



*CA Anshika Patil*



**CA** FOUNDATION

**TEAM  
CHART**

**EDITION 11**

## CA FOUNDATION LAW - CHART BOOK

<b>Ch No.</b>	<b>Name Of The Chart</b>	<b>Chart No.</b>
1	THE INDIAN CONTRACT ACT, 1872	1.1 - 1.32
2	THE SALES OF GOODS ACT, 1930	2.1 - 2.11
3	THE INDIAN PARTNERSHIP ACT. 1932	3.1-3.11
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# THE INDIAN CONTRACT ACT, 1872 (Chart 1.1)

## Contract

"an agreement enforceable by law"

### Two Essential Elements of Contract

### Essential Elements of a Valid Contract

#### Agreement

Every promise & every set of promises, forming consideration for each other

- **Promise :**  
When person to whom proposal is made signifies his assent there to, proposal is said to be accepted.  
Proposal when accepted, becomes a promise
- Agreement is result of proposal made by one party to other party & that other party gives his acceptance thereto for mutual consideration
- Agreement = Offer/Proposal + Acceptance

#### Enforceability by Law

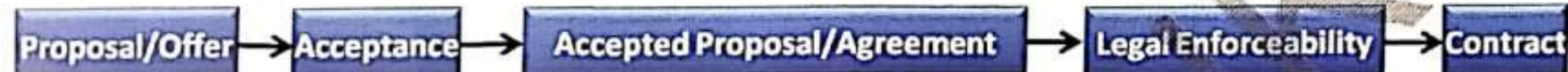
- Agreement to become contract must give rise to legal obligation which means duly enforceable by law
- Agreement should be worthy of being enforceable by law before it is called contract
- Contract = Accepted proposal/Agreement + Enforceability by Law

#### Given by Section 10 of the Act

1. Offer & Acceptance or Agreement
  2. Free Consent
  3. Capacity of the parties
  4. Consideration
  5. Lawful Consideration and Object
  6. Not expressly declared to be void
- It is outcome of offer & acceptance
  - Two or more persons are said to consent when they agree upon same thing in same sense
  - Every person is competent to contract who is of age of majority, sound mind, not otherwise disqualified from contracting
  - It is referred to as 'quid pro quo' i.e. 'something in return'
  - Consideration & object of agreement must be lawful
  - Agreement entered into must not be which law declares to be either illegal or void

#### Not given by Section 10 of Act but considered essential

1. Two Parties
  2. Parties must intend to create legal obligations
  3. Other Formalities to be complied with in certain cases
  4. Certainty of meaning
  5. Possibility of performance of an agreement
- Contract involves at least two parties- one party making offer & other party accepting it
  - There must be intention on part of parties to create legal relationship between them
  - In case of certain contracts, contracts must be in writing, registration of contract under laws which is in force at time, is essential for it to be valid
  - Agreement must be certain & not vague or indefinite
  - Terms of agreement should be capable of performance. Agreement to do an act impossible in itself cannot be enforced



### Difference between Agreement and Contract

Basis of differences	Agreement	Contract
Meaning	Every promise and every set of promises, forming the consideration for each other. Offer + Acceptance	Agreement enforceable by law. Agreement + Legal enforceability
Scope	It's a wider term including both legal and social agreement.	It is used in a narrow sense with the specification that contract is only legally enforceable agreement.
Legal obligation	It may not create legal obligation. An agreement does not always grant rights to the parties	Necessarily creates a legal obligation. A contract always grants certain rights to every party.
Nature	All agreement are not contracts.	All contracts are agreements.

# THE INDIAN CONTRACT ACT, 1872 (Chart 1.2)

## Types of Contract

### On the Basis of Validity or Enforceability

1. Valid Contract
  - Agreement which is binding & enforceable is valid contract
2. Void Contract
  - Contract which ceases to be enforceable by law becomes void when it ceases to be enforceable
3. Voidable Contract
  - Agreement which is enforceable by law at option of one or more parties thereto, but not at option of other or others is voidable contract
4. Illegal Contract
  - It is contract which law forbids to be made
5. Unenforceable Contract
  - Where contract is good in substance but because of some technical defect i.e. absence in writing, barred by limitation etc. one or both parties cannot sue upon it

### On the Basis of Formation

1. Express Contract
  - If terms are expressed by words or in writing, if proposal or acceptance of any promise is made in words the promise is said to be express contract
2. Implied Contracts
  - Come into existence by implication, when proposal or acceptance is made otherwise than in words, promise is said to be implied
3. Tacit Contracts
  - Through conduct of parties without any words spoken or written (Silent)
4. Quasi-Contract
  - Law creates & enforces legal rights & obligations when no real contract exists, there is no intention on part of either party to make contract but law imposes contract upon parties
5. E-Contracts
  - When contract is entered into by two or more parties using electronics means, such as e-mails

### On the Basis of Performance

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

### Difference between Void Contract and Voidable Contract

S. No.	Basis	Void Contract	Voidable Contract
1	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.
2	Cause	A contract becomes void due to change in law or change in circumstances beyond the contemplation of parties.	A contract becomes a voidable contract if the consent of a party was not free.
3	Performance of contract	A void contract cannot be performed.	If the aggrieved party does not, within reasonable time exercise his right to avoid the contract, any party can sue the other for claiming the performance of the contract.
4	Rights	A void contract does not grant any right to any party.	The party whose consent was not free has the right to rescind the contract.

### Difference between Void Agreement and Illegal Agreement

Basis of difference	Void agreement	Illegal agreement
Scope	A void agreement is not necessarily illegal.	An illegal agreement is always void.
Nature	Not forbidden under law.	Are forbidden under law.
Punishment	Parties are not liable for any punishment under the law.	Parties to illegal agreements are liable for punishment.
Collateral Agreement	It's not necessary that agreements collateral to void agreements may also be void. It may be valid also.	Agreements collateral to illegal agreements are always void.
Punishment	Parties are not liable for any punishment under the law.	Parties to illegal agreements are liable for punishment.
Collateral Agreement	It's not necessary that agreements collateral to void agreements may also be void. It may be valid also.	Agreements collateral to illegal agreements are always void.

# THE INDIAN CONTRACT ACT, 1872 (Chart 1.3)

## Proposal/ Offer

When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining assent of that other to such act or abstinence, he is said to make proposal

### Classification of offer

1. General offer:
  - Offer made to public at large & hence anyone can accept & do desired act
  - Until the general offer is retracted or withdrawn, it can be accepted by anyone at any time as it is continuing offer
2. Special/specific offer:
  - Offer made to specific or ascertained person
  - Can be accepted only by that specified person to whom offer has been made
3. Cross offer:
  - When two parties exchange identical offers in ignorance at time of each other's offer, offers are called cross offers. No binding contract as offer made by person cannot be construed as acceptance of another's offer
4. Counter offer:
  - When offeree offers to qualified acceptance of offer subject to modifications & variations in terms of original offer, he is said to have made counter offer
  - It amounts to rejection of original offer. Also called as Conditional Acceptance
5. Standing or continuing or open offer:
  - Offer which is allowed to remain open for acceptance over period of time is known as standing or continuing or open offer
  - Eg. Tenders invited for supply of goods

### Essentials of a valid offer

1. It must be capable of creating legal relations: Offer must be capable of being accepted in law & giving rise to legal relationship
2. It must be certain, definite & not vague: If terms of offer are vague or indefinite, its acceptance cannot create any contractual relationship
3. It must be communicated to offeree: Offer, to be complete, must be communicated to person to whom it is made, otherwise there can be no acceptance of it
4. It must be made with view to obtaining assent of other party: Offer must be made with view to obtaining assent of other party addressed & not merely to disclose intention of making offer
5. It may be conditional: Offer can be made subject to any terms & conditions by offeror
6. Offer should not contain term non-compliance of which would amount to acceptance: One cannot say that if acceptance is not communicated by certain time offer would be considered as accepted
7. Offer may be either specific or general: Offer can be made to either public at large or to any specific person
8. Offer is Different from mere statement of intention, invitation to offer, mere communication of information, Casual Equity, prospectus & Advertisement
9. Offer may be express or implied: Offer may be made either by words or by conduct
10. Statement of price is not an offer

### Difference between offer and invitation to make an offer

- Offer is final expression of willingness by offeror to be bound by offer should other party chooses to accept it. Offers made with intention to negotiate or offers to receive offers are known as invitation to offer. In order to ascertain whether statement amounts to offer or invitation to offer, test would be intention with which such statement is made

# THE INDIAN CONTRACT ACT, 1872 (Chart 1.4)

## Acceptance

When person to whom proposal is made signifies his assent thereto, proposal is said to be accepted.  
Proposal, when accepted, becomes promise

## Communication of Offer and Acceptance

### Relationship between offer and acceptance

- Acceptance is to offer what lighted match is to train of gun powder
- Offer can be withdrawn just before it is accepted. Acceptance converts offer into promise & then it is too late to revoke it
- Offer in itself cannot create any legal relationship but it is acceptance by offeree which creates legal relationship
- Once offer is accepted it becomes promise & cannot be withdrawn or revoked. Offer remains offer so long as it is not accepted but becomes contract as soon as it is accepted

### Legal Rules regarding a valid acceptance

1. Acceptance can be given only by person to whom offer is made: In case of specific offer, it can be accepted only by person to whom it is made
2. Acceptance must be absolute & unqualified: Acceptance is valid only when it is absolute & unqualified & is also expressed in some usual & reasonable manner unless proposal prescribes manner in which it must be accepted
3. Acceptance must be communicated: To conclude contract between parties, acceptance must be communicated in some perceptible form
4. Acceptance must be in the prescribed mode: Where mode of acceptance is prescribed in proposal, it must be accepted in that manner
5. Time: Acceptance must be given within specified time limit, if any, and if no time is stipulated, acceptance must be given within reasonable time & before offer lapses
6. Mere silence is not acceptance: Acceptance of offer cannot be implied from silence of offeree or his failure to answer, unless offeree has in any previous conduct indicated that his silence is evidence of acceptance
7. Acceptance by conduct/Implied Acceptance: Performance of conditions of proposal, or acceptance of any consideration for reciprocal promise which may be offered with proposal, constitutes acceptance of proposal

### 1. Communication of offer:

- It is complete when it comes to knowledge of person to whom it is made

### 2. Communication of acceptance

#### a) Modes of communication :

i) Communication by act : Expression of words whether written (letters, telegrams, faxes, emails, advertisements) or oral (include telephone messages)

ii) Communication by omission : Omission is conveyed by conduct or by forbearance on part of one person to convey his willingness or assent.

Silence would not be treated as communication by omission

#### b) When communication of acceptance is complete?

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

ii) As against acceptor, when it comes to knowledge of proposer

### 3. Acceptance over telephone or telex or fax

When an offer is made of instantaneous communication like telex, telephone, fax or through e-mail, contract is only complete when acceptance is received by offeree, & contract is made place where acceptance is received

### 4. Communication of special conditions

Special conditions are conveyed tacitly & acceptance of these conditions are also conveyed by offeree again tacitly or without him even realizing it

# THE INDIAN CONTRACT ACT, 1872 (Chart 1.7)

## Other Essential Elements of a Contract

Agreement in order to be a contract, must satisfy following conditions: (1) parties must be competent to contract; (2) it must be made by free consent of parties; (3) it must be made for lawful consideration & with lawful object; (4) it should not have been expressly declared as void by law

**Capacity to Contract**  
Capacity refers to competence of parties to make contract. Every person is competent to contract who is of age of majority, & who is of sound mind & is not disqualified from contracting by any law to which he is subject

### Age of Majority

1. Contract made with or by minor is void ab-initio
2. No ratification after attaining majority
3. Minor can be beneficiary or can take benefit out of contract
4. Minor can always plead minority: Rule of estoppel cannot be applied against minor
5. Liability for necessities: Claim for necessities supplied to minor is enforceable by law
6. Contract by guardian: Where guardian makes contract for minor, which is within his competence & which is for benefit of minor, there will be valid contract which minor can enforce
7. No specific performance: Minor's agreement being absolutely void, there can be no question of specific performance of such agreement
8. Minor cannot be declared insolvent
9. Minor being incompetent to contract cannot be partner in partnership firm, but he can be admitted to benefits of partnership
10. Minor can act as agent. But he will not be liable to his principal for his acts
11. Minor cannot bind parent or guardian
12. Joint contract by minor and adult: Adult will be liable on contract & not the minor
13. Surety for a minor: In Contract of guarantee when adult stands surety for minor then adult is liable to third party
14. Minor cannot be Shareholder of a company
15. Liability for torts: Minor is liable in tort unless tort in reality is breach of contract

### Person of sound mind

- Person is said to be of sound mind for the purposes of making contract if, at time when he makes it is capable of understanding it & of forming rational judgment as to its effect upon his interests
- 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 contract when he is of unsound mind
- Contract by person who is not of sound mind is void

### Contract by disqualified persons

Besides minors & persons of unsound mind, there are also other persons who are disqualified from contracting, partially or wholly, so that contracts by such person are void. Incompetency to contract may arise from political status, corporate status, legal status, etc.  
Following persons fall in this category:  
Foreign Soverigns & Ambassadors, Alien enemy, Corporations, Convicts, Insolvent

# THE INDIAN CONTRACT ACT, 1872 (Chart 1.8)

## Free Consent

Two or more persons are said to consent when they agree upon same thing in same sense  
 Consent is said to be free when it is not caused by: (1) Coercion (2) Undue Influence (3) Fraud (4) Misrepresentation (5) Mistake

### Coercion

- Coercion is committing, or threatening to commit, any act forbidden by Indian Penal Code or unlawful detaining, or threatening to detain any property, to prejudice of any person whatever, with intention of causing any person to enter into agreement
- Essential ingredients of coercion:
  - i) Committing or threatening to commit any act forbidden by India Penal Code;
  - ii) unlawful detaining or threatening to detain any property to prejudice of any person whatever,
  - iii) With intention of causing any person to enter into agreement
  - iv) It is to be noted that is immaterial whether India Penal Code is or is not in force at place where the coercion is employed
- Effects of coercion:
  - i) Contract induced by coercion is voidable at option of party whose consent was so obtained
  - ii) As to consequences of rescission of voidable contract, party rescinding void contract should, if he has received any benefit, thereunder from other party to contract, restore such benefit so far as may be applicable, to person from whom it was received
  - iii) Person to whom money has been paid or anything delivered under coercion must repay or return it

### Undue influence

- Contract is said to be induced by 'undue influence' where relations subsisting between parties are such that one of parties is in position to dominate will of other & he uses that position to obtain unfair advantage over other
- Person is deemed to be in position to dominate the will of another:
  - a) Where he holds a real or apparent authority over the other; or
  - b) Where he stands in a fiduciary relationship to the other
  - c) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress for example, an old illiterate person
- Essential ingredients under this provision:
  - a) Relation between parties: Person can be influenced by other when near relation between two exists
  - b) Position to dominate the will: Person is deemed to be in such position in the following circumstances:
    - i) Where person holds Real & apparent authority over other
    - ii) Fiduciary relationship: Where relation of trust & confidence exists
    - iii) Mental distress: Mental capacity of person is temporarily or permanently affected by the reason of mental or bodily distress, illness or of old age
    - iv) Unconscionable bargains: One of the parties to contract is in position to dominate will of other
  - c) Object must be to take undue advantage
  - d) Burden of proof: Burden of proving absence of use of dominant position to obtain unfair advantage will lie on party who is in position to dominate will of other
- When consent to an agreement is caused by undue influence, agreement is a contract voidable at option of party whose consent was so caused

### Difference between Coercion and Undue influence

Basis of difference	Coercion	Undue Influence
Nature of action	It involves the physical force or threat. The aggrieved party is compelled to make the contract against its will.	It involves moral or mental pressure.
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.	No such illegal act is committed or a threat is given.
Relationship between parties	It is not necessary that there must be some sort of relationship between the parties.	Some sort of relationship between the parties is absolutely necessary.
Exercised by whom	Coercion need not proceed from the promisor nor need it be the directed against the promisor. It can be used even by a stranger to the contract.	Undue influence is always exercised between parties to the contract.
Enforceability	The contract is voidable 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 either voidable or the court may set it aside or enforce 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, any benefit received has to be restored back to the other party.	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.



# THE INDIAN CONTRACT ACT, 1872 (Chart 1.9)

## Free Consent

### Fraud

- Fraud means & includes any of following acts committed by party to contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into contract:
  - suggestion, as fact, of that which is not true, by one who does not believe it to be true;
  - active concealment of fact by one having knowledge or belief of fact
  - promise made without any intention of performing it;
  - any other act fitted to deceive;
  - any such act or omission as law specially declares to be fraudulent
- Essential elements of fraud:
  - There must be representation or assertion & it must be false. However, silence may amount to fraud or active concealment may amount to fraud
  - Representation must be related to fact
  - Representation should be made before conclusion of contract with intention to induce other party to act upon it
  - Representation should be made with knowledge of its falsity or without belief in its truth or recklessly not caring whether it is true or false
  - Other party must have been induced to act upon representation or assertion
  - Other party must have relied upon representation & must have been deceived
  - Other party acting on representation must have consequently suffered loss
- Effect of Fraud upon validity of contract: Contract is voidable at option of party defrauded & he has following remedies:
  - He can rescind contract within reasonable time
  - He can sue for damages
  - He can insist on performance of contract on condition that he shall be put in position in which he would have been had representation made been true

- Mere silence is not fraud: Party to contract is under no obligation to disclose whole truth to other party 'Caveat Emptor' i.e. let the purchaser beware is rule applicable to contracts. There is no duty to speak in such cases & silence does not amount to fraud. Similarly there is no duty to disclose facts which are within knowledge of both parties
- Silence is fraud:
  - Duty of person to speak: Where circumstances of case are such that it is duty of person observing silence to speak:
    - Fiduciary Relationship
    - Contracts of Insurance
    - Contracts of marriage
    - Contracts of family settlement
    - Share Allotment contracts
  - Where silence itself is equivalent to speech: In case of fraudulent silence, contracts is not voidable if party whose consent was so obtained had means of discovering truth with ordinary diligence

### Misrepresentation

- Misrepresentation means & includes -
  - positive assertion, in manner not warranted by information of person making it, of that which is not true, though he believes it to be true
  - any breach of duty which, without intent to deceive, gains advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice or to prejudice of any one claiming under him
  - causing, however, innocently, party to agreement to make mistake as to substance of thing which is subject of agreement
- There is misrepresentation:
  - statement of fact, which of false, would constitute misrepresentation if maker believes it to be true but which is not justified by information he possesses
  - When there is breach of duty by person without any intention to deceive which brings advantage to him
  - When party causes, even though done innocently, other party to agreement to make mistake as to subject matter

### Difference between Fraud and Misrepresentation

Basis of difference	Fraud	Misrepresentation
Intention	To deceive the other party by hiding the truth.	There is no such intention to deceive the other party.
Knowledge of truth	The person making the suggestion believes that the statement as untrue.	The person making the statement believes it to be true, although it is not true.
Rescission of the contract and claim for damages	The injured party can repudiate the contract and claim damages.	The injured party is entitled to repudiate the contract or sue for restitution but cannot claim the damages.
Means to discover the truth	The party using the fraudulent act cannot secure or protect himself by saying that the injured party had means to discover the truth.	Party can always plead that the injured party had the means to discover the truth.

### Legal effects of agreements without free consent

- When consent to agreement is caused by coercion, fraud or misrepresentation, agreement is contract voidable at option of party whose consent was so caused
- Party to contract, whose consent was so caused by fraud or misrepresentation may, if he thinks fit, insist that contract shall be performed, & that he shall be put in position in which he would have been if representation made had been true
- Exception - If such consent was caused by misrepresentation or by silence, fraudulent within meaning of section 17, contract is not voidable, if party whose consent was so caused had the means of discovering truth with ordinary diligence
- Fraud or misrepresentation which did not cause consent to contract of party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render contract voidable

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### Mistake

- Mistake may be defined as innocent or erroneous belief which leads party to misunderstand others.
- Mistake may be either Bilateral or Unilateral. Bilateral mistake is when both parties to contract are under a mistake. Unilateral mistake is when only one party to contract is under mistake.
- Effect of mistake on validity of a contract
- Mistake is some unintentional act, omission or error, arising from unconsciousness, ignorance or forgetfulness, imposition or misplaced confidence
- Mistake may be of two kinds:
  - Mistake of Law: It does not render contract void as one cannot take excuse of ignorance of law of his own country. But if mistake of law is caused through inducement of another, contract may be avoided. Mistake of foreign law is excusable & is treated like mistake of fact. Contract may be avoided on such mistake
  - Mistake of fact: Where contracting parties misunderstood each other are at cross purposes, there is bilateral or mutual mistake. Where both parties to agreement are under mistake as to matter of fact essential to agreement, agreement is void

# INDIAN CONTRACT ACT, 1872 (Chart 1.10)

## LEGALITY OF OBJECT AND CONSIDERATION

• In each of following cases consideration or object of agreement is said to be unlawful:

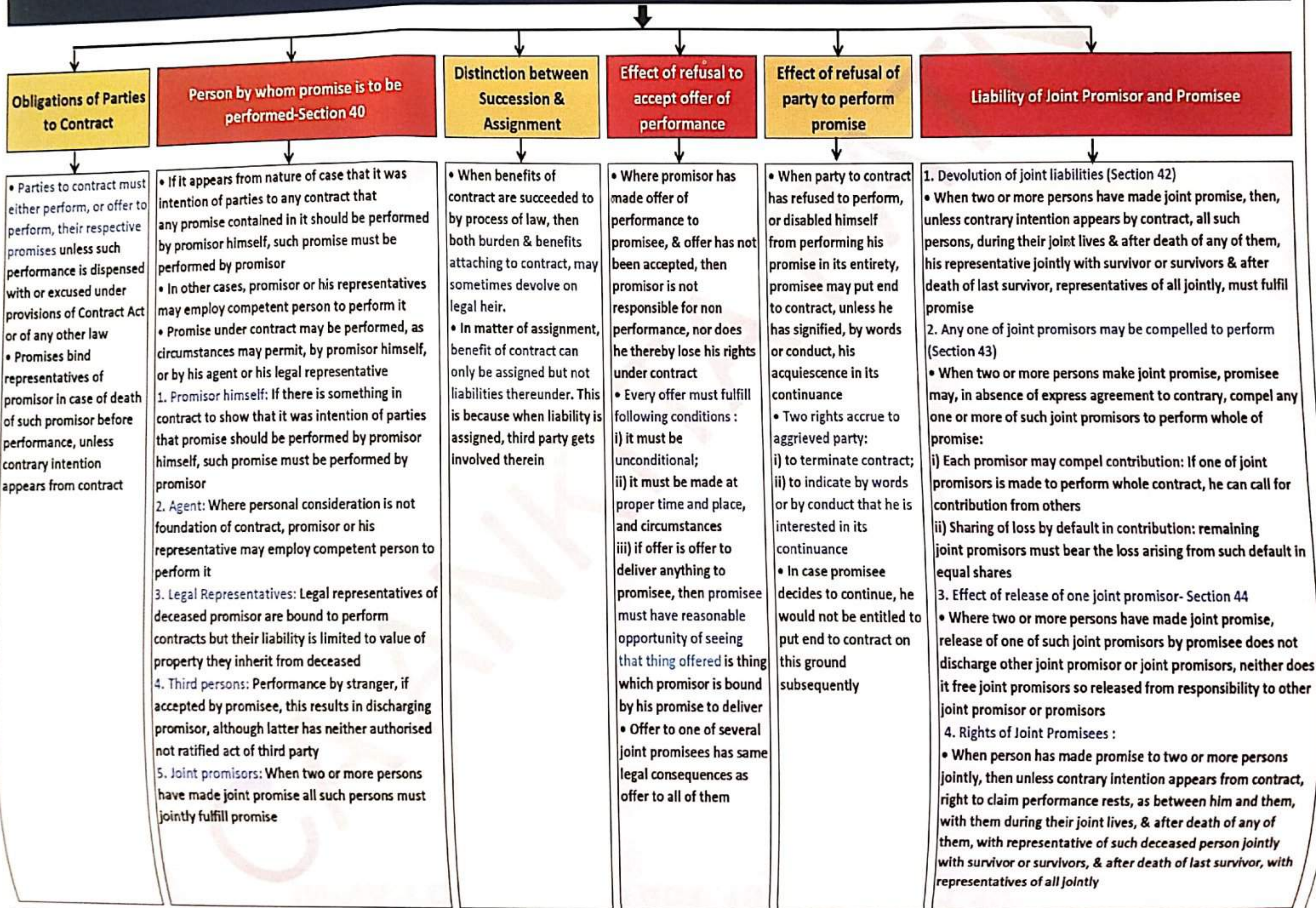
1. When consideration or object is forbidden by law: Acts forbidden by law are those which are punishable under any statute & prohibited by regulations or orders made in exercise of authority conferred by legislature
  2. When consideration or object defeats the provision of law: Defeat provisions of any law- must be taken as limited to defeating intention which law has expressed. If intention of parties is to defeat provisions of law, court will not enforce it
  3. When it is fraudulent: Agreements which are entered into to promote fraud are void
  4. When consideration involves injury to person or property of another: "Injury" means criminal or wrongful harm
  5. When consideration is immoral
  6. When consideration is opposed to public policy: Agreements which are held to be opposed to public policy are:
    - i) Trading with enemy
    - ii) Stifling Prosecution
    - iii) Maintenance and Champerty
    - iv) Traffic relating to Public Offences
    - v) Agreements tending to create monopolies
    - vi) Marriage brokerage agreements
    - vii) Interference with the course of justice
    - viii) Interest against obligation
- Consideration Unlawful in Part: If any part of single consideration for one or more objects, or any one or any part of any one of several considerations for single object, is unlawful, agreement is void

