches. This made them defective.

Conclusion: It can be concluded that since the goods were not of merchantable quality, therefore the seller's suit for price gets dismissed [*Jackson v. Rutax Motor & Cycle Co.*, (1910) 2 K.B. 397].

4. Condition as to Fitness or Quality (Section 16(1)):

As a general rule, a buyer is responsible for assuring himself of the quality of the items he acquires, as well as ensuring that the commodities are suitable for the purpose for which he purchased them. There are, however, several exceptions to this rule of information. There is just an implicit criterion of quality or suitability in these uncommon cases. Thus, if the products purchased are found to be unfit for the purpose for which he brought them, the seller cannot be held liable. The following are the circumstances: -

- i. The buyer should rely on the seller's expertise or judgement.
- ii. The seller's primary business must be the sale of such items.
- iii. The customer must have revealed to the vendor the specific purpose for which the items are required.

5. Conditions Implied in Case of sale by Sample (Section 17(1)):

A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied to that effect. In the case of a contract for sale by sample there is an implied condition that:

- i. The buyer shall have reasonable opportunity of comparing the bulk with sample. If such an opportunity is not afforded; the buyer may refuse to take the goods.
- ii. The bulk shall correspond with the sample as regards quality.
- iii. The goods shall be free from any defect which renders them unmerchantable and which would not be apparent on a responsible examination of sample.



Example: X bought from Y certain quantity of worsted coating equal to sample. The coating was equal to sample but due to a latent defect the cloth was found to be unfit for making coats. The buyer was entitled to reject the goods because the defect contained in the sample was not apparent on reasonable examination of the sample.

6. Conditions as to Wholesomeness -

Condition as to wholesomeness means that goods shall be fit for human consumption. In the case of eatables and provisions in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be Wholesome.



Examples: - 1. A brought a bottle of beer from B, a dealer in wines. The beer was contaminated with arsenic. A on taking the beer, fell ill. B was held liable to A for the consequent illness.

2. F bought milk from A. The milk contained germs of typhoid fever. F's wife took the milk and got infection as a result of which she died. *Held*, F could recover damages [Frost v. Aylesbury Dairy Co. Ltd., (1905) 1 KB. 608].



Case Analysis:

Issue: Chris bought a bun from a local bakery shop. In his last bite he got a piece of stone that broke one of his teeth. He took his broken teeth and the stone to the shop claiming for some remedy. Decide can Chris receive any such remedy under the Contract of Sales goods Act?

Rule: In the case of eatables and provisions in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be Wholesome.

Analysis: Presence of stone indicates that the eatable is having defect in quality. In the case of eatables and provisions in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be Wholesome.

Conclusion: Chris is entitled to recover damages from the bakery shop owner. [Case reference: Chaproniere v. Mason, (1905) 21 T.L.R. 633].

8.5 Implied Warranty

Section 14(b) and section 14(c) of the Sale of Goods Act, 1930 discusses the implied warranty for a contract of sale of goods. Implied warranties under the sales of goods Act, 1930 with examples are discussed below:

1. Warranty as to Non-Existence of Encumbrances: Section 14(b):

If the buyer is required to discharge the amount of the encumbrance it shall be breach of this warranty and the buyer shall be entitled to damages for the same. The buyer is entitled to a further warranty that the goods shall be free from any charge of encumbrance in favour of any third party not declared or not to buyer before or at the time when the contract is made.



Example: Ramesh takes loan from Suresh and hypothecated his scooter with Suresh at security. Later Ramesh sold this scooter to Arun who brought a good faith, here Arun can claim damages from Ramesh because his possession is disturbed by Suresh having a charge.

2. Warranty as to Undisturbed Possession: Section 14(a):

If the buyer right to possession and enjoyment of the goods is in any way disturbed as consequences of the seller's defective title, the buyer may sue the seller for damages for breach of this warranty. In every contract of sale unless there is a contrary intention there is an implied warranty that the buyers shall have and enjoy quite possession of the goods.



Example: Ramesh sold second hand scooter to Suraj spend Rs. 100 on the repairs of this scooter. This scooter was seized by the police as it was a stolen one. Suraj field a Suit against

Ramesh for the recovery of damages for breach of warranty of quiet possession including the cost of the repairs. It was held that Suraj was entitled to recover the same.

3. Disclosure of Dangerous Nature of Goods:

There is another implied warranty on the part of the seller that in case the goods are inherently dangerous or they are likely to be dangerous to the buyer and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger. If there is a breach of this warranty, the seller will be liable in damages.



Example: A sold a tin of disinfectant to B, knowing that it was likely to be dangerous to B, if opened without special care. B opened the tin where upon disinfectant power went into her eyes, causing her injury. Held, A was liable in damages to B, as he failed to warn B of the probable danger.

4. Warranty as to Quality or Fitness by Usage of Trade: Section 16(4):

An implied warranty as to quality or fitness (Implied warranty of fitness) for a particular purpose may be annexed by the usage of trade.

Keywords

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

Warranty: It is the additional stipulation and a written guarantee that is collateral to the main purpose of the contract. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the whole contract however, can claim for the damages. Unlike in the case of breach of condition, in the breach of warranty, the buyer cannot treat the goods as repudiated.

Implied warranties: In a contract of sale, unless there is a contrary intention, there is an implied warranty that (1) the buyer shall have and enjoy quiet possession of the goods [Sec. 14 (b)], and (2) the goods are free from any charge or encumbrance in favour of any third party [Sec. 14 (c)].

Summary

A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty [Sec. 12 (1)]. A condition is a stipulation essential to the main purpose of the contract. In a contract of sale, conditions and warranties may be express or implied. Express conditions and warranties are those which are agreed upon between the parties at the time of the contract. Implied conditions and warranties are those which are implied by law unless the parties stipulate to the contrary. Its breach gives a right to the buyer to treat the contract as repudiated [Sec. 12 (2)]. A warranty is a stipulation collateral to the main purpose of the contract. Its breach gives rise to claim for damages but not a right to reject the goods and treat the contract as repudiated [Sec. 12 (3)].

The condition as to quality or fitness is implied where (a) the goods sold are such as the seller deals in the ordinary course of his business; (b) the buyer relies on the seller's skill or judgment as to the fitness of the goods for any particular purpose; and (c) the buyer expressly or impliedly makes known to the seller that he wants the goods for that particular purpose [Sec. 16 (1)]. An implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. In the case of a contract for sale by sample there are few implied conditions (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample (Sec. 17).

SelfAssessment

Q1. Conditions are stipulations _____.

- A. essential to the main purpose of the contract
- B. collateral to the main purpose of the contract
- C. either 'a' or 'b'
- D. neither 'a' nor 'b'

Q2. A warranty is stipulation _____.

- A. essential to the main purpose of the contract
- B. collateral to the main purpose of the contract
- C. very important to the seller
- D. very important to the buyer

Q3. Breach of a condition gives rise to _____.

- A. claim for damages
- B. a right to treat the contract as repudiated
- C. both 'a' and 'b'
- D. either 'a' or 'b'

Q4. Breach of a warranty gives rise to _____.

- A. claim for damages
- B. a right to treat the contract as repudiated
- C. both 'a' and 'b'
- D. either 'a' or 'b'

Q5. What are implied stipulations of a contract?

- A. agreed by the parties.
- B. incorporated by law unless specifically agreed otherwise.
- C. implied by the circumstances
- D. implied by trade customs

Q6. If the condition as to the title of goods is not fulfilled, the buyer _____.

- A. may reject the goods
- B. has no alternative but to buy the goods
- C. may reject the goods and claim damages
- D. all the above

Q7. In a sale by sample and description, there is an implied condition _____.

- A. that bulk of the goods correspond with the sample
- B. the bulk of goods must correspond either to the description or to the sample
- C. the bulk of goods must correspond to the description only
- D. that bulk of goods must correspond to the description as well as the sample thereof

Q8. "If you contract to sell peas, you cannot oblige a party to have beans": this statement applies to _____.

- A. the implied condition as to fitness of goods for a particular purpose
- B. implied condition as to be description of goods
- C. implied condition as to sample
- D. implied condition as to title

Q9. As per section 11 of the Sale of Goods Act, 1930, the time of payment can be of the essence of the contract _____.

- A. by operation of law
- B. by agreement between the parties
- C. both (a) and (b)
- D. either (a) or (b)

Q10. Whether or not any stipulation other than time of payment is of the essence of the contract depends upon _____.

- A. application of section 11
- B. operation of law
- C. terms of the contract
- D. all of the above

Q11. A stipulation in a contract of sale which is collateral to the main purpose of contract is called as _____.

- A. Guarantee
- B. warranty
- C. condition
- D. term

Q12. Merchantable quality of goods means _____.

- A. that the goods are commercially saleable
- B. they are fit for the purpose for which they are generally used
- C. both 'a' and 'b'
- D. the quality should be of high standard

Q13. A told B, a car dealer, that he wanted to purchase a car 'suitable for touring purposes'. B suggested that a 'Bugatti' car would be fit for the purpose. Relying upon this statement, A bought a 'Bugatti' car which turned out to be unfit for touring purposes Here a

- A. Cannot reject the car, he can claim damages only.
- B. Can neither reject the car nor claim any damages.
- C. Can reject the car and have half refund of price.
- D. Can reject the car and have the refund of the price.

Q14. Implied warranty of freedom from _____ means the buyer is entitled to a warranty that the goods he purchases are not subject to any charge in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

- A. Encumbrance
- B. Presentable
- C. Wholesome
- D. Merchantable

Q15. X purchased a hot water bag from a Chemist. The bag leaked and injured his wife. The Chemist is liable on account of -

- A. Breach of express condition as to quality
- B. Breach of implied condition as to quality
- C. Personal injury caused to the Buyer's wife
- D. Hot water bottle sales are illegal

Answer for SelfAssessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. A | 2. B | 3. C | 4. A | 5. B |
| 6. C | 7. D | 8. B | 9. B | 10. C |
| 11. B | 12. C | 13. D | 14. A | 15. B |

Review Questions

Q1. Discuss the conditions and warranties implied by law in a contract for the sale of goods.

Q2. State the conditions implied in a contract for the sale of goods (a) by description, (b) by sample, and required for a particular purpose.

Q3. What do you mean by the term condition and warranty. Differentiate between condition and warranty.

Q4. Do the case analysis of given cases: -

- a) Ajay purchases some chocolates from a shop. One of the chocolates contains a poisonous matter and as a result A's wife who has eaten it falls seriously ill. What remedy is available to Ajay against the shopkeeper?

[Hint: The chocolates are not of merchantable quality and hence A can repudiate the contract and recover damages (Sec. 16 (2))]

- b) Worst cotton cloth of quality equal to sample was sold to tailors who could not stick it into coats owing to some defect in its texture. The buyers had examined the cloth before effecting the purchase. Are they entitled to damages?

[Hint: Yes, as there is a latent defect in cloth (Sec. 17; Drummond v. Van Ingen).]

Q5. Do the case analysis of given cases: -

In an auction sale of a set of Napkins and table clothes, these were described as dating from the seventh century; the buyer bought the set after seeing it. Subsequently it was found that the set was not of the seventh century but of the eighteenth century. Is the sale binding on the buyer?

[Hint: No, as sales by description is not met]

Anwar contracts to sell Bhanita a piece of silk. Bhanita thinks it is Indian Silk and Anwar knows this. Anwar does not correct her and later after sale Bhanita comes to return the cloth. Anwar refuses to take back cloth. Is Anwar supposed to accept the returned good by Bhanita?

[Hint: No, as according to rule of caveat emptor Bhanita is responsible for her choice]



Further Readings

1. A TextBook of Mercantile Law by P.P.S. Gogna, S. Chand & Company
2. Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
3. A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law by S SGulsan, Excel Books
5. Mercantile Law by M C Kuchchal, Vikas Publishing House
6. Legal Aspects of Business By Daniel Albuquerque, Oxford &Ibh

Unit 09: Sale of Goods Act, 1930

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Objectives

After studying this unit, you will be able to:

- Comprehend the doctrine of Caveat Emptor
- Understand the rights of an unpaid seller

Introduction

“Caveat Emptor” is a Latin phrase. This phrase can be translated as “let the buyer beware”. You may wonder as to What exactly does this mean? Does the seller have no responsibilities? The answers lie in going into the roots of Doctrine of Caveat Emptor and its exceptions, which we shall discuss in detail. Let us also learn that in case a buyer fails or refuses to pay, the seller, as unpaid seller, shall have what all rights.

9.1 Concept of Doctrine of Caveat Emptor

The term "Caveat Emptor" is a Latin term which means, let the buyer beware. In other words, it is no part of the seller's duty to point out defect of the good which he offers for sale, rather it is the duty of the buyer to satisfy himself about the quality as well as the suitability of the goods. The person who buys goods must keep his eyes open, his mind active and should be cautious while buying the goods. If he makes a bad choice he must suffer the consequences of lack of skill and judgement in the absence of any misrepresentation or guarantee by the seller. The rule of caveat emptor is articulated in the Sec. 16 which states that “Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale ...”

Example: Harris sends 32 pigs into the market for sale by auction. The pigs were sold to William “with all faults and errors of description”. Harris knew that the pigs were suffering from swine-fever, but he never disclosed this to William. Held, there was no implied warranty by Harris and the sale was good and Harris was not liable in damages [Ward v. Hobbs, (1878) 4 App. Cas 13].

9.2 Exceptions to Doctrine of Caveat Emptor

In certain circumstances, however the Doctrine has no application. They are as follows:

1] Fitness of Product for the Buyer's Purpose: When the buyer informs the seller of his purpose of buying the goods, it is implied that he is relying on the seller's judgment. It is the duty of the seller then to ensure the goods match their desired usage.



Example: Amanda goes to Binny to buy a bicycle. She informs Binny she wants to use the cycle for mountain trekking. If Binny sells her an ordinary bicycle that is incapable of fulfilling Amanda's purpose the seller will be responsible.

2] Goods Purchased under Brand Name: When the buyer buys a product under a trade name or a branded product the seller cannot be held responsible for the usefulness or quality of the product. So, there is no implied condition that the goods will be fit for the purpose the buyer intended.

3] Goods sold by Description: When the buyer buys the goods based only on the description there will be an exception. If the goods do not match the description then in such a case the seller will be responsible for the goods.

4] Goods of Merchantable Quality: The exception of merchantable quality is dealt with in Section 16 (2). According to the sections, a seller selling products by description has an obligation to provide items of merchantable quality, i.e., goods that can pass market requirements. As a result, if the items are not of marketable quality, the buyer will not be held liable. It will be the seller's obligation to take care of it. However, if the buyer has had a reasonable chance to examine the product, then this exception will not apply. **5] Sale by Sample:** If the buyer buys his goods after examining a sample then the rule of Doctrine of Caveat Emptor will not apply. If the rest of the goods do not resemble the sample, the buyer cannot be held responsible. In this case, the seller will be the one responsible.



Example: Akanksha places an order for 50 Mcqueentoy cars with Benny. She checks one sample where the car is red. The rest of the cars turn out blue, yellow and orange. Here the doctrine will not apply and Benny will be responsible.

6] Sale by Description and Sample: If a product is sold based on a sample and/or a description, the buyer is not liable if the products do not match the sample and/or the description. The vendor will then be held entirely responsible.

7] Trade Usage: There is an implied condition or warranty on the quality or suitability of goods or products. However, if a seller deviates from this, the caveat emptor principles no longer apply.

Example: At an auction of a ship's cargo, Amanda purchased things from Cimantha. However, because Cimantha failed to tell Amanda that the contents were marine damaged, the doctrine's restrictions will not apply.

8] Fraud or Misrepresentation by the Seller: In case the seller obtains the consent of the buyer by fraud then the doctrine of caveat emptor will not apply. Furthermore, if the vendor hides any significant faults in the items that are later revealed upon closer inspection, the buyer is not liable. In both cases, the seller will be the guilty party.

Who is an unpaid seller?

A seller of goods is an unpaid seller when:

1. The entire price has not been paid or offered, a seller of goods is considered unpaid.
2. a bill of exchange or other negotiable instrument has been received as conditional payment, but the condition has not been met due to the instrument's dishonour or other circumstances.

9.3 Rights of an Unpaid Seller

In a contract of sale, a seller is under an obligation to deliver the goods sold and buyer is under an obligation to pay the requisite amount set or quid pro quo i.e something in return, under the contract of sale, by them. This is known as reciprocal promise as per Section 2(f) of the Indian Contract Act. In other words, any set of promises made which forms the consideration or part of the consideration for each other are called reciprocal promises and every contract of sale of goods

consists of reciprocal promises. In certain cases, when a buyer refuses or fails to pay the requisite amount to the seller, the seller becomes an unpaid seller and can exercise certain rights against the buyer. These rights are considered as seller's remedies in case there is a breach of contract by the buyer. These remedies can be against Buyer as well as Goods.

According to Section 45(1) of Sale of Goods Act, 1930, the seller is considered as an unpaid seller when: - a) When the whole price has not been paid and the seller has an immediate right of action for the price. B) When Bills of Exchange or other negotiable instrument has been received as conditional payment, and the pre-requisite condition has not been fulfilled by reason of the dishonour of the instrument or otherwise. For instance, X sold some goods to Y for \$50 and received a cheque. On presentment, the cheque was dishonoured by the bank. X is an unpaid seller.

A. Rights against buyer

1. **Suit for the price:** When goods are passed on to the buyer and the buyer has wrongly disregarded or refused to pay according to the contract's terms and circumstances, the seller may sue him under Section 55(1), since the buyer is obligated to pay the price after the property has been passed. However, if the required deadline for payment has passed and the products have not yet been delivered, the seller may sue the buyer for willful neglect or refusal under Section 55, clause 2. If the price is owed in a foreign currency, the damages must be computed using the exchange rate in effect at the time the price was paid.



Example: Laurine sold certain goods to Bella for Rs. 5,000 and the price was agreed to be paid before the expiry of ten days of the contract. Bella fails to pay the price within the stipulated time. Laurine can file a case for price against Bella even though the goods have not been delivered or the property in goods has not been passed to Bella.

2. **Suit for damages:** In case there is a wrongful refusal on the part of buyer for acceptance of goods and payment of money, the seller can sue him for damages of non-acceptance as per Section 56. For calculating the quantum of damages Section 73 and 74 of the Indian Contract Act applies. In case the goods have a ready market, the seller has to resell the goods and buyer have to pay the losses if incurred. If the seller does not resell the goods the difference between contract and market price at the day of breach is taken as a measure for damages. If the difference between them is nil seller gets nominal value. There is a duty of mitigation on the part of the seller, which means that injured has to make reasonable efforts to minimize the loss from that breach. For instance, if the seller can resale the goods, the difference in price in contract and resale price is given to the seller but if the seller deliberately refuses to resale the goods and its market value reduces then the buyer will not be liable for the exaggerated loss.

3. **Suit for interest:** As stated under Section 61, where there is a specific agreement between buyer and seller with regards to interest on the price of goods from the date on which payment becomes due, the seller may recover interest from a buyer. But if there were no such agreement the seller may charge interest from the day he notifies the buyer. If there is no contract to the contrary, the court of law may award interest to the seller at such rate as it thinks fit on the amount of the price from the date on which amount is payable.

4. **Repudiation of the contract before the due date:** Section 60 applies the rule of anticipatory breach contract, which states that if the buyer repudiates the contract before the delivery date, the seller can consider the contract cancelled and seek for breach damages. If one party repudiates before the due date, the other party has two options, according to this section. Either he can acknowledge the breach right away and file a damages action, in which case the contract will be cancelled and damages will be awarded based on the pricing in effect at the time, or he can wait until the delivery date. The contract in the second situation is open at risk and will benefit both parties. It's possible that the party will change their minds and agree to perform, in which case damages will be calculated using the pricing in effect on the day of delivery.

B. Rights against goods

1. **Lien:** Lien is a right which seller of goods can exercise when a buyer has not paid the price of goods, under this right seller can retain the possession of goods as an agent or bailee for the buyer. The seller can retain his possession as per Section 47 under the following circumstances:
 - In case the buyer is insolvent.

- When the term of goods sold on credit is expired.
- Goods sold without any stipulation as to credit.

When products are sold on credit, the right to lien is suspended for the duration of the credit, and the lien is only for the price of the items, not any other costs. If the seller has delivered a portion of the unpaid goods, he can exercise his right of lien on the remainder under Section 48. The vendors in *Grice V Richardson* had delivered a portion of the three packages of tea included in the deal, but had not been paid for the portion that remained with them. They were given permission to retain it until the price was paid. Where, however, a part of goods delivered which show an agreement to waive the lien, the seller cannot claim the remainder.



Example: The seller cannot claim lien for godown charges for storing the goods in exercise of his lien for the price.

Termination of lien takes place when the seller loses the possession of goods. As per Section 49, under following circumstances right of lien is terminated-

1. Waiver of lien: The right of lien is an implied right attached by law in every contract of sale, the seller has the autonomy to waive this right, it may be expressed or implied from the conduct of the seller.
2. When buyer or agent lawfully obtains possession of goods: Once the buyer got the possession of goods from the seller, all the rights of the seller in respect to goods are ceased even if the price is not paid. The seller can recover the price as a normal debt because the acceptance of possession gives absolute, unqualified and indefeasible right of goods to the buyer. When the goods are given again to the seller for repair he cannot access the right of lien.
3. When the seller delivers goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.
4. When the seller has delivered goods to the carrier for transmission, his right of lien is ceased but the right to stoppage in transit is still accessible by him. In case seller regains possession of goods in transit by stoppage his right to lien is revived.



In *Valpy V Gibson*, the goods were delivered to the buyer's shipping agent, who had put them on board a ship. But the goods were returned to the seller for repacking, while they were still with the seller the buyer became insolvent and seller being unpaid seller claimed to retain the goods in the exercise of their lien. It was held that they have lost their lien by delivery to the shipping agent. On the contrary, when the seller has reserved the rights of disposal his right of lien continues till the end of the transit. And the seller cannot lose his right to lien just because he has obtained a decree for the price of goods.

2. Stoppage in transit: When the goods have been transferred to carrier or bailee for the purpose of transmission to the buyer, who has become insolvent, the seller has the right to stop the goods in transit in order to protect himself against the loss that may arise due to insolvency.



Examples: (i) Badal at Delhi orders goods of Anand at Calcutta. Anand consigns and forwards the goods to Badal. On arrival at Delhi, goods are taken to Badal's warehouse and left there. Badal refuses to take the goods and stop payment. The goods are deemed to be in transit and the unpaid seller can take them back.

(ii) The goods are delivered on board the ship belonging to the buyer. Under the bill of lading the goods are deliverable to the buyer or his agents. Such a bill of lading is a delivery to the buyer and therefore, there could be no right of stoppage in transit.

As per Section 50, there are four essential requirements for stopping the goods in transit:

- Unpaid seller.
- Buyer insolvent.

- Property should have passed to the buyer.
- Property should be in course of transit.

The course of transit depends upon the capacity of middleman to hold the goods. Middleman should be an intervening person between the seller who has parted with the goods and the buyer who has not yet received the goods as held in the case of *Schotsmans v Lancashire & Yorkshire Rly Co*. Section 5 lays down the rules and regulations related to commencement and end of the transit, this Section is divided into seven sub-Sections which solve all the issues related to commencement and end of transit:

a) Delivery to the buyer: Goods are considered to be in transit from the time when they are delivered to the carrier or other bailee for the purpose of transmission to the buyer, till the goods are received by the buyer himself or his agent takes delivery of them. But when the buyer denies accepting the delivery even when it has been landed at the place of destination, the transit does not end. This happened in the case of *James v Griffin* where on arrival of goods at the port of destination in the river Thames, the buyer sent his son to have goods landed, but told him that on account of his insolvency he did not intend to receive the goods and would like the seller to have them. When goods were so lying the seller's instruction to stop them was received. The buyer's trustee in bankruptcy claimed the goods. It was held that the goods were still in transit.



Example: The vendor entrusted the goods to the GIP Ry Co for carriage to the buyer in the case of *Great Indian Peninsula v Hanmandas*. The firm had handed the products to the buyer who had put them on his cart upon arriving at the destination, but the cart had not yet left the railway property when the company got a telegraph to halt the items. The corporation failed to do so, and the seller filed a lawsuit for damages. The transportation was said to have concluded when the products were turned over to the buyer.

b) Buyer interception: When the buyer or agent accepts receipt of the goods from the carrier, the transit period ends even before they arrive at the designated location. Although it is unlawful and the carrier may be held accountable for damages if the carrier delivers the items before the buyer arrives, the transit ends here. In *Lyons v. Honffnung*, the buyer takes a passenger seat on a ship that was transporting the goods. According to the court, this does not constitute delivery to the customer prior to their presence at the specified location.

c) Acknowledgement to the buyer: The transit is considered to come to an end when the goods arrive at the appointed destination and the carrier acknowledges to the buyer or his agent that he is now holding the goods on his behalf. It is immaterial if the goods are still in the carrier or the buyer has indicated another destination. In order to put an end to the original contract of carriage, a very clear acknowledgement is required. In the case of *Whitehead v. Anderson*, a quantity of timber was consigned on board. When the ship arrived at the destination, the buyer went bankrupt. The buyer's agent came to the board and told that he has come to take possession. The captain said that he will deliver only when the freight is paid. Before this could be done, the seller sent a notice to stop and asked to send the goods to be delivered to the agent of the seller. The court said that since the transit has not ended, the carrier was within his rights in returning the goods to the seller. The captain agreed to deliver the goods on a condition and if the condition is not fulfilled, the buyer does not acquire the constructive possession of goods.

d) Rejection by the buyer: When the buyer rejects the goods and the carrier or other bailee continues to possess them, the goods are held to be still in transit. This will also include the case when the seller himself refuses to take back goods.

e) Delivery to ship chartered by the buyer: It is a question of fact whether the carrier is acting independently or as an agent of the buyer at the time when the goods are delivered to a ship chartered by buyer. As soon as the goods are loaded on the ship, the transit ends if the carrier is acting as an agent of the buyer. Thus, for instance, *Rose wear china clay co ltd, re*, the contract was for the sale of china clay at FOB Fowey. The buyer chartered a ship and instructed the seller to load to the goods at Fowey, which was accordingly done. The destination of the ship was not told to the seller nor any bill of lading signed. The seller gave notice stopping the goods.

f) Wrongful refusal to delivery: The transit is completed when the carrier incorrectly refuses to deliver the items to the buyer or his agent. The carrier has the authority to deny delivery if the items have not arrived at their location. In the case of *Bird v. Brown*, the court considered whether refusing to accept delivery of goods is illegal. The items arrived at their destination in this case, but

the customer went bankrupt. The seller was served with a stop notice by a merchant who was acting on behalf of the seller. Due to the buyer's insolvency, the buyer's trustee requested the products. The transporter declined to deliver the goods and instead handed them over to the customer. The carrier refused to deliver the goods and handed them to the merchant. The court said that after the formal demand for goods by the trustee, there could be no valid stoppage in transit.

g) Part delivery: In the case when the goods have been delivered partly, the seller has a right to stop the delivery of the rest of the goods unless the part delivery shows an agreement to the possession of the whole.



