

CA/CMA/CSEET - FOUNDATION LAW

SUMMARY NOTES

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"OUR GREATEST WEAKNESS LIVES IN GIVING UP. THE MOST CERTAIN WAY TO SUCCEED IS ALWAYS TO TRY JUST ONE MORE TIME"

YOUTUBE CHANNEL: ARHAM INSTITUTE

BY CA VARDHAMAN DAGA

THE INDIAN CONTRACT ACT, 1872

UNIT -1: NATURE OF CONTRACTS

SUMMARY LECTURE



CONTRACT [Section 2(h)] - **“an agreement enforceable by law”**

Two essential elements of contract:-

1. **Agreement** and
2. **Enforceable by law.**



AGREEMENT [section 2(e)] – **“Every promise and every set of promises, forming the consideration for each other”.**

AGREEMENT = OFFER/PROPOSAL + ACCEPTANCE



PROMISE [section 2(b)] - **“When the person to whom the proposal is made signifies his assent there to, the proposal is said to be accepted. Proposal when accepted, becomes a promise”.**

Agreement is the result of the proposal made by one party to the other party and that other party gives his acceptance thereto of course for mutual consideration.



ENFORCEABILITY BY LAW – **contract must give rise to legal obligation.**

PROPOSAL ⇨ ACCEPTANCE ⇨ ACCEPTED PROPOSAL/AGREEMENT ⇨ LEGAL ENFORCEABILITY ⇨ CONTRACT

Difference between Agreement and Contract

BASIS	AGREEMENT	CONTRACT
MEANING	Every promise and every set of promise, forming the consideration for each other. Offer + Acceptance	Agreement enforceable by law. Agreement + legal enforceable
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 legal 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 grant certain rights to every party.
NATURE	All agreements are not contracts.	All contracts are agreements.

ESSENTIALS OF A VALID CONTRACT

As given by Section 10 of ICA, 1872

- ❁ **Offer and acceptance or an agreement.**
- ❁ **Free Consent:** Two or more persons are said to consent when they are **agree upon the same thing in the same sense.**



**ESSENTIAL ELEMENTS
OF A
VALID CONTRACT**

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- ♣ **Capacity of the parties:** Every person is competent to contract who is of the **age of majority, sound mind and not otherwise disqualified by law.**
- ♣ **Consideration:** “quid pro quo” i.e **something in return**
- ♣ **Lawful consideration and object:** Not prohibited by law, fraudulent or opposed to public policy.
- ♣ **Not expressly declared to be void:** Should not be illegal

Not covered by Section 10 of ICA, 1872

- ♣ **Two parties.**
- ♣ **Parties must intend to create legal obligation:** Intention is imp. **Social and Domestic are not enforceable.**
- ♣ **Other formalities to be complied with in certain cases:** Certain contracts to be in writing and registered too.
- ♣ **Certainty of meaning:** Must be certain not vague (not clear) or indefinite.
- ♣ **Possibility of performance of an agreement:** An agreement to do impossible act is not enforceable.

TYPES OF CONTRACT

ON THE BASIS OF THE VALIDITY:

- ♥ **Valid Contract:** An agreement which is **binding and enforceable.**
- ♥ **Void Contract:** Which **ceases to be enforceable by law** becomes void when it ceases to be enforceable (cannot be enforced by a court of law).
- ♥ **Voidable Contract:** An agreement which is **enforceable by law at the option of one or more parties thereto**, but not at the option or other or others is a voidable contract.

BASIS	VOID CONTRACT	VOIDABLE CONTRACT
MEANING	A contract ceases to be enforceable by law becomes void when it ceases to be enforceable.	An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.
CAUSE	Change in law or circumstances beyond the contemplation of parties.	If the consent of the party was not free .
PERFORMANCE OF CONTRACT	Cannot be performed	If the aggrieved party does not, within reasonable time, exercise his rights to avoid the contract, any party can sue the other for claiming the performance of the contract.
RIGHTS	No rights available to any party	The party whose consent was not free has the right to rescind the contract.

- ♥ **Illegal Contracts:** It is a contract which the law forbids to be made.

BASIS	VOID AGREEMENT	ILLEGAL AGREEMENT
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SCOPE`	Is not necessarily illegal	Is always void
NATURE	Not forbidden by law	Are forbidden under law
PUNISHMENT	Not liable for any punishment	Liable for punishment
COLLATERAL AGREEMENT	May be valid also	Are always void

♥ **Unenforceable Contract:** Where a contract is *good in substance but because of some technical defects* 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 FORMATION:

- ◆ **Express Contract:** If the terms are *expressed by words or in writing*
- ◆ **Implied Contract:** Come into *existence by implication*(by law or by action)
- ◆ **Tacit contract:** *By conduct of parties* without any words spoken or written.
- ◆ **Quasi-contract:** 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.*
- ◆ **E-contracts:** *Contract through electronic* means such as emails is known as e-commerce contracts.

ON THE BASIS OF PERORMANCE OF THE CONTRACT:

- ♣ **Executed Contracts:** When the *act is done or executed* or the forbearance (tolerance) is brought on record, then the contract is an executed contract.
- ♣ **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 contract.
 - Unilateral contract:** *One sided contract*, one party performed his duty or obligation and other obligation is outstanding.
 - Bilateral contract:** Where the *obligation or promise is outstanding on the part of both the parties.*

PROPOSAL/OFFER [SECTION 2(a)] OF THE ICA, 1872

DEFINATION: "When one person signifies to another his willingness to do or abstain from doing anything (mujhe padhane se rokne ka offer) with a view to obtaining the assent of that to such act or abstienence, he is said to make a proposal".



CLASSIFICATION OF OFFER:

- ♣ **General offer:** Offer made to public at large and hence anyone can accept and do the desired act.
- ♣ **Special offer:** Offer is made to a specific or an ascertained person.



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♣ **Cross offer:** When *two parties exchange identical offers* in ignorance at the time of each other's offer, the offers are called

cross offer.

♣ **Counter offer:** When the *offeree offers to qualified acceptance* of the offer subject to modification and variations in the terms of original offer, he is said to have a counter offer also called conditional acceptance.

♣ **Standing or continuing or open offer:** Offer which is allowed to *remain open for acceptance over a period of time*. Eg.: tenders invited for supply of goods.



ESSENTIALS OF VALID OFFER:

- ♥ **It must be capable of creating legal relations:** Valid offer in eyes of law. Social and domestic are not covered.
- ♥ **It must be certain, definite and not vague:** Otherwise it cannot create any contractual relationship.
- ♥ **It must be communicated to the offeree:** Otherwise there can be no acceptance of it.
- ♥ **It must be made with a view to obtaining the assent (formal agreement to something) of the other party.**
- ♥ **It may be conditional:** Can be made subject to any terms and conditions by the offeror.
- ♥ **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.
- ♥ **The Offer may be either specific or general.**
- ♥ **Offer is different from a mere statement of intention, an invitation to offer, a mere communication of information, casual equity, a prospectus and advertisement:** "An invitation to make an offer" the person making the invitation does not make an offer rather invites the other party to make an offer.
- ♥ **The offer may be express or implied.**
- ♥ **A statement of price is not an offer.**

WHAT IS INVITATION OF OFFER?

An invitation to offer is **only a circulation of an offer it is an attempt to induce offers and preceded a definite offer**. It is the process of negotiation. Offers made with the intention to negotiate or offers to receive offers are known as invitation to offer. Mere statement of lowest price is not offer intention is to seen. E.g. invitation by a company to the public to subscribe for its shares.

ACCEPTANCE [SECTION 2(b)] of the ICA, 1872

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DEFINATION: “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”.

RELATIONSHIP BETWEEN OFFER AND ACCEPTANCE

“Acceptance is to offer what a lighted match is to a train of gun powder”.

- ◆ Offer can be withdrawn just before it is accepted.
- ◆ Acceptance converts the offer into a promise and then it is too late to revoke it.
- ◆ Offer in itself cannot create any legal relationship but it is the acceptance by the offeree which creates a legal relationship.
- ◆ Offer remains an offer as long as it is not accepted but becomes a contract as soon as it is accepted.

LEGAL RULES REGARDING A VALID ACCEPTANCE:

- ♣ Acceptance can be given by the person to whom offer is made.
- ♣ Acceptance must be absolute and unqualified: 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, the it must be accepted accordingly.
- ♣ The acceptance must be communicated: To conclude a contract between the parties, the acceptance **must be communicated in some perceptible (that can be seen or felt) form**.
- ♣ Acceptance must be in the prescribed mode.
- ♣ Time: Acceptance must be **within specified time limit, if no time specified the within reasonable time**. Reasonable time depends upon the facts and circumstances of the particular case.
- ♣ Mere silence is not acceptance: **Mere silence or failure to answer is not acceptance**, unless the offeree has in any previous conduct indicated that his silence is the evidence of acceptance.
- ♣ Acceptance by conduct/implied acceptance: When a person **performs the act intended by the proposer** as the consideration for the promise offered by him, the performance of the act constitute acceptance.

COMMUNICATION OF OFFER AND ACCEPTANCE

COMMUNICATION OF OFFER: “Communication of offer is complete when it comes to the knowledge of the person to whom it is made”. When proposal is made by post, the communication will be complete when the letter containing the proposal reaches the person to whom it is made. Mere receiving the letter is not sufficient, he must receive or read the message contained in the letter.

COMMUNICATION OF ACCEPTANCE:

- ♣ Modes of acceptance:

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- ◆ **Communication by act:** Would include any *expression of words* whether written (letters, telegrams, faxes, emails and advertisement) or *oral* (telephone messages). Communication include any conduct.
- ◆ **Communication of acceptance by 'omission' to do something:** Omission is conveyed by *a conduct or a forbearance* on the part of one person to convey his willingness or assent.
- ♣ **When communication of acceptance is complete.** It is complete,
 - ♥ **As against the proposer** (jo acceptance file kar raha hai), 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.
 - ♥ **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,**
 - ♣ **As against the proposer**, when the *letter of acceptance is posted*
 - ♣ **As against the acceptor**, when the *letter reaches the proposer*
- ♣ **Acceptance over telephone or telex or fax:** 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.
- ♣ **Communication of special conditions:** *Special conditions are tacitly* (implied without being directly stated eg. Conditions of travel printed are printed at the back of the tickets) and the acceptance of these conditions are also conveyed by the offeree again tacitly or without him even realizing it.

COMMUNICATION OF PERFORMANCE:

Communication of a proposal is complete when it comes to the knowledge of the person to whom it is meant.

- ♣ **From the viewpoint of proposer**, when the acceptance is *put in to a course of transmission*, when it would be out of the power of acceptor.
- ♣ **From the view point of acceptor himself**, it would be complete *when it comes to the knowledge of the proposer*.

At times the offeree may be required to communicate the performance (or act) by way of acceptance. In this case it is not enough if the offeree merely performs the act but he should also communicate his performance unless the offer includes a term that a mere performance will constitute acceptance.

RECOVATION OF OFFER AND ACCEPTANCE

Communication of revocation (of the proposal or its acceptance) is complete.

- ◆ **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
- ◆ **As against the person to whom it is made**, when it *comes to his knowledge*.

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If you revoke your proposal made to me by a telegram, the revocation will be complete, as far as you are concerned when you are dispatched the telegram. But as far as i am concerned, it will be complete only when i receive the telegram.

Revocation of acceptance by me will be complete when i dispatch the telegram and against you, it will be complete when it reaches you.

- ◆ **Contract through post:** The acceptor or can revoke his acceptance any time before the letter of acceptance reaches the offeror, if the revocation telegram arrives before or at the same time with the letter of acceptance, the revocation is absolute.
- ◆ **Contract over telephone:** Contract is formed as soon as the offer is accepted but the offeree must make it sure that his acceptance is received by the offeror, otherwise there will be no contract, as communication of acceptance is not complete.

REVOCAION OF PROPOSAL OTHERWISE THAN BY COMMUNCIATION

MODES OF REVOCATION:

- ♥ *By notice of revocation.*
- ♥ *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.
- ♥ *By non fulfilment of condition precedent:* Where the acceptor fails to fulfil a conditions precedent to acceptance the proposal gets revoked.
- ♥ *By death or insanity:* when it comes to the knowledge of the acceptor.
- ♥ *By counter offer.*
- ♥ *By the non acceptance of the offer according to the prescribed or usual mode.*
- ♥ *By subsequent illegality.*

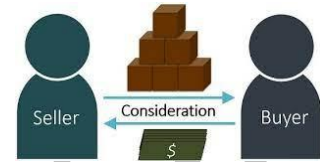
UNIT -2: CONSIDERATION



DEFINATION: 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 act or abstinence or promise is called consideration for the promise”.

The term used in the sense of *quid pro quo*, i.e. **something in return**.



LEGAL RULES REGARDING CONSIDERATION

- ♣ **CONSIDERATION MUST MOVE AT THE DESIRE OF THE PROMISOR.**
- ♣ **CONSIDERATION MAY MOVE FROM PROMISEE OR ANY OTHER PERSON.**
- ♣ **EXECUTED AND EXECUTORY CONSIDERATION.**
- ♣ **CONSIDERATION MAY BE PAST, PRESENT OR FUTURE.**
- ♣ **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 regards as having some value.*
- ♣ **PERFORMANCE OF WHAT ONE IS LEGALLY BOUND TO PERFORM:** (*consideration must not be for existing duty*) 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.
- ♣ **CONSIDERATION MUST BE REAL AND NOT ILLUSORY:** It must be something to which the law attaches some value.
- ♣ **CONSIDERATION MUST NOT BE UNLAWFUL, IMMORAL, OR OPPOSED TO PUBLIC POLICY.**

SUIT BY A THIRD PARTY TO A CONTRACT

Though under the ICA, 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 strangers 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:

- ♣ **IN 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.
- ♣ **IN THE CASE OF FAMILY SETTLEMENT,** if the terms of the settlement are reduced into writing, the members of family who originally had been parties to the settlement may enforce the agreement.

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- ♣ **IN THE CASE OF CERTAIN MARRIAGE CONTRACT/ARRANGEMENTS**, a provision may be made for the benefits of a person, he may file the suit though he is not a party to the agreement.
- ♣ **IN THE CASE OF ASSIGNMENT OF A CONTRACT**, when the benefits under a contract has been assigned, the assignee can enforce the contract.
- ♣ **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.
- ♣ **IN THE CASE OF CONVENANTS RUNNING WITH THE LAND**, the person who purchases land with notice that the owner land is bound by certain duties affecting land, the covenant affecting the land may be enforced by the successor of the seller.
- ♣ **CONTRACTS ENTERED INTROUGH AN AGENT**, the principal can enforce the contract 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

The general rule is that an agreement made without consideration is void. However there are certain exceptions to this rule. **In the following cases, the agreement though made without consideration, will be valid and enforceable.**

- ♥ **NATURAL LOVE AND AFFECTION**: conditions to be fulfilled
 - (i) It must be made out of **natural love and affection** between the parties.
 - (ii) Parties must stand in **near relationship** to each other.
 - (iii) It must be in **writing**.
 - (iv) It must also **be registered** under the law.
- ♥ **COMPENSATION FOR PAST VOLUNTARY SERVICES**: In order that a promise to pay for the past voluntary services be binding, the following essential factors must exist:
 - (i) The services should have been rendered **voluntary**.
 - (ii) The services must have been **rendered for the promisor**.
 - (iii) The **promisor must be in existence** at the time when services were rendered.
 - (iv) The promisor must have **intended to compensate** the promisee.
- ♥ **PROMISE TO PAY TIME BARRED DEBT**: where in writing signed by the person making it or by his authorized agent, is made to pay a debt barred by limitation it is valid without consideration.
- ♥ **AGENCY**: No consideration is necessary to create an agency.
- ♥ **COMPLETED GIFT**.
- ♥ **BAILMENT**.
- ♥ **CHARITY**.



UNIT – 3:- OTHER ESSENTIAL ELEMENTS OF A CONTRACT

SUMMARY LECTURE



CAPACITY TO CONTRACT

“every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject”.



LAW RELATING TO MINOR'S AGREEMENT/POSITION OF MINOR

- ❖ 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 beginning.
- ❖ NO RACTIFICATION 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.*
- ❖ MINOR CAN BE A BENEFICIARY OR CAN TAKE BENEFITS OUT OF A CONTRACT: A minor cannot become partner in a partnership firm. However, he may with the consent of all the partners, be admitted to the benefits of partnership.
- ❖ 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.
- ❖ LIABILITY FOR NECESSARIES: A claim for necessities 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 necessities. There is no personal liability of the minor, but only his property is liable.
- ❖ 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. The guardian of a minor has no power to bind the minor by a contract for the purchase of immovable property.
- ❖ NO SPECIFIC PERFORMANCE.
- ❖ NO INSOLVENCY.
- ❖ PARTNERSHIP.
- ❖ MINOR CAN BE 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.
- ❖ MINOR CANNOT BIND PARENT OR GUARDIAN: Even for necessities. The parents will be liable only when the child is acting as an agent for parents.
- ❖ JOINT CONTRACT BY MINOR AND ADULT: In such a case, the adult will be liable on the contract and not the minor.
- ❖ MINOR AS SHAREHOLDER: Cannot be shareholder.



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- ❖ **LIABILITY FOR TORTS:** *A tort is civil wrong.* A minor is liable in tort unless the tort in reality is a breach of contract.
- ❖ **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.

PERSON OF SOUND MIND

“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 judgment as to its effect upon its interest”.



Person who is usually of unsound mind but occasionally of sound mind may make a contract when he is of sound mind. Person who is usually of sound mind but occasionally of unsound mind may not make a contract when he is of unsound mind.

CONTRACT BY DISQUALIFIED PERSONS:

The following persons fall in this category: *Foreign sovereigns and ambassadors, alien enemy, corporations, convicts, insolvents etc.*



FREE CONSENT

“two or more persons are said to consent when they agree upon the same thing in the same sense”.

ELEMENTS VITIATING FREE CONSENT

♣ COERCION:

- ♥ **Committing or threatening to commit any act** forbidden by the India 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.**
- ♥ It is to be noted that is immaterial whether the Indian penal code is or is not in force at the place where the coercion is employed.

If coercion had a face:

This is the only way to marry my crush



Effect of coercion:

- **Voidable** at the option of the party whose consent was so obtained.
- As to the **consequences of the rescission of voidable contract**, the party rescinded a void contract should, if he has received any benefit, there under from the other party to the contract, **restore such benefits so far as may be applicable, to the person from whom it was received.**
- A person to whom money has been **paid or anything delivered under coercion must repay or return it.**

♣ UNDUE INFLUENCE:

- ◆ **Relation between the parties.**
- ◆ **Position to dominate the will.**



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A person is deemed to be in such position in the following conditions:

- ♣ **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.**
- ♣ **Fiduciary relationship**: Where relation of trust and confidence exist 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.**
- ♣ **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 temporarily or permanently affected by the reason of mental or bodily distress, illness or old age.**
- ♣ **Unconscionable bargains**: Unfair bargains are witnessed mostly in money – **lending transactions and in gifts.**
 - ◆ **The object must be to take undue advantage.**
 - ◆ **Burden of proof: Dominate party**

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 there under, upon such terms and conditions as to the court may seem just.

♣ **FRAUD:**

The following are the essential elements of the fraud:

- ♣ There **must be representation or assertion and it must be false.** However, silence may amount to fraud or an active concealment may amount to fraud.
- ♣ The representations **must be related to a fact.**
- ♣ The representations should be made **before the conclusion of the contract of the contract with the intention to induce the other party to act upon it.**
- ♣ The representations or statement should be made **with a knowledge of its falsity or without belief in its truth or recklessly not carrying whether it is true or false.**
- ♣ The **other party must have been induced to act upon the representations or assertion.**
- ♣ The **other party must have relied upon the representations and must have been deceived.**
- ♣ The other party acting on the representation **must have consequently suffered a loss**



Effect of fraud upon validity of a contract: The contract is voidable at option of the party defrauded and he has the following remedies:

- ♥ He can **rescind** the contract within a reasonable time.
- ♥ He can **sue for damages.**
- ♥ 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 obligations to disclose the whole truth to the other party. **There is no duty to disclose facts which are within the knowledge of both the parties.**

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Silence is fraud:

Duty of persons to speak:

Following contracts come within this category:

- ♣ **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.*
- ♣ **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.
- ♣ **Contract of marriage:** *Every material fact must be disclosed* by the parties to a contract of marriage.
- ♣ **Contract of family settlement:** These contract also require *full disclosure of material facts* within the knowledge of the parties.
- ♣ **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.

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 amount to speech. In case of fraudulent silence, contracts is not voidable if the party whose consent was so obtained had the means of discovering the truth with ordinary diligence.

♣ **MISREPRESENTATION:** There is misrepresentation:

- ♣ *Statement of fact, which of false*, would constitute misrepresentation if the *maker believes it to be true but which is not justified by the information he possesses;*
- ♣ When there is a *breach of duty by a person without any intention to deceive* which brings an advantage to him;
- ♣ When a *party causes, even though done innocently*, the other party to the agreement to make a mistake as to the subject matter.