## VOID AGREEMENTS

1. Agreement in restraint of marriage (Section 26): Every agreement in restraint of marriage of any person other than minor, is void. So if person, being major, agrees for good consideration not to marry, promise is not binding considered as void agreement
2. Agreement in restraint of trade (Section 27): Agreement by which any person is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void  
Exceptions: (i) Sale of Goodwill (ii) Indian Partnership Act, 1932 - Outgoing partner's agreement with continuing partners for not carrying on similar business
3. Agreement in restraint of legal proceedings (Section 28): It is void, party is restricted absolutely from enforcing his rights under contract through Court or which abridges usual period for starting legal proceedings  
Exceptions: i) Contract by which parties agree that dispute between them in respect of any subject be referred to arbitration & that only amount awarded in such arbitration shall be recoverable is valid contract  
ii) Contract by which parties agree to refer to arbitration any question between them which has already arisen or which may arise in future, is valid; but such contract must be in writing
4. Agreement the meaning of which is uncertain (Section 29): It is void, but where meaning is capable of being made certain, agreement is valid
5. Wagering agreement (Section 30): It is agreement involving payment of sum of money upon the determination of uncertain event, such agreement is void
  - Essence of wager: Each side should stand to win or lose, depending on way uncertain event takes place in reference to which chance is taken & in occurrence of which neither of parties has legitimate interest
  - Transactions similar to Wager (Gambling) : Lottery, Crossword Puzzles and Competitions, Speculative transactions, Horse Race Transactions
  - Transactions resembling with wagering transaction but are not void: Chit Fund, Commercial transactions or share market transactions, Games of skill and Athletic Competition, contract of insurance

# INDIAN CONTRACT ACT, 1872 (Chart 1.11)

## Performance Of Contract



# INDIAN CONTRACT ACT, 1872 (Chart 1.12)

## Performance Of Contract

### TIME AND PLACE FOR PERFORMANCE OF PROMISE

1. Time for performance of promise, where no application is to be made and no time is specified - Section 46: **Where, by contract, promisor is to perform his promise without application by promisee, & no time for performance is specified, engagement must be performed within reasonable time**
2. Time and place for performance of promise, where time is specified and no application to be made - Section 47: **When promise is to be performed on certain day, & promisor has undertaken to perform it without application by promisee, promisor may perform it at any time during usual hours of business, on such day & place at which promise ought to be performed**
3. Application for performance on certain day to be at proper time and place - Section 48: **When promise is to be performed on certain day, & promisor has not undertaken to perform it without application by promisee, it is duty of promisee to apply for performance at proper place & within usual hours of business**
4. Place for performance of promise, where no application to be made and no place fixed for performance - Section 49: **When promise is to be performed without application by promisee, & no place is fixed for performance of it, it is duty of promisor to apply to promisee to appoint reasonable place for performance of promise, & to perform it at such place**
5. Performance in manner or at time prescribed or sanctioned by promisee - Section 50: **Performance of any promise may be made in any such manner, or at any time which promisee prescribes or sanctions**

### PERFORMANCE OF RECIPROCAL PROMISE

1. Promisor not bound to perform, unless reciprocal promise ready & willing to perform (Section 51): **When contract consists of reciprocal promises to be simultaneously performed, no promisor need to perform his promise unless promisee is ready & willing to perform his reciprocal promise**
2. Order of performance of reciprocal promises (Section 52): **When order of performance of reciprocal promises is expressly fixed by contract, they shall be performed; & where order is not expressly fixed by contract, they shall be performed as required by nature of transaction**
3. Liability of party preventing event on which contract is to take effect (Section 53): **When contract contains reciprocal promises, & one party to contract prevents other from performing his promise, contract becomes voidable at option of party so prevented; & he is entitled to compensation from other party for loss in consequence of non-performance of contract**
4. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises (Section 54): **When contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till other has been performed, and promisor of promise last mentioned fails to perform it, such promisor cannot claim performance of reciprocal promise, and must make compensation to other party to contract for any loss which such other party may sustain by non-performance of contract**
5. Effects of Failure to Perform at Time Fixed in Contract in which Time is Essential (Section 55): **When party to contract promises to do certain thing at or before specified time, & fails to do at or before specified time, contract, or so much of it as has not been performed, becomes voidable at option of promisee, if intention of parties was that time should be of essence of contract**
6. Agreement to do Impossible Act: **Agreement to do an act impossible in itself is void**
  - a) Contract to do act afterwards becoming impossible or unlawful: **Contract to do an act which, after contract is made, becomes impossible, or, by reason of some event which promisor could not prevent, unlawful, becomes void when act becomes impossible or unlawful**
  - b) Compensation for loss through non-performance of act known to be impossible or unlawful: **Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through non-performance of promise**
    - Impossibility of performance may be of two types: (i) Initial Impossibility (ii) Subsequent or Supervening impossibility

### APPROPRIATION OF PAYMENTS

1. Application of payment where debt to be discharged is indicated (Section 59): **Where debtor, owing several distinct debts to one person, makes payment to him either with express intimation or under circumstances implying that payment is to be applied to discharge of some particular debt, payment, if accepted, must be applied accordingly**
2. Application of payment where debt to be discharged is not indicated (Section 60): **Where debtor has omitted to intimate & there are no other circumstances indicating to which debt payment is to be applied creditor may apply it at his discretion to any lawful debt actually due and payable to him from debtor, where its recovery is or is not barred by law in force for time being as to limitation of suits**
3. Application of payment where neither party appropriates (Section 61): **Where neither party makes any appropriation, payment shall be applied in discharge of debts in order of time, whether they are or are not barred by law in force for time being as to limitation of suits. If debts are of equal standing, payments shall be applied in discharge of each proportionately**

# INDIAN CONTRACT ACT, 1872 (Chart 1.13)

## Performance of Contract

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

1. Effect of novation, rescission, and alteration of contract (Section 62): If parties to contract agree to substitute new contract for it, or to rescind or alter it, original contract need not be performed:
  - a) Effect of novation: Parties to contract may substitute new contract for old, if they do so, it will be case of novation. Old contract is discharged & consequently it need not be performed
  - b) Effect of rescission: When parties to contract agree to rescind it, contract need not be performed. Only old contract is cancelled and no new contract comes to exist in its place
  - c) Effect of alteration of contract: Parties to contract agree to alter it, original contract is rescinded, with result that it need not be performed
2. Promisee may waive or remit performance of promise (Section 63): Every promisee may dispense with or remit, wholly or in part, performance of promise made to him, or may extend time for such performance or may accept instead of it any satisfaction which he thinks fit
3. Restoration of Benefit under Voidable Contract (Section 64): When person at whose option contract is voidable rescinds it, other party thereto need not perform any promise therein contained in which he is promisor. Party rescinding avoidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to person from whom it was received
4. Obligations of Person who has Received Advantage under Void Agreement or contract that becomes void (Section 65): When agreement is discovered to be void or when contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to person from whom he received it
5. Communication of rescission (Section 66): Rescission must be communicated to other party in same manner as proposal is communicated. Rescission may be revoked in same manner as proposal is revoked
6. Effects of neglect of promisee to afford promisor reasonable facilities for performance (Section 67): If any promisee neglects or refuses to afford promisor reasonable facilities for performance of his promise, promisor is excused by such neglect or refusal as to any non-performance caused thereby

### DISCHARGE OF CONTRACT

1. Discharge by performance: It takes place when parties to contract fulfil their obligations arising under contract within time & in manner prescribed. Discharge by performance may be (a) Actual performance; or (b) Attempted performance
2. Discharge by mutual agreement: If parties to contract agree to substitute new contract for it, or to rescind or remit or alter it, original contract need not be performed
3. Discharge by impossibility of performance: Impossibility may exist from very start (impossibility ab initio). Alternatively, it may supervene. Supervening impossibility may take place owing to:
  - a) unforeseen change in law
  - b) destruction of subject-matter essential to that performance
  - c) non-existence or non-occurrence of particular state of things, which was naturally contemplated for performing contract, as result of some personal incapacity
  - d) declaration of war
4. Discharge by lapse of time: Contract should be performed within specified period as prescribed by Limitation Act, 1963. If it is not performed & if no action is taken by promisee within specified period of limitation, he is deprived of remedy at law
5. Discharge by operation of law: Contract may be discharged by operation of law which includes by death of promisor, by insolvency etc.
6. Discharge by breach of contract: Breach of contract may be actual breach of contract or anticipatory breach of contract. If one party defaults in performing his part of contract on due date, he is said to have committed breach thereof. When person repudiates contract before stipulated time for its performance has arrived, he is deemed to have committed anticipatory breach. If one of parties to contract breaks promise party injured thereby, has not only right of action for damages but he is also discharged from performing his part of contract
7. Promisee may waive or remit performance of promise: Every promisee may dispense with or remit, wholly or in part, performance of promise made to him, or may extend time for such performance or may accept instead of it any satisfaction which he thinks fit
8. Effects of neglect of promisee to afford promisor reasonable facilities for performance: If promisee neglects or refuses to afford promisor reasonable facilities for performance of his promise, promisor is excused by such neglect or refusal as to any non-performance caused thereby
9. Merger of rights: Inferior rights & superior rights may coincide & meet in one & same person. On merger, inferior rights vanish & are not required to be enforced.

# INDIAN CONTRACT ACT, 1872 (Chart 1.14)

## Breach of Contract

Breach means failure of party to perform his or her obligation under contract.

Breach of contract may arise in two ways: (1) Actual breach of contract (2) Anticipatory breach of contract

### Anticipatory breach of contract

- Anticipatory breach of contract is breach of contract occurring before time fixed for performance has arrived. When promisor refuses altogether to perform his promise & signifies his unwillingness even before time for performance has arrived, it is called Anticipatory Breach
- Anticipatory breach of contract may take either of following two ways:
  - a) Expressly by words spoken or written, &
  - b) Impliedly by conduct of one of parties
- When party to contract has refused to perform or disable himself from performing, his promise in its entirety, promisee may put end to contract, unless he has signified, but words or conduct, his acquiescence in its continuance
- Effect of anticipatory breach: Promisee is excused from performance or from further performance. He gets option:
  - a) To either treat contract as rescinded & sue other party for damages from breach of contract immediately without waiting until due date of performance; or
  - b) He may elect not to rescind but to treat contract as still operative, and wait for time of performance & then hold other party responsible for consequences of non-performance

### Actual Breach of Contract

- It is case of refusal to perform promise on scheduled date. Parties to lawful contract are bound to perform their respective promises.
- But when one of parties breaks contract by refusing to perform his promise, he is said to have committed breach. In that case, other party to contract obtains right of action against one who has refused to perform his promise
- Actual breach of contract may be committed-
  - a) At time when performance of contract is due
  - b) During performance of contract: Actual breach of contract also occurs when during performance of contract, one party fails or refuses to perform his obligation under it by express or implied act

### Remedies for Breach of Contract

#### Suit for Damages

1. General/ Ordinary Damages
2. Special Damages
3. Vindictive/ Exemplary Damages
4. Nominal Damages
5. Damages for deterioration caused by delay
6. Pre-fixed damages:
  - a) Liquidated damages
  - b) Penalty

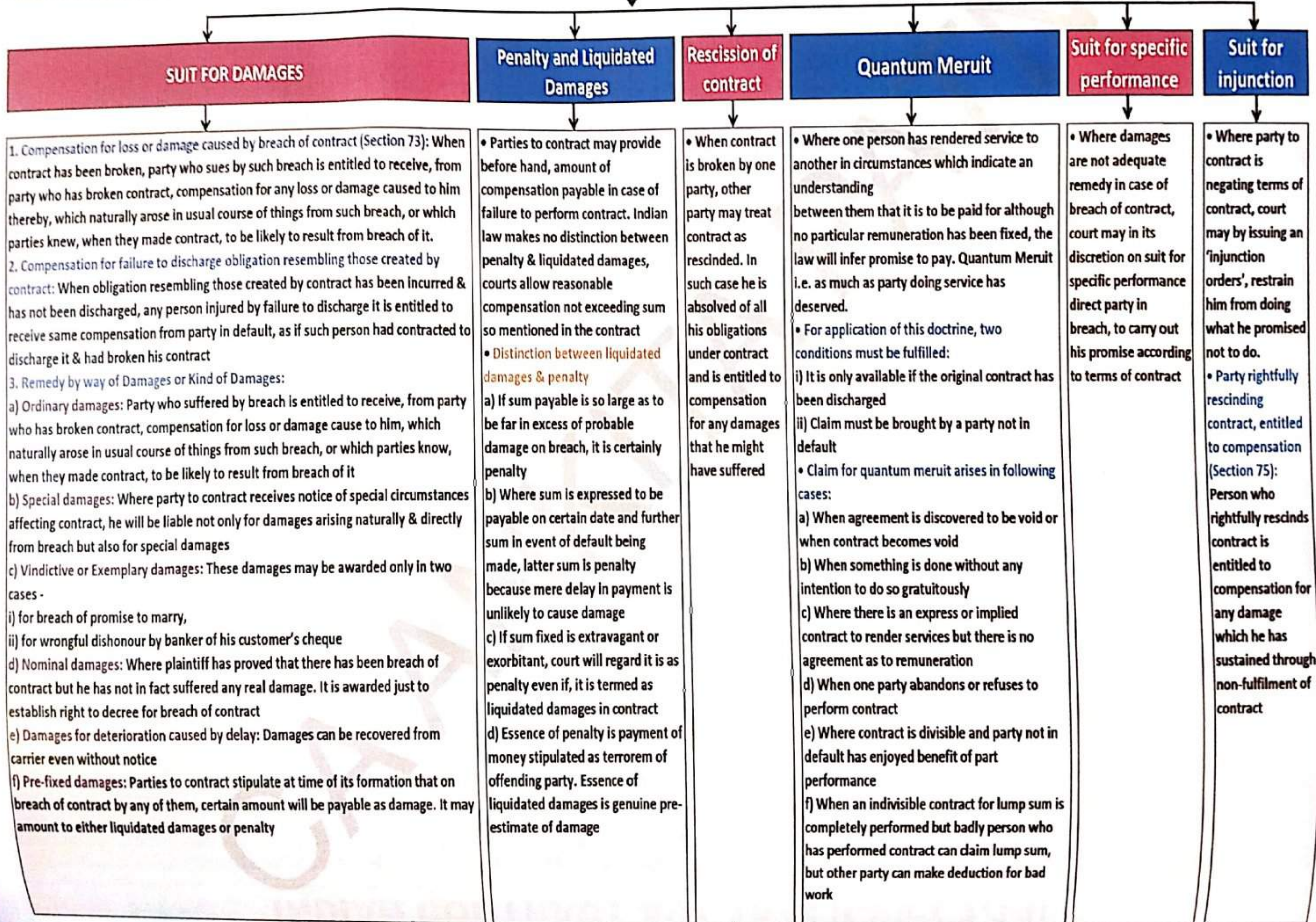
#### Other Remedies

1. Rescission of contract
2. Suit upon Quantum Meruit
3. Suit for specific performance
4. Suit for injunction

DESIGNED BY : CA ANKITA PATNI

# INDIAN CONTRACT ACT, 1872 (Chart 1.15)

## Remedies for Breach of Contract



# INDIAN CONTRACT ACT, 1872 (Chart 1.16)

## Contingent Contracts

"A contract to do or not to do something, if some event, collateral to some contract, does or does not happen."

Collateral event: "an event which is neither a performance directly promised as a part of contract, nor the whole of the consideration for a promise."

### Essentials of Contingent Contract

1. Performance of contingent contract would depend upon happening or non-happening of some event or condition
2. Event referred to is collateral to contract. Event is not part of contract. It should be neither performance promised nor consideration for promise.
3. Contingent event should not be a mere 'will' of promisor. Event should be contingent in addition to being will of promisor.
4. Event must be uncertain. Where event is certain or bound to happen, contract is due to be performed, then it is not contingent contract

### Rules relating to Enforcement of a contingent contract

1. Enforcement of contracts contingent on an event happening: Where contingent contract is made to do or not to do anything if uncertain future event happens, it cannot be enforced by law unless & until that event has happened. If event becomes impossible, such contracts become void
2. Enforcement of contracts contingent on an event not happening: Where contingent contract is made to do or not to do anything if uncertain future event does not happen, it can be enforced only when happening of that event becomes impossible & not before
3. 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 'event' or 'conduct' as impossible of happening: If contract is contingent upon as to how a person will act at an unspecified time, 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.
4. Contingent on happening of specified event within fixed time: Contingent contracts to do or not to do anything, if specified uncertain event happens within fixed time, becomes void if, at expiration of time fixed, such event has not happened, or if, before time fixed, such event becomes impossible
5. Contingent on specified event not happening within fixed time: Contingent contracts to do or not to do anything, if specified uncertain event does not happen within fixed time, may be enforced by law when time fixed has expired, & such event has not happened or before time fixed has expired, if it becomes certain that such event will not happen
6. Contingent on an impossible event: Contingent agreements to do or not to do anything, if impossible event happens are void, whether impossibility of event is known or not to parties to agreement at time when it is made

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### Difference between a contingent contract and a wagering contract

Basis of difference	Contingent contract	Wagering contract
Meaning	A contingent contract is a contract to do or not to do something with reference to a collateral event happening or not happening.	A wagering agreement is a promise to give money or money's worth with reference to uncertain or event happening or not happening.
Reciprocal promises	Contingent contract may not contain reciprocal promises.	A wagering agreement consists of reciprocal promises.
Uncertain event	In a contingent contract, the event is collateral.	In a wagering contract, the uncertain event is the core factor.
Nature of contract	Contingent contract may not be wagering in nature.	A wagering agreement is essentially contingent in nature.
Interest of contracting parties	Contracting parties have interest in the subject matter in contingent contract.	The contracting parties have no interest in the subject matter.
Doctrine of mutual-ity of lose and gain	Contingent contract is not based on doctrine of mutual-ity of lose and gain.	A wagering contract is a game, losing and gaining alone matters.
Effect of contract	Contingent contract is valid.	A wagering agreement is void



# INDIAN CONTRACT ACT, 1872 (Chart 1.17)

## Quasi Contract

### Meaning

- When law implies promise imposing obligations on one party & conferring right in favour of other even when there is no offer, no acceptance, no genuine consent, lawful consideration, & in fact neither agreement nor promise. Such cases are not contracts in strict sense, but Court recognises them as relations resembling those of contracts & enforces them as if they were contracts. Hence term Quasi contracts (i.e. resembling contract)
- Even in absence of contract, certain social relationships give rise to certain specific obligations to be performed by certain persons. These are known as quasi contracts as they create same obligations as in case of regular contract.
- Quasi contracts are based on principles of equity, justice & good conscience.
- Quasi or constructive contract rests upon maxims, "No man must grow rich out of another person's loss"

### Salient features of quasi contracts

1. Such right is always a right to money & generally, to liquidated sum of money
2. It does not arise from any agreement of parties concerned, but is imposed by law
3. It is right which is available not against entire world, but against particular person or persons only, so that in this respect it resembles contractual right

### Cases deemed as a Quasi Contract

1. Claim for necessities supplied to persons incapable of contracting (Section 68)
  - If person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from property of such incapable person.
2. Payment by an interested person (Section 69)
  - Person who is interested in payment of money which another is bound by law to pay, & who therefore pays it, is entitled to be reimbursed by other
3. Obligation of person enjoying benefits of non-gratuitous act (Section 70)
  - Where person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously & such other person enjoys benefit thereof, latter is bound to pay compensation to former in respect of, or to restore, thing so done or delivered
  - It thus follows that for suit to succeed, plaintiff must prove:
    - i) that he had done act or had delivered thing lawfully;
    - ii) that he did not do so gratuitously; &
    - iii) that other person enjoyed benefit
4. Responsibility of finder of goods (Section 71)
  - Person who finds goods belonging to another & takes them into his custody is subject to same responsibility as if he were bailee.
  - Finder of lost goods has:
    - i) to take proper care of property as man of ordinary prudence would take
    - ii) no right to appropriate the goods &
    - iii) to restore goods if owner is found
5. Money paid by mistake or under coercion (Section 72)
  - A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it. Every kind of payment of money or delivery of goods for every type of 'mistake' is recoverable. Similarly any money paid by coercion is also recoverable.

### Difference between quasi contracts and contracts

Basis of distinction	Quasi- Contract	Contract
Essential for the valid contract	The essentials for the formation of a valid contract are absent	Present
Obligation	Imposed by law	Created by the consent of the Parties

# CONTRACT OF INDEMNITY (Chart 1.18)

## MEANING

- 1 - The term "indemnity" literally means "Security against loss" or "to make good the loss" or "to compensate the party who has suffered some loss".
- 2 - It is "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person."

## Parties :

- a. The party who promises to indemnify/ save the other party from loss- "indemnifier",
- b. The party who is promised to be saved against the loss- "indemnified" or "indemnity holder".

## Mode of contract of Indemnity

**A contract of indemnity like any other contract may be express or implied.**

- a. A contract of indemnity is said to be express when a person expressly promises to compensate the other from loss.
- b. A contract of indemnity is said to be implied when it is to be inferred from the conduct of the parties or from the circumstances of the case.

A contract of indemnity is like any other contract and must fulfil all the essentials of a valid contract.

## Rights of Indemnity-holder when sued

**The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor/indemnifier —**

- (a) all damages which he may be compelled to pay in any suit
- (b) all costs which he may have been compelled to pay in bringing/ defending the suit and
- (c) all sums which he may have paid under the terms of any compromise of suit.

Point of distinction	Contract of Indemnity	Contract of Guarantee
Number of party/parties to the contract	There are only two parties namely the indemnifier [promisor] and the indemnified [promisee].	There are three parties- creditor, principal debtor and surety.
Nature of liability	The liability of the indemnifier is primary and unconditional.	The liability of the surety is secondary and conditional as the primary liability is that of the principal debtor.
Time of liability	The liability of the indemnifier arises only on the happening of a contingency.	The liability arises only on the non-performance of an existing promise or non-payment of an existing debt.
Time to Act	The indemnifier need not act at the request of indemnity holder.	The surety acts at the request of principal debtor.
Right to sue third party	Indemnifier cannot sue a third party for loss in his own name as there is no privity of contract. Such a right would arise only if there is an assignment in his favour.	Surety can proceed against principal debtor in his own right because he gets all the right of a creditor after discharging the debts.
Purpose	Reimbursement of loss	For the security of the creditor
Competency to contract	All parties must be competent to contract.	In the case of a contract of guarantee, where a minor is a principal debtor, the contract is still valid.

# CONTRACT OF GUARANTEE ( CHART 1.19 )

## Three Parties Involved

1. Surety - person who gives The guarantee
2. Principle Debtor - person in respect of whose default the guarantee is given
3. Creditor - person to whom the guarantee is given

contract of guarantee is a tripartite agreement between principal debtor, creditor and surety

- i. A principal contract between the principal debtor and the creditor
- ii. A secondary contract between the creditor and the surety.
- iii. An implied contract between the surety and the principal debtor whereby principal debtor is under an obligation to indemnify the surety; if the surety is made to pay or perform.