Example: Aju sells to Bijju 20kg of wheat, 10kg has been transferred to Bijju but rest 10kg is still in transit, in case Bijju fails to pay Aju has a right to stop the goods in transit.

Resale: While exercising the right of lien or stoppage does not rescind the agreement, reselling the products does, and without this right, the other two rights of lien and stoppage would be useless because he can only keep the items until the buyer repays the money. Under the following conditions and circumstances, the underpaid seller may use his claim:

1. Before reselling the items, the seller must give a notification to the buyer, unless the goods are perishable, giving him one final chance to pay the price and return the goods within a reasonable time frame. If the buyer does not pay the money back seller has the right to resell the goods. If the seller fails to give notice of his intention to resell, he cannot claim damages from the buyer and he has to give any profit.
2. If there is any loss in the resale of goods he can claim the loss from the buyer, on the contrary, if there is profit buyer cannot claim it.
3. Seller gives rightful ownership to buyer after the resale it does not matter notice of resale is given or not to defaulted buyer.
4. Sometimes the seller reserves exclusive right to resale the goods if the buyer makes a default in payment, in such cases the buyer cannot ask for profit on resale if no notice is served and seller has the exclusive right to resale.

Example: *R V Ward V Bignall*, there was a contract of sale of two cars, vanguard and zodiac for 850\$. The buyer deposited 25\$ but afterwards did not pay the price despite a reasonable notice. The seller then tried to resell but could be sold only a vanguard for 359\$. he then claimed damages for 475\$ representing the balance of price and 22\$ as advertising expenses. Court held that once the seller resells the goods the contract is rescinded and he cannot claim the money but he can ask for advertising expenses and a shortfall in the price of the vanguard.

Rights against Seller

1. Damages for non-delivery: Section 57 states that, whenever any seller or refuses to deliver the goods to the buyer, the buyer may sue for non-delivery of goods. If the buyer has paid any amount he is entitled to recover it. Quantum of damages is decided through market forces, contract and market price on the day of the breach is considered as damages. If the buyer wants to claim that damages he must prove it in the court of law, otherwise, he cannot get a penny more than refund i.e the amount he has already paid. Buyer must try to keep the loss at a minimum by purchasing the goods from other sources instead of waiting for the market to fluctuate.

2. Suit for specific performance: According to Section 58 when goods are specific or ascertained and there is a breach of contract committed on the part of the seller then the buyer can appeal to the court of law for specific performance. The seller has to perform the contract and he does not have any option of retaining the goods by paying damages. The power of the court to order specific performance is subject to the provisions of chapter II of Specific Relief Act, 1963. Thus, on the sale of ship buyer was allowed to recover the ship specifically in the case of *Behnke V Bede Shopping*, there was a ship named the city which holds a unique value to the plaintiff but she was a cheap vessel being old but her engines were new and as to satisfy the German regulations and hence plaintiff could as a German shipowner have her at once put on the German register. A very experienced ship-valuer has said that he knew only one other comparable ship, but that may not be sold. Thus, on sale of a ship buyer was allowed to specifically recover the ship.

3. Suit for breach of warranty: As stated under Section 59, the buyer cannot reject the goods solely on the basis of breach of warranty on the part of the seller or when a buyer is forced to treat a breach of condition as a breach of warranty. But he may sue the seller for damages or set up against the seller the breach of the warranty in the extinction of the price. The measure of damages is directly and naturally occurring loss in ordinary events from breach of warranty. Mason V Burningham, the buyer of a second-hand typewriter spends some money on getting it overhauled. Afterwards, the typewriter was seized from her as stolen property. This was a breach on the part of the seller of warranty of quiet possession. She was held entitled to recover damages including the cost of repair. She did a natural thing in having the typewriter repaired and the amount she had spent was a loss directly and naturally resulting from the breach.

4. Suit for anticipatory breach: According to Section 60, the rule of anticipatory breach contract applies, wherein, if any party repudiates the contract before the date of delivery the other party can consider the contract as rescinded and can sue for damages of the breach. According to this Section, if one party repudiates before due date other has two courses of action. Either he may immediately accept the breach and bring the action of damages the contract is rescinded and damages will be assessed according to the prices then prevailing or he can wait for the date of delivery. In the second case, the contract is open at risk and will be a benefit to both parties. Maybe the party changes his mind and agree to perform and damages will be assessed according to prices on the day of delivery.

Keywords

Lien means to retain possession.

Unpaid seller: A person who is in possession of goods is entitled to retain them in his possession until payment.

Summary

The seller becomes an unpaid seller when either he had not been paid in full or the buyer has failed to meet the maturity of bills of exchange or any other negotiable instrument accepted by seller as a condition precedent. Under this situation, the seller can resell the goods if he had exercised the right of lien or stoppage in transit, after giving notice to the buyer and the new buyer will have good title over the goods. In this case, the seller has the right to sue the buyer for failure to pay the required amount as well as a lien. On the contrary, if the seller fails to deliver goods to the buyer, he may sue the seller for non-performance and can claim damages or specific performance.

These conditions and warranties may be express or implied. Thus, sale takes place when there is a transfer of ownership in goods from the seller to the buyer.

- A sale is an executed contract.
- The term seller includes any person who is in the position of a seller, e.g., an agent of the seller, to whom a bill of lading has been endorsed, or a consignee or agent who has paid for the goods or is responsible for the price (s.45).
- The word lien means to retain possession of.
- No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.

Self Assessment

Q1. An unpaid seller has not given notice of resale to the buyer. On the resale there is a loss _____.

- A. the unpaid seller can recover it from the buyer.
- B. the unpaid seller cannot recover it from the buyer
- C. the buyer can recover it from an unpaid seller.

D. the buyer must compensate the unpaid seller.

Q2. An unpaid seller can exercise the right of stoppage in transit when the carrier holds the goods

-
- A. as sellers' agent.
 - B. as buyer's agent.
 - C. as agent of both of them.
 - D. in his own name.

Q3. The right of lien exercised by an unpaid seller is to _____

- A. retain possession.
- B. regain possession.
- C. recovery price and other charges.
- D. Damages.

Q4. An unpaid seller can exercise his rights of lien _____.

- A. where the goods have been sold on credit and terms of credit has not expired
- B. where the buyer has not become insolvent.
- C. for the price of the goods.
- D. for the price of the goods and expenses.

Q5. The lien of an unpaid seller depends on _____.

- A. possession.
- B. title.
- C. ownership.
- D. possession and ownership.

Q6. In a sale, there is an implied condition on the part of the seller that he _____.

- A. Is in position of the goods.
- B. Will have the right to sell.
- C. Has right to sell the goods.
- D. Has the right to sell the goods

Q7. The doctrine of caveat emptor applies _____

- A. When the buyer does not intimate the purpose to the seller and depends upon his own skill and judgment
- B. In case of implied conditions and warranties.
- C. When goods are sold by sample.
- D. When goods are sold by description.

Q8. If a price is not determined by the parties in a contract of sale, the buyer is bound to pay _____

- A. The price demanded by the seller
- B. reasonable price

- C. The price to be determined by a third independent person
- D. The price which the buyer thinks is reasonable.

Q9. In a sale, the property in goods _____

- A. Maybe transferred at a future time
- B. Is transferred when the buyer pays the price.
- C. Is transferred when goods are delivered to the buyer.
- D. Is transferred to the buyer.

Q10. The word "perishable" in respect of goods, u/s 54 of the Sale of Goods Act, means _____.

- A. physically perishable
- B. Commercially perishable
- C. both (a) and (b)
- D. either (a) or (b)

Q11. Where the neglected or refusal of the buyer to take delivery of goods amounts to a repudiation of the contract, the seller may sue for the _____.

- A. price of damages.
- B. price only.
- C. damages only.
- D. both for price and damages.

Q12. Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving a sea transit of the seller _____

- A. must inform the buyer in time to get the goods insured
- B. may insure the goods.
- C. must insure the goods.
- D. no need to insure the goods.

Q13. When there is n specific agreement as to place, the goods sold are to be delivered at the place _____.

- A. at which they are at the time of sale.
- B. of the buyer.
- C. decide by the seller.
- D. to be determined by the seller.

Q14. Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving a sea transit of the seller _____

- A. may insure the goods.
- B. must insure the goods.
- C. A. must inform the buyer in time to get the goods insured
- D. no need to insure the goods.

- Q15. A seller delivers goods in excess of the quantity ordered for. The buyer may _____.
- accept the whole.
 - reject the whole.
 - accept the goods ordered for and returns.
 - accept the part of goods.

Answer for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. B | 2. D | 3. B | 4. C | 5. A |
| 6. C | 7. B | 8. B | 9. C | 10. D |
| 11. A | 12. D | 13. A | 14. C | 15. A |

Review Questions

- Q1. Explain the concept of doctrine of caveat emptor along with its exceptions.
- Q2. Who is an unpaid seller? Discuss the rights of an unpaid seller against goods?
- Q3. Who is an unpaid seller? Discuss the rights of an unpaid seller against buyer?
- Q4. a) Bankae, a farmer, simply exhibits oats in his farm. Brijesh buys the oats in the belief that they are old oats. In fact, they are new oats. Brijesh wants to return the oats and refuses to pay the price. Can he do so? Give reasons in support of your answer.
- b) Rosa contracts with Jagdish to buy a necklace, believing it is made of pearls whereas in fact it was made of imitation pearls of no value. Jagdish knows that Rosa is mistaken and takes no steps to correct the error. Is Rosa bound by the Contract? Give reasons in support of your answer.
- Q5. a) Mr. Gupta sold a quantity of wheat to Mr. Verma, who paid by cheque which was dishonoured upon presentation, Mr. Gupta gave a delivery order to Mr. Verma for the wheat and Mr. Verma resold it to Sahil, purchaser in good faith, for consideration indorsing the delivery order to him. Mr. Gupta refuses to deliver the goods to Sahil on the plea of non-receipt of price. Advise Sahil.
- b) Rahul sells and consigns goods to Ravi of the value of ` 10,000. Ravi assigns the bill of lading for these goods to Roshan to secure the sum of ` 4,000 due from him to Roshan, Ravi becomes insolvent. Can Rahul stop the goods in transit?



Further Readings

- A TextBook of Mercantile Law by P.P.S. Gogna, S. Chand & Company
- Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
- A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
- Mercantile Law by S SGulsan, Excel Books
- Mercantile Law by M C Kuchchal, Vikas Publishing House
- Legal Aspects of Business By Daniel Albuquerque, Oxford & Ibh



Web Links

<https://www.toppr.com/guides/business-laws/the-sale-of-goods-act-1930/doctrine-of-caveat-emptor/>

<https://www.vedantu.com/commerce/doctrine-of-caveat-emptor>

<https://blog.ipleaders.in/rights-of-an-unpaid-seller/>

Unit 10: Limited Liability Partnership Act, 2008

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Objectives

After studying this unit, you will be able to:

- Comprehend the different types of entities
- Cognize the types of Partners
- Understand the difference between Company, LLP and Partnership

Introduction

The Parliament passed the Limited Liability Partnership Bill on 12th December, 2008. The President of India assented this Bill on 7th January, 2009 and it became an act, that is called as the Limited Liability Partnership Act, 2008. It is applicable to the whole of India. As an Act, it contains all the necessary provisions pertaining to the formulating and regulating the Limited Liability Partnerships and matters connected therewith or incidental thereto. There are 81 sections and 4 schedules under this Act. The First Schedule of the Act deals with mutual rights and duties of partners. The Second Schedule is all about how to convert a firm into LLP. The Third Schedule provides for conversion of a private company into LLP while the Fourth Schedule deals with conversion of unlisted public company into LLP. This Act may be called the Limited Liability Partnership (Amendment) Act, 2021 as it received the assent of the President on the 13th August, 2021 to amend the Limited Liability Partnership Act 2008.

10.1 Meaning of Limited Liability Partnership

A partnership formed and registered under this Act is referred to as a limited liability partnership (LLP). It is an alternative corporate company form that provides the partners with limited

responsibility while maintaining minimal compliance expenses. It also allows them to create their internal structure in the same way that they would in a regular partnership. In simple words, a limited liability partnership is a legal entity that is responsible for all of its assets. The partners' responsibility, on the other hand, is restricted. As a result, it is a cross between a corporation and a partnership. The Limited Liability Partnership Act, 2008 was enacted by the Parliament of India to introduce and legally sanction the concept of LLP in India. It is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership.

10.2 Important Definitions

Body Corporate" means a company as defined in section 3 of the Companies Act, 1956 (1 of 1956) and includes--

- (i) a limited liability partnership registered under this Act;
- (ii) a limited liability partnership incorporated outside India; and
- (iii) a company incorporated outside India,

but does not include--

- (i) a corporation sole;
- (ii) a co-operative society registered under any law for the time being in force; and
- (iii) any other body corporate (not being a company as defined in section 3 of the Companies Act, 1956 (1 of 1956) or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf;

Business: It refers to as every trade, profession, service and occupation;

Designated partner: It means any partner designated as such pursuant to section 7;

Entity means anybody corporate and includes, for the purposes of sections 18, 46, 47, 48, 49, 50, 52 and 53, a firm setup under the Indian Partnership Act, 1932 (9 of 1932);

Financial year: In relation to a limited liability Partnership, a Financial Year means the period from the 1st day of April of a year to the 31st day of March of the following year:

Provided that in the case of a limited liability partnership incorporated after the 30th day of September of a year, the financial year may end on the 31st day of March of the year next following that year;

Foreign limited liability partnership: It is an entity formed, incorporated or registered outside India which establishes a place of business within India;

Limited liability partnership: It means a partnership formed and registered under this Act;

Limited liability partnership agreement: Any written agreement between the partners of the limited liability partnership or between the limited liability partnership and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that limited liability partnership is known as a Limited liability partnership agreement.

Partner: In relation to a limited liability partnership, a Partner means any person who becomes a partner in the limited liability partnership in accordance with the limited liability partnership agreement;

10.3 Essentials of a Limited Liability Partnership (LLP)

1. Body corporate: An LLP is a body corporate that is created and incorporated under the Section 3 of Limited Liability Partnership Act 2008. It is a separate legal entity from its shareholders.

2. Perpetual Succession: Unlike a general partnership, a limited liability partnership continues to exist even if one or more partners die, retirement, insanity, bankruptcy, or insolvency. It also has the ability to make contracts and possess property in its own name.

3. Separate Legal Entity: A Limited Liability Partnership has a separate identity. It means that it is totally liable for its assets. Also, the liability of the partners under it has certain limitations in their contribution made. In simple words, the creditors of the LLP are not the creditors of individual partners.

- 4. Mutual Agency:** All partners are agents and the actions of one partner do not bind the others.
- 5. LLP Agreement:** It governs the rights and duties of all the partners. Also, they can formulate the agreement as per their choice. If such an agreement is not made, then the Act governs the mutual rights and duties of all partners.
- 6. Artificial Legal Person:** A Limited Liability Partnership is an artificial legal person. A legal process creates it. It has all the rights of an individual. It is invisible, intangible, and immortal but not fictitious since it exists.
- 7. Common Seal:** If the partners decide, the LLP can have a common seal. It is not mandatory though. However, if it decides to have a seal, then it is necessary that the seal remains under the custody of a responsible official. Further, the common seal can be affixed only in the presence of at least two designated partners of the LLP.
- 8. Limited Liability:** According to Section 26 of the Act, every partner is an agent of the LLP for the purpose of the business of the entity. However, he is not an agent of other partners. Further, the liability of each partner has limitations to his agreed contribution to the LLP. It provides personal liability protection to its partners.
- 9. Minimum and Maximum Number of Partners in an LLP:** A Limited Liability Partnership (LLP) must have at least two partners and two designated partners. At least one designated partner should be based in India at all times. The number of maximum partners in the entity has no upper restriction. If the number of partners in a limited liability partnership is reduced below two at any time and the limited liability partnership continues to operate for more than six months while the number is so reduced, the person who is the limited liability partnership's only partner during the time it continues to operate after those six months and has knowledge of the fact that it is operating with him alone is personally liable for the obligations.
- 10. Business Management and Structure:** The LLP's members are capable of managing their company. Legal compliance, on the other hand, is the responsibility of only the designated partners.
- 11. Limited Liability Partnerships:** It may only be created for profit. They cannot be formed for philanthropic or non-commercial purposes. It is critical that the corporation be constituted in order to carry on a legal business in order to make a profit.
- 12. Investigation:** The Central Government has the authority to examine the affairs of an LLP. They can also nominate a competent authority to do so.
- 13. Agreement or Compromise:** Any agreement or compromise, such as a merger or amalgamation, must be in compliance with the Act.
- 14. LLP Conversion:** A private company, firm, unlisted public company, or small business can convert to an LLP in compliance with the Act's requirements.
- 15. Document E-Filing:** If the entity is needed to file any form, application, or document, it must be done electronically by visiting the website - www.mca.gov.in. Furthermore, an electronic or digital signature must be used to validate the document by a partner or designated partner.

10.4 Designated Partners

By agreeing to it and fulfilling the conditions of Section 7 of the Limited Liability Partnership Act, any individual partner can become a designated partner (LLP). If the LLP agreement allows for it, all of the partners can be designated partners. It is important to note that every limited liability partnership (LLP) must have at least two authorized partners, one of whom must be a resident of India (means a person who has stayed in India for a period of not less than 182 days during the immediately preceding one year). If all of the LLP's partners are corporations, at least two of the corporations' individual nominees should function as designated partners. According to the LLP agreement, any partner can be a designated partner.

10.5 Relationship of Partners

The Act's Chapter IV deals with the LLP's partners and the relationships that exist between them. An agreement between the people who sign their names to the LLP's incorporation document in writing before the LLP's formation may impose duties on the LLP. After the LLP is formed, all of the partners must ratify the agreement. The LLP shall file such information in Form 3 with the Registrar within 30 days of ratification by all partners, along with the fee as otherwise provided by this Act. The LLP agreement governs the mutual rights and obligations of the partners of an LLP, as well as the mutual rights and obligations of an LLP and its partners.

The LLP agreement, as well as any amendments made thereto, must be submitted with the Registrar in the form, manner, and with the fees stipulated. An agreement in writing between the people who sign their names to the LLP's incorporation document may impose duties on the LLP if it is approved by all of the partners after the LLP's establishment. In the absence of agreement on any topic, the mutual rights and obligations of the partners, as well as the mutual rights and obligations of the LLP and the partners, shall be established by the provisions of the First Schedule pertaining to that matter.

First Schedule

- All the partners of an LLP are entitled to share equally in the capital, profits and losses of the LLP
- The LLP shall indemnify each partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the LLP; or in or about anything necessarily done for the preservation of the business or property of the LLP.
- Every partner shall indemnify the LLP for any loss caused to it by his fraud in the conduct of the business of the LLP;
- Every partner may take part in the management of the LLP;
- No partner shall be entitled to remuneration for acting in the business or management of the LLP;
- No person may be introduced as a partner without the consent of all existing partners;
- Any matter or issue relating to the LLP shall be decided by a resolution passed by a majority in number of the partners. Each partner shall have one vote. However, no change may be made in the nature of the business of the LLP without consent of all the partners;
- Every LLP shall ensure that decisions taken by it are recorded in the minutes within 30 days of taking such decisions and are kept and maintained at the registered office of the LLP;
- Each partner shall render true accounts and full information of all things affecting the LLP to any partner or his legal representatives;
- If a partner carries on any business of the same nature as and competing with the LLP without the consent of the LLP, he must account for and pay over to the LLP all profits made by him in that business;
- Every partner shall account to the LLP for any benefit derived by him without the consent of the LLP from any transaction concerning the LLP or from any use by him of the property, name or any business connection of the LLP;
- No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners;
- All disputes between the partners arising out of the LLP agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of Arbitration and Conciliation Act, 1996.



Note: Section 26 provides that every partner of a LLP is the agent of the LLP. He is not the agent of other partners.

Cessation of partnership interest (Section 24):

A person may cease to be a partner of a LLP in accordance with an agreement with the other partners or, in the absence of agreement with the other partners as to cessation of being a partner, by giving a notice in writing of not less than 30 days to the other partners of his intention to resign as partner.

A person shall cease to be a partner of a LLP –

- a) on his death or dissolution of the LLP; or
- b) if he is declared to be of unsound mind by a competent court; or
- c) if he has applied to be adjudged as an insolvent or declared as an insolvent.

Where a person has ceased to be a partner of a LLP (hereinafter referred to as “former partner”), the former partner is to be regarded (in relation to any person dealing with the LLP) as still being a partner of the LLP unless –

- a) the person has notice that the former partner has ceased to be a partner of the LLP; or
- b) notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.

The cessation of a partner from the LLP does not by itself discharge the partner from any obligation to the LLP or to the other partners or to any other person which he incurred while being a partner. Where a partner of an LLP ceases to be a partner, unless otherwise provided in the LLP agreement, the former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be entitled to receive from the LLP –

- a) an amount equal to the capital contribution of the former partner actually made to the LLP; and
his right to share in the accumulated profits of the LLP, after the deduction of accumulated losses of the LLP, determined as at the date the former partner ceased to be a partner.
- b) A former partner or a person entitled to his share in consequence of the death or insolvency of the former partner shall not have any right to interfere in the management of the LLP.

Extent of liability of partner (Section 28):

1. A partner is not personally liable, directly or indirectly for an obligation referred to in sub-section (3) of section 27 solely by reason of being a partner of the LLP.
2. The provisions of sub-section (3) of section 27 and sub-section (1) of this section shall not affect the personal liability of a partner for his own wrongful act or omission, but a partner shall not be personally liable for the wrongful act or omission of any other partner of the LLP.

10.6 Incorporation of an LLP

Before initiating the process of registration, you must apply for the digital signature of the designated partners of the proposed LLP. This is because all the documents for LLP are filed online and are required to be digitally signed. So, the designated partner must obtain their digital signature certificates from government recognized certifying agencies. The cost of obtaining DSC varies depending upon the certifying agency.

Step 1: Application for DIN or DPIN

All designated partners of the proposed LLP shall obtain “Designated Partner Identification Number (DPIN)”. You need to file eForm DIR-3 in order to obtain DIN or DPIN. In case you already have a DIN (Director Identification Number), the same can be used as a DPIN.

Step 2: Acquire/Register DSC

The Information Technology Act, 2000 provides for use of Digital Signatures on the documents submitted in electronic form in order to ensure the security and authenticity of the documents filed electronically. This is the only secure and authentic way that a document can be submitted electronically. As such, all filings done by the LLP(s) are required to be filed with the use of Digital Signatures by the person authorized to sign the documents. Acquire DSC -A licensed Certifying Authority (CA) issues the digital signature. Certifying Authority (CA) means a person who has been granted a license to issue a digital signature certificate under Section 24 of the Indian IT-Act 2000.

Step 3: New User Registration

To file an eForm or to avail any paid service on LLP portal; you are first required to register yourself as a user in the relevant user category, such as registered and business user.

Step 4: Incorporate a LLP

Apply for the name of the LLP to be registered by filing Form 1 (Application for reservation or change of name) for the same. After that depending upon the proposed LLP, file required incorporation Form 2 (Incorporation document and Subscriber's statement). Once the form has been approved by the concerned official of the Ministry, you will receive an email regarding the same and the status of the form will get changed to Approved. To know more about e-Filing process click "All About e-Filing"

Step 5: File LLP Agreement

After incorporation of LLP, an initial LLP agreement is to be filed within 30 days of incorporation of LLP. The user has to file the information in Form 3 (Information with regard to Limited Liability Partnership Agreement and changes, if any, made therein).

Is it possible to convert an existing partnership firm into LLP?

Any existing partnership firm that is willing to get converted into LLP will need to apply through Form 17 (Application and statement for the conversion of a firm into LLP. Form 17 needs to be filed along with Form 2 (Incorporation document and Subscriber's statement). Difference between partnership, Company and Limited Liability Partnership (LLP).

Convert an existing private company/ unlisted public company into LLP?

Any private company/ unlisted public company that is willing to get converted into LLP need to apply through Form 18 (Application and Statement for conversion of a private company/ unlisted public company into limited liability partnership (LLP)). Form 18 needs to be filed along with Form 2 (Incorporation document and Subscriber's statement).

Foreign Limited Liability Partnership (FLLP)?

Any Foreign LLP can establish its place of business in India by filling Form 27 (Registration of particulars by Foreign Limited Liability Partnership (FLLP)). The eForm has to be digitally signed by authorized representative of the FLLP. There is no mandatory requirement to apply and obtain DPIN or DIN for Designated Partners of FLLP but the DSC of the authorized representative is mandatory.

10.7 Meaning and Types of Partnership

A partnership is a kind of business where a formal agreement between two or more people is made who agree to be the co-owners, distribute responsibilities for running an organization and share the income or losses that the business generates. In India, all the aspects and functions of the partnership are administered under 'The Indian Partnership Act 1932'. This specific law explains that partnership is an association between two or more individuals or parties who have accepted to share the profits generated from the business under the supervision of all the members or behalf of other members.

Types of Partner

I. General Partners

The following list includes the types of partners we come across on a regular basis. The following list of the partners are not exhaustive in nature, since the Partnership Act, 1932 does not restrict any type of Partnership which the partners wish to define for themselves.

1. *Active/Managing Partner*

An active partner mainly takes part in the day-to-day running of the business and also takes active participation in the conduct and management of the business firm. He carries the daily business activities on behalf of other partners. And may act in different capacities such as manager, advisor, organiser and controller of affairs of the firm. He can withdraw remuneration from the firm. If he wishes to retire from the partnership firm he must give a public notice about his decision. He is to ensure that he is absolved from liability and acts done by the other partner. If he doesn't issue a public notice declaring his retirement he would be held liable for the acts done by other partners post-retirement also.

2. *Sleeping Partner*

A sleeping partner is also known as a "dormant partner". This partner does not participate in the day-to-day functioning activities of the partnership firm. A person who has sufficient money or interest in the firm, but cannot devote his time to the business, can act as a sleeping partner in the firm. However, he is bound by all the acts of the other partners. A sleeping partner like any other partner brings share capital to the firm. He also continues to share the profits and losses of the firm. If a dormant partner decides to retire from the partnership firm, then it is not mandatory for him to give a public notice for the same. As a dormant partner is not participating in daily operations of the business, he is not allowed to withdraw remunerations from the firm. If at all the partnership deed is providing remuneration to dormant partners, it is not deductible under the Income Tax Act, 1961.