DIFFERENCE BETWEEN COERCION AND UNDUE INFLUENCE

BASIS	COERCION	UNDUE INFLUENCE
NATURE OF ACTION	It involves the <i>physical force or threat.</i>	It involves <i>moral or mental pressure.</i>
INVOLVEMENT OF CRIMINAL ACTION	It involves committing or threatening to commit and act forbidden by Indian penal code or detaining or threatening to detain property unlawfully.	<i>No such illegal act is committed</i> or a threat is given.
RELATIONSHIP BETWEEN PARTIES	It is <i>not necessary</i> that there must be some sort of relationship between the parties.	<i>Some sort of relationship</i> between the parties is <i>absolutely necessary.</i>
EXERCISED BY	<i>Coercion need not proceed from the</i>	Undue influence is always

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WHOM	<i>promisor nor need it be the directed against the promisor. It can be used even by a stranger.</i>	exercised <i>between parties to the contract.</i>
ENFORCEABILITY	The contract is <i>voidable</i> at the option of the party whose consent has been obtained by the coercion.	Where the consent is induced by undue influence, the contract is <i>either voidable or the court may set it aside or enforce</i> it in a modified form.
POSITION OF BENEFITS RECEIVED	In case of coercion where the contract is rescinded by the aggrieved party, as per section 64, <i>any benefit received has to be restored back to the other party.</i>	<i>The court has the discretion to direct the aggrieved party to return the benefit in whole or in part or not to give any such directions.</i>

DIFFERENCE BETWEEN FRAUD AND MISREPRESENTATION

BASIS	FRAUD	MISREPRESENTATION
INTENTION	To <i>deceive the other party</i> by hiding the truth	There is <i>no such intention</i> to deceive the other party.
KNOWLEDGE OF TRUTH	<i>The person making the suggestion</i> believes that the statement as <i>untrue</i>	The person making the suggestion <i>believes that the statement as true, although it is not true.</i>
RECESSION OF THE CONTRACT AND CLAIM FOR DAMAGES	The injured party <i>can repudiate the contract and claim damages.</i>	The injured party is entitled to <i>repudiate the contract or sue for restitution but cannot claim the damages.</i>
MEANS TO DISCOVER THE TRUTH	<i>The party using the fraudulent act cannot secure or protect himself</i> by saying that the injured party had means to discover the truth	<i>Party can always plead</i> that the injured party had the means of discover the truth.

LEGAL EFFECTS OF AGREEMENTS WITHOUT FREE CONSENT

When the consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was so caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

EXCEPTION: *If such consent was caused by misrepresentation or by silence, fraudulent, the contract is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.*

Where a party to contract commits fraud or misrepresentation, but the other party is not, in fact, misled by such fraud or misrepresentation, the contract cannot be avoided by the later.

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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 a contract is under a mistake.

EFFECT OF MISTAKE ON VALIDITY OF A CONTRACT:

It may be of two kinds-

- ♥ **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. But if the mistake of law is caused through the inducement of another, the contract may be avoided. **Mistake of foreign law is excusable** and is treated like a mistake of fact. Contract may be avoided on such mistake.
- ♥ **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

The consideration or object of an agreement is lawful, unless-

- ◆ **When consideration or object is forbidden by law:** Acts forbidden by law are those which are punishable under any statute as well as those prohibited by regulations or orders made in exercise of the authority conferred by the legislature.
- ◆ **When consideration or object defeats the provision of law:** The word 'defeat the provision of any law' must be taken as limited to defeating the intention which the law has expressed. The court looks at the real intention of the parties to an agreement. If the intention of the parties is to defeat the provision of law, the court will not enforce it.
- ◆ **When it is fraudulent:** Agreement which are entered into to promote fraud are void.
- ◆ **When consideration defeats any rule for the time being in force in India.**
- ◆ **When consideration involves injury to the person or property of another:** The general term "injury" means criminal or wrongful harm.
- ◆ **When consideration is immoral (unlawful).**
- ◆ **when consideration is opposed to public policy:** Some of the agreements which are held to be opposed to public policy are-
 - ♣ **Trading with enemy:**
 - ♣ **Stifling prosecution:** An agreement to stifle prosecution i.e. "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.
 - ♣ **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

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hand over a portion of the proceeds of the action. The agreement for supplying funds by way of maintenance or champerty is valid unless

(a) *It is unreasonable so as to be unjust to other party or*

(b) *It is made by a malicious motive like that of gambling in litigation or oppressing other party by encouraging unrighteous suits and not with the bonafide object of assisting a claim believed to be just.*

- ♣ 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 consideration for the appointment to an office in which the public is interested.
- ♣ Agreement tending to create monopolies.
- ♣ Marriage brokerage agreement.
- ♣ Interference with the court of justice: *An agreement whose objects is to induce any judicial officer of the state to act partially or corruptly is void*, as it is opposed to public policy.
- ♣ Interest against obligations.
- ♣ Consideration unlawful in part: 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.

VOID AGREEMENTS (EXPRESSLY DECLARED VOID AGREEMENTS)

- ♣ AGREEMENT IN RESTRAINT OF MARRIAGE: In case of minor it is valid.
- ♣ AGREEMENT IN RESTRAINT OF TRADE: An agreement by which any person is restrained from exercising lawful profession, trade or business of any kind, is to that extent void. *But this rule is subject to the following 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.* The local limits within which the seller of the goodwill agrees not to carry on similar business must be reasonable.
- ♣ AGREEMENT IN RESTRAINT OF LEGAL PROCEEDING: 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 a 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.*
- ♣ AGREEMENT – THE MEANING OF WHICH IS UNCERTAIN.



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♣ **WAGERING AGREEMENT:** *essential of a Wager*

- There must be a **promise to pay money or money's worth**.
- Promise must be **conditional on an event happening or not happening**.
- There must be **uncertainty of event**.
- There must be **two parties, each party must stand to win or lose**.
- There must be **common intention** to bet at the timing of making such agreement.
- **Parties should have no interest in the event except for stake**.



TRANSACTION SIMILAR TO WAGERING (gambling)

- ♥ Lottery transactions.
- ♥ Crossword puzzles and competitions
- ♥ Speculative transaction: An agreement or a share market transaction where the parties intend to settle the difference between the contract price and the market price of certain goods or shares on a specified day, is a gambling and hence void.
- ♥ Horse race transactions.

TRANSACTION RESEMBLING WITH WAGERING TRANSACTION BUT ARE NOT VOID

- ♦ Chit fund: 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.
- ♦ 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 athletic competition.
- ♦ A contract of insurance.

DISTINCTION BETWEEN CONTRACT OF INSURANCE AND WAGERING AGREEMENT

BASIS	CONTRACT OF INSURANCE	WAGERING AGREEMENT
MEANING	It is a contract to indemnify the loss	It is a promise to pay money or money's worth on the happening or non-happening of an uncertain event.
CONSIDERATION	The crux of insurance contract is the mutual consideration (premium and compensation)	There is no consideration between the two parties. There is just gambling for money.
INSURABLE INTEREST	Insured party has insurable interest in the life or property sought to be insured	There is no property in case of wagering agreement. There is betting on other's life and properties.
CONTRACT OF INDEMNITY	Except life insurance, the contract of insurance indemnifies the insured	Loser has to pay the fixed amount on the happening of uncertain event.

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	<i>person against loss.</i>	
ENFORCEABILITY	It is <i>valid and enforceable</i>	It is <i>void and unenforceable</i> agreement.
PREMIUM	Calculation of premium is <i>based on scientific and actuarial calculations of risks.</i>	<i>No such logical calculations</i> are required in case of wagering agreement.
PUBLIC WELFARE	They are <i>beneficial to the society</i>	They have been <i>regarded as against the public welfare.</i>

UNIT-4:- PERFORMANCE OF CONTRACTS

SUMMARY LECTURE



OBLIGATION OF PARTIES TO CONTRACTS (SECTION 37)

It is the primary duty of each party to a contract to either perform or offer to perform his promise. He is absolved from such a responsibility only when a provision of law or an act of the other party to the contract, the performance can be dispensed with or excused.

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 (dono party apne apne obligations kar chuke hai).*

OFFER TO PERFORM OR ATTEMPTED PERFORMANCE OR TENDER OF PERFORMANCE: *Promisor offers to perform his obligations but the promisee refuses to accept the performance.*

BY WHOM A CONTRACT MAY BE PERFORMED

PERSON BY WHOM PROMISE IS TO BE PERFORMED

- ❖ **Promisor himself:** As per the intention of the contract if it seems then *promisor should himself perform*. If contract involves exercise of personal skill or diligence or of personal confidence then promisor.
- ❖ **Agent:** Person competent to perform it.
- ❖ **Legal representative:** *Where a contract involves the use of personal skills or is founded on personal confidence comes to end on the death of the promisor.* In other cases legal representative should perform. But his liability is limited to the value of the property they inherit.
- ❖ **Third person:** When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.
- ❖ **Joint promisors:** *All such persons must jointly fulfil the promise.* If anyone dies then his legal representative will perform.

DISTINCTION BETWEEN SUCCESSION AND ASSIGNMENT

SUCCESSION: When the benefits of a contract are succeeded to or by the process of law, then both burden and benefits attaching to the contract, may sometimes devolve on the legal heir. *The liability of the son will be limited to the extent of the property inherited by him.*

ASSIGNMENT: *Benefit of a contract can only be assigned but not the liabilities there under.* This is because when the liability is assigned, a third party gets involved therein.

EFFECT OF REFUSAL TO ACCEPT OFFER OF PERFORMANCE

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 fulfil certain conditions:

- ♣ It must be **unconditional**.



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- ♣ It must be made at a **proper time and place**, and under such circumstances as may be prescribed. Promisor must have ability and willingness to perform.
- ♣ If the offer to deliver anything to the promisee, then the **promisee must have a reasonable opportunity of seeing that**.

An offer to one of several joint promises has the same legal consequences as an offer to all of them.

EFFECT OF A REFUSAL OF PARTY TO PERFORM PROMISE

THE TWO RIGHTS ACCRUE TO THE AGGREIVED PARTY:

- ♥ To **terminate** the contract
- ♥ 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

All the promisor or promisee or their legal representative.

ANY ONE OF JOINT PROMISORS MAY BE COMPELLED TO PERFORM: 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: 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: Release of one joint promise will not release other joint promise from his responsibility.

RIGHT OF JOINT PROMISEES: Can recover from joint promisor or their legal representative.

TIME AND PLACE FOR PERFORMANCE OF THE PROMISE

- ◆ **TIME FOR PERFORMANCE OF PROMISE, WHERE NO APPLICATION IS TO BE MADE AND NO TIME IS SPECIFIED:** The engagement must be performed within a **reasonable time**.
- ◆ **TIME AND PLACE FOR PERFORMANCE OF PROMISE, WHERE TIME IS SPECIFIED AND NO APPLICATION TO BE MADE:** When the promise is to be performed on a certain day, the promisor may perform it at any time during the **usual hours of business**, on such a day and the place at which the promise ought to be performed.
- ◆ **APPLICATION FOR PERFORMANCE ON CERTAIN DAY TO BE AT PROPER TIME AND PLACE:** It is the duty of the promisee to apply for performance at a **proper place and within the usual hours of business**.
- ◆ **PLACE FOR THE PERFORMANCE OF PROMISE, WHERE NO APPLICATION TO BE MADE AND NO PLACE FIXED FOR PERFORMANCE:** It is the duty of the promisor to apply to the promisee to appoint a **reasonable place** for the performance of the promise.
- ◆ **PERFORMANCE IN MANNER OR AT TIME PRESCRIBED OR SANCTIONED BY PROMISEE.**



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PERFORMANCE OF RECIPROCAL PROMISE



- ❖ PROMISOR NOT BOUND TO PERFORM, UNLESS RECIPROCAL PROMISE READY AND WILLING TO PERFORM: In this case no promisor need to perform his promise *unless the promisee is ready and willing to perform his reciprocal promise.*
- ❖ ORDER OF PERFORMANCE OF RECIPROCAL PROMISES: The order of performance may sometimes be indicated not expressly, but by *the nature of the transactions.*
- ❖ LIABILITIES OF PARTY PREVENTING EVENT ON WHICH THE CONTRACT IS TO TAKE EFFECT: When a contract contains reciprocal promises, and one party to the 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.
- ❖ EFFECT OF DEFAULT AS TO THAT PROMISE WHICH SHOULD BE FIRST PERFORMED, IN CONTRACT CONSISTING OF RECIPROCAL PROMISES: *When the promises are reciprocal and dependent.* If the promisor who has to perform his promise before the performance of the other's promise fails to perform it, *he cannot claim performance of the other's promise, and is also liable for compensation for his non-performance.*
- ❖ EFFECT OF FAILURE TO PERFORM AT A TIME FIXED IN A CONTRACT IN WHICH TIME IS ESSENTIAL: *Becomes voidable at the option of the promisee.*

EFFECT OF SUCH FAILURE WHEN TIME IS NOT ESSENTIAL

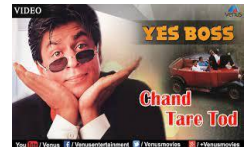
Contract does not become voidable *but promise is entitled to compensation* for any loss occasioned to him by such failure.

EFFECT OF ACCEPTANCE OF PERFORMANCE AT TIME OTHER THAN AGREED UPON

The promisee *cannot claim compensation* for any loss occasioned by the non-performance of the promise at the time agreed.

- ❖ AGREEMENT TO DO IMPOSSIBLE ACT:

(1) INITIAL IMPOSSIBILITY (impossibility existing at the time of contract): *The agreement would be void* (if known to the parties or unknown to the parties). But if only known by promisor, then promisee is entitled to claim compensation for any loss suffered on account of non performance.



(2) SUBSEQUENT OR SUPERVENING IMPOSSIBILITY (becomes impossible after entering into contract): When performance of promise becomes impossible or illegal by *occurrence of an unexpected event or a change of circumstances beyond the contemplation of parties, contract becomes void and the parties are discharged.*



- ❖ RECIPROCAL PROMISE TO DO CERTAIN THINGS THAT ARE LEGAL, AND ALSO SOME OTHER THINGS THAT ARE ILLEGAL: *Legal set of promise is valid contract, but the second is a void agreement.*
- ❖ 'ALTERNATIVE PROMISE' ONE BRANCH BEING ILLEGAL: *One branch being legal can be enforced.*

APPROPRIATION OF PAYMENTS:

The payment is appropriated (i.e. adjusted against the debts).

- ♣ APPLICATION OF PAYMENT WHERE DEBT TO BE DISCHARGED IS INDICATED: Where the payment is made with express



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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*.

- ♣ **APPLICATION OF PAYMENT WHERE DEBT TO BE DISCHARGED IS NOT INDICATED:** 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 its discretion to any lawful debt actually due and its recovery is not barred by the law.*
- ♣ **APPLICATION OF PAYMENT WHERE NEITHER PARTY APPROPRIATES:** The payment shall be applied in discharge of the debts in *order of time*.

CONTRACTS, WHICH NEED NOT BE PERFORMED – WITH THE CONSENT OF BOTH THE PARTIES

- ♥ **EFFECT OF NOVATION, RECISSION, AND ALTERATION OF CONTRACT:**
 - (a) **EFFECT OF NOVATION:** *Substitute new contract for old one.* Old contract will be discharged and need not be performed.
 - (b) **EFFECT OF RECISSION:** *Only the old contract is cancelled and no new contract comes to exist in its place.*
 - (c) **EFFECT OF ALTERATION OF CONTRACT:** *Contract is also discharged by alteration.* Alteration means change in terms and condition of original agreement but the parties to the contract will remain same.
- ♥ **PROMISEE MAY WAIVE OR REMIT PERFORMANCE OF PROMISE:** A contract may be discharged by remission.
- ♥ **RESTORATION OF BENEFIT UNDER A VOIDABLE CONTRACTS:** Where any party to the contract has received any benefit under the contract, he must restore such benefits to the person from whom he has received it.
- ♥ **OBLIGATIONS OF PERSON WHO HAS RECEIVED ADVANTAGE UNDER VOID:** In such case either the advantage received must be restored back or a compensation, sufficient to put the position prior to contract, should be paid.
- ♥ **COMMUNICATION OF RECISSION:** Rescission must be communicated to the other party in the same manner as proposal is communicated.
- ♥ **EFFECT OF NEGLIGENCE OF PROMISEE TO AFFORD PROMISOR REASONABLE FACILITIES FOR PERFORMANCE:** The promisor is excused by such neglect or refusal as to any non performance caused thereby.

DISCHARGE OF CONTRACT

- ◆ **DISCHARGE BY PERFORMANCE:** Parties to the contract fulfil their obligations arising under the contract with the time and in the manner prescribed. *It can be actual or attempted performance.*
- ◆ **DISCHARGE BY MUTUAL AGREEMENT:** If the parties to the contract agree to substitute, rescind, remit or alter, *the original contract need not be performed.*
- ◆ **DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE:** It *could be initial or supervening.* Supervening may be due to
 - (a) *Unforeseen change in law*
 - (b) *Destruction of the subject matter essential to that performance*
 - (c) *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 dangerously malady.*



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(d) Declaration of a war.

- ◆ **DISCHARGE BY LAPSE OF TIME**: Contract to be performed *within the specified time*.
- ◆ **DISCHARGE BY OPERATION OF LAW**: Includes by *death* of the promisor, *by insolvency* etc.
- ◆ **DISCHARGE BY BREACH OF CONTRACT**: Covered under next chapter
- ◆ **PROMISE MAY WAIVE OR REMIT PERFORMANCE OF PROMISE**: Contract may be discharged by *remission*.
- ◆ **EFFECT OF NEGLIGENCE OF PROMISEE TO AFFORD PROMISOR REASONABLE FACILITIES FOR PERFORMANCE**: The promisor is excused by such neglect or refusal as to any non performance caused thereby.
- ◆ **MERGER OF RIGHTS**: Sometimes, *the inferior rights and the superior rights coincide and meet in one and the same person*. The inferior rights vanish and are not required to be enforced.

UNIT – 5:- BREACH OF CONTRACT

Breach means *failure of a party to perform his or her obligation under a contract*. Breach of contract may arise in two ways:



- ❖ **ANTICIPATORY BREACH OF CONTRACT:** 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. It can be expressed or implied by the conduct of parties.



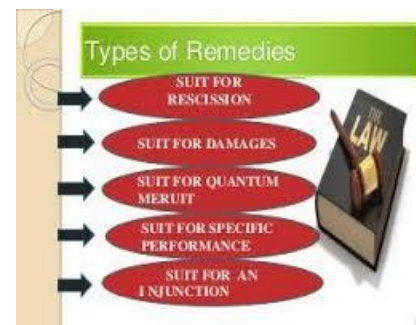
EFFECT OF ANITICIPATORY BREACH:

- ♣ To 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,
- ♣ He 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:** It is a case *of refusal to perform the promise on the scheduled date.* Actual breach may be committed-
 - ♣ *At the time when the performance of the contract is due.*
 - ♣ *During the performance of the contract.*



REMEDIES FOR BREACH OF CONTRACT

- ♥ **SUIT FOR DAMAGES:** 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 damages caused to him by breach. Special damage can be claimed only on a previous notice. No compensation is payable for any remote or indirect loss.*



REMEDIES BY WAY OF DAMAGES OR KIND OF DAMAGES:

- ♦ **GENERAL/ORDINARY DAMAGES:** 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 breach of it.*
- ♦ **SPECIAL DAMAGES:** Where a party to a contract receives a notice of special circumstances affecting the contract then he will be liable for special damages also.
- ♦ **VINDICTIVE OR EXEMPLARY DAMAGES:** In two cases:
 - ♣ *For breach of promise to marry because it causes inquiry to his or her feelings; and*
 - ♣ *For wrongful dishonour by a banker of his customer’s cheque as it causes loss of credit and reputation of drawer.*
- ♦ **NOMINAL DAMAGES:** The amount may be a rupee or even 10 paise.

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- ◆ **DAMAGES FOR DETERIORATION CAUSED BY DELAY:** Damages can be recovered from carrier even without notice. It can be recovered in case of loss of special opportunity for sale.
- ◆ **PRE-FIXED DAMAGES:** It is *also called liquidated damages*. 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.

PENALTY AND LIQUIDATED DAMAGES: As per English law both words have different meaning and Indian law makes no distinction between two words.

DISNTICTION BETWEEN LIQUIDATED DAMAGES AND PENALTY:

- ♣ If the sum payable is *so large as to be far in excess* of the probable damage on breach, it is certainly *a penalty*.
- ♣ Where a sum is expressed to be payable on a certain date and *a further sum in the event of default being made, the latter sum is penalty* because mere delay in payment is unlikely to cause damage.
- ♣ If the *sum fixed in contract is extravagant or exorbitant, the court will regard it as a penalty* even if, it is termed as liquidated damages in the contract.
- ♣ The essence of a *penalty is payment of money stipulated as a terrorem* of the offending party. The essence *of liquidated damages is a genuine pre-estimate* of the damage.
- ♣ However *court cannot allow more than the damages as fixed in the contract*.

BESIDES CLAIMING DAMAGES AS A REMEDY FOR THE BREACH OF CONTRACT, THE FOLLOWING REMENDIES ARE ALSO AVAILABLE:

- ♥ **RESCISSION OF CONTRACT:** Other party can claim compensation for any damages that he may have suffered.
- ♥ **QUANTAM MERUIT:** As much as the party doing the service has deserved. For the application of this doctrine, two conditions must be fulfilled:
 - ◆ *It is only available if the original contract has been discharged.*
 - ◆ *The claim must be brought by a party not in default.*

THE CLAIM FOR QUANTUM MERUIT ARISES IN THE FOLLOWING CASES:

- *When an agreement is discovered to be void or when a contract becomes void.*
- *When something is done without any intention to do so gratuitously.*
- *Where there is an express or implied contract to render services but there is no agreement as to remuneration.*
- *When one party abandons or refuses to perform the contract.*
- *Where a contract is divisible and the party not in default has enjoyed the benefit of part performance.*
- *When an indivisible contract for a lump sum is completely performed but badly the person who has performed the 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 *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:** *Court may by an issuing an 'injunction orders'* restrain him from doing what he promised not to do.

UNIT 6:- CONTINGENT CONTRACT AND QUASI CONTRACT

SUMMARY LECTURE



DEFINATION OF CONTINGENT CONTRACT: “A contract to do or not to do something, if some event, collateral to such contract, does or does not happen”.

Contract of insurance, indemnity and guarantee fall under this category.

