CA FOUNDATION LAW - CHART BOOK

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1	THE INDIAN CONTRACT ACT, 1872	1.1 - 1.17
2	THE SALE OF GOODS ACT, 1930	2.1 - 2.11
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THE INDIAN CONTRACT ACT,1872 (Chart 1.1)

Contract

"an agreement enforceable by law"

Two Essential Elements of 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

Proposal/Offer → Acceptance → Accepted Proposal/Agreement → Legal Enforceability → Contract

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.

Essential Elements of a Valid Contract

Given by Section 10 of the Act

1. Offer & Acceptance or Agreement
   - It is outcome of offer & acceptance
2. Free Consent
   - Two or more persons are said to consent when they agree upon same thing in same sense
3. Capacity of the parties
   - Every person is competent to contract who is of age of majority, sound mind, not otherwise disqualified from contracting
4. Consideration
   - It is referred to as 'quid pro quo' i.e. 'something in return'
5. Lawful Consideration and Object
   - Consideration & object of agreement must be lawful
6. Not expressly declared to be void
   - 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
   - Contract involves at least two parties- one party making offer & other party accepting it
2. Parties must intend to create legal obligations
   - There must be intention on part of parties to create legal relationship between them
3. Other Formalities to be complied with in certain cases
   - 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
4. Certainty of meaning
   - Agreement must be certain & not vague or indefinite
5. Possibility of performance of an agreement
   - Terms of agreement should be capable of performance. Agreement to do an act impossible in itself cannot be enforced

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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 betwen 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 betwen 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.

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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

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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

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

Communication of Offer and Acceptance

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) Commucication 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

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THE INDIAN CONTRACT ACT,1872 (Chart 1.5)

Communication of performance

- Acceptance of proposal would be viewed from two angles :

i) from viewpoint of proposer and

ii) other from viewpoint of acceptor himself

- From viewpoint of proposer, when acceptance is put in to a course of transmission, when it would be out of power of acceptor.
- From viewpoint of acceptor, it would be complete when it comes to knowledge of proposer
- Offeree may be required to communicate performance by way of acceptance
- It is not enough if offeree merely performs act but he should also communicate his performance unless offer include term that mere performance will constitute acceptance
- Following are three important principles:

i) Offer, to be capable of acceptance, must contain definite promise by offeror that he would be bound provided terms specified by him are accepted

ii) Offer may be made either to particular person or to public at large

iii) If offer is made in form of promise in return for act, performance of that act, even without any communication thereof, is to be treated as acceptance of offer

Revocation of Offer and Acceptance

1. Communication of revocation

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

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

ii) as against person to whom it is made, when it comes to his knowledge

- Recovation of Offer: Offeror can revoke his offer before it is accepted. If he does so, offeree cannot create contract by accepting revoked offer
- Offer may be revoked by offeror before its acceptance, even though he had originally agreed to hold it open for definite period of time. So long as it is mere offer, it can be withdrawn whenever offeror desires
- Revocation of Proposal: Proposal can be revoked at any time before communication of its acceptance is complete as against proposer
- Revocation of Acceptance: Acceptance may be revoked at any time before communication of acceptance is complete as against acceptor

2. Contract through post : Acceptor or can revoke his acceptance any time before letter of acceptance reaches offeror, if revocation telegram arrives before or at same time with letter of acceptance, revocation is absolute

3. Contract over Telephone: Contract is formed as soon as offer is accepted but offeree must make it sure that his acceptance is received by offeror, otherwise there will be no contract, as communication of acceptance is not complete. If telephone unexpectedly goes dead during conversation, acceptor must confirm again that words of acceptance were duly heard by offeror

4. Revocation of proposal otherwise than by communication: When proposal is made, proposer may not wait indefinitely for its acceptance. Offer can be revoked otherwise than by communication or sometimes by lapse

5. Modes of revocation of offer:

i) By notice of revocation

ii) By lapse of time: Time for acceptance can lapse if acceptance is not given within specified time & where no time is specified, then within reasonable time

iii) By non fulfillment of condition precedent: Where acceptor fails to fulfill condition precedent to acceptance proposal gets revoked

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

v) By counter offer

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

vii) By subsequent illegality

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THE INDIAN CONTRACT ACT,1872 (Chart 1.6)

Consideration

Meaning & Definition

- Consideration is price agreed to be paid by promisee for obligation of promisor
- Section 2(d) defines consideration as follows: When at desire of promisor, promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called consideration for promise.