3. *Nominal Partner*

A nominal partner does not have any real or significant interest in the partnership firm. In simple words, he is only lending his name to the firm and does not have a voice in the management of the firm. On the strength of his name, the firm can promote its sales in the market or can get more credit from the market. This partner does not share any profit and losses in the firm because he does not contribute any capital to the firm. However, it is pertinent to note that a nominal partner is liable to the outsiders and third parties for the acts done by other partners.

4. *Partner by Estoppel*

A partner by estoppel is a partner who displays by his words, actions or conduct that he is the partner of the firm. In simple words, even though he is not the partner in the firm but he has represented himself in such a manner which depicts that he has become a partner by estoppel or partner by holding out. It is pertinent to note that, though he does contribute in capital or management of the firm but on the basis of his representation in the firm he is liable for the credits and loans obtained by the firm.

5. *Partner in Profits only*

This partner of a firm will only share the profits of the firm and won't be liable for any losses of the firm. Moreover, if a partner who is in "partner in profits only" deals with any of the third parties or outsiders then he will be liable for the acts of profit only and not any of the liability. He is not allowed to take part in management of the firm. Such kinds of partners are associated with the firm for their goodwill and money.

6. *Minor Partner*

A minor is a person who is yet to attain the age of majority in the law of the land. According to Section 3 of the Indian Majority Act, 1875 a person is deemed to have attained the age of majority when he attains 18 years of age. However, a minor can also be appointed to claim the benefits of the Partnership.

7. Secret Partner

In a partnership, the position of secret partner lies between the active and sleeping partner. The membership of the firm of a secret partner is kept secret from the outsiders and third parties. His liability is unlimited since he holds a share in profit and shares liabilities for losses in the business. He can even take part in working for the business.

8. Outgoing partner

An outgoing partner is a partner who voluntarily retires without dissolving the firm. He leaves the existing firm; therefore, he is called as an outgoing or retiring partner. Such a partner is liable for all his debts and obligations incurred before his retirement. However, he can be held liable for his future obligations, if at all he fails to give a public notice stating his retirement from the partnership firm.

9. Limited partner

A limited partner is a partner whose liability is only upto the extent of his contributions for the capital of the partnership firm.

10. Sub-Partner

A partner who associates someone else in his share of the firm is known as a Sub-Partner. He usually agrees to share profits that are derived from the third party. He gives a part of his share to the person. It is pertinent to note that, the relationship is not between the sub-partner and the partnership firm but is between him and the partner. Such a partner cannot represent himself as a partner in the original firm. He can claim his agreed share of profits only from the partner who has contracted him to be a sub-partner.

* The types of partners under the Partnership Act, 1932 can also be discussed as:

II. According to Objectives**1. Partnership at Will**

When a partnership is created as per the discretion of the partners regarding till time they want the partnership to exist. In simple word, it is a partnership created without determination of a specific time limit. Such a partnership is based upon the will of the partners and ends whenever any of the partners serves a notice depicting intention for the same. It is created to conduct a lawful business for an indefinite period. Furthermore, its dissolution is also not pre-decided and it is taken into consideration when the need arises. It's upon the partners to decide among themselves the requisite time period of partnership.

2. Particular Partnership

The main motive behind making a particular partnership is to carry out a specific undertaking. Such a partnership is created between partners for a project of a temporary contract-based work or a specific business only, this is known as a particular partnership. In particular partnerships, once the objective of the business partnership is achieved, then partnership gets dissolved. In simple words, this partnership is formed for undertaking the particular venture and it comes to an end automatically after the completion of tasks involved in the venture. Nevertheless, the partners have a choice to continue the partnership by coming to an agreement.

III. According to Tenure**1. Fixed Term based Partnership**

In such a type of partnership, the partnership is for a fixed period of time say 5 years, 2 years or any specified duration of time. The partnership automatically comes to an end after the expiration of the said period.

2. Flexible Partnership

Partnerships which are neither for a fixed duration of time nor for any particular venture are called flexible partnerships.

IV. According to Nature

1. Limited Liability Partnership (LLP)

Unlike general partnership, limited liability partnership is a corporate form of business organization. In such a type of partnership, the liabilities are limited to each partner in accordance with the contribution made by them in the business. Furthermore, the personal property or assets of the partner cannot be attached to pay back the liability of the firm. It is pertinent to note that this organization is not governed under Partnership act, 1932, but is governed under Limited Liability Partnership Act, 2008. In a limited liability partnership some or all except one partner have a limited liability in accordance with the extent of capital contributed by them. It is pertinent to note that, in partnership all the partners cannot have limited liability.

V. According to Legality

1. Legal Partnership

When the partnership is formed in accordance with the provisions of the Indian Contract Act, 1872 and Indian Partnership Act, 1932, it will be termed as a legal Partnership.

2. Illegal Partnership

The partnership can become illegal when it violates the provisions of any law of the country or when the requisite number of partners exceeds beyond the time limit or below the time limit.

V. On the basis of Registration

The registration of a firm is not mandatory under Partnership Act, 1932. Both Registered firm and unregistered firm are valid in the eyes of Law.

1. Unregistered Partnership Firm

An unregistered firm is established when there is execution of agreement between the partners. The partnership firm which is unregistered allows the partners to carry out business activities as provided in the agreement.

2. Registered Partnership Firm

In order to register a partnership firm, it must be registered with the Register of Firm (RoF) having the requisite jurisdiction over the place where the Firm is carrying out its business activities. The application of registration involves the payment of registration fee to RoF, which varies from state to state in accordance with the state laws. In a partnership, registration of a firm is preferred due to benefits it offers such as filing a suit in the court.

10.8 Meaning of Company

The term company in general means a group of persons associated together in achieving some common objective. However, it is not a legal definition of a company. It refers to as an association of persons incorporated under the existing law of a country.

According to **Lord Justice Lindley** a company is "an association of many persons who contribute money or money's worth to a common stock, and employ it in a common trade or business, and who share the profit or loss arising there from". The common stock so contributed is denoted in money and is 'the capital' of the company. The persons who contribute to it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his 'share'. The member may sell his share in the company, thus, withdrawing himself and making someone else a member to whom he transfers shares. Thus, shares in a company are transferable. As a natural consequence of transferability of shares, the company has what is commonly known as perpetual succession. With the withdrawal or death of a member of a company, the latter does not come to an end. The life of the company is independent of the lives of the members of the company. Members may come and members may go, the company continues until it is dissolved.

10.9 Difference between LLP, Partnership and Company

Category	Partnership	Company	LLP
Prevailing Law	Partnership is prevailed by 'The Indian Partnership Act, 1932' and various Rules made there under	Companies are prevailed by 'Companies Act, 2013'	Limited Liability Partnership are prevailed by 'The Limited Liability Partnership Act, 2008' and various Rules made there under
Registration	Registration is optional	Registration with Registrar of ROC required	Registration with Registrar of LLP required
Creation	Created by Contract	Created by Law	Created by Law
Distinct entity	Not a separate legal entity	Is a separate legal entity	Is a separate legal entity
Name of Entity	Any name as per choice	Name to contain 'Limited' in case of Public Company or 'Private Limited' in case of Private Company as suffix	Name to contain 'Limited Liability Partnership' or 'LLP' as suffix.
Perpetual Succession	It does not have perpetual succession as it is dependent upon the will of partners	It has perpetual succession. Members may come and go yet the business/entity continues until not dissolved as per the provisions laid under the act.	It has perpetual succession. It is not affected by the coming and going of Partners.
Charter Document	Partnership Deed	Memorandum of Association is the charter of the company that defines its scope of operation.	LLP Agreement which denotes its scope of operation and rights and duties of the partners vis-a-vis LLP.
Common Seal	There is no concept of common seal in partnership	It denotes the signature of the company and every company shall have its own common seal	It denotes the signature and LLP may have its own common seal, dependent upon the terms of the Agreement
Formalities of Incorporation	In case of registration, Partnership Deed along with form / affidavit required to be filled with Registrar of firms along with requisite filing fee	Various E-forms along the Memorandum & Articles of Association are filled with Registrar of Companies with prescribed fees	Various E-forms are filled with Registrar of LLP with prescribed fees
Legal Proceedings	Only registered partnership can sue third party	A company is a legal entity which can sue and be sued	A LLP is a legal entity can sue and be sued
Foreign Participation	Foreign Nationals cannot form Partnership Firm in India	Foreign Nationals can be a member in a Company.	Foreign Nationals can be a Partner in a LLP.
Number of Members	Minimum 2 and Maximum 20	2 to 50 members in case of Private Company and Minimum 7 members in case of Public Company.	Minimum 2 partners and there is no limitation of maximum number of partners.

Unit 10: Limited Liability Partnership Act, 2008

Ownership of Assets	Partners have joint ownership of all the assets belonging to partnership firm	The company independent of the members has ownership of assets	The LLP independent of the partners has ownership of assets
Rights / Duties / obligation of the Partners / Managing Partners / Directors	Rights / Duties / obligation of the partners are governed by Partnership Deed.	Rights / Duties / obligation of the directors are governed by AOA and resolution passed by shareholders or directors.	Rights / Duties / obligation of the partners are governed by LLP Agreement.
Liability of Partners/Members	Unlimited. Partners are severally and jointly liable for actions of other partners and the firm and liability extend to their personal assets.	Generally limited to the amount required to be paid up on each share.	Limited, to the extent their contribution towards LLP, except in case of intentional fraud or wrongful act of omission or commission by the partner.
Tax Liability	Income of Partnership is taxed at a Flat rate of 30% plus education cess as applicable.	Income of Company is Taxed at a Flat rate of 30% Plus surcharge as applicable.	Income of LLP is taxed at a Flat rate of 30% plus education cess as applicable.
Principal/Agent Relationship	Partners are agents of the firm and other partners.	The directors act as agents of the company and not of the members	Partners act as agents of LLP and not of the other partners.
Transfer / Inheritance of Rights	Not transferable. In case of death the legal heir receives the financial value of share.	Ownership is easily transferable.	Regulations relating to transfer are governed by the LLP Agreement.
Transfer of Share / Partnership rights in	In case of death of a partner, the legal	In case of death of member, shares are	In case of death of a partner, the legal heirs
In case of death	heirs have the right to get the refund of the capital contribution + share in accumulated profits, if any. Legal heirs will not become partners	transmitted to the legal heirs.	have the right to get the refund of the capital contribution + share in accumulated profits, if any. Legal heirs will not become partners
Director Identification Number / Designated Partner Identification Number (DIN/ DPIN)	The partners are not required to obtain any identification number	Each director is required to have a Director Identification Number before being appointed as Director of any company.	Each Designated Partners is required to have a DPIN before being appointed as Designated Partner of LLP.
Digital Signature	There is no requirement of obtaining Digital Signature	As eforms are filled electronically, atleast one Director should have Digital Signatures	As eforms are filled electronically, atleast one Designated Partner should have Digital Signatures.
Dissolution	By agreement, mutual consent, insolvency, certain contingencies, and by court order.	Voluntary or by order of National Company Law Tribunal.	Voluntary or by order of National Company Law Tribunal.

Transferability of Interest	A partner can transfer his interest subject to the Partnership Agreement	A member can freely transfer his interest	A partner can transfer his interest subject to the LLP Agreement
Admission as partner / member	A person can be admitted as a partner as per the partnership Agreement	A person can become member by buying shares of a company.	A person can be admitted as a partner as per the LLP Agreement
Cessation as partner / member	A person can cease to be a partner as per the agreement	A member / shareholder can cease to be a member by selling his shares.	A person can cease to be a partner as per the LLP Agreement or in absence of the same by giving 30 days prior notice to the LLP.
Requirement of Managerial Personnel for day to day	No requirement of any managerial; personnel, partners themselves administer the business	Directors are appointed to manage the business and other	Designated Partners are responsible for managing the day to
Administration	themselves administer the business	statutory compliances on behalf of the members.	day business and other statutory compliances.
Statutory Meetings	There is no provision in regard to holding of any meeting	Board Meetings and General Meetings are required to conducted at appropriate time.	There is no provision in regard to holding of any meeting.
Maintenance of Minutes	There is no concept of any minutes	The proceedings of meeting of the board of directors / shareholders are required to be recorded in minutes.	A LLP by agreement may decide to record the proceedings of meetings of the Partners/Designated Partners
Voting Rights	It depends upon the partnership Agreement	Voting rights are decided as per the number of shares held by the members.	Voting rights shall be as decided as per the terms of LLP Agreement.
Remuneration of Managerial Personnel for day to day administration	Blaw	Company can pay remuneration to its Directors subject to law.	Remuneration to partner will depend upon LLP Agreement.
Contracts with Partners/Director	Partners are free to enter into any contract.	Restrictions on Board regarding some specified contracts, in which directors are interested.	Partners are free to enter into any contract.
Maintenance of Statutory Records	Required to maintain books of accounts as Tax laws	Required to maintain books of accounts, statutory registers, minutes etc.	Required to maintain books of accounts.
Annual Filing	No return is required to be filed with Registrar of Firms	Annual Financial Statement and Annual Return is required to be filed with the Registrar of Companies every year.	Annual Statement of accounts and Solvency & Annual Return is required to be filed with Registrar of Companies every year.

Unit 10: Limited Liability Partnership Act, 2008

Share Certificate	The ownership of the partners in the firm is evidenced by Partnership Deed, if any.	Share Certificates are proof of ownership of shares held by the members in the Company	The ownership of the partners in the firm is evidenced by LLP Agreement.
Audit of accounts	Partnership firms are only required to have tax audit of their accounts as per the provisions of the Income Tax Act	Companies are required to get their accounts audited annually as per the provisions of the Companies Act, 2013,	All LLP except for those having turnover less than Rs.40 Lacs or Rs.25 Lacs contribution in any financial year are required to get their accounts audited annually as per the provisions of LLP Act 2008.
Applicability of Accounting Standards.	No Accounting Standards are applicable	Companies have to mandatorily comply with accounting standards	The necessary rules in regard to the application of accounting standards are not yet issued.
Compromise / arrangements / merger / amalgamation	Partnership cannot merge with other firm or enter into compromise or arrangement with creditors or partners	Companies can enter into Compromise / arrangements / merger / amalgamation	LLP's can enter into Compromise / arrangements / merger / amalgamation
Oppression and mismanagement	No remedy exists in case of oppression of any partner or mismanagement of Partnership	Provisions providing for remedy against Oppression and mismanagement exists	No provision relating to redressal in case of oppression and mismanagement
Credit Worthiness of organization	Creditworthiness of firm depends upon goodwill and creditworthiness of its partners	Due to Stringent Compliances & disclosures under various laws, Companies enjoys high degree of creditworthiness.	Will enjoy Comparatively higher creditworthiness from Partnership due to Stringent regulatory framework but lesser than a company.
Whistle Blowing	No such provision is provided under Partnership Act, 1932	No such provision is provided under the Companies Act, 2013.	Provision has been made to provide protection to employees & partners, providing useful information during an investigation or convicting any partner or firm.

Summary

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

- The LLP can continue its existence irrespective of changes in partners. It is capable of entering into contracts and holding property in its own name.
- The LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP.
- Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct.
- Mutual rights and duties of the partners within an LLP are governed by an agreement between the partners or between the partners and the LLP as the case may be. The LLP, however, is not relieved of the liability for its other obligations as a separate entity. Since LLP contains elements of

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

A partnership is a kind of business where a formal agreement between two or more people is made who agree to be the co-owners, distribute responsibilities for running an organization and share the income or losses that the business generates. In India, all the aspects and functions of the partnership are administered under 'The Indian Partnership Act 1932.

The term company in general means a group of persons associated together in achieving some common objective. However, it is not a legal definition of a company. It refers to as an association of persons incorporated under the existing law of a country. The legal definition of a company is covered under section 2(20) of the new companies act 2013 which states that:

"Company means a company under this Act or any previous company law"

Keywords

- **LLP:** Limited Liability Partnership. It means a partnership formed and registered under this Act. LLP stands for Limited Liability Partnership.
- **Active partner:** Such a partner mainly takes part in the day-to-day running of the business and also takes active participation in the conduct and management of the business firm.
- **Legal Partnership:** When the partnership is formed in accordance with the provisions of the Indian Contract Act, 1872 and Indian Partnership Act, 1932, it will be termed as a legal Partnership.

SelfAssessment

Q1. A minimum of ____ partners will be required for formation of an LLP.

- A. 2
- B. 3
- C. 5
- D. 7

Q2. What is the maximum limit of Partners that can be added to a Limited Liability Partnership?

- A. 2
- B. 5
- C. 7
- D. No upperlimit

Q3. Any individual or body corporate may be a partner in an LLP. However, an individual shall not be capable of becoming a partner of an LLP, if _____

- A. he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
- B. he is an undischarged insolvent; or
- C. he has applied to be adjudicated as an insolvent and his application is pending
- D. All of the above

Unit 10: Limited Liability Partnership Act, 2008

Q4. A limited liability partnership is:

- A. Not a separate entity from that of its partners
- B. A legal entity separates from that of its partners
- C. Only B and C are correct
- D. A body corporate

Q5. An LLP shall be governed by the provisions of:

- A. The Companies Act, 2013
- B. The Limited Liability Partnership Act, 2008
- C. The Co-operative Societies Act, 1912
- D. The Indian Partnership Act, 1932

Q6. How many designated partners are required in LLP:

- A. At least two designated partners
- B. Seven designated partners
- C. Two designated partners
- D. At least seven designated partners

Q7. At which place the LLP shall maintain books of accounts:

- A. At its Branch Office
- B. At its Corporate Office
- C. At its Head Office
- D. At its Registered Office

Q8. Who shall sign the Statement of Account and Solvency prepared by the LLP:

- A. By any one partner, authorised in this behalf
- B. By at least two partners, authorised in this behalf
- C. By the designated partners
- D. By all the partners

Q9. _____ does not participate in the day-to-day functioning activities of the partnership firm.

- A. Illegal Partner
- B. Sleeping Partner
- C. Flexible Partner
- D. Dormant Partner

Q10. A resident in India as per the Limited Liability Partnership means a person who has stayed in India for a period of not less than _____ days during the immediately preceding one year

- A. 132 days

- B. 182 days
- C. 152 days
- D. 162 days

Q11. Identify which of the given entity does not have a Perpetual Succession?

- A. Company
- B. Limited Liability Partnership
- C. Partnership
- D. None of the above

Q12. Which of the given entities needs to be registered?

- A. Company and Partnership
- B. Company and Limited Liability Partnership
- C. Partnership and Limited Liability Partnership
- D. Partnership

Q13. The Limited Liability Partnership should file its statement of account and solvency with which of the following parties?

- A. The Limited Liability Partnership should file its statement of account and solvency with the registrar of firms
- B. The Limited Liability Partnership should file its statement of account and solvency with the registrar
- C. The Limited Liability Partnership should file its statement of account and solvency with the registrar of cooperative societies
- D. None of the above

Q14. In case of _____, a partner has liability to the amount of capital invested.

- A. Company
- B. Limited Liability Partnership
- C. Partnership
- D. None of the above

Q15. Perpetual succession is not possible in _____

- A. Partnership
- B. Company
- C. Limited Liability Partnership
- D. All of the above

Answer for Self Assessment

1. A 2. D 3. D 4. C 5. B

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6. A 7. D 8. C 9. D 10. B
11. C 12. D 13. B 14. C 15. A

Review Questions

- Q1. Discuss the incorporation of an LLP in detail.
- Q2. What is meant by the term 'Limited Liability Partnership'? Discuss its features in detail.
- Q3. Differentiate between Limited Liability Partnership, Company and Partnership.
- Q4. Discuss the various types of Partners as per the Partnership Act and Limited Liability Partnership.
- Q5. Write a short note on:
- Partnership by Estoppel
 - Partnership by Necessity
 - Minor Partner
 - Nominal Partnership
 - Partnership on basis of Tenure



Further Readings

- A Textbook of Mercantile Law by P.P.S. Gogna, S. Chand & Company
- Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
- A Manual of Business Laws by S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
- Mercantile Law by S S Gulsan, Excel Books
- Mercantile Law by M C Kuchchal, Vikas Publishing House
- Legal Aspects of Business by Daniel Albuquerque, Oxford & Ibh



Web Links

- <https://blog.ipleaders.in/types-partners-partnership-act/>
- https://www.mca.gov.in/content/dam/mca/pdf/llpAct2021_19082021.pdf
- <https://www.toppr.com/guides/business-laws/limited-liability-partnership-act/meaning-and-concept-of-llp/>
- https://www.indiacode.nic.in/show-data?actid=AC_CEN_22_29_00007_200906_1517807325904§ionId=1036§ionno=2&ordererno=2
- https://icsi.edu/media/filer_public/dc/6e/dc6e8d54-a865-4b44-a7ac-51c59f213126/limited_liability_partnership_llp.pdf
- <https://www.mca.gov.in/content/mca/global/en/acts-rules/llp-act-2008.html>

Unit 11: Consumer Protection Act, 2019

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Objectives

After studying this unit, you will be able to:

- Comprehend the meaning and rights of a consumer
- Understand the procedure of lodging a complaint in case of violation of any consumer right
- Cognize the various consumer dispute redressal machinery under the act

Introduction

Consumer Protection Bill 2019 got introduced in the lower house of India's two-tier Parliament, Lok Sabha, on 8th July 2019 by the Minister of Consumer Affairs, Food and Public Distribution, Mr. Ram Vilas Paswan. Thereby replacing the previous Consumer Protection Act, 1986. The new Act mainly aims at safeguarding the rights of the consumers by establishing authorities for timely and effective administration and settlement of consumers' disputes. It plays a foreseeable role in settlement of a large number of pending consumer complaints in consumer courts in India. It offers a proper consumer dispute redressal mechanism to solve their grievances speedily. But, the question here is who is a consumer and what rights does he hold? A consumer is a person buying any type of goods or hires of any service for consideration. In case a person is obtaining goods for resale or goods or services for any commercial purpose, then he is not covered under the definition of a consumer. As a matter of fact, this Act seeks to widen the scope of this definition. Thus, a consumer will now be a buyer of goods and services bought whether online or offline through electronic means, teleshopping, direct selling, or multi-level marketing for self-use.

11.1 Meaning and aim of Consumer Protection Act 2019

The Consumer Protection Act of 2019 protects customers' interests. As a dispute settlement mechanism, it was unavoidable owing to an enormous pending consumer complaint in consumer

courts in India, waiting to be resolved. The main goal of the Act is to guard the rights of consumers by establishing authorities for the quick and effective administration and resolution of consumer disputes.

Who can be a complainant?

The one who files a petition or application for justice is known as a Complainant. An applicant could be a consumer; or the Central any State Government; or the Central Authority; or any voluntary consumer association registered under any law for the time being in force; or one or more consumers, where there are numerous consumers having the same interest; or in case of death of a consumer, his legal heir or legal representative; or in case of a consumer being a minor, his parent or legal guardian.

11.2 Features of Consumer Protection Act 2019

1. E-commerce and direct selling are included: The Consumer Protection Act of 2019 broadened the meaning of the term "consumer." It now refers to everyone who is procuring the items, whether online or offline. E-commerce transactions were not included under the Consumer Protection Act of 1986. The new statute includes a clause called Pecuniary Jurisdiction, which states that the district forum would now hear consumer complaints if the value of the products or services paid does not exceed INR 1 crore. The State Commission will now hear disputes worth more than INR 1 crore but less than INR 10 crore. In addition, when the value surpasses INR 10 crore, the National Commission can now exercise authority.

2. Establishment of Central Consumer Protection Authority (CCPA): The objective of the Central Consumer Protection Authority (CCPA) is to promote, protect and enforce the rights of consumers as a class. The authority is constituted under Section 10(1) of The Consumer Protection Act, 2019 and is empowered to conduct investigations into violation of consumer rights and institute complaints / prosecution, order recall of unsafe goods and services, order discontinuation of unfair trade practices and misleading advertisements, impose penalties on manufacturers/endorsers/publishers of misleading advertisements. The Central Consumer Protection Authority (CCPA) has been established w.e.f. 24th July, 2020. It will start functioning in the premises of IIPA. The support staff is being arranged from the Centre for Consumer Studies of The Indian Institute of Public Administration (IIPA) and the National Consumer Helpline, which have been financially aided by the Department since 2007.

Composition: Additional Secretary in the Department of Consumer Affairs, Smt. Nidhi Khare has been assigned the charge of Chief Commissioner, Joint Secretary in the Department Shri Anupam Mishra as Commissioner, Director General, BIS Shri Pramod K Tiwari as Director General (Investigation) and Director General, National Test House, Shri Vineet Mathur as Additional Director General (Investigation) in the Central Consumer Protection Authority w.e.f. 29th July, 2020 to exercise the powers and discharge the functions under the Act. 3. Establishment of Central Consumer Protection Authority

The formation of a regulatory authority is envisaged in the New Act. It is the Central Consumer Protection Authority (CCPA), which has broad enforcement authority. The CCPA, which will be led by a Director-General, will have an investigation branch that will be able to conduct inquiries and investigations into consumer law infractions. If a consumer complaint affects more than one (one) individual, the CCPA has been given broad authority to take suo moto steps, require refund of the price of goods/services, recall items, terminate licences, and initiate class action litigation.

3. New product liability provisions proposed

The Consumer Protection Act of 2019 proposes product liability measures. The argument that e-commerce platforms are only 'platforms' or 'aggregators' is no longer valid. Now, if a consumer is injured or loses money as a result of faulty goods or poor service, the manufacturer or service provider must pay them. For example, if a mobile phone or other electronic equipment bursts owing to a manufacturing flaw and injures a consumer, the maker is responsible for compensating the victim. This clause has the most substantial influence on e-commerce platforms. Along with manufacturers, product responsibility has now been extended to dealers and service providers. As a result, e-commerce sites can no longer ignore aggregators.

They will also be held liable for any consumer losses or damage. In addition, the Consumer Protection Act of 2019 has a broad definition of unfair trade practices. In comparison to the 1986 Act,

the 2019 Act has expanded the definition of unfair trade practices to include online misleading advertisements; failing to issue bill/memo for goods and services; failing to take back defective goods or deactivate defective services and refund the amount within the stipulated time mentioned in the bill or memo, or within 30 days in the absence of such a stipulation; and disclosing personal information.

5. Prohibition and Penalties for misleading advertisements

Manufacturers will face fines of up to two years in jail if they print misleading or deceptive marketing, according to the Central Consumer Protection Authority (CCPA). Dhan Varsha Laxmi Mantra, for example, or costly Tabeej to ward off evil. The maker faces up to 5 years in prison and a fine of Rs 50 lakhs if the violation is repeated.