MEANING OF 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

- ❖ *The performance of a contingent contract would depend upon the happening or non-happening of some event or condition.*
- ❖ *The event referred to is collateral to the contract: the event is not part of the contract.*
- ❖ *The contingent event should not be a mere ‘will’ of the promisor.*
- ❖ *The event must be uncertain: where the event is certain or bound to happen, the contract is due to be performed, then it is not contingent contract.*

RULES RELATING TO ENFORCEMENT

- ◆ **ENFORCEMENT OF CONTRACT CONTINGENT ON AN EVENT HAPPENING:** Where a contingent contract is made to do or not to do anything if an uncertain future event happens, *it cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contract becomes void.*
- ◆ **ENFORCEMENT OF CONTRACT CONTINGENT ON AN EVENT NOT HAPPENING:** Where a contingent contract is made to do or not do anything if an uncertain future event does not happen, *it can be enforced only when the happening of that event becomes impossible and not before.*
- ◆ **A CONTRACT WOULD CEASE TO BE ENFORCEABLE IF IT IS CONTINGENT UPON THE CONDUCT OF A LIVING PERSON WHEN THAT LIVING PERSON DOES SOME THING TO MAKE THE ‘EVENT’ OR ‘CONDUCT’ AS IMPOSSIBLE OF HAPPENING:** If a contract is contingent upon as to how a person will act at an unspecified time, *the event shall be considered to have become impossible when such person does anything which renders it impossible* that he should so act within any definite time or otherwise than under further contingencies.
- ◆ **CONTINGENT ON HAPPENING OF SPECIFIED EVENT WITHIN THE FIXED TIME:** 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 it, before the time fixed, such event becomes impossible.*
- ◆ **CONTINGENT ON SPECIFIED EVENT NOT HAPPENING WITHIN FIXED TIME:** 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.*

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- ◆ **CONTINGENT ON AN IMPOSSIBLE EVENT**: Contingent contract to do or not to do anything, if an impossible event happens are void.

DIFFERENCE BETWEEN CONTINGENT CONTRACT AND A WAGERING CONTRACT

BASIS	CONTINGENT CONTRACT	WAGERING CONTRACT
MEANING	<i>Is a contract to do or not to do something with reference to a collateral event happening or not happening.</i>	<i>Is a promise to give money or money's worth with reference to an uncertain event happening or not happening.</i>
RECIPROCAL PROMISE	<i>May not</i> contain reciprocal promise.	It <i>consists of</i> reciprocal promise.
UNCERTAIN EVENT	The event is <i>collateral</i> .	The uncertain event is the core factor.
NATURE OF CONTRACT	<i>May not</i> be wagering nature	Is <i>essential contingent</i> in nature
DOCTRINE OF MUTUALITY OF LOSE AND GAIN	Is <i>not based</i> on doctrine of mutability of lose and gain.	It is <i>a game, losing and gaining alone matters.</i>
EFFECT OF CONTRACT	<i>Valid</i>	<i>Void</i>

QUASI CONTRACTS

Sometimes the law implies a promise obligations 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 enforce them as if they are contracts. Quasi contracts are based on principles of equity, justice and good conscience. A quasi or constructive contracts rests upon the maxims, *"No man just grow rich out of another person loss"*. In India it is called as **"CERTAIN RELATION RESEMBLING THOSE CREATED BY CONTRACTS"**.

FEATURES OF QUASI CONTRACTS:

- ♣ ***In the first place***, such a right is always a right to money and generally, through not always, to a liquidated sum of money.
- ♣ ***Secondly***, it does not arise from any agreement of the parties concerned, but is imposed by the law; and
- ♣ ***Thirdly***, it is a right which is available not against all the world, but against a particular person or persons only, so that in this respect it resembles a contractual right.

CASES DEEMED AS QUASI CONTRACT

- ♥ **CLAIM FOR NECESSARIES SUPPLIED TO PERSONS INCAPABLE OF CONTRACTING**: The person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

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- ♥ **PAYMENT BY AN INTERESTED PERSON:** 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.
- ♥ **OBLIGATION OF A PERSON ENJOYING BENEFITS OF NON-GRATUITOUS ACT:** Where a person lawfully does anything for another person, or delivers anything to him not intending to do gratuitously and such other person enjoys the benefits thereof, the latter is bound to pay compensation to the former in respect of, or to restore, the things so done or delivered.
- ♥ **RESPONSIBILITY OF FINDER OF GOODS:**
 - i) *To take proper care of the property as man of ordinary prudence would take.*
 - ii) *No right to appropriate the goods and*
 - iii) *To restore the goods if the owner is found.*
- ♥ **MONEY PAID BY MISTAKE OR UNDER COERCION:** A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it.

DIFFERENCE BETWEEN QUASI CONTRACTS AND CONTRACTS

BASIS	QUASI CONTRACT	CONTRACT
ESSENTIAL FOR THE VALID CONTRACTS	Absent	Present
OBLIGATIONS	Imposed by law	Created by the consent of the parties

IMPORTANT CASE LAW

CARLILL Vs. CARBOLIC SMOKE BALL CO.

Fact of the case:

In this famous case, Carbolic smoke Ball Co. advertised in several newspapers that a reward of £100 would be given to any person who contracted influenza after using the smoke balls produced by the Carbolic Smoke Ball Company according to printed directions. One lady, Mrs. Carlill, used the smoke balls as per the directions of company and even then suffered from influenza.

Decision:

Held, she could recover the amount as by using the smoke balls she had accepted the offer. In terms of Sec. 8 of the Indian Contract 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.

LALMAN SHUKLA Vs. GAURI DUTT

Fact of the case:

Gauri Dutt sent his servant Lalman to trace his missing nephew. He then announced that anybody who traced his nephew would be entitled to a certain reward. Lalman traced the boy in ignorance of this announcement. Subsequently when he came to know of the reward, he claimed it.

Decision:

Held, he has not entitled to the reward, as he did not know the offer. Section 4 of the Indian Contract Act states that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

In Lalman case, the defendant's nephew absconded from home. The plaintiff who was defendant's servant was sent to search for the missing boy.

After the plaintiff had left in search of the boy, the defendant announced a reward of ₹ 501 to anyone who might find out the boy. The plaintiff who was unaware of this reward, was successful in searching the boy. When he came to know of the reward, which had been announced in his absence, he brought an action against

the defendant to claim this reward. It was held that since the plaintiff was ignorant of the offer of reward, his act of bringing the lost boy did not amount to the acceptance of the offer and therefore he was not entitled to claim the reward.

BOULTON Vs. JONES

Fact of the case:

Boulton had taken over the business of one Brocklehurst, with whom Jones had previous dealings. Jones sent an order for goods to Brocklehurst, which Boulton supplied without informing Jones that the business had changed hands. When Jones found out that the goods had not come from Brocklehurst, he refused to pay for them and was sued by Boulton for the price.

Decision:

Jones is not liable to pay for the goods. It is a rule of law that offer made to a specific / ascertained person can be accepted only by that specified person.

HARVEY Vs. FACIE

Fact of the case:

In this case, Privy Council briefly explained the distinction between an offer and an invitation to offer. In the given case, the plaintiffs through a telegram asked the defendants two questions namely,

- (i) Will you sell us Bumper Hall Pen? And
- (ii) Telegraph lowest cash price.

The defendants replied through telegram that the "lowest price for Bumper Hall Pen is £900". The plaintiffs sent another telegram stating "we agree to buy Bumper Hall Pen at £900". However, the defendants contending that they had made an offer to sell the property at £900 and therefore they are bound by the offer.

Decision:

Held that the mere statement of the lowest price at which the vendor would sell contained no implied contract to sell to the person who had enquired about the price.

MAC PHERSON Vs. APPANNA

Fact of the case:

The owner of the property had said that he would not accept less than ₹ 6000/- for it.

Decision:

It was held that this statement did not indicate any offer but indicated only an invitation to offer.

HARRIS Vs. NICKERSON

Fact of the case:

An auctioneer advertised in a newspaper that a sale of office furniture will be held on a particular day. Plaintiff (Harris) with the intention to buy furniture came from a distant place for auction but the action was cancelled.

Decision:

It was held that plaintiff cannot file a suit against the auctioneer for his loss of time and expenses because the advertisement was merely a declaration of intention to hold auction and not an offer to sell. The auctioneer (Nickerson) does not contract with any one who attends the sale. The auction is only an advertisement to sell but the items are not put for sale though persons who have come to the auction may have the intention to purchase.

PHARMA-CEUTICAL SOCIETY OF GREAT BRITAIN Vs. BOOTS CASH CHEMISTS LTD.

Fact of the case:

The goods were displayed in the shop for sale with price tags attached on each article and self service system was there. One customer selected the goods but the owner refused to sell.

Decision:

In this case, it was held that display of goods alongwith price tags merely amounts to invitation to treat and therefore if an intending buyer is willing to purchase the goods at a price mentioned on the tag, he makes an offer to buy the goods. Thus, the shopkeeper has the right to accept or reject the same. They contract would

arise only when the offer is accepted. Hence there was no contract and customer had no rights to sue the owner.

FELTHOUSE Vs. BINDLEY

Fact of the case:

F offered by letter to buy a nephews horse, saying; “if I hear no more about it, I shall consider the horse mine.” The nephew did not reply but he told an auctioneer not to sell that particular horse as he had sold it to his uncle. By mistake, the auctioneer sold the horse. F sued for conversion against his nephew.

Decision:

Held, F could not succeed as his nephew had not communicated acceptance and there was no contract.

NEALE Vs. MERRET

Fact of the case:

M offered to sell his land to N for £280. N replied purporting to accept the offer but enclosed a cheque for £80 only. He promised to pay the balance of £200 by monthly installments of £50 each.

Decision:

It was held that N could not enforce his acceptance because it was not an unqualified one.

BROGDEN Vs. METROPOLITAN RAIWAY CO.

Fact of the case:

Brogden a supplier, sent a draft agreement relating to the supply of coal to the manager of railway co. viz, metropolitan railway for his acceptance. The manager wrote the word “Approved” on the same and put the draft agreement in the drawer of the table intending to send it to the company’s solicitors for a formal contract to be drawn up. By an over sight the draft agreement remained in drawer.

Decision:

Held, that there was no contract as the manager had not communicated his acceptance to the supplier, Brogden.

LILLY WHITE Vs. MANNUSWAMY

Fact of the case:

Plaintiff delivered some clothes to drycleaner for which she received a laundry receipt containing a condition that in case of loss, customer would be entitled to claim 15% of the market price of value of the article, Plaintiff lost her new saree.

Decision:

Held, the terms were unreasonable and plaintiff was entitled to recover full value of the saree from the drycleaner. The receipt carries special conditions and are to be treated as having been duly communicated to the customer and therein a tacit acceptance of these conditions is implied by the customer's acceptance of the receipt.

CHINNAYYA Vs. RAMAYYA

Fact of the case:

An old lady made a gift of her property to her daughter with a direction to pay a certain sum of money to the maternal uncle by way of annuity. On the same day, the daughter executed a writing in favour of the maternal uncle and agreeing to pay him annuity. The daughter did not, however, pay the annuity and the uncle sued to recover it.

Decision:

It was held that there was sufficient consideration for the uncle to recover the money from the daughter.

DURGA PRASED Vs. BALDEO

Fact of the case:

D (defendant) promised to pay to P (plaintiff) a certain commission on articles which would be sold through their agency in a market. Market was constructed by P at the desire of the C (collector), and not at the desire of the D (promisor).

Decision:

D was not bound to pay commission as it was without consideration and hence void.

MOHORI BIBI Vs. DHARMO DAS GHOSE

Fact of the case:

A, a minor borrowed ₹ 20,000 from B and as a security for the same executed a mortgage in his favour. He became a major a few months later and filed a suit for the declaration that the mortgage executed by him during his minority was void and should be cancelled.

Decision:

It was held that a mortgage by a minor was void and B was not entitled to repayment of money.

SAIN DAS Vs. RAM CHAND

Fact of the case:

Where there was a join purchase by two purchaser, one of them was minor.

Decision:

It was held that the vendor could enforce the contract against the major purchaser and not the minor.

WORD Vs. HOBBS

Fact of the case:

H sold to W some pigs which were to his knowledge suffering from fever. The pigs were sold 'with all faults' and H did not disclose the fact of fever to W.

Decision:

Held there was no fraud

PEEK Vs GURNEY

Fact of the case:

The prospectus issued by a company did not refer to the existence of a document disclosing liabilities. The impression thereby created was that the company was a prosperous one, which actually was not the case.

Decision:

Held the suppression of truth amounted to fraud.

REGIER Vs CAMPBELL STAURT

Fact of the case:

A broker was asked to buy shares for client. He sold his own shares without disclosing this fact.

Decision:

Held that the client was entitled to avoid the contract or affirm it with a right to claim secret profit made by broker on the transaction since the relationship between the broker and the client was relationship of utmost good faith.

HADLEY Vs BAXENDALE

Fact of the case:

The crankshaft of P's flour mill had broken. He gives it to D, a common carrier who promised to deliver it to the foundry in 2 days where the new shaft was to be made. The mill stopped working, D delayed the delivery of the crankshaft so the mill idle for another 5 days. P received the repaired crankshaft 7 days later than he would have otherwise received. Consequently, P sued D for damages not only for the delay in the delivering of the broken part but also for loss of profits suffered by the mill for not having been worked.

Decision:

The court held that P was entitled only to ordinary damages and D was not liable for the loss of profits because the only information given by P to D was that the article to be carried was the broken shaft of a mill and it was not made known to them that the delay would result in loss of profits.

SHYAMLAL Vs STATE OF U.P

Fact of the case:

'S' a government servant was compulsorily retired by the government. He filed a writ petition and obtained an injunction against the order. He was reinstated and was paid salary but was given no work and in the mean time government went on appeal.

Decision:

The appeal was decided in favour of the government and 'S' was directed to return the salary paid to him during the period of reinstatement.

HOLLINS Vs HOWLER L.R. & H.L.,

Fact of the case:

H' picked up a diamond on the floor of 'F's shop and handed over the same to 'F' to keep till the owner was found. In spite of the best efforts, the true owner could not be traced. After the lapse of some weeks, 'H' tendered to 'F' the lawful expenses incurred by him and requested to return the diamond to him. 'F' refused to do so.

Decision:

Held that 'F' must return the diamond to 'H' as he was entitled to retain the goods found against everybody except the true owner.

TRIKAMDAS Vs BOMBAY MUNICIPAL CORPORATION

Fact of the case:

'T' was traveling without ticket in a tram car and on checking he was asked to pay ₹5/- as penalty to compound transaction. T filed a suit against the corporation for recovery on the ground that it was extorted from him.

Decision:

The suit was decreed in his favour.

INDIAN CONTRACT ACT SECTIONS LIST

SECTION NO.	TOPIC
2(h)	Contract
2(e)	Agreement
2(b)	Promise/acceptance
10	Essential of valid contract
2(j)	Void contract
2(i)	Voidable contract
2(a)	Proposal/offer
2(d)	Consideration
3	Mode of acceptance
4	Communication of offer
5	Revocation of proposal
11	Competent to contract
12	Person of sound mind
13	Free consent
15	Coercion
16	Undue influence
17	Fraud
18	Misrepresentation
19	Effect of coercion
19A	Power to set aside contract induced by undue influence
Explanation to section 19	Discovering the truth with ordinary diligence
23	Agreement the consideration or object of which is unlawful
24	Agreement the consideration or object of which is unlawful in parts
25	Agreement without consideration
26	Agreement in restraint of marriage
27	Agreement in restraint of trade
28	Agreement in restraint of legal proceeding
29	Agreement the meaning of which is uncertain
30	Wagering agreement
31	Contingent contract
32	Enforcement of contracts contingent on an event happening
33	Enforcement of contracts contingent on an event not happening
34	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

INDIAN CONTRACT ACT SECTIONS LIST

35	Contingent on happening of specified event within the fixed time
	Contingent on specified event not happening within fixed time
36	Contingent on an impossible event
37	Obligations of parties to contracts
38	Effect of refusal to accept offer of performance
39	Effect of refusal of party to perform wholly
40	Person by whom promise is to be performed
41	Effect of accepting performance from third person
42	Devolution of Joint liabilities
43	Any one of joint promisors may be compelled to perform
44	Effect of release of one joint promisor
45	Devolution of joint liability
46	Time for performance of promise, where no application is to be made and no time is specified
47	Time and place for performance of promise, where time is specified and no application to be made
48	Application for performance on certain day to be at proper time and place
49	Place for the performance of promise, where no application to be made and no place fixed for performance
50	Performance in manner or at time prescribed or sanctioned by promisee
51	Promisor not bound to perform, unless reciprocal promise ready and willing to perform
52	Order of performance of reciprocal promises
53	Liability of party preventing event on which the contract is to be effect
54	Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises
55	Effects of failure to perform at a time fixed in a contract in which time is essential
56	Agreement to do impossible act (initial and subsequent)
57	Reciprocal promise to do certain things that are legal, and also some other things that are illegal
58	'Alternative promise' one branch being illegal
59	Application of payment where debt to be discharged is indicated
60	Application of payment where debt to be discharged is not indicated
61	Application of payment where neither party appropriates
62	Effect of novation, rescission, and alteration of contract
63	Promisee may waive or remit performance of promise
64	Restoration of benefit under a voidable contract
65	Obligations of person who has received advantage under void agreement

INDIAN CONTRACT ACT SECTIONS LIST

	or contract that becomes void
66	Communication of rescission
67	Effects of neglect of promisee to afford promisor reasonable facilities for performance
68	Claim for necessaries supplied to persons incapable of contracting
69	Payment by an interested person
70	Obligation of person enjoying benefits of non-gratuitous act
71	Responsibility of finder of goods
72	Money paid by mistake or under coercion
73	Compensation for loss or damages caused by breach of contract
74	Penalty and liquidated damages
75	Party rightfully rescinding contract, entitled to compensation

UNIT – 1:- CONTRACT OF SALE

SUMMARY LECTURE



DEFINITIONS:

- ♣ **BUYER AND SELLER:** Buyer means a person *who buys or agrees to buy goods*. Seller means a person *who sells or agrees to sell goods*.
- ♣ **GOODS AND OTHER RELATED TERMS:**
 - “**GOODS**”[section 2(7)] 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 served 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.
- ♣ **EXISTING GOODS** are such goods as are in *existence at the time of the contract of sale*. The existing goods may be of following kinds:
 - **SPECIFIC GOODS** means goods *identified and agreed upon at the time a contract* of sale is made.
 - **ASCERTAINED GOODS** are those goods *which are identified in accordance with the agreement after the contract of sale* is made.
 - **UNASCERTAINED GOODS** are the *goods not specifically identified or ascertained* at the time of making of the contract.
- ♣ **FUTURE GOODS** means goods to be *manufactured or produced or acquired by the seller after making the contract* of sale.
- ♣ **CONTINGENT GOODS** the *acquisition of which by the seller depends upon an uncertain contingency (uncertain event)*. The property does not pass to the buyer at the time of making the contract.
- ♣ **DELIVERY – ITS FORMS AND DERIVATIVES:** Delivery means *voluntary transfer of possession* from one person to another.
 - 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).
 - (iii) **SYMBOLIC DELIVERY:** *Delivery of goods in the course of transit* may be made by handing over document of title to goods, like bill of lading.



Goods are said to be in a deliverable state when they are in such a condition that the buyer would, under the contract, be bound to take

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delivery of them.

- ♣ **DOCUMENT OF TITLE TO GOODS**: Including bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's 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.
- ♣ **MERCANTILE AGENT**: An agent having 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**: Property here means '**OWNERSHIP**' or general property.
- ♣ **INSOLVENT**: When he ceases to pay his debt or cannot pay his debt as they become due.
- ♣ **PRICE**: The money consideration for a sale of goods.
- ♣ **QUALITY OF GOODS**: State or condition.

SALE AND AGREEMENT TO SALE

SALE: In sale, *the property in goods is transferred* from seller to the buyer *immediately*.

AGREEMENT TO SALE: The ownership of the goods is not transferred immediately. It is intending to *transfer at a future date upon the completion of certain conditions thereon*.

WHEN AGREEMENT TO SELL BECOMES SALE: An agreement to sell becomes a sale *when the time elapses or the conditions are fulfilled* subject to which the property in the goods is to be transferred.

THE FOLLOWING ELEMENTS MUST CO-EXIST SO AS TO CONSTITUTE A CONTRACT OF SALE OF GOODS:

- ♥ There must be at *least two parties*, the seller and the buyer.
- ♥ The subject matter of the contract must necessarily be *goods* covering only movable property.
- ♥ *A price in money (not in kind) should be paid or promised*. Can be partly cash and kind.
- ♥ *A transfer of property in goods from seller to the buyer must take place*.
- ♥ A contract of sale may be *absolute or conditional*.
- ♥ All the *essential elements of a valid contract must be present* in the contract of sale.

DISTINCTION BETWEEN SALE AND AN AGREEMENT TO SELL

BASIS		SALE	AGREEMENT TO SELL
TRANSFER OF PROPERTY	OF	<i>Immediately</i>	<i>Future date or fulfilment of some condition.</i>
NATURE OF CONTRACT	OF	It is an <i>executed contract</i> .	It is an <i>executory contract</i> .
REMEDIES FOR BREACH	FOR	The <i>seller can sue the buyer for the price</i> of the goods because of the passing of the property therein to the buyer.	The aggrieved <i>party can sue for damages only and not for the price</i> , unless the price was payable at a stated date.
LIABILITIES OF PARTIES	OF	Liability of <i>buyer</i>	Liability of <i>seller</i>

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BURDEN OF RISK	Of <i>buyer</i>	Of <i>seller</i>
NATURE OF RIGHTS	Creates Jus in rem (against whole world)	Creates Jus in personam (against particular person)
RIGHTS OF RESALE	The seller <i>cannot resell</i> the goods	The seller <i>may sell the goods</i> since ownership is with the seller.

DISTINCTION BETWEEN SALE AND HIRE PURCHASE

HIRE PURCHASE: 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-

- ◆ *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*
- ◆ *The property in the goods is to pass to such person on the payment of the last of such installments, and*
- ◆ *Such person has a right to terminate the agreement at any time before the property so passes.*



BASIS	SALE	HIRE- PURCHASE
TIME OF PASSING PROPERTY	<i>Immediately</i>	Upon the payment of <i>last instalment</i>
POSITION OF THE PARTY	<i>Buyer as a owner</i>	<i>The position of the hirer is that of a bailee</i> till he pays the last installment.
TERMINATION OF CONTRACT	<i>The buyer cannot terminate the contract</i> and is bound to pay the price of the goods	<i>The hirer may, if he so likes, terminate the contract by returning the goods to its owner</i> without any liability to pay the remaining installments.
BURDEN OF RISK OF INSOLVENCY OF THE BUYER	<i>The seller takes the risk of any loss</i> resulting from the insolvency of the buyer	<i>The owner takes no such risk</i> , for if the hirer fails to pay an installment, the owner has right to take back the goods.
TRANSFER TO TITLE	<i>The buyer can pass a good title to a bona fide</i> purchaser from him.	<i>The hirer cannot pass</i> any title even to a bona fide purchaser.
RESALE	The buyer in sale <i>can resell the goods</i>	The <i>hire purchaser cannot resell</i> unless he has paid all the installments.

