CA Foundation

Business Law Brief Notes

THE INDIAN CONTRACT ACT, 1872

CONTRACT

The term contract is defined under section 2(h) of the Indian Contract Act, 1872 as- "an agreement enforceable by law".

The contract consists of two essential elements:

(i) an agreement, and

(ii) its enforceability by law.

AGREEMENT

The term 'agreement' is defined in Section 2 (e) of the Indian Contract Act, as under: "Every promise and every set of promises forming the consideration for each other, is an agreement." Agreement = Offer + Acceptance.

All Contracts are agreements but all agreements are not contracts.

DIFFERENCE BETWEEN AGREEMENT AND CONTRACT

Basis	Agreement	Contract
Meaning	Every promise and every set of promises, forming the consideration for each other. Offer + Acceptance	Agreement enforceable by law. Agreement + Legal enforceability

Basis	Agreement	Contract
Scope	It's a wider term including both legal and social agreement.	It is used in a narrow sense with the specification that contract is only legally enforceable agreement
Legal obligation	It may not create legal obligation. An agreement does not always grant rights to the parties	Necessarily creates a legal obligation. A contract always grants certain rights to every party.
Nature	All agreement are not contracts.	All contracts are agreements.

ESSENTIALS OF A VALID CONTRACT

According to Section 10 of the Indian Contract Act, 1872, the following are the essential elements of a Valid Contract:

I. **Offer and Acceptance or an agreement:**

- An agreement is the first essential element of a valid contract.
- According to Section 2(e) of the Indian Contract Act, 1872, "Every promise and every set of promises, forming consideration for each other, is an agreement".

- According to Section 2(b) "A proposal when accepted, becomes a promise". An agreement is an outcome of offer and acceptance.

II. Free Consent:

- Two or more persons are said to consent when they agree upon the same thing in the same sense.
- Further such a consent must be free.
- Consent would be considered as free consent if it is not caused by coercion, undue influence, fraud or, misrepresentation or mistake.
- When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

III. Capacity of the parties:

- Capacity to contract means the legal ability of a person to enter into a valid contract.
- Section 11 of the Indian Contract Act specifies that every person is competent to contract who
  a) is of the age of majority and
  b) is of sound mind and
  c) is not otherwise disqualified from contracting by any law.
- A person competent to contract must fulfil all the above three qualifications.

IV. Consideration:

- A valuable consideration in the sense of law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

V. Lawful Consideration and Object:

- The consideration and object of the agreement must be lawful.
- Section 23 states that consideration or object is not lawful if it is prohibited by law, or it is such as would defeat the provisions of law, if it is fraudulent or involves injury to the person or property of another or court regards it as immoral or opposed to public policy.

VI. Not expressly declared to be void:

- The agreement entered into must not be which the law declares to be either illegal or void.
- An illegal agreement is an agreement expressly or impliedly prohibited by law. A void agreement is one without any legal effects.

TYPES OF CONTRACT

On the basis of the validity

1. **Valid Contract:** An agreement which is binding and enforceable is a valid contract. It contains all the essential elements of a valid contract.
2. **Void Contract:** Section 2 (j) states as follows: "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". Thus a void contract is one which cannot be enforced by a court of law.
3. **Voidable Contract:** Section 2(i) defines that "an agreement which is enforceable by law at the option of one or more parties thereto, but not at the option of the other or others is a voidable contract". This in fact means where one of the parties to the agreement is in a position or is legally entitled or authorized to avoid performing his part, then the agreement is treated and becomes voidable.
4. **Illegal Contract:** It is a contract which the law forbids to be made. The court will not enforce such a contract but also the connected contracts. All illegal agreements are void but all void agreements are not necessarily illegal.
5. **Unenforceable Contract:** Where a contract is good in substance but because of some technical defect i.e. absence in writing, barred by limitation etc. one or both the parties cannot sue upon it, it is described as an unenforceable contract.

On the basis of the formation of contract

1. **Express Contracts:** A contract would be an express contract if the terms are expressed by words or in writing. Section 9 of the Act provides that if a proposal or acceptance of any promise is made in words the promise is said to be express.

2. **Implied Contracts:** Implied contracts in contrast come into existence by implication. Most often the implication is by law and or by action. Section 9 of the Act contemplates such implied contracts when it lays down that in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

3. **Quasi-Contract:** A quasi-contract is not an actual contract but it resembles a contract. It is created by law under certain circumstances. The law creates and enforces legal rights and obligations when no real contract exists. Such obligations are known as quasi-contracts. In other words, it is a contract in which there is no intention on part of either party to make a contract but law imposes a contract upon the parties.

4. **E-Contracts:** When a contract is entered into by two or more parties using electronics means, such as e-mails is known as e-commerce contracts. In electronic commerce, different parties/persons create networks which are linked to other networks through ED1 - Electronic Data Inter change. This helps in doing business transactions

using electronic mode. These are known as EDI contracts or Cyber contracts or mouse click contracts.

On the basis of the performance of the contract

1. **Executed Contract:** The consideration in a given contract could be an act or forbearance. When the act is done or executed or the forbearance is brought on record, then the contract is an executed contract.
2. **Executory Contract:** In an executory contract the consideration is reciprocal promise or obligation. Such consideration is to be performed in future only and therefore these contracts are described as executory contracts.
    a. **Unilateral Contract:** Unilateral contract is a one-sided contract in which one party has performed his duty or obligation and the other party's obligation is outstanding.
    b. **Bilateral Contract:** A Bilateral contract is one where the obligation or promise is outstanding on the part of both the parties.

PROPOSAL / OFFER	According to **Section 2(a) of the Indian Contract Act, 1872**, "when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent

of that other to such act or abstinence, he is said to make a proposal".

Essential of a valid offer

1. **It must be capable of creating legal relations:**
    - Offer must be such as in law is capable of being accepted and giving rise to legal relationship.
    - If the offer does not intend to give rise to legal consequences and creating legal relations, it is not considered as a valid offer in the eye of law.
    - A social invitation, even if it is accepted, does not create legal relations because it is not so intended.
2. **It must be certain, definite and not vague:**
    - If the terms of an offer are vague or indefinite, its acceptance cannot create any contractual relationship.
    - Thus, where A offers to sell B 100 quintals of oil, there is nothing whatever to show what kind of oil was intended. The offer is not capable of being accepted for want of certainty.
3. **It must be communicated to the offeree:**
    - An offer, to be complete, must be communicated to the person to whom it is made, otherwise there can be no acceptance of it.
    - Unless an offer is communicated, there can be no acceptance by it.
4. **It must be made with a view to obtaining the assent of the other party:** Offer must be made with a view to

obtaining the assent of the other party addressed and not merely with a view to disclosing the intention of making an offer.

5. **It may be conditional:** An offer can be made subject to any terms and conditions by the offeror.

6. **Offer should not contain a term the non-compliance of which would amount to acceptance:** Thus, one cannot say that if acceptance is not communicated by a certain time the offer would be considered as accepted.

7. **The offer may be either specific or general:** Any offer can be made to either public at large or to the any specific person.

8. **Offer is Different from a mere statement of intention, an invitation to offer, a mere communication of information, Casual Equity, A prospectus and Advertisement.**

9. **The offer may be express or implied:** An offer may be made either by words or by conduct.

10. **An offer should be distinguished from an invitation to offer.**

    - An offer is definite and capable of converting an intention into a contract.
    - Whereas an invitation to an offer is only a circulation of an offer, it is an attempt to induce offers and precedes a definite offer.
    - An invitation to offer is an act precedent to making an offer.

- Acceptance of an invitation to an offer does not result in the contract and only an offer emerges in the process of negotiation.

CLASSIFICATION OF OFFER

a. General offer:

- It is an offer made to public at large and hence anyone can accept and do the desired act (Carlill v. Carbolic Smoke Ball Co.).
- In terms of Section 8 of the Act, anyone performing the conditions of the offer can be considered to have accepted the offer.
- Until the general offer is retracted or withdrawn, it can be accepted by anyone at any time as it is a continuing offer.

b. Special/specific offer:

- When the offer is made to a specific or an ascertained person, it is known as a specific offer.
- Specific offer can be accepted only by that specified person to whom the offer has been made. [Boulton v. Jones]

c. Cross offer:

- When two parties exchange identical offers in ignorance at the time of each other's offer, the offers are called cross offers.

- There is no binding contract in such a case because offer made by a person cannot be construed as acceptance of the another's offer.

d. Counter offer:

- When the offeree offers to qualified acceptance of the offer subject to modifications and variations in the terms of original offer, he is said to have made a counter offer.
- Counter-offer amounts to rejection of the original offer.
- It is also called as Conditional Acceptance.

e. Standing or continuing or open offer:

- An offer which is allowed to remain open for acceptance over a period of time is known as standing or continuing or open offer.
- Tenders that are invited for supply of goods is a kind of standing offer.

ACCEPTANCE

In terms of **Section 2(b) of the Act**, 'the term acceptance' is defined as follows:

"When the person to whom the proposal is made signifies his assent thereto, proposal is said to be accepted. The proposal, when accepted, becomes a promise".

Legal Rules regarding a valid acceptance

1. **Acceptance can be given only by the person to whom offer is made:** In case of a specific offer, it can be accepted only by the person to whom it is made.
2. **Acceptance must be absolute and unqualified:**
    - As per section 7 of the Act, acceptance is valid only when it is absolute and unqualified and is also expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it must be accepted.
    - If the proposal prescribes the manner in which it must be accepted, then it must be accepted accordingly.
3. **The acceptance must be communicated:**
    - To conclude a contract between the parties, the acceptance must be communicated in some perceptible form.
    - Any conditional acceptance or acceptance with varying or too deviant conditions is no acceptance.
    - Such conditional acceptance is a counter proposal and has to be accepted by the proposer, if the original proposal has to materialize into a contract.
    - Further when a proposal is accepted, the offeree must have the knowledge of the offer made to him. If he does not have the knowledge, there can be no acceptance.

- The acceptance must relate specifically to the offer made. Then only it can materialize into a contract.

4. **Acceptance must be in the prescribed mode:**
    - Where the mode of acceptance is prescribed in the proposal, it must be accepted in that manner.
    - But if the proposer does not insist on the proposal being accepted in the manner prescribed after it has been accepted otherwise, i.e., not in the prescribed manner, the proposer is presumed to have consented to the acceptance.
5. **Time:**
    - Acceptance must be given within the specified time limit, if any, and if no time is stipulated, acceptance must be given within the reasonable time and before the offer lapses.
    - What is reasonable time is nowhere defined in the law and thus would depend on facts and circumstances of the particular case.
6. **Mere silence is not acceptance:** The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer, unless the offeree has in any previous conduct indicated that his silence is the evidence of acceptance.
7. **Acceptance by conduct/Implied Acceptance:** Section 8 of the Act lays down that “the performance of the conditions of a proposal, or the acceptance of any consideration for a

reciprocal promise which may be offered with a proposal, constitutes an acceptance of the proposal.

COMMUNICATION OF OFFER AND ACCEPTANCE

The Indian Contract Act,1872 gives a lot of importance to "time" element in deciding when the offer and acceptance is complete. **Communication of offer:**

- In terms of Section 4 of the Act, "the communication of offer is complete when it comes to the knowledge of the person to whom it is made".
- This can be explained by an example. Where 'A' makes a proposal to 'B' by post to sell his house for Rs. 5 lakhs and if the letter containing the offer is posted on 10th March and if that letter reaches 'B' on 12th March the offer is said to have been communicated on 12th March when B received the letter.
- Thus, it can be summed up that when a proposal is made by post, its communication will be complete when the letter containing the proposal reaches the person to whom it is made.
- Mere receiving of the letter is not sufficient, he must receive or read the message contained in the letter.
- He receives the letter on 12th March, but he reads it on 15th of March. In this case offer is communicated on 15th of March, and not 12th of March.

Communication of acceptance:

Section 3 of the Act prescribes in general terms two modes of communication namely, (a) by any act and (b) by omission, intending thereby, to communicate to the other or which has the effect of communicating it to the other.

- **Communication by act** would include any expression of words whether written or oral. Written words will include letters, telegrams, faxes, emails and even advertisements. Oral words will include telephone messages. Again communication would include any conduct intended to communicate like positive acts or signs so that the other person understands what the person 'acting ' or 'making signs' means to say or convey.
- **Communication of acceptance by 'omission' to do something.**

  Such omission is conveyed by a conduct or by forbearance on the part of one person to convey his willingness or assent. However, silence would not be treated as communication by 'omission'.
- **Communication of acceptance by conduct.** For instance, delivery of goods at a price by a seller to a willing buyer will be understood as a communication by conduct to convey acceptance.

When communication of acceptance is complete:

In terms of Section 4 of the Act, it is complete,

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

(ii) **As against the acceptor**, when it comes to the knowledge of the proposer.

Where a proposal is accepted by a letter sent by the post, the communication of acceptance will be complete as against the proposer when the letter of acceptance is posted and as against the acceptor when the letter reaches the proposer.

Acceptance over telephone or telex or fax: When an offer is made of instantaneous communication like telex, telephone, fax or through e-mail, the contract is only complete when the acceptance is received by the offeree, and the contract is made at the place where the acceptance is received (Entores Ltd. v. Miles Far East Corporation). However, in case of a call drops and disturbances in the line, there may not be a valid contract.

REVOCATION OF OFFER AND ACCEPTANCE

In term of Section 4, communication of revocation (of the proposal or its acceptance) is complete.

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

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

Modes of revocation of offer

(i) By notice of revocation

(ii) **By lapse of time:** The time for acceptance can lapse if the acceptance is not given within the specified time and where no time is specified, then within a reasonable time.

(iii) **By non-fulfillment of condition precedent:** Where the acceptor fails to fulfill a condition precedent to acceptance the proposal gets revoked.

(iv) **By death or insanity:** Death or insanity of the proposer would result in automatic revocation of the proposal but only if the fact of death or insanity comes to the knowledge of the acceptor.

(v) By counter offer

(vi) By the non-acceptance of the offer according to the prescribed or usual mode

(vii) By subsequent illegality

CONSIDERATION

Consideration is an essential element of a valid contract without which no single promise will be enforceable. It is a term used in the sense of quid pro quo, i.e., 'something in return'.

Section 2(d) defines consideration as follows:

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing something, such an

act or abstinence or promise is called consideration for the promise". Consideration = Promise / Performance that parties exchange with each other.

LEGAL RULES REGARDING CONSIDERATION

i. **Consideration must move at the desire of thepromisor:**

- Consideration must be offered by the promisee or the third party at the desire or request of the promisor.
- An act done at the desire of a third party is not a consideration.

ii. **Consideration may move from promisee or any other person:**

- In India, consideration may proceed from the promisee or any other person who is not a party to the contract.
- In other words, there can be a stranger to a consideration but not stranger to a contract.

iii. **Executed and executory consideration:**

- A consideration which consists in the performance of an act is said to be executed. When it consists in a promise, it is said to be executory.
- The promise by one party may be the consideration for an act by some other party, and vice versa.

iv. **Consideration may be past, present or future:**

- The words "has done or abstained from doing" [as contained in Section 2(d)] are a recognition of the doctrine of past consideration.
- In order to support a promise, a past consideration must move by a previous request.
- It is a general principle that consideration is given and accepted in exchange for the promise.
- The consideration, if past, may be the motive but cannot be the real consideration of a subsequent promise. But in the event of the services being rendered in the past at the request or the desire of the promisor, the subsequent promise is regarded as an admission that the past consideration was not gratuitous.

v. Consideration need not be adequate:

- Consideration need not to be of any particular value. It need not be approximately of equal value with the promise for which it is exchanged but it must be something which the law would regard as having some value.
- Something in return need not be equal to something given. It can be considered a bad bargain of the party.

vi. Performance of what one is legally bound to perform:

- The performance of an act by a person who is legally bound to perform the same cannot be consideration for a contract.

- Hence, a promise to pay money to a witness is void, for it is without consideration. Hence such a contract is void for want of consideration.

vii. **Consideration must be real and not illusory:**

- Consideration must be real and must not be illusory.
- It must be something to which the law attaches some value.
- If it is legally or physically impossible it is not considered valid consideration.

viii. **Consideration must not be unlawful, immoral, or opposed to public policy:**

- Only presence of consideration is not sufficient it must be lawful.
- Anything which is immoral or opposed to public policy also cannot be valued as valid consideration.

SUIT BY A THIRD PARTY TO A CONTRACT

Though under the Indian Contract Act, 1872, the consideration for an agreement may proceed from a third party, the third party cannot sue on contract.

Only a person who is party to a contract can sue on it.

Thus, the concept of stranger to consideration is a valid and is different from stranger to a contract.

The aforesaid rule, that stranger to a contract cannot sue is known as a **"doctrine of privity of contract"**, is however, subject to certain exceptions.

In other words, even a stranger to a contract may enforce a claim in the following cases:

1. **In the case of trust**, a beneficiary can enforce his right under the trust, though he was not a party to the contract between the settler and the trustee.
2. **In the case of a family settlement**, if the terms of the settlement are reduced into writing, the members of family who originally had not been parties to the settlement may enforce the agreement.
3. **In the case of certain marriage contracts/ arrangements**, a provision may be made for the benefit of a person, he may file the suit though he is not a party to the agreement.
4. **In the case of assignment of a contract**, when the benefit under a contract has been assigned, the assignee can enforce the contract.
5. **Acknowledgement or estoppel –** where the promisor by his conduct acknowledges himself as an agent of the third party, it would result into a binding obligation towards third party.
6. **In the case of covenant running with the land**, the person who purchases land with notice that the owner of land is bound by certain duties affecting land, the covenant affecting the land may be enforced by the successor of the seller.
7. **Contracts entered into through an agent:** The principal can enforce the contracts entered by his agent where the

agent has acted within the scope of his authority and in the name of the principal.

VALIDITY OF AN AGREEMENT WITHOUT CONSIDERATION

Indian Contract Act contains certain exceptions where the agreement though made without consideration, will be valid and enforceable.

1. **Natural Love and Affection:** A written and registered agreement based on natural love and affection between the parties standing in near relation (e.g., husband and wife) to each other is enforceable even without consideration.
2. **Compensation for past voluntary services:** A promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, is enforceable under Section 25(2).
3. **Promise to pay time barred debt:** Where a promise in writing signed by the person making it or by his authorised agent, is made to pay a debt barred by limitation it is valid without consideration [Section 25(3)].
4. **Agency:** According to Section 185 of the Indian Contract Act, 1872, no consideration is necessary to create an agency.
5. **Completed gift:** In case of completed gifts, the rule no consideration no contract does not apply.
6. **Bailment: N**o consideration is required to effect the contract of bailment (Section 148).