## ESSENTIAL FEATURES OF A GUARANTEE

- 1 Purpose : The purpose of a guarantee being to secure the payment of a debt, the existence of recoverable debt is necessary. If there is no principal debt, there can be no valid guarantee.
- 2 Consideration : Like every other contract, a contract of guarantee should also be supported by some consideration. A guarantee without consideration is void, but there is no need for a direct consideration between the surety and the creditor. A to pay for them in default of B. The agreement is void.
3. Existence of a liability : There must be an existing liability or a promise whose performance is guaranteed. Such liability or promise must be enforceable by law. The liability must be legally enforceable and not time barred.
- 4 No misrepresentation or concealment (section 142 and 143): Any guarantee which has been obtained by the means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid (section 142) Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances, is invalid (section 143).
- 5 Writing not necessary: Section 126 expressly declares that a guarantee may be either oral or written.
- 6 Joining of the other co-sureties (Section 144): Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join. That implies, the guarantee by a surety is not valid if a condition is imposed by a surety that some other person must also join as a co-surety, but such other person does not join as a co-surety.

Point of distinction	Contract of Indemnity	Contract of Guarantee
Number of party/parties to the contract	There are only two parties namely the indemnifier [promisor] and the indemnified [promisee]	There are three parties- creditor, principal debtor and surety.
Nature of liability	The liability of the indemnifier is primary and unconditional.	The liability of the surety is secondary and conditional as the primary liability is that of the principal debtor.
Time of liability	The liability of the indemnifier arises only on the happening of a contingency.	The liability arises only on the non-performance of an existing promise or non-payment of an existing debt.
Time to Act	The indemnifier need not act at the request of indemnity holder.	The surety acts at the request of principal debtor.
Right to sue third party	Indemnifier cannot sue a third party for loss in his own name as there is no privity of contract. Such a right would arise only if there is an assignment in his favour.	Surety can proceed against principal debtor in his own right because he gets all the right of a creditor after discharging the debts.
Purpose	Reimbursement of loss	For the security of the creditor
Competency to contract	All parties must be competent to contract.	In the case of a contract of guarantee, where a minor is a principal debtor, the contract is still valid.

## TYPES OF GUARANTEES

**A. Specific Guarantee-** A guarantee which extends to a single debt/ specific transaction is called a specific guarantee. The surety's liability comes to an end when the guaranteed debt is duly discharged or the promise is duly performed.

**B. Continuing Guarantee [Section 129]** - A guarantee which extends to a series of transaction is called a continuing guarantee. A surety's liability continues until the revocation of the guarantee. The essence of continuing guarantee is that it applies not to a specific number of transactions but to any number of transactions and makes the surety liable for the unpaid balance at the end of the guarantee.

## NATURE AND EXTENT OF SURETY'S LIABILITY [SECTION 128]

- (i) The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. [Section 128]
- (ii) Liability of surety is of secondary nature as he is liable only on default of principal debtor
- (iii) Where a debtor cannot be held liable on account of any defect in the document, the liability of the surety also ceases.
- (iv) A creditor may choose to proceed against a surety first, unless there is an agreement to the contrary.

# CONTRACT OF GUARANTEE ( CHART 1.20 )

## DISCHARGE OF A SURETY

### By revocation

#### (A) By revocation of the Contract of Guarantee

Once the guarantee is revoked, the surety is not liable for any future transaction however he is liable for all the transactions that happened before the notice was given. A specific guarantee can be revoked only if liability to principal debtor has not accrued.

#### (B) Revocation of continuing guarantee by surety's death

In the absence of any contract to the contrary, the death of surety operates as a revocation of a continuing guarantee as to the future transactions taking place after the death of surety. However, the surety's estate remains liable for the past transactions which have already taken place before the death of the surety.

#### (C) By novation

The surety under original contract is discharged if a fresh contract is entered into either between the same parties or between the other parties, the consideration being the mutual discharge of the old contract.

### By the conduct of the creditor

#### (a) By variance in terms of contract

Where there is any variance in the terms of contract between the principal debtor and creditor without surety's consent, it would discharge the surety in respect of all transactions taking place subsequent to such variance

#### (b) By release or discharge of principal debtor

The surety is discharged if the creditor:  
i. enters into a fresh/ new contract with principal debtor; by which the principal debtor is released, or  
ii. does any act or omission, the legal consequence of which is the discharge of the principal debtor

#### (c) Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor

i. Composition: If the creditor makes a composition with the principal debtor, without consulting the surety, the latter is discharged. Composition inevitably involves variation of the original contract, and, therefore, the surety is discharged.  
ii. Promise to give time: When the time for the payment of the guaranteed debt comes, the surety has the right to require the principal debtor to pay off the debt. Accordingly, it is one of the duties of the creditor towards the surety not to allow the principal debtor more time for payment.  
iii. Promise not to sue: If the creditor under an agreement with the principal debtor promises not to sue him, the surety is discharged. The main reason is that the surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt when it is due and this right is positively violated when the creditor promises not to sue the principal debtor

#### (d) Discharge of surety by creditor's act or omission impairing surety's eventual remedy

If the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

### On Invalidation of the contract of guarantee

#### (a) Guarantee obtained by misrepresentation

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

#### (b) Guarantee obtained by concealment

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

#### (C) Guarantee on contract that creditor shall not act on it until co-surety joins

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

#### Cases where surety not discharged

- i. Surety not discharged when agreement made with third person to give time to principal debtor :Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.
- ii. Creditor's forbearance to sue does not discharge surety : Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not in the absence of any provision in the guarantee to the contrary, discharge the surety.

# CONTRACT OF GUARANTEE ( CHART 1.21 )

## RIGHTS OF A SURETY

### Debtor

(a) **Rights of subrogation** - Where, a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor

(b) **Implied promise to indemnify surety** - In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. The surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he paid wrongfully.

### Creditor

(a) **Surety's right to benefit of creditor's securities** - A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

(b) **Right to set off** - If the creditor sues the surety, for payment of principal debtor's liability, the surety may have the benefit of the set off, if any, that the principal debtor had against the creditor

(c) **Right to share reduction** - The surety has right to claim proportionate reduction in his liability if the principal debtor becomes insolvent

### Co-sureties

(a) **Co-sureties liable to contribute equally** - each surety is liable to contribute equally for discharge of whole debt or part of the debt remains unpaid by debtor.

(b) **Liability of co-sureties bound in different sums** - The principle of equal contribution is, however, subject to the maximum limit fixed by a surety to his liability. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

## Right of Surety

### Principal Debtor

1. Subrogation
2. Indemnity

### Creditor

1. Securities
2. Set Off

### Co Sureties

1. Contribution

# CONTRACT OF BAILMENT ( CHART 1.22 )

**Meaning** - bailment is the delivery of goods by one person to another for some purpose, upon a contract, that the goods shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

## Parties to bailment

- (a) Bailor: The person delivering the goods.
- (b) Bailee: The person to whom the goods are delivered.

## Essential Elements :

- (a) **Contract** : Bailment is based upon a contract. The contract may be express or implied. No consideration is necessary to create a valid contract of bailment.
- (b) **Delivery of goods** :
  - i. **Actual Delivery**: When goods are physically handed over to the bailee by the bailor. Eg: delivery of a car for repair to workshop
  - ii. **Constructive Delivery**: Where delivery is made by doing anything that has the effect of putting goods in the possession of the bailee or of any person authorized to hold them on his behalf. Eg: Delivery of the key of car to a workshop dealer for repair of the car.
- (c) **Purpose** : The goods are delivered for some purpose. The purpose may be express or implied.
- (d) **Possession** : In bailment, possession of goods changes. The change of possession does not lead to change of ownership. In bailment, bailor continues to be the owner of goods.
- (e) **Return of goods**: Bailee is obliged to return the goods physically to the bailor.

## Types of bailment

### On the basis of benefit

- a. For the exclusive benefit of bailor :
- b. For the exclusive benefit of bailee:
- c. For mutual benefit of bailor and bailee:

### On the basis of reward

- a. **Gratuitous Bailment** : The word gratuitous means free of charge. So, a gratuitous bailment is one when the provider of service does it gratuitously i.e. free of charge. Such bailment would be either for the exclusive benefits of bailor or bailee.
- b. **Non-Gratuitous Bailment** : Non gratuitous bailment means where both the parties get some benefit i.e. bailment for the benefit of both bailor & bailee

## TERMINATION OF BAILMENT

1. **On expiry of stipulated period** : If the goods were given for a stipulated period, the contract of bailment shall terminate after the expiry of such period
2. **On fulfillment of the purpose** : If the goods were delivered for a specific purpose, a bailment shall terminate on the fulfillment of that purpose.
3. **By Notice** :
  - (a) Where the bailee acts in a manner which is inconsistent with the terms of the bailment, the bailor can always terminate the contract of bailment by giving a notice to the bailee.
  - (b) A gratuitous bailment can be terminated by the bailor at any time by giving a notice to the bailee. However, the termination should not cause loss to the bailee in excess of the benefit derived by him. In case the loss exceeds the benefit derived by the bailee, the bailor must compensate the bailee for such a loss (Sec. 159).
4. **By death** : A gratuitous bailment terminates upon the death of either the bailor or the bailee.
5. **Destruction of the subject matter** : A bailment is terminated if the subject matter of the bailment is destroyed or there is a change in the nature of goods which makes it impossible to be used for the purpose of bailment.

## CONTRACT OF BAILMENT ( CHART 1.23 )

### DUTIES OF A BAILOR

#### (i) Bailor's duty to disclose faults in goods bailed :

a. In case of *gratuitous bailment*: The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

b. In case of *non-gratuitous bailment* : If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

#### (ii) Duty to pay necessary expenses

a. In case of *Gratuitous bailment* : Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration (*gratuitous bailment*), the bailor shall repay to the bailee the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of the bailment.

b. In case of *non-gratuitous bailment* : the bailor is liable to pay the extraordinary expenses incurred by the bailee.

(iii) *Duty to indemnify the Bailee for premature termination* : The bailor must compensate the bailee for the loss or damage suffered by the bailee that is in excess of the benefit received, where he had lent the goods gratuitously and decides to terminate the bailment before the expiry of the period of bailment.

#### (iv) Bailor's responsibility to bailee : The bailor is responsible to the bailee for the following

a. Indemnify for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them (*defective title in goods*).

b. It is the duty of the bailor to receive back the goods when the bailee returns them after the time of bailment has expired or the purpose of bailment has been accomplished. If the bailor refuses to take delivery of goods when it is offered at the proper time the bailee can claim compensation for all necessary expenses incurred for the safe custody.

### RIGHTS OF A BAILOR

i) *Right to terminate the bailment* : A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

(ii) *Right to demand back the goods* : When the goods are lent gratuitously, the bailor can demand back the goods at any time even before the expiry of the time fixed or the achievement of the object.

(iii) *Right to file a suit against a wrong doer* : If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury

(iv) *Right to sue the bailee* : The bailor has a right to sue the bailee for enforcing all the liabilities and duties of him.

(v) *Right to compensation*: If any damage is caused to the goods bailed because of the unauthorized use of the goods or unauthorized mixing of the goods, the bailor has a right to claim compensation for the same.

# CONTRACT OF BAILMENT ( CHART 1.24 )

## DUTIES OF A BAILEE (CHART 1.25)

**1. Take reasonable care of the goods** - In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take care of his own goods of the same bulk, quality and value, as the goods bailed.

**Exception:** Bailee when not liable for loss, etc., of thing bailed [Section 152]: The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken reasonable

**2. Not to make inconsistent use of goods** - if the bailee makes any use of the goods bailed, which is not according to the terms and conditions of the bailment, he is liable to compensate the bailor for any loss or destruction of goods.

**3. Not to mix the goods**

### Mixing of Goods

**With the consent of the Bailor**

Both parties will have proportionate interest

**Without the consent of Bailor**

Goods are separable

Bailee will bear separation charges  
Eg: Cotton Bags



Goods are not separable

Bailee shall compensate Bailor  
Eg: Rice



**4. Return the goods** - It is the duty of bailee to return, or deliver according to the bailor's directions, the goods bailed without demand, as soon as the time for which they were bailed, has expired, or the purpose for which they were bailed has been accomplished.

**5. Return an accretion from the Goods** - In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

**6. Not to setup Adverse Title:** Bailee must not set up a title adverse to that of the bailor. He must hold the goods on behalf of and for the bailor. He cannot deny the title of the bailor.

## RIGHTS OF A BAILEE

**1. Right to Deliver the Goods to any one of the joint bailors:** If several joint owners bailed the goods, the bailee has a right to deliver them to any one of the joint owners unless there was a contract to the contrary.

**2. Right to indemnity:** Bailee is entitled to be indemnified by the bailor for any loss arising to him by reasons that the bailor was not entitled to make the bailment or to receive back the goods or to give directions in respect to them.

to him due to the failure of the bailor to disclose any faults in the goods known to him. If the bailment is for hire, the bailor will be liable to compensate even though he was not aware of the existence of such faults.

**4. Right to claim necessary expenses:** In case of gratuitous bailment, the bailor shall repay to the bailee the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of the bailment.

**5. Right to Apply to Court to Decide the Title to the Goods:** If the goods bailed are claimed by the person other than the bailor, the bailee may apply to the court to stop its delivery and to decide the title to the goods.

**6. Right of particular lien for payment of services**

**7. Right of general lien**



# CONTRACT OF BAILMENT ( CHART 1.25 )

## FINDER OF LOST GOODS

**Right of finder of lost goods- may sue for specific reward offered :** A person who finds some goods which do not belong to him, is called the finder of the goods. It is the duty of the finder of goods to find the true owner and surrender the goods to him. However, the finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him in finding the owner and preserving the goods found. But he has a right to retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward on the lost goods, the finder may sue the owner for such reward, and may retain the goods until then.

**When finder of thing commonly on sale may sell it :** When a thing which is commonly the subject of sale if lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder in respect of the thing found amount to two thirds of its value.

General lien	Particular lien
Section 171 of the Indian Contract Act, 1872 confer on Bailee the right of General Lien.	Section 170 of the Indian Contract Act, 1872 confers on the Bailee, the right of particular lien.
General lien alludes to the right to keep possession of goods belonging to other against general balance of account.	Particular lien implies a right of the bailee to retain specific goods bailed for non-payment of amount.
A general lien is not automatic but is recognized through on agreement. It is exercised by the bailee only by name.	It is automatic.
It can be exercised against goods even without involvement of labor or skill.	It comes into play only when some labor or skill is involved has been expended on the goods, resulting in an increase in value of goods.
Only such persons as are specified under section 171, e.g., Bankers, factors, wharfingers, policy brokers etc. are entitled to general lien.	Bailee, finder of goods, pledgee, unpaid seller, agent, partner etc. are entitled to particular lien.

# CONTRACT OF PLEDGE ( CHART 1.26 )

**Meaning** - The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

## ESSENTIALS -

all the essentials of bailment are also the essentials of the pledge. Apart from that, the other essentials of the pledge are:

There shall be a bailment for security against payment or performance of the promise,

The subject matter of pledge is goods

Goods pledged for shall be in existence,

There shall be the delivery of goods from pledger to pledgee

## RIGHTS OF A PAWNEE

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

(b) **Right to retention of subsequent debts** : a right to retain goods for subsequent debts can be exercised only when it has been provided for in a contract to this effect.

(c) **Pawnee's right to extraordinary expenses incurred** : The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged. For such expenses, however, he does not have the right to retain the goods, but he can sue the pawnor for such expenses.

(d) **Pawnee's right where pawnor makes default** : If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee has the following rights:  
i. the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or  
ii. he may sell the thing pledged on giving the pawnor reasonable notice of the sale.  
If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor

## Rights of a pawnor :

As the bailor of goods, pawnor has all the rights of the bailor. Along with that he also has the right of redemption to the pledged goods  
**Right to redeem** : If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

## Duties of the Pawnee

- Duty to take reasonable care of the pledged goods.
- Duty not to make unauthorized use of pledged goods.
- Duty to return the goods when the debt has been repaid or the promise has been performed.
- Duty not to mix his own goods with goods pledged.
- Duty not to do any act which is inconsistent with the terms of the pledge.
- Duty to return accretion to the goods, if any.

## Duties of a Pawnor

- The pawnor is liable to pay the debt or perform the promise as the case may be.
- It is the duty of the pawnor to compensate the pawnee for any extraordinary expenses incurred by him for preserving the goods pawned.
- It is the duty of the pawnor to disclose all the faults which may put the pawnee under extraordinary risks
- If loss occurs to the pawnee due to defect in pawnor's title to the goods, the pawnor must indemnify the pawnee.
- If the pawnee sells the good due to default by the pawnor, the pawnor must pay the deficit.

## CONTRACT OF AGENCY ( CHART 1.31 )

### PRINCIPAL'S LIABILITY TO THIRD PARTIES

(i) **Principal's liability for the Acts of the Agent** : Principal liable for the acts of agents which are within the scope of his authority.

(ii) **Principal's liability when agent exceeds authority** : When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

**Principal not bound when excess of agent's authority is not separable** : Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

(iii) **Consequences of notice given to agent** : Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

(iv) **Principal's liability for the agent's fraud, misrepresentation or torts** : Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed, by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

### PERSONAL LIABILITY OF AGENT TO THIRD PARTIES

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal

#### Exceptions :

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad/foreign principal

(2) Where the agent does not disclose the name of his principal or undisclosed principal

(3) Non-existent or incompetent principal : Where the principal, though disclosed, cannot be sued, the agent is presumed to be personally liable.

(4) Pretended agent – if the agent pretends but is not an actual agent, and the principal does not rectify the act but disowns it, the pretended agent will be himself liable

(5) When agent exceeds authority - When the agent exceeds his authority, misleads the third person in believing that the agent he has the requisite authority in doing the act, then the agent can be made liable personally for the breach of warranty of authority.

## CONTRACT OF AGENCY ( CHART 1.32 )

## CONTRACT OF AGENCY ( CHART 1.32 )

### RIGHTS OF THIRD PARTIES

i. **Rights of parties to a contract made by undisclosed agent** : If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same right as he would have had as against the agent if the agent had been the principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

ii. **Performance of contract with agent supposed to be principal** : When agent does not disclosed that he is acting as an agent & the principal requires the performance of the contract then the principal can obtain such performance subject to the rights & obligations subsisting between the agent & the other party to the contract.

#### iii. **Option to Third Person- sue the Agent or the Principal :**

a. **Right of person dealing with agent personally liable**: In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

b. **Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable** : When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

### Termination of agency

a. **Revocation** : An agency may be terminated by the principal revoking the authority of the agent. Principal may revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal

b. **Renunciation by agent** : An agent may renounce the business of agency, if the agency is for a fixed period, the agent would have to compensate the principal for any premature renunciation without sufficient cause.

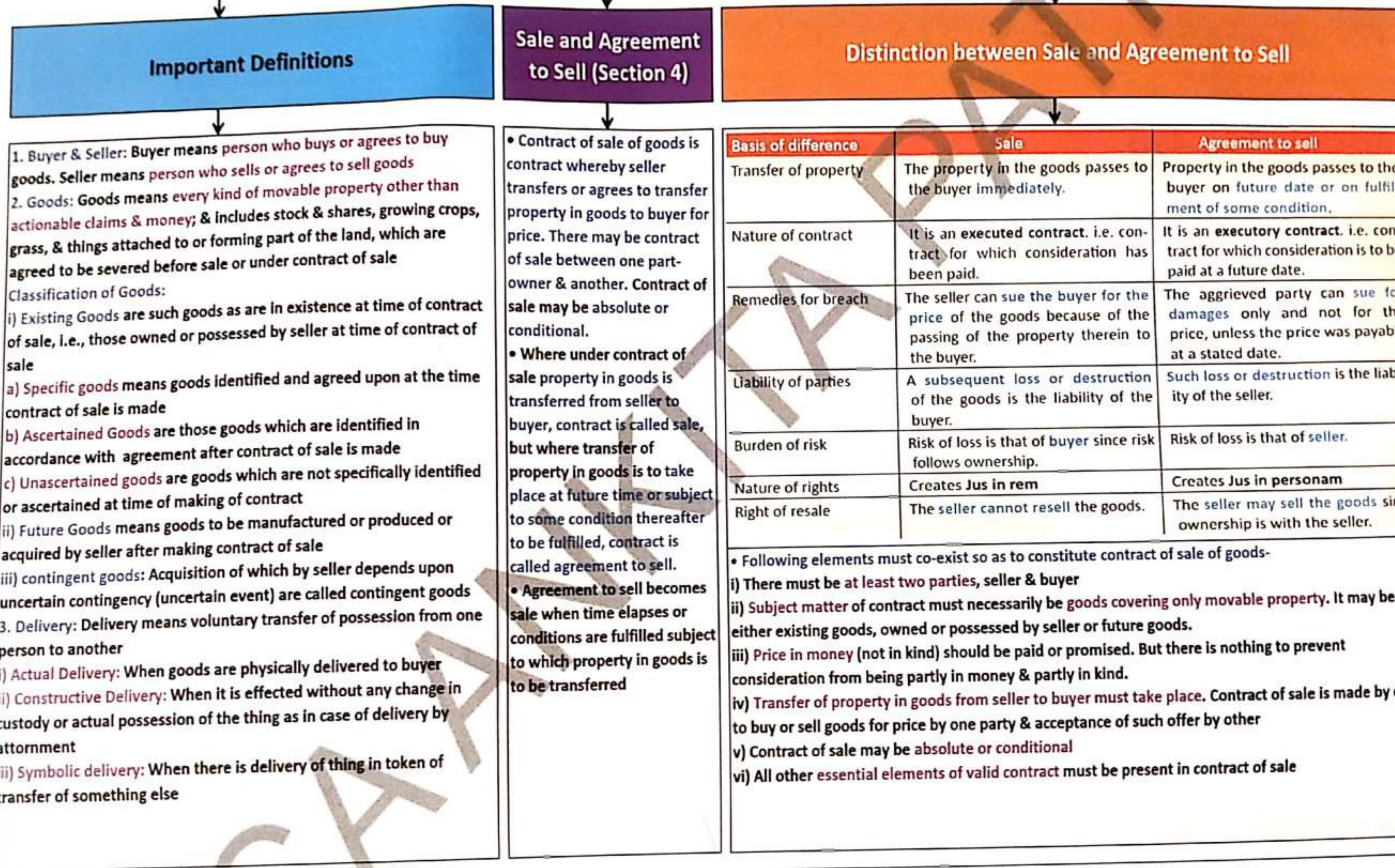
c. **Completion of business** : An agency is automatically and by operation of law terminated when its business is completed.

d. **Death or insanity** : An agency is determined automatically on the death or insanity of the principal or the agent. Winding up of a company or dissolution of partnership has the same effect. Act done by agent before death would remain binding.

e. **Principal's insolvency** : An agency ends on the principal being adjudicated insolvent.

f. **On expiry of time**: Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of agency has been accomplished or not. An agency comes to an automatic end on expiry of its term.

# THE SALE OF GOODS ACT, 1930 (Chart 2.1)



# THE SALE OF GOODS ACT, 1930 (Chart 2.2)

Sale distinguished from other similar Contracts

# THE SALE OF GOODS ACT, 1930 (Chart 2.2)

## Sale distinguished from other similar Contracts

### Sale and Hire Purchase

Hire purchase: Agreement under which goods are let on hire & under which hirer has option to purchase them in accordance with terms of agreement & includes agreement under which: (a) Possession of goods is delivered by owner to person on condition that such person pays agreed amount in periodical instalments, (b) property in goods is to pass to such person on payment of last instalment, (c) Such person has right to terminate agreement at any time before property so passes

Basis of difference	Sale	Hire- Purchase
Time of passing property	Property in the goods is transferred to the buyer immediately at the time of contract	The property in goods passes to the hirer upon payment of the last installment.
Position of the party	The position of the buyer is that of the owner of the goods.	The position of the hirer is that of a bailee till he pays the last installment
Termination of contract	The buyer cannot terminate the contract and is bound to pay the price of the goods.	The hirer may, if he so likes, terminate the contract by returning the goods to its owner without any liability to pay the remaining installments.
Burden of Risk of insolvency of the buyer	The seller takes the risk of any loss resulting from the insolvency of the buyer	The owner takes no such risk, for if the hirer fails to pay an installment, the owner has right to take back the goods.
Transfer of title	The buyer can pass a good title to a bona fide purchaser from him.	The hirer cannot pass any title even to a bona fide purchaser.
Resale	The buyer in sale can resell the goods	The hire purchaser cannot resell unless he has paid all the installments.