DISTINCTION BETWEEN SALE AND BAILMENT

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.



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BASIS	SALE	BAILMENT
TRANSFER OF PROPERTY	Transferred from seller to 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	Not possible	The bailee must return the goods to the bailor on the accomplishment of the purpose for which the bailment was made.
CONSIDERATION	Is the price in terms of money	May be gratuitous or non-gratuitous.

SALE AND CONTRACT FOR WORK AND LABOUR: A contract of sale of goods is one in which some goods are sold or are to be sold for a price. **But where no goods are sold, and there is only the doing or rendering of some work of labour**, then the contract is only of work and labour and not of sale of goods.

CONTRACT OF SALE HOW MADE:

The 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 **immediately delivery** of the goods.
- ❖ There may be **immediately 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 goods and an **immediate payment** of price,
- ❖ It may be agreed that the **delivery or payment or both are to be made in instalments**,
- ❖ It may be agreed that the **delivery or payment or both are to be made at some future date**.

SUBJECT MATTER OF CONTRACT OF SALE

GOODS PERISHING BEFORE MAKING CONTRACT OF CONTRACT: When there is a contract for the **sale of specific goods, the contract is void** if the goods without knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description contract.

GOODS PERISHING BEFORE SALE BUT AFTER AGREEMENT TO SALE: Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the **agreement before the risk to the buyer, the agreement is thereby avoided**.

ASCERTAINMENT OF PRICE

Price means the monetary consideration for the sale of goods. The price in the contract of sale may be-

- ♥ **Fixed by the contract or**
- ♥ **Agreed to be fixed in a manner provided by the contract e.g. valuer or**
- ♥ **Determined by the course of dealing between the parties.**

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AGREEMENT TO SELL AT VALUATION

DETERMINATION OF PRICE BY A THIRD PARTY

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

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UNIT – 2:- CONDITIONS & WARRANTIES

SUMMARY LECTURE



STIPULATION: At the time of selling the goods, a seller usually makes *certain statements or representations* with a view to induce the intending buyer to purchase the goods. A representations which forms a part of the contract of sale and affects the contract, is called a stipulation.

CONDITION: “A condition is a *stipulation essential to the main purpose* of the contract, the breach of which gives rise to a right to treat the contract as repudiated”.

WARRANTY: “ 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 a right to reject the goods and treat the contract as repudiated”.



DIFFERENCE BETWEEN CONDITIONS AND WARRANTIES:

POINT OF DIFFERENCES	CONDITION	WARRANTY
MEANING	A condition is <i>essential to the main purpose</i> of the contract.	It is <i>only collateral to the main purpose</i> of the contract.
RIGHT IN CASE OF BREACH	The aggrieved party can <i>repudiate the contract or claim damages</i> or both in the case of breach of condition	The aggrieved party <i>can claim only damages</i> in case of breach of warranty.
CONVERSION OF STIPULATIONS	A breach of condition <i>may be</i> treated as a breach of warranty.	A breach of warranty <i>cannot be</i> treated as a breach of condition.

WHEN CONDITION TO BE TREATED AS WARRANTY

As a result buyer loses his right to rescind the contract and claim for damages only.

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

- ❖ When the *buyer altogether waives the performance of the condition.*
- ❖ Where the *buyer elects to treat the breach of the conditions, as one of a warranty.*
- ❖ Where the *contract is non-severable and the buyer has accepted either the whole goods or any part thereof.*
- ❖ Where the *fulfilment of any condition or warranty is excused by law by reason of impossibility or otherwise.*



EXPRESS AND IMPLIED CONDITIONS AND WARRANTIES

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

IMPLIED CONDITIONS are those, which are presumed by law to be present in the contract.

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

- ♣ **CONDITION AS TO TITLE:** 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

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be defective, the buyer must return the goods to the true owner and recover the price from the seller.

- ♣ **SALE BY DESCRIPTION**: Where there is a contract of sale of goods by description, there is an implied condition that *the goods shall correspond with the description*.
- ♣ **SALE BY SAMPLE**: 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*.
- ♣ **SALE BY SAMPLE AS WELL AS BY DESCRIPTION**: Where the goods are sold by sample as well as by description the implied condition is that the *bulk of the goods supplied shall correspond both with the sample and the description*.
- ♣ **CONDITION AS TO QUALITY OR FITNESS**: Ordinarily, *there is no implied conditions as to the quality or fitness of the goods sold for any particular purpose*.
- ♣ **CONDITION AS TO MERCHANTABILITY**: Where goods are brought 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*.
- ♣ **CONDITION AS TO WHOLESOMENESS**: In 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 WARRANTY

It is the stipulation which has not been included in the contract of sale in express words. But the law presumes that the parties have incorporated in into their contract.

The following implied warranties:

- ♥ **WARRANTY AS TO UNDISTURBED POSSESSION**: That the buyer shall have and enjoy quiet possession of the goods.
- ♥ **WARRANTY AS TO NON-EXISTANCE OF ENCUMBRANCES**: Goods shall be free from any charge or encumbrances in favour of any third party not declared or known to the buyer before or at the time the contract is entered into.
- ♥ **WARRANTY AS TO QUALITY OR FITNESS BY USAGE OF TRADE**: Seller is under no duty to reveal unflattering truths about the goods sold.
- ♥ **DISCLOSURE OF DANGEROUS NATURE OF GOODS**:

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.

EXCEPTIONS:

- ◆ **FITNESS AS TO QUALITY OR USE**: When 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 judgement and the goods are of description* which is in the course of seller's business to apply.
- ◆ **GOODS PURCHASED UNDER PATENT OR BRAND NAME**: There is no implied condition that goods shall be fit for any particular purpose.
- ◆ **GOODS SOLD BY DISCRIPTION**: The good shall correspond with the description.
- ◆ **GOODS OF MERCHANTABILITY QUALITY**: same as above
- ◆ **SALE BY SAMPLE** – same as above
- ◆ **GOODS BY SAMPLE AS WELL AS DESCRIPTION** – same as above



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- ◆ ***TRADE USAGE:*** An *implies 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.
- ◆ ***SELLER ACTIVELY CONCEALS A DEFECT OR IS GUILTY OF FRAUD:*** *When 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 allowed discovered by the buyer on a reasonable examination, then the rule of caveat emptor will not apply.

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UNIT – 3:- TRANSFER OF OWNERSHIP AND DELIVERY OF GOODS

SUMMARY LECTURE



PASSING OF PROPERTY: Passing of property means passing of ownership.

- ♣ **PROPERTY (SPECIFIC OR ASCERTAINED GOODS) PASSES WHEN INTENDED TO PASS:** Where there is a contract for 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 to be transfer.



STAGES OF GOODS WHILE PASSING OF PROPERTY:

- **SPECIFIC GOODS IN A DELIVERABLE STATE:** The property in the goods passes to the buyer *when the contract is made*, immaterial of payment.
- **SPECIFIC GOODS TO BE PUT INTO A DELIVERABLE STATE:** Where 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*.
- **SPECIFIC GOODS IN A DELIVERABLE STATE, WHEN THE SELLER HAS TO DO ANTHING THERETO IN ORDER TO ASCERTAIN PRICE:** 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 thing is done and the buyer has notice thereof*.
- ♣ **GOODS MUST BE ASCERTAINED:** Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer, *unless and until the goods are ascertained*.
- **SALE OF UNASCERTAINED GOODS BY DESCRIPTION:** 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.
- **DELIVERY TO THE CARRIER:** *Where 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.*
- ♣ **GOODS SENT ON APPROVAL OR "ON SALE OR RETURN":** The property therein passes to the buyer-
 - ♣ *When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;*
 - ♣ *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 goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time; or*
 - ♣ *He does something to the goods which is equivalent to accepting the goods e.g. he pledges or sells the goods.*



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- ♣ **SALE FOR CASH ONLY OR RETURN:** Where the goods have been delivered on the terms that the goods were to remain the property of the seller till they are paid for, the property therein does not pass to the buyer until the terms are complied with. i.e. cash is paid for.



- ♣ **RESERVATION OF RIGHT OF DISPOSAL:** The right of disposal of goods to secure that the price is paid before the property in goods passes to the buyer. Seller may reserve the rights until certain conditions have been fulfilled. Even if the goods are transferred property would not be transferred.

CIRCUMSTANCES UNDER WHICH THE RIGHT TO DISPOSAL MAY BE RESERVED:

- ♥ *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, the seller will be prima facie deemed to have reserved to the right of disposal.*
- ♥ *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.*
And if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

RISK PRIMA FACIE PASSES WITH PROPERTY

“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”.

The aforesaid rule is, however, subject to two qualification:

- ♦ *If delivery has been delayed by the fault of the seller or the buyer, the goods shall be at the risk of the party in default, as regards loss which might not have arisen but for the default.*
- ♦ *The duties and liabilities of the seller or the buyer as a bailee of goods for the other party remain unaffected even when the risk has passed generally.*

TRANSFER TO TITLE

SALE BY PERSON NOT THE OWNER: 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 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:

- ♣ **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;
a) *If he was in possession of the goods or documents with the consent of the owner;*

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- b) *If the sale was made by him when acting in the ordinary course of business as a mercantile agent; and*
- c) *If the buyer has 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*

- ♣ **SALE BY ONE OF THE JOINT 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 seller has no authority to sell*.
- ♣ **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.
- ♣ **SALE BY ONE WHO HAS ALREADY SOLD THE GOODS BUT CONTINUES IN POSSESSION THEREOF:** The goods are sold to the third person, and such person obtains the delivery thereof in *good faith and without notice of the previous sale*, he would have good title to them.
- ♣ **SALE BY OWNER OBTAINING POSSESSION BEFORE THE PROPERTY IN THE GOODS HAS VESTED IN HIM:** Buyer with the consent of the seller sells, *pledge or otherwise dispose of the goods to a third person and* third person obtains the 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.
- ♣ **EFFECT OF ESTOPPEL:** Where the *owner is stopped by the conduct from denying the seller's authority to sell*, the transferee will get a good title as against the true owner.
- ♣ **SALE BY AN UNPAID SELLER:** *Where an unpaid seller who has 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.
- ♣ **SALE UNDER THE PROVISION OF OTHER ACTS:** Sale by official receiver or liquidator, purchase of goods from finder of goods, sale by pawnee can convey a good title to the buyer.

PERFORMANCE OF THE CONTRACT OF SALE

DEFINATION OF DELIVERY: Voluntary transfer of possession from one person to another

DUTIES OF SELLER AND BUYER: it is the duty of the *seller to deliver the goods and of the buyer to accept and pay for them*.

PAYMENT AND DELIVERY ARE CONCURRENT CONDITIONS: *Unless otherwise agreed*, both things to be done at the same time.

RULES REGARDING DELIVERY OF GOODS:

- ♣ **DELIVERY:** Putting the goods in possession of buyer.
- ♣ **EFFECT OF PART DELIVERY:** A delivery of part of the goods, in progress of the delivery of the whole has the same effect, for the purpose of passing the property in such goods, as delivery of the whole.
- ♣ **BUYER TO APPLY FOR DELIVERY:** Apart from any express *contract seller is not bound to deliver them until the buyer applies*.
- ♣ **PLACE OF DELIVERY:** *Firstly as specified in the contract, otherwise goods sold are to be delivered at the place at which they are at the time of sale*, and goods agreed to be sold are to be delivered at the place at which they are at the time of the

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agreement to sell or if not then in existence, at the place at which they are manufactured or produced.

- ♣ **TIME OF DELIVERY:** If no time fixed then at *reasonable time*.
- ♣ **GOOD IN POSSESSION OF A THIRD PARTY:** There will be no delivery unless and until such third person acknowledge to the buyer that he holds the goods on his behalf.
- ♣ **TIME FOR TENDER OF DELIVERY:** Should be at *reasonable hour*.
- ♣ **EXPENSES OF DELIVERY:** *Borne by the seller* unless contrary to the contract.
 - ♣ **DELIVERY OF WRONG QUANTITY:** *If less quantity*, buyer may reject them or if buyer accepts the goods he shall pay for them. *More quantity*, buyer may accept as contracted and reject extra, he may reject the whole, accept the whole and pay from whole. *Mix goods*, buyer may accept which are in accordance of contract and reject balance, reject the whole goods.
- ♣ **INSTALLMENT DELIVERIES:** *Unless otherwise agreed*, buyer is not bound to accept the delivery in instalments.
- ♣ **DELIVERY TO CARRIER:** *Is prima facie deemed to be delivered to buyer* unless otherwise agreed in contract.
- ♣ **DETERIORATION DURING TRANSIT:** *Liability will fall on buyer*.
- ♣ **BUYER'S RIGHT TO EXAMINE THE GOODS:** *Buyer is entitled to reasonable examine the goods* as specified in contract. *Unless otherwise agreed* in the contract.

RULES RELATED TO ACCEPTANCE OF DELIVERY OF GOODS

Acceptance is deemed to take place when the buyer:

- ♥ *Intimates to the seller that he had accepted the goods; or*
- ♥ *Does any act to the goods, which is inconsistent with the ownership of the seller; or*
- ♥ *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: *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.

LIABILITIES OF BUYER FOR NEGLECTING OR REFUSING DELIVERY OF GOODS: *Buyer will be liable to 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.

UNIT – 4:- UNPAID SELLER

The seller of goods is deemed to be an 'Unpaid Seller' when-

- ♣ *The whole of the price has not been paid or tendered and the seller had an immediate right of action for the price.*
- ♣ *When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by the reason of the dishonour of the instrument or otherwise.*



RIGHT OF UNPAID SELLER:

Subject to the provisions of this act and of any law for the time being in force, notwithstanding that the property in the goods may have been passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

- ♣ *A lien on the goods for the price while he is in possession of them;*
- ♣ *In case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;*
- ♣ *A right of resale as limited by this act.*

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. The unpaid seller has the right against the goods as well as buyer:

♥ RIGHT OF AN UNPAID SELLER AGAINST THE GOODS:

- i) SELLER'S LIEN: *An unpaid seller has a right of lien on the goods for the price while he is in possession, until the payment or tender of the price of such goods.*

The lien can be exercised as long as the seller remains in possession of the goods.



Exercise of right of lien: 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 terms of credit has expired; or*
- *Where the buyer becomes insolvent.*

TERMINATION OF LIEN:

- *When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.*
- *Where the buyer or his agent lawfully obtains possession of the goods.*
- *Where seller has waived the right of lien.*
- *By estoppels i.e. where the seller so conducts himself that he leads third parties to believe that the lien does not exist.*

EXCEPTION: *The unpaid seller of the goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.*

♥ RIGHT OF STOPPAGE IN TRANSIT: Can be exercised if following conditions are fulfilled:

- *The seller must be unpaid.*



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- He **must have parted with the possession** of goods.
- The goods are **in transit**.
- The **buyer has become insolvent**.
- The **right is subject to provisions of this act**.

DURATION OF TRANSIT: From the time **when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer**, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

When does the transit comes to an end?

In the following cases:

- ◆ When the **buyer or other bailee obtains delivery**.
- ◆ Buyer **obtains delivery before the arrival of goods at destination**.
- ◆ Where **the carrier or bailee acknowledge to the buyer or his agent that he holds the goods** as soon as the goods are loaded on the ship, unless the seller has reserved the rights of disposal of the goods.
- ◆ If the **carrier wrongfully refuses to deliver the goods to the buyer**.
- ◆ Where **goods are delivered to the carrier hired by the buyer**, the transit comes to an end.
- ◆ Where the **part delivery of the goods has been made to the buyer**, there the transit will come to an end for the remaining goods which are yet in the course of transmission.
- ◆ Where the **goods are delivered to a ship chartered by the buyer**, the transit comes to an end.

EFFECT OF SUB-SALE OR PLEDGE BY BUYER: **The right of lien or stoppage in transit is not affected by the buyer selling or pledging the goods unless the seller has assented to it.** The right of stoppage is defeated if the buyer has transferred the document of title or pledges the goods to a sub buyer in good faith and for consideration.

EXCEPTIONS:

- ♣ When the **seller has assented to the sale, mortgage or other disposition of the goods made by the buyer**.
- ♣ When a **document of title to goods has been transferred to the buyer and the buyer transfers the documents to a person who has bought goods in good faith and for value** i.e. for price, then, the proviso stipulates as follows:
 - If the last mentioned transfer is by way of sale, right of lien or stoppage in transit is defeated, or
 - If the last mentioned transfer is by way of pledge, unpaid seller's right of lien or stoppage only be exercised, subject to the rights of the pledge.

EFFECT OF STOPPAGE: The contract is not rescinded when the seller exercises his right of stoppage in transit. **The contract still remains in force and the buyer can ask for delivery of goods on payment of price.**

♥ **RIGHT OF RE-SALE:** **The right of resale is very valuable right given to an unpaid seller.** In the absence of this right, the unpaid seller's other rights against the goods that is lien and the stoppage in transit would not have been of much use because these rights only entitled the unpaid seller to retain the goods until paid by the buyer.

The unpaid seller can exercise the right to resell the goods under the following conditions:

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- ♣ *Where the goods are of perishable nature.*
- ♣ *Where he gives notice to the buyer of his intention to re-sell the goods:* If after the receipt of such notice buyer fails within a reasonable time to pay or tender the price, the seller may resell the goods.
It may be noted that in such cases, on the resale of the goods, the seller is also entitled to:
 - (a) *Recover the difference between the contract price and resale price*, from the original buyer, as damages.
 - (b) *Retain the profit* if the resale price is higher than the contract price.
It may be noted that the seller can recover damages and retain the profits only when the goods are resold after giving the notice of resale to the buyer.
- ♣ *Where an unpaid seller who has exercised his right of lien or stoppage in transit resells the goods:* The subsequent buyer acquires the good titles.
- ♣ *A re sale by the seller where a right of resale is expressly reserved in a contract of sale:* In such a case seller is not required to give notice of resale. Can recover damages from original buyer.
- ♣ *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".*

RIGHT OF UNPAID SELLER AGAINST THE BUYER

♥ SUIT FOR PRICE:

- *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: Where the *buyer wrongfully neglects or refuses to accept* and pay for the goods.

♥ REPUTATION OF CONTRACT BEFORE DUE DATE: If the buyer does this then the seller may treat the *contract as rescinded and sue damages for the breach*.

♥ SUIT FOR INTEREST: *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.

REMEDIES OF BUYER AGAINST THE SELLER

- ♦ DAMAGES FOR NON-DELIVERY: Where the *seller wrongfully neglects or refuses to deliver the goods* to the buyer may sue the seller for damages for non-delivery.
- ♦ SUIT FOR SPECIFIC PERFORMANCE: *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.
- ♦ SUIT FOR BREACH OF WARRANTY: *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*

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warranty, the buyer is not entitled to reject the goods only on the bases of such breach of warranty.

- ◆ **REPUDIATION OF CONTRACT BEFORE DUE DATE:** 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 the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.*
- ◆ **SUIT FOR INTEREST:**
 - *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.*
 - *In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller from the date on which the payment was made.*

AUCTION SALE

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

RULE OF AUCTION SALE:

- ♣ **WHERE GOODS ARE SOLD IN LOTS:** Each lot is *prima facie* deemed to be subject of a separate contract of sale.
- ♣ **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, nay bidder may retract from his bid.
- ♣ **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.*
- ♣ **WHERE THE SALE IS NOT NOTIFIED BY 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 other person and any sale contravening this rule may be treated as fraudulent by the buyer.
- ♣ **RESERVED PRICE.** *Upset price.*
- ♣ **PRETENDED BIDDING:** If the *seller does it to raise the price*, the sale is voidable at the option of the buyer.