	7. Charity: If a promisee undertakes the liability on the promise of the person to contribute to charity, there the contract shall be valid.
ESSENTIAL ELEMENTS OF A VALID CONTRACT	Section 10 of the Indian Contract Act, 1872 provides that an agreement in order to be a contract, must satisfy the following conditions: 1. the parties must be competent to contract; 2. it must be made by the free consent of the parties; 3. it must be made for a lawful consideration and with a lawful object; 4. it should not have been expressly declared as void by law.
CAPACITY TO CONTRACT	Capacity refers to the competence of the parties to make a contract. It is one of the essential element to form a valid contract. Every person is competent to contract who- A. has attained the age of majority, B. is of sound mind and C. is not disqualified from contracting by any law to which he is subject.

AGE OF MAJORITY

Every person domiciled in India shall attain the age of majority on the completion of 18 years of age and not before. The age of majority being 18 years, a person less than that age even by a day would be minor for the purpose of contracting.

Law relating to Minor's agreement/Position of Minor

1. **A contract made with or by a minor is void ab-initio:** A minor is not competent to contract and any agreement with or by a minor is void from the very beginning.
2. **No ratification after attaining majority:**A minor cannot ratify the agreement on attaining majority as the original agreement is void ab initio and a void agreement can never be ratified.
3. **Minor can be a beneficiary or can take benefit out of a contract:** Though a minor is not competent to contract, nothing in the Contract Act prevents him from making the other party bound to the minor.
4. **A minor can always plead minority:**
    - A minor can always plead minority and is not stopped to do so even where he has taken any loan or entered into any contract by falsely representing that he was major.
    - Rule of estoppel cannot be applied against a minor.
    - It means he can be allowed to plea his minority in defence.
5. **Liability for necessaries:**
    - A claim for necessaries supplied to a minor is enforceable by law.

- But a minor is not liable for any price that he may promise and never for more than the value of the necessaries.
- There is no personal liability of the minor, but only his property is liable.
- To render minor's estate liable for necessaries two conditions must be satisfied.
    i. The contract must be for the goods reasonably necessary for his support in the station in life.
    ii. The minor must not have already a sufficient supply of these necessaries.

6. **Contract by guardian - how far enforceable:**
    - Though a minor's agreement is void, his guardian can, under certain circumstances enter into a valid contract on minor's behalf.
    - Where the guardian makes a contract for the minor, which is within his competence and which is for the benefit of the minor, there will be valid contract which the minor can enforce.
7. **No specific performance:** A minor's agreement being absolutely void, there can be no question of the specific performance of such an agreement.
8. **No insolvency:** A minor cannot be declared insolvent as he is incapable of contracting debts and dues are payable from the personal properties of minor and he is not personally liable.

9. **Partnership:** A minor being incompetent to contract cannot be a partner in a partnership firm, but under Section 30 of the Indian Partnership Act, he can be admitted to the benefits of partnership.

10. **Minor can be an agent:** A minor can act as an agent. But he will not be liable to his principal for his acts. A minor can draw, deliver and endorse negotiable instruments without himself being liable.

11. **Minor cannot bind parent or guardian:** In the absence of authority, express or implied, an infant is not capable of binding his parent or guardian, even for necessaries. The parents will be held liable only when the child is acting as an agent for parents.

12. **Joint contract by minor and adult:** In such a case, the adult will be liable on the contract and not the minor.

13. **Surety for a minor:** In a contract of guarantee when an adult stands surety for a minor then he (adult) is liable to third party as there is direct contract between the surety and the third party.

14. **Minor as Shareholder:**

    - A minor, being incompetent to contract cannot be a shareholder of the company.
    - If by mistake he becomes a member, the company can rescind the transaction and remove his name from register.

- But, a minor may, acting though his lawful guardian become a shareholder by transfer or transmission of fully paid shares to him.

15. Liability for torts:

- A tort is a civil wrong.
- A minor is liable in tort unless the tort in reality is a breach of contract.
- Thus, where a minor borrowed a horse for riding only he was held liable when he lent the horse to one of his friends who jumped and killed the horse.

PERSON OF SOUND MIND (SECTION 12)

- According to section 12 of Indian Contract Act, "a person is said to be of sound mind for the purposes of making a contract if, at the time when he makes it is capable of understanding it and of forming a rational judgement as to its effect upon his interests."
- A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.
- A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.
- A contract by a person who is not of sound mind is void.

CONTRACT BY DISQUALIFIED PERSONS	• Besides minors and persons of unsound mind, there are also other persons who are disqualified from contracting, partially or wholly, so that the contracts by such person are void. • Incompetency to contract may arise from political status, corporate status, legal status, etc. • The following persons fall in this category: Foreign Soverigns and Ambassadors, Alien enemy, Corporations, Convicts, Insolvent etc.
FREE CONSENT	Consent is said to be free when it is not caused by: 1. Coercion 2. Undue Influence 3. Fraud 4. Misrepresentation 5. Mistake When consent to an agreement is caused by coercion, fraud, misrepresentation, or undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. When the consent is vitiated by mistake, the contract becomes void.
COERCION (SECTION 15)	As per Section 15 of the Act, "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." **Following are the essential ingredients of coercion:**

(i) Committing or threatening to commit any act forbidden by the India Penal Code; or

(ii) the unlawful detaining or threatening to detain any property to the prejudice of any person whatever,

(iii) With the intention of causing any person to enter into an agreement.

(iv) It is to be noted that is immaterial whether the India Penal Code is or is not in force at the place where the coercion is employed.

Effects of coercion under section 19 of Indian Contract Act, 1872

(i) Contract induced by coercion is voidable at the option of the party whose consent was so obtained.

(ii) As to the consequences of the rescission of voidable contract, the party rescinding a void contract should, if he has received any benefit, thereunder from the other party to the contract, restore such benefit so far as may be applicable, to the person from whom it was received.

(iii) A person to whom money has been paid or anything delivered under coercion must repay or return it.(Section 71)

UNDUE INFLUENCE (SECTION 16)

According to section 16 of the Indian Contract Act, 1872, "A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and he uses that position to obtain an unfair advantage over the other". A person is deemed to be in position to dominate the will of another:

a) Where he holds a real or apparent authority over the other; or

b) Where he stands in a fiduciary relationship to the other; or

c) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress for example, an old illiterate person.

The essential ingredients of Undue Influence:

1. **Relation between the parties:** A person can be influenced by the other when a near relation between the two exists.

2. **Position to dominate the will:** Relation between the parties exist in such a manner that one of them is in a position to dominate the will of the other. A person is deemed to be in such position in the following circumstances:

a. **Real and apparent authority:** Where a person holds a real authority over the other as in the case of master and servant, doctor and patient and etc.

b. **Fiduciary relationship:** Where relation of trust and confidence exists between the parties to a contract. Such type of relationship exists between father and son, solicitor and client, husband and wife, creditor and debtor, etc.

c. **Mental distress:** An undue influence can be used against a person to get his consent on a contract where the mental capacity of the person is temporaily or permanently affected by the reason of mental or bodily distress, illness or of old age.

d. **Unconscionable bargains:** Where one of the parties to a contract is in a position to dominate the will of the other and the contract is apparently unconscionable i.e., unfair, it is presumed by law that consent must have been obtained by undue influence. Unconscionable bargains are witnessed mostly in money-lending transactions and in gifts.

3. **The object must be to take undue advantage:** Where the person is in a position to influence the will of the other in getting consent, must have the object to take advantage of the other.

4. **Burden of proof:** The burden of proving the absence of the use of the dominant position to obtain the unfair

advantage will lie on the party who is in a position to dominate the will of the other.

Power to set aside contract induced by undue influence-

- When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.
- Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

FRAUD (SECTION 17)

As per Section 17 of the Act, Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with an intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

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

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

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

(4) any other act fitted to deceive;

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

The following are the essential elements of the fraud:

(1) There must be a representation or assertion and it must be false. However, silence may amount to fraud or an active concealment may amount to fraud.

(2) The representation must be related to a fact.

(3) The representation should be made before the conclusion of the contract with the intention to induce the other party to act upon it.

(4) The representation or statement should be made with a knowledge of its falsity or without belief in its truth or recklessly not caring whether it is true or false.

(5) The other party must have been induced to act upon the representation or assertion.

(6) The other party must have relied upon the representation and must have been deceived.

(7) The other party acting on the representation must have consequently suffered a loss.

Effect of Fraud upon validity of a contract: When the consent to an agreement in caused by the fraud, the contract is voidable at option of the party defrauded and he has the following remedies:

(1) He can rescind the contract within a reasonable time.

(2) He can sue for damages.

(3) He can insist on the performance of the contract on the condition that he shall be put in the position in which he would have been had the representation made been true.

Mere silence is not fraud

- A party to the contract is under no obligation to disclose the whole truth to the other party.
- 'Caveat Emptor' i.e. let the purchaser beware is the rule applicable to contracts.
- There is no duty to speak in such cases and silence does not amount to fraud.
- Similarly, there is no duty to disclose facts which are within the knowledge of both the parties.

Silence is fraud:

1. **Duty of person to speak:** Where the circumstances of the case are such that it is the duty of the person observing silence to speak. For example, in contracts of uberrimae fidei (contracts of utmost good faith). Following contracts come within this category:

    a) **Fiduciary Relationship:** Here, the person in whom confidence is reposed is under a duty to act with utmost good faith and make full disclosure of all material facts concerning the agreement, known to him.

    b) **Contracts of Insurance:** In contracts of marine, fire and life insurance, there is an implied condition that full disclosure of material facts shall be made, otherwise the insurer is entitled to avoid the contract.

c) **Contracts of marriage:** Every material fact must be disclosed by the parties to a contract of marriage.

d) **Contracts of family settlement:** These contracts also require full disclosure of material facts within the knowledge of the parties.

e) **Share Allotment contracts:** Persons issuing 'Prospectus' at the time of public issue of shares/ debentures by a joint stock company have to disclose all material facts within their knowledge.

2. **Where the silence itself is equivalent to speech:** For example, A says to B "If you do not deny it, I shall assume that the horse is sound." A says nothing. His silence amounts to speech.

MISREPRESENTATION (SECTION 18)

Misrepresentation means and includes –

1. the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
2. any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice or to the prejudice of any one claiming under him;
3. causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Legal effects where consent to an agreement is caused by misrepresentation: When consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

MISTAKE

Mistake may be defined as innocent or erroneous belief which leads the party to misunderstand the others. Mistake may be either Bilateral or Unilateral.

Bilateral mistake is when both the parties to a contract are under a mistake.

Unilateral mistake is when only one party to the contract is under a mistake.

Effect of mistake on validity of a contract:

- Mistake is some unintentional act, omission or error, arising from unconsciousness, ignorance or forgetfulness, imposition or misplaced confidence. It may be of two kinds-
    1. Mistake of Law
    2. Mistake of Fact
- **Mistake of Law:** A mistake of law does not render a contract void as one cannot take excuse of ignorance of the law of his own country.
- **Mistake of fact:** Where the contracting parties misunderstood each other and are at cross purposes, there is a bilateral or mutual mistake. Where both the

	parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.
LEGALITY OF OBJECT AND CONSIDERATION (SECTION 23)	The consideration or object of an agreement is lawful, unless- 1. It is forbidden by law; or 2. Is of such a nature that, if permitted, it would defeat the provisions of any law; or 3. Is fraudulent; or 4. Involves injury to the person or property of another; or 5. The court regards it as immoral; or 6. Opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. **Under Section 23 of the Indian Contract Act, in each of the following cases the consideration or object of an agreement is said to be unlawful:** (i) When consideration or object is forbidden by law (ii) When consideration or object defeats the provision of law (iii) When it is fraudulent (iv) When consideration defeats any rule for the time being in force in India. (v) When consideration involves injury to the person or property of another: (vi) When consideration is immoral (vii) When consideration is opposed to public policy:

Some of the agreements which are held to be opposed to public policy are-

(1) **Trading with enemy:** Any trade with person owing allegiance to a Government at war with India without the licence of the Government of India is void, as the object is opposed to public policy.

(2) **Stifling Prosecution:** An agreement to stifle prosecution

i.e. "an agreement to present proceedings already instituted from running their normal course using force" tends to be a perversion or an abuse of justice; therefore, such an agreement is void.

(3) **Maintenance and Champerty:**

- **Maintenance** is an agreement in which a person promises to maintain suit in which he has no interest.
- **Champerty** is an agreement in which a person agrees to assist another in litigation in-exchange of a promise to hand over a portion of the proceeds of the action.

(4) **Traffic relating to Public Offices:**

- An agreement to traffic in public office is opposed to public policy, as it interferes with the appointment of a person best qualified for the service of the public.
- Public policy requires that there should be no money consideration for the appointment to an office in which the public is interested.

(5) **Agreements tending to create monopolies:** Agreements having for their object the establishment of monopolies are opposed to public policy and therefore void.

(6) **Marriage brokerage agreements:**

- An agreement to negotiate marriage for reward, which is known as a marriage brokerage contract, is void, as it is opposed to public policy.
- For instance, an agreement to pay money to a person hired to procure a wife is opposed to public policy and therefore void.

(7) **Interference with the course of justice:**

- An agreement whose object is to induce any judicial officer of the State to act partially or corruptly is void, as it is opposed to public policy; so also is an agreement by A to reward B, who is an intended witness in a suit against A in consideration of B's absenting himself from the trial.
- For the same reasons, an agreement which contemplates the use of under-hand means to influence legislation is void.

(8) **Interest against obligation:** The following are examples of agreement that are void as they tend to create an interest against obligation. The object of such agreements is opposed to public policy.

- An agreement by an agent to receive without his principal's consent compensation from another for the performance of his agency is invalid.

- A, who is the manager of a firm, agrees to pass a contract to X if X pays to A Rs. 200,000 privately; the agreement is void.

(9) Consideration Unlawful in Part:

- By virtue of Section 24, 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, the agreement is void."
- The general rule is that where the legal part of a contract can be severed from the illegal part, the bad part may be rejected and the good one can be retained. But where the illegal part cannot be severed, the contract is altogether void.

VOID AGREEMENTS

Expressly declared Void Agreements

1. Agreement in restraint of marriage (Section 26):

- Every agreement in restraint of marriage of any person other than a minor, is void.
- So, if a person, being a major, agrees for good consideration not to marry, the promise is not binding and considered as void agreement.

2. Agreement in restraint of trade (Section 27):

- An agreement by which any person is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

- But this rule is subject to some exceptions, namely, where a person sells the goodwill of a business and agrees with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or his successor in interest carries on a like business therein, such an agreement is valid.

3. **Agreement in restraint of legal proceedings (Section 28):**

- An agreement in restraint of legal proceeding is the one by which any party thereto is restricted absolutely from enforcing his rights under a contract through a Court or which abridges the usual period for starting legal proceedings. A contract of this nature is void.
- However, there are certain exceptions to the above rule:

i. A contract by which the parties agree that any dispute between them in respect of any subject shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable is a valid contract.

ii. Similarly, a contract by which the parties agree to refer to arbitration any question between them which has already arisen or

which may arise in future, is valid; but such a contract must be in writing.

4. **Agreement - the meaning of which is uncertain (Section 29):** An agreement, the meaning of which is not certain, is void, but where the meaning thereof is capable of being made certain, the agreement is valid.

5. **Wagering agreement (Section 30):**

    - An agreement by way of a wager is void.
    - It is an agreement involving payment of a sum of money upon the determination of an uncertain event.
    - The essence of a wager is that each side should stand to win or lose, depending on the way an uncertain event takes place in reference to which the chance is taken and in the occurrence of which neither of the parties has legitimate interest.

Transactions resembling with wagering transaction but arenot void

i. **Chit fund:**

    - Chit fund does not come within the scope of wager (Section 30).
    - In case of a chit fund, a certain number of persons decide to contribute a fixed sum for a specified period and at the end of a month, the amount so contributed is paid to the lucky winner of the lucky draw.

ii. **Commercial transactions or share market transactions:** In these transactions in which delivery of goods or shares is intended to be given or taken, do not amount to wagers. **Games of skill and**

iii. Athletic Competition:

- Crossword puzzles, picture competitions and athletic competitions where prizes are awarded on the basis of skill and intelligence are the games of skill and hence such competition are valid.
- According to the Prize Competition Act, 1955 prize competition in games of skill are not wagers provided the prize money does not exceed Rs. 1,000.

iv. contingent contract and is valid under law and these contracts are different from wagering agreements.

OBLIGATIONS OF PARTIES TO CONTRACTS (SECTION 37)

- A contract being an agreement enforceable by law, creates a legal obligation, which subsists until discharged.
- Thus, it is the primary duty of each party to a contract to either perform or offer to perform his promise.
- **Actual Performance:** Where a party to a contract has done what he had undertaken to do or either of the parties have fulfilled their obligations under the contract within the time and in the manner prescribed.
- **Offer to perform or attempted performance or tender of performance:** It may happen sometimes, when the

performance becomes due, the promisor offers to perform his obligation but the promisee refuses to accept the performance.

BY WHOM A CONTRACT MAY BE PERFORMED

The promise under a contract may be performed, as the circumstances may permit, by the promisor himself, or by his agent or his legal representative.

1. **Promisor himself:**
   - If there is something in the contract to show 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 means contracts which involve the exercise of personal skill or diligence, or which are founded on personal confidence between the parties must be performed by the promisor himself.
2. **Agent:** Where personal consideration is not the foundation of a contract, the promisor or his representative may employ a competent person to perform it.
3. **Legal Representatives:**
   - A contract which involves the use of personal skill or is founded on personal consideration comes to an end on the death of the promisor.
   - As regards any other contract the legal representatives of the deceased promisor are

bound to perform it unless a contrary intention appears from the contract.

- But their liability under a contract is limited to the value of the property they inherit from the deceased.

4. **Third persons (Section 41):**

- When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.
- That is, performance by a stranger, if accepted by the promisee, this results in discharging the promisor, although the latter has neither authorised not ratified the act of the third party.

5. **Joint promisors (Section 42):**

- When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons must jointly fulfill the promise.
- If any of them dies, his legal representatives must, jointly with the surviving promisors, fulfill the promise.
- If all of them die, the legal representatives of all of them must fulfill the promise jointly.

EFFECT OF REFUSAL TO ACCEPT OFFER OF PERFORMANCE (SECTION 38)

Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, then the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract. Every such offer must fulfill certain conditions which are as follows, namely:

i. it must be unconditional;

ii. it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

iii. if the offer is an offer to deliver anything to the promisee, then the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

EFFECT OF A REFUSAL OF PARTY TO PERFORM PROMISE (SECTION 39)

- According to Section 39, when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
- From above it is clear that in the case under consideration, the following two rights accrue to the aggrieved party, namely, (a) to terminate the contract; (b) to indicate by

words or by conduct that he is interested in its continuance.

- In case the promisee decides to continue the contract, he would not be entitled to put an end to the contract on this ground subsequently. In either case, the promisee would be able to claim damages that he suffers as a result on the breach.

LIABILITY OF JOINT PROMISOR & PROMISEE

General Rule

- If two or more persons have made a joint promise, ordinarily all of them during their life-time must jointly fulfill the promise.
- After death of any one of them, his legal representative jointly with the survivor or survivors should do so.
- After the death of the last survivor the legal representatives of all the original co-promisors must fulfil the promise.