i) Consideration is act- doing something
ii) Consideration is abstinence- abstain from doing something
iii) Consideration must be at desire of promisor
iv) Consideration may move from promisee or any other person
v) Consideration may be past, present or future

- Consideration = Promise / Performance that parties exchange with each other
- Form of consideration = Some benefit, right or profit to one party / some detriment, loss, or forbearance to other

Legal rules regarding consideration

1. Consideration must move at desire of promisor: Consideration must be offered by promisee or third party at desire or request of promisor. This implies "return" element of consideration
2. Consideration may move from promisee or any other person: Consideration may proceed from promisee or any other person who is not party to contract. There can be stranger to consideration but not stranger to contract
3. Executed & executory consideration: Consideration which consists in performance of act is said to be executed. When it consists in promise, it is said to be executory
4. Consideration may be past, present or future: In order to support promise, past consideration must move by previous request. It is a general principle that consideration is given & accepted in exchange for promise
5. Consideration need not be adequate: Consideration need not to be of any particular value. Something in return need not be equal to something given
6. Performance of what one is legally bound to perform: Consideration must not be performance of existing duty. Performance of act by person who is legally bound to perform same cannot be consideration for contract
7. Consideration must be real and not illusory: It must be something to which law attaches some value. If it is legally or physically impossible it is not considered valid consideration
8. Consideration must not be unlawful, immoral, or opposed to public policy

Suit by third party to Contract Doctrine of privity of contract

- Consideration for agreement may proceed from third party, third party cannot sue on contract. Only person who is party to contract can sue on it.
- Exceptions to the above rule : Even stranger to contract may enforce claim in following cases:

i) In case of trust, beneficiary can enforce his right under trust, though he was not party to contract between settler & trustee
ii) In case of family settlement, if terms of settlement are reduced into writing, members of family who originally had not been parties to settlement may enforce agreement
iii) In the case of certain marriage contracts, female member can enforce provision for marriage expenses made on the partition of Hindu Undivided Family
iv) In the case of assignment of a contract / arrangements, provision may be made for the benefit of a person. He may file the suit though he is not a party to the agreement
v) Acknowledgement or estoppel – where promisor by his conduct acknowledges himself as agent of third party, it would result into binding obligation towards third party
vi) In case of covenant running with land, person who purchases land with notice that owner of land is bound by certain duties affecting land, covenant affecting land may be enforced by successor of seller
vii) Contracts entered into through agent: Principal can enforce contracts entered by his agent where agent has acted within scope of his authority in name of principal

Validity of an Agreement without Consideration

1. Natural Love and Affection: Conditions to be fulfilled u/s 25(1)

i) It must be made out of natural love & affection between parties
ii) Parties must stand in near relationship to each other
iii) It must be in writing
iv) It must also be registered under law

2. Compensation for past voluntary services: Promise to compensate, wholly or in part, person who has already voluntarily done something for promisor, is enforceable u/s 25(2). In order that promise to pay for past voluntary services be binding, following essential factors must exist:

i) Services should have been rendered voluntarily
ii) Services must have been rendered for promisor
iii) Promisor must be in existence at time when services were rendered
iv) Promisor must have intended to compensate promisee

3. Promise to pay time barred debt: Where promise in writing signed by person making it or by his authorised agent, is made to pay debt barred by limitation it is valid without consideration
4. Agency: No consideration is necessary to create agency
5. Completed gift: In case of completed gifts, rule no consideration no contract does not apply. Gifts do not require any consideration
6. Bailment: No consideration is required to effect contract of bailment
7. Charity: If promisee undertakes liability on promise of person to contribute to charity, there contract shall be valid

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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 necessaries: Claim for necessaries 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

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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 temporaily 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.

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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:

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

ii) active concealment of fact by one having knowledge or belief of fact

iii) promise made without any intention of performing it;

iv) any other act fitted to deceive;

v) any such act or omission as law specially declares to be fraudulent

• Essential elements of fraud:

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

b) Representation must be related to fact

c) Representation should be made before conclusion of contract with intention to induce other party to act upon it

d) 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

e) Other party must have been induced to act upon representation or assertion

f) Other party must have relied upon representation & must have been deceived

g) 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:

a) He can rescind contract within reasonable time

b) He can sue for damages

c) 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:

1. Duty of person to speak: Where circumstances of case are such that it is duty of person observing silence to speak:

a) Fiduciary Relationship

b) Contracts of Insurance

c) Contracts of marriage

d) Contracts of family settlement

e) Share Allotment contracts

2. 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 -

a) 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

b) 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

c) causing, however, innocently, party to agreement to make mistake as to substance of thing which is subject of agreement

• There is misrepresentation:

a) 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

b) When there is breach of duty by person without any intention to deceive which brings advantage to him

c) 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

DESIGNED BY : CA ANKITA PATNI

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.