INCLUSION OF INCREASED OR DECREASED TAXES IN CONTRACT OF SALE

- ♣ *Where after a contract has been made but before it has been performed, tax revision takes place.*
- ♣ *Where tax is being imposed, increased, decreased or remitted in respect of any goods without any stipulations to the payment of tax, the parties would become entitled to read just the price of the goods accordingly.*
- ♣ *The buyer would have to pay the increased price where the taxes increases and may derive the benefits of reduction if taxes are curtailed.*
- ♣ *Thus, seller may add the increased taxes in the price. However this can be excluded by an agreement.*

SALE OF GOODS ACT SECTIONS LIST

SECTION NO.	TOPIC
2(1)	Buyer
2(2)	Delivery
2(4)	Document of title to goods
2(6)	Future goods
2(7)	Goods
2(8)	Insolvent
2(9)	Mercantile agent
2(10)	Price
2(11)	Property
2(12)	Quality of goods
2(13)	Seller
2(14)	Specific goods
4(1)	Sale
4(3)	Agreement to sale
5	Contract of sale how made
6	Existing goods
6(2)	Contingent goods
7	Goods perishing before making of contract
8	Goods perishing before sale but after agreement to sell
9	Ascertainment of price
10	Agreement to sell at valuation
11	Stipulation as to time
12	Condition and warranty
13	When condition to be treated as warranty
14 - 17	Condition and warranty
14(a)	Condition as to title
14(b)	Warranty as to undisturbed possession
14(c)	Warranty as to non-existence of encumbrances
15	Sale by description & sale by sample as well as by description
16	Caveat emptor
16(1)	Condition as to quality or fitness
16(2)	Condition as to merchantability
16(3)	Warranty as to quality or fitness by usage of trade
17	Sale by sample
18 - 26	Passing of property
18	Identification of goods
19	Property (specific or ascertained goods) passes when intended to pass
20	Specific goods in a deliverable state
21	Specific goods to be put into a deliverable state
22	Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price

SALE OF GOODS ACT SECTIONS LIST

23(1)	Sale of unascertained goods by description
23(2)	Delivery to carrier
24	Goods sent on approval or "on sale or return"
25	Reservation of right of disposal
26	Risk prima facie passes with property
27-30	Transfer of title by non-owners
27	Sale by person not the owner
28	Sale by one of the joint owners
29	Sale by a person in possession under voidable contract
30(1)	Sale by one who have already sold the goods but continues in possession thereof
30(2)	Sale by buyer obtaining possession before the property in the goods has vested
31	Duties of seller and buyer
32	Payment and delivery are concurrent conditions
33	Delivery of goods sold
34	Effect of part delivery
35	Buyer to apply for delivery
36(1)	Place of delivery
36(2)	Time of delivery
36(3)	Goods in possession of a third party
36(4)	Time for tender of delivery
36(5)	Expenses for delivery
37	Delivery of wrong quantity
38	Instalment deliveries
39(1)	Delivery to carrier
40	Deterioration during transit
41	Buyer's right to examine the goods
42	Rules related to acceptance of delivery of goods
43	Buyer not bound to return rejected goods
44	Liability of buyer for neglecting or refusing delivery of goods
45	Unpaid seller
46	Unpaid seller's right
47	Seller's lien
48	Part delivery
49	Termination of lien
50	Right to stoppage in transit
51	Duration of transit
52	How stoppage in transit is affected
53	Effect of sub-sale or pledge by buyer
54	Right of re-sale
55-61	Rights of unpaid seller against the buyer
55	Suit for price
56	Suit for damages for non-acceptance
57	Damages for non-delivery

SALE OF GOODS ACT SECTIONS LIST

58	Suit for specific performance
59	Suit for breach of warranty
60	Repudiation of contract before due date
61	Suit for interest
64	Auction sale
64A	Inclusion of increased or decreased taxes in contract of sale

UNIT – 1:- GENERAL NATURE OF PARTNERSHIP

SUMMARY LECTURE



Partnership

DEFINITIONS:

PARTNERSHIP: *Is the relation between persons who have agreed to share the profits of a business carried on by all or any one 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

- ❖ **ASSOCIATION OF TWO OR MORE PERSONS:** Section 464 of the Companies Act, 2013 has now put a limit of 50 partners in any associations/partnership firm.
- ❖ **AGREEMENT:** *Its an agreement between two or more persons and nature of partnership is voluntary and contractual.*
- ❖ **BUSINESS:** *There can be no partnership where there is no intention to carry on the business and to share the profit thereof.*
- ❖ **AGREEMENT TO SHARE PROFITS:** *There can be no partnership where only of the partners is entitled to the whole of the profit of business. But an agreement to share losses is not essential element. Unless agreed otherwise, these must be borne in the profit sharing ratio.*
- ❖ **BUSINESS CARRIED ON BY ALL OR ANY OF THEM ACTING FOR ALL:** *There should be a binding contract of mutual agency of mutual agency between the partners.*

TRUE TEST OF PARTNERSHIP

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

- ♣ There was an **agreement** between all the persons concerned
- ♣ The agreement was to **share the profits** of a business and
- ♣ The business was **carried on by all or any one of them** acting for all.
 - **AGREEMENT:** *Members of family business or a Burmese Buddhist husband wife carrying on business as such are **not partners** in such business.*
 - **SHARING OF PROFIT:** *The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners. **Following persons receive profits but would not be considered as partner:***
 - (a) *By a lender o money to persons engaged or about to engage in any business,*
 - (b) *By a servant or agent as remuneration,*
 - (c) *By a widow or child of a deceased partner, as annuity, or*
 - (d) *By a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof, does not itself make the receiver a partner with the persons carrying on the business.*

Sharing of profit is an essential element to constitute a partnership. But it is only a prima facie evidence and not conclusive evidence, in this regard.
 - **AGENCY:** *Existence of **mutual agency which is the cardinal principal of partnership law**, is very much helpful in reaching a conclusion in this regard. Each partner*

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carrying on the business is the principal as well as an agent of other partners. So, the act of one partner done on behalf of firm, binds all the partners.

DIFFERENCE BETWEEN PARTNERSHIP AND JOINT STOCK COMPANY

BASIS	PARTNERSHIP	JOINT STOCK COMPANY
LEGAL STATUS	A firm is not legal entity i.e. partners and firm are same persons.	A company is a separate legal entity .
AGENCY	Every partner is an agent of the other partner, as well as of the firm.	A member is not an agent of the other members or of the company, his actions do not bind company.
DISTRIBUTION	According to the partnership deed	There is no such compulsion to distribute its profit among its members.
EXTENT OF LIABILITY	Unlimited	Company limited by shares , the liability of a shareholder to the unpaid amount on shares . Company limited by guarantee , up to the amount of guarantee .
PROPERTY	The firm's property is that which is the 'joint estate' of all the partners as distinguished from the 'separate' estate of any of them and it does not belong to a body distinct in law from its member	In a company, its property is separate from that of its members who can receive it back only in the form of dividends or refund of capital
TRANSFER OF SHARES	Cannot be transferred without the consent of all partners.	May share its shares , subject to the provisions contained in the 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 in which case they may participate.
REGISTRATION	Not compulsory	Compulsory
WINDING UP	Can be dissolved anytime	Winded by NCLT or its name is struck off by the registrar of companies.
NO. OF MEMBERSHIP	50	Private company – 2 to 200 Public company – 7 to unlimited
DURATION OF EXISTANCE	Unless there is a contract to the contrary , death, retirement or insolvency of a partner results in the dissolution of the firm.	Perpetual succession

DIFFERENCE BETWEEN PARTNERSHIP AND CLUB

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BASIS	PARTNERSHIP	CLUB
DEFINATION	<i>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.</i>	<i>It is an association of persons formed with the object not of earning profits, but of promoting some beneficial purposes such as improvement of health or providing recreation for the members, etc.</i>
RELATIONSHIP	They are <i>partners and agent</i> for other partners	They are called <i>members</i> .
INTEREST IN THE PROPERTY	<i>Has interest</i>	<i>No interest</i>
DISSOLUTION	A change in the partners of the firm affect its existence	A change in the members of the club not affect its existence

DIFFERENCE BETWEEN PARTNERSHIP AND HINDU UNDIVIDED FAMILY

BASIS	PARTNERSHIP	JOINT HINDU FAMILY
MODE OF CREATION	By an <i>agreement</i>	<i>By status means its creation by birth</i> in the family
DEATH OF A MEMBER	<i>Ordinarily leads to dissolution</i>	<i>Does not give rise to dissolution</i>
MANAGEMENT	<i>All the partners are equally entitled to take part</i> in business	<i>Karta</i> has the right of management
AUTHORITY TO BIND	<i>Every partner can, by his act, bind the firm</i>	<i>The karta or the manager</i> , has the authority to bind the family
LIABILITY	<i>Unlimited</i>	Liability of <i>karta is unlimited, coparcener are liable to the extent of share of profit.</i>
CALLING FOR ACCOUNTS ON CLOSURE	<i>A partner can bring a suit against the firm for accounts</i> , provided he also seeks the dissolution of the firm.	On the separation of the joint hindu famiy, <i>a member is not entitled to ask for account</i> of the family business.
GOVERNING LAW	<i>Indian Partnership Act, 1932</i>	<i>Hindu law</i>
MINOR'S LIABILITY	<i>A minor cannot become a partner</i> , through he can be admitted to the benefit of partnership, only with the consent of all the partners.	In HUF business, <i>a minor becomes a member</i> of the ancestral business by the incidence of birth.
CONTINUITY	A firm is <i>subject to a contract between the partners get dissolved by death or insolvency of a partner.</i>	A HUF has the <i>continuity till is divided.</i>
NUMBER OF MEMBERS	<i>50</i>	<i>Unlimited</i>
SHARE IN THE BUSINESS	Decided <i>by agreement</i>	<i>No coparceners has a definite share.</i>

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DIFFERENCE BETWEEN PARTNERSHIP AND CO-OWNERSHIP

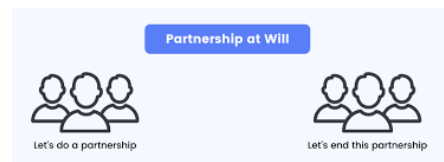
BASIS	PARTNERSHIP	CO-OWNERSHIP
FORMATION	Arises out of a contract, express or implied	May arise either from agreement or by the operation of law, such as inheritance
IMPLIED AGENCY	A partner is an agent of other	Is not a agent of other co-owner
NATURE OF INTEREST	Sharing of profit and losses	Not necessarily involving sharing of profit and losses
TRANSFER OF INTEREST	Is transferred only by the consent of other partners	May transfer his interest or rights in property without the consent of other co-owner.

DIFFERENCE BETWEEN PARTNERSHIP AND 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.
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.

KINDS OF PARTNERSHIPS

- ♥ **PARTNERSHIP AT WILL:** Is a partnership when:
 - a) No fixed period has been agreed upon the duration of the partnership; and
 - b) There is no provision made as to the determination of the partnership.



Where a partnership entered into for a fixed term is continued after the expiry of such term, it is to be treated as having become a partnership at will.

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.

- ♥ **PARTNERSHIP FOR A FIXED PERIOD:** It is a partnership created for a particular period of time. Comes to an end on the expiry of the fixed term.
- ♥ **PARTICULAR PARTNERSHIP:** Where a person becomes a partner with another person in any particular adventure or undertaking the partnership is called particular partnership.
- ♥ **GENERAL PARTNERSHIP:** Where a partnership is constituted with the respect to the business in general, it is called a general partnership.

PARTNERSHIP DEED

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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

Partnership deed may contain the following information:

- ◆ Name of the partnership firm.
- ◆ Names of all partners.
- ◆ Nature and place of the business of the firm.
- ◆ Date of commencement of partnership.
- ◆ Duration of the partnership. Etc.

TYPES OF PARTNERS

● ACTUAL OR ACTIVE OR OSTENSIBLE PARTNER:

- it is a person,
- who has become a partner by agreement, and
- *who actively participates in the conduct of the partnership.*
- In the event of his retirement, he must give a public notice in order to absolve himself of liabilities for act of other partners done after his retirement.



● SLEEPING OR DORMANT PARTNER:

- it is a person,
 - *who is a partner by agreement, and*
 - *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. They are not required to give public notice of their retirement.



● NOMINAL PARTNER:

- *who lends his name to firm,*
- *without having any real interest in firm,*
- *not entitled to share the profits,*
- does not take part in the conduct of the business and liable to third parties for all acts of the firm.



● PARTNER IN PROFITS ONLY:

- Entitled to share the profit only
- *Not liable for the losses*
- Liable to the third parties for all the acts of the profits only

● INCOMING PARTNERS: New partner admitted.

● 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.

● PARTNER BY HOLDING OUT:

- *When a person represent himself, or*
- *Knowingly permits himself,*
- *To be presented 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 representations has given credit to the firm.



UNIT – 2:- RELATIONS OF PARTNERS

SUMMARY LECTURE



RELATION OF PARTNERS TO ONE ANOTHER:

- ♣ **GENERAL DUTIES OF PARTNERS:** The *partners should carry business of the firm to the greatest common advantages* and later, they should render to any partner or his legal representatives full information of all the things affecting the firm. All partners are bound to render accounts to each other.
- ♣ **DUTY TO INDEMNIFY FOR LOSS CAUSED BY FRAUD:** *The partner, committing fraud in the conduct of the business of the firm, must take good the loss sustained by the firm* by his misconduct and the amount so brought in the partnership should be divided between the partners.
- ♣ **DETERMINATION OF RIGHTS AND DUTIES OF PARTNERS BY CONTRACT BETWEEN THE PARTIES:** *Subject to the provisions of the act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners* and such contract may be express or may be implied by a course of dealing. It further provides that such contract may be varied by consent of all the partners. Notwithstanding anything contained in the section 27 (agreement in restraint of trade) of the ICA, the contract between the partners may provide that a partner shall not carry on any business other than that of the firm while he is a partner.
- ♣ **THE CONDUCT OF THE BUSINESS:** *Subject to contract between the partners-*
 - ♣ *Right to take part in the conduct of the business.*
 - ♣ *Every partner is bound to attend diligently to his duties in the conduct of the business.*
 - ♣ *Any difference arising as to contrary matters connected with the business may be decided by majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of the partners; and*
 - ♣ *Every partners has a right to have access to and to inspect and copy any of the books of the firm.*
- ♣ **MUTUAL RIGHTS AND LIABILITIES:** *Subject to contract between the partners-*
 - ♥ *A partner is not entitled to receive remuneration for taking part in the conduct of the business;*
 - ♥ *The partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;*
 - ♥ *Where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits;*
 - ♥ *A partner making, for the purpose of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six percent per annum;*
 - ♥ *The firm shall indemnify a partner in respect of payments made and liabilities incurred by him-*
 - (i) *In the ordinary and proper conduct of the business, and*
 - (ii) *In doing such act, in an emergency, for the purposes of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and*

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- ♥ A **partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of business of the firm.**
(right to remuneration, right to share profit, interest on capital, interest on advances, right to be indemnified, right to indemnify the firm)

PARTNERSHIP PROPERTY

- ♦ **THE PROPERTY OF THE FIRM:** 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:
 - (i) All property, rights and interests which partners may have brought into the common stock as their contribution to the common business;
 - (ii) All the property, rights and interest acquired or purchases by or for the firm, or for the purposes and in the course of the business of the firm; and
 - (iii) Goodwill of the business.

The determination of a question whether a particular property is or is not 'property' of the firm ultimately depends on the real intention or agreement of the partners.

GOODWILL: Goodwill of a business is subject to a contract between the partners, to be regarded as 'property' of the firm. When the partnership firm is dissolved every partner has a right, in the absence of any agreement to the contrary, to have the goodwill of business sold for the benefits of all partners.

Where the property is exclusively belonging to a person, it does not become a property of the partnership merely because it is used for the business of partnership, such property will become property of the partnership if there is an agreement.

- ♦ **APPLICATION OF THE PROPERTY OF THE FIRM:** Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

PERSONAL PROFITS EARNED BY PARTNERS

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.

RIGHT AND DUTIES OF PARTNERS AFTER A CHANGE IN THE FIRM

It may occur in one of the four ways, namely:

- Where a **new partner** or partners come in
- Where some partner or partners go out, **i.e. by death or retirement**
- Where the partnership concerned **carries on business other than the business for which it was originally formed.**
- Where the **partnership business is carried on after the expiry** the term fixed for the purpose.

SUBJECT TO THE CONTRACT BETWEEN THE PARTNERS:

- ♣ **After a change in the firm:** Mutual rights and duties remains same
- ♣ **After the expiry of the term of the firm:** Where a firm continues to carry on business after expiry of term, mutual rights and duties remains same as before.
- ♣ **Where additional undertakings are carried out:** Where a firm constituted to carry out one or more adventures or undertaking carries out other adventures or

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undertaking are the same as those in respect of the original adventures or undertakings.

RELATION OF PARTNERS TO THIRD PARTIES

- ♣ **PARTNER TO BE AGENT OF THE FIRM:** Subject to the provisions of this act, a partner is the agent of the firm for the purposes of the business of the firm.
- ♣ **IMPLIED AUTHORITY OF PARTNER AS AGENT OF THE FIRM:** Subject to the provisions of section 22, *the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.*
In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to-
 - ♥ *Submit a dispute relating to the business of the firm to arbitration;*
 - ♥ *Open a banking account on behalf of the firm in his own name;*
 - ♥ *Compromise or relinquish any claim or portion of a claim by the firm;*
 - ♥ *Withdraw a suit or proceedings filed on behalf of the firm;*
 - ♥ *Admit any liability in a suit or proceeding against the firm;*
 - ♥ *Acquire immovable property on behalf of the firm;*
 - ♥ *Transfer immovable property belonging to the firm and*
 - ♥ *Enter into partnership on behalf of the firm.*

MODE OF DOING ACT TO BIND FIRM: Shall be done or executed in the firm name, or in any other manner expressing or implying intention to bind the firm.

- ♣ **EXTENSION AND RESTRICTION OF PARTNER'S IMPLIED AUTHORITY:** 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:*
 - *The third party knows about the restrictions, and*
 - *The third party does not know that he dealing with a partner in a firm.*
- ♣ **PARTNERS AUTHORITY IN AN EMERGENCY:** 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 binds the firm.

EFFECT OF ADMISSION BY A PARTNER: Partners, as agents of each other can make binding admissions but only in relation to partnership transaction and in the ordinary course of business.

EFFECT OF NOTICE TO ACTING PARTNER: *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 principle. 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. Except in the case of a fraud on the firm committed by or with the consent of that partner.

LIABILITY TO THIRD PARTIES

- ♦ **LIABILITIES OF A PARTNER FOR ACTS OF THE FIRM:** *Every partner is liable, jointly with all the other partners and also severally,* for all acts of the firm done while he is a partner.
- ♦ **LIABILITY OF THE FIRM FOR WRONGFUL ACT OF A PARTNER:** 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.*

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(a) *In the ordinary course of business of the firm*

(b) *With the authority of the partners.*

◆ **LIABILITY OF FIRM FOR MISAPPLICATION BY PARTNERS:** Where –

(a) A *partner acting within his apparent authority* receives money or property from a third party and misapplies it, or

(b) 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, the firm is liable to make good the loss.

RIGHTS OF TRANSFEREE OF A PARTNER'S INTEREST:

A share in 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. The right of such a transferee are as follows:

➤ ***During the continuance of partnership, such transferee is not entitled***

✚ *To interfere with the conduct of the business*

✚ *To require accounts, or*

✚ *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, against the remaining partners:

✚ *To receive the share of the assets of the firm* to which the transferring partner was entitled, *and*

✚ *For the purpose of ascertaining the share,*

He is entitled to an account as from the date of dissolution.

MINORS ADMITTED TO THE BENEFITS OF PARTNERSHIP

Minor's contract is void. Minor cannot become a partner in a firm because partnership is founded on a contract. Though a minor cannot be a partner in a firm, he can nonetheless be admitted to the benefits of partnership.

RIGHTS:

♣ *A minor partner has a right to his agreed share of 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 be 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 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:

♠ ***Before attaining majority:***

(a) *The liability of the minor is confined only to the extent of his share in the profits and the property of the firm.*

(b) *Minor has no personal liability for the debt of the firm incurred during his majority.*

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- (c) Minor **cannot be declared insolvent**, but if the firm is declared insolvent his share in the firm vests in the official receiver/assignee.

♣ **After attaining majority:**

Within 6 months of his attaining majority or his obtaining knowledge that he had been admitted to the benefit of partnership, whichever date is later, the minor partner has to decide whether he shall remain a partner or leave the firm.

When 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 willingness or by his failure to give the notice within the specified time, his rights and liabilities:

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

(ii) His **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.

LEGAL CONSEQUENCES OF PARTNER COMING IN AND GOING OUT:

♥ **INTRODUCTION OF A PARTNER:**

(a) **Subject to contract** between the partners, **no person shall be introduced** as a partner into a firm without the **consent of all the existing partners.**

(b) **Subject to the provisions of section**, a person who is introduced as a partner into a firm does not thereby becomes liable for any acts of the firm done before he became a partner.

In case of partnership of two partners: this section does not apply to a partnership of two partners which is automatically dissolved by the death of one of them.

♥ **RETIREMENT OF A PARTNERS:**

(1) **A partner may retire:**

(a) With the **consent of all the other partners;**

(b) In accordance with **an express agreement** by the partners; or

(c) Where the **partnership is at will, by giving notice in writing** to all the other partners of his intention to retire.

(2) **A retiring partner may be discharged from any liabilities to any third party for Acts of the firm done before his retirement by an agreement made by him with Such third party and the partners of the reconstituted firm, and such agreement may be**



Retirement of a Partner

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implied by a course of dealing between the third party and the reconstituted firm after he had knowledge of the retirement.

- (3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been act of the firm if done before the retirement, until public notice is given of the retirement.

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

- (4) Notices under above third point may be given by the retired partner or by any partner of the reconstituted firm.

♥ EXPULSION OF A PARTNER:

- (a) The power of expulsion **must be existed in a contract** between the partners.
(b) The power has been exercised by a **majority of the partners**; and
(c) It has been exercised in **good faith**.

If all these conditions are not present, the expulsion is not deemed to be in bona fide interest of the business of the firm.

The test of good faith:

- The expulsion must be in the **interest** of the partnership.
- The partner to be expelled is served with a **notice**.
- He is given an **opportunity of being heard**.

If a partner is otherwise expelled, the expulsion is null and void.

♥ INSOLVENCY OF A PARTNER:

- (1) Where a partner in a firm is adjudicated an insolvent **he ceases to be partner on the date on which the order of adjudication is made**, whether or not the firm is hereby dissolved.
- (2) Where under a contract between the partners the firm is not dissolved by the adjudicated of a partner as an insolvent, **the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent**, done after the date on which the order of adjudication is made.

- ♥ LIABILITY OF ESTATE OF DECEASED PARTNER: Where under a contract between the partners, the firm is not dissolved by the death of a partner, **the estate of a deceased partner is not liable for any act of the firm done after his death**.

RIGHTS OF OUTGOING PARTNER TO CARRY ON COMPETING BUSINESS:

An outgoing partner may carry on business competing with that of the firm and he may advertise such business, but **subject to contract to the contrary, he may not-**

- (a) Use the firm name,
(b) Represent himself as carrying on the business of the firm or
(c) Solicit the custom of persons who are dealing with the firm before he ceased to be a partner.

RIGHT OF OUTGOING PARTNER IN CERTAIN CASES TO SHARE SUBSEQUENT PROFITS:



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It lays down a substantial law relating to a liability of the surviving or continuing partner, who without a settlement of accounts with legal representatives of the deceased partner utilizes the assets of partnership for continuing the business.

REVOCATION OF CONTINUING GUARANTEE BY CHANGE IN FIRM:

Mere changes in the constitution of the firm operates to revoke the guarantee as to all the future transactions. Such change may occur by the death, or retirement of a partner, or by introduction of a new partner.

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UNIT – 3:- REGISTRATION AND DISSOLUTION OF A FIRM

SUMMARY LECTURE



REGISTRATION OF FIRMS:

The registration of a partnership is optional and one partner cannot compel another partner to join in the registration of the firm. It is not essential that the firm should be registered from the very beginning. When the partners decide to get the firm registered as per the provisions, they have to file the statement in the prescribed form.

When the registrar is satisfied that the above mentioned provisions have been complied with, he shall record an entry of this statement in the register (called the registrar of firms) and shall file the statement.

Subsequent alterations in the name, place, constitutions, etc., of the firm that may occur during its continuance should also be registered.