For a period of one year, the endorser is also prohibited from endorsing a false advertisement of that particular goods or service under the CCPA. The period of restriction may be extended to three years for each subsequent offence. The Act also establishes responsibility in the event that a customer is subjected to unfair commercial practices as a result of celebrity brand ambassadors. This paragraph clearly states that it is the endorser's responsibility to check the claims made in the advertising and to do so with appropriate diligence.

6. Establishment of Consumer Disputes Redressal Commission

The formation of Consumer Disputes Redress Commissions (CDRCs) at the national, state, and district levels is provided for under this new statute. This panel was established to hear complaints on: (i) overcharging or misleading charging, (ii) unfair or restrictive commercial tactics, (iii) the sale of dangerous products and services that might endanger people's lives, and (iv) the sale of faulty goods or services.

7. Provision for Alternate Dispute Resolution

Due to the Alternate Dispute Resolution mechanism, that makes the process of resolving disputes easier and faster, this New Act is far more convenient than the previous one. It allows for faster resolution of disputes and relieves strain on consumer courts, which are already overburdened with cases.

8. E-Filing of Complaints:

It is one of the most significant advantages of the Consumer Protection Act of 2019. It provides consumers with a great deal of freedom. They can register complaints with a local jurisdictional consumer forum, whether it is close to their home or workplace. It differs from the former practice of filing from the point of purchase or where the seller's registered office is located. Complaints can also be submitted by e-mail. In reality, videoconferencing can be used to connect parties who are hearing or examining a case. Its goal is to make the procedure as simple as possible for consumers while also reducing annoyance and harassment. Consumers are no longer warned to be cautious under the new law, which is based on fair-trade principles. Today's consumer is handled as if he or she were a king. Hence, it becomes important for the owners of consumer driven businesses, like e-commerce or retail to be mindful of the changes in the legal landscape and have robust policies that deal with consumer redressal in place. Consumer driven businesses need to be cautious before opting for unfair trade practices.

11.3 Definition

1. Consumer

Section 2 sub-section 7 of the Act, states that a consumer is anyone who:

(i) buys any goods for a consideration paid or promised or partly paid or partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any service 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 service, 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 the approval of the first-mentioned person, but does not include a person who avails of such a service for any commercial purpose.

2. "Complaint"

It refers to as any written allegation, made by a complainant to obtain any relief provided by or under this Act, that—

- i. Any trader or service provider has engaged in an unfair contract, unfair trade practice, or restrictive trade practice;
- ii. the goods purchased or agreed to be purchased by him have one or more defects;
- iii. the services hired or availed of or agreed to be hired or availed of by him have any deficiency;
- iv. a trader or service provider, as the case may be, has charged for the goods or services mentioned in the complaint, a price: -
 - (a) established by or under any currently in force legislation; or Definitions.
 - (b) items that are harmful to life and safety when used, are being offered for sale to the public
 - (c) displayed on the goods or any package containing such goods; or
 - (d) shown on the price list exhibited by him by or under any legislation currently in effect; or
 - (e) negotiated between the parties;
- i. in contravention of standards relating to the safety of such goods as required to be complied with by or under any law for the time being in force;
- ii. where the trader knows that the goods so offered are unsafe for the public;
- (f) services which are hazardous or likely to be hazardous to the life and safety of the public when used, are being offered by a person who provides any service and who knows it to be injurious to life and safety;
- (g) a claim for product liability action lies against the product manufacturer, product seller, or product service provider, as the case may be;

3. Restrictive Trade Practice

When a trade practice that intends to inflate market prices or delivery conditions, or to affect the flow of supplies in the market of goods or services to impose unjustified costs or restrictions on consumers, it shall include:-

- (i) a delay beyond the period agreed to by a trader in the supply of such goods or even in providing the services, which has resulted or is likely to contribute to a price increase;
- (ii) any commercial practice requiring a customer to purchase, hire, or use any goods or services as a condition prior to purchasing, hiring, or using other goods or services;

4. Service

It 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 amusement or the purveying of news or other information, boarding or lodging or both, banking, financing, insurance, processing, supply of electrical or other energy, transport, telecom, housing construction, entertainment, but does not include the rendering of any service free of charge or under a contract of personal service.

5. Product Liability

The concept is newly introduced, which states that it is the responsibility of a product manufacturer or product seller of any product or service to compensate for any harm caused to a consumer due to defective product manufactured, sold or deficiency in services relating thereto. A "product liability action" means a complaint filed by a person before a District Commission or State Commission or National Commission, as the case may be, to claim compensation for the harm caused to him;

6. Product Manufacturer

"Product manufacturer" means a person who—(i) makes any product or parts thereof; or (ii) assembles parts thereof made by others; or (iii) puts or causes to be put his own mark on any product made by any other person; or (iv) makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or is otherwise involved in placing such product for commercial purposes; or designs, produces, fabricates, constructs or re-manufactures any product before its sale; or (vi) being a product seller of a product, is also a manufacturer of such product;

7. Product Seller

Any person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose is a product seller. The term of product seller includes:

- (a) a manufacturer who is also a product seller; or
- (b) a service provider. The section specifically excludes certain people from the definition of a product seller who are as under.

Note: 1. The new definition further states that a seller of an immovable property is not a product seller unless such a person is engaged in the sale of constructed house or in the construction of homes of flats.

2. A provider of professional services, where the skill or service is the essence of the transaction and the sale or use of the product is only incidental to it, shall not be included in the definition of a product seller.

3. Lastly, a person who (a) acts only in a financial capacity with respect to the sale of the product or (b) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider or (c) leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease agreement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

Liability of a Product Seller

A product seller (who is not a product producer) may be held accountable in a product liability case for injury caused by a faulty product supplied by the product seller, according to Section 86 of the Act. They are as follows:

- (a) if the product seller has significant influence over the design, testing, manufacture, packing, or labelling of a harmful product.
- (b) if the product seller changes or modifies the product, and such change or modification is a significant cause in the injury.
- (c) if a product seller has made an explicit warranty of a product, apart from any express warranty given by a manufacturer, and the product failed to adhere to the express warranty made by the product seller, resulting in injury.
- (d) if a product has been sold by the product seller and the identity of the product manufacturer is unknown or unknown, service of notice, process, or warrant cannot be served on the product manufacturer, the product manufacturer is not subject to Indian law, and any order passed or to be passed against the product manufacturer cannot be enforced.
- (e) if the product seller fails to use reasonable care in assembling, inspecting, or maintaining the product, or if it fails to pass on the product manufacturer's warnings or instructions regarding the dangers involved or proper product usage while selling the product, and such failure was the proximate cause of the harm.

8. "Unfair trade practice"

It refers to any trade practice that, for the purpose of promoting the sale, use, or supply of any goods or services, employs any unfair method or deceptive practice, including any of the following: I making any statement, whether orally, in writing, or by visible representation, including by means of electronic record, that:

- a. falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style, or model; falsely represents that the services are of a particular standard, quality, or grade;
- b. falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
- c. represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
- d. represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
- e. makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
- f. gives to the public any warranty or guarantee of the performance, efficacy, or length of life of a product or of any goods that is not based on an adequate or proper test thereof:

9. Deficiency in Service

Section. 2(11) of Consumer Protection Act 2019 ("the Act") states that any sort of imperfection, or defect in the feature, quality, amount, worth, authenticity, its capacity or potential, and standard which is obligatory to be maintained and regulated as per the laws and statutes in function or any agreement/contract claimed by the seller, with respect to the products and goods, is known as deficiency. Deficiency of service refers to the purposeful and deliberate concealing of crucial information, as well as the seller's omission or neglect of activities that may cause harm or loss to the consumer(s). Any act(s) that a cautious seller is required to do or omit, but purposefully does the opposite, are referred to as "deficiency of service."

Any service industry with a buyer-seller interaction, such as aviation, banking, construction, education, railways, power, legal assistance, transportation, hospitality, restaurants, and entertainment, might demonstrate a lack of service. Service failure can have a variety of effects, ranging from discomfort to harassment to mental or bodily damage to death, and can result in legal action.

10. Defect

Section 2 (10) of the Consumer Protection Act of 2019 defines a "defect" as "any fault, imperfection, or shortcoming in the quality, quantity, potency, purity, or standard which is required to be maintained by or under any law for the time being 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 or products, and the expression 'defective' shall be construed accordingly."

Deficiency of service occurs in any buyer-seller interaction. Legal aid, banks, trains, construction, transportation, education, electricity, entertainment, restaurants, hospitality, and so on are only a few examples. Defective service can result in everything from annoyance to intimidation to mental or physical impairment to death, all of which might result in legal repercussions.

11. "Misleading advertisement"

In relation to any product or service, a "misleading advertisement" is one that: a. falsely describes such product or service; or b. gives a false guarantee to, or is likely to mislead, consumers as to the nature, substance, quantity, or quality of such product or service; or c. conveys an express or implied representation that, if made by the manufacturer, seller, or service provider thereof, would constitute an unfair trade practice; or d. deliberately conceals important information

Who may be held responsible for a deceptive advertisement?

It is possible to hold manufacturers, advertising agencies, celebrity endorsers, and publishers accountable.

12. E-commerce

"E-commerce" means buying or selling goods or services, including digital products, over a digital or electronic network.

12. Electronic service provider

A person providing technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer, and includes any online market place or online auction sites is known as an electronic service provider.

13. E-commerce Entity

Any person owning, operating or managing a digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity is known as an e-commerce entity.

11.4 Duties of E-commerce Entity and Liabilities of Marketplace E-Commerce Entities

As per Rule 4 of the Rules, e-commerce entities are required to inter alia ensure easy product returns, customer grievance redressal, etc. They are not allowed to levy cancellation charges on consumers who cancel after their purchase in confirmed, unless similar charges have also been borne by the e-commerce entity. Further, they are barred from engaging in manipulating any prices of goods or services offered on their platform, to gain unreasonable profit by imposing any unjustified price that does not correlate to prevailing market conditions.

Liabilities of Marketplace E-commerce Entities

"An e-commerce entity that provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers" is defined as "an e-commerce entity that provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers." These companies shall verify that all vendors offer accurate descriptions, photos, and other material relevant to products or services on their platform, according to Rule 5 of the Rules. It should match with the look, nature, quality, purpose, and other broad characteristics of the provided commodity or service. A description of any differential treatment that it offers or could give between items or services or sellers in the same category should be included in the terms and conditions between the seller and the marketplace.

11.5 Rights of a Consumer

1. *Right to be Protected*

A consumer has a right to be protected against marketing of goods and services which are hazardous to life and property. It is applicable to specific areas like healthcare, pharmaceuticals and food processing, this right is spread across the domain having a serious effect on the health of the consumers or their well-being viz. Automobiles, Housing, Domestic Appliances, Travel etc. It is estimated every year that thousands or millions of citizens of India are killed or seriously injured by immoral practices by doctors, hospitals, pharmacies and the automobile industry. Still the government of India, known for its callousness, does not succeed in acknowledging this fact or making a feeble effort for maintaining statistics of the mishaps. The Government of India needs to have world class product testing facilities to test drugs, food, cars or any other consumable product that can prove to be a menace to life. This right needs each product which can potentially be a danger to our lives to be marketed after adequate and complete verification as well as validation.



Example: In a case covered in Hindustan times newspaper on 20th February 2022, there were sixteen children who got hospitalized and three of them died, due to a cough syrup containing dextromethorphan during September-October 2021 in Delhi. Another equally tragic incident involving 15 children and the death of nine of them in Jammu and Kashmir last year from an adulterated cough expectorant, throw up serious questions about the safety and efficacy of cough medications for children. The pharmaceutical companies must ensure the safety and efficacy of cough medications for children. There is a need to hold them accountable under the Consumer Protection Act too and force them to pay hefty compensation and punitive damages to the victims, in addition to prosecution under the Drugs and Cosmetics Act for dangerous and adulterated drugs.

Case Analysis

Issue: Xola is a resident in Meghalaya. He buys a pressure cooker from a shop. Lola, his wife used it to cook dinner. The quality of cooker was of not very good quality. As such, when Lola was using it

to cook food, suddenly the cooker bursted and hurt her. Xola filed a case for compensation for his wife who got injured. Will he succeed? Give reasons.

Rule: A customer has a right to stay protected against marketing of goods and services hazardous to life and property.

Analysis: In the given case both husband and wife get covered under the definition of consumer. Xola buys a pressure cooker that bursts owing to defective/poor quality and hurt the wife of Xola.

Conclusion: In the given case both husband and wife are consumers and as such they have right to stay protected against marketing of goods and services which are hazardous to life and property'. Thus, Xola has right to recover the compensation for the injuries of his wife.

2. Right to Information

A consumer must be well informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to remain protected against unfair trade practice. The label of a product must provide these details. Also, the instructions about how to use the product safely should be provided. In India, consumers get information by two ways namely advertising and word of mouth however these sources are considered unreliable but still this word of mouth is quite common here. Indian consumers hardly have accurate and complete information for assessing the true value, safety, suitability, reliability of any product. Usually the hidden costs can be found, lack of suitability, quality problems and safety hazards only after the purchase of the product.

3. Right to Choose

The definition of Right to Choose as per the Consumer Protection Act 1986 is the right to be assured, wherever possible, to have access to a variety of goods and services at competitive prices. This right can be better exercised in a competitive market where a variety of goods are available.

4. Right to be Heard

It means that consumer's interests will receive due consideration at appropriate forums. It also includes right to be represented in various forums formed to consider the consumer's welfare

5. Right to Redressal

The consumer has a right to get relief against unfair trade practice of restrictive trade practices or unscrupulous exploitation in case the product or a service falls short of his expectations. The Consumer Protection Act 2019 provides for redressal to the consumers including replacement of the product, removal of defect in the product, compensation paid or any loss or injury suffered by the consumer, etc.

6. Right to Education

The consumer has a right to attain knowledge and be a well-informed throughout life. He should be aware about his rights and the reliefs available to him in case of a product or service falling short of his expectations. Any consumer organizations and some enlightened businesses are taking an active part in educating consumers in this respect.

11.6 Manner of Lodging a Complaint

Step 1: Before initiating a legal action against the service provider, the aggrieved consumer may consider to go to the grievance redressal mechanism of the service provider. Most companies have internal grievance redressal mechanism where the consumer may file their complaints.

Step 2: The consumer can send a legal notice to the service provider before taking the matter to the consumer court specifying the details of the complaints, relief to be taken and time stipulated to resolve the issue and conditions.

Step 3: If the service provider fails to resolve the issue and disagrees to compensate the loss occurred to them then the consumer has full authority to lodge a legal complaint against the service provider in the consumer forum. However, if the consumer wants to directly approach the consumer forum, he/she can because there is no obligation to send a legal notice beforehand.

A complaint needs to be included with essential details of both consumer as well as the service provider such as name, address, facts, remedy, affidavit and other supporting documents.

Section 35 of Consumer Protection Act, 2019 states that a complaint must be lodged to the respective District Forum within two years of the time of the cause of deficiency in service or any defect in goods. If the consumer has proper and valid reasons and the District Forum agrees, then the time span of filing the complaint can cross more than two years period of time.

Section 36 of the Act talks about the admissibility of complaint by forum that a consumer must file a complaint within the time period of 21 days from the date of filing. Further, the Act discusses the admissibility of complaint by forum that a consumer must file a complaint within the time period of 21 days from the date of filing.

Section 37 of the Act talks about mediation as an option of settlement with the consent of parties. Within the period of five days, both parties are to provide with a written consent. No appeal can be filed and entertained by respective forum against the order passed by Mediation. Section 40 of Consumer Protection Act, 2019 states that if the consumer is not satisfied with the order given by the District Consumer Forum, then a review application can be filed by the consumer within the time period of 30 days from the pronouncement of the order. Section 41 of Consumer Protection Act, 2019 states that if the consumer is not satisfied with the order given by the review application, then they can seek State Commission within 45 days from the date of pronouncement of order. The consumers have the liberty to go the Consumer Courts in case of deficiency in services as laid down under the Act. The new Consumer Protection Act, 2019 has opened the option of filing consumer complaint electronically. The procedure to register consumer complaint is made simple by allowing the State and District Consumer Forums for reviewing the applications and advising appropriate method such as mediation.

Pecuniary Jurisdiction of Commissions

A consumer can contact the dispute redressal agencies depending upon the amount of defect or loss suffered. The below given table summarises the Pecuniary jurisdiction of Commissions:

District Commission: Up to 1 cr

State Commission: 1 cr – 10 cr

National Commission: above 10 cr

Case Analysis: Pyaridevi Chabiraj Steels Pvt. Ltd. v. National Insurance Company Ltd. & Ors

In this case, the complainant had preferred a complaint before NCDRC challenging the decision of an insurance company for wrongfully repudiating its insurance claim of INR 28.23 crore for restoration of its factory premises. The complainant argued that “a liberal view” should be taken as if “the word value of consideration paid” is taken to be the amount paid for the purchase of goods or services by a Consumer” since there will be no instance of making payment by any consumer of premium of more than INR 10 crores. It was further argued that if a strict measure is applied, insurance claims will have to be necessarily filed either before the District Forums or the State Commissions and not before NCDRC, causing “great hardship” to such consumers. If a person has agreed to purchase a Flat/Apartment/Plot for about Rs.60,00,000/- and he is claiming refund as also compensation of Rs.50,00,000/- then the value will exceed Rs.1,00,00,000/- and the Consumer Complaint has to be filed before the National Commission. Similar, would be the case of taking Insurance Policy of above Rs. 1,00,00,000/- or may be below Rs.1,00,00,000/- but taking into consideration the premium paid and the compensation claimed if the value exceeds Rs.1,00,00,000/- the Consumer Complaint has to be filed before the National Commission.” (emphasis supplied)

11.7 Consumer Dispute Redressal Agencies

To protect consumer rights, the Act mentions the establishment of three redressal mechanisms wherein the consumers can approach to address their grievances. These are discussed below:

1. District Commission

This is the lowest rung in the redressal commissions that consumers can approach. Section 28(1) states that the State Government establishes at least one district consumer dispute redressal commission in

every district of the state. Generally, one district commission is setup in each state, however, the State Government may formulate more than one district commission.

Composition

Every district commission shall have a minimum of one president and two members but can have more members after discussing it with the Central government.

Jurisdiction

If the redressal value of a consumer dispute is 1 crore or less than that, then the aggrieved party (consumer) can approach the district commission.

Who can file a complaint at the district commission?

The following people can file a complaint at the commission under section 35(1) of the Act:

1. Consumer

A person to whom such goods are delivered, or sold or agreed to be sold or such service which has been provided or has been agreed to be provided. Someone, who alleges unfair trade practices in respect of such goods is also a consumer.

2. Consumer Association

- i. Any voluntary consumer association registered under the law. It doesn't matter if the consumer is part of such association or not.
- ii. One or more consumers appearing on behalf of all consumers with a common interest
- iii. These consumers would first need to get permission from the District Commission to proceed with the complaint in such a manner.
- iv. Central Government, State Government or the Central Authority as the case may be

Once a complaint is received by the District Commission, within 21 days of receiving a complaint, it needs to accept or reject it. Section 36 of the act states that, the commission cannot reject a complaint without first hearing the complainant. Once the complaint is admitted, the commission must:

- Send a copy of the complaint, within 21 days of the complaint being admitted, to the opposite party and call for its own version of the story within 30 days or the extended period as granted by it.
- If the opposite party fails and omits to take any action regarding the complaint or disputes the allegation, then district commission must deal with it in the following ways.
- It also needs to seal the apparently defective goods, and send them to the appropriate laboratory after verifying it in the manner required. It must direct the laboratory to find if there is any genuine fault with the goods and report its findings to the commission within 45 days or how much ever time granted by it.
- The complainant must be directed to deposit the sum of money required for testing in the credit of the commission, before the goods go to the laboratory.
- If any of the parties dispute the correctness of the finding of the laboratory, then the parties must be directed to submit their objections in writing to it.
- Before taking any decision, a reasonable opportunity to the opposite party or the initiating party must be provided by it to be heard regarding their objections.



Do you know?

If the above-mentioned procedure can't be followed due to the lack of goods to take a sample from or if the defect alleged is in the service of the opposite party. Then the commission shall settle the dispute:

- On the basis of evidence provided by the complainant or the opposite party, if the opposite party disputes the allegation.
- Take an ex parte decision, if the opposite party omits to do anything regarding the allegations.
- In case the complainant fails to show up for the hearing, the commission shall decide the case on its merits.
- If it's inconvenient for the party to show up to the commission in person, it can allow for hearing or examination of parties through video conferencing. If the district commission agrees with the reasons then it may allow so after recording the reason.
- The commission must deal with the case as expeditiously as possible and attempt must be done to dispose of the case within three months if no analysis or testing is required and five months if analysis and testing are required.
- The District commission has the same power as the district court under this act.

Dissatisfaction from decision of District commission

If an aggrieved party who is not satisfied by the order of the district commission, it may make an appeal to the State Commission within 45 days of receiving such order. Even though the State Commission may entertain the plea after 45 days if sufficient reason is given by the party. However, the State Commission shall not hear the appeal of the party if the party has to pay a certain amount ordered to be paid by the District Commission. Minimum 50% of the amount must be paid before the State Commission will hear the appeal.



Do you know?

It is necessary for every proceeding to be presided by the President and one member at least. Where the member who has been sitting for a particular proceeding is absent, the proceeding can be resumed with another method.

2. State Commission

The State government establishes a State commission, under section 42(1) of the Act, in the state through the notification. It can also establish regional branches, if it seems fit.

Composition:

- i. one President;
- ii. no less than four members and a maximum of as many members as is required.

Jurisdiction

According to section 47, the State Commission has the jurisdiction to entertain the complaints where the value of the goods or services paid as consideration, exceeds rupees one crore but does not exceed rupees ten crores. However, where the Central Government deems it necessary, it may prescribe such other value, as it deems fit. Further the state commission shall entertain the complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees. Also, it may provide a solution to the applicants appealing against the orders of any District Commission within the State.

Apart from that, it also has the jurisdiction to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Commission within the State, where it appears to the State Commission that such District Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity. A bench of the State Commission must consist of a President and one member or more if the president deems it fit.

Power of State Commission

It is provided under section 48, that the State Commission has the power to shift proceedings from one district commission to another. State Commission disposes of the case in the exact same method as the District Commission and also holds the power to review its own cases.

If aggrieved by the decision, the aggrieved party may prefer an appeal to the National Commission within 30 days of receiving the order from the state commission. If sufficient reason is shown then the national commission can also entertain the plea after the thirty days. The national commission shall not listen to an appeal if the person who has to pay a particular amount from the order of the state commission, has not paid at least 50% of the amount ordered to be paid. The appeal must be dealt with expeditiously and endeavors must be made to dispose of the appeal within 90 days from its date of admission.

3. National Commission

Under Section 53(1), the Central Government establishes a National commission through notification. The main National Commission operates on the national capital region but the Central government can establish regional branches through notification. The National Commission must have one president and at least 4 members with the maximum being whatever is prescribed by the national government.

The National Commission has jurisdiction, under section 58 of the Act:

(a) to entertain:

(i) complaints where the value of the goods or services paid as consideration exceeds rupees ten crores: Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;

(ii) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;

(iii) appeals against the orders of any State Commission;

(iv) appeals against the orders of the Central Authority; and

(b) 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.

A bench in the National Commission must at least consist of the President and one member but there can be more members if the President deems it fit. The National Commission disposes of a case in the same manner as the district commission and also reserves the right to review its cases suo moto or based on an application filed by one of the parties.

Section 65(1) also states:

- All notices, required by this Act to be served, shall be served by delivering or transmitting a copy thereof by registered post acknowledgment due addressed to opposite party against whom complaint is made or to the complainant by speed post or by such courier service, approved by the District Commission, the State Commission or the National Commission, as the case may be, or by any other mode of transmission of documents including electronic means:
- If the postal delivery guy acknowledges that the post was refused by the party then the commission must acknowledge the party as duly served under 65(2).
- If aggrieved by the decision then an appeal does lie to the Supreme Court if made within thirty days of receiving the order.

Administrative control

Section 70 of the act states that the national commission shall lay down regulations for the State Commission after consultation with the Central government, for the better protection of the consumers and for that purpose must also have administrative control over all state commissions in the following matters:

a) monitoring performance of the State Commissions in terms of their disposal by calling for periodical returns regarding the institution, disposal and pendency of cases;

(b) investigating into any allegations against the President and members of a State Commission and submitting inquiry report to the State Government concerned along with copy endorsed to the Central Government for necessary action;

(c) issuance of instructions regarding the adoption of uniform procedure in the hearing of matters, prior service of copies of documents produced by one party to the opposite parties, furnishing of the English translation of judgments written in any language, speedy grant of copies of documents;

(d) Overseeing the functioning of the State Commission or the District Commission either by way of inspection or by any other means, as the National Commission may like to order from time to time, to ensure that the objects and purposes of the Act are best served and the standards set by the National Commission are implemented without interfering with their quasi-judicial freedom.

There shall be a monitoring cell instituted by the president of the national commission and the State Commission shall also have the same administrative control over the district commission. Section 71 of the Act also states that every decision of the commission must be enforced in the same way as a decree made by the court under Order XXI of the first schedule of the Civil procedure code. Section 72 lays down the punishment on the disobedience of commission orders:

- Whoever fails to comply with any order made by the District Commission or the State Commission or the National Commission, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one month, but which may extend to three years, or with fine, which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees, or with both.
- The section further grants the commissions the same power as a judicial magistrate first class under the Code of Criminal Procedure.

Penalty for consumer Rights Violation

The provisions of the extensive act relate to what constitute an offence and what are the related penalties for manufacturing, distributing and selling of any spurious or adulterated product. Any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees; and for every subsequent offence, be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.

Whoever, by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any product containing an adulterant shall be punished, if such act:

(a) does not result in any injury to the consumer, with imprisonment for a term which may extend to six months and with fine which may extend to one lakh rupees;

(b) causing injury not amounting to grievous hurt to the consumer, with imprisonment for a term which may extend to one year and with fine which may extend to three lakh rupees;

(c) causing injury resulting in grievous hurt to the consumer, with imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees; and

(d) results in the death of a consumer, with imprisonment for a term which shall not be less than seven years, but which may extend to imprisonment for life and with fine which shall not be less than ten lakh rupees.

The Director General or any other officer, who knows that there are no reasonable grounds for so doing, and yet searches, or causes to be searched any premises; or seizes any record, register or other document or article, shall, for every such offence, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees or with both

Summary

- The Consumer Protection Act of 2019 protects customers' interests. The main goal of the Act is to guard the rights of consumers by establishing authorities for the quick and effective administration and resolution of consumer disputes.