• Euect 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:

1. 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

2. 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

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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

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INDIAN CONTRACT ACT,1872 (Chart 1.11)

Performance Of Contract

Obligations of Parties to Contract

- Parties to contract must either perform, or offer to perform, their respective promises unless such performance is dispensed with or excused under provisions of Contract Act or of any other law
- Promises bind representatives of promisor in case of death of such promisor before performance, unless contrary intention appears from contract

Person by whom promise is to be performed-Section 40

- If it appears from nature of case that it was intention of parties to any contract that any promise contained in it should be performed by promisor himself, such promise must be performed by promisor
- In other cases, promisor or his representatives may employ competent person to perform it
- Promise under contract may be performed, as circumstances may permit, by promisor himself, or by his agent or his legal representative

1. Promisor himself: If there is something in contract to show that it was intention of parties that promise should be performed by promisor himself, such promise must be performed by promisor
2. Agent: Where personal consideration is not foundation of contract, promisor or his representative may employ competent person to perform it
3. Legal Representatives: Legal representatives of deceased promisor are bound to perform contracts but their liability is limited to value of property they inherit from deceased
4. Third persons: Performance by stranger, if accepted by promisee, this results in discharging promisor, although latter has neither authorised not ratified act of third party
5. Joint promisors: When two or more persons have made joint promise all such persons must jointly fulfill promise

Distinction between Succession & Assignment

- When benefits of contract are succeeded to by process of law, then both burden & benefits attaching to contract, may sometimes devolve on legal heir.
- In matter of assignment, benefit of contract can only be assigned but not liabilities thereunder. This is because when liability is assigned, third party gets involved therein

Effect of refusal to accept offer of performance

- Where promisor has made offer of performance to promisee, & offer has not been accepted, then promisor is not responsible for non performance, nor does he thereby lose his rights under contract
- Every offer must fulfill following conditions :

i) it must be unconditional;
ii) it must be made at proper time and place, and circumstances
iii) if offer is offer to deliver anything to promisee, then promisee must have reasonable opportunity of seeing that thing offered is thing which promisor is bound by his promise to deliver

- Offer to one of several joint promisees has same legal consequences as offer to all of them

Effect of refusal of party to perform promise

- When party to contract has refused to perform, or disabled himself from performing his promise in its entirety, promisee may put end to contract, unless he has signified, by words or conduct, his acquiescence in its continuance
- Two rights accrue to aggrieved party:

i) to terminate contract;
ii) to indicate by words or by conduct that he is interested in its continuance

- In case promisee decides to continue, he would not be entitled to put end to contract on this ground subsequently

Liability of Joint Promisor and Promisee

1. Devolution of joint liabilities (Section 42)
- When two or more persons have made joint promise, then, unless contrary intention appears by contract, all such persons, during their joint lives & after death of any of them, his representative jointly with survivor or survivors & after death of last survivor, representatives of all jointly, must fulfil promise

2. Any one of joint promisors may be compelled to perform (Section 43)
- When two or more persons make joint promise, promisee may, in absence of express agreement to contrary, compel any one or more of such joint promisors to perform whole of promise:

i) Each promisor may compel contribution: If one of joint promisors is made to perform whole contract, he can call for contribution from others
ii) Sharing of loss by default in contribution: remaining joint promisors must bear the loss arising from such default in equal shares

3. Effect of release of one joint promisor- Section 44
- Where two or more persons have made joint promise, release of one of such joint promisors by promisee does not discharge other joint promisor or joint promisors, neither does it free joint promisors so released from responsibility to other joint promisor or promisors

4. Rights of Joint Promisees :
- When person has made promise to two or more persons jointly, then unless contrary intention appears from contract, right to claim performance rests, as between him and them, with them during their joint lives, & after death of any of them, with representative of such deceased person jointly with survivor or survivors, & after death of last survivor, with representatives of all jointly

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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 promise, 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 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

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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.