REGISTRATION: When the registrar is satisfied that the provisions of above section have been duly complied with, 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. *However, registration is deemed to be completed as soon as an application in the prescribed form with the prescribed fee and necessary details concerning the particulars of partnership is delivered to the registrar.*

Registration may also be effected even after a suit has been filed by the firm but in that case it is necessary to withdraw the suit and get the firm registered and then file a fresh suit.

The firm may be registered on payment, to the registrar, of a penalty of one hundred rupees per year of delay or a part thereof.



CONSEQUENCES OF NON-REGISTRATION:

Registration of firms is not compulsory, yet the consequences or disabilities of non-registration have a persuasive pressure for their registration. These disabilities briefly are as follows:

- ❖ NO SUIT IN A CIVIL COURT BY FIRM OR OTHER CO-PARTNERS AGAINST THIRD PARTY.
- ❖ No relief TO PARTNERS FOR SET-OFF OF CLAIM.
- ❖ AGGRIEVED PARTNER CANNOT BRING LEGAL ACTION AGAINST OTHER PARTNER OR THE FIRM.
- ❖ THIRD PARTY CAN SUE THE FIRM

EXCEPTIONS: *Non-registration of a firm does not, however effect the following rights:*

- ♠ *The right of third parties to sue the firm or any partner.*
- ♠ *The rights of partners to sue for the dissolution of the firm or for the settlement of the accounts of a dissolved firm, or for realisation of the property of a dissolved firm.*
- ♠ *The power of an official assignees, receiver of court to release the property of the insolvent partner and to bring an action.*
- ♠ *The right to sue or claim a set-off if the value of suit does not exceed Rs.100 in value.*

DISSOLUTION OF FIRM:

BASIS	DISSOLUTION OF FIRM	DISSOLUTION OF PARTNERSHIP
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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 settlement of liabilities	It involves only reconstitution and requires only revaluation of assets and liabilities of the firm.
ORDER OF COURT	A firm may be dissolved by the court	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.

MODE OF DISSOLUTION OF A FIRM

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

♥ DISSOLUTION WITHOUT THE ORDER OF THE COURT OR VOLUNTARY DISSOLUTION:

It consists of following four types:

- ◆ **DISSOLUTION BY AGREEMENT:** A firm may be dissolved with the **consent of all partners** or in accordance with a contract between the partners.
- ◆ **COMPULSORY DISSOLUTION:** 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.

Provided that, when more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

- ◆ **DISSOLUTION ON THE HAPPENING OF CERTAIN CONTINGENCIES:** **Subject to contract** between the partners, a firm can be dissolved on the happening of any of the following contingencies-
 - (a) **Where the firm is constituted for a fixed term, on the expiry of that term**
 - (b) **Where the firm is constituted to carry out one or more adventures or undertaking, then by completion thereof**
 - (c) **By the death of a partner, and**
 - (d) **By the adjudication of a partner as an insolvent.**
- ◆ **DISSOLUTION BY NOTICE OF PARTNERSHIP AT WILL:**
 - (a) **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.**
 - (b) **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.**

♥ DISSOLUTION BY THE COURT:

The court **MAY**, at the suit of the partner, dissolve a firm on any of the following ground:

- (a) **INSANITY/UN SOUND MIND:** Where a partner (not a sleeping partner) has become of unsound mind.
- (b) **PERMANENT INCAPACITY:** When a partner, other than the partner suing, has become incapable, such as physical disability, illness etc.

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- (c) **MISCONDUCT:** When a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of business.
- (d) **PERSISTENT BREACH OF AGREEMENT** (Embezzlement, keeping erroneous accounts, holding more cash than allowed, refusal to show accounts despite repeated request etc.)
- (e) **TRANSFER OF INTEREST:** When a partner, other than the partner suing, has transferred whole of interest in the firm, in the recovery of arrears of land revenue due by the partner.
- (f) **CONTINUOUS/PERPETUAL LOSSES:** There will be loss in future also.
- (g) **JUST AND EQUITABLE GROUNDS** (deadlock in the management, where the partners are not in talking terms between them, loss of substratum, gambling by a partner on a stock exchange)

CONSEQUENCES OF DISSOLUTION

- (a) **LIABILITY FOR ACTS OF PARTNERS DONE AFTER DISSOLUTION:** Two fold objectives-
 1. It *seek to protect third parties* dealing with the firm who had no notice of prior dissolution and
 2. It also *seeks to protect partners* of a dissolved firm from liabilities towards third parties.

However, there are exceptions to the rule stated in above example i.e. even where notice of dissolution has not given, there will be no liability for subsequent acts in the case of:

- *The estate of a deceased partner*
 - *An insolvent partner, or*
 - *A dormant partner, i.e. a partner, who was not known as a partner to the person dealing with the firm.*
- (b) **RIGHT OF PARTNERS TO HAVE BUSINESS WOUND UP AFTER DISSOLUTION:** To have the property of the firm applied in payment of the debt 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:** 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.
 - (d) **SETTLEMENT OF PARTERSHIP ACCOUNTS:** It may be noted that prima facie, accounts between the partners shall be settled in the manner prescribed by partnership agreement. The above mentioned rules apply subject to any agreement between partners. The provision as to what will be the mode of settlement of accounts in the usual course of business. But if the partners, by their agreement, express any different intention as to the mode in which losses will have to be borne eventually or the manner in which capital or advances will have to be paid to any partner, such an intention must be given effect to. However, any such agreement cannot affect the rights of the creditors of the firm.

The significance of the foregoing provisions is that if the assets of the firm are not sufficient to pay off the liabilities of the firm including the amount due to each partner on account of capital, each partner would individually be liable to

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contribute towards the losses, including deficiencies of capital, in the proportion in which he entitled to share profits.

(e) PAYMENTS OF FIRM DEBTS AND OF SEPERATE DEBTS: Where there are joint debts due from the firm and also separate debts due from any partner:

- (a) 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.*
- (b) The separate property of any partner shall be applied first in the payment of his separate debts and surplus, if any, in the payments debts of the firm.*

CA VARDHAMAN DAGA

IMPORTANT CASE LAWS

KD KAMATH & CO.

The supreme court has held that the two essential conditions to be satisfied are that:

- (1) There should be an agreement to share the profits as well as the losses of business; and
- (2) The business must be carried on by all or any of them acting for all, within the meaning of the definition of partnership under section 4

The fact that the exclusive power and control, by agreement of the parties, is vested in one partner or the further circumstances that only one partner can operate the bank accounts or borrow on behalf of the firm are not destructive of the theory of partnership provided the two essential conditions, mentioned earlier, are satisfied.

SANTIRANJAN DAS GUPTA Vs. DASYRAN MURZAMULL (SUPREME COURT)

The supreme court to reach the conclusion that there is no partnership between the parties:

- (a) Parties have not retained any record of terms and conditions of partnership.
- (b) Partnership business has maintained no account of its own, which would be open to inspection by both parties.
- (c) No account of the partnership was opened with any bank.
- (d) No written intimation was conveyed to the deputy director of procurement with respect to the newly created partnership.

VISHNU CHANDRA Vs. CHANDRIKA PRASAD [SUPREME COURT]

The supreme court, held that the expression, 'if any partner want to dissociate from the partnership business', in a clause of the partnership deed which was being constructed, comprehends a situation where a partner wants to retire from the partnership. The expression clearly indicated that in the event of retirement, the partnership business will not come to an end.

INDIAN PARTNERSHIP ACT SECTIONS LIST

SECTION NO.	TOPIC
4	DEFINATION OF 'PARTNERSHIP', 'PARTNER', 'FIRM' AND 'FIRM NAME'
6	Mode of determining existence of partnership
7	Partnership at will
9	General duties of partners
10	Duty to indemnify for loss caused by fraud
11	Determination of rights and duties of partners by contract between the partners
12	Conduct of the business
12(a)	Right to take part in the conduct of the business
12(b)	Right to be consulted
12(c)	Right to be consulted
12(d)	Right of access to books
12(e)	Right of legal heirs/representatives/their duly authorised agents
13	Mutual rights and liabilities
13(a)	Right to remuneration
13(b)	Right to share profits
13(c)	Interest on capital
13(d)	Interest on advances
13(e)	Right to be indemnified
13(f)	Right to indemnify the firm
14	The property of firm
15	Application of the property of the firm
16	Personal profit earned by partners
17	Rights and duties of partners after a change in the firm
18	Relation of partners to third parties
19	Implied authority of partner as agent of the firm
20	Extension and restriction of partners implied authority
21	Partner's authority in an emergency
22	Mode of doing act to bind firm
23	Effect of admissions by a partner
24	Effect of notice to acting partner
25	Liability of a partner for act of the firm
26	Liability of the firm for wrongful acts of a partner
27	Liability of firm for misapplication by partners
28	Partner by holding out
29	Right of transferee of a partner's interest
30	Minors admitted to the benefit of partnership
31	Introduction of a partner
32	Retirement of a partner
33	Expulsion of a partner
34	Insolvency of a partner
35	Liability of estate of deceased partner

INDIAN PARTNERSHIP ACT SECTIONS LIST

36	Rights of outgoing partner to carry on competing business
37	Right of outgoing partner in certain cases to share subsequent profits
38	Revocation of continuing guarantee by change in firm
39	Dissolution of firm
40	Dissolution by agreement
41	Compulsory Dissolution
42	Dissolution on the happening of certain contingencies
43	Dissolution by notice of partnership at will
44	Dissolution by court
45	Liability for acts of partners done after dissolution
46	Rights of partners to have business wound up after dissolution
47	Continuing authority of partners for purposes of winding up
48	Mode of settlement of partnership accounts
49	Payment of firm debts and of separate debts
58	Application for registration
59	Registration
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SUMMARY LECTURE



SUMMARY LECTURE



INTRODUCTION

The Ministry of Law and Justice on 9th January 2007 notified the Limited Liability Partnership Act, 2008.

The Parliament passed the Limited Liability Partnership Bill on 12th December 2008 and the President of India has assented the Bill on 7th January, 2009 and called as the Limited Liability Partnership Act, 2008..

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

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

The Second Schedule deals with conversion of firm into LLP.

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

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

It is *also to be noted that the Indian Partnership Act, 1992 is not applicable to LLPs.*



LIMITED LIABILITY PARTNERSHIP- MEANING AND CONCEPT

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

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

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

IMPORTANT DEFINITIONS

♣ **Body Corporate [section 2(d)]:** It means a company as defined in clause(20) of section 2 of the Companies Act, 2013 and **Includes-**

- (i) a LLP registered under this Act;
- (ii) a LLP incorporated outside India; and
- (iii) a company incorporated outside India,

but does not include-

- (i) a **corporation sole**;
- (ii) a **co-operative society** registered under any law for the time being in force; and
- (iii) any **other body corporate** (not being a company as defined in clause(20) of section 2 of the Companies Act, 2013 or a limited liability partnership as defined in this Act),

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which the Central Government may, by notification in the official Gazette, specify in this behalf.

- ♣ **Business [Section 2(e)]:** “Business” includes every trade, profession, service and occupation **except any activity which the central government may, by notification, exclude** (amendment)
- ♣ **Designated Partner [Section 2(j)]:** “Designated Partner” means any partner designated as such pursuant section 7.
- ♣ **Entity [Section 2(k)]:** “Entity” means any body corporate and includes, for the purpose of section 18,46,47,48,49,50, 52 and 53, a firm setup under the Indian Partnership Act, 1932.
- ♣ **Financial Year [Section 2(l)]:** “Financial year”, in relation to a LLP, means the period from the 1st day of April of a year to the 31st day of March of following year. However, in the case of a LLP incorporated after the 30st day of September of the year, the financial year may ended on 31st day of March of the next following year.
- ♣ **Foreign LLP [Section 2(m)]:** It means a LLP formed, incorporated or registered outside India which establishes a place of business within India.
- ♣ **Limited Liability Partnership [Section 2(n)]:** Limited Liability Partnership means a partnership formed and registered under this Act.
- ♣ **Limited Liability Partnership Agreement [Section 2(o)]:** It means any written agreement between the partner of the LLP or between the LLP and its partners which determines the mutual rights and duties of the partner and their rights and duties in relation to that LLP.
- ♣ **Partner [Section 2(q)]:** Partner, in relation to a LLP, means any person who becomes a partner in LLP in accordance with the LLP agreement.
- ♣ **“small limited liability partnership [section 2(ta)]:** it means a limited liability partnership – [amendment]
 - (i) **The contribution of which, does not exceed twenty-five lakh rupees or such higher amount, not exceeding five crore rupees, as may be prescribed; and**
 - (ii) **The turnover of which, as per the statement of account and solvency for the immediately preceding financial year, does not exceed forty lakh rupees or such higher amount not exceeding fifty crore rupees, as may be prescribed; or**
 - (iii) **Which meet such other requirements as may be prescribed, and fulfils such terms and conditions as may be prescribed;**

Non-applicability of the India Partnership Act, 1932(Section 4): *Save as otherwise provide, the provisions of the Indian Partnership Act, 1932 shall not apply to a LLP.*

Partners (Section5): **Any individual or body corporate may be a partner in a LLP.**

However, **an individual shall not be capable o becoming a partner of a LLP, if -**

- (a) He has been found to be of **unsound mind** by a Court of competent jurisdiction and the finding is in force;
- (b) He is an **undischarged insolvent**; or
- (c) He has **applied to be adjudicated as an insolvent and his application in pending.**

Minimum number of partners (Section 6):

- (i) Every LLP shall have **at least two partners.**

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- (ii) *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 the period.*

Designated partner (Section 7): [amendment]

- (1) Every LLP shall have **at least two** designated partners **who are individuals and at least one of them shall be a resident in India.**

Provided that in case of LLP, all the partners are bodies corporate or in which one or more partners are individual and bodies corporate, at least two individuals who are partner of such LLP or nominees of such bodies corporate shall act as a designated partners.

Explanation: For the purposes of this section, the term “resident in India” means a person who has stayed in India for a period of not less than 120 days during the financial year.

- (2) Subject to the provision of sub-section(1)
- (i) If the incorporation document
 - (a) **Specifies who are to be designated partners, such persons shall be designated partners on incorporation; or**
 - (b) **States that each of the partners from time to time of LLP is to be designated partner, every partner shall be designated partner;**
 - (ii) **Any partner may become a designated partner by and in accordance with LLP agreement and a partner may cease to be a designated partner in accordance with LLP agreement.**
- (3) **An individual shall not become a designated partner in any LLP unless he has given his prior consent to act as such to the LLP in such form and manner as may be prescribed.**
- (4) **Every LLP shall file with the registrar the particulars of every individual who has given his consent to act as designated partner in such form and manner as may be prescribed within 30 days of his appointment.**
- (5) **An individual eligible to be designated partner shall satisfy such conditions and requirement as may be prescribed.**
- (6) **Every designated partner of a LLP shall obtain a designated partners identification number (DPIN) from the central government and the provisions of section 153 to 159 (both inclusive) of the companies Act, 2013 shall apply mutatis mutandis for the said purpose.**

CHARACTERISTICS/SALIENT FEATURES OF LLP:

- ♣ **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.

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

- ♣ **Perpetual Succession:** *It is capable of entering into contract and holding property in its own name.*

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- ♣ **Separate Legal Entity:** The LLP is a separate legal entity, *LLP is liable to the full extent of its assets but liability of the partner is limited to their agreed contribution in the LLP.* In other words, creditors of LLP shall be the creditors LLP alone.
- ♣ **Mutual Agency:** Further, no partner is liable on account of the independent or unauthorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decision or misconduct. In other words, *all the partners will be the agents of the LLP alone. No one partner can bind the other partner by this Act.*
- ♣ **LLP Agreement:** *Mutual right 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.
- ♣ **Artificial Legal Person:** *A LLP is an artificial legal person because it is created by a legal process and is clothed with rights of an individual.* It can do everything which any natural person can do, except of course that, *it cannot sent to jail, cannot take an oath, cannot marry or get divorce nor can it practice a learned profession like CA or Medicine.* A LLP is invisible, intangible, immortal (it can be dissolved by law alone) but not fictitious because it really exists.
- ♣ **Common Seal:** A LLP being an artificial person can act through its partners and designated partners. LLP may have a common seal, if they decided to have one [Section 14(c)]. Thus, *it is not mandatory for a LLP to have a common seal. It shall remain under the custody of some responsible official and it shall be affixed in the presence of at least two designated partners of the LLP.*
- ♣ **Limited Liability:** Every partner of a LLP is, for the purpose of business of LLP, the agent of the LLP, but not of other partners (Section 26). *The liability of the partners is limited to there agreed to their agreed contribution in the LLP.* Such contribution may be of tangible or intangible nature or both
- ♣ **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.*
- ♣ **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 partner in LLP.
- ♣ **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.*
- ♣ **Investigation:** The Central Government shall have powers to investigate the affairs of an LLP by appointment of competence authority for the purpose.
- ♣ **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
- ♣ **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.
- ♣ **E-Filling of Documents:** Every form or application of document required to be filed or delivered under the act and rules made there under, shall be filed in computer readable

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electronic form on its website www.mca.gov.in and authenticated by a partner or designated partner LLP by the use of electronic and digital signature.

- ♣ **Foreign LLPs:** Section 2(1)(m) defines foreign limited liability partnership “*as a limited liability partnership formed, incorporated, or registered outside India which established as place of business within India*”. Foreign LLP can become a partner in India LLP.

INCORPORATION OF LLP

Incorporation document (Section 11):

♥ For a LLP to be incorporated:

- (a) *Two or more persons associated for carrying a lawful business* with a view to profit shall subscribe their name to an incorporation document;
- (b) *The incorporation document* shall be filed in such manner and with such fees, *as may be prescribed with the Register of the State in which the registered office of the LLP* is to be situated; and
- (c) *Statement to be filed:*
 - There shall be filed along with the *incorporation document, a statement in the prescribed form,*
 - Made either by an advocate, or a Company Secretary or a Chartered Accountant or a Cost Accountant, who is engaged in the formation of the LLP and
 - *By any one who subscribed his name to the incorporation document,*
 - That all the requirements of this Act and the rule made there under have been complied with,
 - In respect of incorporation and matters precedent and incidental thereto

♥ The incorporation document shall—

- (a) Be in *a form as may be* prescribed;
- (b) State the *name* of the LLP;
- (c) State the *proposed business* of the LLP;
- (d) State *the address of the registered office* of the LLP;
- (e) State the *name and the address of each of the persons who are to be partners* of the LLP on incorporation;
- (f) State the *name and the address of each of the persons who are to be designated partners* of the LLP on incorporation;
- (g) *Contain such other information* concerning the proposed LLP as may be prescribed.

♥ If a person makes a statements as discussed above which he—

- (a) Knows to be false: or
- (b) Does not believe to be true, shall be punishable
 - With imprisonment for a term which may extend to 2 years and
 - With fine which shall not be less than Rs 10,000 but which may extend to Rs 5 Lakhs.

Incorporation by registration (Section 12):

- ◆ When the requirement imposed by clauses (b) and (c) of sub section 11 have been complied with, the Register shall retain the incorporation document and, unless the

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requirement imposed by clause (a) of that sub section has not been complied with, he shall, *within a period of 14 days—*

(a) Register the incorporation document; and

(b) Give a certificate that the LLP is incorporated by the name specified therein.

- ◆ The registrar may accept the statement delivered under clause (c) of sub section (1) of section 11 as sufficient evidence that the requirement imposed by clause (a) of that sub section has been complied with.
- ◆ *The certificate issued under clause (b) of sub section (1) shall be signed by the Registrar and authenticated by his office seal.*
- ◆ *The certificate shall be conclusive evidence that the LLP is incorporated by the name specified therein.*

Registered office of LLP and change therein (Section 13): [Amendment]

- ♣ *Every LLP shall have a registered office to which all communication 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 by post under a certificate of posting or by registered post or by any other manner, as may be prescribed, at the registered office and any other address specifically declared by the LLP for the purpose in such form and manner as may be prescribed.*
- ♣ 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.
- ♣ *If any default is made in complying with the requirement of this section, the LLP and its every partner shall be liable to a penalty of five hundred rupees for each day during which the default continues, subject to a maximum of fifty thousand rupees for the LLP and its partners*

Name (Section 15): [Amendment]

- ♠ *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—*
 - (a) Undesirable; or*
 - (b) Identical or too nearly resembles to that of and other or LLP or a registered trade mark of any other person under the Trade Mark Act, 1999.*

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 under sub section (1) and on payment of the prescribed fee, the Registrar may, if he is satisfied, subject to the rules prescribed by the *Central Government in the matter, that the name to be reserved is not one which may be rejected*

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on any ground referred to in sub section(2) of section 15, reserve the name for the period of 3 months from the date of intimation by the Registrar.

Change of name of LLP (section 17) [Amendment]

- (1) Notwithstanding anything contained in sections 15 and 16, *if through inadvertence or otherwise, a LLP on its first registration or on its registration by a new body corporate, its registered name; is registered by a name which is identical with or too nearly resembles to—*
- (a) *That of any other limited liability partnership or a company; or*
 - (b) *A registered trade mark of a proprietor under the trade marks Act, 1999, as is likely to be mistaken for it, then on an application of such LLP or proprietor referred to in clauses (a) and (b) respectively or a company, the central government may direct that such LLP to change its name or new name within a period of three months from the date of issue of such direction;*

Provided that an application of the proprietor of the registered trade marks shall be maintainable within a period of three years from the date of incorporation or registration or change of name of the LLP under this act.

- (2) *Where a LLP changes its name or obtains a new name under sub-section(1), it shall within a period of fifteen days from the date of such change, give notice of the change to registrar along with the order of the central government, who shall carry out necessary changes in the certificate of incorporation and within thirty days of such change in certificate of incorporation, such LLP shall change its name in the LLP agreement.*
- (3) *If the LLP is in default in complying with any direction given under sub-section(1), the central government shall allot a new name to the LLP in such manner as may be prescribed and the registrar shall enter the new name in the register of LLP in place of the old name and issue a fresh certificate of incorporation with new name, which the LLP shall use thereafter;*
- Provided that nothing contained in this sub-section shall prevent a LLP from subsequently changing its name in accordance with the provisions of section 16.*

PARTNERS AND THEIR RELATIONS

Eligibility to be partner (Section 22): On the incorporation of a LLP, the person who *subscribed their names to the incorporation document* shall be its partners and any other person may become a partner of the LLP by and in accordance with the LLP agreement.