If joint promisors do not discharge their obligation on their own volition –

- **Any one of joint promisors may be compelled to perform:** When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.
- **Each promisor may compel contribution –** Each of two or more joint promisors may compel every other joint

promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

- **In other words**, if one of the joint promisors is made to perform the whole contract, he can call for a contribution from others.
- **Sharing of loss by default in contribution –** If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Effect of release of one joint promisor – Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors, neither does it free the joint promisors so released from responsibility to the other joint promisor or promisors.

Rights of Joint Promisees – As per **Section 45 of the Act**, "When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly".

TIME AND PLACE FOR PERFORMANCE OF THE PROMISE

(i) Time for performance of promise, where no application is to be made and no time is specified (Section 46):

- The engagement must be performed within a reasonable time.
- The expression reasonable time is to be interpreted having regard to the facts and circumstances of a particular case.

(ii) Time and place for performance of promise, where time is specified and no application to be made (Section 47): The promisor may perform it at any time during the usual hours of business, on such day and the place at which the promise ought to be performed.

(iii) Application for performance on certain day to be at proper time and place (Section 48):

When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

(iv) Place for the performance of promise, where no application to be made and no place fixed for performance (Section 49):

It is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such a place.

(v) Performance in manner or at time prescribed or sanctioned by promise (Section 50):

The performance of any promise may be made in any such manner, or at any time which the promisee prescribes or sanctions.

PERFORMANCE OF RECIPROCAL PROMISE

(i) Promisor not bound to perform, unless reciprocal promise ready and willing to perform (Section 51):

When a contract consists of reciprocal promises to be simultaneously performed, no promisor need to perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

(ii) Order of performance of reciprocal promises (Section 52):

- When the order of performance of the reciprocal promises is expressly fixed by the contract, they shall be performed in that order; and
- where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

(iii) Liability of party preventing event on which the contract is to take effect (Section 53):

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented ; and he is entitled to

compensation from the other party for any loss he may sustain in consequence of the non- performance of the contract.

(iv) Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises (Section 54):

When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

(v) Effects of Failure to Perform at a Time Fixed in a Contract in which Time is Essential (Section 55):

- When a party to a contract promises to do certain thing at or before the specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.
- **Effect of such failure when time is notessential**

  - If it was not the intention of the parties that time should be of essence of the contract, the

contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

- **Effect of acceptance of performance at time other than agreed upon -** If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he gives notice to the promisor of his intention to do so.

(vi) Agreement to do Impossible Act (Section 56)

- An agreement to do an act impossible in itself is void.
- The impossibility of performance may be of the two types, namely (a) initial impossibility, and (b) subsequent impossibility.
- **Initial Impossibility (Impossibility existing at the time of contract):** When the parties agree upon doing of something which is obviously impossible in itself the agreement would be void. Impossible in itself means impossible in the nature of things. The

fact of impossibility may be and may not be known to the parties.

i. **If known to the parties:** It would be observed that an agreement constituted, quite unknown to the parties, may be impossible of being performed and hence void.

ii. **If unknown to the parties:** Where both the promisor and the promisee are ignorant of the impossibility of performance, the contract is void.

iii. **If known to the promisor only:** Where at the time of entering into a contract, the promisor alone knows about the impossibility of performance, or even if he does not know though he should have known it with reasonable diligence, the promisee is entitled to claim compensation for any loss he suffered on account of non-performance.

- **Subsequent or Supervening impossibility (Becomes impossible after entering into contract):**
    - When performance of promise become impossible or illegal by occurrence of an unexpected event or a change of circumstances beyond the contemplation of parties, the contract becomes void e.g. change in law etc.

- In other words, sometimes, the performance of a contract is quite possible when it is made. But subsequently, some event happens which renders the performance impossible or unlawful.
- Such impossibility is called the subsequent or supervening. It is also called the post- contractual impossibility.
- The effect of such impossibility is that it makes the contract void, and the parties are discharged from further performance of the contract.

(vii) Reciprocal promise to do certain things that are legal, and also some other things that are illegal (Section 57):

Where persons reciprocally promise, first to do certain things which are legal and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a valid contract, but the second is a void agreement.

(viii) 'Alternative promise' one branch being illegal (Section 58):

In the case of the alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

APPROPRIATION OF PAYMENTS

Sometimes, a debtor owes several debts to the same creditor and makes payment, which is not sufficient to discharge all the debts.

i. **Application of payment where debt to be discharged is indicated (Section 59):**

Where a debtor, owing several distinct debts to one person, makes a payment to him either with express intimation or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

ii. **Application of payment where debt to be discharged is not indicated (Section 60):**

Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, where its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

iii. **Application of payment where neither party appropriates (Section 61):**

- Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not

barred by the law in force for the time being as to the limitation of suits.

- If the debts are of equal standing, the payments shall be applied in discharge of each proportionately.

CONTRACTS WHICH NEED NOT BE PERFORMED

1. **Novation:**
   - The term 'novation' means the substitution of existing contract for a new contract.
   - In other words, when the parties to a contract agree to substitute the existing contract by a new contract, it is known as novation.
   - The novation must be with the mutual consent of all the parties.
2. **Rescission:**
   - The term 'rescission' means the cancellation of the contract.
   - A contract may be rescinded by mutual agreement between the parties at any time before it is discharged by performance or in some other way.
3. **Alteration:**
   - The term 'alteration' means change in one or more terms of the contract.
   - The alteration is valid when it is made with the consent of all the parties.

- The valid alteration discharges the original contract, and the parties become bound by the new contract (i.e., contract with altered terms).
- It is important to note here that in case of a written contract, the material alteration by one party without the consent of the other, also discharges the contract.

4. **Remission:**

- The term 'remission' means the acceptance of lesser fulfillment of the terms of the promise, e.g., acceptance of a less sum of money where more is due.
- In other words, the remission is the lesser fulfillment of the promise made. The remission is the valid discharge of the whole of the liability under the contract.

DISCHARGE OF A CONTRACT

A contract may be discharged in any one of the following ways:

(i) Discharge by performance: It takes place when the parties to the contract fulfil their obligations arising under the contract within the time and in the manner prescribed. Discharge by performance may be

- Actual performance; or
- Attempted performance.

(ii) Discharge by mutual agreement:

- If the parties to a contract agree to substitute a new contract for it, or to rescind or remit or alter it, the original contract need not be performed.

(iii) Discharge by impossibility of performance:

- The impossibility may exist from the very start.
- In that case, it would be impossibility ab initio.
- Alternatively, it may supervene. Supervening impossibility may take place owing to:
    i. an unforeseen change in law;
    ii. the destruction of the subject-matter essential to that performance;
    iii. the non-existence or non-occurrence of particular state of things, which was naturally contemplated for performing the contract, as a result of some personal incapacity like dangerous malady;
    iv. the declaration of a war

(iv) Discharge by lapse of time:

- A contract should be performed within a specified period as prescribed by the Limitation Act, 1963.
- If it is not performed and if no action is taken by the promisee within the specified period of limitation, he is deprived of remedy at law.

(v) Discharge by operation of law: A contract may be discharged by operation of law which includes by death of the promisor, by insolvency etc.

(vi) Discharge by breach of contract:

- Breach of contract may be actual breach of contract or anticipatory breach of contract.
- If one party defaults in performing his part of the contract on the due date, he is said to have committed breach thereof.
- When on the other hand, a person repudiates a contract before the stipulated time for its performance has arrived, he is deemed to have committed anticipatory breach.
- If one of the parties to a contract breaks the promise the party injured thereby, has not only a right of action for damages but he is also discharged from performing his part of the contract.

(vii) Promisee may waive or remit performance of promise:

- Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit.
- In other words, a contract may be discharged by remission.

(viii) Effects of neglect of promisee to afford promisor reasonable facilities for performance: If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the

promisor is excused by such neglect or refusal as to any non-performance caused thereby.

(ix) Merger of rights:

- Sometimes, the inferior rights and the superior rights coincide and meet in one and the same person.
- In such cases, the inferior rights merge into the superior rights.
- On merger, the inferior rights vanish and are not required to be enforced.

ANTICIPATORY BREACH OF CONTRACT (SECTION 39)

- An anticipatory breach of contract is a breach of contract occurring before the time fixed for performance has arrived.
- When the promisor refuses altogether to perform his promise and signifies his unwillingness even before the time for performance has arrived, it is called Anticipatory Breach.
- Anticipatory breach of a contract may take either of the following two ways:
  a. Expressly by words spoken or written, and
  b. Impliedly by the conduct of one of the parties.

Effect of anticipatory breach:

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

	2) May elect not to rescind but to treat the contract as still operative, and wait for the time of performance and then hold the other party responsible for the consequences of non-performance.
ACTUAL BREACH OF CONTRACT	• In contrast to anticipatory breach, it is a case of refusal to perform the promise on the scheduled date. • The parties to a lawful contract are bound to perform their respective promises. But when one of the parties breaks the contract by refusing to perform his promise, he is said to have committed a breach. • In that case, the other party to the contract obtains a right of action against the one who has refused to perform his promise. • **Actual breach of contract may be committed-** 1) At the time when the performance of the contract is due. 2) During the performance of the contract by express or implied act.
REMEDIES FOR BREACH OF CONTRACT	• Suit for Damages • Rescission of Contract • Suit for specific performance • Suit for Injunction

- Suit upon quantum meruit

SUIT FOR DAMAGES (SECTION 73)

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

Remedy by way of Damages or Kind of Damages

(i) **Ordinary damages:** When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage cause to him thereby, which naturally arose in the usual course of things from such breach, or which the parties know, when they made the contract, to be likely to result from the breach of it:

(ii) **Special damages:** Where a party to a contract receives a notice of special circumstances affecting the contract, he

will be liable not only for damages arising naturally and directly from the breach but also for special damages.

(iii) **Vindictive or Exemplary damages:** These damages may be awarded only in two cases –

a) for breach of promise to marry because it causes injury to his or her feelings; and

b) for wrongful dishonour by a banker of his customer's cheque because in this case the injury due to wrongful dishonour to the drawer of cheque is so heavy that it causes loss of credit and reputation to him.

(iv) **Nominal damages:** Nominal damages are awarded where the plaintiff has proved that there has been a breach of contract but he has not in fact suffered any real damage.

(v) **Damages for deterioration caused by delay:** In the case of deterioration caused to goods by delay, damages can be recovered from carrier even without notice.

(vi) **Pre-fixed damages:** Sometimes, parties to a contract stipulate at the time of its formation that on a breach of contract by any of them, a certain amount will be payable as damage.

RESCISSION OF CONTRACT

- When a contract is broken by one party, the other party may treat the contract as rescinded.

	• In such a case he is absolved of all his obligations under the contract and is entitled to compensation for any damages that he might have suffered.
QUANTUM MERUIT	• Where one person has rendered service to another in circumstances which indicate an understanding between them that it is to be paid for although no particular remuneration has been fixed, the law will infer a promise to pay. Quantum Meruit i.e. as much as the party doing the service has deserved. • It covers a case where the party injured by the breach had at time of breach done part but not all of the work which he is bound to do under the contract and seeks to be compensated for the value of the work done. • For the application of this doctrine, two conditions must be fulfilled: 1) It is only available if the original contract has been discharged. 2) The claim must be brought by a party not in default. • The claim for quantum meruit arises in the following cases: 1) When an agreement is discovered to be void or when a contract becomes void. 2) When something is done without any intention to do so gratuitously.

	3) Where there is an express or implied contract to render services but there is no agreement as to remuneration. 4) When one party abandons or refuses to perform the contract. 5) Where a contract is divisible and the party not in default has enjoyed the benefit of part performance. 6) When an indivisible contract for a lump sum is completely performed but badly the person who has performed the contract can claim the lump sum, but the other party can make a deduction for bad work.
SUIT FOR SPECIFIC PERFORMANCE	Where damages are not an adequate remedy in the case of breach of contract, the court may in its discretion on a suit for specific performance direct party in breach, to carry out his promise according to the terms of the contract.
SUIT FOR INJUNCTION	Where a party to a contract is negating the terms of a contract, the court may by issuing an 'injunction orders', restrain him from doing what he promised not to do.

CONTINGENT CONTRACTS (SECTION 31)

- A contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
- Contracts of Insurance, indemnity and guarantee fall under this category.
- **Collateral Event -** an event which is neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise.

Essentials of a contingent contract

a) **The performance of a contingent contract would depend upon the happening or non-happening of some event or condition.** The condition may be precedent or subsequent.

b) **The event referred to is collateral to the contract.** The event is not part of the contract. The event should be neither performance promised nor a consideration for a promise.

c) **The contingent event should not be a mere 'will' of the promisor.**

The event should be contingent in addition to being the will of the promisor.

d) **The event must be uncertain.** Where the event is certain or bound to happen, the contract is due to be performed, then it is a not contingent contract.

RULES RELATING TO ENFORCEMENT OF

a) Enforcement of contracts contingent on an event happening (Section 32):

CONTINGENT CONTRACT

- Where a contract identifies happening of a future contingent event, the contract cannot be enforced until and unless the event 'happens'.
- If the happening of the event becomes impossible, then the contingent contract is void.

b) Enforcement of contracts contingent on an event not happening (Section 33):

Where a contingent contract is made contingent on a non-happening of an event, it can be enforced only when its happening becomes impossible.

c) A contract would cease to be enforceable if it is contingent upon the conduct of a living person when that living person does something to make the 'event' or 'conduct' as impossible of happening. (Section 34)

d) Contingent on happening of specified event within the fixed time (Section 35):

Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, becomes void if, at the expiration of time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

e) Contingent on specified event not happening within fixed time (Section 35):

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired, and such event has not happened or before the

time fixed has expired, if it becomes certain that such event will not happen.

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

QUASI CONTRACTS

- Quasi Contracts arise where obligations are created without a contract.
- Sometimes the law implies a promise imposing obligation on one party and conferring right in favour of the other even when there is no offer, no acceptance, no genuine consent, lawful consideration, etc. and in fact neither agreement nor promise.
- Such cases are not contracts in the strict sense, but the Court recognises them as relations resembling those of contracts and enforces them as if they were contracts.
- Quasi contracts are based on principles of equity, justice and good conscience.
- A quasi or constructive contract rests upon the maxims, “No man must grow rich out of another persons loss”.

Cases Deemed as Quasi Contracts

a) Claim for necessaries supplied to persons incapable of contracting (Section 68):

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

b) Payment by an interested person (Section 69):

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

c) Obligation of person enjoying benefits of non-gratuitous act (Section 70):

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

d) Responsibility of finder of goods (Section 71):

A person who finds goods belonging to another and takes them into his custody is subject to same responsibility as if he were a bailee.

e) **Money paid by mistake or under coercion (Section 72):** A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it.

THE SALE OF GOODS ACT, 1930

INTRODUCTION	• Sale of goods is one of the specific forms of contracts recognized and regulated by law in India. • Sale of Goods Act, 1930 is the Act to define and amend the law relating to the sale of goods. • It extends to the whole of India except the State of Jammu and Kashmir.
BUYER AND SELLER	• '**Buyer**' means a person who buys or agrees to buy goods [Section 2(1)]. • '**Seller**' means a person who sells or agrees to sell goods [Section 2(13)]. • The two terms, 'buyer' and 'seller' are complementary and represent the two parties to a contract of sale of goods. • Not only the person who buys but also the one who agrees to buy is a buyer. • Similarly, a 'seller' means not only a person who sells but also a person who agrees to sell.
GOODS [SECTION 2(7)]	• "Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming

part of the land, which are agreed to be severed before sale or under the contract of sale.

- **'Actionable claims**' are claims, which can be enforced only by an action or suit, e.g., debt. A debt is not a movable property or goods.
- **Money** here means legal tender of money, i.e. the recognised circulation in the country; but not old rare coins.
- **Things attached to the earth** are not movables, but trees, growing crops which can be easily severed from the earth before sale. Fruits, vegetables and flowers which can be separated from the trees, are included in 'goods'.

CLASSIFICATION OF GOODS

1. Existing Goods (Section 6)

- Existing goods are such goods as are in existence at the time of the contract of sale, i.e., those owned or possessed by the seller at the time of contract of sale.
- The existing goods may be of following kinds:

a) **Specific Goods:** Specific goods mean goods identified and agreed upon at the time a contract of sale is made.

b) **Ascertained Goods:** Ascertained goods are those goods which are identified in accordance with the agreement after the contract of sale is made. When from a lot or out of large quantity of unascertained goods, the number or quantity

contracted for is identified, such identified goods are called ascertained goods.

c) **Unascertained Goods:** Unascertained goods are the goods which are not specifically identified or ascertained at the time of making of the contract. They are indicated or defined only by description or sample.

2. **Future Goods [Section 2 (6)]:** Future goods means goods to be manufactured or produced or acquired by the seller after making the contract of sale.

3. **Contingent Goods [Section 6(2)]:** The acquisition of which by the seller depends upon an uncertain contingency (uncertain event) are called 'contingent goods'.

DELIVERY

SECTION 2(2)]

- Delivery means voluntary transfer of possession from one person to another.
- As a general rule, delivery of goods may be made by doing anything, which has the effect of putting the goods in the possession of the buyer, or any person authorized to hold them on his behalf.

FORMS OF DELIVERY –

(i) **Actual delivery:** When the goods are physically delivered to the buyer.

(ii) **Constructive delivery:** When it is effected without any change in the custody or actual possession of the thing as in the case of delivery by attornment (acknowledgement) e.g., where a warehouseman holding

the goods of A agrees to hold them on behalf of B, at A's request.

(iii) Symbolic delivery: When there is a delivery of a thing in token of a transfer of something else, i.e., delivery of goods in the course of transit may be made by handing over documents of title to goods, like bill of lading or railway receipt or delivery orders or the key of a warehouse containing the goods is handed over to buyer.

DOCUMENT OF TITLE TO GOODS

- Document of title to goods is a document which is used as proof of the possession or control of goods.
- As per Section 2 (4) of the Act, "**Document of title to goods**" includes bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, multimodal transport document, 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 or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.
- **Documents Showing Title to Goods** is a document which shows the ownership of goods.
- A share certificate is a 'document' showing title but not a document of title. It merely shows that the person named in the share certificate is entitled to the share

	represented by it, but it does not allow that person to transfer the share mentioned therein by mere endorsement on the back of the certificate and the delivery of the certificate.
MERCANTILE AGENT [SECTION 2(9)]	• It means an agent having in the customary course of business as such agent authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of the goods. • It means an agent having in the customary course of business as such agent authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of the goods.
PROPERTY [Section 2(11)]	• The property in the goods means the general property i.e., all ownership right of the goods. • In every contract of sale, the ownership of goods must be transferred by the seller to the buyer, or there should be an agreement by the seller to transfer the ownership to the buyer.
INSOLVENT [SECTION 2(8)]	A person is said to be insolvent when he ceases to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.