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INDIAN CONTRACT ACT,1872 (Chart 1.16)

Contingent Contracts

"A contact 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 Contigent 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 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 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 bewagering 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 mutuality of lose and gain	Contingent contract is **not based** on doctrine of mutuality 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.**

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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

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

Cases deemed as a Quasi Contract

1. Claim for necessaries 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 necessaries 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, plaintif 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.

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THE SALE OF GOODS ACT, 1930 (Chart 2.1)

Important Definitions

1. **Buyer & Seller:** Buyer means person who buys or agrees to buy goods. Seller means person who sells or agrees to sell goods
2. **Goods:** Goods means every kind of movable property other than actionable claims & money; & includes stock & shares, growing crops, grass, & things attached to or forming part of the land, which are agreed to be severed before sale or under contract of sale

Classification of Goods:

i) **Existing Goods** are such goods as are in existence at time of contract of sale, i.e., those owned or possessed by seller at time of contract of sale

a) **Specific goods** means goods identified and agreed upon at the time contract of sale is made

b) **Ascertained Goods** are those goods which are identified in accordance with agreement after contract of sale is made

c) **Unascertained goods** are goods which are not specifically identified or ascertained at time of making of contract

ii) **Future Goods** means goods to be manufactured or produced or acquired by seller after making contract of sale

iii) **contingent goods:** Acquisition of which by seller depends upon uncertain contingency (uncertain event) are called contingent goods

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

i) **Actual Delivery:** When goods are physically delivered to buyer

ii) **Constructive Delivery:** When it is effected without any change in custody or actual possession of the thing as in case of delivery by attornment

iii) **Symbolic delivery:** When there is delivery of thing in token of transfer of something else

Sale and Agreement to Sell (Section 4)

- Contract of sale of goods is contract whereby seller transfers or agrees to transfer property in goods to buyer for price. There may be contract of sale between one part-owner & another. Contract of sale may be absolute or conditional.
- Where under contract of sale property in goods is transferred from seller to buyer, contract is called sale, but where transfer of property in goods is to take place at future time or subject to some condition thereafter to be fulfilled, contract is called agreement to sell.
- Agreement to sell becomes sale when time elapses or conditions are fulfilled subject to which property in goods is to be transferred

Distinction between Sale and Agreement to Sell

Basis of difference	Sale	Agreement to sell
Transfer of property	The property in the goods passes to the buyer immediately.	Property in the goods passes to the buyer on future date or on fulfilment of some condition.
Nature of contract	It is an **executed contract**. i.e. contract for which consideration has been paid.	It is an **executory contract**. i.e. contract for which consideration is to be paid at a future date.
Remedies for breach	The seller can sue the buyer for the price of the goods because of the passing of the property therein to the buyer.	The aggrieved party can sue for damages only and not for the price, unless the price was payable at a stated date.
Liability of parties	A subsequent loss or destruction of the goods is the liability of the buyer.	Such loss or destruction is the liability of the seller.
Burden of risk	Risk of loss is that of buyer since risk follows ownership.	Risk of loss is that of seller.
Nature of rights	Creates **Jus in rem**	Creates **Jus in personam**
Right of resale	The seller cannot resell the goods.	The seller may sell the goods since ownership is with the seller.

- Following elements must co-exist so as to constitute contract of sale of goods-

i) There must be at least two parties, seller & buyer

ii) Subject matter of contract must necessarily be goods covering only movable property. It may be either existing goods, owned or possessed by seller or future goods.

iii) Price in money (not in kind) should be paid or promised. But there is nothing to prevent consideration from being partly in money & partly in kind.

iv) Transfer of property in goods from seller to buyer must take place. Contract of sale is made by offer to buy or sell goods for price by one party & acceptance of such offer by other

v) Contract of sale may be absolute or conditional

vi) All other essential elements of valid contract must be present in contract of sale

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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 diuerence	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

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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, agreements 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

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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):

a) Stipulation in contract of sale with reference to goods which are subject thereof may be condition or warranty

b) Condition is stipulation essential to main purpose of contract, breach of which gives rise to right to treat contract as repudiated

c) 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

d) 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 diuerences	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)

1. 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
2. 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
3. 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:

a) Where buyer altogether waives performance of condition. Party may for his own benefit, waive stipulation

b) 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

c) Where contract is non-severable & buyer has accepted either whole goods or any part thereof

d) 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

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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.

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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.

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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 untilthe 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

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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:

a) When seller has assented to sale, mortgage or other disposition of goods made by buyer

b) 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:

i) If last-mentioned transfer is by way of sale, right of lien or stoppage in transit is defeated, or

ii) 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:

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

ii) 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, eller may resell goods.