Relationship of partners (Section 23):

- ♣ *Save as otherwise provided by this Act, the mutual rights and duties of the partners of a LLP, and the mutual rights and duties of a LLP and its partners, shall be governed by the LLP agreement between the partners, or between the LLP and its partners.*
- ♣ *The LLP agreement and any changes, if any, made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be prescribed.*
- ♣ *An agreement in writing made before the incorporation of a LLP between the persons who subscribed their name to the incorporation document may impose obligations on the LLP, provided such agreement is ratified by all the partners after the incorporation of the LLP.*

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- ♣ In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual right and duties of the LLP and the partners shall be determined by the provisions relating to that matter as are set out in the First Schedule.

Cessation of partnership interest (Section 24):

- ♣ A person may cease to be a partner of a LLP in accordance with an agreement with the other partners or, in the absence of agreement with the other partners as to cessation of being a partner, *by giving a notice in writing of not less than 30 days to the other partners of his intention to resign a partner.*
- ♣ *A person shall cease to be a partner* of a LLP—
 - (a) *On his death or dissolution* of the LLP; or
 - (b) If he is declared to be of *unsound mind by a competent court*; or
 - (c) If he has applied to be *adjudged as an insolvent or declared as an insolvent.*
- ♣ *Where a person has ceased to be a partner of a LLP* (hereinafter referred to as “former partner”), the former partner is to be regarded (in relation to any person dealing with the LLP) as still being a partner of the LLP unless—
 - (a) *The person has notice that the former partner has ceased to be a partner* of the LLP; or
 - (b) *Notice that the former partner* has ceased to be a partner of the LLP has been *delivered to the Registrar.*
- ♣ The cessation of a partner from the LLP does not by itself discharge the partner from any obligation to the LLP or to the other partners or to any other person which he incurred while being a partner.
- ♣ *Where a partner of 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 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):[amendment]

- (1) *Every partner shall inform the LLP of any change in his name or address within a period of 15 days of such change.*
- (2) *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 ceases to be a partner; and
 - (b) Where the *any change in the name or address of a partner, file a notice with the Registrar within 30 days* of such change.
- (3) *A notice filed with the Registrar under sub section (2)—*

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- (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 consent to becoming a partner, signed by him and authenticated in the manner as may be prescribed.

(4) If the LLP contravenes the provisions of sub section (2), the LLP and every designated partner of the LLP shall be liable to a penalty of ten thousand rupees.

(5) If any contravenes referred to in sub section (2) is made by any partner of LLP, such partner shall be liable to a penalty of ten thousand rupees.

(6) Any person who ceases to be a partner of a LLP may himself file with the Registrar the notice referred in the sub section (3) if he has reasonable cause to believe that the LLP may not file the notice with the Registrar and in case of any such notice filed by a partner , the Registrar and in case any such notice filed by a partner, the Registrar shall obtain a conformation to this effect from the LLP unless the LLP has also filed such notice.

Provided that where no confirmation is given by the LLP within 15 days, the registrar shall register the notice made by the person ceasing to be a partner under this section.

EXTENT AND LIMITATION OF LIABILITY OF LLP AND PARTNER

Partner as agent (Section 26): *Every partner of a LLP is, for the purpose of the business of the LLP, the agent of the LLP, but not of other partners.*

Extent of liability of LLP (Section 27):

- ◆ **A LLP is not bound by anything done by a partner** in dealing with a person if—
 - (a) The partner in fact has no authority to act for the LLP in doing a particular act; and
 - (b) The person knows that he has no authority or does not know or believe him to be a 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.

Extent of liability of partner (Section 28):

- ♣ **A partner is not personally liable, directly or indirectly** for an obligation referred to in sub section (3) of section 27 solely by reason of being a partner of the LLP.
- ♣ The provision of sub section (3) of section 27 and sub section (1) of this section shall not affect the personal liability of a partner for his own wrongful act or omission, but **a partner shall not be personally liable for the wrongful act or omission of any other partner of the LLP.**

Holding out (Section 29)

- ♠ Any person,
 - **Who by words spoken or written or by conduct,**
 - **Represent himself, or knowingly permits himself to be represented to be a partner,**
 - **Is liable to any person**

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- 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.*

Unlimited liability in case of fraud (Section 30):

♥ ***In case of fraud:***

- 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.***

However, in case any such act is carried out by the partner, the LLP is liable to the same extent as the partner unless it is established by the LLP that such act was without the knowledge or the authority of the LLP.

- ♥ Where any business is carried on with such intent or for such purpose as mentioned in sub section (1), every person who was knowingly apart to the carrying on of the business in the manner aforesaid shall be punishable with
 - Imprisonment for a term which may extend to 2 years and
 - With fine which shall not be less than Rs.50,000 but may extend to Rs. 5 lakhs.
- ♥ Where a LLP or an partner or designated partner or employee of such LLP has conducted the affairs of the LLP in as fraudulent manner, then without prejudice to any criminal proceeding 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.

However, such LLP shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the LLP.

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

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- When any *information given by any partner or employee* (whether or not during investigation) *leads to LLP or any partner or employee of such LLP being convicted* under this Act or any other Act.
- ◆ *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 or causing information to be provided pursuant to sub section (1).

FINANCIAL DISCLOSURES

Maintenance of books of account, other records and audit, etc. (Section 34): **[Amendment]**

- (1) The LLP shall maintain such proper books of account as may be prescribed Relating to its affairs for each of its existence On cash basis or accrual basis and According to double entry system of accounting and *Shall maintain the same as its registered office* For such period as may be prescribed.
- (2) *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 partner of the LLP.
- (3) Every LLP shall file within the prescribed time, the Statement of Account and Solvency prepared pursuant to sub section (2) with the Registrar every year in such form and manner and accompanied by such fees as may be prescribed.
- (4) *The accounts of LLP shall be audited in accordance with such rules as may be prescribed.* Provided that the Central Government may, by notification in the Official Gazette, exempt any class or classes of LLP from the requirement of this sub section.
- (5) *Any LLP which fails to comply with the provisions of sub-section(3), such LLP and its designated partners shall be liable to a penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of one lakh rupees for the LLP and fifty thousand rupees for every designated partner.*
- (6) *Any LLP which fails to comply with the provision of sub-section(1), sub-section(2) and sub-section(4), such LLP shall be punishable with fine which shall not be less than twenty-five thousand rupees, but may extend to five lakh rupees and every designated partner of such LLP shall be punishable with fine which shall not be less than ten thousand rupees, but may extend to one lakh rupees.*

ACCOUNTING AND AUDITING RECORDS (SECTION 34A): [Amendment]

The central government may, in consultation with the national financial reporting authority constituted under section 132 of the companies Act, 2013, -

- (a) **Prescribe the standards of accounting; and**
- (b) **Prescribe the standard of auditing, as recommended by the ICAI constituted under section 3 of the Chartered Accountant Act, 1949, for a class or classes of LLP.**

Annual return (Section 35): [Amendment]

- (1) 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.

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- (2) **If any LLP fails to file its annual return under sub-section(1) before the expiry of the period specified therein, such LLP and its designated partners shall be liable to penalty of one hundred rupees for each day during such failure continues, subject to a maximum of one lakh rupees for the LLP and fifty thousand rupees for designated partners.**

CONVERSION INTO LLP

Conversion from firm into LLP (Section 55): A firm may convert into a LLP in accordance with the provisions of this Chapter and the Second Schedule.

Conversion from private company into LLP (Section 56): A private company may convert into a LLP in accordance with the provision of this Chapter and the Third Schedule.

Conversion from unlisted public company into LLP (Section 57): An unlisted public company may convert into a LLP in accordance with the provisions of this Chapter and the Fourth Schedule.

Registration and effect of conversion (Section 58):

Registration:

- ♥ The Registrar on satisfying that a firm, private company or an unlisted public company, as the case may be, has complied with the provisions of the various Schedule, provision of this Act and the rule made there under, **register the documents issue a certificate of registration** in such form as the Register may determine stating that the LLP is on and from the date specified in the certificate, registered under this Act.
- ♥ The LLP shall, within 15 days of the date of registration, inform the concerned Registrar of Firms or Registrar of Companies, as the case may be, with which it was registered under the provision of Indian Partnership Act, 1932 or the Companies Act, 1956 (Now Companies Act, 2003) as the case may be, about the conversion and of the particulars of the LLP in such form and manner as may be prescribed.
- ♥ Upon such conversion, the partners of the firm, the shareholders of private company or unlisted public company, as the company may be, the LLP to which such firm or such company has converted, and the partners of the LLP shall be bound by the provision of the various Schedule, as the case may be applicable to them.
- ♥ Upon such conversion, on and from the date of certificate of registration, the effects of the conversion shall be such as specified in the various schedule, as the case may be.

Effect of Registration: Notwithstanding anything contained in any other law for the time being in force, on and from the date of registration specified in the certificate of registration issued under the various Schedule, as the case may be—

- ◆ There shall be **a LLP by the name specified in the certificate of registration registered under this Act;**
- ◆ All tangible (moveable or immovable) and intangible property vested in the firm or the company, as the case may be, **all assets, interests, rights, privileges, liabilities, obligation, relating to the firm or the company, as the case may be transferred to and shall vest in the limited liability partnership** without further assurance, act or dead; and
- ◆ **The firm of the company, as the case may be, shall be deemed to be dissolved and removed from the records of the Registrar of Firm or Registrar of companies** as the case may be.

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FORIGN LLP

Foreign limited liability partnerships (Section 59): the Central Government may make rules for provisions in relation to establishment of place of business by foreign LLP within India and carrying on their business therein by applying or incorporating, with such modification, as appear appropriate, the provision of the Companies Act, 1956 or such regulatory mechanism with such composition as may be prescribed.

WINDING UP AND DISSOLUTION

Winding up and dissolution (Section 63): The winding up of a LLP may be *either voluntary or by the Tribunal* and LLP, so wound up may be dissolved.

Circumstance in which LLP may be wound up by the Tribunal (Section 64): A LLP may be wound up by the Tribunal;

- ♣ If the LLP decides that LLP be *wound up by the Tribunal*;
- ♣ *If for a period of more than six months, the number of partner of the LLP is reduced below two*;
- ♣ If the LLP *unable to pay its debts*;
- ♣ If the LLP has *acted against the interests of the sovereignty and integrity of India*, the security of the State or public order;
- ♣ 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
- ♣ *If the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.*

Rules for winding up and dissolution (Section 65): The Central Government may make rules for the provision in relation to winding up dissolution of LLP.

MISCELLANEOUS

Business transactions of partner with LLP (Section 66): *A partner may lend money to and transact other business with the LLP and has the same right and obligations with respect to the loan or other transactions as a person who is not a partner.*

Application of the provisions of the Companies Act (Section 67)

- ♣ The Central Government may, by notification in the Official Gazette, direct that any of the provisions of the Companies Act, 1956 specified in the notification—
 - Shall apply to any LLP; or
 - Shall apply to any LLP with such exception, modification and adaptation, as may be specified, in the notification.
- ♣ A copy of every notification proposed to be issued under sub section (1)
 - Shall be laid in draft before each House of Parliament, while it is in session,
 - For a total period of 30 days which may be comprised in one session or in two or more successive sessions, and
 - If, before the expire of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both House agree in making any modification in the notification,
 - The notification shall not be issued or, as the case may be,
 - Shall be issued only in such modified for us may be agreed upon by both the Houses,

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ESTABLISHMENT OF SPECIAL COURT (Section 67A): [Newly Inserted]

- (1) The central government may for the purpose of providing speedy trial of offences under this act, by notification, establish or designate as may special courts as may be necessary for such area or areas, as may be specified in the notification.**
- (2) The special court shall consist of –**
 - (a) A single judge holding office as sessions judge or additional sessions judge,, in case of offences punishable under this act with imprisonment of three years or more; and**
 - (b) A metropolitan magistrate or a judicial magistrate of the first class, in the case of other offences, who shall be appointed by the central government with the concurrence of the chief justice of the high court:**

Provided that until special court are designated or established under sub-section (1), the court designated as special courts in terms of section 435 of the companies Act, 2013 shall be deemed to be special courts for the purpose of trial of offences punishable under this act:

Provided further that notwithstanding anything contained in the code of criminal procedure, 1973, any offence committed under this act, which is triable by a special court shall, until a special court is established under this act or the Companies Act, 2013, be tried by a court of sessions or the court of metropolitan magistrate or a judicial magistrate of the first class, as the case may be, exercising jurisdiction over the area.

PROCEDURE AND POWERS OF SPECIAL COURT [Section 67B] [Newly Inserted]

- (1) Notwithstanding anything contained in the code of criminal procedure, 1973, all offences specified under sub-section (1) of section 67A shall be triable only by the special court established or designated for the area in which the registered office of the limited liability partnership is situated in relation to which the offence is committed or where there are more than one special courts for such area, by such one of them as may be specified in this behalf by the high court concerned.**
- (2) While trying an offence under this Act, a special court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial.**
- (3) Notwithstanding anything contained in the code of criminal procedure, 1973, the special court may, if it thinks fit, try in a summary way any offence under this act which is punishable with imprisonment for a term not exceeding three years:**

Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one shall be passed:

Provided further that, when at the commencement of or in the course of a summary trial, it appears to the special court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any reason, undesirable to try the case summarily, the special court shall after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

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APPEAL AND REVISION (Section 67C) [Newly inserted]

The high court may exercise, so far as may be applicable, all the powers conferred by chapters XXIX and XXX of the code of criminal procedure, 1973 on a high court, as if a special court within local limits of the jurisdiction of the high court were a court of sessions trying cases within the local limits of the jurisdiction of the high court

Electronic filing of documents (Section 68):

- ♥ Any document required to be filed, recorded or registered under this Act may be filed, recorded or registered in such manner and subject to such conditions as may be prescribed.
- ♥ A copy of or an extract from any document electronically filed with or submitted to the Registrar which is supplied or issued by the Registrar and certified through affixing digital signature to be a true extract from any document filed with or submitted to the Registrar shall, in any proceeding, be admissible in evidence and be presumed, unless evidence to the contrary is adduced, to be a true extract from such document.

REGISTRATION OFFICES (Section 68A) [Newly inserted]

- (1) For the purpose of exercising such powers and discharging such functions as are conferred on the central government by or under this Act or under rules made thereunder and for the purpose of registration of limited liability partnerships under this Act, the central government shall, by notification, establish such number of registration offices at such places as it thinks fit, specifying their jurisdiction.
- (2) The central government may appoint such registrars, additional registrars, joint registrars, deputy registrars and assistant registrars as it considers necessary, for the registration of LLP and discharge of various functions under this Act.
- (3) The powers and duties of the registrar referred to in sub-section(2) and the terms and conditions of their service shall be such as may be prescribed.
- (4) The central government may direct the registrar to prepare a seal or seals for the authentication of documents required for, or connected with the registration of LLP.

Payment of additional fee (Section69): [Amendment]

Any document or return required to be filed or registered under this Act with Registrar, if, is not registered or filed in time provided therein, may be registered or filed after that time, on payment of such additional fees as may be prescribed in addition to any fees payable for filing of such document or return:

Provided that such document or return shall be filed after the due date of filing, without prejudice to any other action or liability under this Act:

Provided further that a different fee or additional fee may be prescribed for different classes of LLP or for different documents or returns required to be filed under this Act or rules made thereunder.

LIMITED LIABILITY PARTNERSHIP SECTIONS LIST

SECTION NO.	TOPICS
2(d)	Body corporate
2(e)	Business
2(j)	Designated partner
2(k)	Entity
2(I)	Financial year
2(m)	Foreign LLP
2(n)	LLP
2(o)	LLP agreement
2(ta) [newly inserted]	Small limited liability partnership
4	Non-applicability of the IPA
5	Partners
6	Minimum numbers of partners
7	Designated partners
11	Incorporation
12	Incorporation by registration
13	Registered office of LLP and change therein
14	Effect of registration
15	Name
16	Reservation of name
17	Change of name of LLP
22	Eligibility of partners
23	Relationship of partners
24	Cessation of partnership interest
25	Registration of changes in partners
26	Partner as agent
27	Extent of liability of LLP
28	Extent of liability of partner
29	Holding out
30	Unlimited liability in case of fraud
31	Whistle blowing
34	Maintenance of books of account, other records and audit, etc.
34A [newly inserted]	Accounting and auditing records
35	Annual return
55	Conversion from firm into LLP
56	Conversion from private company into LLP
57	Conversion from unlisted public company into LLP
58	Registration and effect of conversion

LIMITED LIABILITY PARTNERSHIP SECTIONS LIST

59	Foreign limited liability partnerships
63	Winding up and dissolution
64	Circumstances in which LLP may be wound up by tribunal
65	Rules for winding up and dissolution
66	Business transactions of partner with LLP
67	Application of the provisions of the companies act
67A [newly inserted]	Establishment of special court
67B[newly inserted]	Procedure and powers of special court
67C [newly inserted]	Appeals and revision
68	Electronic filing of documents
68A [newly inserted]	Registration offices
69	Payment of additional fee

THE COMPANIES ACT, 2013

COMPANY: MEANING AND ITS FEATURES

SECTION 2(20) OF THE COMPANIES ACT, 2013 defines the term

company. "Company means a company incorporated under this act or under any previous company law"

In the words of professor Haney "A company is an incorporated association, which is an artificial person created by law, having separate legal entity, with a perpetual succession and a common seal".



FEATURES OF COMPANY:

- ♣ **SEPARATE LEGAL ENTITY:** A member does not even have an insurable interest in the property of the company.
- ♣ **PERPETUAL SUCCESSION:** Members may die or change, but the company goes on till it is wound up on the ground specified by the act.
- ♣ **LIMITED LIABILITY:**
 - (i) Company limited liability by shares: To the **unpaid amount** of the shares.
 - (ii) Company limited by guarantee: The **members are liable only to the extent of the amount guaranteed by them and that too only when company goes into liquidation.**
 - (iii) Unlimited company: The liability of members is **unlimited.**
- ♣ **ARTIFICIAL LEGAL PERSON:** A company is an artificial person as it is created by a process other than natural birth. It can do everything which any natural person can do **except sent to jail, take an oath, marry or practice a learned profession.**
- ♣ **COMMON SEAL:** **Common seal is optional for the company, the company does not have a common seal, the authorization shall be made by two directors or by a director and the Company secretary, wherever the company has appointed a company secretary.**

CORPORATE VEIL THEORY

- ♣ **CORPORATE VEIL:** The term corporate veil refers to the **concept the members of a company are shielded from liability connected to the company's actions.** If the company incurs any debt or contravenes any laws, the corporate veil concept implies that members should not be liable for those errors. In other words, they enjoy corporate insulation. Thus, the shareholders are protected from the acts of the company.
- ♣ **LIFTING OF CORPORATE VEIL:** The following are the cases where company law disregards the principal of corporate veil and that too, when questions of control are involved rather than merely a question of ownership.
 - (1) To determine the character of the company i.e. to find out whether co-enemy or friend.
 - (2) To protect revenue/tax:
 - (a) Where corporate entity is used to **evade or circumvent tax**
 - (b) Where the company was formed and **shares was purchased to transfer the income by way of dividend and interest.**



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- (3) To avoid legal obligation.
- (4) Formation of subsidiaries to act as agent.
- (5) Company formed for fraud/improper conduct or to defeat law.

CLASSES OF COMPANIES UNDER THE ACT

♥ ON THE BASIS OF LIABILITY:

- ◆ **Company limited by shares:** When the liability of the members of a company is limited by its MOA to the **amount unpaid on the shares** held by them.
- ◆ **Company limited by guarantee:** When the liability of the members of a company is limited by its MOA 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**.
- ◆ **Unlimited company:** 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.

♥ ON THE BASIS OF MEMBERS:

- ♣ **ONE PERSON COMPANY:** OPC is a **private limited company** with the minimum paid up share capital as may be prescribed and has at least one member.



Significant points:

- **Only one person** as member.
- Minimum paid up capital – **no limit** prescribed.
- The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with the registrar of companies at the time of incorporation.
- Such other person may be given the right to withdraw his consent.
- The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the registrar.
- Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- **Only a natural person who is an Indian citizen and resident in India** (person who has stayed in India for a period of not **less than 120 days** during the immediately preceding financial year)-
 - **Shall be eligible to incorporate a OPC;**
 - **Shall be a nominee for the sole member of a OPC.**
- ♠ **No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.**
- ♠ **No minor shall become member or nominee of the OPC or can hold share with beneficial interest.**
- ♠ **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.

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- Such company **cannot carry out NBFC** including investment in securities of anybody corporate.
- OPC cannot convert voluntary into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.**
- If OPC or any officer of such company contravenes the provisions, they shall be punishable with the fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

✦ **PRIVATE COMPANY:** Means a company having a minimum paid-up share capital as may be prescribed, and which by its articles-

- Restrict the right to transfer its shares;
- Except in case of OPC, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purpose of this clause, be treated as a single member:

Provided further that-

- Persons who are in the **employment** of the company; and
- Persons who, **having been formerly in the employment** of the company, were members of the company while in that employment and have continued to be members after the employment ceased, Shall not be included in the number of members; and
- Prohibits any invitation to the public** to subscribe for any securities of the company;

SMALL COMPANY: Which means a company other than a public company-

- Paid-up share capital** of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than **ten crore** rupees: and
- Turnover** of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than **one hundred crore** rupees:

Exceptions: this section shall not apply to:

- A holding company or a subsidiary company;
- A company registered under section 8; or
- A company or body corporate governed by any special act

For the purpose of sub-clause (i) and sub-clause (ii) of clause (85) of section 2 of the Act, paid up share capital and turnover of the small company shall not exceed rupees four crores and rupees forty crores respectively (Amended)

(c) **PUBLIC COMPANY:** Means a company which-

- Is **not a private company**; and
- Has a **minimum paid up share capital, as may be prescribed:**

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this act even where such subsidiary company



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continues to be a private company in its article;

♥ ON THE BASIS OF CONTROL:

♥ HOLDING AND SUBSIDIARY COMPANIES:

A company is a holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies. Company include body corporate.