PRICE [SECTION 2(10)]	• Price means the money consideration for a sale of goods. • No sale can take place without a price. • Therefore, a) Exchange of goods for goods will not be considered as sale b) Gift of goods will not be considered as sale c) Exchange of goods for goods along with price will be considered as sale
QUALITY OF GOODS [Section 2(12)]	Quality of goods includes their state or condition.
SALE AND AGREEMENT TO SELL	• A contract for the sale of goods may be either sale or agreement to sell. • **Sale:** a) In Sale, the property in goods is transferred from seller to the buyer immediately. b) The term sale is defined in the Section 4(3) of the Sale of Goods Act, 1930 as – "where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale."

- **Agreement to Sell:**

  a) In an agreement to sell, the ownership of the goods is not transferred immediately.

  b) It is intending to transfer at a future date upon the completion of certain conditions thereon.

  c) The term is defined in Section 4(3) of the Sale of Goods Act, 1930, as – "where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell."

The differences between the two are as follows:

Basis	Sale	Agreement to sell
Transfer of property	The property in the goods passes to the buyer immediately.	Property in the goods passes to the buyer on future date or on fulfilment of some condition.
Nature of contract	It is an executed contract. i.e. contract for which consideration has been paid.	It is an executory contract. i.e. contract for which consideration is to be paid at a future date.
Remedies for breach	The seller can sue the buyer for the price of the goods because of the passing of the	The aggrieved party can sue for damages only and not for the price, unless the price

	property therein to the buyer.	was payable at a stated date.
Liability of parties	A subsequent loss or destruction of the goods is the liability of the buyer.	Such loss or destruction is the liability of the seller.
Burden of risk	Risk of loss is that of buyer since risk follows ownership.	Risk of loss is that of seller.
Right of resale	The seller cannot resell the goods.	The seller may sell the goods since ownership is with the seller.

ESSENTIAL ELEMENTS OF A VALID CONTRACT OF SALE

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

i. There must be at least two parties
ii. The subject matter of the contract must necessarily be goods
iii. A price in money (not in kind) should be paid or promised.
iv. A transfer of property in goods from seller to the buyer must take place.
v. A contract of sale must be absolute or conditional [section 4(2)].
vi. All other essential elements of a valid contract must be present in the contract of sale.

HIRE PURCHASE

- Hire purchase agreements are governed by the Hire- purchase Act, 1972.
- Term "hire-purchase agreement" means an agreement under which goods are let on hire and under which the hirer has an option to purchase them in accordance with the terms of the agreement and includes an agreement under which—
    a) Possession of goods is delivered by the owner thereof to a person on condition that such person pays the agreed amount in periodical instalments, and
    b) The property in the goods is to pass to such person on the payment of the last of such instalments, and
    c) Such person has a right to terminate the agreement at any time before the property so passes;

Distinction between the 'sale' and 'hire-purchase' are as follows:

Basis	Sale	Hire- Purchase
Time of passing property	Property in the goods is transferred to the buyer immediately at the time of contract.	The property in goods passes to the hirer upon payment of the last installment.
Position of the party	The position of the buyer is that of the owner of the goods.	The position of the hirer is that of a bailee

		till he pays the last installment.
Termination of contract	The buyer cannot terminate the contract and is bound to pay the price of the goods.	The hirer may, if he so likes, terminate the contract by returning the goods to its owner without any liability to pay the remaining installments.
Burden of Risk of insolvency of the buyer	The seller takes the risk of any loss resulting from the insolvency of the buyer.	The owner takes no such risk, for if the hirer fails to pay an installment, the owner has right to take back the goods.
Transfer of title	The buyer can pass a good title to a bona fide purchaser from him.	The hirer cannot pass any title even to a bona fide purchaser.
Resale	The buyer in sale can resell the goods	The hire purchaser cannot resell unless he has paid all the installments.

BAILMENT

A 'bailment' is the delivery of goods for some specific purpose under a contract on the condition that the same goods are to be returned to the bailor or are to be disposed off according to the directions of the bailor.

DIFFERENCE BETWEEN BAILMENT AND SALE

Basis	Sale	Bailment
Transfer of property	The property in goods is transferred from the seller to the buyer.	There is only transfer of possession of goods from the bailor to the bailee for any of the reasons like safe custody, carriage etc.
Return of goods	The return of goods in contract of sale is not possible.	The bailee must return the goods to the bailor on the accomplishment of the purpose for which the bailment was made.
Consideration	The consideration is the price in terms of money.	The consideration may be gratuitous or non-gratuitous.

MODES OF FORMATION OF A CONTRACT OF SALE (SECTION 5)

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

- Contract of sale is made by an offer to buy or sell goods for a price and acceptance of such offer.
- There may be immediate delivery of the goods; or

- There may be immediate payment of price, but it may be agreed that the delivery is to be made at some future date; or
- There may be immediate delivery of the goods and an immediate payment of price; or
- It may be agreed that the delivery or payment or both are to be made in installments; or
- It may be agreed that the delivery or payment or both are to be made at some future date.

Form of Contract of Sale-

No particular form is necessary for the making of a contract of sale. A contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

However, if any particular mode is prescribed by any law, then the contract of sale must be made in that particular mode

EFFECT OF DESTRUCTION OF GOODS

In case of Specific Goods

Goods perishing before making of contract (Section 7): A contract for the sale of specific goods is void if at the time when the contract was made; the goods without the knowledge of the seller, perished or become so damaged as no longer to answer to their description in the contract, then the contract is void ab initio. This section is based on

the rule that where both the parties to a contract are

under a mistake as to a matter of fact essential to a contract, the contract is void.

Goods perishing before sale but after agreement to sell (Section 8): An agreement to sell specific goods becomes void if subsequently the goods, without any fault on the part of the seller or buyer, perish or become so damaged as no longer to answer to their description in agreement before the risk passes to the buyer. This rule is also based on the ground of impossibility of performance as stated above.

In case of Unascertained Goods: If the agreement is to sell a certain quantity of unascertained goods, the perishing of even the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver the goods.

ASCERTAINMENT OF PRICE

'Price' means the monetary consideration for sale of goods [Section 2 (10)].

By virtue of Section 9, the price in the contract of sale may be fixed in any of the following modes -

1. **The fixation of price by the contract of sale –**
   - The price may be expressly fixed the contract of sale.
   - The parties may fix any price they like.
2. **The fixation of price in a manner provided in the contract of sale –**
   - The contract of sale may provide for some manner in which 'price is to, be fixed.

- In such cases, the price may be fixed in a manner provided in the contract.

3. **The fixation of price by course of dealings –**
    - Sometimes, the customs or usage of trade provides certain principles for the determination of the price.
    - In such cases, the price may be determined from the course of dealings between the parties.
4. **The fixation of a reasonable price**
    - Sometimes, none of the above principles is applicable, in such cases, the buyer shall pay to the seller a reasonable price.
    - The term 'reasonable' price is a question of fact which depends on the circumstances of each particular case.
5. **The fixation of price by third party**
    - The parties may agree to sell and buy goods on the terms that the price shall be fixed by the valuation of a third party.
    - However, if such third party fails to make the valuation, the contract becomes void. But if the buyer has received the goods and has appropriated them, he becomes bound to pay reasonable price to the seller.
    - Sometime, the third party is influenced or prevented by the buyer or the seller from fixing the price. In such cases, the innocent party may recover damages from the defaulting party.

CONDITION AND WARRANTY (SECTION 12)

- A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.
- 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.
- A **warranty** is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

DIFFERENCE BETWEEN CONDITIONS AND WARRANTIES:

Point of Condition Warranty differences		
Meaning	A condition is essential to the main purpose of the contract.	It is only collateral to the main purpose of the contract.
Right in case of breach	The aggrieved party can repudiate the contract or claim damages or both in the case of breach of condition.	The aggrieved party can claim only damages in case of breach of warranty.
Conversion of stipulations	A breach of condition may be treated as a breach of warranty.	A breach of warranty cannot be treated as a breach of condition.

WHEN CONDITION TO BE TREATED AS WARRANTY (SECTION 13)

- Section 13 of the Act specifies cases where a breach of condition be treated as a breach of warranty. As a result of which the buyer loses his right to rescind the contract and can claim for damages only.
- In the following cases, a contract is not avoided even on account of a breach of a condition:

1. **Voluntary Waiver:**

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

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

2. **Compulsory Waiver:**

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

   Where the fulfillment of any condition or warranty is excused by law by reason of impossibility or otherwise.

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

- 'Conditions' and 'Warranties' may be either express or implied. They are "express" when the terms of the contract expressly state them. They are implied when, not being expressly provided for.
- **Express conditions and warranties** are those, which are agreed upon between the parties at the time of contract and are expressly provided in the contract.
- The **implied conditions and warranties**, on the other hand, are those, which are presumed by law to be present in the contract. It should be noted that an implied condition may be negated or waived by an express agreement.

IMPLIED CONDITIONS AS PER THE ACT

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

1. **Condition as to title [Section 14(a)] –**
   - The condition implied is that the seller has the right to sell the goods at the time when the property is to pass.
   - If the seller's title turns out to be defective, the buyer must return the goods to the true owner and recover the price from the seller.

2. **Sale by description [Section 15] –**

- Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description.
- This rule is based on the principle that "if you contract to sell peas, you cannot compel the buyer to take beans."
- The buyer is not bound to accept and pay for the goods which are not in accordance with the description of goods.

3. **Sale by sample [Section 17] –**

In a contract of sale by sample, there is an implied condition that

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

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

(c) the goods shall be free from any defect rendering them un-merchantable, which would not be apparent on reasonable examination of the sample.

4. **Sale by sample as well as by description [Section 15] -**

- Where the goods are sold by sample as well as by description the implied condition is that the bulk of the goods supplied shall correspond both with the sample and the description.
- In case the goods correspond with the sample but do not tally with description or vice versa or both, the buyer can repudiate the contract.

5. **Condition as to quality or fitness [Section 16(1)] -**

- The condition as to the reasonable fitness of goods for a particular purpose may be implied if the buyer had made known to the seller the purpose of his purchase and relied upon the skill and judgment of the seller to select the best goods and the seller has ordinarily been dealing in those goods.
- As a general rule, it is the duty of the buyer to examine the goods thoroughly before he buys them in order to satisfy himself that the goods will be suitable for his purpose for which he is buying them. This is known as rule of caveat emptor which means "Let the buyer beware".

6. **Condition as to Merchantability [Section 16(2)] -**

- Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.
- Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

7. **Condition as to wholesomeness -**

- In the case of eatables and provisions, in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be wholesome.

IMPLIED WARRANTIES AS PER THE ACT

Following warranties are implied in a contract of sale of goods unless the circumstances of the contract show a different intention.

1. **Warranty as to undisturbed possession [Section 14(b)]**

   -

   - An implied warranty that the buyer shall have and enjoy quiet possession of the goods.
   - That is to say, if the buyer having got possession of the goods, is later on disturbed in his possession, he is entitled to sue the seller for the breach of the warranty.

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

3. **Warranty as to quality or fitness by usage of trade Section 16(3)] -** An implied warranty as to quality or fitness for a particular purpose may be annexed or attached by the usage of trade.

4. **Disclosure of dangerous nature of goods -**

   - Where the goods are dangerous in nature and the buyer is ignorant of the danger, the seller must

     warn the buyer of the probable danger.

- If there is a breach of warranty, the seller may be liable in damages.

DOCTRINE OF CAVEAT EMPTOR

- In case of sale of goods, the doctrine 'Caveat Emptor' means 'let the buyer beware'.
- It is the duty of the buyer to satisfy himself before buying the goods that the goods will serve the purpose for which they are being bought.
- If the goods turn out to be defective or do not serve his purpose or if he depends on his own skill or judgment, the buyer cannot hold the seller responsible.
- As per Section 16 of the Act, "subject to the provisions of this Act or of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale".

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

1. Fitness as to quality oruse:

Where the buyer makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment and the goods are of a description which is in the course of seller's business to supply, it is the duty of the seller to supply such goods as are reasonably fit for that purpose.

2. **Goods sold by description:**

   Where the goods are sold by description there is an implied condition that the goods shall correspond with the description. If it is not so then seller is responsible.

3. **Goods of Merchantable Quality:**

   Where the goods are bought by description from a seller who deals in goods of that description there is an implied condition that the goods shall be of merchantable quality.

4. **Sale by sample:**

   Where the goods are bought by sample, this rule of Caveat Emptor does not apply if the bulk does not correspond with the sample.

5. **Goods by sample as well as description:**

   Where the goods are bought by sample as well as description, the rule of Caveat Emptor is not applicable in case the goods do not correspond with both the sample and description or either of the condition.

6. **Trade Usage:**

   An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade and if the seller deviates from that, this rule of Caveat Emptor is not applicable.

7. **Seller actively conceals a defect or is guilty of fraud:** Where the seller sells the goods by making some misrepresentation or fraud and the buyer relies on it or when the seller actively conceals some defect in the goods so that the same could not be discovered by the buyer on a reasonable examination, then the rule of Caveat Emptor

	will not apply. In such a case the buyer has a right to avoid the contract and claim damages.
TRANSFER OR PASSING OF PROPERTY	• The term 'property in the goods' may be defined as the legal ownership of the goods. • Transfer of Ownership means transfer of Risk, Rights and Returns pertaining to the goods. • The term 'property in the goods' must be distinguished from the term 'possession of the goods'. The term 'property in the goods' means the ownership' of the goods, whereas the term 'possession of goods' simply means the custody or physical control over the goods. • If the property has passed to the buyer, the risk in the goods sold is that of buyer and not of seller, though the goods may still be in the seller's possession.
PASSING OF PROPERTY IN CASE OF SPECIFIC OR ASCERTAINED GOODS (SECTION 19)	• Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. • For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. • When intention of parties is not clear from the contract, regard shall be given to the following:

1. **Specific goods in a deliverable state (Section 20):** Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.
2. **Specific goods to be put into a deliverable state (Section 21):**

   Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.
3. **Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price (Section 22):**

   Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

PASSING OF PROPERTY IN CASE OF UNASCERTAINED GOODS

- Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.
- The rules in respect of passing of property of unascertained goods are as follows:

1. **Sale of unascertained goods by description [Section 23(1)]:**
   - Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.
   - Such assent may be express or implied, and may be given either before or after the appropriation is made.
2. **Delivery to the carrier [Section 23(2)]:**

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

PASSING OF PROPERTY IN CASE OF GOODS SENT ON APPROVAL OR "ON SALE OR RETURN" (SECTION 24)	When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time; or (c) he does something to the good which is equivalent to accepting the goods e.g. he pledges or sells the goods.
TRANSFER OF PROPERTY IN CASE OF RESERVATION OF RIGHT TO DISPOSAL (SECTION 25)	• Where there is contract of sale of specific goods or where the goods have been subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, as the case may be, reserve the right to dispose of the goods, until certain conditions have been fulfilled. • In such a case in spite of the fact that the goods have already been delivered to the buyer or to a carrier or other bailee for the purpose of transmitting the same to the buyer, the property therein will not pass to the buyer till

the condition imposed, if any, by the seller has been fulfilled.

- In the following circumstances, seller is presumed to have reserved the right of disposal:

    1. If the goods are shipped or delivered to a railway administration for carriage and by the bill of lading or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, then the seller will be prima facie deemed to have reserved to the right of disposal.

    2. Where the seller draws a bill on the buyer for the price and sends to him the bill of exchange together with the bill of lading or (as the case may be) the railway receipt to secure acceptance or payment thereof, the buyer must return the bill of lading, if he does not accept or pay the bill.

RISK PRIMA FACIE PASSES WITH PROPERTY (SECTIONS 26)

- The general rule is, "unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not".
- However, where delivery of the goods has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

TRANSFER OF TITLE (SECTIONS 27 – 30)

- In general, the seller sells only such goods of which he is the absolute owner.
- But sometimes a person may sell goods of which he is not the owner, then the question arises as to what is the position of the buyer who has bought the goods by paying price.
- The general rule regarding the transfer of title is that the seller cannot transfer to the buyer of goods a better title than he himself has.
- If the seller is not the owner of goods, then the buyer also will not become the owner i.e. the title of the buyer shall be the same as that of the seller.
- This rule is expressed in the Latin maxim "Nemo dat quod non habet" which means that no one can give what he has not got.

EXCEPTIONS TO THE ABOVE RULE

1. **Sale by a Mercantile Agent:**

   A sale made by a mercantile agent of the goods for document of title to goods would pass a good title to the buyer in the following circumstances; namely;

   (i) If he was in possession of the goods or documents with the consent of the owner;

   (ii) If the sale was made by him when acting in the ordinary course of business as a mercantile agent;

   and

(iii) If the buyer had acted in good faith and has at the time of the contract of sale, no notice of the fact that the seller had no authority to sell.

2. **Sale by one of the joint owners:**

If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

3. **Sale by a person in possession under voidable contract:** A buyer would acquire a good title to the goods sold to him by a seller who had obtained possession of the goods under a contract voidable on the ground of coercion, fraud, misrepresentation or undue influence provided that the contract had not been rescinded until the time of the sale.

4. **Sale by one who has already sold the goods but continues in possession thereof:**

(i) If a person has sold goods but continues to be in possession of them or of the documents of title to them, he may sell them to a third person, and if such person obtains the delivery thereof in good faith and without notice of the previous sale, he would have good title to them, although the property in the goods had passed to the first buyer earlier.

(ii) A pledge or other disposition of the goods or documents of title by the seller in possession are equally valid.

5. **Sale by buyer obtaining possession before the property in the goods has vested in him:**

   Where a buyer with the consent of the seller obtains possession of the goods before the property in them has passed to him, he may sell, pledge or otherwise dispose of the goods to a third person, and if such person obtains delivery of the goods in good faith and without notice of the lien or other right of the original seller in respect of the goods, he would get a good title to them.

6. **Effect of Estoppel:**

   - Where the owner is estopped by the conduct from denying the seller's authority to sell, the transferee will get a good title as against the true owner.
   - But before a good title by estoppel can be made, it must be shown that the true owner had actively suffered or held out the other person in question as the true owner or as a person authorized to sell the goods.

7. **Sale by an unpaid seller:**

   Where an unpaid seller who had exercised his right of lien or stoppage in transit resells the goods, the buyer acquires a good title to the goods as against the original buyer.

8. **Sale under the provisions of other Acts:**

   (i) Sale by an Official Receiver or Liquidator of the Company will give the purchaser a valid title.

   (ii) Purchase of goods from a finder of goods will get a valid title under circumstances.

(iii) A sale by pawnee can convey a good title to the buyer.

PERFORMANCE OF THE CONTRACT OF SALE

- It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.
- Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

RULES REGARDING DELIVERY OF GOODS

The Sale of good Act, 1930 prescribes the following rules of delivery of goods:

(i) Delivery (Section 33):

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

(ii) Effect of part delivery (Section 34):

A delivery of part of goods, in progress of the delivery of the whole has the same effect, for the purpose of passing the property in such goods, as a delivery of the

whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

(iii) Buyer to apply for delivery (Section 35):

Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

(iv) Place of delivery [Section 36(1)]:

- Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties.
- Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell or if not hen in existence, at the place at which they are manufactured or produced.