### Sale and Bailment

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

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

### Sale and contract for work and labour

Contract of sale of goods is one in which some goods are sold or are to be sold for price. But where no goods are sold, and there is only doing or rendering of some work of labour, then contract is only of work and labour and not of sale of goods

Example:

Where gold is supplied to goldsmith for preparing ornament or when artist is asked to paint picture

# THE SALE OF GOODS ACT, 1930 (Chart 2.3)

## Contract of Sale how made (Section 5)

1. Contract of sale is made by offer to buy or sell goods for price and acceptance of such offer.
2. Contract may provide for immediate delivery of goods or immediate payment of price or both, or for delivery or payment by instalments, or that delivery or payment or both shall be postponed.
3. Subject to provisions of any law for time being in force, contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from conduct of parties.
4. Contract of sale may be made in any of following modes:
  - a) Contract of sale is made by offer to buy or sell goods for price & acceptance of such offer
  - b) There may be immediate delivery of goods
  - c) There may be immediate payment of price, but it may be agreed that delivery is to be made at some future date
  - d) There may be immediate delivery of goods and an immediate payment of price
  - e) It may be agreed that delivery or payment or both are to be made in installments
  - f) It may be agreed that delivery or payment or both are to be made at some future date.

## Subject matter of Contract of Sale

1. Existing or future goods (section 6):
  - a) Goods which form subject of contract of sale may be either existing goods, owned or possessed by seller, or future goods.
  - b) There may be contract for sale of goods acquisition of which by seller depends upon contingency which may or may not happen.
  - c) Where by contract of sale seller purports to effect present sale of future goods, contract operates as an agreement to sell goods.
2. Goods perishing before making of contract (Section 7): Where there is contract for sale of specific goods, contract is void if goods without knowledge of seller have, at time when contract was made, perished or become so damaged as no longer to answer to their description contract.
3. Goods perishing before sale but after agreement to sell (Section 8): Where there is an agreement to sell specific goods, and subsequently goods without any fault on part of seller or buyer perish or become so damaged as no longer to answer to their description in agreement before risk passes to buyer, agreement is thereby avoided.

## Ascertainment of Price

1. Ascertainment of price (Section 9):
  - a) Price in contract of sale may be fixed by contract or may be left to be fixed in manner thereby agreed or may be determined by course of dealing between parties.
  - b) Where price is not determined in accordance with foregoing provisions, buyer shall pay seller reasonable price.
    - Price means monetary consideration for sale of goods.
2. Agreement to sell at valuation (Section 10):
  - a) Where there is agreement to sell goods on terms that price is to be fixed by valuation of third party and such third party cannot or does not make such valuation, agreement is thereby avoided: Provided that, if goods or any part thereof have been delivered to, and appropriated by, buyer, he shall pay reasonable price therefore.
  - b) Where such third party is prevented from making valuation by fault of seller or buyer, party not in fault may maintain suit for damages against party in default.
    - Where there is agreement to sell goods on terms that price has to be fixed by third party & he either does not or cannot make such valuation, agreement will be void
    - In case third party is prevented by default of either party from fixing price, party at fault will be liable to damages to other party who is not at fault
    - Buyer who has received and appropriated goods must pay reasonable price for them in any eventuality

# THE SALE OF GOODS ACT, 1930 (Chart 2.4)

## Stipulation as to Time (Section 11)

1. Unless different intention appears from terms of contract, stipulations as to time of payment are not deemed to be of essence of contract of sale

2. Whether any other stipulation as to time is of essence of contract or not depends on terms of contract

- As regard time for payment of price, unless different intention appears from terms of contract, stipulation as regard this, is not deemed to be of essence of contract of sale. But delivery of goods must be made without delay
- Price for goods may be fixed by contract or may be agreed to be fixed later on in specific manner.

Stipulations as to time of delivery are usually essence of contract

## Introduction- Conditions and Warranties

- At time of selling goods, seller usually makes certain statements or representations with view to induce intending buyer to purchase goods. Such representations are generally about nature and quality of goods, and about their fitness for buyer's purpose
- When these statements or representations do not form part of contract of sale, they are not relevant & have no legal effects on contract
- But when these form part of contract of sale & buyer relies upon them, they are relevant and have legal effects on contract
- Representation which forms part of contract of sale and affects contract, is called stipulation. However, every stipulation is not of equal importance

1. Condition and warranty (Section 12):

- Stipulation in contract of sale with reference to goods which are subject thereof may be condition or warranty
- Condition is stipulation essential to main purpose of contract, breach of which gives rise to right to treat contract as repudiated
- Warranty is stipulation collateral to main purpose of contract, breach of which gives rise to claim for damages but not to right to reject goods and treat contract as repudiated
- Whether stipulation in contract of sale is condition or warranty depends in each case on construction of contract. stipulation may be condition, though called warranty in contract

### Difference between conditions and warranties

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

## When Condition to be treated as Warranty (Section 13)

- Where contract of sale is subject to any condition to be fulfilled by seller, buyer may waive condition or elect to treat breach of condition as breach of warranty and not as ground for treating contract as repudiated
- Where contract of sale is not severable & buyer has accepted goods or part thereof, breach of any condition to be fulfilled by seller can only be treated as breach of warranty & not as ground for rejecting goods and treating contract as repudiated, unless there is term of contract, express or implied, to that effect
- Nothing in this section shall affect case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise
  - In following cases, contract is not avoided even on account of breach of condition:
    - Where buyer altogether waives performance of condition. Party may for his own benefit, waive stipulation
    - Where buyer elects to treat breach of conditions, as one of warranty. That is to say, he may claim only damages instead of repudiating contract
    - Where contract is non-severable & buyer has accepted either whole goods or any part thereof
    - Where fulfillment of any condition or warranty is excused by law by reason of impossibility or otherwise

### Waiver of conditions

**Voluntary Waiver**

- Waives performance of contract
- Elect to treat condition as warranty

**Compulsory Waiver**

- Non-severability of contract
- Fulfilment of conditions excused by law



# THE SALE OF GOODS ACT, 1930 (Chart 2.5)

## Express and Implied Conditions and Warranties (Section 14 to 17)

Conditions' & Warranties may be either express or implied. Express conditions are those, which are agreed upon between parties at time of contract & are expressly provided in contract. Implied conditions, are those, which are presumed by law to be present in contract

**I. Implied Conditions: Following are implied unless circumstances of contract show different intention:**

- 1. Condition as to title [Section 14(a)]:** In every contract of sale, unless there is agreement to contrary, first implied condition on part of seller is that: (i) in case of sale, he has right to sell goods, & (ii) in case of agreement to sell, he will have right to sell goods at time when property is to pass
- 2. Sale by description (Section 15):** Where there is contract of sale of goods by description, there is implied condition that goods shall correspond with description. Buyer is not bound to accept & pay for goods which are not as per with description of goods
- 3. Sale by sample (Section 17):** In contract of sale by sample, there is implied condition that: (i) bulk shall correspond with sample in quality; (ii) buyer shall have reasonable opportunity of comparing bulk with sample; (iii) goods shall be free from any defect rendering them un-merchantable, which would not be apparent on reasonable examination of sample
- 4. Sale by sample as well as by description (Section 15):** Where goods are sold by sample as well as by description implied condition is that bulk of goods supplied shall correspond both with sample & description. In case goods correspond with sample but do not tally with description or vice versa or both, buyer can repudiate contract
- 5. Condition as to quality or fitness [Section 16(1)]:** Condition as to reasonable fitness of goods for particular purpose may be implied if buyer had made known to seller purpose of his purchase & relied upon skill and judgment of seller to select best goods & seller has ordinarily been dealing in those goods
- 6. Condition as to Merchantability [Section 16(2)]:** Where goods are bought by description from seller who deals in goods of that description, there is implied condition that goods shall be of merchantable quality.
- 7. Condition as to wholesomeness:** In case of eatables & provisions, in addition to implied condition as to merchantability, there is another implied condition that goods shall be wholesome

**II. Implied Warranties: It is warranty which law implies into contract of sale. It is stipulation which has not been included in contract of sale in express words. Following implied warranties are disclosed in Act:**

- 1. Warranty as to undisturbed possession [Section 14(b)]:** Implied warranty that buyer shall have & enjoy quiet possession of goods. If buyer having got possession of goods, is later on disturbed in his possession, he is entitled to sue seller for breach of warranty.
- 2. Warranty as to non-existence of encumbrances [Section 14(c)]:** Implied warranty that goods shall be free from any charge or encumbrance in favour of any third party not declared or known to buyer before or at time contract is entered into.
- 3. Warranty as to quality or fitness by usage of trade [Section 16(3)]:** Implied warranty as to quality or fitness for particular purpose may be annexed or attached by usage of trade. Regarding implied condition or warranty as to quality or fitness for any particular purpose of goods supplied, rule is 'let buyer beware'.
- 4. Disclosure of dangerous nature of goods:** Where goods are dangerous in nature & buyer is ignorant of danger, seller must warn buyer of probable danger. If there is breach of warranty, seller may be liable in damages.

## Caveat Emptor

- 1. In case of sale of goods, doctrine 'Caveat Emptor' means 'let buyer beware'. When sellers display their goods in open market, it is for buyers to make proper selection or choice of goods. If goods turn out to be defective he cannot hold seller liable.**
- 2. Seller is in no way responsible for bad selection of buyer. Seller is not bound to disclose defects in goods which he is selling**
- 3. It is duty of buyer to satisfy himself before buying goods that goods will serve purpose for which they are being bought. If goods turn out to be defective or do not serve his purpose or if he depends on his own skill or judgment, buyer cannot hold seller responsible**
- 4. Rule of Caveat Emptor is laid down in Section 16, which states that, "subject to provisions of this Act or of any other law for time being in force, there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under contract of sale"**
  - Following are conditions to be satisfied:
    - if buyer had made known to seller purpose of his purchase,
    - buyer relied on seller's skill & judgement,
    - seller's business to supply goods of that description

## Exceptions to Caveat Emptor

- 1. Fitness as to quality or use: Where buyer makes known to seller particular purpose for which goods are required, so as to show that he relies on seller's skill or judgment & goods are of description which is in course of seller's business to supply, it is duty of seller to supply such goods as are reasonably fit for that purpose.**
- 2. Goods sold by description: Where goods are sold by description there is implied condition that goods shall correspond with description. If it is not so then seller is responsible.**
- 3. Goods of Merchantable Quality: Where goods are bought by description from seller who deals in goods of that description there is implied condition that goods shall be of merchantable quality. But where buyer has examined goods this rule shall apply if defects were such which ought to have not been revealed by ordinary examination.**
- 4. Sale by sample: Where goods are bought by sample, this rule of Caveat Emptor does not apply if bulk does not correspond with sample.**
- 5. Goods by sample as well as description: Where goods are bought by sample as well as description, rule of Caveat Emptor is not applicable in case goods do not correspond with both sample & description or either of condition.**
- 6. Trade Usage: Implied warranty or condition as to quality or fitness for particular purpose may be annexed by usage of trade & if seller deviates from that, this rule of Caveat Emptor is not applicable.**
- 7. Seller actively conceals defect or is guilty of fraud: Where seller sells goods by making some misrepresentation or fraud & buyer relies on it or when seller actively conceals some defect in goods so that same could not be discovered by buyer on reasonable examination, then rule of Caveat Emptor will not apply. In such case buyer has right to avoid contract and claim damages.**

# THE SALE OF GOODS ACT, 1930 (Chart 2.6)

## Passing of Property (Section 18 to 26)

Passing of property implies passing of ownership. If property has passed to buyer, risk in goods sold is that of buyer and not of seller, though goods may still be in seller's possession.

### Property passes when intended to pass (Section 19)

1. Where there is contract for sale of specific or ascertained goods property in them is transferred to buyer at such time as parties to contract intend it to be transferred

2. For purpose of ascertaining intention of parties regard shall be had to terms of contract, conduct of parties and circumstances of case

- Stages of goods while passing of property:
- a) Specific goods in deliverable state (Section 20): Where there is unconditional contract for sale of specific goods in deliverable state, property in goods passes to buyer when contract is made & it is immaterial whether time of payment of price or time of delivery of goods, or both, is postponed.
- b) Specific goods to be put into deliverable state (Section 21): Where there is contract for sale of specific goods & seller is bound to do something to goods for purpose of putting them into deliverable state, property does not pass until such thing is done & buyer has notice
- c) Specific goods in deliverable state, when seller has to do anything thereto in order to ascertain price (Section 22): Where there is contract for sale of specific goods in deliverable state, but seller is bound to weigh, measure, test or do some other act or thing with reference to goods for purpose of ascertaining price, property does not pass until such act or thing is done and buyer has notice thereof.

### Goods must be ascertained

- Where there is contract for sale of unascertained goods, no property in goods is transferred to buyer unless & until goods are ascertained. [Section 18]
- Rules in respect of passing of property of unascertained goods are as follows:
  1. Sale of unascertained goods by description [Section 23(1)]: Where there is contract for sale of unascertained or future goods by description & goods of that description & in deliverable state are unconditionally appropriated to contract, either by seller with assent of buyer or by buyer with assent of seller, property in goods thereupon passes to buyer. Such assent may be express or implied, & may be given either before or after appropriation is made
  2. Delivery to carrier [Section 23(2)]: Where, in pursuance of contract, seller delivers goods to buyer or to carrier or other bailee (whether named by buyer or not) for purpose of transmission to buyer, & does not reserve right of disposal, he is deemed to have unconditionally appropriated goods to contract
- Sale of unascertained goods & Appropriation: Appropriation of goods involves selection of goods with intention of using them in performance of contract & with mutual consent of seller & buyer. Essentials are:
  - a) There is contract for sale of unascertained or future goods
  - b) Goods should conform to description & quality stated in contract
  - c) Goods must be in deliverable state
  - d) Goods must be unconditionally (as distinguished from an intention to appropriate) appropriated to contract either by delivery to buyer or his agent or carrier
  - e) Appropriation must be made by: (i) seller with assent of buyer; (ii) buyer with assent of seller
  - f) Assent may be express or implied
  - g) assent may be given either before or after appropriation

### Goods sent on approval or on sale or return (Section 24)

- When goods are delivered to buyer on approval or on sale or return or other similar terms, property therein passes to buyer-
  - a) When he signifies his approval or acceptance to seller or does any other act adopting transaction
  - b) If he does not signify his approval or acceptance to seller but retains goods without giving notice of rejection, then, if time has been fixed for return of goods, on expiration of such time, & if no time has been fixed, on expiration of reasonable time; or
  - c) He does something to good which is equivalent to accepting goods e.g. he pledges or sells goods.
- Buyer under contract on basis of sale or return is deemed to have exercised his option when he does any act exercising domination over goods showing an unequivocal intention to buy, if he pledges goods with third party. Failure or inability to return goods to seller does not necessarily imply selection to buy.
- Sale for cash only or Return: It may be noted that where goods have been delivered by person on sale or return on terms that goods were to remain property of seller till they are paid for, property therein does not pass to buyer until terms are complied with, i.e., cash is paid for

### Reservation of right of disposal (Section 25)

- This section preserves right of disposal of goods to secure that price is paid before property in goods passes to buyer.
- Where there is contract of sale of specific goods or where goods have been subsequently appropriated to contract, seller may, by terms of contract or appropriation reserve right to dispose of goods, until certain conditions have been fulfilled
- In such case in spite of fact that goods have already been delivered to buyer or to a carrier or other bailee for purpose of transmitting same to buyer, property therein will not pass to buyer till condition imposed, if any, by seller has been fulfilled.
- In following circumstances, seller is presumed to have reserved right of disposal:
  - a) If goods are shipped or delivered to railway administration for carriage and by bill of lading or railway receipt, as case may be, goods are deliverable to order of seller or his agent, then seller will be prima facie deemed to have reserved to right of disposal
  - b) Where seller draws bill on buyer for price and sends to him bill of exchange together with bill of lading or (as case may be) railway receipt to secure acceptance or payment thereof, buyer must return bill of lading, if he does not accept or pay billIf he wrongfully retains bill of lading or railway receipt, property in goods does not pass to him

# THE SALE OF GOODS ACT, 1930 (Chart 2.7)

## Risk Prima Facie passes with Property (Section 26)

- General rule is, unless otherwise agreed, goods remain at seller's risk until property therein is transferred to buyer, but when property therein is transferred to buyer, goods are at buyer's risk whether delivery has been made or not
- Section 26 also lays down exception to rule that 'risk follows ownership.' It provides that where delivery of goods has been delayed through fault of either buyer or seller, goods are at risk of party in fault as regards any loss which might not have occurred but for such fault
- Risk is borne by buyer only when property in goods passes over to him. However, parties may by special agreement stipulate that 'risk' will pass sometime after or before 'property' has passed
- Risk prima facie passes with ownership: Owner of goods must bear loss or damage of goods unless otherwise is agreed to. Goods remain at seller's risk until property therein has passed to buyer. After that event they are at buyer's risk, whether delivery has been made or not.
- Aforesaid rule is, however, subject to two qualifications:
  - If delivery has been delayed by fault of seller or buyer, goods shall be at risk of party in default, as regards loss which might not have arisen but for default
  - Duties & liabilities of seller or buyer as bailee of goods for other party remain unaffected even when risk has passed generally

## Transfer of Title (Section 27-30)

### Sale by person not owner (Section 27)

- Seller sells only such goods of which he is absolute owner. But sometimes person may sell goods of which he is not owner, then question arises as to what is position of buyer who has bought goods by paying price
- Seller cannot transfer to buyer of goods better title than he himself has. If seller is not owner of goods, then buyer also will not become owner i.e. title of buyer shall be same as that of seller. This rule is expressed in Latin maxim "Nemo dat quod non habet" meaning no one can give what he has not got
- If this rule is enforced rigidly then innocent buyers may be put to loss in many cases, hence exceptions are provided

### Exceptions

In following cases, non-owner can convey better title to bona fide purchaser of goods for value:

1. Sale by Mercantile Agent: Sale made by mercantile agent of goods for document of title to goods would pass good title to buyer in following circumstances: (a) If he was in possession of goods or documents with consent of owner (b) If sale was made by him when acting in ordinary course of business as mercantile agent (c) If buyer had acted in good faith & has at time of contract of sale, no notice of fact that seller had no authority to sell
2. Sale by one of joint owners (Section 28): If one of several joint owners of goods has sole possession of them by permission of co-owners, property in goods is transferred to any person who buys them of such joint owner in good faith & has not at time of contract of sale notice that seller has no authority to sell
3. Sale by person in possession under voidable contract: Buyer would acquire good title to goods sold to him by seller who had obtained possession of goods under contract voidable on ground of coercion, fraud, misrepresentation or undue influence provided that contract had not been rescinded until time of sale
4. Sale by one who has already sold goods but continues in possession thereof: If person has sold goods but continues to be in possession of them or of documents of title to them, he may sell them to third person, & if such person obtains delivery thereof in good faith & without notice of previous sale, he would have good title to them, although property in goods had passed to first buyer earlier. Pledge or other disposition of goods or documents of title by seller in possession are equally valid
5. Sale by buyer obtaining possession before property in goods has vested in him: Where buyer with consent of seller obtains possession of goods before property in them has passed to him, he may sell, pledge or otherwise dispose of goods to third person, & if such person obtains delivery of goods in good faith & without notice of lien or other of original seller in respect of goods, he would get good title to them. However, person in possession of goods under 'hire-purchase' agreement which gives him only option to buy is not covered within section unless it amounts to sale
6. Effect of Estoppel: Where owner is estopped by conduct from denying seller's authority to sell, transferee will get good title as against true owner. But before good title by estoppel can be made, it must be shown that true owner had actively suffered or held out other person in question as true owner or as person authorized to sell goods
7. Sale by an unpaid seller: Where unpaid seller who had exercised his right of lien or stoppage in transit resells goods, buyer acquires good title to goods as against original buyer
8. Sale under provisions of other Acts: (i) Sale by Official Receiver or Liquidator of Company will give purchaser valid title; (ii) Purchase of goods from finder of goods will get valid title under circumstances; (iii) Sale by pawnee can convey good title to buyer

# THE SALE OF GOODS ACT, 1930 (Chart 2.8)

## Performance of Contract of Sale (Section 31 to 44)

Delivery means voluntary transfer of possession from one person to another.

If possession is taken through unfair means, there is no delivery of goods. Delivery of goods sold may be made by doing anything which parties agree, shall be treated as delivery or putting goods in possession of buyer or of any person authorised to hold them on his behalf.

1. Duties of seller and buyer (Section 31): It is duty of seller to deliver goods & of buyer to accept & pay for them, in accordance with terms of contract of sale
2. Payment and delivery are concurrent conditions (Section 32): Unless otherwise agreed, delivery of goods & payment of price are concurrent conditions, that is to say, seller shall be ready and willing to give possession of goods to buyer in exchange for price, & buyer shall be ready & willing to pay price in exchange for possession of goods.

### Rules Regarding Delivery of goods (Section 33-41)

1. Delivery (Section 33): Delivery of goods sold may be made by doing anything which parties agree shall be treated as delivery or which has effect of putting goods in possession of buyer or of any person authorised to hold them on his behalf.
2. Effect of part delivery (Section 34): Delivery of part of goods, in progress of delivery of whole has same effect, for purpose of passing property in such goods, as delivery of whole; but delivery of part of goods, with intention of severing it from whole, does not operate as delivery of remainder
3. Buyer to apply for delivery (Section 35) : Apart from any express contract, seller of goods is not bound to deliver them until buyer applies for delivery
4. Place of delivery: Whether it is for buyer to take possession of goods or for seller to send them to buyer is question depending in each case on contract, express or implied, between parties
5. Time of delivery [Section 36(2)]: Where under contract of sale seller is bound to send goods to buyer, but no time for sending them is fixed, seller is bound to send them within reasonable time
6. Goods in possession of third party [Section 36(3)]: Where goods at time of sale are in possession of third person, there is no delivery unless & until such third person acknowledges to buyer that he holds goods on his behalf. Provided that nothing in this section shall affect operation of issue or transfer of any document of title to goods
7. Time for tender of delivery [Section 36(4)]: Demand/ tender of delivery may be treated as ineffectual unless made at reasonable hr
8. Expenses for delivery: Expenses of and incidental to putting goods into deliverable state must be borne by seller in absence of contract to contrary.
9. Delivery of wrong quantity (Section 37): Where seller delivers to buyer quality of goods less than he contracted to sell, buyer may reject them, but if buyer accepts goods so delivered he shall pay for them at contract rate. Where seller delivers to buyer quantity of goods larger than he contracted to sell, buyer may accept goods included in contract & reject rest, or he may reject whole. If buyer accepts whole of goods so delivered, he shall pay for them at contract rate. Where seller delivers to buyer goods he contracted to sell mixed with goods of different description not included in contract, buyer may accept goods which are in accordance with contract & reject, or may reject whole
10. Instalment deliveries (Section 38): Unless otherwise agreed, buyer is not bound to accept delivery in instalments. rights & liabilities in cases of delivery by instalments and payments thereon may be determined by parties of contract
11. Delivery to carrier [Section 39(1)]: Subject to terms of contract, delivery of goods to carrier for transmission to buyer, is prima facie deemed to be delivery to buyer
12. Deterioration during transit (Section 40): Where goods are delivered at distant place, liability for deterioration necessarily incidental to course of transit will fall on buyer, though seller agrees to deliver at his own risk
13. Buyer's right to examine goods (Section 41): Where goods are delivered to buyer, who has not previously examined them, he is entitled to reasonable opportunity of examining them in order to ascertain whether they are in conformity with contract. Unless otherwise agreed, seller is bound, on request, to afford buyer reasonable opportunity of examining goods

1. Rule related to Acceptance of Delivery of Goods (Section 42): Buyer is deemed to have accepted goods when he intimates to seller that he has accepted them, or when goods have been delivered to him and he does any act in relation to them which is inconsistent with ownership of seller, or when, after lapse of reasonable time, he retains goods without intimating to seller that he has rejected them.