- The Consumer Protection Act of 2019 broadened the meaning of the term "consumer." It now refers to everyone who is procuring the items, whether online or offline. The new statute includes a clause called Pecuniary Jurisdiction, which states that the district forum would now hear consumer complaints if the value of the products or services paid does not exceed INR 1 crore. The State Commission will now hear disputes worth more than INR 1 crore but less than INR 10 crore. In addition, when the value surpasses INR 10 crore, the National Commission can now exercise authority.
- Central Consumer Protection Authority (CCPA) promotes, protects and enforces the rights of consumers as a class. It is empowered to conduct investigations into violation of consumer rights and institute complaints / prosecution, order recall of unsafe goods and services, order discontinuation of unfair trade practices and misleading advertisements, impose penalties on manufacturers/endorsers/publishers of misleading advertisements.
- The Consumer Protection Act of 2019 proposes product liability measures. The argument that e-commerce platforms are only 'platforms' or 'aggregators' is no longer valid. Now, if a consumer is injured or loses money as a result of faulty goods or poor service, the manufacturer or service provider must pay them.
- Along with manufacturers, product responsibility has now been extended to dealers and service providers. As a result, e-commerce sites can no longer ignore aggregators. They will also be held liable for any consumer losses or damage.
- Manufacturers will face fines of up to two years in jail if they print misleading or deceptive marketing, according to the Central Consumer Protection Authority (CCPA).
- For a period of one year, the endorser is also prohibited from endorsing a false advertisement of that particular goods or service under the CCPA. The period of restriction may be extended to three years for each subsequent offence. The Act also establishes responsibility in the event that a customer is subjected to unfair commercial practices as a result of celebrity brand ambassadors. This paragraph clearly states that it is the endorser's responsibility to check the claims made in the advertising and to do so with appropriate diligence.
- Rights of a Consumer includes:
 - Right to be Protected
 - Right to Information
 - Right to Choose
 - Right to be Heard
 - Right to Redressal
 - Right to Education
- A consumer can contact the dispute redressal agencies depending upon the amount of defect or loss suffered. The below given table summarises the Pecuniary jurisdiction of Commissions:

District Commission: Up to 1 cr
State Commission: 1 cr - 10 cr
National Commission: above 10 cr

Keywords

- **Complaint:** Complaint many allegations in writing by a complainant with a view to obtaining any relief under the Act.
- **Consumer Dispute:** Dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint.

- **Consumer:** Any person who buys any goods for consideration which has been paid or promised or partly paid and partly promised.
- **Defect:** It is defined to mean any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained.
- **Service:** It means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing.

SelfAssessment

Q1. A complaint relating to which among the following can forwarded either in writing or in electronic mode, to any one of the authorities, namely, the District Collector or the Commissioner of regional office or the Central Authority?

- A. Violation of consumer rights
- B. Unfair trade practices
- C. False or misleading advertisements
- D. All the options are correct

Q2. Consumer Protection Act is significant to?

- A. All Goods and Services
- B. Immovable Goods
- C. Movable Goods
- D. All types of Goods and Services

Q3. How many rights does a consumer have under the Consumer Protection Act?

- A. 6
- B. 5
- C. 4
- D. 3

Q4. What is the maximum penalty that can be imposed by the Central Authority for every subsequent contravention, in respect of such false or misleading advertisement, by a manufacturer or an endorser?

- A. One Lakh
- B. Fifty Lakhs
- C. Ten lakh
- D. One crore

Q5. Under the Consumer Protection Act, the rights of a consumer do not include:

- A. Safety
- B. Choose
- C. Presented
- D. Informed

Q6. Which of the following forum can reappoint the same person as its member?

- A. National commission

- B. State commission
- C. District commission
- D. None of the above

Q7. Within how many days does the opposite party have to answer after they are informed about the complaint?

- A. 20 days
- B. 30 days
- C. 7 days
- D. 5 days

Q8. _____ is the standardized mark on jewellery

- A. ISI
- B. FPO
- C. Hallmark
- D. CERC

Q9. _____ are made to hear complaints of the value less than 5 lakhs.

- A. District Forum
- B. State commission
- C. National commission
- D. None of the above

Q10. Mahesh bought a packet of chips from a local shopkeeper and found that the ingredients given on the label were not legible. He complained about it to the company. The company sent a written apology stating that they will make sure that existing packets are withdrawn from the market and new packets with legible labels are soon made available. Which Consumer right has been Mahesh exercised?

- A. Right to choose
- B. Right to be informed
- C. Right to seek redressal
- D. Right to remain silent

Q11. When the seller manipulates the price, it is known as

- A. Caveat Emptor
- B. Unfair trade practices
- C. Restricted trade practices
- D. None of the above

Q12. The maximum age for a state commission member should be

- A. 50
- B. 70
- C. 60

D. 67

Q13. In which forum is it compulsory to have a female member?

- A. National commission
- B. State commission
- C. District commission
- D. National commission, State commission as well as District commission

Q14. Right to _____ provides that a consumer has right to know about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to be protected against unfair trade practices in the Consumer Protection Act.

- A. Information
- B. Choose
- C. Heard
- D. Protected

Q15. Under this act, the minimum age of forum member of a district forum should be

- A. 30
- B. 35
- C. 40
- D. 55

Answer for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. D | 2. D | 3. A | 4. B | 5. C |
| 6. D | 7. B | 8. C | 9. A | 10. B |
| 11. C | 12. B | 13. D | 14. A | 15. B |

Review Questions

- Q1. What are the consumer rights laid under Companies Act?
- Q2. Discuss the role of District Forum in Consumer Dispute settlement in detail.
- Q3. Discuss the role of State Commission in Consumer Dispute settlement in detail.
- Q4. Discuss the role of National Commission in Consumer Dispute settlement in detail.
- Q5. Write a short note on:
- i. Deficiency of Service
 - ii. Unfair Trade Practice
 - iii. Duties of E-commerce Entity



Further Readings

1. A Text Book Of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements of Mercantile Law By N.D. Kapoor, S. Chand & Company
3. A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law by S SGulsan, Excel Books
5. Mercantile Law by M C Kuchchal, Vikas Publishing House
6. Legal Aspects of Business By Daniel Albuquerque, Oxford &Ibh



Web Links

<https://www.hindustantimes.com/cities/delhi-news/time-to-read-the-fine-print-of-consumer-law-to-punish-unfair-trade-practices-101641036718405.html>

https://blog.ipleaders.in/consumer-protection-act-2019/#Consumer_protection_redressal_agencies

<https://www.legitquest.com/legal-guide/consumer-protection-act-2019-and-its-salient-features>

<https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/FAQ.pdf>

Unit 12 : Negotiable Instruments Act,1881

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Objective

After studying this unit, you will be able to:

- Comprehend the meaning and characteristics of Negotiable Instruments
- Understand the classification of Negotiable Instruments
- Compare and contrast between promissory note, bill of exchange and cheque

Introduction

This Act may be called as Negotiable Instruments Act, 1881. It extends to the whole of India. The law relating to negotiable instruments is enacted to facilitate the activities in trade and commerce; provide sanctity to the instruments of credit which are deemed to easily convertible into money and easily transferable from one person to another. The main objective of the Act is to legalize the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. The Law in India relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881. This is an Act to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques. The Act applies to the whole of India, but nothing herein contained affects the Reserve Bank of India Act, 1934, (section 21 which provides the Bank to have the right to transact Government business in India), or affects any local usage relating to any instrument in an oriental language. The provisions of this Act are also applicable to Hundis, unless there is a local usage to the contrary.

12.1 Meaning of Negotiable Instruments

Negotiable instrument is an instrument (the word instrument means a document) which is freely transferable (by customs of trade) from one person to another by mere delivery or by endorsement and delivery. The property in such instrument passes to bonafide transferee for value. It is important to understand that a Negotiable instrument is payable to order and is payable to bearer.

12.2 Features of Negotiable Instruments

1. **Transferability:** A negotiable instrument is easily and freely transferable. There are no formalities or much paperwork involved in such a transfer. The ownership of an instrument can transfer simply by delivery or by a valid endorsement.
2. **Must be in Writing:** All negotiable instruments must be in writing. This includes handwritten notes, printed, engraved, typed, etc.
3. **Time of Payment must be Certain:** If the order is to pay when convenient then such an order is not a negotiable instrument. Here the time period has to be certain even if it is not a specific date. For example, it is acceptable if the time of payment is linked with the death of a specific individual. As death is a certain event.
4. **Payee also must be certain:** The person to whom the payment is to be made must be a specific person or persons. It is important to note that 'person' here means natural as well as an artificial person who can be a body corporate, trade union, chairman, secretary etc. Also, there can be more than one payee for a negotiable instrument.

12.3 Types of Negotiable Instruments

1. **Promissory Note:** It refers to as an instrument that is in a written form writing with an unqualified or unconditional undertaking. It is 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.

Parties to a Promissory note includes:

Maker: The person who makes the promissory note and promises to pay is called the maker.

Payee: The person to whom the payment is to be made is called the payee.

Features of a Promissory note:

1. **In writing-** An oral promise to pay is not sufficient to form a valid promissory note.
2. **There must be an express promise to pay:** If there is just an acceptance of debt, then it is not sufficient to make a promissory note.



Example: Suppose Angela signs the instruments in following terms as:

1. I promise to Johnny, an order of Rs. 5,000
2. I acknowledge that I am indebted to Johnny, a sum of Rs. 10,000 which is payable on demand for value received.
3. Mr. Johnny, I owe you a sum of Rs. 10,000
4. "I promise to Pay Johnny, a sum of Rs. 10,000 within seven days after my marriage with Chandrika."

It is to understand that the instruments respectively marked (1) and (2) are promissory notes. The instruments respectively marked (3) and (4) are not promissory notes.

3. **Definite and unconditional promise:** A promissory note must have a definite as well as an unconditional promise.



Example: "I promise to Pay Johnny, a sum of Rs. 10,000 within seven days after my marriage with Chandrika." (the promissory note is invalid as marriage with C may or may not happen.)

A promissory note must be signed by the maker otherwise it is incomplete and ineffective.

Promise to pay money only.



Example: I promise to pay B ₹ 500 and to deliver to him my black horse on 1st January next. - It is not a valid promissory note, as the promisor needs to deliver its black horse which is not money.

Promise to pay a certain sum



Example: "I promise to pay B ₹ 500 and all other sums which shall be due to him." - Promissory note invalid as the amount payable is not certain.

Themaker and payee must be certain, definite and different persons. A promissory note cannot be made payable to the bearer (Sec. 31 of RBI Act). Only the Reserve Bank or the Central Government can make or issue a promissory note 'payable to bearer'.

Stamping A promissory note must be properly stamped in accordance with the provisions of the Indian Stamp Act and such stamp must be duly cancelled by maker's signatures or initials

3. **Bill of exchange:** It is an instrument in writing, containing an unconditional order, signed by the maker. With this instrument, a maker directs a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

Parties to a Bill of Exchange

1. Drawer: The maker of a bill of exchange.
2. Drawee: The person directed by the drawer to pay is called the 'drawee'. He is the person on whom the bill is drawn. On acceptance of the bill he is called an acceptor and is liable for the payment of the bill. His liability is primary and unconditional.
3. Payee: The person named in the instrument, to whom or to whose order the money is, by the instrument, directed to be paid.

Features of a Bill of Exchange

1. It is essential that a bill of exchange should be in written.
2. The name of all relevant parties should be properly mentioned. It is important to note that, all three parties may not necessarily be three different persons. One can play the role of two. But there must be two distinct persons in any case. Section 31 of RBI Act, 1934 states that a bill of exchange cannot be made payable to bearer on demand.
3. It must be addressed from one party to another
4. It must bear the signature of the party giving it
5. It must outline the time when the money is due
6. It must outline the amount of money that must be paid

Specimen of Bill of Exchange

10,000

Jalandhar – 144022

Feb. 21, 2022

Six months after date pay to Allen or order/bearer the sum of ten thousand rupees only for value received.

To Xavier

Sd/- Allen

Address.....

Stamp

In this case Yousuf is the drawer, Allen is the payee and Xavier is drawee. Xavier will express his willingness to pay 'accepting' the bill by writing words somewhat as below across the face of the bill.

Accepted

Sd: Xavier Feb 24th February 2022

4. **Cheque:** It is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Explanation I.-- For the purposes of this section, the expressions:

2[(a) A cheque in the electronic form means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and asymmetric crypto system or with electronic signature, as the case may be;]

(b) A truncated cheque means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Explanation II -- For the purposes of this section, the expression clearing house means the clearing house managed by the Reserve Bank of India or a clearing house recognized as such by the Reserve Bank of India.]

Explanation III -- For the purposes of this section, the expressions asymmetric crypto system, computer resource, digital signature, electronic form and electronic signature shall have the same meanings respectively assigned to them in the Information Technology Act, 2000 (21 of 2000).]

Features

(i) **Instrument in Writings:** A cheque or a bill or a promissory note must be an instrument in writing. Though the law does not prohibit a cheque being written in pencil, bankers never accept it because of risks involved. Alternation is quite easy but detection impossible in such cases.

(ii) **Unconditional Orders:** The instrument must contain an order to pay money. It is not necessary that the word 'order' or its equivalent must be used to make the document a cheque. It does not cease to be a cheque just because the word 'please' is used before the word pay. Further the order must be unconditional. In other words, payment of money is made dependent on the happening of an event or on a fulfilment of a condition, the instrument loses the characteristics of a cheque.

(iii) **Drawn on a Specified Banker Only:** The cheque is always drawn on a specified banker. A cheque vitally differs from a bill in this respect as latter can be drawn on any person including a banker. The customer of a banker can draw the cheque only on the particular branch of the bank where he has an account.

(iv) **A Certain Sum of Money Only:** The order must be for payment of only money. If the banker is asked to deliver securities, the document cannot be called a cheque. Further, the sum of money must be certain.

(v) **Payee to be Certain:** The cheque must be made payable to a certain person or to the order of a certain person or to the bearer of the instrument. The word, person includes bodies corporate, local authorities, associations, holders of office of an institution etc.,

(vi) **Signed by the Drawer:** The cheque is to be signed by the drawer. Further, it should tally with specimen signature furnished to the bank at the time of opening the account.

(vii) **Payable Always on Demand:** A cheque is always payable on demand. The words on demand are not used when the drawee bank is asked to pay and the time for its payment is not specified, it is considered to be payable on demand.

12.4 Definition

Drawer: The one who makes a bill of exchange or cheque is called as a drawer

Unit 12: Negotiable Instruments Act, 1881

Drawee: The person who is directed to pay is called the drawee.

Drawee in case of need: When in the Bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a drawee in case of need.

Acceptor: After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the acceptor.

Acceptor for honour: When a bill of exchange has been noted or protested for non-acceptance [acceptance or for better security,] and any person accepts it supra protest for honour of the drawer or of any one of the endorsers, such person is called an acceptor for honour.

Payee: The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid.

Holder: The 'holder' of a 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. Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

Holder in due course: This 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 without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

Payment in due course: This 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.

12.5 Compare and Contrast between Promissory Note, Bill of Exchange and Cheque

I. Bill of Exchange vs Promissory Note

Basis of Difference	Bill of Exchange	Promissory Note
Meaning	It's a written instrument that indicates the indebtedness of a buyer towards a seller of goods.	It's a written promise by the debtor to pay a certain sum of money to the creditor at a future specified date.
Definition	It is defined under section 5 of Negotiable Instrument Act, 1881.	It is defined under section 4 of Negotiable Instrument Act, 1881.
Parties	It involves three parties, i.e. drawer, drawee and payee.	It involves two parties, i.e. drawer and payee.
Drawn by	It is drawn by a Creditor	A Debtor draws it
Liability of Maker	A maker of Bill of Exchange in this case is secondary and conditional	A maker of Promissory note has a primary and absolute liability
Can maker and payee be the same person?	Both maker and payee can be the same person.	Maker and payee cannot be the same person.
Copies	Bill can be drawn in copies.	Promissory Note cannot be drawn

		in copies.
Dishonour	Notice is necessary to be given to all the parties involved.	Notice is not necessary to be given to the maker.

II. Promissory Note vs Cheque

Basis of Difference	Cheque	Promissory Note
Nature of order	A cheque contains an order to pay the money	A promissory note contains an undertaking to pay money
No. of Parties	There are three parties involved, namely: i. Drawer ii. Drawee and iii. Payee	There are two parties involved, namely: i. Maker ii. Payee
Creator of Instrument	Drawer drafts it	Debtor prepares this
Identity of Parties to Instrument	Drawer and drawee can be the same person	Maker and Payee cannot be same
Liability	A cheque is payable on demand	It can be paid on demand or after a specified period
Crossing	There are two ways to cross a cheque, namely: i. General and ii. Specific	Crossing is not applicable
Stamping	It is not compulsory to stamp it	It must be stamped
Discounting	It is not possible to get a Cheque discounted.	A promissory note may be discounted with a Banker
Grace Period	Grace days are allowed for payment of a cheque	3 days grace is allowed to calculate due date of promissory note
Bearer	It is payable to order or to its bearer	It is not payable to bearer

III. Cheque vs Bill of Exchange

Basis of difference	Cheque	Bill of Exchange
Meaning	A document used to make easy payments on demand and can be transferred through hand delivery is known as cheque.	A written document that shows the indebtedness of the debtor towards the creditor.
Defined in	Section 6 of The Negotiable Instrument Act, 1881	Section 5 of The Negotiable Instrument Act, 1881
Validity Period	3 months	Not Applicable
Payable to bearer on demand	Always	Cannot be made payable on demand as per RBI Act, 1934
Grace Days	Not Applicable, as it is always payable at the time of presentment.	3 days of grace are allowed.
Acceptance	A cheque does not require acceptance.	Bill of exchange needs to be accepted.
Stamping	No such requirement.	Must be stamped.
Crossing	Yes	No
Drawee	Bank	Person or Bank
Noting or Protesting	If the cheque is dishonoured it cannot be noted or protested	If a bill of exchange is dishonoured it can be noted or protested.

Summary

Negotiable instrument means a written document which creates a right in favour of some person and which is freely transferable. It can be classified as Promissory Note, Bill of Exchange and Cheque.

Section 4 of the Act defines, "A **promissory note** is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments." Parties to a Promissory note includes a maker. He makes the promissory note and promises to pay is called the maker and ii. Payee: The person to whom the payment is to be made is called the payee. A promissory note must be in writing as an oral promise to pay is not sufficient to form a valid promissory note. If there is just an acceptance of debt, then it is not sufficient to make a promissory note. A promissory note must have a definite as well as an unconditional promise.

Bill of exchange: It is an instrument in writing, containing an unconditional order, signed by the maker. With this instrument, a maker directs a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. Parties to a Bill of Exchange includes, drawer, who is the maker of a bill of exchange, drawee: The person as directed by the drawer to pay and payee, the person named in the instrument, to whom or to whose order the money is, by the instrument, directed to be paid. It is essential that a bill of exchange should be in written.

The name all relevant parties should be properly mentioned. It is important to note that, all three parties may not necessarily be three different persons. One can play the role of two. But there must be two distinct persons in any case. Section 31 of RBI Act, 1934 states that a bill of exchange cannot be made payable to bearer on demand. It must be addressed from one party to another. It must bear the signature of the party giving it and should outline the time when the money is due. It must outline the amount of money that must be paid.

Cheque: It is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Keywords

- **Bill of exchange:** It is a written agreement that happens between two parties, which are the buyer and the seller.
- **Promissory note:** It is a negotiable instrument directing the payment of a specific amount of money to the creditor or the individual mentioned therein or the bearer of the instrument. The instrument comprises an unconditional order in writing that must be duly signed by the maker.
- **Cheque:** It is a bill of exchange in which one party orders the bank to transfer the money to the bank account of another party. It is a negotiable instrument that is covered under the Negotiable Instruments Act, 1881. There are three parties involved in the transaction – the drawer is the person who writes the cheque, the drawee is the bank that has to transfer the funds and the payee is the person in whose name the cheque has been issued. A cheque can be issued against a savings account or a current account.
- **Drawer:** The one who makes a bill of exchange or cheque is called as a drawer
- **Drawee:** The person who is directed to pay is called the drawee.
- **Drawee in case of need:** When in the Bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a drawee in case of need.
- **Acceptor:** After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the acceptor.
- **Acceptor for honour:** When a bill of exchange has been noted or protested for non-acceptance or for better security, and any person accepts it supra protest for honour of the drawer or of any one of the endorsers, such person is called an acceptor for honour
- **Payee:** The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid.
- **Holder:** The 'holder' of a 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. Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.
- **Holder in due course:** This 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 without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

- **Payment in due course:** This 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.

SelfAssessment

Q1. Identify which of the given is not true regarding a Negotiable Instrument?

- A. Transferability
- B. Must be Verbal
- C. Time of Payment must be Certain
- D. Payee also must be certain

Q2. _____ refers to as an instrument that is in a written form writing with an unqualified or unconditional undertaking.

- A. Promissory note
- B. Cheque
- C. Bill of Exchange
- D. None of the above

Q3. Identify the false statement regarding a Bill of Exchange:

- A. It essential that a bill of exchange should be in written.
- B. It must outline the time when the money is due.
- C. It must outline the amount of money that must be paid.
- D. It must not be signed by the party giving it.

Q4. _____ is a bill of exchange drawn on a specified banker and not expressed to be payable.

- A. Bill of Exchange
- B. Promissory note
- C. Cheque
- D. All of the above

Q5. Which of the given is a Promissory Note?

- A. I promise to pay Ballu Rs. 500 and to deliver to him my white puppy on 1st January 2023.
- B. "I acknowledge myself to be indebted to Raghav in Rs. 1,000, to be paid on demand, for value received."
- C. I promise to pay Chandru a sum of Rs. 500 in seven days or after my marriage with Chanda.
- D. I promise to pay Bob Rs. 500 on Derrick's death, provided Derrick leaves me enough to pay that sum.

Q6. All offences under Negotiable Instruments Act shall be tried by:

- A. A Metropolitan Magistrate
- B. A Judicial Magistrate of the first class

- C. Either A or B
- D. None of the above

Q7. When a bill is said to be dishonoured?

- A. where presentment is excused and the bill is not accepted
- B. one of several drawees makes default in acceptance upon being duly required to accept the bill.
- C. by non-acceptance by the drawee
- D. All of the above.

Q8. When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due:

- A. On the same day.
- B. On the next preceding business day.
- C. On the next business day.
- D. On the next succeeding business day.

Q9. Three days grace is allowed to calculate due date of _____

- A. Promissory note
- B. Cheque
- C. Bill of Exchange
- D. Any one of the above

Q10. _____ involves three parties, i.e. drawer, drawee and payee.

- A. Promissory note
- B. Purchase Invoice
- C. Bill of Exchange
- D. Any one of the above

Q11. _____ is valid for 3 months.

- A. Cheque
- B. Bill of exchange
- C. Promissory Note
- D. None of the above

Q12. In which of the following crossing is not applicable?

- A. Cheque
- B. Cheque and Bill of Exchange
- C. Bill of Exchange and Promissory note
- D. Promissory note and Cheque

Q13. Identify the false statement regarding a Cheque?

- A. A cheque contains an order to pay the money.
- B. Drawer, Drawee and Payee are parties to it.
- C. Drawer and drawee can be the same person.
- D. It must be stamped.

Q14. _____ is prepared by a Debtor.

- A. Promissory note
- B. Cheque
- C. Bill of Exchange
- D. Any of the above

Q15. If _____ is dishonoured it cannot be noted or protested.

- A. Promissory note
- B. Cheque
- C. Bill of Exchange
- D. Any of the above

Answer for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. B | 2. A | 3. D | 4. C | 5. B |
| 6. C | 7. D | 8. B | 9. A | 10. C |
| 11. A | 12. C | 13. D | 14. A | 15. B |

Review Questions

- Q1. Discuss the types of a Negotiable Instrument with the help of suitable examples.
- Q2. Write a detailed note on Crossing of a Cheque.
- Q3. Discuss the difference between i) Cheque and Promissory note ii) Bill of Exchange and Cheque
- Q4. What is a Bill of Exchange? Discuss its features in detail.
- Q5. What is a Negotiable Instrument. Discuss the features of a Negotiable Instrument.



Further Readings

1. A Textbook Of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
3. A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law by S SGulsan, Excel Books
5. Mercantile Law by M C Kuchchal, Vikas Publishing House
6. Legal Aspects of Business By Daniel Albuquerque, Oxford & Ibh



Web Links

<https://www.mbaknol.com/mercantile-law/features-of-negotiable-instruments/>

https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_33_00042_00042_1523271998701&orderno=6

<https://legislative.gov.in/sites/default/files/A1881-26.pdf>

Unit 13: Negotiable Instrument Act,1881

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Objective

After studying this unit, you will be able to:

- Comprehend the concept of holder and holder in due case
- Understand the crossing of cheque
- Cognize the concept of endorsement and its types
- Comprehend the concept of crossing and types of crossing a cheque
- Understand the consequences for bouncing of a cheque

Introduction

In the previous unit, we discussed regarding concept of negotiable instruments, their features and classification. We compared and contrasted between promissory note, bill of exchange and cheque. In this chapter, we shall discuss about the concept of holder, holder in due course, endorsement and its types, crossing and bouncing of cheques. Finally, the penalty for bouncing of cheques.

13.1 Meaning of Holder and Holder in Due Course

When we talk about types of negotiable instruments like Promissory note and Bills of Exchange, we come across the term of holder and holder in due course. A **holder** refers to as the payee of a negotiable instrument, who is in possession of it. Such a person is eligible to obtain or recuperate the amount due on the instrument from the parties thereto. **Holder in due course** implies a person who obtains the instrument bonafide for consideration before maturity, without any knowledge of defect in the title of the person transferring the instrument.

13.2 Holder Vs. Holder in Due Course

Section 8 defines the term 'Holder' as a holder of a promissory note, bill of exchange or cheque means any person. As per this section, such a person is entitled in his own name to the possession thereof, and to receive or recover the amount due thereon from the parties thereto. A person who finds or steals a bearer instrument or takes an instrument under forged indorsement is not holder.

Section 9 defines 'Holder in due course' as 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 indorsee thereof, (if payable to order) before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Where a signature on the negotiable instrument is forged, it becomes a nullity. The holder of a forged instrument cannot enforce payment thereon. This principle is universal in character, by reason where of even a holder in due course is not exempt from it.

Let us discuss the difference between the two terms. The table below summarizes the difference with solid basis:

Basis for Comparison	Holder	Holder in Due Course (HDC)
Meaning	A person legally obtaining a negotiable instrument. The Instrument shall have the name of such a person entitled on it. Thus, the person so entitled may receive the payment from the parties liable.	A person acquiring the negotiable instrument bonafide for some consideration, whose payment is still due is better known as a Holder in Due Course (HDC).
Consideration	Not necessary	Necessary
Right to sue	A holder cannot sue all prior parties.	A holder in due course can sue all prior parties.
Good faith	The instrument may or may not be obtained in good faith.	The instrument must be obtained in good faith.
Privileges	There are comparatively less privileges.	There are comparatively more privileges.
Maturity	A person can become holder, before or after the maturity of the negotiable instrument.	A person can become holder in due course, only before the maturity of negotiable instrument.