(v) Time of delivery [Section 36(2)]:

Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(vi) **Goods in possession of a third party [Section36(3)]:** Where the goods at the time of sale are in possession of a third person, there is no delivery unless and until

such third person acknowledges to the buyer that he holds the goods on his behalf.

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

(viii) Expenses for delivery [Section 36(5)]:

The expenses of and incidental to putting the goods into a deliverable state must be borne by the seller in the absence of a contract to the contrary.

(ix) Delivery of wrong quantity [Section 37]:

- Where the seller delivers to the buyer a quality of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.
- Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.
- Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject, or may reject the whole.

(x) Instalment deliveries (Section 38):

Unless otherwise agreed, the buyer is not bound to accept delivery in instalments. The rights and liabilities in cases of delivery by instalments and payments thereon may be determined by the parties of contract.

(xi) Delivery to carrier [Section 39(1)]:

Subject to the terms of contract, the delivery of the goods to the carrier for transmission to the buyer, is prima facie deemed to be delivery to the buyer.

(xii) Deterioration during transit (Section 40):

Where goods are delivered at a distant place, the liability for deterioration necessarily incidental to the course of transit will fall on the buyer, though the seller agrees to deliver at his own risk.

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

RULE RELATED TO ACCEPTANCE OF DELIVERY OF GOODS (SECTION 42)

Acceptance is deemed to take place when the buyer-

a) intimates to the seller that he had accepted the goods; or

b) does any act to the goods, which is inconsistent with the ownership of the seller; or

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

BUYER NOT BOUND TO RETURN REJECTED GOODS (SECTION 43)

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

LIABILITY OF BUYER FOR NEGLECTING OR REFUSING DELIVERY OF GOODS (SECTION 44)

- When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods.
- Provided further that nothing shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

UNPAID SELLER	A seller is called an 'unpaid seller' when – • either he has not been paid the whole price or • the buyer has failed to meet at maturity the bill of exchange or any other negotiable instrument which was accepted by the seller as conditional payment.
RIGHTS OF AN UNPAID SELLER (SECTION 46)	Rights of an unpaid seller expressly given under the Act- a) Rights against the goods: a. Rights of lien b. Right of stoppage in transit c. Right of re-sale b) Rights against the buyer a. Suit for price b. Suit for damages for non-acceptance c. Repudiation of contract before due date d. Suit for interest
RIGHTS OF LIEN (SECTION 47)	• It is the right to retain the possession of the goods and refusal to deliver them to the buyer until the price due in respect of them is paid or tendered. • The unpaid seller's lien is a possessory lien i.e. the lien can be exercised as long as the seller remains in possession of the goods.

- **This right can be exercised by him in the following cases only:**
  - where goods have been sold without any stipulation of credit; (i.e., on cash sale)
  - where goods have been sold on credit but the term of credit has expired; or
  - where the buyer becomes insolvent.
- **Termination of lien**
  - When seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.
  - Where the buyer or his agent lawfully obtains possession of the goods.
  - Where seller has waived the right of lien.
  - By Estoppel i.e., where the seller so conducts himself that he leads third parties to believe that the lien does not exist.

RIGHT OF STOPPAGE IN TRANSIT (SECTION 50)

- The right of stoppage in transit means the right of stopping the goods while they are in transit, to regain the possession and to retain them till the full price is paid.
- When the unpaid seller has parted with the goods to a carrier and the buyer has become insolvent, he can exercise this right of asking the carrier to return the goods back, or not to deliver the goods to the buyer.

- This right is the extension of the right of lien because it entitles the seller to regain possession even when the seller has parted with the possession of the goods.
- However, the right of stoppage in transit is exercised only when the following conditions are fulfilled:
  - (a) The seller must be unpaid.
  - (b) He must have parted with the possession of goods.
  - (c) The goods are in transit.
  - (d) The buyer has become insolvent.
  - (e) The right is subject to provisions of the Act.
- The right of stoppage in transit is lost when transit comes to an end.
- There are **two modes of stoppage in transit**-
  - (a) By taking actual possession of goods
  - (b) By giving notice to the carrier not to deliver the goods.

RIGHT OF RE- SALE [SECTION 54]:

The unpaid seller can exercise the right to re-sell the goods under the following conditions:

(i) **Where the goods are of a perishable nature:** In such a case the buyer need not be informed of the intention of resale.

(ii) **Where he gives notice to the buyer of his intention to re-sell the goods:** If after the receipt of such notice the buyer fails within a reasonable time to pay or tender the price, the seller may resell the goods.

(iii) **Where an unpaid seller who has exercised his right of lien or stoppage in transit resells the goods:** The subsequent buyer acquires the good title thereof as against the original buyer, despite the fact that the notice of re-sale has not been given by the seller to the original buyer.

(iv) **A re-sale by the seller where a right of re-sale is expressly reserved in a contract of sale:** Sometimes, it is expressly agreed between the seller and the buyer that in case the buyer makes default in payment of the price, the seller will resell the goods to some other person. In such cases, the seller is said to have reserved his right of resale, and he may resell the goods on buyer's default.

(v) **Where the property in goods has not passed to the buyer:**the unpaid seller has in addition to his remedies a right of withholding delivery of the goods. This right is similar to lien and is called "quasi-lien".

SUIT FOR PRICE (SECTION 55)

- Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.
- Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller

	may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.
SUIT FOR DAMAGES FOR NON-ACCEPTANCE (SECTION 56)	• Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. • As regards measure of damages, Section 73 of the Indian Contract Act, 1872 applies.
REPUDIATION OF CONTRACT BEFORE DUE DATE (SECTION 60)	• Where the buyer repudiates the contract before the date of delivery, the seller may treat the contract as rescinded and sue damages for the breach. • This is known as the 'rule of anticipatory breach contract'.
SUIT FOR INTEREST [SECTION 61]	• Where there is specific agreement between the seller and the buyer as to interest on the price of the goods from the date on which payment becomes due, the seller may recover interest from the buyer. • If, however, there is no specific agreement to this effect, the seller may charge interest on the price when it becomes due from such day as he may notify to the buyer.

RIGHTS OF BUYER AGAINST THE SELLER

If the seller commits a breach of contract, the buyer gets the following rights against the seller:

1. **Damages for non-delivery (Section 57):**

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

2. **Suit for specific performance (Section 58):**

   Where the seller commits of breach of the contract of sale, the buyer can appeal to the court for specific performance. The court can order for specific performance only when the goods are ascertained or specific.

3. **Suit for breach of warranty (section 59):**

   Where there is breach of warranty on the part of the seller, or where the buyer elects to treat breach of condition as breach of warranty, the buyer is not entitled to reject the goods only on the bases of such breach of warranty. But he may –

   a. set up against the seller the breach of warranty in diminution or extinction of the price; or
   b. sue the seller for damages for breach of warranty.

4. **Repudiation of contract before due date (Section 60):**

   Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either

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

5. Suit forinterest:

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

AUCTION SALE (SECTION 64)

An 'Auction Sale' is a mode of selling property by inviting bids publicly and the property is sold to the highest bidder.

RULES OF AUCTION SALE:

a) Where goods are sold in lots:

Where goods are put up for sale in lots, each lot is prima facie deemed to be subject of a separate contract of sale.

b) Completion of the contract of sale:

The sale is complete when the auctioneer announces its completion by the fall of hammer or in any other customary manner and until such announcement is made, any bidder may retract from his bid.

c) Right to bid may be reserved:

Right to bid may be reserved expressly by or on behalf of the seller and where such a right is expressly reserved, but not otherwise, the seller or any one person on his behalf may bid at the auction.

d) Where the sale is not notified by the seller:

Where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer.

e) Reserved price:

The sale may be notified to be subject to a reserve or upset price; and

f) Pretended bidding:

If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

THE INDIAN PARTNERSHIP ACT, 1932

INTRODUCTION

- '**Partnership**' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.
- Persons who have entered into partnership with one another are called individually '**partners**' and collectively '**a firm**', and the name under which their business is carried on is called the '**firm name**'.

ELEMENTS OF PARTNERSHIP

The definition of the partnership contains the following five elements –

1. **ASSOCIATION OF TWO OR MORE PERSONS:**
   - Partnership is an association of 2 or more persons.
   - Section 464 of the Companies Act, 2013 has put a limit of 50 partners in any association/partnership firm.
2. **AGREEMENT:**
   - Partnership must be the result of an agreement between two or more persons.
   - There must be an agreement entered into by all the persons concerned.
   - An agreement from which relationship of Partnership arises may be express or implied.

3. **BUSINESS:**

- There must exist a business.
- The term 'business' includes every trade, occupation and profession.
- The motive of the business is the "acquisition of gains" which leads to the formation of partnership.
- Therefore, there can be no partnership where there is no intention to carry on the business and to share the profit thereof.

4. **AGREEMENT TO SHARE PROFITS:**

- There can be no partnership where only one of the partners is entitled to the whole of the profits of the business.
- Partners must agree to share the profits in any manner they choose.

5. **BUSINESS CARRIED ON BY ALL OR ANY OF THEM ACTING FOR ALL:**

- The business must be carried on by all the partners or by anyone or more of the partners acting for all.
- An act of one partner in the course of the business of the firm is in fact an act of all partners.
- Each partner carrying on the business is the principal as well as the agent for all the other partners.

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MODE OF DETERMINING EXISTENCE OF PARTNERSHIP (SECTION 6)

For determining the existence of partnership, it must be proved –

1. There is an agreement between all the persons concerned;
2. The agreement was to share the profits of a business; and
3. The business was carried on by all or any of them acting for all.

KINDS OF PARTNERSHIPS

The various kinds of partnership are discussed below:

1. **Partnership at will (Section 7):**
   - A Partnership at will is a partnership when:
     i. no fixed period has been agreed upon for the duration of the partnership; and
     ii. there is no provision made as to the determination of the partnership.
   - A partnership at will may be dissolved by any partner by giving notice in writing to all the other partners of his intention to dissolve the same.
2. **Partnership for a fixed period:**
   - Where a provision is made by a contract for the duration of the partnership, the partnership is called 'partnership for a fixed period'.
   - It is a partnership created for a particular period of time.
   - Such a partnership comes to an end on the expiry of the fixed period.

3. **Particular partnership:**
    - Where a person becomes a partner with another person in any particular adventure or undertaking the partnership is called 'particular partnership'.
    - A partnership, constituted for a single adventure or undertaking is, subject to any agreement, dissolved by the completion of the adventure or undertaking.
4. **General partnership:**
    - Where a partnership is constituted with respect to the business in general, it is called a general partnership.
    - In the case of a particular partnership the liability of the partners extends only to that particular adventure or undertaking, but it is not so in the case of general partnership.

PARTNERSHIP DEED

- The document in writing containing the various terms and conditions as to the relationship of the partners to each other is called the 'partnership deed'.
- Partnership deed may contain the following information:-
    - Name of the partnership form.
    - Names of all the partners.
    - Nature and place of the business of the firm.
    - Date of commencement of partnership.
    - Duration of the partnership firm.
    - Capital contribution of each partner.

- Profit Sharing ratio of the partners.
- Admission and Retirement of a partner.
- Rates of interest on Capital, Drawings and loans.
- Provisions for settlement of accounts in the case of dissolution of the firm.
- Provisions for Salaries or commissions, payable to the partners, if any.
- Provisions for expulsion of a partner in case of gross breach of duty or fraud.

TYPES OF PARTNERS

Based on the extent of liability, the different classes of partners are:

1. **Active or Actual or Ostensible partner:**
   - It is a person
     1) Who has become a partner by agreement, and
     2) Who actively participates in the conduct of the partnership.
   - He acts as an agent of other partners for all acts done in the ordinary course of business.
2. **Sleeping or Dormant Partner:**
   - It is a person
     1) Who is a partner by agreement, and
     2) Who does not actively take part in the conduct of the partnership business.
   - They share profits and losses and are liable to the third parties for all acts of the firm.

3. **Nominal Partner:**

   - A person who lends his name to the firm, without having any real interest in it, is called a nominal partner.
   - He is not entitled to share the profits of the firm.
   - He doesn't take part in the conduct of the business.
   - However, he is liable to third parties for all acts of the firm.

4. **Partner in profits only:**

   A partner who is entitled to share the profits only without being liable for the losses is known as the partner for profits only and also liable to the third parties for all acts of the profits only.

5. **Incoming partners:**

   - A person who is admitted as a partner into an already existing firm with the consent of all the existing partners is called as "incoming partner".
   - Such a partner is not liable for any act of the firm done before his admission as a partner.

6. **Outgoing partner:**

   - A partner who leaves a firm in which the rest of the partners continue to carry on business is called a retiring or outgoing partner.
   - Such a partner remains liable to third parties for all acts of the firm until public notice is given of his retirement.

7. **Partner by holding out (Section 28):**

- Partnership by holding out is also known as partnership by estoppel.
- When a person represent himself, or knowingly permits himself, to be represented as a partner in a firm (when in fact he is not) he is liable, like a partner in the firm to anyone who on the faith of such representation has given credit to the firm.

RIGHTS OF PARTNER

The mutual rights of partners depend upon the provisions of the partnership agreement. However, subject to an agreement between the partners; the law confers the following rights upon all the partners:

1. **Right to take part in business [Section 12(a)]:**
   - Every partner has the right to take part in the business of the firm.
   - This is because partnership business is a business of the partners and their management powers are generally coextensive.
2. **Right to be consulted [Section 12(c)]:**
   - Where any difference arises between the partners with regard to the business of the firm, it shall be determined by the views of the majority of them, and every partner shall have the right to express his opinion before the matter is decided.

- But no change in the nature of the business of the firm can be made without the consent of all the partners.

3. **Right to have access to books [Section 12(d)]:**

Every partner whether active or sleeping is entitled to have access to any of the books of the firm and to inspect and take out of copy thereof.

4. **Right to remuneration [Section 13(a)]:**

- A partner can claim remuneration even in the absence of a contract, when such remuneration is payable under the continued usage of the firm.
- In other words, where it is customary to pay remuneration to a partner for conducting the business of the firm, he can claim it even in the absence of a contract for the payment of the same.

5. **Right to share Profits [Section 13 (b)]:**

- Partners are entitled to share equally in the profits earned and so contribute equally to the losses sustained by the firm.
- The amount of a partner's share must be ascertained by enquiring whether there is any agreement in that behalf between the partners.

6. **Interest on Capital [Section 13(c)]:**

The following elements must be there before a partner can be entitled to interest on moneys brought by him in the partnership business:

i. an express agreement to that effect, or practice of the particular partnership or

ii. any trade custom to that effect; or

iii. a statutory provision which entitles him to such interest.

7. Interest on advances [Section 13(d)]:

- When a partner makes an advance to the firm in addition to the amount of capital to be contributed by him, in such a case, the partner is entitled to claim interest thereon @ 6% per annum.
- While interest on capital account ceases to run on dissolution, the interest on advances keep running even after dissolution and up to the date of payment.

8. Right to be indemnified [Section 13(e)]:

Every partner has the right to be indemnified by the firm in respect of payments made and liabilities incurred by him in the ordinary and proper conduct of the business of the firm as well as in the performance of an act in an emergency for protecting the firm from any loss, if the payments, liability and act are such as a prudent man would make, incur or perform in his own case, under similar circumstances.

DUTIES OF PARTNER

1. **Duty to carry on the firm business to the greatest common advantage (SECTION 9):**
    - The partners should carry business of the firm to the greatest common advantages
    - He must use his knowledge and skill for the common benefit of the firm and he restrict from making any personal or private profits.
2. **Duty observe the utmost good faith (SECTION 9):**
    - A partner must observe the utmost good faith and he should be just and faithful in his dealings with the other partners.
    - Good faith requires that a partner should not deceive the other partners by concealment of material facts e.g. a partner should not try to make secret profits, for himself, at the expense of the firm.
3. **Duty to render true accounts and full information (SECTION 9):**
    - Every partner must render true accounts and full information of all things affecting the firm to other partners.
    - It is duty of every partner that he should keep proper accounts, and render correct and true accounts of partnership.
    - He should give full information of all things affecting the firm, to his co-partners. Thus, if a

      partner is in possession of more information about

the affairs and assets of the firm, he should not conceal that from the other partners.

4. **Duty to indemnify for loss caused by fraud (Section 10):**
    - The partner, committing fraud in the conduct of the business of the firm, must make good the loss sustained by the firm by his misconduct and the amount so brought in the partnership should be divided between the partners.
    - Thus, if some loss is caused to the firm due to the fraud of a particular partner, the firm has the right to recover the loss from the same partner.
    - However, the firm shall remain liable to the third parties for fraud of its partners.
5. **Duty to attend diligently [Section 12(b)]:**
    - Every partner is bound to attend diligently to his duties in the conduct of the business.
    - If a partner does not attend diligently the business of the firm, and the firm suffers a loss due to his 'willful neglect', then he is bound to make compensation to the firm.
6. **Duty to account and pay for personal profits [Section 16]:**
    - Where a partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection of the firm or firm name, he must account for that profit and pay it to the firm.

	• Where a partner carries on a competing business, he must account for and pay to the firm all profits made by him in that business.
PROPERTY OF THE FIRM (SECTION 14)	• The expression 'property of the firm', also referred to as 'partnership property', 'partnership assets', 'joint stock', 'common stock' or 'joint estate', denotes all property, rights and interests to which the firm, that is, all partners collectively, may be entitled. • The property which is deemed as belonging to the firm, in the absence of any agreement between the partners showing contrary intention, is comprised of the following items: ○ all property, rights and interests which partners may have brought into the common stock as their contribution to the common business; ○ all the property, rights and interest acquired or purchased by or for the firm, or for the purposes and in the course of the business of the firm; and ○ Goodwill of the business.
APPLICATION OF THE PROPERTY OF THE FIRM (SECTION 15)	• The property of the firm shall be held and used exclusively for the purpose of the firm. • In partnership, there is a community of interest which all the partners take in the property of the firm.

- Every partner of the firm has a right to get his share of profits till the firm subsists and he has also a right to see that all the assets of the partnership are applied to and used for the purpose of partnership business.

THE AUTHORITY OF A PARTNER

- As per Section 18 of the Act, "Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm."
- Authority means the right of a partner to bind the firm by his own acts.
- The authority of a partner to act on behalf of the firm can be expressed or implied.

I. EXPRESSED AUTHORITY

' The authority which is expressly given to a partner by the agreement of partnership is called "Expressed authority".

' The firm is bound by all acts done by a partner by virtue of any express authority given to him.

II. IMPLIED AUTHORITY

' A partner has implied authority to bind the firm by all acts done by him in all matters connected with the partnership business and which are done in the usual way and are not in their nature beyond the scope of partnership.

- In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to-

  a) Submit a dispute relating to the business of the firm to arbitration;

  b) open a banking account on behalf of the firm in his own name;

  c) compromise or relinquish any claim or portion of a claim by the firm;

  d) withdraw a suit or proceedings filed on behalf of the firm;

  e) admit any liability in a suit or proceedings against the firm;

  f) acquire immovable property on behalf of the firm;

  g) transfer immovable property belonging to the firm; and

  h) enter into partnership on behalf of the firm.