- Acceptance is deemed to take place when buyer-
    - a) intimates to seller that he had accepted goods; or
    - b) does any act to goods, which is inconsistent with ownership of seller; or
    - c) retains goods after lapse of reasonable time, without intimating to seller that he has rejected them.
2. Buyer not bound to return rejected goods (Section 43): Unless otherwise agreed, where goods are delivered to buyer & he refuses to accept them, having right so to do, he is not bound to return them to seller, but it is sufficient if he intimates to seller that he refuses to accept them.
3. Liability of buyer for neglecting or refusing delivery of goods (Section 44): When seller is ready & willing to deliver goods & requests buyer to take delivery, & buyer does not within reasonable time after such request take delivery of goods, he is liable to seller for any loss occasioned by his neglect or refusal to take delivery & also for reasonable charge for care & custody of goods; Provided further that nothing in this section shall affect rights of seller where neglect or refusal of buyer to take delivery amounts to repudiation of contract.

# THE SALE OF GOODS ACT, 1930 (Chart 2.9)

## Unpaid Seller

1. Contract comprises of reciprocal promises. In contract of sale, if seller is under obligation to deliver goods, buyer has to pay for it. In case buyer fails or refuses to pay, seller, as unpaid seller, shall have certain rights.
2. Section 45: Seller of goods is deemed to be an 'Unpaid Seller' when
  - a) whole of price has not been paid or tendered & seller had an immediate right of action for price
  - b) when bill of exchange or other negotiable instrument has been received as conditional payment & condition on which it was received has not been fulfilled by reason of dishonour of instrument or otherwise.
3. Term 'seller' here includes any person who is in position of seller, as, for instance, an agent of seller to whom bill of lading has been endorsed, or consignor or agent who has himself paid, or is directly responsible for, price

## Rights of unpaid Seller (Section 46)

1. Subject to provisions of this Act and of any law for time being in force, notwithstanding that property in goods may have passed to buyer, unpaid seller of goods, as such, has by implication of law-
  - a) lien on goods for price while he is in possession of them;
  - b) in case of insolvency of buyer right of stopping goods in transit after he has parted with possession of them;
  - c) right of re-sale as limited by this Act.
2. Where property in goods has not passed to buyer, unpaid seller has, in addition to his other remedies, right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where property has passed to buyer.

## Rights of Unpaid Seller against Goods Section 47,48 and 49

1. Rights of lien: Unpaid seller has right of lien on goods for price while he is in possession, until payment or tender of price of such goods. It is right to retain possession of goods and refusal to deliver them to buyer until the price due in respect of them is paid or tendered. unpaid seller's lien is possessory lien i.e. lien can be exercised as long as seller remains in possession of goods
2. Exercise of right of lien (Section 47): This right can be exercised by him in following cases only:
  - a) where goods have been sold without any stipulation of credit; ( i.e., on cash sale)
  - b) where goods have been sold on credit but term of credit has expired; or
  - c) where buyer becomes insolvent
  - Seller may exercise his right of lien even where he is in possession of goods as agent or bailee for buyer. Insolvent refers to person is said to be insolvent who has ceased to pay his debts in ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not
3. Part delivery (Section 48): Where unpaid seller has made part delivery of goods, he may exercise his right of lien on remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive lien
4. Termination of lien (Section 49): Unpaid seller loses his right of lien under following circumstances:
  - i) When he delivers goods to carrier or other bailee for purpose of transmission to buyer without reserving right of disposal of goods
  - ii) Where buyer or his agent lawfully obtains possession of goods.
  - iii) Where seller has waived right of lien
  - iv) By Estoppel i.e., where seller so conducts himself that he leads third parties to believe that lien does not exist
5. Exception: Unpaid seller of goods, having lien thereon, does not lose his lien by reason only that he has obtained decree for price of goods

# THE SALE OF GOODS ACT, 1930 (Chart 2.10)

## Right of stoppage in transit Section 50 to 52

1. Right of stoppage in transit (Section 50): **When** buyer of goods becomes insolvent, unpaid seller who has parted with the possession of the goods has right of stopping them in transit, he may resume possession of goods as long as they are in course of transit & may retain them until paid or tendered price of goods

2. Duration of transit (Section 51) : Goods are deemed to be in course of transit from time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until buyer or his agent in that behalf takes delivery of them from such carrier or other bailee

When does transit come to end? Right of stoppage in transit is lost when transit comes to end. Transit comes to end in following cases:

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

3. How stoppage in transit is effected (Section 52): Unpaid seller may exercise his right of stoppage in transit either by taking actual possession of goods, or by giving notice of his claim to carrier or other bailee in whose possession goods are. When notice of stoppage in transit is given by seller to carrier or other bailee in possession of goods, he shall re-deliver the goods to, or according to directions of, seller. Expenses of such re-delivery shall be borne by seller

## Effects of sub-sale or pledge by buyer (Section 53)

1. Right of lien or stoppage in transit is not affected by buyer selling or pledging goods unless seller has assented to it. This is based on principle that second buyer cannot stand in better position than his seller

2. Right of stoppage is defeated if buyer has transferred document of title or pledges goods to sub-buyer in good faith & for consideration

3. Exceptions:

- When seller has assented to sale, mortgage or other disposition of goods made by buyer
- When document of title to goods has been transferred to buyer & buyer transfers documents to person who has bought goods in good faith & for value i.e. for price, then, proviso of sub-section (1) stipulates as follows:
  - If last-mentioned transfer is by way of sale, right of lien or stoppage in transit is defeated, or
  - If last mentioned transfer is by way of pledge, unpaid seller's right of lien or stoppage only be exercised, subject to rights of pledgee

Pledgee may be required by unpaid seller to use in first instance, other goods or securities of pledger available to him to satisfy his claims

4. Effect of stoppage: Contract of sale is not rescinded when seller exercises his right of stoppage in transit. Contract still remains in force & buyer can ask for delivery of goods on payment of price

## Right of re-sale (Section 54)

Unpaid seller can exercise right to re-sell goods under following conditions:

- Where goods are of perishable nature: In such case buyer need not be informed of intention of resale.
- Where he gives notice to buyer of his intention to re-sell goods: If after receipt of such notice buyer fails within reasonable time to pay or tender price, seller may resell goods. It may be noted that in such cases, on resale of goods, seller is also entitled to:
  - Recover difference between contract price & resale price, from original buyer, as damages.
  - Retain profit if resale price is higher than contract price.

Seller can recover damages & retain profits only when goods are resold after giving notice of resale to buyer.

If goods are resold by seller without giving any notice to buyer, seller cannot recover loss suffered on resale

- Where unpaid seller who has exercised his right of lien or stoppage in transit resells goods: Subsequent buyer acquires good title thereof as against original buyer, despite fact that notice of resale has not been given by seller to original buyer
- Are-sale by seller where right of re-sale is expressly reserved in contract of sale: It is expressly agreed between seller & buyer that in case buyer makes default in payment of price, seller will resell goods to some other person. Seller is said to have reserved his right of resale, & he may resell goods on buyer's default.
- Where property in goods has not passed to buyer: Unpaid seller has in addition to his remedies right of withholding delivery of goods

## Rights of Unpaid Seller against Buyer (Section 55 to 61)

Unpaid seller can enforce certain rights against goods as well as against buyer personally.

Rights of unpaid seller against buyer are otherwise known as seller's remedies for breach of contract of sale. Rights of seller against buyer personally are called rights in person and are in addition to his rights against goods. Right against buyer are as follows:

- Suit for price (Section 55): Where under contract of sale property in goods has passed to buyer & buyer wrongfully neglects or refuses to pay for goods according to terms of contract, seller may sue him for price of goods. Where under contract of sale price is payable on day certain irrespective of delivery & buyer wrongfully neglects or refuses to pay such price, seller may sue him for price although property in goods has not passed & goods have not been appropriated to contract
- Suit for damages for non-acceptance (Section 56): Where buyer wrongfully neglects or refuses to accept & pay for goods, seller may sue him for damages for non-acceptance.
- Repudiation of contract before due date (Section 60): Where buyer repudiates contract before date of delivery, seller may treat contract as rescinded & sue damages for breach. This is known as 'rule of anticipatory breach contract'.
- Suit for interest [Section 61]: Where there is specific agreement between seller & buyer as to interest on price of goods from date on which payment becomes due, seller may recover interest from buyer. If, however, there is no specific agreement to this effect, seller may charge interest on price when it becomes due from such day as he may notify to buyer. In absence of contract to contrary, Court may award interest to seller in suit by him at such rate as it thinks fit on amount of price from date of tender of goods or from date on which price was payable.

# THE SALE OF GOODS ACT, 1930 (Chart 2.11)

## Remedies of Buyer against Seller

- Breach of contract by seller happens where he-
  - a) Fails to deliver goods at time or in manner prescribed,
  - b) Repudiates contract,
  - c) Deliver non-conforming goods and buyer rejects & revokes acceptance.
- If seller commits breach of contract, buyer gets following rights against seller:
  1. Damages for non-delivery [Section 57]: **Where seller wrongfully neglects or refuses to deliver goods to buyer, buyer may sue seller for damages for non-delivery.**
  2. Suit for specific performance (Section 58): **Where seller commits of breach of contract of sale, buyer can appeal to court for specific performance. court can order for specific performance only when goods are ascertained or specific.**
  3. Suit for breach of warranty (section 59): **Where there is breach of warranty on part of seller, or where buyer elects to treat breach of condition as breach of warranty, buyer is not entitled to reject goods only on bases of such breach of warranty. But he may –**
    - i) set up against seller breach of warranty in diminution or extinction of price; or
    - ii) sue seller for damages for breach of warranty.
  4. Repudiation of contract before due date (Section 60): **Where either party to contract of sale repudiates contract before date of delivery, other may either treat contract as subsisting and wait till date of delivery, or he may treat contract as rescinded and sue for damages for breach.**
  5. Suit for interest:
    - i) Nothing in this Act shall affect right of seller or buyer to recover interest or special damages, in any case where by law interest or special damages may be recoverable, or to recover money paid where consideration for payment of it has failed.
    - ii) In absence of contract to contrary, court may award interest at such rate as it thinks fit on amount of price to buyer in suit by him for refund of price in case of breach of contract on part of seller-from date on which payment was made.

## Auction Sale (Section 64)

- Auction Sale is mode of selling property by inviting bids publicly & property is sold to highest bidder. Auctioneer is agent governed by Law of Agency.
- When he sells, he is only agent of seller. He may, however, sell his own property as principal & need not disclose fact that he is so selling
- Rules of Auction sale: Section 64 of Sale of Goods Act, 1930 provides following rules to regulate sale by auction:
  1. Where goods are sold in lots: **Where goods are put up for sale in lots, each lot is prima facie deemed to be subject of separate contract of sale**
  2. Completion of contract of sale: **Sale is complete when auctioneer announces its completion by fall of hammer or in any other customary manner & until such announcement is made, any bidder may retract from his bid**
  3. Right to bid may be reserved: **Right to bid may be reserved expressly by or on behalf of seller & where such right is expressly reserved, but not otherwise, seller or any one person on his behalf may bid at auction**
  4. Where sale is not notified by seller: **Where sale is not notified to be subject to right to bid on behalf of seller, it shall not be lawful for seller to bid himself or to employ any person to bid at such sale, or for auctioneer knowingly to take any bid from seller or any such person; and any sale contravening this rule may be treated as fraudulent by buyer**
  5. Reserved price: **Sale may be notified to be subject to reserve or upset price**
  6. Pretended bidding: **If seller makes use of pretended bidding to raise price, sale is voidable at option of buyer**

## Inclusion of increased or decreased taxes in Contract of Sales (Section 64A)

1. **Where after contract has been made but before it has been performed, tax revision takes place.**
2. **Where tax is being imposed, increased, decreased or remitted in respect of any goods without any stipulations to payment of tax, parties would become entitled to read just price of the goods accordingly.**
3. **Following taxes are applied on sale or purchase of goods:**
  - a) Any duty of customs or excise on goods,
  - b) Any tax on sale or purchase of goods
4. **Buyer would have to pay increased price where tax increases and may derive benefit of reduction if taxes are curtailed.**
5. **Thus, seller may add increased taxes in price. effect of provision can, however, be excluded by an agreement to contrary. It is open to parties to stipulate anything regard to taxation.**

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.1)

## Partnership

Section 4: 'Partnership' is relation between persons who have agreed to share profits of business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually 'partners' & collectively 'a firm', & name under which their business is carried on is called 'firm name'.

### Elements of Partnership

1. Association Of Two Or More Persons
  - Only persons recognized by law can enter into agreement of partnership.
  - Firm cannot be partner. Minor cannot be partner in firm, but with consent of all partners, may be admitted to benefits of partnership.
  - Partnership Act is silent about maximum number of partners but Section 464 of Companies Act, 2013 has now put limit of 50 partners in any association/partnership firm.
2. Agreement
  - Partnership must be result of agreement between two or more persons. Nature of partnership is voluntary & contractual.
  - Agreement from which relationship of Partnership arises may be express. It may also be implied from act done by partners & from consistent course of conduct being followed, showing mutual understanding between them. It may be oral or in writing.
3. Business
  - There must exist business, it includes trade, occupation & profession.
  - Motive of business is "acquisition of gains" which leads to formation of partnership. There can be no partnership where there is no intention to carry on business & to share profit thereof.
4. Agreement To Share Profits
  - There can be no partnership where only one of partners is entitled to whole of profits of business. Partners must agree to share profits in any manner they choose.
  - But agreement to share losses is not essential element. It is open to one or more partners to agree to share all losses. In event of losses, unless agreed otherwise, these must be borne in profit-sharing ratio.
5. Business Carried On By All Or Any Of Them Acting For All
  - Business must be carried on by all partners or by anyone or more of partners acting for all. There should be binding contract of mutual agency between partners.
  - Each partner carrying on business is principal as well as agent for all other partners.

### True Test of Partnership

- Mode of determining existence of partnership (Section 6)
1. Agreement: Relation of partnership arises from contract & not from status; & in particular, members of HUF or Burmese Buddhist husband & wife carrying on business are not partners in such business
  2. Sharing of Profit
    - Sharing of profits or of gross returns arising from property by persons holding joint or common interest in that property does not of itself make such persons partners.
    - Receipt by person of share of profits of business, or of payment contingent upon earning of profits or varying with profits earned by business, does not of itself make him partner with persons carrying on business; & in particular, receipt of such share or payment-
      - a) by lender of money to persons engaged or about to engage in any business,
      - b) by servant or agent as remuneration,
      - c) by widow or child of deceased partner, as annuity, or
      - d) by previous owner or part owner of business, as consideration for sale of goodwill or share,does not of itself make receiver partner with persons carrying on business
    - Sharing of profit is essential element to constitute partnership. But, it is only prima facie evidence & not conclusive evidence
  3. Agency
    - Existence of Mutual Agency is cardinal principle of partnership law. Each partner carrying on business is principal as well as agent of other partners. So, act of one partner done on behalf of firm, binds all partners
    - If elements of mutual agency relationship exist between parties constituting group formed with view to earn profits by running business, partnership may be deemed to exist



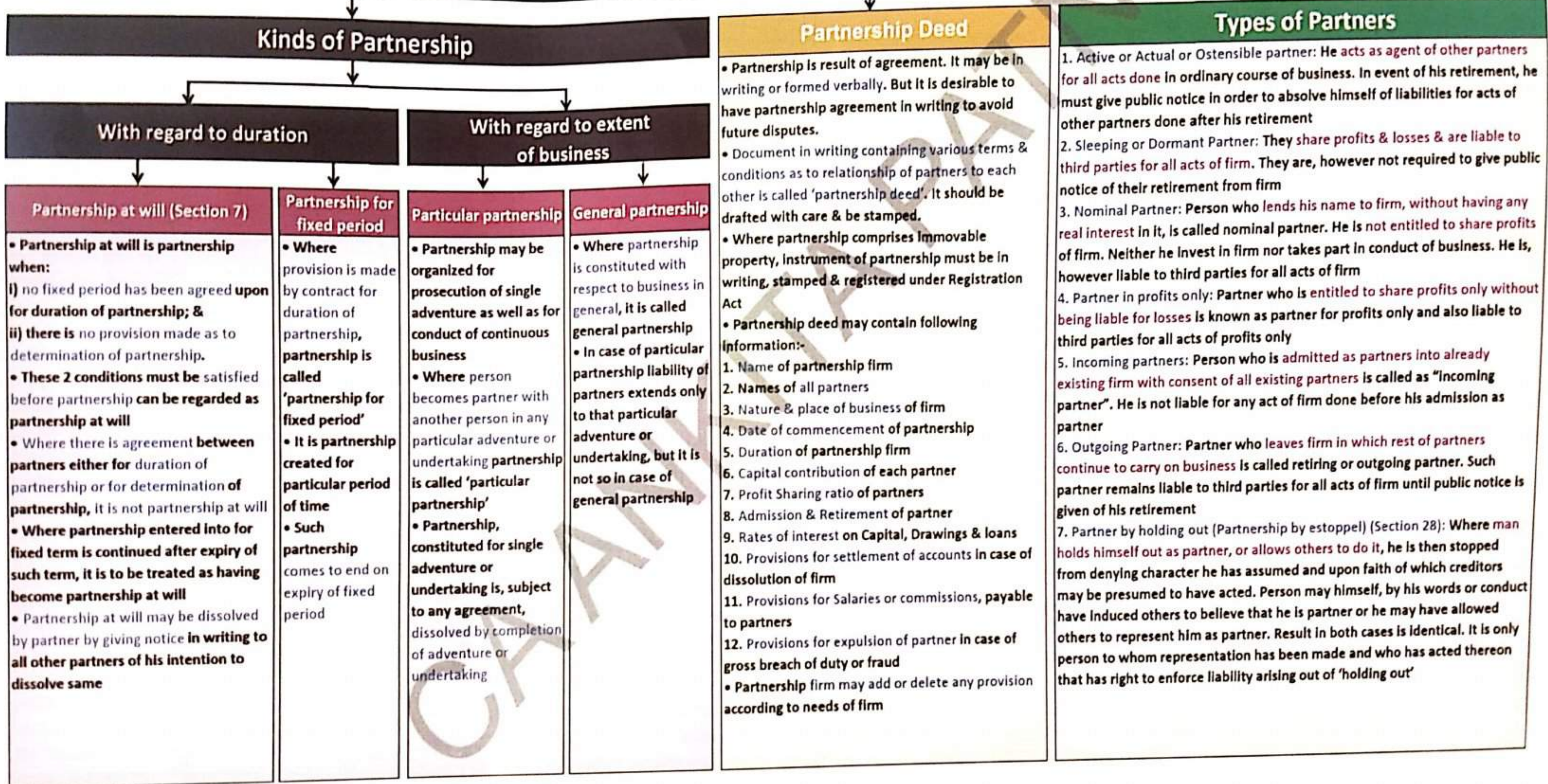
# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.2)

## Partnership Distinguished from other forms of Organisation

Partnership Vs. Joint Stock Company			Partnership Vs. Club			Partnership vs. Hindu Undivided Family		
Basis	Partnership	Joint Stock Company	Basis of Difference	Partnership	Club	Basis of difference	Partnership	Joint Hindu family
Legal status	A firm is not legal entity i.e., it has no legal personality distinct from the personalities of its constituent members.	A company is a separate legal entity distinct from its members (Solomon v. Salomon).	Definition	It is an association of persons formed for earning profits from a business carried on by all or any one of them acting for all.	A club is an association of persons formed with the object not of earning profit, but of promoting some beneficial purposes such as improvement of health or providing recreation for the members, etc.	Mode of creation	Partnership is created necessarily by an agreement.	The right in the joint family is created by status means its creation by birth in the family.
Agency	In a firm, every partner is an agent of the other partners, as well as of the firm.	In a company, a member is not an agent of the other members or of the company, his actions do not bind either.	Relationship	Persons forming a partnership are called partners and a partner is an agent for other partners.	Persons forming a club are called members. A member of a club is not the agent of other members.	Death of a member	Death of a partner ordinarily leads to the dissolution of partnership.	The death of a member in the Hindu undivided family does not give rise to dissolution of the family business.
Distribution of profits	The profits of the firm must be distributed among the partners according to the terms of the partnership deed.	There is no such compulsion to distribute its profits among its members. Some portion of the profits, but generally not the entire profit, become distributable among the shareholders only when dividends are declared.	Interest in the property	Partner has interest in the property of the firm.	A member of a club has no interest in the property of the club.	Management	All the partners are equally entitled to take part in the partnership business.	The right of management of joint family business generally vests in the Karta, the governing male member or female member of the family.
Extent of liability	In a partnership, the liability of the partners is unlimited. This means that each partner is liable for debts of a firm incurred in the course of the business of the firm and these debts can be recovered from his private property, if the joint estate is insufficient to meet them wholly.	In a company limited by shares, the liability of a shareholder is limited to the amount, if any, unpaid on his shares, but in the case of a guarantee company, the liability is limited to the amount for which he has agreed to be liable. However, there may be companies where the liability of members is unlimited.	Dissolution	A change in the partners of the firm affect its existence.	A change in the membership of a club does not affect its existence.	Authority to bind	Every partner can, by his act, bind the firm.	The Karta or the manager, has the authority to contract for the family business and the other members in the family.
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 members.	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.	<b>Partnership Vs. Co-ownership</b>			Liability	In a partnership, the liability of a partner is unlimited.	In a Hindu undivided family, only the liability of the Karta is unlimited, and the other coparcener are liable only to the extent of their share in the profits of the family business.
Transfer of shares	A share in a partnership cannot be transferred without the consent of all the partners.	In a company a shareholder may transfer his shares, subject to the provisions contained in its Articles. In the case of public limited companies whose shares are quoted on the stock exchange, the transfer is usually unrestricted.	Basis of difference	Partnership	Co-ownership	Calling for accounts on closure	A partner can bring a suit against the firm for accounts, provided he also seeks the dissolution of the firm.	On the separation of the joint family, a member is not entitled to ask for account of the family business.
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. Members, however, enjoy the right of attending general meeting and voting where they can decide certain questions such as election of directors, appointment of auditors, etc.	Formation	Partnership always arises out of a contract, express or implied.	Co-ownership may arise either from agreement or by the operation of law, such as by inheritance.	Governing Law	A partnership is governed by the Indian Partnership Act, 1932.	A Joint Hindu Family business is governed by the Hindu Law.
Registration	Registration is not compulsory in the case of partnership.	A company cannot come into existence unless it is registered under the Companies Act, 2013.	Implied agency	A partner is the agent of the other partners.	A co-owner is not the agent of other co-owners.	Minor's capacity	In a partnership, a minor cannot become a partner, though he can be admitted to the benefits of partnership, only with the consent of all the partners.	In Hindu undivided family business, a minor becomes a member of the ancestral business by the incidence of birth. He does not have to wait for attaining majority.
Winding up	A partnership firm can be dissolved at any time if all the partners agree.	A company, being a legal person is either wind up by the National Company Law Tribunal or its name is struck off by the Registrar of Companies.	Nature of interest	There is community of interest which means that profits and losses must have to be shared.	Co-ownership does not necessarily involve sharing of profits and losses.	Continuity	A firm subject to a contract between the partners gets dissolved by death or insolvency of a partner.	A Joint Hindu family has the continuity till it is divided. The status of Joint Hindu family is not thereby affected by the death of a member.
Number of membership	According to section 464 of the Companies Act, 2013, the number of partners in any association shall not exceed 100.  However, the Rule given under the Companies (Miscellaneous) Rules, 2014 restrict the present limit to 50.	A private company may have as many as 200 members but not less than two and a public company may have any number of members but not less than seven. A private Company can also be formed by one person known as one person Company.	Transfer of interest	A share in the partnership is transferred only by the consent of other partners.	A co-owner may transfer his interest or rights in the property without the consent of other co-owners.	Number of Members	In case of Partnership number of members should not exceed 50.	Members of HUF who carry on a business may be unlimited in number.
Duration of existence	Unless there is a contract to the contrary, death, retirement or insolvency of a partner results in the dissolution of the firm.	A company enjoys a perpetual succession.	<b>Partnership Vs. Association</b>			Share in the business	In a partnership each partner has a defined share by virtue of an agreement between the partners.	In a HUF, no coparceners has a definite share. His interest is a fluctuating one. It is capable of being enlarged by deaths in the family diminished by births in the family.
			Basis of difference	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.			