13.3 Essentials to Become Holder in Due Course

The holder must have paid valuable consideration to become a holder in due course, a person must obtain a negotiable instrument by paying valuable and lawful consideration for it. When given as a gift or has been inherited, the transferee cannot be a holder in due course. A holder must acquire the instrument before its maturity in order to attain the status of holder in due course. The holder must have obtained the instrument in good faith. The instrument must be complete and regular on the face of it. He must have received the instrument as a holder- i.e. he may be either payee, or the possessor (if the instrument is payable to bearer), or the indorsee (if the instrument is payable to order).

Privileges of Holder in Due Course

1. Inchoate stamped instruments [Section 20]: When one person signs and delivers a stamped paper to another as per the provisions laid under the Negotiable Instruments act 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; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

2. Acceptance of bill drawn in fictitious name [Section 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 indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

3. Instrument obtained by unlawful means or for unlawful consideration [Section 58]: When a negotiable instrument has been lost, or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course.

4. Estoppel against denying original validity of instrument [Section 120]: No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.

5. Estoppel against denying capacity of payee to indorse [Section 120]: No maker of a promissory note and no acceptor of a bill of exchange [payable to order] shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the rate of the note or bill, to indorse the same.

13.4 Meaning and essentials of Endorsements

Endorsement literally means "writing on the back of the instrument." But under the Negotiable Instruments Act, it means "**writing of a person's name on the back of the instrument or on any paper attached to it for the purpose of negotiation.**" The one who signs the instrument for purpose is called the 'endorser'. It is essentially is of two kinds - Endorsement in Blank and Endorsement in full. According to Section 16 of the Negotiable Instrument Act, 1881, If the endorser signs his name only, the endorsement is said to be "in blank", and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the endorsement is said to be "in full", and the person so specified is called the "endorsee" of the instrument. The following are the essentials of a valid endorsement:

The endorsement may be on the back or face of the instrument (cheque) and if no space is left it may be made on a separate paper attached to it called allonage. The essentials of a valid endorsement are discussed below:

1. Endorsement is on the back or face of the instrument.
2. It must be duly signed.
2. It must be made by the maker or holder.
3. It must be for the entire Negotiable Instrument.
4. There is no specific form of words are necessary for Endorsement.



Note: The indorsement may be made by the indorser either by merely signing his name on the instrument or by specifying in addition to his signature, the person to whom or to whose order the instrument is payable. When, in a bill payable to order, the indorsee's name is wrongly spelled, he should when he indorses it, sign the name as spelled in the instrument and write the correct spelling within brackets after his indorsement.

Who may endorse or negotiate?

Every sole maker, drawer, payee or indorsee, or all of several joint makers, drawers, payees or indorsee's of a negotiable instrument may indorse and negotiate the same unless negotiability of such instrument has been restricted or excluded as mentioned in Sec. 50. It is however, necessary that such maker or drawer who wants to indorse is in lawful possession of the instrument. (Section 51)



Example: A bill is drawn payable to A or order. A indorses it to B, the indorsement not containing the words "or order" or any equivalent words. B may negotiate the instrument.

Effect of Indorser

The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation, but the indorsement may by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other specified person.



Example: B signs the following indorsements on different negotiable instruments payable to bearer, –

- a) "pay the contents to C only".
- b) "pay C for my use".
- c) "pay C on order for the account to B".
- d) "the within must be credited to C".

These indorsements exclude the right of further negotiation by C.

B signs the following indorsements on different negotiable instruments payable to bearer, –

- a) "pay C".
- b) "pay C value in account with the Oriental Bank".
- c) "pay the contents to C, bring part of the consideration in a certain deed of assignment executed by C to indorser and others".

These indorsements do not exclude the right of further negotiation by C.

Indorser who excludes his own liability or makes it conditional [Section 52]

The indorser of a negotiable instrument may,

- by express words in the indorsement, exclude his own
- liability thereon, or
- make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

The indorser of a negotiable instrument may,

- Where an indorser so excludes his liability and afterwards becomes the holder of the instrument all intermediates indorsers are liable to him. The indorser of a negotiable instrument signs his name, adding the words "without recourse". Upon this indorsement he incurs no liability.



Example: A is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement, "without recourse", he transfers the instrument to B, and B indorses it to C, who indorses it to A. A is not only reinstated in his former rights, but has the rights of an indorsee against B and C.

Cancellation of indorsement

Where the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity (Sec. 40).

A is the holder of a bill of exchange made payable to the order of B. which contains the following indorsements in blank: 1st indorsement - 'B', 2nd indorsement - C, 3rd indorsement - D, 4th indorsement - E. A puts this bill in suit against C and strikes out, without E's consent, the indorsements by C and D. A is not entitled to recover anything from E.

Negotiation Back ("taking up of a bill")

The person who becomes the holder in due course under this negotiation back cannot make any of the intermediate indorsers liable on the instruments.



Example: X, who is the holder of a negotiable instrument, writes on the back thereof: "pay to Y or order" and signs the instrument. In such a case, X is deemed to have indorsed the instrument to Y. If X delivers the instrument to Y, X ceases to be the holder and Y becomes the holder.

13.5 Types of Endorsements

1. **Blank Endorsement:** Where the indorser just puts his signature without specifying the indorsee, the indorsement is said to be in blank (Section 16). The effect of such an indorsement is to render the instrument payable to bearer even though originally payable to order (Section 54).



Example: If a cheque is payable to "Shanky" or order and "Shanky" merely signs on its back, such endorsement is known as an endorsement in blank.

Conversion of indorsement in Blank into indorsement in full [Section 49]

According to **Section 55**, if a negotiable instrument, after having been indorsed in blank, is indorsed in full, the amount of it cannot be claimed from the indorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person.

2. **Full Endorsement:** In this type of Endorsement along with endorser's signature, the name of the endorsee is specified. Section 16 of the Negotiable Instrument Act, 1881 says that, where along with endorser's signature, the name of the endorsee is specified, the endorsement is called 'endorsement in full'.



Example: If a cheque is payable to "David" or order and "David" adds the words Pay to "Ronit" or pay to "Ronit or order", such endorsement is known as an endorsement in full.

3. **Partial Endorsement:** An indorsement which purports to transfer only a part of amount of the instrument is called as partial indorsement. As per section 56, such an indorsement is invalid under law. Second part of section 56 states that if a bill has been paid in part, the fact of the part payment may be indorsed on the instrument, and it may then be negotiated for the residue.
4. **Restrictive Endorsement:** An indorsement is "restrictive" when it prohibits or restricts the further negotiability of the instrument. An indorsement is restrictive when the endorser while making indorsement restricts or excludes the right of the indorsee to further transfer the instrument or constitutes the indorsee as an to indorse the instrument or to receive its content for the endorser or for some other specified person (Section 50).
5. **Conditional Endorsement:** Section 52 empowers an endorser to insert in the endorsement by express words, a stipulation negating (excluding) or limiting his own liability to the holder by making such liability or the right of the indorsee to receive the amount due thereon upon the happening of a specified event although such event may never happen.

Types of Conditional Endorsement are as follows:

1. **Sans recourse endorsement:** In this kind of endorsement the holder does not incur any liability on the bill as an endorser.



Examples:-

1. A is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement, "without recourse", he transfers the instrument to B, and B indorses it to C, who indorses it to A. A is not only reinstated in his former rights, but has the rights of an indorsee against B and C.
2. By excluding his liability e.g., the holder of a bill may indorse it thus:
 - a. 'Pay Amar or order without recourse to me, or Pay Amar or order sans recourse, or
 - b. Pay Amar or order at his own risk'.

2. **Liability dependent upon a contingency:** By making his liability dependent upon the happening of a specified event which may never happen, in such a case the liability of the holder as an endorser, arises only upon the happening of the event specified, and is extinguished if the event becomes impossible, or the conditions specified are not fulfilled.

3. **Facultative endorsement:** In this type of endorsement an endorser by express words abandons some right or increases his liability under an instrument. In it, an indorser by express words abandons some right or increases his liability under an instrument.



Example: 'Pay Amar order. Notice of dishonor waived' is a facultative indorsement.

4. **Sans frais endorsement:** Where the endorser does not want the endorsee or any subsequent holder to incur any expenses on his account on the instrument, the endorsement is 'sans frais' endorsement.

13.6 Meaning and types of Crossing of Cheque

Crossing is a unique feature associated with a cheque affecting to a certain extent the obligation of the paying banker and also its negotiable character. It is a peculiar method of modifying the instrument to the banker for payment of the cheque. Crossing on cheque is a direction to the paying banker by the drawer that payment should not be made across the counter. The payment on a crossed cheque can be collected only through a banker.

Sec.123 defines crossing as, "Where a cheque bears across its face an addition of the words 'and company' or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words, 'not negotiable', that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally." A cheque that is not crossed is called an open cheque.

Types of Crossing of Cheque

1. **General:** It is general crossing where a cheque bears across its face an addition of two parallel transverse lines and/or the addition of the words "and Co." between them, or addition of "not negotiable". As stated earlier, where a cheque is crossed generally, the paying banker will pay to any banker. Two transverse parallel lines are essential for a general crossing (Sections 123-126). In case of general crossing, the holder or payee cannot get the payment over the counter of the bank but through a bank only. The addition of the words "and Co." do not have any significance. But the addition of the words "not negotiable" restrict the negotiability of the cheque and in case of transfer, the transferee will not give a better title than that of a transferor.

Effect of General Crossing

Sec. 126 of the NI Act, 1881 lays down that when a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker. It gives a direction to the paying

banker. Thus, the General crossing gives protection and avoids fraudulent withdrawals. It is the liability of the paying banker to verify proper payment in proper account. The payment does not constitute "Payment in due course". The banker is answerable to his customer, if he pays the money to a third person without the direction of his customer. He should not make any contract with third party concerning the cheque generally crossed.

2. **Special:** Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable" that addition constitutes a crossing and the cheque is crossed specially and to that banker. The paying banker will pay only to the banker whose name appears across the cheque, or to his collecting agent. Parallel transverse lines are not essential but the name of the banker is the insignia of a special crossing. In case of special crossing, the paying banker is to honour the cheque only when it is prescribed through the bank mentioned in the crossing or its agent bank.

Effect of Special Crossing

It prevents the fraudulent transactions and misappropriation. Special crossing gives more protection than general crossing. If there is any forgery he can easily detect it

Forms

- Two parallel transverse lines are not essential.
- The name of the bank should be mentioned with or without crossing. The name of the bank itself constitutes special crossing.
- The name of the bank should be written on the left side of cheque.
- The name of the bank and the words "Not Negotiable" or "A/c Payee" or "Not Negotiable" or "A/c Payee Only", may also be mentioned.

Sec. 127 lays down that where a cheque is crossed specially to more than one banker except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

2. **Double Crossing:** There a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker his agent, for collection. It is not permitted to general public. It is practiced only in case of transactions between the bankers. Others are not allowed to use double crossing. It is in practice to cross on the face of the cheque at left side. But in case of Double crossing it is the regular practice to cross at the back side of the cheque, where sufficient space is available. According to Sec. 127, it means that it is necessary, in all cases, to specify in the second special crossing that the banker in whose favour it is made is an agent of the first banker for collection.

Who can cross the cheque?

Generally, the maker of the cheque makes the crossing. If he does not cross, the holder of the cheque can cross it, or in certain occasions the banker may also cross it. According to Sec. 125 where a cheque is uncrossed, the holder may cross it generally or specially. Where a cheque is crossed generally, the holder may cross it specially. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable". Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

13.7 Bouncing of Cheque

A cheque bounce is an offence under Section 138 of the Negotiable Instruments Act, 1881 ("Act") punishable with a fine which can extend to twice the amount of the cheque or imprisonment for a term not more than two years or both. When the payee presents a cheque to the bank for payment, and the cheque is returned unpaid by the bank with a memo of insufficient funds, then the cheque is said to have bounced. A cheque bounce can occur due to several reasons, but if a cheque bounces due to insufficient funds in the drawer's account, it amounts to an offence under the Act. The bank must reject the cheque presented for payment with a return memo stating the reason as insufficient

funds. In such a case, the payee of the cheque can issue a cheque bounce notice to the drawer demanding to pay the cheque amount.

The various situations that result in cheque bounce are as follows:

1. **Insufficient account balance** - If there is not enough balance in the drawer's account to make the payment of the cheque, the bank will reject and return the cheque to the payee with a memo stating insufficient funds to pay the cheque amount.
2. **Expired validity of cheque** - Once the drawer issues the cheque, it must be presented for payment within three months. If it is not presented to the bank within three months, the cheque expires. If the expired cheque is presented to the bank, it bounces.
3. **Overwriting** - If the signature of the drawer or cheque amount or any other statement has been overwritten on the cheque, then the cheque bounces for overwriting.
4. **Damaged cheque** - If a cheque is damaged or disfigured and the details are not visible or have marks or stains, the cheque will bounce.
5. **Signature mismatch** - If the drawer's signature is unclear or absent or does not match the one in the bank's data, then the cheque will bounce.
6. **Mismatch of amounts or digits** - If the cheque amount mentioned in words and figures does not match, then the cheque will bounce.

Dishonour by Non-acceptance [Sec. 91]: When a bill is duly presented for acceptance, and the drawee, or one of several drawees not being partners, refuse acceptance within forty-eight hours from the time of presentment, the bill is dishonoured. In other words, when the drawee makes default in acceptance upon being duly required to accept the bill. Where presentment is excused and the bill is not accepted. Where the drawee is incompetent to contract, the bill may be treated as dishonoured. Where the drawee is a fictitious person. Where the drawee could not be found even after reasonable search. When a drawee gives a qualified acceptance, the holder may treat the instrument dishonoured.

Effect of Dishonour by Non-acceptance: The holder of the bill can start an action against the drawer and the indorsers and need not wait for maturity of the bill.

Dishonour by non-payment [Sec. 92]: When the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same. Again, a negotiable instrument is dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid (Sec. 76).

Liability of Maker/ Drawer of Foreign Bill

In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note or bill of exchange or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable (Section 134).

"Foreign instrument"

Any such instrument not so drawn, made or made payable shall be deemed to be foreign instrument. Bills drawn outside India on a person residing in or outside India and payable outside India are foreign bills. In other words, it means:

1. Bills drawn outside India on a person resident in or outside India and made payable in India.
2. Bills drawn outside India on a person residing outside India and payable in India or outside India.

Notice of Dishonour (Sections 91-98 and Sections 105-107)

Party liable thereon must give notice of dishonour to all other parties whom he seeks to make liable. Each party receiving notice of dishonour must in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time after he has received

it. Notice may be oral or in writing, but it must be actual formal notice. It must be given within a reasonable time of dishonour.

Object of Notice of Dishonour

The object of giving notice is not to demand payment but to whom the party notified of his liability. Any Omission to give it discharges all parties other than the maker or acceptor. The notice may be oral or in writing, but it must be actual formal notice. It must be given within a reasonable time of dishonour.

Notice by whom?

1. Notice of dishonour must be given by the holder, or by a person liable on the instrument.
2. Notice of dishonour must be given to all parties other than the maker or the acceptor or the drawee whom the holder seeks to make liable.

Note: They are the parties primarily liable upon the instrument, on the due date and at the proper place.

Modes of Giving Notice

Notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative or, where he has been declared insolvent, to his assignee. A notice may be given by any of the given modes:

- oral or written;
- in any form;
- at the place of business or
- (in case such party has no place of business) at the residence of the party for whom it is intended.

Party Receiving Must Transmit Notice of Dishonour

Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within reasonable time, unless such party otherwise receives due notice as provided by Sec. 93 (Sec. 95).

Agent of Presentment

When instrument is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour (Sec. 96).

When Party to Whom Notice Given is Dead

When the party to whom notice of dishonour is dispatched is dead, but the party dispatching the notice is ignorant of his death, the notice is sufficient (Sec. 97).

Notice of Dishonour Unnecessary

1. When it is dispensed with or waived by the party entitled thereto, e.g., where an endorser writes on the instrument such words as "notice of dishonour waived",
2. When the drawer has countermanded payment. (c) When the party charged would not suffer damage for want of notice.
3. When the party entitled to notice cannot after due search be found.
4. When the omission to give notice is caused by unavoidable circumstances, e.g., death or dangerous illness of the holder.
5. Where the acceptor is also a drawer, e.g., where a firm draws on its branch.
6. Where the promissory note is not negotiable. Such a note cannot be endorsed.
7. Where the party entitled to notice promises to pay unconditionally.

Noting and Protest (Sections 99-104 A)

Section 99 provides a convenient method of authenticating the fact of dishonour by means of "Noting". Where a bill or note is dishonoured, the holder may, if he so desires, cause such dishonour to be noted by a notary public on the instrument, or on a paper attached thereto or partly on each. 'Noting' must contain the following particulars (Sec. 90):

- The fact of dishonour
- The date of dishonour,
- The reasons, if any, assigned for such dishonour,
- If the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured; and
- The notary's charges: 'Noting' must be made by the notary within a reasonable time after dishonour (Sec. 99).

The protest is the formal notarial certificate attesting the dishonour of the bill, and based upon the noting which has been effected on the dishonour of the bill. After the noting has been made, the formal protest is drawn up by the notary and when it is drawn up it relates back to the date of noting.

Contents of Protest

- Protest is based upon noting. A protest, in order to be valid, must contain all the following particulars:
 - The instrument itself or a literal transcript of the instrument and of everything written or printed thereupon.
 - The name of the person for whom and against whom the instrument has been protested.
 - The fact and reasons for dishonour.
- The place and time of dishonour (and, when better security has been refused, the place and time of refusal).
- The subscription (signature) of the notary public.
- In case of acceptance for honor or payment for honor, the name of the person accepting or paying and the name of the person for whose honor it is accepted or paid (sec. 101)

Protest for better Security

- When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor, and on its being refused may, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a protest for better security.

Notice of Protest

When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions; but the notice may be given by the notary public who makes the protest (Sec. 102).

Reasonable Time

In determining what is reasonable time of presentment for acceptance or payment, for giving notice of dishonour and for noting, regards shall be had to the nature of the instrument and the usual course of dealing with respect to similar instrument; and, in calculating such time, public holidays shall be excluded (Sec. 105).

Reasonable Time of Giving Notice of Dishonour

If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different place, such notice is given within a reasonable time if it is dispatched by the next post or on the day next after the day of dishonour. If the said parties carry on business or live in the same place, such notice is given within a reasonable time if it is dispatched in time to reach its destination on the date next after the day of dishonour (Sec. 106).

Dishonor Of Cheque For Insufficiency, Etc., Of Funds In The Accounts [Section 138]

Where any cheque drawn by a person on an account maintained by him with a banker is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque, or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both provided that this section shall not apply, unless cheque presented within validity period or demand for the payment through the notice or failure of drawer to make payment

Defence Which May Not Be Allowed in Any Prosecution Under Section 138 [Section 140]

It shall not be a defence in a prosecution of an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section. If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

13.8 Remedies against Cheque Bounce

Resubmission of cheque: When the cheque bounces due to overwriting, mismatch of signature, mismatch of the figures and words of the cheque amount or damaged cheque, the payee can ask the drawer to submit another cheque rectifying the mistake. If the drawer does not agree to submit another cheque, then the payee can initiate civil action against the drawer to pay the cheque amount due to him and not for cheque bounce.

Cheque Bounce Notice under Section 138 of the Negotiable Instruments Act: A cheque bounce notice is issued under Section 138 of the Negotiable Instruments Act when a cheque bounces due to insufficient funds in the drawers' account for making the payment of the cheque amount. If the cheque bounces for any other reason other than insufficient funds, the cheque bounce notice cannot be issued, and the payee can demand resubmission of the cheque.

When the cheque bounces due to an insufficient amount, the first step is to demand the payment of the amount by issuing a cheque bounce notice in writing by post under the Negotiable Instruments Act. The payee can issue a cheque bounce notice within 30 days of an intimation sent by the bank along with the bounced cheque stating that the bank cannot make the cheque payment due to an insufficient amount. After issuance of the cheque bounce notice, the payee must give the drawer 15 days' time period from the receipt of the cheque bounce notice to pay the cheque amount. If the drawer does not pay the cheque amount even after the expiry of 15 days' time period, then legal action can be initiated by the payee against the drawer within 30 days of the expiry of 15 days. However, a cheque bounce notice cannot be issued if the cheque was issued as a donation, gift or any other obligation that is not legally enforceable. The cheque must be issued for the discharge of a legally enforceable liability or debt to constitute an offence under the Act.

Procedure after Issuance of a Cheque Bounce Notice

After the expiry of 15 days of issuing the cheque bounce notice, the payee can initiate legal action against the drawer. The payee should register a complaint under Section 138 of the Act. Under Section 138 of the Act, the offence of cheque bounce is a criminal offence for which the payee can initiate a criminal suit. The payee must file the complaint against cheque bounce before the Magistrate within 30 days of the expiry of 15 days of the issuance of the cheque bounce notice.

Jurisdiction of Magistrate for Filing Cheque Bounce Suit

The payee can file the complaint before the Magistrate in any of the following places:

1. Where the cheque was drawn,
2. Where the cheque was presented for payment,
3. Where the payment had to be made,
4. Where the cheque is dishonoured, or
5. Where the demand notice was served.

The cheque bounce complaint has to be filed before the Metropolitan Magistrate if the suit for the cheque bounce falls in any of the metropolitan cities. If the suit for cheque bounce falls in any other cities, then the complaint must be filed before the Judicial Magistrate.

Process of Cheque Bounce Suit

The process of a cheque bounce suit are as follows:

1. Filing a complaint before the Magistrate after the expiry of 15 days of receipt of cheque bounce notice by the drawer.
2. The payee/complainant has to appear before the court and provide the details of the case. If the Magistrate is satisfied with the complainant's statement, he will issue summons to the drawer for appearing before the court.
3. The drawer will appear and accept or deny the facts stated by the complainant. If the drawer denies the complaint, then the court will proceed with the criminal trial of the case.
4. The drawer/accused will file his statement, evidence and arguments of both sides will be presented to the court.
5. If the court finds the drawer guilty of the offence of cheque bounce, the court will pass a judgement of conviction against the drawer for the offence of cheque bounce.
6. The punishment for cheque bounce is imprisonment for a term not more than two years or a fine that can extend to twice the amount of the cheque or both.
7. A civil suit can also be instituted against the drawer for payment of the cheque amount. In the case of the institution of a civil suit, the payee cannot issue a cheque bounce notice. The payee can only issue legal notice for recovery of the amount.

The offence of cheque bounce under Section 138 of the Act provides criminal punishment for the reason of cheque bounce due to insufficient amount, whereas the civil suit for recovery does not punish the drawer and provides for only the recovery of the cheque bounce amount. The cheque bounce notice can be issued against the company, and a criminal suit can be initiated against a company when the company issues the cheque, and it bounces due to an insufficient amount under Section 148 of the Act. When a criminal suit is initiated under Section 148 of the Act, the company and its directors will be punished for the offence of cheque bounce. However, if the drawer pays the cheque amount to the payee within 15 days of receipt of the cheque bounce notice, no offence is committed by him, and legal action cannot be instituted against him for cheque bounce under section 138 of the Act.



Did You know?

1. An FIR can be filed against the person who has issued a cheque. A person can then file a case against the issuer of the cheque under Section 420 or 406 of the Indian Penal Code (IPC) in a criminal court. Alternatively, the payee can directly file a complaint before the Magistrate under Section 138 of the Negotiable Instruments Act, 1881 for a cheque bounce case after issuing a cheque bounce notice.
2. When a cheque is bounced due to insufficient funds in the bank account, it can invite civil as well as criminal proceedings against the party at default. The civil proceedings can be instituted under Section 138 of the Negotiable Instruments Act, or criminal proceedings can be initiated by filing a complaint before the

Magistrate. However, a payee can file a criminal complaint under Section 138 of the Negotiable Instruments Act, 1881. When a criminal complaint is filed, the issuer of the cheque can be imprisoned. It is important to note that, it is a bailable offence.

3. The bail amount for a cheque bounce case varies on a case-to-case basis. Certain parameters affect the bail amount such as, the amount for which the cheque was issued, the number of similar cases pending against the drawer in the same transaction, the financial status of the drawer, etc.
4. A bank issues a memo to the issuer of the cheque containing the reason for the dishonour of cheque, date of cheque bounce, cheque number and date of issue of the cheque. This memo is called a cheque return memo and is an essential document to issue a cheque bounce notice. The payee can issue a cheque bounce notice based on the cheque return memo issued by the bank.
5. The documents required to file a cheque bounce case in India are:
 - a) Copy of the notice served on drawer
 - b) Proof of service of notice, either courier receipt or receipt of registered post
 - c) Original cheque on record
 - d) Cheque return memo issued by the banker to the drawer
 - e) Proof of the existence of a legally enforceable debt or liability

Summary

1. When we talk about types of negotiable instruments like Promissory note and Bills of Exchange, we come across the term of holder and holder in due course. A **holder** refers to as the payee of a negotiable instrument, who is in possession of it. Such a person is eligible to obtain or recuperate the amount due on the instrument from the parties thereto. **Holder in due course** implies a person who obtains the instrument bonafide for consideration before maturity, without any knowledge of defect in the title of the person transferring the instrument.
2. The word Endorsement means, signatures of the person which are generally made at the back of the instrument, for the purpose of negotiation i.e. transfer of rights to another person. The signature may also be on the face of the instrument. No particular form of words is necessary for an Endorsement. The maker or holder of a negotiable instrument is said to endorse the same and called as the Endorser. The person to whom the instrument is endorsed is called the Endorsee. It is a legal term that refers to the signing of a document which allows for a legal transfer of a negotiable from one person to another. When the maker or holder of a negotiable instrument signs the same for the purpose of negotiation, on the back or face 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, the maker or holder is said to endorse the same, and is called the "Endorser".
3. Crossing is a unique feature associated with a cheque affecting to a certain extent the obligation of the paying banker and also its negotiable character. It is a peculiar method of modifying the instrument to the banker for payment of the cheque. Crossing on cheque is a direction to the paying banker by the drawer that payment should not be made across the counter. The payment on a crossed cheque can be collected only through a banker. Crossing of a cheque can be general or special.

4. A cheque bounce is an offence under Section 138 of the Negotiable Instruments Act, 1881 (“Act”) punishable with a fine which can extend to twice the amount of the cheque or imprisonment for a term not more than two years or both. When the payee presents a cheque to the bank for payment, and the cheque is returned unpaid by the bank with a memo of insufficient funds, then the cheque is said to have bounced.
5. A cheque bounce can occur due to several reasons, but if a cheque bounces due to insufficient funds in the drawer’s account, it amounts to an offence under the Act. The bank must reject the cheque presented for payment with a return memo stating the reason as insufficient funds. In such a case, the payee of the cheque can issue a cheque bounce notice to the drawer demanding to pay the cheque amount.