EXTENSION AND RESTRICTION OF PARTNERS' IMPLIED AUTHORITY (SECTION 20)

- The implied authority of a partner may be extended or restricted by contract between the partners.
- Under the following conditions, the restrictions imposed on the implied authority of a partner by agreement shall be effective against a third party:

  1. The third party knows about the restrictions, and

	2. The third party does not know that he is dealing with a partner in a firm.
PARTNER'S AUTHORITY IN AN EMERGENCY	According to section 21, a partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.
EFFECT OF ADMISSIONS BY A PARTNER (SECTION 23)	• Partners, as agents of each other can make binding admissions but only in relation to partnership transaction and in the ordinary course of business. • An admission or representation by a partner will not however, bind the firm if his authority on the point is limited and the other party knows of the restriction. T • Admissions and representations being evidenced against the firm, they will affect the firm when tendered by third parties; they may not have the same effect in case of disputes between the partners themselves.
EFFECT OF NOTICE TO ACTING PARTNER (SECTION 24)	• The notice to a partner, who habitually acts in business of the firm, on matters relating to the affairs of the firm, operates as a notice to the firm except in the case of a

	fraud on the firm committed by or with the consent of that partner. • Thus, the notice to one is equivalent to the notice to the rest of the partners of the firm, just as a notice to an agent is notice to his principal. • This notice must be actual and not constructive. • It must be received by a working partner and not by a sleeping partner. • It must further relate to the firm's business. Only then it would constitute a notice to the firm.
LIABILITY OF A PARTNER TO THIRD PARTIES FOR ACTS OF THE FIRM (SECTION 25)	• The partners are jointly and severally responsible to third parties for all acts which come under the scope of their express or implied authority. • The expression 'act of firm' connotes any act or omission by all the partners or by any partner or agent of the firm, which gives rise to a right enforceable by or against the firm.
FIRM LIABILITY TO THIRD PARTIES FOR WRONGFUL ACTS OF A PARTNER (SECTION 26)	The firm is liable to the same extent as the partner for any loss or injury caused to a third party by the wrongful acts of a partner, if they are done by the partner while acting – a) in the ordinary course of the business of the firm b) with the authority of the partners.

	All the partners in a rm are liable to a third party for loss or injury caused to him by the negligent act of a partner acting in the ordinary course of the business.
LIABILITY OF THE FIRM TO THIRD PARTIES FOR MISAPPLICATION BY PARTNER (SECTION 27)	The firm is liable to make good the loss, if - • a partner acting within his apparent authority receives money or property from a third party and misapplies it, or • a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm.
RIGHTS OF TRANSFEREE OF A PARTNER'S INTEREST (SECTION 29)	• A share in a partnership is transferable like any other property, but as the partnership relationship is based on mutual confidence, the assignee of a partner's interest by sale, mortgage or otherwise cannot enjoy the same rights and privileges as the original partner. • During the continuance of partnership, such transferee is not entitled a) to interfere with the conduct of the business, b) to require accounts, or c) to inspect books of the firm. • He is only entitled to receive the share of the profits of the transferring partner and he is bound to accept the

	profits as agreed to by the partners, i.e., he cannot challenge the accounts. • On the dissolution of the firm or on the retirement of the transferring partner, the transferee will be entitled to receive the share of the assets of the firm to which the transferring partner was entitled.
MINOR'S POSITION IN PARTNERSHIP FIRM (SECTION 30)	• A minor cannot become a partner in a firm because partnership is founded on a contract and contract with a minor is void-ab-initio. • Though a minor cannot be a partner in a firm, he can be admitted to the benefits of partnership with the consent of all the partners.
RIGHTS OF MINOR IN PARTNERSHIP	• A minor partner has a right to his agreed share of the profits and of the firm. • He can have access to, inspect and copy the accounts of the firm. • He can sue the partners for accounts or for payment of his share but only when severing his connection with the firm, and not otherwise. • On attaining majority, he may within 6 months elect to become a partner or not to become a partner. If he elects to become a partner, then he is entitled to the share to which he was entitled as a minor. If he does not, then his

share is not liable for any acts of the firm after the date of the public notice served to that effect.

LIABILITIES OF MINOR IN PARTNERSHIP

1. Before attaining majority:

- The liability of the minor is confined only to the extent of his share in the profits and the property of the firm.
- Minor has no personal liability for the debts of the firm incurred during his minority.
- Minor cannot be declared insolvent, but if the firm is declared insolvent his share in the firm vests in the Official Receiver/Assignee.

2. After attaining majority:

Within 6 months of his attaining majority or on his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, the minor partner has to decide whether he shall remain a partner or leave the firm. Where he has elected not to become partner he may give public notice that he has elected not to become partner and such notice shall determine his position as regards the firm. If he fails to give such notice he shall become a partner in the firm on the expiry of the said six months.

a) When he becomes partner:

If the minor becomes a partner on his own willingness or by his failure to give the public notice within specified time, his rights and liabilities are as follows:

i. He becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership.

ii. He is share in the property and the profits of the firm remains the same to which he was entitled as a minor.

b) When he elects not to become a partner:

i. His rights and liabilities continue to be those of a minor up to the date of giving public notice.

ii. His share shall not be liable for any acts of the firm done after the date of the notice.

iii. He shall be entitled to sue the partners for his share of the property and profits. It may be noted that such minor shall give notice to the Registrar that he has or has not become a partner.

RECONSTITUTION OF A FIRM

The reconstitution of a firm means a change in the constitution i.e., composition of the firm and it takes place in the following cases:

1) Admission of a new partner
2) Retirement of a partner
3) Expulsion of a partner
4) Insolvency of a partner
5) Death of a partner.

ADMISSION OF A PARTNER (SECTION 31)

- A newly admitted partner is known as 'incoming partner'.
- A new partner can be admitted into an existing firm in any of the following ways:
  - **a)** With the consent of all the partners.
  - **b)** In accordance with a contract already entered into between the partners for the admission of a new partner.
- The liability of an incoming partner:
  - **a) Liability for the acts of the firm done before admission:** An incoming partner is not liable for the acts of the firm done before his admission into the firm. Thus, he is not liable for the past debts of the firm.
  - **b) Liability for the acts of the firm done after admission:** As a matter of fact, the liability of an incoming partner starts from the date of his admission into the firm. Thus, he is liable for all the acts of the firm done after he became a partner in the firm.
  - **c)** If the incoming partner agrees to bear the past liabilities, then for past liabilities he shall not be liable to third parties as he is a stranger to contract but he shall be liable to other partners.

RETIREMENT OF A PARTNER (SECTION 32)

- A partner is said to retire when he ceases to be a member of the firm without bringing to an end the subsisting relations between the other members, or between the firm and third parties.
- A partner may retire:
  - i. with the consent of all the other partners;
  - ii. in accordance with an express agreement by the partners; or
  - iii. where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.
- **The liability of a retiring partner:**
  - i. A retiring partner continues to be liable to third party for acts of the firm after his retirement until public notice of his retirement has been given either by himself or by any other partner.
  - ii. But the retired partner will not be liable to any third party if the latter deals with the firm without knowing that the former was partner.
  - iii. As regards the liability for acts of the firm done before his retirement, the retiring partner remains liable for the same, unless there is an agreement made by him with the third party concerned and the partners of the reconstituted firm. Such an agreement may be implied by a course of dealings between the third party and the reconstituted firm after he had knowledge of the retirement.

EXPULSION OF A PARTNER (SECTION 33)	• A partner may not be expelled from a firm by a majority of partners except in exercise, in good faith, of powers conferred by contract between the partners. It is, thus, essential that: i. the power of expulsion must have existed in a contract between the partners; ii. the power has been exercised by a majority of the partners; and iii. it has been exercised in good faith. • If all these conditions are not present, the expulsion is not deemed to be in bonafide interest of the business of the firm.
INSOLVENCY OF A PARTNER (SECTION 34)	• When a partner in a firm is adjudicated an insolvent, he ceases to be a partner on the date of the order of adjudication whether or not the firm is thereby dissolved. • His estate (which thereupon vests in the official assignee) ceases to be liable for any act of the firm done after the date of the order, and the firm also is not liable for any act of such a partner after such date (whether or not under a contract between the partners the firm is dissolved by such adjudication).

DEATH OF A PARTNER (SECTION 35)	• The firm is automatically dissolved on the death of a partner. However, the partners may specifically provide in their agreement that the firm shall not be dissolved, and the remaining partners shall continue the firm's business. • Where the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any acts of the firm which are done after his death.
RIGHTS OF OUTGOING PARTNER TO CARRY ON COMPETING BUSINESS (SECTION 36)	• An outgoing partner may carry on business competing with that of the firm and he may advertise such business, but he may not,- ○ use the firm name, ○ represent himself as carrying on the business of the firm or ○ solicit the customers of the firm who were dealing with the firm before he ceased to be a partner. • A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits, such agreement shall be valid if the restrictions imposed are reasonable.

RIGHT OF OUTGOING PARTNER TO SHARE SUBSEQUENT PROFITS (SECTION 37)

- Where any member of a firm has died or otherwise ceased to be partner, and the surviving or continuing partners carry on the business without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm.
- Provided that whereby contract between the partners, an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits.

REGISTRATION OF FIRMS (SECTION 58 & 59)

- The registration of a firm is not compulsory.
- It is optional for the firm either to get itself registered or not.
- There is no penalty for non-registration of a firm.
- The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or

proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating-

a) The firm's name

b) The place or principal place of business of the firm,

c) The names of any other places where the firm carries on business,

d) The date when each partner joined the firm,

e) The names in full and permanent addresses of the partners, and

f) The duration of the firm.

- The statement shall be signed and verified by all the partners, or by their agents specially authorised in this behalf.
- When the Registrar is satisfied, he shall record an entry of the statement in a Register called the Register of Firms and shall file the statement.
- Then he shall issue a certificate of Registration.

CONSEQUENCES OF NON-REGISTRATION (SECTION 69)

1. **No suit in a civil court by firm or other co-partners against third party:**
   - The firm or any other person on its behalf cannot bring an action against the third party for breach of contract entered into by the firm, unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm.

- In other words, a registered firm can only file a suit against a third party and the persons suing have been in the register of firms as partners in the firm.

2. **No relief to partners for set-off of claim:**

   If an action is brought against the firm by a third party, then neither the firm nor the partner can claim any set- off, if the suit be valued for more than Rs. 100 or pursue other proceedings to enforce the rights arising from any contract.

3. **Aggrieved partner cannot bring legal action against other partner or the firm:**

   - A partner of an unregistered firm (or any other person on his behalf) is precluded from bringing legal action against the firm or any person alleged to be or to have been a partner in the firm.
   - But, such a person may sue for dissolution of the firm or for accounts and realization of his share in the firm's property where the firm is dissolved.

4. **Third party can sue the firm:**

   In case of an unregistered firm, an action can be brought against the firm by a third party.

DISSOLUTION OF FIRM (SECTIONS 39 - 47)

- **Dissolution of partnership**
  - o The term 'dissolution of partnership' may be defined as a change in the relations of partners, and not the extinction of relationship.

- In this case, the firm as a whole is not closed down but only the relations between some of the partners come to an end, and the remaining partners continue to carry on the business of the firm.

- According to Section 39 of the Indian Partnership Act, 1932, the dissolution of partnership between all partners of a firm is called the '**dissolution of the firm**'.
- Dissolution of firm means the discontinuation of the jural relation existing between all the partners of the firm.
- When particular partner(s) goes out, but the remaining partners carry on the business of the firm, it is called dissolution of partnership. In the case of dissolution of the firm, on the other hand, the whole firm is dissolved. The partnership terminates as between each and every partner of the firm.

Dissolution of Firm Vs. Dissolution of Partnership

Basis	Dissolution of Firm	Dissolution of Partnership
Continuation of business	It involves discontinuation of business in partnership.	It does not affect continuation of business. It involves only reconstitution of the firm.
Winding up	It involves winding up of the firm and requires realization of assets and	It involves only reconstitution and requires only revaluation

	settlement of liabilities.	of assets and liabilities of the firm.
Order of court	A firm may be dissolved by the order of the court.	Dissolution of partnership is not ordered by the court.
Scope	It necessarily involves dissolution of partnership.	It may or may not involve dissolution of firm.
Final closure of books	It involves final closure of books of the firm.	It does not involve final closure of the books.

MODES OF DISSOLUTION OF A FIRM (SECTIONS 40-44)

The dissolution of partnership firm may be in any of the following ways:

1. **DISSOLUTION WITHOUT THE ORDER OF THE COURT OR VOLUNTARY DISSOLUTION:**

   a. **Dissolution by agreement (Section 40):**

   A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

   b. **Compulsory dissolution (Section 41):**

   A firm is compulsorily dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership.

c. **Dissolution on the happening of certain contingencies (Section 42):**

Subject to contract between the partners, a firm can be dissolved on the happening of any of the following contingencies-

- where the firm is constituted for a fixed term, on the expiry of that term
- where the firm is constituted to carry out one or more adventures or undertaking, then by completion thereof
- by the death of a partner
- by the adjudication of a partner as an insolvent.

d. **Dissolution by notice of partnership at will (Section 43):**

- Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.
- If the date is mentioned, the firm is dissolved as from the date mentioned in the notice as the date of dissolution, or if no date is so mentioned, as from the date of the communication of the notice.

2. **DISSOLUTION BY THE COURT (Section 44)**

a. **Insanity/unsound mind:**

- Where a partner (not a sleeping partner) has become of unsound mind, the court may

dissolve the firm on a suit of the other partners or by the next friend of the insane partner.

- Temporary sickness is no ground for dissolution of firm.

b. Permanent incapacity:

- When a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner, then the court may dissolve the firm.
- Such permanent incapacity may result from physical disability or illness etc.

c. Misconduct:

- Where a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of business, the court may order for dissolution of the firm, by giving regard to the nature of business.
- It is not necessary that misconduct must relate to the conduct of the business. The important point is the adverse effect of misconduct on the business.

d. Persistent breach of agreement:

- Where a partner other than the partner suing, wilfully or persistently commits breach of agreements relating to the

management of the affairs of the firm or the conduct of its business, or otherwise so conduct himself in matters relating to the business that it is not reasonably practicable for other partners to carry on the business in partnership with him, then the court may dissolve the firm at the instance of any of the partners.

- Following comes in to category of breach of contract:
  - ❖ Embezzlement,
  - ❖ Keeping erroneous accounts
  - ❖ Holding more cash than allowed
  - ❖ Refusal to show accounts despite repeated request etc.

e. Transfer of interest:

Where a partner other than the partner suing, has transferred the whole of his interest in the firm to a third party or has allowed his share to be charged or sold by the court, in the recovery of arrears of land revenue, the court may dissolve the firm at the instance of any other partner.

f. Continuous/Perpetual losses:

Where the business of the firm cannot be carried on except at a loss in future also, the court may order for its dissolution.

g. Just and equitable grounds:

Where the court considers any other ground to be just and equitable for the dissolution of the firm, it may dissolve a firm. The following are the cases for the just and equitable grounds-

i. Deadlock in the management.

ii. Where the partners are not in talking terms between them.

iii. Loss of substratum.

iv. Gambling by a partner on a stock exchange.

CONSEQUENCES OF DISSOLUTION (SECTIONS 45 - 55)

(a) Liability for acts of partners done after dissolution (Section 45):

- Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution.
- The estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(b) Right of partners to have business wound up after dissolution (Section 46):

On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representative, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

(c) Continuing authority of partners for purposes of winding up (Section 47):

- After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise
- Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

(d) Settlement of partnership accounts (Section 48):

In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed: -

i. Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

ii. The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, must be applied in the following manner and order:

   a. in paying the debts of the firm to third parties;

   b. in paying to each partner rateably what is due to him from capital;

   c. in paying to each partner rateably what is due to him on account of capital; and

   d. the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

(e) Payment of firm debts and of separate debts (Section 49):

Where there are joint debts due from the firm and also separate debts due from any partner:

i. the property of the firm shall be applied in the first instance in payment of the debts of the

firm, and if there is any surplus, then the share of each partner shall be applied to the payment of his separate debts or paid to him;

ii. the separate property of any partner shall be applied first in the payment of his separate debts and surplus, if any, in the payment of debts of the firm.

PARTNERSHIP VS. OTHER FORMS OF ORGANISATION	**See Below Tables**

PARTNERSHIP VS. JOINT STOCK COMPANY

Basis	Partnership	Joint Stock Company
Legal status	A firm is not legal entity i.e., it has no legal personality distinct from its members.	A company is a separate legal entity distinct from its members.
Agency	In a firm, every partner is an agent of the other partners, as well as of the firm.	In a company, a member is not an agent of the other members or of the company, his actions do not bind either.

Basis	Partnership	Joint Stock Company
Distribution of profits	The profits of the firm must be distributed among the partners according to the terms of the partnership deed.	There is no such compulsion to distribute its profits among its members.
Extent of liability	In a partnership, the liability of the partners is unlimited.	In a company limited by shares, the liability of a shareholder is limited to the amount, if any, unpaid on his shares.
Property	The firm's property is the "joint estate" of all the partners.	In a company, its property is separate from that of its members.
Transfer of shares	A share in a partnership cannot be transferred without the consent of all the partners.	In a company a shareholder may transfer his shares, subject to the provisions contained in its Articles.
Management	In the absence of an express agreement to the contrary, all the partners are entitled to participate in the management.	Members of a company are not entitled to take part in the management unless they are appointed as directors.
Registration	Registration is not compulsory in the case of partnership.	A company cannot come into existence unless it is registered under the Companies Act, 2013.
Winding up	A partnership firm can be dissolved at any time if all the partners agree.	A company, being a legal person is either wind up by the National Company Law Tribunal or its name is

Basis	Partnership	Joint Stock Company
		struck of by the Registrar of Companies.
Number of membership	According to section 464 of the Companies Act, 2013, the number of partners in any association shall not exceed 100. However, the Rule given under the Companies (Miscellaneous) Rules, 2014 restrict the present limit to 50.	A private company may have as many as 200 members but not less than two and a public company may have any number of members but not less than seven. A private Company can also be formed by one person known as one-person Company.
Duration of existence	Unless there is a contract to the contrary, death, retirement or insolvency of a partner results in the dissolution of the firm.	A company enjoys a perpetual succession.

PARTNERSHIP VS. CLUB

Basis	Partnership	Club
Definition	It is an association of persons formed for earning profits from a business carried on by all or any one of them acting for all.	A club is an association of persons formed with the object not of earning profit, but of promoting some beneficial purposes such as improvement of health or providing recreation for the members, etc.
Relationship	Persons forming a partnership are called partners and a partner is an agent for other partners.	Persons forming a club are called members. A member of a club is not the agent of other members.