Charts Designed by : CA Ankita Patni

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.3)



# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.4)

## Relation of Partners to one another

### General Duties Of Partners Section 9

- Partners should carry business of firm to greatest common advantages & later, they should render to any partner or his legal representatives full information of all things affecting firm. Partner must observe utmost good faith in his dealings with other partners
- All partners are bound to render accounts to each other but where some of accounts are kept by one of them, prima facie he would be proper person to explain & give full information about them

### Duty to Indemnify For Loss Caused By Fraud Section 10

- Partner, committing fraud in conduct of business of firm, must make good loss sustained by firm by his misconduct & amount so brought in partnership should be divided between partners
- Act of partner imputable to firm or principles of agency, which is fraud on his co-partners, entitles co-partners, as between themselves, to throw whole of consequences upon him

### Determination of Rights & Duties of Partners By Contract Between Partners Section 11

- Mutual rights & duties of partners of firm may be determined by contract between partners, & such contract may be express or may be implied by course of dealing. Such contract may be varied by consent of all partners, & such consent may be express or may be implied by course of dealing
- Contract between partners may provide that partner shall not carry on any business other than that of firm while he is partner
- Partnership is relation eminently depending on consent of parties, not only for its existence, but for terms of agreement in all things consistent with its essential nature & purpose; & agreement to become partners in first instance, or to vary terms at any time, need not be manifested in any particular form

### Conduct of Business Section 12

- Subject to contract between partners-
  - Every partner has right to take part in conduct of business
  - Every partner is bound to attend diligently to his duties in conduct of business
  - Difference arising as to ordinary matters connected with business may be decided by majority of partners, & every partner shall have right to express his opinion before matter is decided, but no change may be made in nature of business without consent of all partners
  - Every partner has right to have access to & to inspect & copy any of books of firm

### Mutual Rights & Liabilities Section 13

- Subject to contract between partners-
  - Partner is not entitled to receive remuneration for taking part in conduct of business
  - Partners are entitled to share equally in profits earned, & shall contribute equally to losses sustained by firm
  - Where partner is entitled to interest on capital subscribed by him such interest shall be payable only out of profits
  - Partner making, for purposes of business, any payment or advance beyond amount of capital he has agreed to subscribe, is entitled to interest thereon at rate of 6% per annum
  - Firm shall indemnify partner in respect of payments made & liabilities incurred by him-
    - In ordinary & proper conduct of business, &
    - In doing such act, in emergency, for protecting firm from loss, as would be done by person of ordinary prudence, in his own case, under similar circumstances
  - Partner shall indemnify firm for any loss caused to it by his wilful neglect in conduct of business of firm
- Partner has following Rights:
  - Right to remuneration: No partner is entitled to receive any remuneration in addition to his share in profits of firm for taking part in business of firm
  - Right to share Profits: Partners are entitled to share equally in profits earned & so contribute equally to losses sustained by firm. Amount of partner's share must be ascertained by enquiring whether there is any agreement in that behalf between partners
  - Interest on Capital: These elements must be there before partner can be entitled to interest on moneys brought by him in partnership business: Express agreement to that effect, or practice of particular partnership or any trade custom to that effect;
- Statutory provision which entitles him to such interest
- Interest on advances
- Right to be indemnified
- Right to indemnify firm

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.5)

## Partnership Property Section 14

1. Property of Firm
- Expression property of firm, also referred to as partnership property, partnership assets, joint stock, common stock or joint estate, denotes all property, rights & interests to which firm, that is, all partners collectively, may be entitled
  - Property which is deemed as belonging to firm, in absence of agreement between partners showing contrary intention, is comprised of following items:
    - i) all property, rights & interests which partners may have brought into common stock as their contribution to common business;
    - ii) all property, rights & interest acquired or purchased by or for firm, in course of business
    - iii) Goodwill of business
- Goodwill: Value of reputation of business house in respect of profits expected in future over & above normal level of profits earned by undertaking belonging to same class of business.
- When partnership firm is dissolved every partner has right, in absence of any agreement to contrary, to have goodwill of business sold for benefit of all partners.
  - Goodwill is part of property of firm. It can be sold separately or along with other properties of firm.
- Property of partner: Where property is exclusively belonging to person, it does not become property of partnership merely because it is used for business of partnership, such property will become property of partnership if there is agreement.
2. Application of Property of Firm (Section 15): Property of firm shall be held & used by partners exclusively for purposes of business. Every partner of firm has right to get his share of profits till firm subsists & he has also right to see that all assets of partnership are applied to & used for purpose of partnership business

## Personal Profit earned by Partners Section 16

- a) Where partner derives profit for himself from transaction of firm or from use of property or business connection of firm or firm name, he must account for that profit & pay it to firm.
- b) Where partner carries on competing business, he must account for & pay to firm all profits made by him in that business

## Rights & Duties of Partners After Change in Firm Section 17

- Change may take place in constitution of firm in one of four ways:
  - i) Where new partner or partners come in;
  - ii) Where some partner or partners go out, i.e., by death or retirement;
  - iii) Where partnership concerned carries on business other than business for which it was originally formed;
  - iv) Where partnership business is carried on after expiry of term
- Subject to contract between partners-
  - a) After change in firm: Where change occurs in constitution of firm, mutual rights & duties of partners in reconstituted firm remain same as they were immediately before change
  - b) After expiry of term of firm: Where firm constituted for fixed term continues to carry on business after expiry of that term, mutual rights & duties of partners remain same as they were before expiry, consistent with incidents of partnership at will
  - c) Where additional undertakings are carried out: Where firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings are same as those in respect of original adventures or undertakings

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.6)

Relation of Partners to Third Parties	Effect of Admission by Partner Section 23	Effect of Notice to Acting Partner Section 24	Liability to Third Party	Rights of Transferee of Partner's Interest Section 29
<p>1. Partner to be Agent of Firm (Section 18)</p> <ul style="list-style-type: none"> <li>Partner is agent of firm for purposes of business of firm</li> <li>Partner indeed virtually embraces character of both principal &amp; agent</li> <li>So far as he acts for himself &amp; in his own interest in common concern of partnership, he may properly be deemed principal &amp; so far as he acts for his partners, he may properly be deemed as agent</li> </ul> <p>2. Implied Authority of Partner as Agent of Firm (Section 19)</p> <ul style="list-style-type: none"> <li>Act of partner which is done to carry on, in usual way, business of kind carried on by firm, binds firm. Authority of partner to bind firm conferred by this section is called his implied authority</li> <li>In absence of any usage or custom of trade to contrary, implied authority of partner does not empower him to:                             <ol style="list-style-type: none"> <li>Submit dispute relating to business of firm to arbitration</li> <li>open banking account on behalf of firm in his own name</li> <li>compromise or relinquish any claim or portion of claim by firm</li> <li>withdraw suit or proceedings filed on behalf of firm</li> <li>admit any liability in suit or proceedings against firm</li> <li>acquire immovable property on behalf of firm</li> <li>transfer immovable property belonging to firm</li> <li>enter into partnership on behalf of firm</li> </ol> </li> <li>Mode of doing Act to bind Firm (Section 22): In order to bind firm, act or instrument done or executed by partner or other person on behalf of firm shall be done or executed in firm name, or in any other manner expressing or implying intention to bind firm</li> </ul> <p>3. Extension &amp; Restriction Of Partners' Implied Authority (Section 20)</p> <ul style="list-style-type: none"> <li>Implied authority of partner may be extended or restricted by contract between partners</li> <li>Under following conditions, restrictions imposed on implied authority of partner by agreement shall be effective against third party:                             <ol style="list-style-type: none"> <li>third party knows about restrictions, &amp;</li> <li>third party does not know that he is dealing with partner in firm</li> </ol> </li> </ul> <p>4. Partner's Authority In An Emergency (Section 21)</p> <ul style="list-style-type: none"> <li>Partner has authority, in emergency, to do all such acts for purpose of protecting firm from loss as would be done by person of ordinary prudence, in his own case, acting under similar circumstances, &amp; such acts bind firm</li> </ul>	<ul style="list-style-type: none"> <li>Admission or representation made by partner concerning affairs of firm is evidence against firm, if it is made in ordinary course of business</li> <li>Partners, as agents of each other can make binding admissions but only in relation to partnership transaction and in ordinary course of business. Admission or representation by partner will not however, bind firm if his authority on point is limited and other party knows of restriction.</li> <li>Section speaks of admissions &amp; representations being evidenced against firm. They will affect firm when tendered by third parties; they may not have same effect in case of disputes between partners themselves.</li> </ul>	<ul style="list-style-type: none"> <li>Notice to partner, who habitually acts in business of firm, on matters relating to affairs of firm, operates as notice to firm except in case of fraud on firm committed by or with consent of that partner</li> <li>Notice to one is equivalent to notice to rest of partners of firm, just as notice to agent is notice to his principal</li> <li>Notice must be actual &amp; not constructive. It must be received by working partner &amp; not by sleeping partner. It must further relate to firm's business. Only then it would constitute notice to firm. Only exception would lie in case of fraud, whether active or tacit</li> </ul>	<p>1. Liability Of Partner For Acts Of Firm (Section 25): Every partner is liable, jointly with all other partners &amp; also severally, for all acts of firm done while he is partner. Partners are jointly &amp; severally responsible to third parties for all acts which come under scope of their express or implied authority. This is because that all acts done within scope of authority are acts done towards business of firm.</p> <p>2. Liability Of Firm For wrongful Acts Partner (Section 26): Where, by wrongful act or omission of partner in ordinary course of business of firm, or with authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, firm is liable therefor to same extent as partner.</p> <ul style="list-style-type: none"> <li>Firm is liable to same extent as partner for any loss or injury caused to third party by wrongful acts of partner, if they are done by partner while acting:                             <ol style="list-style-type: none"> <li>in ordinary course of business of firm</li> <li>with authority of partners</li> </ol> </li> </ul> <p>3. Liability Of firm For Misapplication By Partners (Section 27): Where-</p> <ol style="list-style-type: none"> <li>partner acting within his apparent authority receives money or property from third party &amp; misapplies it, or</li> <li>firm in course of its business receives money or property from third party, &amp; money or property is misapplied by any of partners while it is in custody of firm, firm is liable to make good loss</li> </ol>	<ul style="list-style-type: none"> <li>Share in partnership is transferable like any other property, but as partnership relationship is based on mutual confidence, assignee of partner's interest by sale, mortgage or otherwise cannot enjoy same rights &amp; privileges as original partner.</li> <li>Rights of such transferee are as follows:                             <ol style="list-style-type: none"> <li>During continuance of partnership, such transferee is not entitled                                     <ol style="list-style-type: none"> <li>to interfere with conduct of business,</li> <li>to require accounts, or</li> <li>to inspect books of firm</li> </ol>                                     He is only entitled to receive share of profits of transferring partner &amp; he is bound to accept profits as agreed to by partners, i.e., he cannot challenge accounts                                 </li> <li>On dissolution of firm or on retirement of transferring partner, transferee will be entitled, against remaining partners:                                     <ol style="list-style-type: none"> <li>to receive share of assets of firm to which transferring partner was entitled, &amp;</li> <li>for purpose of ascertaining share, he is entitled to account as from date of dissolution</li> </ol> </li> </ol> </li> <li>Partner cannot by transferring his own interest, make anybody else partner in his place, unless other partners agree to accept that person as partner</li> </ul>

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.7)

## Minors admitted to Benefits of Partnership (Section 30)

Minor cannot be partner in firm, he can be admitted to benefits of partnership. He can be validly given share in partnership profits. This can be done with consent of all partners

### 1. Rights:

- i) Minor partner has right to his agreed share of profits & of firm.
- ii) He can have access to, inspect & copy accounts of firm.
- iii) He can sue partners for accounts or for payment of his share but only when severing his connection with firm, & not otherwise.
- iv) On attaining majority he may within 6 months elect to become partner or not to become partner.
  - If he elects to become partner, then he is entitled to share to which he was entitled as minor. If he does not, then his share is not liable for any acts of firm after date of public notice served to that effect.

### 2. Liabilities:

#### i) Before attaining majority:

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

#### ii) After attaining majority:

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

#### a) When he becomes partner:

- i) He becomes personally liable to third parties for all acts of firm done since he was admitted to benefits of partnership.
- ii) His share in property & profits of firm remains same to which he was entitled as minor

#### b) When he elects not to become partner:

- i) His rights & liabilities continue to be those of minor up to date of giving public notice.
- ii) His share shall not be liable for any acts of firm done after date of notice.
- iii) He shall be entitled to sue partners for his share of property & profits. It may be noted that such minor shall give notice to Registrar that he has or has not become partner

## Legal Consequences of Partner Coming in & Going out

### 1. Introduction of Partner (Section 31)

- No person shall be introduced as partner into firm without consent of all existing partners. Person who is introduced as partner into firm does not become liable for any acts of firm done before he became partner
- Liabilities of new partner commence from date when he is admitted as partner, unless he agrees to be liable for obligations incurred by firm prior to date. New firm, including new partner who joins it, may agree to assume liability for existing debts of old firm, & creditors may agree to accept new firm as their debtor & discharge old partners

### 2. Retirement Of Partner (Section 32)

- Partner may retire with consent of all other partners, in accordance with express agreement by partners; or where partnership is at will, by giving notice in writing to all other partners of his intention to retire
- Retiring partner may be discharged from any liability to any third party for acts of firm done before his retirement by agreement made by him with such third party & partners of reconstituted firm, & such agreement may be implied by course of dealing between third party & reconstituted firm after he had knowledge of retirement.
- He & partners continue to be liable as partners for act done by them which would have been act of firm if done before retirement, until public notice is given of retirement: provided that retired partner is not liable to any third party who deals with firm without knowing that he was partner. Retirement of partner from firm does not dissolve it, but has to be reconstituted

### 3. Expulsion Of Partner (Section 33)

- Power of expulsion must have existed in contract between partners; power has been exercised by majority of partners; & in good faith
- If partner is otherwise expelled, expulsion is null & void. Expulsion of partners does not necessarily result in dissolution of firm. Invalid expulsion of partner does not put end to partnership even if partnership is at will & it will be deemed to continue as before

### 4. Insolvency Of Partner (Section 34)

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

### 5. Liability Of Estate Of Deceased Partner (Section 35)

- Firm is not dissolved by death of partner, estate of deceased partner is not liable for any act of firm done after his death

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.8)

## Rights of Outgoing Partner to Carry on Competing Business Section 36

- Outgoing partner may carry on business competing with that of firm & he may advertise such business, but subject to contract to contrary, he may not-
  - a) use firm name,
  - b) represent himself as carrying on business of firm or
  - c) solicit custom of persons who were dealing with firm before he ceased to be partner
- Agreement in restraint of trade- Partner may make agreement with his partners that on ceasing to be partner he will not carry on any business similar to that of firm within specified period or within specified local limits & such agreement shall be valid if restrictions imposed are reasonable
- Although restrictions are imposed on outgoing partner, it effectively permits him to carry on business competing with that of firm
- Partner may agree with his partners that on his ceasing to be so, he will not carry on business similar to that of firm within specified period or local limits
- Such agreement will not be in restraint of trade if restraint is reasonable

## Rights of Outgoing Partner in certain cases to share subsequent profits Section 37

- Where any member of firm has died or otherwise ceased to be partner, & surviving or continuing partners carry on business of firm with property of firm without any final settlement of accounts as between them & outgoing partner or his estate, then, in absence of contract to contrary, outgoing partner or his estate is entitled at option of himself or his representatives to such share of profits made since he ceased to be partner as may be attributable to use of his share of property of firm or to interest at rate of 6% per annum on amount of his share in property of firm
- Whereby contract between partners, option is given to surviving or continuing partners to purchase interest of deceased or outgoing partner, and that option is duly exercised, estate of deceased partner, or outgoing partner or his estate, as case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of option does not in all material respects comply with terms thereof, he is liable to account under foregoing provisions of this section
- It deals with rights of outgoing partners. It lays down substantial law relating to liability of surviving or continuing partner, who without settlement of accounts with legal representatives of deceased partner utilizes assets of partnership for continuing business.
- Although principle applicable to such cases is clear but at times some complicated questions arise when disputes are raised between outgoing partner or his estate on one hand and continuing or surviving partners on other in respect of subsequent business. Such disputes are to be resolved keeping in view facts of each case.

## Revocation of Continuing Guarantee by change in Firm Section 38

- Continuing guarantee given to firm or to third party in respect of transaction of firm is, in absence of agreement to contrary, revoked as to future transactions from date of any change in constitution of firm
- Mere changes in constitution of firm operates to revoke guarantee as to all future transactions. Such change may occur by death, or retirement of partner, or by introduction of new partner.

Designed By :  
CA Ankita Patni

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.9)

## Registration of Firms

### Application For Registration Section 58

1. Registration of firm may be effected at any time by sending by post or delivering to Registrar of area in which any place of business of firm is situated or proposed to be situated, statement in prescribed form & accompanied by prescribed fee, stating-

- a) firm's name
- b) place or principal place of business of firm
- c) names of any other places where firm carries on business
- d) date when each partner joined firm
- e) names in full & permanent addresses of partners &
- f) duration of firm

Statement shall be signed by all partners, or by their agents specially authorised in this behalf

2. Each person signing statement shall also verify it in manner prescribed

3. Firm name shall not contain any of following words, namely:-

'Crown', 'Emperor', 'Empress', 'Empire', 'Imperial', 'King', 'Queen', 'Royal', or words expressing or implying sanction, approval or patronage of Government except when SG signifies its consent to use of such words as part of firm-name by order in writing

- When Registrar is satisfied that provisions have been complied, he shall record entry of this statement in register (called Register of Firms) & shall file statement

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

### Registration Section 59

- When Registrar is satisfied that provisions of Section 58 have been duly complied with, he shall record entry of statement in Register called Register of Firms & shall file statement. Then he shall issue certificate of Registration

- However, registration is deemed to be completed as soon as application in prescribed form with prescribed fee & necessary details concerning particulars of partnership is delivered to Registrar. Recording of entry in register of firms is routine duty of Registrar

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

## Consequences of Non-registration Section 69

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

- a) No suit in civil court by firm or other co-partners against third party
  - Firm or any other person on its behalf cannot bring an action against third party for breach of contract entered into by firm, unless firm is registered and persons suing are or have been shown in register of firms as partners in firm
  - Registered firm can only file suit against third party and persons suing have been in register of firms as partners in firm
- b) No relief to partners for set-out of claim
  - If action is brought against firm by third party, then neither firm nor partner can claim any set-out, if suit be valued for more than Rs. 100 or pursue other proceedings to enforce the rights arising from any contract
- c) Aggrieved partner cannot bring legal action against other partner or firm
  - Partner of an unregistered firm (or any other person on his behalf) is precluded from bringing legal action against firm or any person alleged to be or to have been partner in firm
  - But, such person may sue for dissolution of firm or for accounts and realization of his share in firm's property where firm is dissolved
- d) Third party can sue firm
  - In case of an unregistered firm, action can be brought against firm by third party

2. Exceptions: Non-registration of firm does not effect following rights:

- a) Right of third parties to sue firm or any partner
- b) Right of partners to sue for dissolution of firm or for settlement of accounts of dissolved firm, or for realization of property of dissolved firm
- c) Power of an Official Assignees, Receiver of Court to release property of insolvent partner & to bring an action
- d) Right to sue or claim set-off if value of suit does not exceed Rs. 100 in value



# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.10)

## Dissolution of Firm

### Meaning

Section 39: Dissolution of partnership between all partners of firm is called dissolution of firm

- Dissolution of firm means discontinuation of jural relation existing between all partners of firm. But when only one or more partners retires or becomes incapacitated from acting as partner due to death, insolvency or insanity, partnership, i.e. relationship between such partner and other is dissolved, but rest may decide to continue. In such cases, there is in practice, no dissolution of firm.
- Particular partner goes out, but remaining partners carry on business of firm, it is called dissolution of partnership.
- In case of dissolution of firm, on other hand, whole firm is dissolved. Partnership terminates as between each & every partner of firm.

### Modes of Dissolution of firm

1. Dissolution Without Order Of Court Or Voluntary Dissolution
  - a) Dissolution by agreement (Section 40): Firm may be dissolved with consent of all partners or in accordance with contract between partners. 'Contract between partners' means contract already made
  - b) Compulsory dissolution (Section 41): Firm is compulsorily dissolved by happening of any event which makes it unlawful for business of firm to be carried on or for partners to carry it on in partnership. Provided that, when more than one separate adventure or undertaking is carried on by firm, illegality of one or more shall not of itself cause dissolution of firm in respect of its lawful adventures & undertakings
  - c) Dissolution on happening of certain contingencies (Section 42): Subject to contract between partners, firm can be dissolved on happening of any of following contingencies- where firm is constituted for fixed term on expiry of that term, where firm is constituted to carry out one or more adventures or undertaking then by completion thereof, by death of a partner & by adjudication of partner as insolvent
  - d) Dissolution by notice of partnership at will (Section 43): Where partnership is at will, firm may be dissolved by any partner giving notice in writing to all other partners of his intention to dissolve firm. If date is mentioned, firm is dissolved as from date mentioned in notice as date of dissolution, or if no date is so mentioned, as from date of communication of notice
2. Dissolution by Court (Section 44): Court may, at suit of partner, dissolve firm on any of following ground:
  - a) Insanity/unsound mind: Where partner (not sleeping partner) has become of unsound mind, court may dissolve firm on suit of other partners or by next friend of insane partner. Temporary sickness is no ground for dissolution of firm
  - b) Permanent incapacity: When partner, other than partner suing, has become permanently incapable of performing his duties as partner, then court may dissolve firm. Permanent incapacity may result from physical disability or illness etc.
  - c) Misconduct: Where partner, other than partner suing, is guilty of conduct which is likely to affect prejudicially carrying on of business, court may order for dissolution of firm, by giving regard to nature of business
  - d) Persistent breach of agreement: Where partner other than partner suing, wilfully or persistently commits breach of agreements relating to management of affairs of firm or conduct of its business, or otherwise so conduct himself in matters relating to business that it is not reasonably practicable for other partners to carry on business in partnership with him, then court may dissolve firm at instance of any of partners
  - e) Transfer of interest: Where partner other than partner suing, transferred whole of his interest in firm to third party/ allowed his share to be charged or sold by court, in recovery of arrears of land revenue, court may dissolve firm
  - f) Continuous/Perpetual losses: Where business of firm cannot be carried on except at loss, court may order for its dissolution
  - g) Just & equitable grounds: Where court considers any other ground to be just & equitable for dissolution of firm, it may dissolve firm. Following are cases for just & equitable grounds- (i) Deadlock in management; (ii) Where partners are not in talking terms between them; (iii) Loss of substratum; (iv) Gambling by partner on stock exchange

### Dissolution of Firm Vs. Dissolution of Partnership

S. No.	Basis of Difference	Dissolution of Firm	Dissolution of Partnership
1.	Continuation of business	It involves discontinuation of business in partnership.	It does not affect continuation of business. It involves only reconstitution of the firm.
2.	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.
3.	Order of court	A firm may be dissolved by the order of the court.	Dissolution of partnership is not ordered by the court.
4.	Scope	It necessarily involves dissolution of partnership.	It may or may not involve dissolution of firm.
5.	Final closure of books	It involves final closure of books of the firm.	It does not involve final closure of the books.

DESIGNED BY : CA ANKITA PATNI

# THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.11)

## Consequences of Dissolution

1. **Liability for acts of partners done after dissolution (Section 45):** Partners continue to be liable to third parties for act done by them which would have been act of firm if done before dissolution, until public notice is given of dissolution. It has two fold objectives-

- a) To protect third parties dealing with firm who had no notice of prior dissolution
- b) To protect partners of dissolved firm from liability towards third parties

2. **Right of partners to have business wound up after dissolution (Section 46):** On dissolution of firm every partner or his representative is entitled, as against all other partners or their representative, to have property of firm applied in payment of debts & liabilities of firm & to have surplus distributed among partners or their representatives according to their rights.