Keywords

- **Endorsee:** The person in whose favour the note is negotiated by endorsement.
- **Endorser:** The person who endorses the note in favour of another person.
- **Holder:** It is either the original payee or any other person in whose favour the note has been endorsed.
- **Holder in due course refers to** as 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 indorsee thereof, (if payable to order) before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.
- **Blank Endorsement:** Where the indorser just puts his signature without specifying the indorsee, the indorsement is said to be in blank (Section 16). The effect of such an indorsement is to render the **Full Endorsement:**In this type of Endorsement along with endorser's signature, the name of the endorsee is specified. Section 16 of the Negotiable Instrument Act, 1881 says that, where along with endorser's signature, the name of the endorsee is specified, the endorsement is called 'endorsement in full'.
- **Partial Endorsement:** An indorsement which purports to transfer only a part of amount of the instrument is called as partial indorsement.
- **Restrictive Endorsement:** An indorsement is “restrictive” when it prohibits or restricts the further negotiability of the instrument. An indorsement is restrictive when the endorser while making indorsement restricts or excludes the right of the indorsee to further transfer the instrument or constitutes the indorsee as an to indorse the instrument or to receive its content for the endorser or for some other specified person (Section 50).
- **Conditional Endorsement:** Section 52 empowers an endorser to insert in the endorsement by express words, a stipulation negating (excluding) or limiting his own liability to the holder by making such liability or the right of the indorsee to receive the amount due thereon upon the happening of a specified event although such event may never happen.
- **General:**It is general crossing where a cheque bears across its face an addition of two parallel transverse lines and/or the addition of the words “and Co.” between them, or addition of “not negotiable”.
- **Special:**Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable” that addition constitutes a crossing and the cheque is crossed specially and to that banker.

Self Assessment

Q1. _____ refers to as the payee of a negotiable instrument, who is in possession of it. Such a person is eligible to obtain or recuperate the amount due on the instrument from the parties thereto.

- A. Buyer
- B. Holder in due course
- C. Holder
- D. None of the above

Q2. A person acquiring the negotiable instrument bonafide for some consideration, whose payment is still due is better known as _____

- A. Holder
- B. Holder in due course
- C. Either Holder or Holder in due case
- D. None of these

Q3. A person can become holder, _____ of the negotiable instrument.

- A. Before the maturity
- B. After the maturity
- C. Before or after the maturity
- D. None of the above

Q4. A _____ cannot sue all prior parties

- A. Holder
- B. Holder in due course
- C. Both Holder and Holder in Due course
- D. None of the above

Q5. A person can become holder in due course, only _____ of negotiable instrument.

- A. After the maturity
- B. Before the maturity
- C. Before or after the maturity
- D. None of the above

Q6. A _____ can sue all prior parties.

- A. Holder
- B. Holder in due course
- C. Both Holder and Holder in Due course
- D. None of the above

Q7. A signed check without a specified payee is _____

- A. Partial endorsement
- B. Restrictive endorsement

- C. Full endorsement
- D. Blank endorsement

Q8. When an endorser inserts the endorsement by expressing words, a stipulation negating (excluding) or limiting his own liability to the holder by making such liability or the right of the indorsee to receive the amount due thereon upon the happening of a specified event although such event may never happen, this is known as_____.

- A. Partial endorsement
- B. Restrictive endorsement
- C. Full endorsement
- D. Blank endorsement

Q9. _____ is a kind of endorsement the holder does not incur any liability on the bill as an endorser.

- A. Sans recourse endorsement
- B. Liability dependent upon a contingency
- C. Facultative endorsement
- D. Sans frais endorsement

Q10. Where the endorser does not want the endorsee or any subsequent holder to incur any expenses on his account on the instrument, the endorsement is _____ endorsement.

- A. Sans recourse endorsement
- B. Liability dependent upon a contingency
- C. Facultative endorsement
- D. Sans frais endorsement

Q11. _____ refers to a crossing of cheque as per which a cheque bears across its face an addition of two parallel transverse lines and/or the addition of the words "and Co." between them, or addition of "not negotiable".

- A. Special crossing
- B. General crossing
- C. Both general as well as special crossing
- D. Either general or special crossing

Q12. A cheque bounce is an offence punishable with_____

- A. A fine which can extend to twice the amount of the cheque
- B. Imprisonment for a term not more than two years or both
- C. Either A fine which can extend to twice the amount of the cheque or imprisonment for a term not more than two years or both
- D. None of the above

Q13. The payee must file the complaint against cheque bounce before the magistrate within _____ of the expiry of 15 days of the issuance of the cheque bounce notice.

- A. 30 days, 15 days
- B. 10 days, 15 days

- C. 30 days, 7 days
- D. 25 days, 10 days

Q14. When a cheque is bounced due to insufficient funds in the bank account, it can ____ at default.

- A. invite civil proceedings against the party
- B. invite criminal proceedings against the party
- C. invite civil as well as criminal proceedings against the party
- D. No action against the party

Q15. ____ is a type of endorsement as per which an endorser by express words abandons some right or increases his liability under an instrument.

- A. Sans recourse endorsement
- B. Liability dependent upon a contingency
- C. Sans frais endorsement
- D. Facultative endorsement

Answer for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. C | 2. B | 3. C | 4. A | 5. B |
| 6. B | 7. D | 8. B | 9. A | 10. D |
| 11. A | 12. C | 13. A | 14. C | 15. D |

Review Questions

- Q1. Explain the concept of holder and holder in due course. Discuss the essentials to become holder in due course.
- Q2. Discuss meaning and types of endorsements with the help of suitable examples.
- Q3. What is meant by the term crossing of a cheque? Discuss the various types of crossing of cheque.
- Q4. What is bouncing of Cheque? Discuss the reasons behind the same in detail.
- Q5. Discuss the penalty and remedies against Cheque Bounce.



Further Readings

1. A Textbook Of Mercantile Law By P.P.S. Gogna, S. Chand & Company
2. Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
3. A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd
4. Mercantile Law by S SGulsan, Excel Books
5. Mercantile Law by M C Kuchchal, Vikas Publishing House
6. Legal Aspects of Business by Daniel Albuquerque, Oxford & Ibh



Web Links

<https://taxguru.in/rbi/endorsement-magical-tool-demonetization.html>

Copyright © Taxguru.in

<https://cleartax.in/s/consequences-cheque-bounce-notice>

<https://www.lexology.com/library/detail.aspx?g=070d1241-a9ed-4dc1-8deb-27bbf81dea99>

<https://www.mondaq.com/india/trials-appeals-compensation/814178/negotiable-instruments-amendment-act-2018-retrospective-or-not>

Unit 14: Intellectual Property Rights

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Objectives

After studying this unit, you will be able to:

- Comprehend the concept of Intellectual Property and its types
- Understand the procedure of obtaining a copyright, patent and trademark

Introduction

Intellectual property has increasingly assumed a vital role with the rapid pace of technological, scientific and medical innovation that we are witnessing today. Moreover, changes in the global economic environment have influenced the development of business models where intellectual property is a central element establishing value and potential growth. In India several new legislations for the protection of intellectual property rights (IPRs) have been passed to meet the international obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Intellectual property has therefore grown into one of the world's biggest and fastest-growing fields of law thereby necessitating the demand for IP professionals well versed in this area to deal with (IPRs) across the national and international borders. This chapter discusses the concept of Intellectual property rights, its classification, requirements and procedure for filing a patent and intellectual property infringement.

14.1 Meaning of Intellectual Property Rights

Intellectual property rights refer to the rights allied with intangible assets owned by a person or company and protected against use without consent. Intangible assets refer to non-physical personal property, including right of ownership in intellectual property. It basically represents something of value, such as, negotiable instruments, securities, service and intangible assets, including goodwill etc. It is a property that exists by application of human intellect.

Intellectual Property indicates a number of distinct types of creations of the mind for which law confers certain property rights upon its creator. The jurisprudence developed on the concept of 'Property' has made it abundantly clear that property does not just encompass tangible things, like a house, a car, furniture, currency, investment etc and that these assets are not the only kind of property which are subject matter of protection by law. There are many other forms of intangible properties which are known with the term 'intellectual property' that have been recognised by the law and thus granted protection against any kind of infringement by a person other than its rightful owner or a person authorised by such rightful owner.

14.2 Background of Intellectual Property Rights in India

Intellectual property rights are referred to as "BauddhikSampada" in the Indian Context. Bauddhik means related to buddhi or intellect and word sampada means property. When word buddhi gets combined with sampada it amounts to bauddhikSampada. The person who is owner of Intellectual property is provided bundle of rights related to the property which has come into existence by application of his intellect. These rights collectively are termed as intellectual Property rights.

14.3 Types of Intellectual Property Rights

There are four main types of intellectual property rights, including patents, trademarks, copyrights, and trade secrets. Owners of intellectual property frequently use more than one of these types of intellectual property law to protect the same intangible assets.

Examples of intellectual property rights include:

- Business or trade names
- Commercial secrets
- Computer software
- Confidential information
- Database rights
- Design rights
- Domain names
- Industrial design
- Inventions
- Logos
- Moral rights
- Patents
- Service marks
- Trademarks
- Works of authorship

In this chapter we shall discuss in detail about Patent, Trademark and Copyright.

14.4 Patent

A Patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. To obtain it, technical information about the invention must be disclosed to the public in a patent application. Patent is a statutory right granted by the respective governments. It gives one the exclusive rights and bars others from making, using, selling and importing product or process, based on the patented invention without one's prior permission.

Criteria for Grant of Patent

1. Patentable Subject Matter: It should be clear as to the patent is to be obtained for a product or process.

2. Industrial Applicability: Industrial applicability requirement checks if an invention is capable of being made or used in an industry (Section 2(1) (ac)). If a product can be manufactured repeatedly and has at least one use in an industry, it will be considered as industrially applicable.

3. Novelty: if it is different from what is already existing, which is referred to as 'prior art.'

4. Inventive Step: means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both

5. Specification: The specification has to enable the invention, which means it must fully and particularly describe the invention and its operation or use and the method by which it is to be performed.

Non-Patentable Inventions

- Inventions which are frivolous or contrary to well established natural laws.
- Inventions whose primary or intended use or commercial exploitation could be contrary to public order or morality (such as something against accepted norms of a culture in a society), or which causes serious prejudice to human, animal or plant life or health or to the environment.
- Mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance, or mere discovery of any new property, or new use of a known substance, or mere use of known process, machine, or apparatus unless such known process results in a new product or employs at least one new reactant.
- It may be seen from section 3(d) that new use of a known substance is not permissible. It means that claims for second medical use are not allowed in India. Further, derivatives of known substances are considered to be the same substance unless they "differ significantly in properties with regard to efficacy".
- Substances obtained by mere admixture such as physical admixture are not patentable under the Act.
- The mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way.
- Methods of agriculture or horticulture.
- Processes for medical, surgical, curative, prophylactic, diagnostic, therapeutic, or other treatment of human beings or animals or plants that would render them free of disease or to increase their economic value.
- Plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals. For example: clones and new variety of plants are not patentable. But process/method of preparing genetically modified organisms is patentable subject matter.
- Computer program per se, a mathematical method or a business method or algorithms.
- Literary, dramatic, musical or artistic work or any other aesthetic creations including cinematographic works and television productions are not patentable as they are covered under the copyrights, design and entertainment laws.
- Scheme/rule/method of performing a mental act or method of playing a game.

- Presentation of information.
- Topography of integrated circuits.
- An invention falling within the scope of traditional knowledge such as the use of herbal medicines.



Case Analysis: Strix Limited Vs. Maharaja Appliances Limited

Facts: Plaintiff had a product patent in respect of 'Liquid Heating Vessels'. The control works based on sensing the temperature of the element. The element gets switched off once a certain temperature is reached. The Plaintiff claims to be the world's leading manufacturer, inter alia, of temperature controls and cordless interfaces for kettles, jugs and a wide range of water boiling appliances, selling in over 40 countries in the world. The Plaintiff holds a product patent number 192511/95 in respect of Liquid Heating Vessels. The Defendant is an Indian company engaged in the business of manufacturing and selling of electrical appliances including electric kettles. The Defendant claims to have imported the product bona fide from China and states that the supplier in China from whom the Defendant imported the product in question held a patent inclusive of the heating element installed in the kettle.

Plaintiff's Case: Patent has been validly granted to it and has not been revoked till date.

Defendant's Case:

- Electric kettles were earlier being supplied by the Plaintiff to the Defendant in the years 2005-2006.
- **Court's Observations:**
- Patent of the Plaintiff appears to work on a different principle.
- The Defendant will have to place on record some scientific literature supported by some credible expert opinion to show even prima facie that the Defendant's product is a mere re-arrangement of already known products.

Revocation of Patent

Revocation of patent can be done by the given ways:

- Revocation in the public interest by the Central Government suo motu (Section 66).
- Revocation of Patents relating to atomic energy by the Controller (Section 65).
- Revocation by Controller for non-working of the Patent (Section 85).
- Revocation by the High Court on petition for failure to comply with the request of the Central Government to use the invention (Section 64(4) and (5)).
- Revocation by the Appellate Board on Petition by a person interested or the Central Government or the High Court on a counter claim in a suit for infringement on any of the grounds stated under section 64(1).
- Revocation by the appellate board or the High Court under Section 64(1)
- Section 64 of the Patents Act, 1970 provides as, "Subject to the provisions contained in this Act, a Patent whether granted before or after the commencement of this Act, may be revoked on a Petition of any person interested or of the Central Government by the Appellate Board or on a counter-claim in a suit for infringement of the patent by the High Court on any of the following grounds, that is to say

There are 17 grounds enumerated under section 64(1) of the Patents Act under which a Patent may be revoked. These can be classified under the following heads:

- Grounds relating to rights of the Patentee and his conduct.
- Grounds relating to the invention and its quality.

- Grounds relating to the description of the invention.

Validity: A Patent is valid for 20 years - The term of every patent granted is 20 years from the date of filing of application.

Patent Registration Process

The Indian Patent launched the E- filing services for Patents in the year 2007 which enabled online filing of new applications for Patents. Appreciating the significance of being more transparent and user friendly in building confidence among stake holders, IPO has further developed the e-filing system so as to cover comprehensive e-filing for Patents, wherein, in addition to online filing of New Applications, subsequent filings have also been integrated. The applicants have the benefit of registering themselves as users and owning personal folders in the IPO's environment.

Features of e-filing system

New and enhanced features of Comprehensive E-filing services includes:

- Web based filing system
- Dual way login (Digital Signature as well as Password based) and password re - generation procedure
- Provision for filing of all entries as per Schedule 1 of the Patents Rules, 2003
- Proper Validations with IPO Patent database
- Facility to upgrade / update the digital signatures
- User Profile
- Improved procedures to minimize transaction errors
- Documents required for filing patent application

A patent application should contain the following:

- Application for grant of patent in Form-1.
- A proof of right.
- Provisional/complete specification in Form-2.
- Statement and undertaking under Section 8 (1) in Form-3
- Declaration as to inventorship shall be filed in Form-5.
- If an applicant is MSME/Startup, Form 28.
- Authorization of an agent shall be filed in Form 26.
- Priority document.
- Every application shall bear the signature of the applicant or authorized person/patent agent along with name and date in the appropriate space provided in the forms.
- If the invention as disclosed in the patent specification uses the biological material obtained from India, the applicant is required to submit the permission from the National Biodiversity Authority.
- The application shall disclose in the specification the source and geographical origin of the biological material, if any used in the invention.

These documents can be filed in the patent office electronically by visiting the website www.ipindiaonline.gov.in/ or by physically submitting the same.

General procedure for obtaining a patent

The steps involved in a patent filing in India are:

- Filing of patent application.
- Publication after 18 months.
- Pre Grant-Opposition /Representation by any person.
- Request for examination.

- Examination: Grant or Refusal.
- Publication of Grant of patent.
- Post Grant Opposition to grant of patent.
- Decision by Controller.

Comprehensive E-Filing

- Visit www.ipindia.gov.in and proceed to E-Gateways.
- Register for New User and creation of –user-id .
- Install Digital Signature Certificate (DSC) and configure the system as per the DSC manual.
- Login to the e-filing module.
- Select New Application Filing or any particular Form which is to be filed.
- Draft the Form(s) for new application or any other subsequent form (s).
- Upload the PDF version of required documents.
- Save the draft.
- Go to the drafted forms.
- Enter the mobile number, if SMS alert are required.
- Select the drafted form and proceed for signing of drafted for.
- After the forms are digitally signed, it is ready for making the payment though the available Payment Gateways.
- Select the digitally signed form and proceed for payment.
- Select the payment gateway.
- Select the bank and payment mode to make the payment of fee.
- After making payment, the acknowledgement receipt would be generated.

14.5 Processing the Application

Initial Processing

On receipt of an application, the Office accords a date and serial number to it. Requests for examination are accorded separate serial numbers. Applications and other documents filed in physical form are digitized, verified, screened, classified and uploaded to the internal server of the Office. Patent applications and other documents are arranged in e-wrapper.

Screening the Application

The Application is screened for:

- a. International Patent Classification
- b. Technical field of invention for allocation to an examiner in the respective field
- c. Relevance to defence or atomic energy.
- d. Correctness and completeness of abstract. If the abstract is found as not appropriate , the same will be amended suitably by the office , so as to provide better information to third parties. However, care is taken that such amendment does not result in a change in the nature of invention.

Scrutiny of Application

- The Office checks whether the Application has been filed in Appropriate Jurisdiction .
- The address for service shall mandatorily include e-mail address and PIN code. If the address for service is not complete, the application shall be returned and the applicant will be informed accordingly.
- The Office checks for Proof of Right to file the application.

- If proof of right is not filed along with the application, the same shall be filed within a period of six months from the date of filing of the application.
- Otherwise, the applicant shall file the same along with a petition under Rule 137/138.
- The Office checks whether the application and other documents have been filed in the prescribed format i.e. prescribed forms, request, petitions, assignment deeds, translation etc.
- Further, the Office checks whether:
 - the documents have been prepared on a proper sized paper and typed in appropriate font with proper spacing,
 - the documents are duly signed
 - abstract, drawings (if any) have been filed in proper format
 - meaningful claim(s) are present in a complete specification.
- Whether authorization of an Agent in Form 26 or in the form of a power of attorney is filed within a period of three months from the date of filing of such application or document.
- Whether Form-5 has been filed, if required.
- Whether the invention has been assigned to another person, and if yes, whether Form 6 has been duly filed along with the deed of assignment.
- If the right is assigned from an individual to a legal entity, the legal entity is invited to pay the balance fees.

Secrecy Directions and consequences thereof

- If in the opinion of the Controller, an invention pertains to a subject matter relevant for the purpose of defence, as notified by the Central Government, or otherwise the invention appears to the Controller to be so relevant, he will issue directions prohibiting the publication of the application and will notify the applicant.
- Where the Controller gives any such direction, he shall refer the matter to the Central Government for consideration as to whether the publication of the application would be prejudicial to the defence of India.
- If the Central Government, after considering the merits of the secrecy direction, is of the opinion that the publication of the invention would not so prejudice, will give notice to the Controller to that effect, who shall thereupon revoke the directions and notify the applicant accordingly.
- The Central Government reviews the continuation of secrecy directions in the following circumstances:
 - periodically at an interval of six months, or
 - on a request made by the applicant.
- If the applicant requests for reconsideration of the secrecy direction already imposed, and, if the same is found reasonable by the Controller, he shall request the Central Government for review.

Inventions relating to Atomic Energy

No Patent is granted in respect of an invention relating to atomic energy falling within sub-section (1) of Section 20 of the Atomic Energy Act, 1962.

Withdrawal of patent application

The applicant may, at any time after filing the application but before the grant of a patent, withdraw the application by making a request in Section 11A (3)(c), 30 writing. A request for withdrawing the application under sub-section (4) of section 11B shall be made in Form 29. However, if the applicant makes a request for withdrawal within 15 months from the date of filing or priority of the application, whichever is earlier, the application will not be published. 90% of the fee paid for request for examination/expedited examination can be refunded as prescribed in the First Schedule, on a request made by the applicant in Form 29.

Publication of Patent Application

An application for Patent is not open to public before the expiry of 18 months from the date of filing or date of priority, whichever is earlier. At the end of the period as mentioned in para (a) above, the Application is published in the Official Journal except in the cases, where:

- i. Secrecy direction u/s 35 is in force.
- ii. Application is abandoned u/s 9 (1) (i.e., complete Specification not filed within twelve months from the date of filing of Provisional Specification).
- iii. Application is withdrawn three months prior to the due date of publication, i.e., before the end of 15th month from the date of filing or priority, whichever is earlier.

The Patent Office publishes applications in the official e-Journal, ordinarily within one month from the date of expiry of the period as specified in para above. Where a secrecy direction has been given, then the application will be published after the expiry of the period as mentioned in para above or when the secrecy direction has ceased to operate, whichever is later. Publication of application under sub-sections (2) and (5) of section 11A shall be identified by the letter 'A' along with the number of application.

Early Publication

- a) A request for early publication may be made in Form-9 with the prescribed fee.
- b) Such a request will be considered only if the Complete specification has been filed in the instant case.
- c) Further, a patent application shall not be considered for early publication if an invention pertains to subject matter relevant for defence purpose.
- d) The application is published within one month from the date of such request.

Particulars of Publication

The Patent Office Journal is published on every Friday with the following particulars in respect of application:

- i. Application number
- ii. Country
- iii. Date of filing
- iv. Publication date
- v. Title of invention
- vi. International Patent Classification

The Patent Office Journal is published on every Friday with the following particulars in respect of application:

- i. Priority details like priority document number, priority date, Priority country, International Application No. and Filing date, etc.
- ii. Name and address of the applicant

- iii. Name of the inventor(s)

The Patent Office Journal is published on every Friday with the following particulars in respect of application:

- i. Reference in respect of Patent of Addition shall be the application number and filing date of the main application.
- ii. Reference in respect of Divisional Application shall be the application number and filing date of the of the first mentioned application.
- iii. Abstract

Effects of Publication

Upon publication, the Patent Office makes the specification (complete as well as provisional, if any), abstract, drawings and any other documents filed in respect of the application available to the public on its website and copies of the same can also be made available on payment of the prescribed fee as given in the First Schedule of Patents Rules 2003 (as amended), if such a request is filed. After publication of the application for Patent, the depository institution shall make the biological material, mentioned in the specification, available to the public. On and from the date of publication of the application for patent and until the date of grant of a patent in respect of such application, the applicant shall have the like privileges and rights as if a patent for the invention had been granted on the date of publication of the application: Provided that the applicant shall not be entitled to institute any proceedings for infringement until the patent has been granted. No patent shall be granted before the expiry of six months from the date of publication of the application.

Specification

The Specification is a techno-legal document containing scientific and technical disclosure and claims for the invention which is the basis of rights of a patent. The Specification, thus, forms a crucial part of the patent application. A specification may be filed either as a provisional or complete specification. Provisional or Complete Specification shall be submitted in Form-2 along with the Application Form-1 and other documents accompanied with the prescribed fee as given in the First Schedule.

The first page of Form - 2 shall contain:

- a) Title of the invention;
- b) Name, address and nationality of each of the applicants for patent; and

The first page of Form - 2 shall contain:

- c) Preamble to the description:
 - i) If the provisional specification is filed, the Preamble shall be as under: " The following Specification describes the invention".
 - ii) If the complete specification is filed, the Preamble shall be as under: " The following specification particularly describes the invention and the manner in which it is to be performed." Title of the invention shall disclose the specific features of the invention normally in not more than fifteen words.
- d) Title of the invention shall disclose the specific features of the invention normally in not more than fifteen words. The applicant shall submit drawings, wherever required.

Provisional Specification

When the applicant finds that his invention has reached a stage where it can be disclosed but has not attained the final stage, he may prepare a disclosure of the invention in the form of a written description and submit it to Patent Office as a Provisional Specification.

Contents of Provisional Specification:

A provisional specification shall essentially contain the title and description of the invention. It is advisable not to include claims in the provisional specification as the purpose of filing a provisional specification is to claim a priority date and it is only meant for describing the invention.

Complete Specification

Complete Specification is a techno-legal document which fully and particularly describes the invention and discloses the best method of performing the invention. As a complete specification is an important document in the patent proceedings, it is advised that it should be drafted:

- i. with utmost care without any ambiguity.
- ii. Fully and particularly describe the invention and its operation or use and the method by which it is performed;
- iii. Disclose the best method of performing the invention which is known to the applicant for which he is entitled to claim protection;
- iv. End with a claim or set of claims defining the scope of the invention for which the protection is claimed;
- v. Make a reference to deposit of the biological material in the international depository authority, if applicable;
- vi. Disclose the source and geographical origin of biological material specified in the Specification;

Examination of Application

This step involves search for Anticipation by previous publication and Prior Claiming:

The examiner conducts a search in the Indian Patent Database, starting from 1.1.1912, and all the available databases including patent/non-patent literature. In addition to the above, PCT Minimum documentation is searched. The search is conducted to find out any publication which may anticipate the claimed subject matter. Another objective of the search is to ascertain whether an invention as claimed in any of the claims of the complete specification has been claimed in any claim of any other complete specification, filed in India, which has been published on or after the date of filing of the applicant's complete specification being a specification filed in pursuance of an application for a patent made in India and dated before or claiming the priority date earlier than that date.

Report of Examiner

The examiner makes a report after carrying out detailed examination whether the application and the specification and other documents relating thereto are in accordance with the requirements of the Act and rules made thereunder. The examiner makes a report after carrying out detailed examination whether there is any lawful ground of objection to the grant of patent under the Act. The result of investigations under Section 13; any other matter which may be prescribed.

Pre-Grant Opposition

Any person may file an opposition by way of representation (Pre-Grant Opposition) to the Controller in Form 7A against the grant of Patent, at the appropriate office, at any time after publication of patent application u/s 11A but before the grant of Patent on any of the grounds mentioned in Section 25(1) with a copy to the applicant. The representation shall include a statement and evidence, if any, in support of such representation and a request for hearing, if so desired.

The Controller shall consider the representation only after a Request for Examination for that Application has been filed. Any pre-grant opposition, if available on record, is considered by the Controller along with the report of the Examiner. On consideration of the representation, if the Controller is of the opinion that pre-grant opposition has merit and the application shall be refused or amended, a notice is given to the applicant. The applicant shall, if he so desires, reply to the notice to the Controller by filing his statement and evidence, if any, in support Section 11A, 25(1). Rule 55. 110 of his application within three months from the date of the notice, with a copy to the opponent. On consideration of the statement and evidence filed by the applicant, the representation including the statement and evidence filed by the opponent, submissions made by the parties, and after hearing the parties, if so requested, the Controller may either reject the representation or require the complete specification and other documents to be amended to his satisfaction before the patent is granted or refuse to grant a patent on the application, by passing a speaking order under Section 15, to simultaneously decide on the application and the representation, ordinarily within one month from the completion of above proceedings.