Basis	Partnership	Club
Interest in the property	Partner has interest in the property of the firm.	A member of a club has no interest in the property of the club.
Dissolution	A change in the partners of the firm affect its existence.	A change in the membership of a club does not affect its existence.

PARTNERSHIP VS. HINDU UNDIVIDED FAMILY

Basis	Partnership	Joint Hindu family
Mode of creation	Partnership is created necessarily by an agreement.	The right in the joint family is created by status means its creation by birth in the family.
Death of a member	Death of a partner ordinarily leads to the dissolution of partnership.	The death of a member in the Hindu undivided family does not give rise to dissolution of the family business.
Management	All the partners are equally entitled to take part in the partnership business.	The right of management of joint family business generally vests in the Karta, the governing male member or female member of the family.
Authority to bind	Every partner can, by his act, bind the firm.	The Karta or the manager, has the authority to contract for the family business and the other members in the family.
Liability	In a partnership, the liability of a partner is unlimited.	In a Hindu undivided family, only the liability of the Karta is unlimited, and the other coparcener are liable

Basis	Partnership	Joint Hindu family
		only to the extent of their share in the profits of the family business.
Calling for accounts on closure	A partner can bring a suit against the firm for accounts, provided he also seeks the dissolution of the firm.	On the separation of the joint family, a member is not entitled to ask for account of the family business.
Governing Law	A partnership is governed by the Indian Partnership Act, 1932.	A Joint Hindu Family business is governed by the Hindu Law.
Minor's capacity	In a partnership, a minor cannot become a partner, though he can be admitted to the benefits of partnership, only with the consent of all the partners.	In Hindu undivided family business, a minor becomes a member of the ancestral business by the incidence of birth. He does not have to wait for attaining majority.
Continuity	A firm subject to a contract between the partners gets dissolved by death or insolvency of a partner.	A Joint Hindu family has the continuity till it is divided. The status of Joint Hindu family is not thereby affected by the death of a member.
Number of Members	In case of Partnership number of members should not exceed 50.	Members of HUF who carry on a business may be unlimited in number.
Share in the business	In a partnership each partner has a defined share by virtue of an agreement between the partners.	In a HUF, no coparceners has a definite share. His interest is a fluctuating one. It is capable of being enlarged by deaths in the

Basis	Partnership	Joint Hindu family
		family diminished by births in the family.

PARTNERSHIP VS. CO-OWNERSHIP

Basis	Partnership	Co-ownership
Formation	Partnership always arises out of a contract, express or implied.	Co-ownership may arise either from agreement or by the operation of law, such as by inheritance.
Implied agency	A partner is the agent of the other partners.	A co-owner is not the agent of other co- owners.
Nature of interest	There is community of interest which means that profits and losses must have to be shared.	Co-ownership does not necessarily involve sharing of profits and losses.
Transfer of interest	A share in the partnership is transferred only by the consent of other partners.	A co - owner may transfer his interest or rights in the property without the consent of other co-owners.

PARTNERSHIP VS. ASSOCIATION

Basis	Partnership	Association
Meaning	Partnership means and involves setting up relation of agency between two or more persons who have entered into a business for gains, with the intention to share the profits of such a business.	Association evolve out of social cause where there is no necessarily motive to earn and share profits. The intention is not to enter in a business for gains.

Basis	Partnership	Association
Examples	Partnership to run a business and earn profit thereon.	Members of charitable society or religious association or an improvement scheme or building corporation or a mutual insurance society or a trade protection association.

THE LIMITED LIABILITY PARTNERSHIP ACT, 2008

INTRODUCTION

- A LLP is a new form of legal business entity with limited liability.
- 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 is a separate legal entity and, while the LLP itself will be liable for the full extent of its assets, the liability of the partners will be limited.
- LLP is called a hybrid between a company and a partnership.

PARTNER

- Partner, in relation to a LLP, means any person who becomes a partner in the LLP in accordance with the LLP agreement.
- Save as otherwise provided, the provisions of the Indian Partnership Act, 1932 shall not apply to a LLP.
- Any individual or body corporate may be a partner in a LLP.

MINIMUM NUMBER OF PARTNERS (SECTION 6)	• Every LLP shall have at least two partners. • If at any time the number of partners of a LLP is reduced below two and the LLP carries on business for more than six months while the number is so reduced, the person, who is the only partner of the LLP during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the LLP incurred during that period.
DESIGNATED PARTNER (SECTION 7)	• Every LLP shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. • If in LLP, all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners.
CHARACTERISTIC/ SALIENT FEATURES OF LLP	**1. LLP is a body corporate:** • LLP is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners and shall have perpetual succession.

- Therefore, any change in the partners of a LLP shall not affect the existence, rights or liabilities of the LLP.

2. Perpetual Succession:

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

3. Separate Legal Entity:

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

4. Mutual Agency:

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

5. LLP Agreement:

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

6. Artificial Legal Person:

- A LLP is an artificial legal person because it is created by a legal process and is clothed with all rights of an individual.
- A LLP is invisible, intangible, immortal (it can be dissolved by law alone).

7. Common Seal:

- A LLP being an artificial person can act through its partners and designated partners.
- LLP may have a common seal, if it decides to have one.
- Thus, it is not mandatory for a LLP to have a common seal.
- It shall remain under the custody of some responsible official and it shall be affixed in the presence of at least 2 designated partners of the LLP.

8. **Limited Liability:**

- The liability of the partners will be limited to their agreed contribution in the LLP.
- Such contribution may be of tangible or intangible nature or both.

9. **Management of Business:**

- The partners in the LLP are entitled to manage the business of LLP.
- But only the designated partners are responsible for legal compliances.

10. **Minimum and Maximum number of Partners:**

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

11. **Business for Profit Only:**

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

12. **Investigation:**

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

13. Compromise or Arrangement:

Any compromise or agreements including merger and amalgamation of LLPs shall be in accordance with the provisions of the LLP Act, 2008.

14. Conversion into LLP:

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

15. E-Filling of Documents:

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

INCORPORATION OF LLP

Essential elements to incorporate Limited Liability Partnership (LLP):

(i) To complete and submit incorporation document in the form prescribed with the Registrar electronically;

(ii) To have at least two partners for incorporation of LLP [Individual or body corporate];

(iii) To have registered office in India to which all communications will be made and received;

(iv) To appoint minimum two individuals as designated partners who will be responsible for number of duties including doing of all acts, matters and things as are

required to be done by the LLP. Atleast one of them should be resident in India.

(v) A person or nominee of body corporate intending to be appointed as designated partner of LLP should hold a Designated Partner Identification Number (DPIN) allotted by Ministry of Corporate Affairs.

(vi) To execute a partnership agreement between the partners inter se or between the LLP and its partners. In the absence of any agreement the provisions as set out in First Schedule of LLP Act, 2008 will be applied.

(vii) LLP Name.

STEPS TO INCORPORATE LLP:

1. **Name reservation:**

- The first step to incorporate Limited Liability Partnership (LLP) is reservation of name of LLP.
- Applicant has to file e-Form 1, for ascertaining availability and reservation of the name of a LLP business.

2. **Incorporate LLP:**

- After reserving a name, user has to file e- Form 2 for incorporating a new Limited Liability Partnership (LLP).
- e-Form 2 contains the details of LLP proposed to be incorporated, partners'/designated partners' details and consent of the partners/designated partners to act as partners/ designated partners.

3. LLP Agreement

- Execution of LLP Agreement is mandatory as per Section 23 of the Act.
- LLP Agreement is required to be filed with the registrar in e-Form 3 within 30 days of incorporation of LLP.

EFFECT OF REGISTRATION

On registration, a LLP shall, by its name, be capable of –

(a) suing and being sued;

(b) acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible;

(c) having a common seal, if it decides to have one; and

(d) doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.

REGISTERED OFFICE OF LLP (SECTION 13)

- Every LLP shall have a registered office to which all communications and notices may be addressed and where they shall be received.
- A document may be served on a LLP or a partner or designated partner thereof by sending it at the registered office.
- A LLP may change the place of its registered office and file the notice of such change with the Registrar in such form and manner and subject to such conditions as may be prescribed and any such change shall take effect only upon such filing.

NAME OF LLP (SECTION 15)	• Every limited liability partnership shall have either the words "limited liability partnership" or the acronym "LLP" as the last words of its name. • No LLP shall be registered by a name which, in the opinion of the Central Government is— a) undesirable; or b) identical or too nearly resembles to that of any other partnership firm or LLP or body corporate or a registered trade mark.
RESERVATION OF NAME (SECTION 16)	• A person may apply in such form and manner and accompanied by such fee as may be prescribed to the Registrar for the reservation of a name set out in the application as – a) the name of a proposed LLP; or b) the name to which a LLP proposes to change its name. • Upon receipt of an application and on payment of the prescribed fee, the Registrar may, if he is satisfied, reserve the name of LLP.

CHANGE OF NAME OF LLP (SECTION 17)

- Where the Central Government is satisfied that a LLP has been registered under a name which is —
  a) undesirable; or
  b) identical or too nearly resembles to that of any other partnership firm or LLP or body corporate or a registered trade mark or other name as to be likely to be mistaken for it,

the Central Government may direct such LLP to change its name, and the LLP shall comply with the said direction within 3 months after the date of the direction or such longer period as the Central Government may allow.

WHEN A PERSON CEASE TO BE A PARTNER OF LLP (SECTION 24)

Cessation of partnership interest –

- A person may cease to be a partner of a LLP in accordance with an agreement with the other partners.
- In the absence of agreement, 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.

IMPORTANT POINTS

- Where a person has ceased to be a partner of a LLP (hereinafter referred to as "former partner"), he shall be

still regarded as partner to any person dealing with the LLP unless—

a) the person has notice that the former partner has ceased to be a partner of the LLP; or

b) notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.

- The 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 a LLP ceases to be a partner, unless otherwise provided in the LLP agreement, the former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be entitled to receive from the LLP—

  a) an amount equal to the capital contribution of the former partner actually made to the LLP; and

  b) his right to share in the accumulated profits of the LLP, after the deduction of accumulated losses of the LLP, determined as at the date the former partner ceased to be a partner.

- 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.

REGISTRATION OF CHANGES IN PARTNERS (SECTION 25)

- Every partner shall inform the LLP of any change in his name or address within a period of 15 days of such change.
- A LLP shall—
  a) where a person becomes or ceases to be a partner, file a notice with the Registrar within 30 days from the date he becomes or ceases to be a partner; and
  b) where there is any change in the name or address of a partner, file a notice with the Registrar within 30 days of such change.
- A notice filed with the Registrar —
  a) shall be in such form and accompanied by such fees as may be prescribed;
  b) shall be signed by the designated partner of the LLP and authenticated in a manner as may be prescribed; and
  c) if it relates to an incoming partner, shall contain a statement by such partner that he consents to becoming a partner, signed by him and authenticated in the manner as may be prescribed.
- Any person who ceases to be a partner of a LLP may himself file with the Registrar the notice referred to in above point, if he has reasonable cause to believe that the LLP may not file the notice with the Registrar, the Registrar shall obtain a confirmation to this effect from the LLP unless the LLP has also filed such notice.

LIABILITY OF LLP (SECTION 27)	• A LLP is not bound by anything done by a partner in dealing with a person if — ○ the partner in fact has no authority to act for the LLP in doing a particular act; and ○ the person knows that he has no authority or does not know or believe him to be a partner of the LLP. • The LLP is liable if a partner of a LLP is liable to any person as a result of a wrongful act or omission on his part in the course of the business of the LLP or with its authority. • An obligation of the LLP whether arising in contract or otherwise, shall be solely the obligation of the LLP. • The liabilities of the LLP shall be met out of the property of the LLP.
LIABILITY OF PARTNERS (SECTION 28)	• A partner is not personally liable, directly or indirectly for an obligation of the LLP, solely by reason of being a partner of the LLP. • A partner may be personally liable for his own wrongful act or omission but he shall not be personally liable for the wrongful act or omission of any other partner of the LLP. **Unlimited liability of Partners (Section 30)** • In the event of an act carried out by a LLP, or any of its partners, with intent to defraud creditors of the LLP or

any other person, or for any fraudulent purpose, the liability of the LLP and partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the LLP.

- Where a LLP or any partner or designated partner or employee of a LLP has conducted the affairs of the LLP in a fraudulent manner, then without prejudice to any criminal proceedings which may arise under any law for the time being in force, the LLP and any such partner or designated partner or employee shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct.

LIABILITY IN CASE OF PARTNER BY HOLDING OUT (SECTION 29)

- Any person, who by words spoken or written or by conduct, represents himself, or knowingly permits himself to be represented to be a partner in a LLP is liable to any person who has on the faith of any such representation given credit to the LLP, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.
- However, where any credit is received by the LLP as a result of such representation, the LLP shall, without prejudice to the liability of the person so representing himself or represented to be a partner, be liable to the

extent of credit received by it or any financial benefit derived thereon.

- Where after a partner's death the business is continued in the same LLP name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the LLP done after his death.

WHISTLE BLOWING (SECTION 31)

- The Court or Tribunal may reduce or waive any penalty leviable against any partner or employee of a LLP, if it is satisfied that—
  - such partner or employee of a LLP has provided useful information during investigation of such LLP; or
  - when any information given by any partner or employee leads to LLP or any partner or employee of such LLP being convicted.
- No partner or employee of any LLP may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms and conditions of his LLP or employment merely because of his providing information.

MAINTENANCE OF BOOKS OF ACCOUNT, OTHER RECORDS AND AUDIT, ETC.	• The LLP shall maintain such **proper books of account** as may be prescribed relating to its affairs for each year of its existence on cash basis or accrual basis and according to double entry system of accounting and shall maintain the same at its registered office for such period as may be prescribed. • Every LLP shall, within a period of 6 months from the end of each financial year, prepare a Statement of Account and Solvency for the said financial year as at the last day of the said financial year in such form as may be prescribed, and such statement shall be signed by the designated partners of the LLP. • Every LLP shall file within the prescribed time, the Statement of Account and Solvency with the Registrar every year in such form and manner and accompanied by such fees as may be prescribed. • Every LLP shall file an annual return duly authenticated with the Registrar within 60 days of closure of its financial year in such form and manner and accompanied by such fee as may be prescribed.
CONVERSION INTO LLP	**REGISTRATION OF CONVERSION** • The Registrar, on satisfying that a firm, private company or an unlisted public company, as the case may be, has complied with the provisions, register the documents and issue a certificate of registration.

- The LLP shall, within 15 days of the date of registration, inform the concerned Registrar of Firms or Registrar of Companies about the conversion and of the particulars of the LLP in such form and manner as may be prescribed.

EFFECT OF REGISTRATION:

On and from the date of registration specified in the certificate of registration issued —

a) there shall be a LLP by the name specified in the certificate of registration registered under this Act;

b) all tangible (movable or immovable) and intangible property vested in the firm or the company, as the case may be, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, as the case may be, and the whole of the undertaking of the firm or the company, as the case may be, shall be transferred to and shall vest in the limited liability partnership without further assurance, act or deed; and

c) the firm or the company, as the case may be, shall be deemed to be dissolved and removed from the records of the Registrar of Firms or Registrar of Companies, as the case may be.

CIRCUMSTANCES IN WHICH LLP MAY BE WOUND UP BY TRIBUNAL (SECTION 64)

A LLP may be wound up by the Tribunal:

a) if the LLP decides that LLP be wound up by the Tribunal;

b) if, for a period of more than six months, the number of partners of the LLP is reduced below two;

c) if the LLP is unable to pay its debts;

d) if the LLP has acted against the interests of the sovereignty and integrity of India, the security of the State or public order;

e) if the LLP has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years; or

f) if the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.

DISTINCTION BETWEEN LLP AND PARTNERSHIP FIRM

Basis	LLP	Partnership firm
Regulating Act	The Limited Liability Partnership Act, 2008.	The Indian Partnership Act, 1932.
Body corporate	Body corporate.	Not a body corporate.
Separate legal entity	Legal entity separate from its members.	No separate legal entity.
Creation	It is created by a legal process called registration under the LLP Act, 2008.	It is created by an agreement between the partners.
Registration	Mandatory.	Voluntary.

Basis	LLP	Partnership firm
Perpetual succession	The death, insanity, retirement or insolvency of the partner(s) does not affect its existence of LLP. Members may join or leave but its existence continues forever.	The death, insanity, retirement or insolvency of the partner(s) may affect its existence. It has no perpetual succession.
Name	Contain the word limited liability partners (LLP) as suffix.	No guidelines. The partners can have any name as per their choice.
Liability	Liability of each partner limited to the extent to agreed contribution except in case of willful fraud.	Liability of each partner is unlimited.
Mutual agency	Each partner can bind the LLP by his own acts but not the other partners.	Each partner can bind the firm as well as other partners by his own acts.
Designated partners	At least two designated partners and atleast one of them shall be resident in India.	There is no provision for such partners under the partnership Act, 1932.
Common seal	It may have its common seal as its official signatures.	There is no such concept in partnership.
Legal compliances	Only designated partners are responsible for all the compliances and penalties under this Act.	All partners are responsible for all the compliances and penalties under the Act.

Basis	LLP	Partnership firm
Annual filing of documents	LLP is required to file: a) Annual statement of accounts b) Statement of solvency c) Annual return with the registration of LLP every year.	Partnership firm is not required to file any annual document with the registrar of firms.
Minor as partner	Minor cannot be admitted to the benefits of LLP.	Minor can be admitted to the benefits of the partnership with the prior consent of the existing partners.

DISTINCTION BETWEEN LLP AND LIMITED LIABILITY COMPANY

Basis	LLP	Limited Liability Company
Act	LLP Act, 2008.	Companies Act, 2013.
Members/ Partners	The persons who contribute to LLP are known as partners of the LLP.	The persons who invest the money in the shares are known as members of the company.
Internal governance structure	The internal governance structure of a LLP is governed by contract agreement between the partners.	The internal governance structure of a company is regulated by statute (i.e., Companies Act, 2013).
Name	Name of the LLP to contain the word “Limited Liability	Name of the public company to contain the word “limited” and Pvt.

Basis	LLP	Limited Liability Company
	partnership" or "LLP" as suffix.	Co. to contain the word "Private limited" as suffix.
No. of members/ partners	Minimum – 2 members Maximum – No such limit on the members in the Act. The members of the LLP can be individuals/or body corporate through the nominees.	Private company: Minimum – 2 members Maximum 200 members Public company: Minimum – 7 members Maximum – No such limit on the members. Members can be organizations, trusts, another business form or individuals
Liability of members/ partners	Liability of a partners is limited to the extent of agreed contribution in case of intention is fraud.	Liability of a member is limited to the amount unpaid on the shares held by them.
Management	The business of the company managed by the partners including the designated partners authorized in the agreement.	The affairs of the company are managed by board of directors elected by the shareholders.
Minimum number of directors/ designated partners	Minimum 2 designated partners.	Pvt. Co. – 2 directors Public co. – 3 directors

THE COMPANIES ACT, 2013

INTRODUCTION

- The Companies Act, 2013 was enacted to consolidate and amend the law relating to the companies.
- The provisions of the Act shall apply to-
  - Companies incorporated under this Act or under any previous company law.
  - Insurance companies
  - Banking companies
  - Companies engaged in the generation or supply of electricity
  - Any other company governed by any special Act for the time being in force.
  - Such body corporate which are incorporated by any Act for time being in force, and as the Central Government may by notification specify in this behalf.