3. **Continuing authority of partners for purposes of winding up (Section 47):** After dissolution of firm authority of each partner to bind firm, & other mutual rights & obligations of partners, continue notwithstanding dissolution, so far as may be necessary to wind up affairs of firm & to complete transactions begun but unfinished at time of dissolution, but not otherwise. Firm is in no case bound by acts of partner who has been adjudicated insolvent

4. **Settlement of partnership accounts (Section 48):** In settling accounts of firm after dissolution, following rules shall be observed:

- a) Losses, including deficiencies of capital, be paid first out of profits, next out of capital & lastly by partners individually in proportions in which they were entitled to share profits
- b) Assets of firm, including any sums contributed by partners to make up deficiencies of capital, must be applied:
  - i) in paying debts of firm to third parties; (ii) in paying to each partner rateably what is due to him from capital; (iii) in paying to each partner rateably what is due to him on account of capital; & (iv) residue be divided among partners in PSR

• Accounts between partners be settled in manner prescribed by partnership agreement

• If partners, by their agreement, express different intention as to mode in which losses will have to be borne eventually or manner in which capital or advances will have to be paid to any partner, such intention must be given effect to. Agreement cannot affect rights of creditors of firm

• Significance of foregoing provisions is that if assets of firm are not sufficient to pay out liabilities of firm including amount due to each partner on account of capital, each partner would individually be liable to contribute towards losses, including deficiencies of capital, in proportion in which he is entitled to share profits

5. **Payment of firm debts & of separate debts (Section 49):** Where there are joint debts due from firm & also separate debts due from any partner:

i) property of firm be applied in first instance in payment of debts of firm & surplus be applied to payment of his separate debts or paid to him;

ii) separate property of any partner be applied first in payment of his separate debts & surplus, in payment of debts of firm

6. **Personal profits earned after dissolution (Section 50):** Where firm is dissolved by death of partner & surviving partners or surviving partners along with representatives of deceased partner carry on business of firm, personal profits by them, before firm is fully wound up, must be accounted for by them to other partners. Lease expiring on death of partner, which is renewed by surviving partners, before final winding up, belongs to partnership. In absence of agreement to contrary, each partner or his representative is entitled to restrain (by injunction) other partners from carrying on similar business in name of firm or from using property of firm for their own benefit till affairs of firm are completely wound up

7. **Return of premium on premature dissolution (Section 51):** In case of dissolution of partnership earlier than period fixed for it, partner paying premium is entitled to return of premium of such part thereof as may be reasonable, regard being had to terms of agreement & to length of time during which he was partner, except when partnership is dissolved:

- (a) by death of one of partners (b) mainly due to misconduct of partner paying premium (c) pursuant to agreement containing no provisions for return of premium or any part thereof

Partner paying premium gets proportionate part of premium where partnership is dissolved: (a) Without fault of either party or (b) owing to fault of both or (c) on account of fault of partner receiving premium or (d) due to insolvency of partner receiving premium, where partner paying premium was unaware of others embarrassing circumstances at time of entering into partnership

8. **Rights where partnership contract is rescinded for fraud or misrepresentation (Section 52):** Where contract creating partnership is rescinded on ground of fraud or misrepresentation of any of parties thereto, party entitled to rescind is entitled

- 1) to lien on surplus or assets of firm remaining after debts of firm have been paid, for any sum paid by him for purchase of share in firm & for any capital contributed by him
- 2) to rank as creditor of firm in respect of any payment made by him towards debts of firm &
- 3) to indemnity from partners guilty of fraud or misrepresentation against all debts of firm

9. **Sale of Goodwill after dissolution (Section 55):** In settling accounts of firm after dissolution, goodwill shall, subject to contract between partners, be included in assets, & it may be sold either separately or along with other property of firm.

**Rights of buyer & seller of goodwill:** Where goodwill of firm is sold after dissolution, partner may carry on business competing

with that of buyer & he may advertise such business, but subject to agreement between him & buyer, he may not, (a) use firm name, (b) represent himself as carrying on business of firm, or (c) solicit custom of persons who were dealing with firm before its dissolution

**Agreement in restraint of trade:** Any partner may, upon sale of goodwill of firm, make agreement with buyer that such partner will not carry on any business similar to that of firm within specified period or within specified local limits, & notwithstanding anything contained in section 27 of Indian Contract Act, 1872 such agreement shall be valid if restrictions imposed are reasonable

## Mode of giving public notice

• Public notice under this Act is given-

a) Where it relates to retirement or expulsion of partner from registered firm, or to dissolution of registered firm, or to election to become or not to become partner in registered firm by person attaining majority who was admitted as minor to benefits of partnership, by notice to Registrar of Firms u/s 63, & by publication in Official Gazette & in at least 1 vernacular newspaper circulation in district where firm to which it relates has its place or principal place of business.

b) In any other case, by publication in Official Gazette & in at least one vernacular newspaper.

# THE LIMITED LIABILITY PARTNERSHIP ACT, 2008 (Chart 4.1)

## LIMITED LIABILITY PARTNERSHIP

LLP is new form of legal business entity with limited liability. It is alternative corporate business vehicle that not only gives benefits of limited liability at low compliance cost but allows its partners flexibility of organising their internal structure as traditional partnership. LLP contains elements of both 'corporate structure' as well as 'partnership firm structure' so it is called hybrid between company & partnership

### Partners (Section 5) :

Individual or body corporate may be partner in LLP. However, individual shall not be capable of becoming partner of LLP, if-

- he has been found to be of unsound mind by Court
- he is undischarged insolvent; or
- he has applied to be adjudicated as insolvent & his application is pending

### Minimum number of partners (Section 6)

- Every LLP shall have at least 2 partners
- If at any time, number of partners of LLP is reduced below 2 & LLP carries on business for more than 6 months while number is so reduced, person, who is only partner of LLP during that time shall be liable personally for obligations of LLP incurred during that period

### Designated Partners (Section 7)

Every limited liability partnership 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 a limited liability partnership in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominees of such body corporate shall act as 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 one hundred and twenty days during the financial year.

2) Subject to the provisions 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 limited liability partnership is to be designated partner, every partner shall be a designated partner.

(ii) any partner may become a designated partner by and in accordance with the limited liability partnership agreement and a partner may cease to be a designated partner in accordance with limited liability partnership agreement.

3) An individual shall not become a designated partner in any limited liability partnership unless he has given his prior consent to act as such to the limited liability partnership in such form and manner as may be prescribed.

4) Every limited liability partnership 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 thirty days of his appointment.

5) An individual eligible to be a designated partner shall satisfy such conditions and requirements as may be prescribed.

6) Every designated partner of a limited liability partnership shall obtain a Designated Partners Identification Number (DPIN) from the Central Government and the provisions of sections 153 to 159 (both inclusive) of the Companies Act, 2013 shall apply mutatis mutandis for the said purpose.

### Characteristic/Salient Features of LLP

- Body corporate :** LLP is body corporate formed & incorporated under this Act & is legal entity separate from its partners
- Perpetual Succession :** LLP can continue existence irrespective of changes in partners. Death/insanity/retirement/insolvency of partners has no impact on existence of LLP. It is capable of entering into contracts & holding property in its own name
- Separate Legal Entity :** LLP is a separate legal entity, is liable to full extent of its assets but liability of partners is limited to their agreed contribution in LLP
- Mutual Agency :** No partner is liable on account of independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct
- LLP Agreement :** Mutual rights and duties of the partners within LLP are governed by agreement between partners
- Artificial Legal Person :** LLP is artificial legal person because it is created by legal process & is clothed with all rights of individual. LLP is invisible, intangible, immortal (it can be dissolved by law alone) but not fictitious because it really exists
- Common Seal:** LLP being an artificial person can act through its partners & designated partners. LLP may have common seal, if it decides to have one
- Limited Liability:** Every partner of a LLP is, for purpose of business of LLP, agent of LLP, but not of other
- Management of Business:** Partners in LLP are entitled to manage business of LLP. But only designated partners are responsible for legal compliances partners
- Minimum & Maximum number of Partners:** Every LLP shall have least two partners and shall also have at least 2 individuals as designated partners, of whom at least one shall be resident in India. There is no maximum limit on the partners in LLP
- Business for Profit Only:** Essential requirement for forming LLP is carrying on lawful business with a view to earn profit. Thus LLP cannot be formed for charitable or non-economic purpose
- Investigation:** Central Government shall have powers to investigate the affairs of LLP
- Compromise or Arrangement:** Any compromise or arrangement including merger and amalgamation of LLPs shall be in accordance with provisions of LLP Act, 2008
- Conversion into LLP:** Firm, private company or unlisted public company would be allowed to be converted into LLP in accordance with provisions of LLP Act, 2008
- E-Filing of Documents:** Every form or application of document required to be filed or delivered under the act and rules made thereunder, shall be filed in computer readable electronic form on its website [www.mca.gov.in](http://www.mca.gov.in) & authenticated by a partner or designated partner of LLP by the use of electronic or digital signature.
- Foreign LLPs:** Section 2(1)(m) defines foreign LLP "as limited liability partnership formed, incorporated, or registered outside India which established place of business within India". Foreign LLP can become partner in Indian LLP.

**Definition of Small LLP :** "Small limited liability partnership [Section 2(ta)]: It means a limited liability partnership— (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 Accounts 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 meets such other requirements as may be prescribed, and fulfils such terms and conditions as may be prescribed;

# THE LIMITED LIABILITY PARTNERSHIP ACT, 2008 (Chart 4.2)

## INCORPORATION OF LLP

Incorporation document (Section 11)	Incorporation by registration (Section 12)	Registered office of LLP and change therein (Section 13)	Effect of registration (Section 14)	Name (Section 15)	Reservation of Name (Section 16)	Change of name of LLP (Section 17)	
<p>1. For LLP to be incorporated:</p> <p>a) 2 or more persons associated for carrying on lawful business with view to profit shall subscribe their names to incorporation document;</p> <p>b) incorporation document shall be filed in prescribed manner &amp; fees, with Registrar of State in which registered office of LLP is to be situated; &amp;</p> <p>c) Statement to be filed:</p> <p>i) there shall be filed along with incorporation document, statement in prescribed form,</p> <p>ii) made by either advocate, or CS or CA or CWA, who is engaged in formation of LLP &amp;</p> <p>iii) by any one who subscribed his name to incorporation document, that all requirements of this Act &amp; rules made thereunder have been complied with,</p> <p>iv) in respect of incorporation &amp; matters precedent &amp; incidental thereto</p>	<p>2. Incorporation document shall:</p> <p>a) be in prescribed form;</p> <p>b) state name of LLP;</p> <p>c) state proposed business of LLP;</p> <p>d) state address of registered office of LLP;</p> <p>e) state name &amp; address of each of persons who are to be partners of LLP on incorporation;</p> <p>f) state name &amp; address of persons who are to be designated partners of LLP on incorporation;</p> <p>g) contain such other information concerning proposed LLP as may be prescribed</p> <p>3. If person makes statement as discussed above which he-</p> <p>a) knows to be false; or</p> <p>b) does not believe to be true, shall be punishable with imprisonment upto 2 years &amp; fine Rs. 10,000 to Rs. 5 Lakhs</p>	<p>1. When requirements imposed by clauses (b) &amp; (c) of section 11(1) have been complied with, Registrar shall retain incorporation document and, unless requirement imposed by clause (a) of that sub-section has not been complied with, he shall, within 14 days -</p> <p>a) register incorporation document; &amp;</p> <p>b) give certificate that LLP is incorporated by name specified therein</p> <p>2. Registrar may accept statement delivered under clause (c) of section 11(1) as sufficient evidence that requirement imposed by clause (a) of that sub-section has been complied with</p> <p>3. Certificate issued under clause (b) of sub-section (1) shall be signed by Registrar &amp; authenticated by his official seal</p> <p>4. Certificate shall be conclusive evidence that LLP is incorporated by name specified therein</p>	<p>1. Every LLP shall have registered office to which all communications &amp; notices may be addressed &amp; where they shall be received</p> <p>2. Document may be served on LLP or partner or designated partner thereof by sending it by post under certificate of posting or by registered post or by other prescribed manner, at registered office &amp; any other address specifically declared by LLP for purpose in prescribed form &amp; manner</p> <p>3. LLP may change place of its registered office &amp; file notice of change with Registrar in prescribed form &amp; manner &amp; such change shall take effect only upon such filing</p> <p>4. If any default is made in complying with the requirements of this section, the limited liability partnership 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 limited liability partnership and its every partner.</p>	<p>On Registration, LLP shall by its name, be capable of -</p> <p>i) suing &amp; being sued</p> <p>ii) acquiring, owning, holding, &amp; developing or disposing of property, whether movable or immovable, tangible or intangible</p> <p>iii) having common seal, if it decides to have one &amp;</p> <p>iv) doing and suffering such other acts &amp; things as bodies corporate may lawfully do &amp; suffer</p>	<p>1. Every limited liability partnership shall have either the words limited liability partnership or the acronym LLP as the last words of its name.</p> <p>2. No limited liability partnership shall be registered by a name which, in the opinion of the Central Government is (a) undesirable; or (b) identical or too nearly resembles to that of any other limited liability partnership or a company or a registered</p>	<p>1. Person may apply in prescribed form &amp; manner with fee to Registrar for reservation of name set out in application as-</p> <p>a) name of proposed LLP; or</p> <p>b) name to which LLP proposes to change its name</p> <p>2. Upon receipt of application under sub-section (1) &amp; on payment of prescribed fee, Registrar may, if he is satisfied, subject to rules prescribed by CG, that name to be reserved is not one which may be rejected on any ground referred to in section 15(2), reserve name for 3 months</p>	<p>1) Notwithstanding anything contained in sections 15 and 16, if through inadvertence or otherwise, a limited liability partnership, on its first registration or on its registration by a new body corporate, its registered name; name, is registered by a name which is identical with or too nearly resembles to—</p> <p>(a) that of any other limited liability partnership or a company; or</p> <p>(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 limited liability partnership or proprietor referred to in clauses (a) and (b) respectively or a company, the Central Government may direct that such limited liability partnership 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 limited liability partnership under this Act.</p> <p>2) Where a limited liability partnership 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 the certificate of incorporation, such limited liability partnership shall change its name in the limited liability partnership agreement.</p> <p>3) If the limited liability partnership is in default in complying with any direction given under sub-section (1), the Central Government shall allot a new name to the limited liability partnership in such manner as may be prescribed and the Registrar shall enter the new name in the register of limited liability partnerships in place of the old name and issue a fresh certificate of incorporation with new name, which the limited liability partnership shall use thereafter: Provided that nothing contained in this sub-section shall prevent a limited liability partnership from subsequently changing its name in accordance with the provisions of section 16.</p>

## THE LIMITED LIABILITY PARTNERSHIP ACT, 2008 (Chart 4.3)

### Distinction between LLP & Partnership Firm

Basis	LLP	Partnership firm
1. Regulating Act	The Limited Liability Partnership Act, 2008.	The Indian Partnership Act, 1932.
2. Body corporate	It is a body corporate.	It is not a body corporate.
3. Separate legal entity	It is a legal entity separate from its members.	It is a group of persons with no separate legal entity.
4. Creation	It is created by a legal process called registration under the LLP Act, 2008.	It is created by an agreement between the partners.
5. Registration	Registration is mandatory. LLP can sue and be sued in its own name.	Registration is voluntary. Only the registered partnership firm can sue the third parties.
6. Perpetual succession	The death, insanity, retirement or insolvency of the partner(s) does not affect its existence of LLP. Members may join or leave but its existence continues forever.	The death, insanity retirement or insolvency of the partner(s) may affect its existence. It has no perpetual succession.
7. Name	Name of the LLP to contain the word limited liability partners (LLP) as suffix.	No guidelines. The partners can have any name as per their choice.
8. Liability	Liability of each partner limited to the extent to agreed contribution except in case of willful fraud.	Liability of each partner is unlimited. It can be extended upto the personal assets of the partners.
9. Mutual agency	Each partner can bind the LLP by his own acts but not the other partners.	Each partner can bind the firm as well as other partners by his own acts.
10. Designated partners	At least two designated partners and atleast one of them shall be resident in India.	There is no provision for such partners under the Indian partnership Act, 1932.
11. Common seal	It may have its common seal as its official signatures.	There is no partnership such in concept
12. Legal compliances	Only designated partners are responsible for all the compliances and penalties under this Act.	All partners are responsible for all the compliances and penalties under the Act.
13. Annual filing of documents	LLP is required to file: (i) Annual statement of accounts (ii) Statement of solvency (iii) Annual return with the registration of LLP every year.	Partnership firm is not required to file any annual document with the registrar of firms.
14. Foreign partnership	Foreign nationals can become a partner in a LLP.	Foreign nationals cannot become a partner in a partnership firm.
15. Minor as partner	Minor cannot be admitted to the benefits of LLP.	Minor can be admitted to the benefits of the partnership with the prior consent of the existing partners.

### Distinction between LLP & Limited Liability Company (LLC)

Basis	LLP	LLC
1. Regulating Act	The LLP Act, 2008	The Companies Act, 2013.
2. Members/Partners	The persons who contribute to LLP are known as partners of the LLP.	The persons who invest the money in the shares are known as members of the company
3. Internal governance structure	The internal governance structure of a LLP is governed by agreement between the partners.	The internal governance structure of a company is regulated by statute (i.e., Companies Act, 2013)
4. Name	Name of the LLP to contain the word "Limited Liability partnership" or "LLP" as suffix.	Name of the public company to contain the word "limited" and Private company to contain the word "Private limited" as suffix.
5. Number of members/ partners	Minimum – 2 members  Maximum – No such limit on the members in the Act. The members of the LLP can be individuals/or body corporate through the nominees.	The Comp Private company: Minimum – 2 members Maximum – 200 members Public company:  Minimum – 7 members  Maximum – No such limit on the members.  Members can be organizations, trusts, another business form or individuals.
6. Liability of members/ partners	Liability of a partners is limited to the extent of agreed contribution except in case of willful fraud.	Liability of a member is limited to the amount unpaid on the shares held by them.
7. Management	The business of the company managed by the partners including the designated partners authorized in the agreement.	The affairs of the company are managed by board of directors elected by the shareholders.
8. Name	Minimum number of directors/ designated partners	Private Co. – 2 directors  Public Co. – 3 directors

#### Advantages of LLP form

LLP form is a form of business model which:

Is organized and operates on the basis of an agreement.

provides flexibility without imposing detailed legal and procedural requirements.

Easy to form

All partners enjoy limited liability

Flexible capital structure

Easy to dissolve

# THE COMPANIES ACT, 2013 (Chart 5.1)

## Applicability of Companies Act, 2013

Provisions of Act shall apply to-

- i) Companies incorporated under this Act or under any previous Company law
- ii) Insurance companies (except where provisions of said Act are inconsistent with provisions of Insurance Act, 1938 or IRDA Act, 1999)
- iii) Banking companies (except where provisions of said Act are inconsistent with provisions of Banking Regulation Act, 1949)
- iv) Companies engaged in generation or supply of electricity (except where provisions of above Act are inconsistent with provisions of Electricity Act, 2003)
- v) Any other co. governed by any special Act for time being in force
- vi) Such body corporate which are incorporated by any Act for time being in force, & as Central Government may by notification specify in this behalf

## Meaning

- According to Chief Justice Marshall, "Corporation is artificial being, invisible, intangible, existing only in contemplation of law"
- Being mere creation of law, it possesses only those properties which charter of its creation confers upon it, either expressly or as accidental to its very existence
- In words of professor Haney, "Co. is incorporated association, which is an artificial person created by law, having separate entity, with perpetual succession & common seal"
- Section 2(20) of Companies Act, 2013 defines term 'Company' as "Company means Co. incorporated under this Act or under any previous Co. law"

## Company

### Features of Company

1. Separate Legal Entity
  - When co. is registered, it is clothed with legal personality, its existence is distinct & separate from that of its members
  - It is at law, different from subscribers to MOA. Its personality is distinct & separate from personality of those who compose it
  - Members can contract with company, acquire right against it or incur liability to it. For debts of company, its creditors can sue it but not its members
  - Co. is capable of owning, enjoying & disposing of property in its own name
2. Perpetual Succession
  - Members may die or change, but co. goes on till it is wound up on grounds specified by Act
  - Since co. is artificial person created by law, law alone can bring end to its life. Its existence is not affected by death or insolvency of its members
3. Limited Liability
  - In case of limited liability co, liability of members of co. is limited to extent of nominal value of shares held by them. In no case shareholders be asked to pay anything more than unpaid value of their shares
  - In case of co. limited by guarantee, members are liable only to extent of amount guaranteed by them & that too only when co. goes into liquidation
  - If it is unlimited co., liability of its members is unlimited as well
4. Artificial Legal Person
  - Co. is artificial person legal or judicial as it is created by law. Co. being separate legal entity can own property, have banking account, raise loans, incur liabilities & enter into contracts. It can sue & be sued in its own name
  - As Co. is artificial person, it can act only through some human agency, viz directors. Directors cannot control affairs of co. & act as its agency, but they are not "agents" of members of Co.
5. Common Seal
  - Common seal is official signature of co., affixed by officers & employees of co. on its every document. Common seal is seal used by corporation as symbol of its incorporation
  - Common Seal is optional, Documents which need to be authenticated by common seal will be required to be so done, only if co. opts to have common seal. In case co. does not have common seal, authorization shall be made by two directors or by director & CS, wherever co. has appointed CS

# THE COMPANIES ACT, 2013 (Chart 5.2)

## Corporate Veil Theory

### Corporate Veil meaning

- Corporate Veil refers to legal concept whereby Co. is identified separately from members of Co. Members of co. are shielded from liability connected to Company's actions
- If co. incurs any debts or contravenes any laws, corporate veil concept implies that members should not be liable for those errors, they enjoy corporate insulation
- Co. is at law different person altogether from subscribers to memorandum, & though it may be that after incorporation business is precisely same as it was before & same persons are managers, & same hands receive profits, co. is not in law agent of subscribers or trustees for them. Nor are subscribers, as members, liable, in any shape or form, except to extent & in manner provided by Act
- Where Courts ignore co. & concern themselves directly with members or managers, corporate veil may be said to have been lifted. Only in appropriate circumstances, Courts are willing to lift corporate veil & that too, when questions of control are involved rather than merely question of ownership

### Lifting of Corporate Veil

In following cases Company Law disregards principle of corporate personality or principle that co. is legal entity distinct & separate from its shareholders or members:

1. To determine character of co. i.e. to find out whether co-enemy or friend: In law relating to trading with enemy where test of control is adopted
2. To protect revenue/tax: In certain matters concerning law of taxes, duties & stamps particularly where question of controlling interest is in issue
  - i) Where corporate entity is used to evade or circumvent tax, Court can disregard corporate entity
  - ii) Dinshaw Maneckjee Petit - Co. was not genuine co. but merely assessee himself disguised under legal entity of limited co. Court decided that private companies were sham & corporate veil was lifted to decide real owner of income
3. To avoid legal obligation: Where it was found that sole purpose for formation of co. was to use it as device to reduce amount to be paid by way of bonus to workmen, Supreme Court upheld piercing of veil to look at real transaction
4. Formation of subsidiaries to act as agents: Co. may sometimes be regarded as agent or trustee of its members, or of another co., and may therefore be deemed to have lost its individuality in favour of its principal. Here principal will be held liable for acts of that co.
5. Co. formed for fraud/improper conduct or to defeat law: Where device of incorporation is adopted for some illegal or improper purpose, e.g., to defeat or circumvent law, to defraud creditors or to avoid legal obligations

### Corporate Veil will be lifted

DESIGNED BY : CA ANKITA PATNI

Trading with enemy

Where corporate entity is used to evade or circumvent tax

Where companies form other companies as their subsidiaries to act as their agent

To avoid a legal obligation

Where the device of incorporation is adopted for some illegal or improper purpose





# THE COMPANIES ACT, 2013 (Chart 5.4)

## MODE OF REGISTRATION/INCORPORATION OF COMPANY

Promoters	Formation of Company	Incorporation of Company (Section 7)				
<ul style="list-style-type: none"> <li>• Promoter means person:                             <ol style="list-style-type: none"> <li>who has been named as such in prospectus or is identified by co. in annual return referred to u/s 92</li> <li>who has control over affairs of co., directly or indirectly whether as shareholder, director or otherwise</li> <li>in accordance with whose advice, directions or instructions BOD of co. is accustomed to act.</li> </ol> </li> <li>• Persons who form co. are known as promoters.</li> <li>• It is they who conceive idea of forming co.</li> <li>• They take all necessary steps for its registration</li> <li>• Persons acting only in professional capacity e.g., solicitor, banker, accountant etc. are not regarded as promoters</li> </ul>	<ul style="list-style-type: none"> <li>• In case of public co., any 7 or more persons can form co. for any lawful purpose by subscribing their names to MOA &amp; complying with requirements of this Act in respect of registration.</li> <li>• 2 or more persons can form private co. &amp; one person where co. to be formed is One Person Company</li> </ul>	<p>i) Filing of documents &amp; information with registrar :</p> <ol style="list-style-type: none"> <li>memorandum &amp; articles of co. duly signed by all subscribers to MOA</li> <li>declaration by person who is engaged in formation of co.</li> <li>declaration from each of subscribers to memorandum &amp; from persons named as first directors, if any, in AOA stating that-                             <ul style="list-style-type: none"> <li>• he is not convicted of any offence in connection with promotion, formation or management of any co.</li> <li>• he has not been found guilty of any fraud or misfeasance or of any breach of duty to any co. under this Act or any previous co. law during last 5 yrs</li> <li>• &amp; that all documents filed with Registrar for registration of co. contain information that is correct &amp; complete &amp; true</li> </ul> </li> <li>address for correspondence</li> <li>particulars of every subscriber to MOA along with proof of identity</li> <li>particulars of persons mentioned in articles as subscribers to MOA</li> <li>particulars of interests of persons mentioned in AOA as first directors</li> </ol>	<p>ii) Issue of certificate of incorporation on registration: Registrar on basis of documents &amp; information filed, shall register all documents &amp; information in register &amp; issue certificate of incorporation in prescribed form to effect that proposed co. is incorporated</p> <p>iii) Allotment of Corporate Identity Number (CIN): On &amp; from date mentioned in certificate of incorporation, Registrar shall allot to co. corporate identity number, which shall be distinct identity for co. &amp; which shall also be included in certificate</p> <p>iv) Maintenance of copies of all documents &amp; information: Co. shall maintain &amp; preserve at its registered office copies of all documents &amp; information as originally filed, till its dissolution under this Act</p>	<p>v) Furnishing of false or incorrect information or suppression of material fact at time of incorporation: Person doing so shall be liable for action for fraud under section 447</p> <p>vi) Co. already incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact (i.e. post Incorporation): Persons named as first directors of co. &amp; persons making declaration under this sec shall each be liable for action for fraud under sec 447</p>	<p>vii) Order of Tribunal:</p> <ol style="list-style-type: none"> <li>pass such orders, as it may think fit, for regulation of management of co. including changes, if any, in its memorandum &amp; articles, in public interest or in interest of co. &amp; its members &amp; creditors; or</li> <li>direct that liability of members shall be unlimited</li> <li>direct removal of name of co. from register of companies; or</li> <li>pass order for winding up of co.</li> <li>pass such other orders as it may deem fit: Provided that before making any order,-                             <ul style="list-style-type: none"> <li>• Co. shall be given reasonable opportunity of being heard in matter</li> <li>• Tribunal shall take into consideration transactions entered into by co., including obligations, if any, contracted or payment of any liability</li> </ul> </li> </ol> <p>viii) Simplified Proforma for Incorporating Company Electronically (SPICe): MCA has taken various initiatives for ease of business. It has simplified process of filing of forms for incorporation of Co. through SPICe</p>	

# THE COMPANIES ACT, 2013 (Chart 5.5)

## Effect of Registration Section 9

- From date of incorporation subscribers to memorandum & all other persons, who may from time to time become members of co., shall be body corporate by name contained in memorandum
- Registered co. shall be capable of exercising all functions & having perpetual succession with power to acquire, hold & dispose of property, both movable & immovable, tangible & intangible, to contract & to sue & be sued, by said name
- From date of incorporation mentioned in certificate, co. becomes legal person separate from incorporators & there comes into existence binding contract between company & its members as evidenced by MOA & AOA
- Company may purchase shares of another co. & thus become controlling Co. but merely because Co. purchases all shares of another Co. it will not serve as means of putting end to corporate character of another Co. & each company is separate juristic entity

## Effect of Memorandum & Articles Section 10

- Memorandum & articles shall, when registered, bind Co. & members thereof to same extent as if they respectively had been signed by Co. & by each member
- All monies payable by any member to Co. under memorandum or articles shall be debt due from him to co.