Grant of Patent

A Patent is granted as expeditiously as possible when,

- i. the application has not been refused by the Controller by virtue of any power vested in him by this Act or Rules, or
- ii. the application has not been found to be in contravention of any of the provisions of the Act or Rules;

The date of grant of patent is the date on which the patent is granted by the Controller. The date on which the patent is granted shall be entered in the register.

Post-Grant Opposition

Any person interested can give a notice of opposition against the grant of Patent in Form 7 at the appropriate Office, any time after the grant but within one year from the date of publication of grant of patent. The opponent shall, along with the notice of opposition, send a written statement setting out the nature of opponent's interest, the facts upon which he bases his case and relief which he seeks and evidence, if any. The post-grant opposition can be filed on any of the grounds as mentioned in Section 25(2), but on no other grounds. After receipt of the notice of opposition, the Controller shall notify the patentee about the fact of receipt of such notice, without any delay. A copy of the statement and evidence, if any, shall also be delivered to the patentee by the opponent. If the patentee desires to contest the opposition, he shall file a reply statement setting out fully the grounds upon which the opposition is contested and evidence, if any, in support of his case within a period of two months from the date of receipt of the copy of opponent's written statement and evidence, if any, and also deliver a copy to the opponent.

If the patentee does not desire to contest or does not file his reply and evidence within two months, the patent shall be deemed to have been abandoned and the Controller shall issue the order of revocation of Patent and the fact of revocation shall be entered in the register of patents.

14.6 Trademark

A trademark is a word, phrase, design or symbol, or combination thereof, that identifies the source of the goods of one party and distinguishes those goods from the goods of others.

Definitions under Trade Marks Act 1999

Section 2 (zb) of the TM Act defines Trade mark to be as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.

Section 2(1)(m) states that "Mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof".

Under Section 2(1)(zg) of the Trade Marks Act, 1999 “well-known trade mark”, in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

The current law of trademarks is contained in the Trademarks Act, 1999 and is in harmony with two major international treaties on the subject, namely, The Paris Convention for Protection of Industrial Property and TRIPS Agreement, to both of which India is a signatory. “The object of trademark law is to protect the rights of persons who manufacture and sell goods with distinct trademarks against invasion by other persons passing off their goods fraudulently and with counterfeit trademarks as those of the manufacturers. Normally, the remedy for such infringement will be by action in Civil Courts but in view of the delay which is incidental to civil proceedings and the great injustice which might result if the rights of manufacturers are not promptly protected, the law gives them the right to take the matter before the Criminal Courts, and prosecute the offenders, so as to enable them to effectively and speedily vindicate their rights”.

Trademark Vs Property Mark

Trademark denotes the manufacture or quality of the goods to which it is attached, the latter denotes the ownership in them. In other words, a trade mark concerns the goods themselves, while a property mark concerns the proprietor. A property mark attached to the movable property of a person remains even if part of such property goes out of his hands and ceases to be his.”

The term ‘use’ under the Trade Marks Act, 1999 has acquired a broad meaning and does not necessarily mean the physical presence of the goods in India. Presence of the trade mark on the Internet and publication in international magazines and journals having circulation in India are also considered as use in India.

Registration of Trademark

Under Section 3 of the Trade Marks Act, 1999, the Central Government appoints Controller-General of Patents, Designs, and Trade Marks, as the Registrar of Trade Marks for the purposes of the Trade Marks Act 1999. Other officers may also be appointed by the Central Government under Section 3(2) for the purpose of discharging such functions of the Registrar as he may authorize them to discharge under his superintendence and direction.

The registration procedure in India is based on the ‘first to file’ system. It is therefore important that the rights holder applies for the registration of its mark as soon as possible.

The registration of a trade mark confers on the registered proprietor of the trade mark the exclusive right to use the trade mark in relation to the goods or services in respect of which the trade mark is registered.

While registration of a trade mark is not compulsory, it offers better legal protection for an action for Infringement the renewable . It is pertinent to note that the letter "R" in a circle i.e. ® with a trademark can only be used after the registration of the trademark under the TM Act. rm of registration of a trademark as 10 years.

Requirements

- It should be unique and distinctive.
- Not indicate kind, quality, quantity, intended purpose, values of the product.
- Not be customary in the current language.
- Not deceive or cause confusion to the public.
- Not hurt the religious susceptibilities of any class or section of the citizens of India.
- Not be scandalous or obscene.
- Not be prohibited under the Emblem and names (Prevention of Improper use Act, 1950)
- Symbols
- TM for pending/applied marks
- ® for registered marks
- SM for service marks.



Case Analysis: Lal Babu Priyadarshi vs. Amritpal Singh

Issue: An application for registration of trademark “RAMAYAN” was filed by the Appellant in respect of incense sticks and perfumeries etc. The said application was opposed on the grounds being impugned mark. Whether the registration of the word “RAMAYAN” as a trademark, being the name of a Holy Book of Hindus, is prohibited Under Section 9(2) of the Trademarks Act, 1999?

Court’s Observations:

Mark shall not be registered if it contains or comprises of any matter likely to hurt the religious susceptibilities. Any symbol relating to Gods, Goddesses, places of worship should not ordinarily be registered as a trademark. Section 9 of the Act stipulates that the trademarks which are devoid of any distinctive character or which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of goods or rendering of the services or other characteristics of the goods or service or which consist exclusively of marks or indications which have become customary in the current language or in the bona-fide and established practice of the trade shall not be registered, unless it is shown that the mark has in fact acquired a distinctive character as a result of use before the date of application.

Rights conferred by registration

1. It confers on the registered proprietor the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered.
2. If the trade mark consists of several matters, there is an exclusive right to the use of the trade mark taken as a whole. If the trade mark contains matter common to trade or is not of a distinctive character, there shall be no exclusive right in such parts.
3. It entitles the registered proprietor to obtain relief in respect of infringement of the trade mark in the manner provided by the Trade Marks Act, 1999 when a similar mark is used on :
 - same goods or services,
 - similar goods or services,
 - in respect of dissimilar goods or services.
4. Registration of a trade mark forbids every other person (except the registered or unregistered permitted user) to use or to obtain the registration of the same trade mark or a confusingly similar mark in relation to the same goods or services or the same description of goods or services in relation to which the trade mark is registered.

Trademark Search

Before making an application for registration, it is prudent to make an inspection of the already registered trade marks to ensure that registration may not be denied in view of resemblance of the proposed mark to an existing one or prohibited one.

Who May Apply for Trade Mark?

As per Section 18 of the Trade Marks Act, 1999 any person “claiming to be the proprietor” of the trade mark ‘used’ or ‘proposed to be used’ by him may make an application in the prescribed manner for registration of his trade mark.

Who may apply?

- individual,
- company,
- association of persons or body of individuals,
- society,

- HUF,
- partnership firm, whether registered or not,
- Government, trust etc.

Joint Applicant

Section 24 enables registration of two or more persons to be registered as joint proprietors of the trade mark, where the mark is used or proposed to be used in relation to goods or services connected with the joint applicants.

Fees for Trade Mark Applications

First Schedule of Trade Mark Rules 2017 describes fees and forms for registration of Trade Marks

Application for registration of a trademark /collective Marks / Certification Mark / Series of trademark for specification of goods or services included in one or more than one classes.(TM-A)

Where the applicant is an Individual / Startup/Small Enterprise

For Physical filing 5000

For E-filing 4500

In all other cases

For Physical filing 10000

For E-filing 9000

For renewal of registration of a trademark under section 25 for each class(TM-R)

For Physical filing 10000

For E-filing 9000

Registration Process**Form and signing of application. –**

- (1) An application for the registration of a trademark in respect of specification of goods or services shall be made in TM-A and shall be signed by the applicant or his agent.
- (2) An application for the registration of a trademark, for goods or services shall –
 - (a) explain with sufficient precision, a description by words, of the trademark, if necessary, to determine the right of the applicant;
 - (b) be able to depict the graphical representation of the trademark;
 - (c) be considered as a three dimensional trademark only if the application contains a statement to that effect;
 - (d) be considered as a trademark consisting of a combination of colours only if the application contains a statement to that effect.
- (3) An amendment to divide an application under proviso to section 22 shall be made in Form TM-M.
- (4) An application, not being a series trademark shall be in respect of one trademark only, for as many class or classes of goods or services as may be made.

Duration and Renewal of Trade Mark Registration

Trade mark protection in India is perpetual subject to renewal of the registration after every 10 years. The application for renewal can be filed six months before the expiry of the validity period of the trade mark.

Opposing the impugned mark

Within three months of the publication of the journal it needs to be done.

Tax Deductibility

The Supreme Court in *Commissioner of Income-tax v. Finlay Mills Ltd.*, AIR 1951 SC 464, has held that the expenditure incurred on registration of trade mark is capital expenditure thus allowable deduction under the Income-tax Act.

Notice of Opposition. –

(1) A notice of opposition to the registration of a trademark under sub-section (1) of section 21, with such particulars as specified in Rule 43, shall be filed in form TM-O within four months from the date of publication of the trademark journal in which the application for registration of the trademark was advertised or re advertised.

(2) Where a notice of opposition has been filed in respect of a single application for the registration of a trademark for different classes of goods and services, it shall bear the fee in respect of each class in relation to which the opposition is filed.

Grounds of Opposition

That the trade mark advertised is not registrable in that it is neither distinctive nor capable of distinguishing or that it does not satisfy the requirements of the Act as to registrability;

The essential part of the said trade mark is a word in ordinary use, descriptive of the character or quality of the goods and the applicant is not entitled to acquire an exclusive right therein by registration;

That the trade mark is not capable of being represented graphically;

That the trade mark is devoid of distinctive character, that is to say, not capable of distinguishing the goods, or services of one person from those of another person;

That the trade mark consists exclusively of marks of indication which may serve to designate the kind, quality, intended purpose, values, geographical origin or the time of production of the goods or rendering of the services or other characteristics of the goods or services (mark which is directly descriptive of the character or quality of the goods or services or indicating geographical origin);

That the trade mark consists exclusively of marks or indications which have become in the current language or in the bona fide and established practice of the trade (may refer to generic names or marks common to the trade);

That the trade mark is of such a nature as to deceive the public or cause confusion;

That the trade mark contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India;

That the trade mark comprises or contains scandalous or obscene matter;

That the trade mark is:

(a) identical with or similar to an earlier trade mark, and

(b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, and the earlier trade mark is a well-known trade mark in India and the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark;

14.7 Copyrights

It is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings. It is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations including computer databases which may be expressed in words, codes, schemes or in any other form, including a machine readable medium), dramatic, musical and artistic works, cinematographic films and sound recordings. It is important to note that Copyright law protects expressions of ideas rather than the ideas themselves.

Under section 13 of the Copyright Act 1957, copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording. For example, books, computer programs are protected under the Act as literary works. Copyright refers

to a bundle of exclusive rights vested in the owner of copyright by virtue of Section 14 of the Act. These rights can be exercised only by the owner of copyright or by any other person who is duly licensed in this regard by the owner of copyright. These rights include the right of adaptation, right of reproduction, right of publication, right to make translations, communication to public etc. Its' protection is conferred on all Original literary, artistic, musical or dramatic, cinematograph and sound recording works. Original means, that the work has not been copied from any other source. Copyright protection commences the moment a work is created, and its registration is optional. It is always advisable to obtain a registration for a better protection. Copyright registration does not confer any rights and is merely a prima facie proof of an entry in respect of the work in the Copyright Register maintained by the Registrar of Copyrights.

Definitions:

An artistic work means- • a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; • a work of architecture; and • any other work of artistic craftsmanship.

"Sound recording" means a recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. A phonogram and a CD-ROM are sound recordings.

"Cinematograph film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films.

"Author" as per Section 2(d) of the Act means

In the case of a literary or dramatic work the author, i.e., the person who creates the work.

In the case of a musical work, the composer.

In the case of a cinematograph film, the producer. Lesson 12 Copyrights 281

"Author" as per Section 2(d) of the Act means

In the case of a sound recording, the producer.

In the case of a photograph, the photographer.

In the case of any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.

Case Analysis:Macmillan and Company Limited v. K. and J. Cooper, AIR 1924

- It was held that the word 'original' does not mean that the work must be the expression of original or inventive thought.
- Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of 'literary work, with the expression of thought in print or writing.
- The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.

Enforcement of Copyright in India

- Civil remedies in the form of permanent injunction, damages or accounts of profits, delivery of the infringing material for destruction and cost of the legal proceedings. etc.
- A cognizable offence punishable with for a term which shall not be less than six months but which may extend to three years with a fine which shall not be less than INR 50,000 but may extend to INR 2,00,000.

Indian perspective on copyright protection

The Copyright Act, 1957 provides copyright protection in India. It confers copyright protection in the following two forms:

1. Economic rights of the author, and
2. Moral Rights of the author.

14.8 Validity

Literary, dramatic, musical and artistic work – Life of author plus 60 years from the beginning of calendar year which follows the year in which the author dies.

Cinematographic Film: These are copyrighted for 60 years from the beginning of calendar year that follows the year in which the cinematograph film was published.

Sound recording: 60 years from the beginning of calendar year which follows the year in which the sound recording was published.

Posthumous, anonymous and pseudonymous works, photographs, cinematograph films, sound recordings, works of Government, public undertaking and international organizations: Validity duration is 60 years from the beginning of the calendar year next following the year in which the work has been first published.



Case Analysis

Issue: Edward Stratemeyer is a well-known publisher and author for his creation named 'Nancy Drew'. His book revolves around his lady hero Nancy and her mysterious stories. Alexander, a movie producer uses one of the mysterious stories of Nancy for one of his film without permission from Edward. He filed a suit against Alexander. Identify the type of damage done to the rights of Edward? What remedy does he have against Alexander? Discuss.

Rule: Copyright is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations including computer databases which may be expressed in words, codes, schemes or in any other form, including a machine readable medium), dramatic, musical and artistic works, cinematographic films and sound recordings.

Analysis: In the given case, Alexander, a movie producer uses one of the mysterious stories of Nancy for one of his film without permission from Edward.

Conclusion: The published copies of copyrighted work can be seized or destroyed.

Remedy for Copyright Infringement in India

Copyright owners can take legal action against any person or entity that infringes on the copyright of a work. The copyright owner can file a civil remedies case in a court having jurisdiction and is entitled to remedies by way of injunctions, damages and accounts. Further, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class can try any offence under the Copyright Act.

In case of copyright infringement by an artificial judicial person like a private limited company or limited liability partnership (LLP), the company and all persons who at the time the offence was committed was in charge or was responsible to the company for the conduct of the business of the company, would be liable to be proceeded against.

Criminal Prosecution for Copyright Infringement

If any person knowingly infringes or abets the infringement of the copyright in any work, then such an offence is a criminal offence under Copyright Act. In the case of criminal copyright infringement, the minimum punishment for an infringement of copyright is imprisonment for six months with a minimum fine of Rs. 50,000/-. In the case of a second and subsequent conviction, the minimum punishment is imprisonment for one year and a fine of Rs.1,00,000/-.

Copyright Infringement a Cognizable Offence

Cognisable offence means a police officer has the authority to make an arrest without a warrant and to start an investigation with or without the permission of a court. Copyright infringement is a cognizable offence and any police officer, not below the rank of a sub-inspector, can seize without a warrant, all copies of the work and all plates used for the purpose of making infringing copies of

the work, to be produced before a magistrate. To obtain copyright registration or to consult a copyright attorney, visit IndiaFilings.com with a http link as:

<https://www.indiafilings.com/learn/copyright-infringement-in-india/>

Copyright Registration Process

The person applying for copyright has to follow the following steps:

The person has to file the application along with the fee either in the form of DD/ IPO

Then the diary number will be issued.

The person has to compulsorily wait for 30 days for objections.

If in case no objection is filed then, the Application will be accepted. It will go to the examiner for scrutinization. If in case there is no discrepancy found, the application will be sent for approval. If discrepancies are found then the discrepancy letter will be issued to the applicant. The applicant will have a right to reply which will be heard by the registrar. In case the registrar is satisfied by the reply he may approve the application and send extracts from the register to the applicant. However, if not satisfied then he may reject the application and send the rejection letter to the applicant.

If in case objection is filed:

The letter will be sent to both parties i.e., party filing objections and the party against whom the objection is filed.

Reply will be awaited from both the parties.

Reply by both the parties will be heard by the registrars.

If in case objections are rejected the application will be accepted and if objection will be accepted, then the application will be rejected.

This procedure applies in the case of both the published or unpublished work.

Copyright Board (Section 11) and its Functions

- i. Settlement of disputes as to whether copies of any literary, dramatic or artistic work or records are issued to the public in sufficient numbers.
- ii. Settlement of disputes as to whether the term of copyright for any work is shorter in any other country than that provided for that work under the Act.
- iii. Settlement of disputes with respect to assignment of copyright as dealt with in Section 19A.
- iv. Granting of compulsory licences in respect of Indian works withheld from public.
- v. Granting of compulsory licence to publish unpublished Indian works.
- vi. Granting of compulsory licence to produce and publish translation of literary and dramatic works.
- vii. Granting of compulsory licence to reproduce and publish literary, scientific or artistic works for certain purposes.
- viii. Determination of royalties payable to the owner of copyright.
- ix. Determination of objection lodged by any person as to the fees charged by Performing Rights Societies.
- x. Rectification of Register on the application of the Registrar of Copyright or of any person aggrieved.
- xi. Assignment of Copyright (Section 18)
- xii. Assignment may be made of the copyright either wholly or partially and generally, or subject to limitations and for the whole period of copyright or part thereof.

Where the copyright vests?

If a work is done by an author for a consideration for a publisher, the copyright in it would normally vest in the publisher subject to any contract to the contrary, as is provided by Section 17 of the said Act. It can be legitimately said that this Section has been inserted in the Act of 1957, but the rule of law has been same even prior to this statutory provision. Secondly as provided by Section 18, the copyright could be assigned, and if it is so done it would be vested in the purchaser. (Khemraj Shrikrishnadass v. M/s Garg & Co. and Another AIR 1975 Del 130.)

Mode of Assignment

- Section 19 of the Act provides that an assignment of copyright should be in writing signed by the owner of the copyright.
- Mere acceptance of remuneration or delivery of manuscript does not constitute an assignment of copyright.
- Oral assignment is invalid, and it is impermissible in law.



Case Analysis: Mannu Bhandari V. Kala Vikas Pictures Pvt. Ltd. And Anr.

Issue: Mannu Bhandari, the Plaintiff/Appellant, was an author of great repute in Hindi Literature. She entered into a contract with the Defendants/Respondents for the assignment of the rights in her novel 'Aap Ka Bunty' for its production into a film. The Respondents produced the film 'Samay Ki Dhara' based on the aforesaid novel. However, the Appellant claimed that the Respondents have distorted and mutilated her novel for commercial gain.

Arguments on behalf of the Appellant: Novel of the Appellant, 'Aap Ka Bunty' is recognised by the public both nationally and internationally for its script, theme, dialogue, substance and the central idea. If a distorted version of her novel is allowed to be presented through the film, her admirers would conclude that she has fallen prey to big money and consented to mutilations and distortions of her novel and doubt her sincerity and commitment.

Arguments on behalf of the Respondents: The Appellant cannot object to the modifications after the movie has been produced. If a film is produced based on the novel, no restraint order can be passed.

Judgement: The modifications should not distort or mutilate the original novel. The main theme, the situations and the main characters of the novel must be untouched.

Summary

Intellectual property rights refer to the rights allied with intangible assets owned by a person or company and protected against use without consent. Intangible assets refer to non-physical personal property, including right of ownership in intellectual property. It basically represents something of value, such as, negotiable instruments, securities, service and intangible assets, including goodwill etc. It is a property that exists by application of human intellect. There are four main types of intellectual property rights, including patents, trademarks, copyrights, and trade secrets. Owners of intellectual property frequently use more than one of these types of intellectual property law to protect the same intangible assets.

Examples of intellectual property rights include:

- Business or trade names
- Commercial secrets
- Computer software
- Confidential information
- Database rights

- Design rights
- Domain names
- Industrial design
- Inventions
- Logos
- Moral rights
- Patents
- Service marks
- Trademarks
- Works of authorship
- in general, a new way of doing something, or offers a new technical solution to a problem. To obtain it, technical information about the invention must be disclosed to the public in a patent application. Patent is a statutory right granted by the respective governments. It gives one the exclusive rights and bars others from making, using, selling and importing product or process, based on the patented invention without one's prior permission.

Criteria for grant of Patent

1. **Patentable Subject Matter:** It should be clear as to the patent is to be obtained for a product or process.
2. **Industrial Applicability:** Industrial applicability requirement checks if an invention is capable of being made or used in an industry (Section 2(1) (ac)). If a product can be manufactured repeatedly and has at least one use in an industry, it will be considered as industrially applicable.
3. **Novelty:** if it is different from what is already existing, which is referred to as 'prior art.'
4. **Inventive Step:** means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both
5. **Specification:** The specification has to enable the invention, which means it must fully and particularly describe the invention and its operation or use and the method by which it is to be performed.

A trademark is a word, phrase, design or symbol, or combination thereof, that identifies the source of the goods of one party and distinguishes those goods from the goods of others.

Copyright is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings. It is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations including computer databases which may be expressed in words, codes, schemes or in any other form, including a machine readable medium), dramatic, musical and artistic works, cinematographic films and sound recordings. It is important to note that Copyright law protects expressions of ideas rather than the ideas themselves.

Keywords

- A patent is a legal grant by the government of the nation providing exclusive rights to the owner to use their inventions and creations. The basic idea behind it is encouraging to safeguard one's ideas and inventions.
- Copyright (or author's right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.

- A trademark (also written trade mark or trade-mark is a type of intellectual property consisting of a recognizable sign, design, or expression that identifies products or services from a particular source and distinguishes them from others.

SelfAssessment

Q1. What protects the intellectual property created by artists?

- A. Copyright
- B. Patent
- C. Industrial Design
- D. Geographical Indications

Q2. What does a trademark protect?

- A. An invention
- B. A work of art
- C. Logos, names and brands
- D. A secret formula

Q3. How long do patents usually last for?

- A. 5 years
- B. 10 years
- C. 30 years
- D. 20 years

Q4. Imagine a sports team sets up a company to sell its own range of clothes. What type of intellectual property can the team use to show that the clothes are made by them?

- A. Trademark
- B. Patent
- C. Copyright
- D. Industrial Design

Q5. If a company develops a new technology that improves its main product, what type of intellectual property can they use to stop others from copying their invention?

- A. Copyright
- B. Patent
- C. Industrial Design
- D. Geographical Indications

Q6. In most countries, how long does copyright last for?

- A. 10 years after the creation of the work
- B. 50 years after the creation of the work
- C. 10 years after the death of the person who created that work
- D. 50 years after the death of the person who created that work

Q7. What does a trademark protect?

- A. Logos, names and brands
- B. The look, shape and feel of a product
- C. An invention
- D. A work of art

Q8. Which of these is a geographical indication?

- A. BMW
- B. Hogwarts
- C. Champagne
- D. PlayStation

Q9. What protects the intellectual property created by inventors?

- A. Copyright
- B. Geographical indications
- C. Patents
- D. Registered designs

Q10. What protects the intellectual property created by designers?

- A. Copyright
- B. Geographical indications
- C. Patents
- D. Registered designs

Q11. Use of patented invention by a person other than a patentee constitutes.....

- A. Co-Operation to patentee
- B. Infringement of patent rights of patentee
- C. Advertisement of patent
- D. Anticipation

Q12. Can lecture delivered in the classroom be copyrighted?

- A. Occasionally with conditions
- B. None
- C. No
- D. Yes

Q13. Patent for theis prohibited.

- A. Junk food
- B. Atomic energy
- C. Arms
- D. Traditional knowledge

Q14. The mark granted by the authority granting the certificate of quality and standard is called

- A. Additional Trademark
- B. Service Mark
- C. Certification Mark
- D. Quality Mark

Q15. Which of the following is not the infringement of copyright?

- A. To make back up copy
- B. Copy the software to another computer by company
- C. Copy the software to another computer
- D. Copy the software to another computer by educational institution

Answer for Self Assessment

- | | | | | |
|-------|-------|-------|-------|-------|
| 1. A | 2. C | 3. D | 4. A | 5. B |
| 6. D | 7. B | 8. C | 9. C | 10. D |
| 11. B | 12. D | 13. B | 14. D | 15. A |

Review Questions

Q1. What is meant by the term 'Copyright'? Discuss the procedure for its registration.

Q2. What is meant by the term 'Trademark'? Discuss the procedure for its registration.

Q3. What is meant by the term 'Patent'? Discuss the procedure for its registration.

Q4. a) Sia, a renowned Australian recording artist wrote the lyrics of a song named 'Chandellier'. Rihanna, a Barbadian singer, actress, and fashion designer is a good friend of Sia. On one of her visits to Sia's home during Christmas, she copies the lyrics and launched an album in her name. What type of damage has been done to Sia? What remedy does she have against Rihanna? Discuss briefly.

b) Edward Stratemeyer is a well-known publisher and author for his creation named 'Nancy Drew'. His book revolves around his lady hero Nancy and her mysterious stories. Alexander, a movie producer uses one of the mysterious stories of Nancy for one of his films without permission from Edward. He filed a suit against Alexander. Identify the type of damage done to the rights of Edward? What remedy does he have against Alexander? Discuss.

Q5. Write a short note on: a. Fees for Trade Mark Applications and b. Criminal Prosecution for Copyright Infringement



Further Readings

1. A Textbook of Mercantile Law by P.P.S. Gogna, S. Chand & Company
2. Elements of Mercantile Law by N.D. Kapoor, S. Chand & Company
3. A Manual of Business Laws By S.N Maheshwari, S.K. Maheshwari, Himalaya Publishing House Pvt. Ltd

4. Mercantile Law by S SGulsan, Excel Books
5. Mercantile Law by M C Kuchchal, Vikas Publishing House
6. Legal Aspects of Business by Daniel Albuquerque, Oxford &Ibh



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<https://taxguru.in/rbi/endorsement-magical-tool-demonetization.html>

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<https://www.lexology.com/library/detail.aspx?g=070d1241-a9ed-4dc1-8deb-27bbf81dea99>

<https://www.mondaq.com/india/trials-appeals-compensation/814178/negotiable-instruments-amendment-act-2018-retrospective-or-not>

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