MEANING OF COMPANY

- As per Section 2(20) of the Companies Act, 2013, "Company means a company incorporated under this Act or under any previous company law".
- A company is an incorporated association, which is an artificial person created by law, having a separate entity, with a perpetual succession.

FEATURES OF A COMPANY

1. **Separate Legal Entity:**
    - Its existence is distinct and separate from that of its members.
    - A company can own property, have bank account, raise loans, incur liabilities and enter into contracts.
2. **Perpetual Succession:**
    - Members may die or change, but the company goes on till it is wound up on the grounds specified by the Act.
    - Since a company is an artificial person created by law, law alone can bring an end to its life.
    - Its existence is not affected by the death or insolvency of its members.
3. **Limited Liability:**
    - In the case of a limited liability company, the liability of the members of the company is limited to the extent of the nominal value of shares held by them.
    - In the case of a company limited by guarantee, the members are liable only to the extent of the amount guaranteed by them and that too only when the company goes into liquidation.
    - However, if it is an unlimited company, the liability of its members is unlimited as well.

4. **Artificial Legal Person**

- A company is created by a process of law.
- The company being a separate legal entity can own property, have banking account, raise loans, incur liabilities and enter into contracts.
- It can sue and be sued in its own name.
- Thus, a company is called an artificial legal person.

5. **Common Seal:**

- Common seal is the official signature of a company, which is affixed by the officers and employees of the company on its every document.
- The common seal is a seal used by a corporation as the symbol of its incorporation.

CORPORATE VEIL

- Corporate Veil refers to a legal concept whereby the company is identified separately from the members of the company.
- If the company incurs any debts or contravenes any laws, the corporate veil concept implies that members should not be liable for those errors.
- In other words, they members corporate insulation.

LIFTING OF CORPORATE VEIL

Where the Courts ignore the company and concern themselves directly with the members or managers, the corporate veil may be said to have been lifted.

Only in appropriate circumstances, the Courts are willing to lift the corporate veil and that too, when questions of control are involved rather than merely a question of ownership.

The following are the cases veil may be lifted:

1. **To determine the character of the company i.e. to find out whether co-enemy or friend:**
    - A company may be characterised as an enemy company, if its affairs are under the control of people of an enemy country.
    - For this purpose, the Court may examine the character of the persons who are really at the helm of affairs of the company.
2. **To protect revenue/tax:**

    Where corporate entity is used to evade or circumvent tax, the Court can disregard the corporate entity.
3. **To avoid a legal obligation:**

    Where it was found that the sole purpose for the formation of the company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the Court upheld the piercing of the veil to look at the real transaction.
4. **Formation of subsidiaries to act as agents:**
    - A company may sometimes be regarded as an agent or trustee of its members, or of another company,

and may therefore be deemed to have lost its individuality in favour of its principal.

- Here the principal will be held liable for the acts of that company.

5. **Company formed for fraud/improper conduct or to defeat law:** Where the device of incorporation is adopted for some illegal or improper purpose, e.g., to defeat or circumvent law, to defraud creditors or to avoid legal obligations. [Gilford Motor Co. vs. Horne]

CLASSIFICATION OF COMPANIES ON THE BASIS OF LIABILITY

1. **Company limited by shares:**

- Section 2(22) of the Companies Act, 2013, defines that when the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares.
- Thus, for meeting the debts of the company, the shareholder may be called upon to contribute only to the extent of the amount, which remains unpaid on his shareholdings. His separate property cannot be encompassed to meet the company's debt.

2. **Company limited by guarantee:**

- Section 2(21) of the Companies Act, 2013 defines it as the company having the liability of its members limited by the memorandum to such amount as the

members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up.

- Thus, the liability of the member of a guarantee company is limited upto a stipulated sum mentioned in the memorandum. Members cannot be called upon to contribute beyond that stipulated sum.

3. **Unlimited company:**

- Section 2(92) of the Companies Act, 2013 defines unlimited company as a company not having any limit on the liability of its members. In such a company, the liability of a member ceases when he ceases to be a member.
- The liability of each member extends to the whole amount of the company's debts and liabilities but he will be entitled to claim contribution from other members.

CLASSIFICATION OF COMPANIES ON THE BASIS OF MEMBERS

1. **One-person company [Section 2(62)]:**

- Only one person as member.
- Minimum paid up capital – no limit prescribed
- The MOA shall indicate the name of the other person (nominee), who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company

- The member of OPC may at any time change the name of nominee by giving notice to the company and the company shall intimate the same to the Registrar
- No person shall be eligible to incorporate more than one OPC
- No minor shall become member of the OPC
- Such Company cannot be incorporated or converted into a company under section 8 of the Act. Though it may be converted to private or public companies in certain cases
- Such Company cannot carry out NBFC activities including investment in securities of anybody corporate
- Here, the member can be the sole member and director.

2. **Private Company [Section 2(68)]:**

- No minimum paid-up capital requirement
- Minimum number of members – 2 (except if private company is an OPC, where it will be 1)
- Maximum number of members – 200, excluding present employee-cum-members and erstwhile employee-cum-members
- Right to transfer shares restricted
- Prohibition on invitation to subscribe to securities of the company
- Small company is a private company

- OPC can be formed only as a private company.

3. Public Company [Section 2(71)]:

- Is not a private company (Articles do not have the restricting clauses).
- Shares freely transferable
- No minimum paid up capital requirement
- Minimum number of members – 7
- Maximum numbers of members – No limit
- Subsidiary of a public company is deemed to be a public company

CLASSIFICATION OF COMPANIES ON THE BASIS OF CONTROL

1. Holding and Subsidiary Company

- **Holding company [Section 2(46)]:** Holding company, in relation to one or more other companies, means a company of which such companies are subsidiary companies.
- **Subsidiary company [Section 2(87)]:** means a company in which the holding company —
  - o controls the composition of the Board of Directors; or
  - oexercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies.

However, prescribed class or classes of holding companies shall not have layers of subsidiaries beyond such numbers as may be prescribed.

2. Associate Company [Section 2(6)]:

- In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.
- "**Significant influence**" means control of at least 20% of total voting power, or control of or participation in business decisions under an agreement.
- "**Joint venture**" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.
- "**Total voting power**", in relation to any matter, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of a company if all the members thereof or their proxies having a right to vote on that matter are present at the meeting and cast their votes.

CLASSIFICATION OF COMPANIES ON THE BASIS OF ACCESS TO CAPITAL

1. **Listed company [Section 2(52)] -** Which has any of its securities listed on any recognised stock exchange.
2. **Unlisted company -** company other than listed company.

OTHER COMPANIES

1. **Government company (GC) [Section 2(45)]**
   - At least 51% of the paid-up share capital is held by-
     i. The Central Government (CG), or
     ii. Any State Govt./s (SG), or
     iii. Partly by CG and partly by one or more SG
   - Includes a company which is a subsidiary company of such Government company.
2. **Small Company [Section 2(85)]**
   - A private company
   - **Paid up capital –** not more than Rs 50 lakhs or such higher amount as may be prescribed which shall not be more than 10 crore rupees; and
   - **Turnover (as per P&L A/cc of immediately preceding FY) –** not more than Rs. 2 crores or such higher amount as may be prescribed which shall not be more than Rs. 100 crore rupees.
   - Should not be
     i. Section 8 company
     ii. Holding or a Subsidiary company

iii. a company or body corporate governed by any special Act

3. Foreign company [Section 2(42)]

Any company or body corporate incorporated outside India which—

- has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- conducts any business activity in India in any other manner

4. Formation of companies with charitable objects etc. [Section 8]

- Formed for the promotion of commerce, art, science, religion, charity, protection of environment, sports, etc.
- Uses its profits for the promotion of the objective for which formed
- Does not declare dividend to members
- Operates under a special licence from Central Government
- Need not use the word Ltd./ Pvt. Ltd. in its name and adopt a more suitable name such as club, chambers of commerce etc.
- Enjoy same privileges and obligations as of a limited company
- Licence revoked if conditions contravened

- Can call its general meeting by giving a clear 14 days notice instead of 21 days
- Requirement of minimum number of directors, independent directors etc. does not apply

PROMOTERS

As per Section 2(69) of the Act, "promoter" means the person

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(a) who has been named as such in a prospectus or is identified by the company in the annual return; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

In ordinary language, "promoter" means the person

→ who form the company are known as promoters.

→ who conceive the idea of forming the company.

→ who take all necessary steps for its registration.

→ It should, however, be noted that persons acting only in a professional capacity e.g., the solicitor, banker, accountant etc. are not regarded as promoters.

INCORPORATION OF COMPANY (SECTION 7)

Procedure to be followed for incorporation of a company-

1. **Filing of the documents and information with the registrar:**

   For the registration of the company following documents and information are required to be filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated-

   - the memorandum and articles of the company duly signed by all the subscribers to the memorandum.
   - declaration by person who is engaged in the formation of the company and by a person named in the articles
   - declaration from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles
   - address for correspondence
   - particulars of every subscriber
   - the particulars of the persons mentioned in the articles as the subscribers to the Memorandum
   - particulars of the interests of the persons mentioned in the articles

2. **Issue of certificate of incorporation on registration:** The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

3. **Allotment of Corporate Identity Number (CIN):**

   On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

4. **Maintenance of copies of all documents and information:** The company shall maintain and preserve at its registered office copies of all documents and information as originally filed, till its dissolution under this Act.

5. **Furnishing of false or incorrect information or suppression of material fact at the time of incorporation (i.e. at the time of Incorporation):**

   If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action for fraud.

6. **Company already incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact (i.e. post Incorporation):** Where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent

action, the promoters, the persons named as the first directors of the company and the persons making declaration under this section shall each be liable for action for fraud.

7. **Order of the Tribunal**

Where a company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants,—

- pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- direct that liability of the members shall be unlimited; or
- direct removal of the name of the company from the register of companies; or
- pass an order for the winding up of the company; or
- pass such other orders as it may deem fit

EFFECT OF REGISTRATION

→ From the date of incorporation, the subscribers become the members of the company.

→ The company shall be a body corporate with a name, capable of exercising all the functions of an incorporated company under this Act

→ The company shall have perpetual succession with power to acquire, hold and dispose of property, to contract, to sue and be sued, by the said name.

SHARES

- Section 2(84) of the Companies Act, 2013 defines the term 'share' which means a share in the share capital of a company and includes stock.
- A share thus represents such proportion of the interest of the shareholders as the amount paid up thereon bears to the total capital payable to the company.
- The shares are movable property, transferable in the manner provided by the articles of the company.

KINDS OF SHARE CAPITAL

A. EQUITY SHARE

'Equity share capital'', with reference to any company limited by shares, means all share capital which is not preference share capital.

B. PREFERENCE SHARE CAPITAL

''Preference share capital'', with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—

a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and

b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid- up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;

CLASSIFICATION OF CAPITAL

1. **Nominal or authorised or registered capital:**
   As per section 2(8) of the Companies Act, 2013, "Authorised capital" or "Nominal capital" means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company.
2. **Issued capital:**
   Section 2(50) of the Companies Act, 2013 defines "issued capital" which means such capital as the company issues from time to time for subscription. It is that part of authorised capital which is offered by the company for subscription and includes the shares allotted for consideration other than cash.

3. **Subscribed capital:**

Section 2(86) of the Companies Act, 2013 defines "subscribed capital" as such part of the capital which is for the time being subscribed by the members of a company.

4. **Called-up capital:**

Section 2(15) of the Companies Act, 2013 defines "called- up capital" as such part of the capital, which has been called for payment. It is the total amount called up on the shares issued.

5. **Paid-up capital:**

It is the total amount paid or credited as paid up on shares issued. It is equal to called up capital less calls in arrears.

MEMORANDUM OF ASSOCIATION (MOA)

- The Memorandum of Association of company is in fact its charter; it defines its constitution and the scope of the powers of the company with which it has been established under the Act.
- It contains the object for which the company is formed and therefore identifies the possible scope of its operations beyond which its actions cannot go.
- It enables shareholders, creditors and all those who deal with company to know what its powers are and what activities it can engage in.
- A memorandum is a public document under Section 399 of the Companies Act, 2013. Consequently, every person

entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

- As per Section 4, Memorandum of a company shall be drawn up in such form as is given in Tables A, B, C, D and E in Schedule I of the Companies Act, 2013.

    1. Table A is a form for memorandum of association of a company limited by shares.
    2. Table B is a form for memorandum of association of a company limited by guarantee and not having a share capital.
    3. Table C is a form for memorandum of association of a company limited by guarantee and having a share capital.
    4. Table D is a form for memorandum of association of an unlimited company.
    5. Table E is a form for memorandum of association of an unlimited company and having share capital.

CONTENT OF THE MEMORANDUM

The memorandum of a company shall state—

1. NAME CLAUSE

- The name of the company with the last word "Limited" in the case of a public limited company, or the last words "Private Limited" in the case of a private limited company.
- This clause is not applicable on the companies formed under section 8 of the Act.

2. REGISTERED OFFICE CLAUSE

The State in which the registered office of the company is to be situated.

3. OBJECT CLAUSE

The objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

4. LIABILITY CLAUSE

The liability of members of the company (Liability clause), whether limited or unlimited, and also state, —

- in the case of a company limited by shares, that the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
- in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute.

5. Capital Clause

- The amount of authorized capital divided into share of fixed amounts and the number of shares with the subscribers to the memorandum have agreed to take, indicated opposite their names, which shall not be less than one share.
- A company not having share capital need not have this clause.

6. **Subscription Clause**

- In this clause, the persons (includes a body corporate) subscribing to the memorandum declare their desire to be formed into a company and agree to take the shares indicated opposite their respective names.
- Every subscriber to the Memorandum shall take atleast one share, and shall write against his name, the number of shares taken by him.

7. **Succession Clause (only in the case of OPC):**

- This clause shall state the name of the person who, in the event of the death of the subscriber, shall become the member of the company.
- The above clauses are compulsory and are designated by the Companies Act as "conditions", on the basis of which alone a company is incorporated.

ARTICLES OF ASSOCIATION

1. The articles of association of a company are its rules and regulations, which are framed to manage its internal affairs.
2. The articles of association are the bye-laws of the company according to which director and other officers are required to perform their functions as regards the management of the company.

3. It regulates domestic management of a company and creates certain rights and obligations between the members and the company

4. Just as the memorandum contains the fundamental conditions upon which the company is allowed to be incorporated, so also the articles are the internal regulations of the company

CONTENTS AND MODEL OF ARTICLES OF ASSOCIATION (SECTION 5)

1. **Contains regulations:**
   The articles of a company shall contain the regulations for management of the company.
2. **Inclusion of matters:**
   The articles shall also contain such matters, as are prescribed under the rules. However, a company may also include such additional matters in its articles as may be considered necessary for its management.
3. **Contain provisions for entrenchment:**
   The articles may contain provisions for entrenchment (to protect something) to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.
4. **Manner of inclusion of the entrenchment provision:**
   The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the

articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

5. **Notice to the registrar of the entrenchment provision:** Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

6. **Forms of articles:**

   The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

7. **Model articles:**

   A company may adopt all or any of the regulations contained in the model articles applicable to such company.

8. **Company registered after the commencement of this Act:**

   In case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

DOCTRINE OF ULTRA VIRES	• The meaning of the term ultravires is simply "beyond (their) powers". • When an act is performed, which though legal in itself, is not authorized by the object clause of the memorandum, or by the statute, it is said to be ultravires the company, and hence null and void. • An act which is ultravires the company, the company cannot be ratified even by the unanimous consent of all the shareholders. • An act which is ultravires the directors, but intravires the company can be ratified by the members of the company through a resolution passed at a general meeting. • If an act is ultravires the Articles, it can be ratified by altering the Articles by a Special Resolution at a general meeting.
DOCTRINE OF CONSTRUCTIVE NOTICE	• When the memorandum and articles of association of a company are registered, they become public documents and are open to inspection by anyone on payment of nominal fee. Hence, every person dealing with the company is under an obligation to know the contents of these documents. • Whether a person reads the documents or not, he is presumed to have knowledge of the contents of the

documents. He is not only presumed to have read the documents but also understood them in their true perspective, Thus, if a person enters into a contract which is beyond the powers of the company as defined in the memorandum, or outside the authority of directors as per memorandum or articles, he cannot acquire any rights under the contract against the company.

DOCTRINE OF INDOOR MANAGEMENT

- The Doctrine of Indoor Management is the exception to the doctrine of constructive notice.
- The aforesaid doctrine of constructive notice does in no sense mean that outsiders are deemed to have notice of the internal affairs of the company.
- While persons dealing with a company are presumed to have read the public documents and understood their contents and ascertain that the transaction is not inconsistent therewith, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. It is no part of the duty of an outsider to see how the company carries out its own internal proceedings or indoor management. He can assume that all is being done regularly.
- The doctrine of indoor management, thus, imposes an important restriction on the scope of doctrine of constructive "notice. While the doctrine of “constructive notice” seeks to protect the company against the

outsiders, the principle of indoor management operates to protect the outsiders against the company.

EXCEPTIONS TO THE DOCTRINE OF INDOOR MANAGEMENT

The doctrine of Indoor Management has limitations of its own. That is to say, it is inapplicable to the following cases, namely:

a) **Actual or constructive knowledge of irregularity:**

The rule does not protect any person when the person dealing with the company has notice, whether actual or constructive, of the irregularity.

b) **Suspicion of Irregularity:**

Where the person dealing with the company is put upon an inquiry, for example, where the transaction is unusual or not in the ordinary course of business, it is the duty of the outsider to make the necessary enquiry.

c) **Forgery:**

The doctrine of indoor management applies only to irregularities which might otherwise affect a transaction but it cannot apply to forgery which must be regarded as nullity.

KEY DIFFERENCES BETWEEN MOA VS. AOA

1. **Objectives:**

   Memorandum of Association defines and delimits the objectives of the company whereas the Articles of association lays down the rules and regulations for the internal management of the company. Articles determine how the objectives of the company are to be achieved.

2. **Relationship:**

   Memorandum defines the relationship of the company with the outside world and Articles define the relationship between the company and its members.

3. **Alteration:**

   Memorandum of association can be altered only under certain circumstances and in the manner provided for in the Act. In most cases permission of the Regional Director, or the Tribunal is required. The articles can be altered simply by passing a special resolution.

4. **Ultra Vires:**

   Acts done by the company beyond the scope of the memorandum are ultra-vires and void. These cannot be ratified even by the unanimous consent of all the shareholders. The acts ultra-vires the articles can be ratified by a special resolution of the shareholders, provided they are not beyond the provisions of the memorandum.

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