## Classification of Capital

- Capital means share capital i.e., capital or figure in terms of so many rupees divided into shares of fixed amount
1. Nominal or authorised or registered capital
    - Such capital as is authorised by memorandum of co. to be maximum amount of share capital of Co.
    - It is sum stated in memorandum as capital of co. with which it is to be registered being maximum amount which it is authorised to raise by issuing shares, & upon which it pays stamp duty
    - It is usually fixed at amount, which, it is estimated, co. will need, including working capital and reserve capital, if any.
  2. Issued capital
    - Such capital as co. issues from time to time for subscription.
    - It is that part of authorised capital which is offered by co. for subscription & includes shares allotted for consideration other than cash.
  3. Subscribed capital
    - Such part of capital which is for time being subscribed by members of co. It is nominal amount of shares taken up by public. Where any notice, advertisement or other official communication or any business letter, bill head or letter paper of co. states authorised capital, subscribed and paid-up capital must also be stated in equally conspicuous characters.
  4. Called-up capital
    - Such part of capital, which has been called for payment. It is total amount called up on shares issued.
  5. Paid-up capital
    - Total amount paid or credited as paid up on shares issued. It is equal to called up capital less calls in arrears.

## Shares Share in share capital of company & includes stock.

- Nature of shares
  - Share is an interest in co: Share is not sum of money but is interest measured by sum of money and made up of various rights contained in contract, including right to sum of money of more or less amount. Rights & obligations attaching to share are those prescribed by MOA & AOA
  - Shares are movable property: Shares or debentures or other interests of any member in co. shall be movable property transferable in manner provided by AOA of co.
  - Shares shall be numbered: Every share in co. having share capital, shall be distinguished by its distinctive number. Every share shall be numbered.
- Kinds of share capital
  - Equity share capital: All share capital which is not preference share capital;
    - with voting rights; or
    - with differential rights as to dividend, voting or otherwise in accordance with prescribed rules.
  - Preference share capital: Part of issued share capital of co. which carries or would carry preferential right with respect to-
    - payment of dividend, either as fixed amount or amount calculated at fixed rate, which may either be free of or subject to income-tax;
    - repayment, in case of winding up or repayment of capital, of amt of share capital paid-up or deemed to have been paid-up

# THE COMPANIES ACT, 2013 (Chart 5.6)

## MOA and AOA

### MEMORANDUM OF ASSOCIATION

Memorandum of Association of company is in fact its charter; it defines its constitution & scope of powers of Co. with which it has been established under Act. It is very foundation on which whole edifice of company is built

#### I. Object of registering memorandum of association:

- a) It contains object for which company is formed & therefore identifies possible scope of its operations beyond which its actions cannot go
- b) It enables shareholders, creditors & all those who deal with company to know what its powers are & what activities it can engage in
- c) MOA is public document u/s 399 of Companies Act, 2013. Every person entering into contract with company is presumed to have knowledge of conditions contained therein
- d) Shareholders must know purposes for which his money can be used by company & what risks he is taking in making investment
- e) Co. cannot depart from provisions contained in memorandum however imperative may be necessity for departure
- f) It cannot enter into contract or engage in any trade or business, which is beyond power conferred on it by memorandum. If it does so, it would be ultra vires company & void.
- g) As per Section 4, MOA shall be drawn up in such form as is given in Tables A, B, C, D & E in Schedule I of Companies Act, 2013
  - Table A is form for MOA of company limited by shares
  - Table B is form for MOA of company limited by guarantee & not having share capital
  - Table C is form for MOA of company limited by guarantee & having share capital
  - Table D is form for MOA of unlimited company
  - Table E is form for MOA of unlimited company & having share capital
- h) MOA & AOA of company must be as close to model forms, as possible, depending upon circumstances

#### II. Content of memorandum:

- a) Name of company (Name Clause) with last word "Limited" in case of public limited company, or last words "Private Limited" in case of private limited company. (Not applicable to Section 8 Co.)
  - Name including phrase 'Electoral Trust' may be allowed for Registration of companies to be formed under section 8 of Act, in accordance with Electoral Trusts Scheme, 2013 notified by CBDT
  - For section 8 Company name shall include words foundation, Forum, Association, Federation, Chambers, Confederation, council, Electoral trust & like etc.
  - Government company's name must end with word "Limited". In case of One Person Company, words "One Person Company", should be included below its name.
- b) State in which registered office of company (Registered Office clause) is to be situated
- c) objects for which company is proposed to be incorporated & any matter considered necessary in furtherance thereof (Object clause)
- d) liability of members of company (Liability clause), whether limited or unlimited, & also state,—
  - in case of company limited by shares, that liability of its members is limited to amount unpaid, if any, on shares held by them; and
  - in case of company limited by guarantee, amount up to which each member undertakes to contribute to assets of company in event of its being wound-up & to costs, charges & expenses of winding-up & for adjustment of rights of contributories among themselves;
- e) amount of authorized capital (Capital Clause) divided into share of fixed amounts & number of shares with subscribers to memorandum have agreed to take, indicated opposite their names, which shall not be less than one share. Co. not having share capital need not have this clause
- f) Desire of subscribers to be formed into company. Memorandum shall conclude with association clause. Every subscriber to Memorandum shall take at least one share, & shall write against his name, number of shares taken by him
- g) In case of OPC, name of person who, in event of death of subscriber, shall become member of company.
  - Memorandum must be printed, divided into paragraphs, numbered consecutively & signed by at least seven persons (two in case of private company & one in case of One Person Company) in presence of at least one witness, who will attest signatures
  - Particulars about signatories to memorandum as well as witness, as to their address, description, occupation etc., must also be entered. Minor cannot be signatory to memorandum as he is not competent to contract, his guardian, who subscribes to memorandum on his behalf, will be deemed to have subscribed in his personal capacity

### ARTICLES OF ASSOCIATION

Articles of association of company are its rules & regulations, which are framed to manage its internal affairs. Articles are internal regulations of Co.

1. Contains regulations: AOA of company shall contain regulations for management of company
2. Inclusion of matters: It shall also contain such matters, as are prescribed under rules. However, company may also include such additional matters in its articles as may be considered necessary for its management
3. Contain provisions for entrenchment: It may contain provisions for entrenchment (to protect something) to effect that specified provisions of articles may be altered only if conditions or procedures as that are more restrictive than those applicable in case of special resolution, are met or complied with
4. Manner of inclusion of entrenchment provision: Provisions for entrenchment shall only be made either on formation of company, or by amendment in articles agreed to by all members of company in case of Private & by SR in case of Public Co.
5. Notice to registrar of entrenchment provision: Where articles contain provisions for entrenchment, whether made on formation or by amendment, company shall give notice to Registrar of such provisions in such form & manner as may be prescribed.
6. Forms of articles: AOA shall be in respective forms specified in Tables F, G, H, I & J in Schedule I as may be applicable to such Co.
7. Model articles: Co. may adopt all or any of regulations contained in model articles applicable to such co.
8. Company registered after commencement of this Act: Such Co. do not exclude or modify regulations contained in model articles applicable to such company, those regulations shall be regulations of that company in same manner & to extent as if they were contained in duly registered articles of company

# THE COMPANIES ACT, 2013 (Chart 5.7)

## Doctrines

### DOCTRINE OF ULTRA VIRES

- Legal phrase "ultra vires" is applicable only to acts done in excess of legal powers of doers. This presupposes that powers in their nature are limited
- Act done or contract made by Co. which travels beyond powers not only of directors but also of Co. is wholly void & inoperative in law & is therefore not binding on Co.
- Co. can be restrained from employing its fund for purposes other than those sanctioned by MOA
- Impact of doctrine of ultra vires is that company can neither be sued on ultra vires transaction, nor can it sue on it
- MOA is "public document", it is open to public inspection. When one deals with Co, one is deemed to know about powers of company. If in spite of this you enter into transaction which is ultra vires company, you cannot enforce it against company

Key points about the Doctrine of Ultra Vires:

- When act is performed, which though legal in itself, is not authorized by object clause of MOA, or by statute, it is said to be ultravires company, & hence null & void
  - Act which is ultravires company cannot be ratified even by unanimous consent of all shareholders
  - Act which is ultravires directors, but intravires Co. can be ratified by members of company through resolution passed at GM
  - If act is ultravires Articles, it can be ratified by altering Articles by SR at GM
- Disadvantages of this doctrine outweigh its main advantage, namely to provide protection to shareholders & creditors
  - Although it may be useful to members in restraining activities of directors, it is only nuisance in so far as it prevents Co. from changing its activities in direction which is agreed by all
  - Purpose of doctrine of ultravires has been defeated as now object clause can be easily altered, by passing just SR of shareholders

### DOCTRINE OF INDOOR MANAGEMENT

Doctrine of Constructive Notice:

- Any person can inspect by electronic means any document kept by Registrar, or make record of same, or get copy or extracts of any document, including certificate of incorporation of any company, on payment of prescribed fees.
- MOA & AOA of company when registered with ROC, become public documents, & they are available for inspection to any person, on payment of nominal fees.
- It is, duty of every person dealing with company to inspect its documents & make sure that his contract is in conformity with their provisions but whether person reads them or not, it will be presumed that he knows contents of documents. This kind of presumed/implied notice is called constructive notice.

Constructive notice means:

- Whether person reads documents or not, he is presumed to have knowledge of contents of documents, He is not only presumed to have read documents but also understood them in their true perspective, &
- Every person dealing with company not only has constructive notice of memorandum & articles, but also of all other related documents, such as Special Resolutions etc., which are required to be registered with Registrar.

If person enters into contract which is beyond powers of company as defined in memorandum, or outside authority of directors as per memorandum or articles, he cannot acquire any rights under contract against company

Doctrine of Indoor Management (Turquand Rule):

- It is exception to doctrine of constructive notice. Doctrine of constructive notice does in no sense mean that outsiders are deemed to have notice of internal affairs of company
- Rule of Indoor Management is important to persons dealing with company through its directors or other persons
- As long as act is valid under articles, if done in particular manner, outsider dealing with company is entitled to assume that it has been done in manner required.

Exceptions to doctrine of Indoor Management:

- Actual or constructive knowledge of irregularity: Rule does not protect any person when person dealing with company has notice, whether actual or constructive, of irregularity
- Suspicion of Irregularity: Doctrine in no way, rewards those who behave negligently. Protection of "Turquand Rule" is not available where circumstances surrounding contract are suspicious & therefore invite inquiry.
- Forgery: Doctrine of Indoor management applies only to irregularities which might otherwise affect transaction but it cannot apply to forgery which must be regarded as nullity

## NEGOTIABLE INSTRUMENTS ( CHART 6.1)

### PROMISSORY NOTE

**Meaning:** "A 'promissory note' is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

#### Parties to promissory note

1. **Maker:** The person who makes the promise to pay is called the Maker. He is the debtor and must sign the instrument.
2. **Payee:** Payee is the person to whom the amount on the note is payable.

#### Essential Characteristics of a Promissory Note

- a. In writing- An oral promise to pay is not sufficient.
- b. There must be an express promise to pay. Mere acknowledgment of debt is insufficient.
- c. The promise to pay should be definite and unconditional.
- d. A promissory note must be signed by the maker otherwise it is incomplete & ineffective.
- e. Promise to pay money only.
- f. Promise to pay a certain sum.
- g. The maker and payee must be certain, definite and different persons.
- h. **Stamping:** A promissory note must be properly stamped

### BILLS OF EXCHANGE

**Meaning:** A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

#### Parties to the bill of exchange

- a. **Drawer:** The maker of a bill of exchange.
- b. **Drawee:** The person directed by the drawer to pay is called the 'drawee'. He is the person on whom the bill is drawn. On acceptance of the bill, he is called an acceptor and is liable for the payment of the bill. His liability is primary and unconditional.
- c. **Payee:** The person named in the instrument, to whom or to whose order the money is, by the instrument, directed to be paid.

#### Essential characteristics of bill of exchange

- (a) It must be in writing.
- (b) Must contain an express order to pay.
- (c) The order to pay must be definite and unconditional.
- (d) The drawer must sign the instrument.
- (e) Drawer, drawee, and payee must be certain. All these three parties may not necessarily be three different persons. One can play the role of two. But there must be two distinct persons in any case. As per Section 31 of RBI Act, 1934, a bill of exchange cannot be made payable to bearer on demand.
- (f) The sum must be certain.
- (g) The order must be to pay money only.
- (h) It must be stamped.

### CHEQUE

A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

1. **Drawer:** The person who draws a cheque i.e., makes the cheque (Debtor). His liability is primary and conditional.
2. **Drawee:** The specific bank on whom cheque is drawn. He makes the payment of the cheque. In case of cheque, drawee is always banker.
3. **Payee:** The person named in the instrument (i.e., the person in whose favour cheque is issued), to whom or to whose order the money is, by the instrument, directed to be paid, is called the payee. The payee may be the drawer himself or a third party.

#### Essential Characteristics of a cheque :

- a. all the essential characteristics of a bill of exchange
- b. Must be drawn on a specified banker.
- c. It must be payable on demand

## NEGOTIABLE INSTRUMENTS ( CHART 6.2)

S.no	Basis Promissory	Note	Bill of Exchange
1.	Definition	"A Promissory Note" is an instrument in writing (not being a banknote or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.	"A bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument.
2.	Nature of Instrument	In a promissory note, there is a promise to pay money.	In a bill of exchange, there is an order for making payment.
3.	Parties	In a promissory note, there are only 2 parties namely: i. the maker and ii. the payee	In a bill of exchange, there are 3 parties which are as under: i. the drawer ii. the drawee iii. the payee
4.	Acceptance	A promissory note does not require any acceptance, as it is signed by the person who is liable to pay.	A bills of exchange needs acceptance from the drawee.
5.	Payable to bearer	A promissory note cannot be made payable to bearer.	On the other hand, a bill of exchange can be drawn payable to bearer. However, it cannot be payable to bearer on demand.

### CLASSIFICATION OF NEGOTIABLE INSTRUMENTS

**Bearer Instrument** : It is an instrument where the name of the payee is blank or where the name of payee is specified with the words "or bearer" or where the last indorsement is blank. Such instrument can be negotiated by mere delivery.

**Order Instrument** : It is an instrument which is payable to a person or Payable to a person or his order or Payable to order of a person or where the last indorsement is in full, such instrument can be negotiated by indorsement and delivery.

**"Inland instrument"** : A promissory note, bill of exchange or cheque drawn or made in India and made payable in, or drawn upon any person resident in India shall be deemed to be an inland instrument.

**"Foreign instrument"** : A foreign instrument is one which is not an inland instrument.

Place where bill is drawn	Residence of Person on whom drawn and place where made payable	Nature of Instrument
P/N, BOE, C drawn/made outside India	on a person resident in or outside India + made payable in India	are foreign bills.
	on a person residing outside India + payable outside India.	
	on a person residing in India + payable outside India	

## NEGOTIABLE INSTRUMENTS ( CHART 6.3 )

### Inchoate and Ambiguous Instruments

1 - **Inchoate Instrument** : It means an instrument that is incomplete in certain respects. The drawer/ maker/ acceptor/ indorser of a negotiable instrument may sign and deliver the instrument to another person in his capacity leaving the instrument, either wholly blank or having written on it the word incomplete. Such an instrument is called an inchoate instrument and this gives a power to its holder to make it complete by writing any amount either within limits specified therein or within the limits specified by the stamp's affixed on it. The principle of this rule of an inchoate instrument is based on the principle of estoppel.

2 - **Liability on drawing inchoate instrument** : The person signing and delivering the inchoate instrument is liable both to a holder and holder in due course.

3 - The holder of such an instrument cannot recover the amount in excess of the amount intended to be paid by the signor.

4 - The holder in due course can, however, recover any amount on such instrument provided it is covered by the stamp affixed on the instrument.

### Ambiguous Instrument

"Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly." Thus, an instrument which is vague and cannot be clearly identified either as a bill of exchange, or as a promissory note, is an ambiguous instrument. that the holder may, at his discretion, treat it as either and the instrument shall thereafter be treated accordingly. Thus, after exercising his option, the holder cannot change that it is the other kind of instrument.

### NEGOTIATION AND ITS MODES

1 - when a negotiable instrument is transferred to any person with a view to constitute the person holder thereof, the instrument is deemed to have been negotiated.

2 - (i) A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.  
 (ii) A promissory note, bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof.

### Importance of Delivery in Negotiation

1 - The delivery can be, actual or constructive. Actual delivery takes place when the instrument changes hand physically. Constructive delivery takes place when the instrument is delivered to the agent, clerk or servant of the indorsee on his behalf or when the indorser, after indorsement, holds the instrument as an agent of the indorsee.

2 - The delivery is essential not only at the time of negotiation but also at the time of making or drawing of negotiable instrument. The rights in the instrument are not transferred to the indorsee unless after the indorsement the same has been delivered. If a person makes the indorsement of instrument but before the same could be delivered to the indorsee the indorser dies, the legal representatives of the deceased person cannot negotiate the same by mere delivery thereof.

Negotiation of instruments between the parties	How delivery is to be made
As between parties standing in immediate relation	Delivery to be effectual must be made by the party making, accepting, or endorsing the instrument, or by a person authorized by him in that behalf.
As between such parties and any holder of the instrument other than holder in due course	It may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

## NEGOTIABLE INSTRUMENTS ( CHART 6.4 )

### DISHONOUR OF CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS

1] - Where any cheque drawn by a person on an account maintained by him with a banker—

- for payment of any amount of money
- to another person from that account
- for the discharge, in whole or in part, of any debt or other liability, [A cheque given as gift or donation, or as a security or in discharge of a mere moral obligation, or for an illegal consideration, would be outside the purview of this section]
- is returned by the bank unpaid,
- either because of the—
  - amount of money standing to the credit of that account is insufficient to honor the cheque, or
  - that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both.

2] Cheque presented within validity period : The cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier.

3] Demand for the payment through the notice : the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid

4] Failure of drawer to make payment : the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

### RULES OF COMPENSATION

The compensation payable in case of dishonour of promissory note, bill of exchange or cheque, by any party liable to the holder or any endorsee, shall be determined by the following rules :

(a) the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it;

(b) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places;

(c) an endorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at 18% per annum from the date of payment until tender or realisation thereof, together with all expenses caused by the dishonour and payment;

(d) when the person charged and such endorser reside at different places, the endorser is entitled to receive such sum at the current rate of exchange between the two places;

(e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.



## NEGOTIABLE INSTRUMENTS ( CHART 6.5 )

### PRESENTMENT OF INSTRUMENTS

#### Presentment for acceptance

- 1 - A bill of exchange payable after sight must be presented to the drawee thereof for acceptance by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day.
- 2 - In default of such presentment, no party thereto is liable thereon to the person making such default. If the drawee cannot, after reasonable search, be found, the bill is dishonoured.

#### Drawee's time for deliberation

- 1 - The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee 48 hours (exclusive of public holidays) to consider whether he will accept it.

#### When presentment unnecessary

- (a) (i) If the maker, drawee or acceptor intentionally prevents the presentment of the instrument, or  
(ii) If the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or  
(iii) if the instrument being payable at some other specified place, neither he nor any person authorised to pay it attends at such place during the usual business hours, or  
(iv) if the instrument not being payable at any specified place, he cannot after due search be found;

(b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented—

- 1 - he makes a part payment on account of the amount due on the instrument,
- 2 - or promises to pay the amount due thereon in whole or in part,
- 3 - or otherwise waives his right to take advantage of any default in presentment for payment;

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

**BARODA**



**NAGPUR**



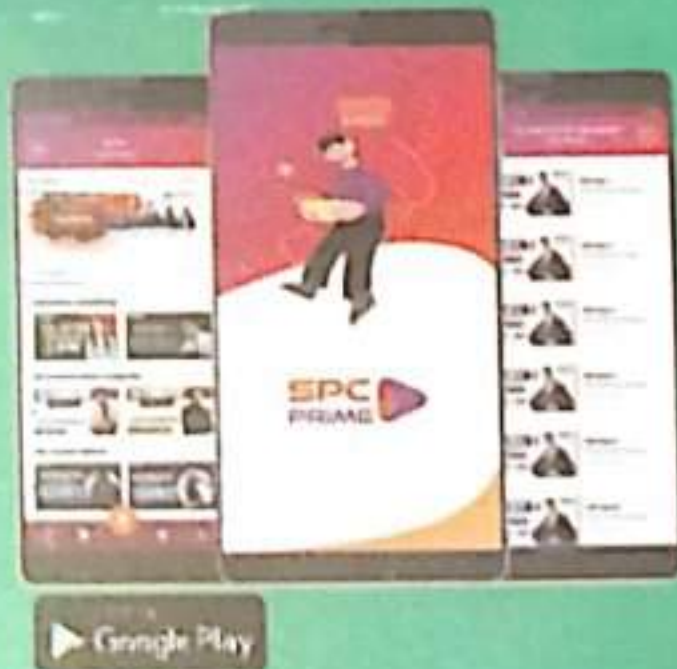
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