Subsidiary company in relation to any other company (that is to say the holding company), means a company in which the holding company-

- (i) Controls the composition of the board of directors; or
- (ii) Exercises or controls more than **one-half of the total voting power** either at its own or together with one or more of its subsidiary companies;

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

Explanation – for the purposes of this clause, -

- (a) A company shall be deemed to be a subsidiary company of the holding company if the control referred to in sub-clause (i) or sub clause is of another subsidiary company of the holding company;
- (b) The composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or removal all or a majority of the directors;
- (c) The expression "company" includes body corporate;
- (d) "layer" in relation to a holding company means its subsidiary or subsidiaries;

♥ ASSOCIATE COMPANY: 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**.

Explanation – for the purpose of this clause -

- The expression "**significant influence**" means control of at **twenty per cent** of total voting power, or control of or participation in business decisions under an agreement;
- The expression "**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.

♥ ON THE BASIS OF ACCESS TO CAPITAL

(a) **Listed company:** Company which has any of its securities listed on any recognised stock exchange.

(b) **Unlisted company:** Means other than listed company.

♥ OTHER COMPANIES:

♦ GOVERNMENT COMPANY: Government company means **any company in which not less than 51%** of the paid up share capital is held by-

- (i) The central government
- (ii) By any state government or governments, or



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(iii) Partly by the central government and partly by one or more state governments,

And the section includes a company which is a subsidiary company of a government company

Explanation – for the purpose of this clause, the “paid up share capital” shall be constructed as “total voting power”, where shares with differential voting rights have been issued.”

◆ **FOREIGN COMPANY:** it means any company or body corporate *incorporated outside india* which-

(i) *Has a place of business in india* whether by itself or through an agent, physically or through electronic mode; and

(ii) *Conducts any business activity in India* in any other manner

◆ **FORMATION OF COMPANIES WITH CHARITABLE OBJECTS ETC. (SECTION 8):**

Deals with the formation of companies which are formed to

- *Promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc.*

Such company intend to apply its profit in

- Promoting its objects and
- **Prohibiting the payment of any dividend to its members.**

Examples of section 8 companies are FCCI, ASSOCHAM, national sports club of India, CII etc.

Significant points:

- ♣ *Requirement of minimum share capital does not apply*
- ♣ *Does not declare dividends to members*
- ♣ *Operate under the license 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.*
- ♣ *License revoked if conditions contravened*
- ♣ *On revocation, central government may direct it to*
 - + *Converts its status and change its name*
 - + *Wind-up*
 - + *Amalgamate with another company having similar object.*
- *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.*
- *A partnership firm can be a member of section 8 company.*

Penalty/punishment in contravention: if a company makes any default in complying with any of the requirement laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees.



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Provided that when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447 (Amended)

- ◆ **DORMANT COMPANY:** Where a company is formed and registered under this act for a future projects or **to hold an asset or intellectual property and has no significant accounting transaction**, such a company or an inactive company may make an application to the registrar in such manner as may be prescribed for obtaining the status of a dormant company.

“Inactive company” means a company which has not been carrying on any business or operation, or as not made any significant accounting transaction during the last two years, or has not filed financial statements and annual returns during the last two financial years.

“Significant accounting transactions” means any transaction **other than-**

- (i) Payments of fees by a company to the registrar;
- (ii) Payments made by it to fulfil the requirements of this act or any other law;
- (iii) Allotment of shares to fulfil the requirements of this act; and
- (iv) Payments for maintenance of its office and records.

- ◆ **NIDHI COMPANIES:** In this section, “Nidhi” or Mutual benefit society” means a company which the central government may, by notification in the official Gazette, declare to be a Nidhi or Mutual benefit Society, as the case may be.

- ◆ **PUBLIC FINANCIAL INSTITUTIONS:** The following are regarded as public financial institutions LIC, IDFC, UTI, institution notified by the central government.

Conditions for an institutions to be notified as PFI: no institution shall be so notified unless-

- (a) It has been **established or constituted by or under any central or state act** other than this act or the previous companies law; or
- (b) **Not less than fifty one percent of a paid up share capital is held or controlled by the central government or by any state government or government or partly by the central government and partly by one or more state governments.**



MODE OF REGISTRATION/INCORPORATION OF COMPANY

PROMOTERS: Means a person-

- (a) Who has been **named as such in a prospectus or is identified by the company in the annual return**
- (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.**

FORMATION OF COMPANY: Public company- 7 or more, Private company- 2 or more, OPC- 1

INCORPORATION OF COMPANY: Provides for the procedure to be followed for incorporation of a company.

◆ **FILLING OF THE DOCUMENTS AND INFORMATION WITH THE REGISTRAR:**

- The memorandum and articles of the company duly **signed by all the subscribers to the memorandum.**

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- A declaration by person who is engaged in the formation of the company and by a person named in the articles.
- A declaration from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles
- The address for correspondence till its registered office is established
- The particulars of the persons mentioned in the articles as the subscribers to the memorandum

♣ ISSUE OF CERTIFICATE OF INCORPORATION ON REGISTRATION.

♣ ALLOTMENT OF CORPORATE IDENTITY NUMBER (CIN).

♣ MAINTENANCE OF COPIES OF ALL DOCUMENTS AND INFORMATION: At registered office.

♣ FURNISHING OF FALSE OR INCORRECT INFORMATION OR SUPPRESSION OF MATERIAL FACT AT THE TIME OF INCORPORATION (i.e. at the time of incorporation): He shall be liable for action for fraud under section 447.

♣ COMPANY ALREADY INCORPORATED BY FURNISHING ANY FALSE OR INCORRECT INFORMATION OR REPRESENTATION OR BY SUPPRESSING ANY MATERIAL FACT (I.E POST INCORPORATION):

♣ 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,-

- (a) **Pass such orders**, as it may think it, 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
- (b) Direct that **liability** of the members shall be **unlimited**; or
- (c) Direct **removal of the name of the company** from the register of companies; or
- (d) Pass an order for the **winding up** the company; or
- (e) Pass such other orders as it **may deem fit**:

Provided that **before making any order**,-

- The company shall be given a **reasonable opportunity of being heard** in the matter; and
- The tribunal shall take into **consideration the transactions** entered into by the company, including the obligations, if any, contracted payment of any liability.

EFFECT OF REGISTRATION: According to section 9, from the date of incorporation (mentioned in the certificate of incorporation), the subscribers to the memorandum and all other persons, who may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum. Such a registered company shall be capable of exercising all the functions of an incorporated company under this act and having perpetual succession with the power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

EFFECT OF MEMORANDUM AND ARTICLES: Where the memorandum and articles when registered, shall bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and an agreement to

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observe all the provisions of the memorandum and of the articles. All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

CLASSIFICATION OF CAPITAL:

- ♥ **NOMINAL OR AUTHORISED OR REGISTERED CAPITAL.**
- ♥ **ISSUED CAPITAL.**
- ♥ **SUNSCRIBED CAPITAL**
- ♥ **CALLED UP CAPITAL**
- ♥ **PAID UP CAPITAL**

SHARES

- ◆ **Nature of shares:** Share which means a share in the share of a company and included stock.

Shares are a movable property: Shares are transferable as provided by the article of the company.

Shares shall be numbered: Every share shall be distinguished by its distinctive number.

- ◆ **Kinds of share capital:**

(a) **Equity share capital-**

- 1) **With voting rights;** or
- 2) **With differential voting rights** as to dividend, voting or otherwise in accordance with prescribed rules;

(b) **Preference share capital:** which carries preferential right with respect to –

- 1) **Payment of dividend**
- 2) **Repayment of capital**

MEMORANDUM OF ASSOCIATION

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 is the very foundation on which the whole edifice of the company is built.

Objects of registering a memorandum of association:

- 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 the 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.

- The shareholder must know the purposes for which his money can be used by the company and what risks he is taking in making the investment.

A company cannot depart from the provisions contained in the memorandum however imperative may be the necessity for the departure. It cannot enter into a contract or engage in any trade or business, **which is beyond the power confessed on it by the memorandum. If it does so, it would be ultra vires the company and void.**

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.

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Table A is a form for memorandum of association of a *company limited by shares*.

Table B is a form for memorandum of association of a *company limited by guarantee and not having a share capital*.

Table C is a form for memorandum of association of a *company limited by guarantee and having a share capital*.

Table D is a form for memorandum of association of an *unlimited company*.

Table E is a form for memorandum of association of an *unlimited company and share capital*.

CONTENT OF THE MEMORANDUM: The memorandum of a company shall state-

- ♣ The name of the company (**NAME CLAUSE**) with the last word "**limited**" in the case of a public 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.

The name including phrase '**Electoral trust**' may be allowed for registration of companies to be formed under section 8 of the act. For the companies under section 8 of the act, the name shall include the words foundation, forum, association, federation, chambers, confederation, council, electoral trust and the like etc.

A government company's name must end with the word "**Limited**". In the case of OPC, the word "OPC", should be included below its name.

- ♣ The state in which the registered office of the company (**REGISTERED OFFICE CLAUSE**) is to be situated;
- ♣ The objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof (**OBJECT CLAUSE**);
If any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.

- ♣ The liability of members of the company (**LIABILITY CLAUSE**) whether limited or unlimited, and also state-

- **In case of a company limited by shares;**
- **In case of a company limited by guarantee.**

- ♣ The amount of authorised capital (**CAPITAL CLAUSE**) 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.

- ♣ The desire of the subscribers to be formed into a company. The memorandum shall conclude with the **ASSOCIATION CLAUSE**. Every subscriber to the memorandum shall take atleast one share, and shall write against his name, the number of shares taken by him.

In case of OPC, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

The memorandum must be printed, divided into paragraphs, numbered consequently, and signed by at least seven persons (two in the case of a private company and one in the case of OPC) in the presence of at least one witness, who will attest the signatures. The particulars about the signatories to the

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memorandum as well as the witness, as to their address, description, occupation etc., must also be entered.

It is to be noted that a company being a legal person can through its agent, subscribe to the memorandum. However, a minor cannot be a signatory to the memorandum as he is not competent to contract. The guardian of a minor, who subscribes to the memorandum on his behalf, will be deemed to have subscribed in his personal capacity.

DOCTRINE OF ULTRA VIRES

The meaning of the term ultra vires is simply **“beyond (their) powers”**. The legal phrase **“ultra vires”** is applicable only to acts done in excess of the legal powers of the doers. This presupposes that the power in their nature are limited.

An ultra vires contract can never be made binding on the company. It cannot become “intravires” by reasons of estoppels, acquiescence (the reluctant acceptance of something without protest), lapse of time, delay or ratification.

The whole position regarding the doctrine of ultra vires can be summed up as:

- (i) 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 ultra vires the company, and hence null and void.
- (ii) An act which is **ultravires**, the company cannot be ratified even by the unanimous consent of all the shareholders.
- (iii) 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.
- (iv) If an act is **ultravires the articles**, it can be ratified by altering the articles by a **special resolution at a general meeting**.

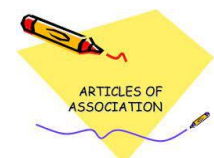
However, the disadvantages of this doctrine outweigh its main advantage, namely to provide protection to the shareholders and creditors. Although it may be useful to members in restraining the activities of the directors, it is only a nuisance in so far as it prevents the company from changing its activities in a direction which is agreed by all. Again, the purpose of doctrine of doctrine of ultravires has been defeated as now the object clause can be easily altered, by passing just a special resolution of the shareholders.

ARTICLES OF ASSOCIATION

The articles of association of a company are its rules and regulations, which are framed to manage its **internal affairs**. Articles are the **internal regulations** of the company. The articles of association are in fact the **bye-laws** of the company according to director and other officers are required to perform their functions as regards the management of the company, its account and audit.

Section 5 of the companies act, 2013 seeks to provide the contents and model of articles of association. The section lays the following law-

- ♣ **Contains regulation.**
- ♣ **Inclusion of matters.**
- ♣ **Contain provisions for entrenchment.**
- ♣ **Manner of inclusion of the entrenchment provision.**
- ♣ **Notice to the registrar of the entrenchment provision.**
- ♣ **Forms of articles.**
- ♣ **Model articles.**



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♣ *Company registered after the commencement of this act.*

BASIS	MOA	AOA
OBJECTIVES	<i>Defines and delimits the objectives of the company.</i>	Lays down the <i>rules and regulations for the internal management</i> of the company.
RELATIONSHIP	<i>Company with the outsider world</i>	<i>Company and its members</i>
ALTERATION	<i>Only under special circumstances and in the manner provided for in the act. In most cases permission of the regional director or the tribunal is required.</i>	<i>By passing special resolution</i>
ULTRA VIRES	<i>Void and cannot be ratified</i>	<i>Can be ratified by a special resolution not beyond the MOA.</i>

DOCTRINE OF INDOOR MANAGEMENT

Provides that any person can inspect by electronic means any document kept by the registrar, or make a record of the same, or get a copy or extracts of any document, including certificate of incorporation of any company, on payment of prescribed fees.

By constructive notice is meant:

- (i) *Whether a person reads the document 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, and*
- (ii) *Every person dealing with the company not only has the constructive notice of the memorandum and articles, but also of all the others related documents, such as special resolutions etc., which are required to be registered with the registrar.*

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 IS THE EXCEPTION TO THE DOCTRINE OF CONSTRUCTIVE NOTICE.

EXCEPTIONS TO THE DOCTRINE OF INDOOR MANAGEMENT:

- ♥ *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.*
- ♥ *Suspicion of irregularity: The doctrine in no way, rewards those who behave negligently. 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.*
- ♥ *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.*

IMPORTANT CASE LAWS

MACAURA Vs. NORTHERN ASSURANCE CO.

Fact of the case

Macaura (M) was the holder of nearly all (except one) shares of a timber company. He was also a major creditor of the company. M insured the company's timber in his own name. The timber was lost in fire. M claimed the insurance compensation.

Decision

Held, the insurance company was not liable to him as no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest in them.

SALOMON Vs. SALOMON AND CO. LTD.

Fact of the case

Salomon incorporated a company named "Salomon & Co. Ltd.", with seven subscribers consisting of himself, his wife, four sons and one daughter. This company took over the personal business assets of Salomon for £ 38,872 and in turn, Salomon took 20000 shares of £ 1 each, debenture worth £ 10,000 of the company with charge on the company's assets and the balance in cash. His wife, daughter and four sons took up one £ 1 share each. Subsequently, the company went into liquidation due to general trade depression. The unsecured creditors to the tune of £ 7,000 contended that Salomon could not be treated as a secured creditor of the company, in respect of the debenture held by him, as he was the managing director of one-company, which was not different from Salomon and the cloak of the company was a mere sham and fraud.

Decision

The company is at law a different person altogether from the subscribers to the memorandum, and through it may be that after incorporation the business is precisely the same as it was before and the same person are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.

JUGGILAL Vs. COMMISSIONER OF INCOME TAX AIR (SC)

Where corporate entity is used to evade or circumvent tax

DINSHAW MANECKJEE PETIT

Where assessee earned huge income by way of dividends and interest. So, he opened some companies and purchased their shares in exchange of his income by way of dividend and interest. This income was transferred back to assessee by way of loan. The court decided that the private companies were a sham and the corporate veil was lifted to decided the real owner of the income.

ASSOCIATED RUBBER INDUSTRIES LIMITED, BHAVNAGAR V. ASSOCIATED RUBBER INDUSTRY LTD

Fact of the case

A limited purchased shares of B limited by investing a sum of ₹ 4,50,000. The dividend in respect of these shares are shown in the profit and loss account of the company, year after year. It was taken into account for the purpose of calculating the bonus payable to workmen of the company. Thus, the dividend income did not find place in the profit & loss account of A ltd., with the result that the surplus available for the purpose for payment of bonus to the workmen got reduced.

Decision

The supreme court brushed aside the separate existence of the subsidiary company. The new company so formed had no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company and serving no purpose except to reduce the gross profit of the principal company so as to reduce the amount paid as bonus to workmen.

MERCHANDISE TRANSPORT LIMITED Vs. BRITISH TRANSPORT COMMISSION

Fact of the case

A transport company wanted to obtain licenses for its vehicles but could not do so if applied in its own name, it therefore formed a subsidiary company, and the application for license was made in the name of subsidiary. The vehicle were to be transferred to the subsidiary company.

Decision

Held, the parent and the subsidiary were one commercial unit and the application for licenses was rejected.

GILFORD MOTOR CO. Vs. HORNE

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 obligation.

HARI NAGAR SUGAR MILLS LTD. Vs. S.S JHUNJHUNWALA

From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from incorporators; and there comes into existence a binding contract between the company and its members as evidenced by the MOA and AOA.

STATE TRADING CORPORATION OF INDIA Vs. COMMERCIAL TAX OFFER

A legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the memorandum of association and other persons joining as members are regarded as a body corporate or a corporation in aggregate and the legal person begins to function as an entity. A company on registration acquires a separate existence and the law recognises it as a legal person separate and distinct from its members.

SPENCER & CO. LTD. MADRAS Vs. CWT MADRAS

It may be noted that under the provisions of the act, a company may purchase shares of another company and thus become a controlling company. However, merely because a company purchases all shares of another company it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity.

HEAVY ELECTRICAL UNION Vs. STATE OF BIHAR

The law recognises such a company as a juristic person separate and distinct from its members. The mere fact that the entire share capital has been contributed by the CG and all its shares are held by the president of India and other officers of the CG does not make any difference in the position of registered company and it does not make a company an agent either of the president or the CG.

BORLAND TRUSTEES Vs. STEEL BORS. & CO. LTD.

A SHARE IS NOT A SUM OF MONEY BUT IS AN INTEREST MEASURED BY A SUM OF MONEY AND MADE UP OF VARIOUS RIGHTS CONTAINED IN THE CONTRACT, INCLUDING THE RIGHT TO A SUM OF MONEY OF A MORE OR LESS AMOUNT.

ASHBURY RAILWAY CARRIAGE AND IRON COMPANY LIMITED V. RICHE-(1875)

Fact of the case

The main objects of a company were:

- (a) To make, sell or lend on hire, railway carriages and wagons;
- (b) To carry on the business of mechanical engineers and general contractors.
- (c) To purchase, lease, sell and work mines.
- (d) To purchase and sell as merchants or agents, coal, timber, metals etc.

The directors of the company entered into a contract with Riche, for financing the construction of a railway line in Belgium, and the company further ratified this act of the directors by passing a special resolution. The company however, repudiated the contract as being ultra-virus. And Riche brought an action for damages for breach of contract. His contention was that the contract was well within the meaning of the word general contractors and hence within its powers. Moreover it had been ratified by a majority of share-holders.

Decision

It was held by the court that the contract was null and void. It said that the terms general contractors was associated with mechanical engineers, i.e. it had to be read in connection with the company's main business. If, the term general contractor's was not so interpreted, it would authorise the making of contracts of any kind and every description, for example, marine and fire insurance.

ROYAL BRITISH BANK VS. TURQUAND

Fact of the case

Mr. Turquand was the official manager (liquidator) of the insolvent Cameron's Coalbrook Steam, coal and Swansea and Loughor Railway Company. It was incorporated under the Joint stock companies Act, 1844. The company had given a bond for £ 2,000 to the Royal British Bank, which secured the company's

drawing on its current account. The bond was under the company's seal, signed by two directors and the secretary. When the company was sued, it alleged that under its registered deed of settlement (article of association), directors only had power to borrow up to an amount authorised by a company resolution. A resolution had been passed but not specifying how much the directors could borrow.

Decision

Held, it was decided that the bond was valid, so the Royal British Bank could enforce the terms. He said the bank was deemed to be aware that the directors could borrow only up to the amount resolutions allowed. AOA were registered with companies House, so there was constructive notice. But the bank could not be deemed to know which ordinary resolutions passed, because these were not registrable. The bond was valid because there was no requirement to look into the company's internal workings. This is the indoor management rule, that the company's indoor affairs are the company's problem.

HOWARD Vs. PATENT IVORY MANUFACTURING CO.

Where the directors could not defend the issue of debentures to themselves because they should have known that the extent to which they are lending money to the company required the assent of the general meeting which they had not obtained.

MORRIS V KANSSEEN

A director could not defend an allotment of shares to him as he participated in the meeting, which made the allotment. His appointment as a director also fell through because none of the directors appointed him was validly in office.

ANAND BIHARI LAL VS. DINSHAW & CO.

The plaintiff accepted a transfer of a company's property from its accountant, the transfer was held void. The plaintiff could not have supposed, in absence of a power of attorney that the accountant had authority to effect transfer of the company's property.

HAUGHTON & CO. V. NOTHARD, LOWE & WILLS LTD.

Where a person holding directorship in two companies agreed to apply the money of one company in payment of the debt to other, the court said that it was

something so unusual “that the plaintiff were put upon inquiry to ascertain whether the persons making the contract had any authority in fact to make it.”

RUBEN V GREAT FINGALL CONSOLIDATED

Fact of the case

In this case the plaintiff was the transferee of a share certificate issued under the seal of the defendant's company. The company's secretary, who had affixed the seal of the defendant's company. The company's secretary, who had affixed the seal of the company and forged the signature of the two directors, issued the certificate. The plaintiff contended that whether the signature were genuine or forged was apart of the internal management, and therefore, the company should be stopped from denying genuineness of the document.

Decision

It was held, that the rule has never been extended to cover such a complete forgery.

COMPANIES ACT SECTIONS LIST

SECTIONS NO.	TOPICS
2(6)	Associate company
2(8)	Nominal or authorised or registered capital
2(15)	Called-up capital
2(20)	Definition of company
2(21)	Company limited by guarantee
2(22)	Company limited by shares
2(42)	Foreign company
2(45)	Government company
2(46)	Holding company
2(50)	Issued capital
2(52)	Listed company
2(62)	One person company
2(68)	Private company
2(69)	Promoters
2(71)	Public company
2(72)	Public financial institution
2(84)	Nature of shares
2(85)	Small company
2(86)	Subscribed capital
2(87)	Subsidiary company
2(92)	Unlimited company
3	Formation of company
7	Incorporation of company
8	Formation of company with charitable objects etc.
9	Effect of registration
43	Kind of share capital
44	Shares are a movable property
45	Shares shall be numbered
406(1)	Nidhi company
455	Dormant company