It may be noted that in such cases, on resale of goods, seller is also entitled to:

a) Recover difference between contract price & resale price, from original buyer, as damages.

b) 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

iii) 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 re-sale has not been given by seller to original buyer

iv) Are-sale by seller where right of re-sale isexpressly 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.

v) 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 amand are in addition to his rights against goods.

right against buyer are as follows:

1. 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

2. 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.

3. 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'.

4. 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.

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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, is excluded by an agreement to contrary. It is open to parties to stipulate anything regard to taxation.

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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

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THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.2)

Partnership Distinguished from other forms of Organisation

Partnership Vs. Joint Stock Company

Basis	Partnership	Joint Stock Company
Legal status	A firm is not legal entity i.e., it has no legal personality distinct from the personalities of its constituent members.	A company is a separate legal entity distinct from its members (*Salomon v. Salomon*).
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.
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.
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.
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.
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.
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.
Registration	Registration is not compulsory in the case of partnership.	A company cannot come into existence unless it is registered under the Companies Act, 2013.
Winding up	A partnership firm can be dissolved at any time if all the partners agree.	A company, being a legal person is either wind up by the National Company Law Tribunal or its name is struck of by the Registrar of Companies.
Number of membership	According to section 464 of the Companies Act, 2013, the number of partners in any association shall not exceed 100. However, the Rule given under the Companies *(Miscellaneous) Rules, 2014* restrict the present limit to 50.	A private company may have as many as 200 members but not less than two and a public company may have any number of members but not less than seven. A private Company can also be formed by one person known as one person Company.
Duration of existence	Unless there is a contract to the contrary, death, retirement or insolvency of a partner results in the dissolution of the firm.	A company enjoys a perpetual succession.

Partnership Vs. Club

Basis of Difference	Partnership	Club
Definition	It is an association of persons formed for earning profits from a business carried on by all or any one of them acting for all.	A club is an association of persons formed with the object not of earning profit, but of promoting some beneficial purposes such as improvement of health or providing recreation for the members, etc.
Relationship	Persons forming a partnership are called partners and a partner is an agent for other partners.	Persons forming a club are called members. A member of a club is not the agent of other members.
Interest in the property	Partner has interest in the property of the firm.	A member of a club has no interest in the property of the club.
Dissolution	A change in the partners of the firm affect its existence.	A change in the membership of a club does not affect its existence.

Partnership Vs. Co-ownership

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

Partnership Vs. Association

Basis 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.

Partnership vs. Hindu Undivided Family

Basis of difference	Partnership	Joint Hindu family
Mode of creation	Partnership is created necessarily by an agreement.	The right in the joint family is created by status means its creation by birth in the family.
Death of a member	Death of a partner ordinarily leads to the dissolution of partnership.	The death of a member in the Hindu undivided family does not give rise to dissolution of the family business.
Management	All the partners are equally entitled to take part in the partnership business.	The right of management of joint family business generally vests in the Karta, the governing male member or female member of the family.[1]
Authority to bind	Every partner can, by his act, bind the firm.	The Karta or the manager, has the authority to contract for the family business and the other members in the family.
Liability	In a partnership, the liability of a partner is unlimited.	In a Hindu undivided family, only the liability of the Karta is unlimited, and the other coparcener are liable only to the extent of their share in the profits of the family business.
Calling for accounts on closure	A partner can bring a suit against the firm for accounts, provided he also seeks the dissolution of the firm.	On the separation of the joint family, a member is not entitled to ask for account of the family business.
Governing Law	A partnership is governed by the Indian Partnership Act, 1932.	A Joint Hindu Family business is governed by the Hindu Law.
Minor's capacity	In a partnership, a minor cannot become a partner, though he can be admitted to the benefits of partnership, only with the consent of all the partners.	In Hindu undivided family business, a minor becomes a member of the ancestral business by the incidence of birth. He does not have to wait for attaining majority.
Continuity	A firm subject to a contract between the partners gets dissolved by death or insolvency of a partner.	A Joint Hindu family has the continuity till it is divided. The status of Joint Hindu family is not thereby affected by the death of a member.
Number of Members	In case of Partnership number of members should not exceed 50.	Members of HUF who carry on a business may be unlimited in number.
Share in the business	In a partnership each partner has a defined share by virtue of an agreement between the partners.	In a HUF, no coparceners has a definite share. His interest is a fluctuating one. It is capable of being enlarged by deaths in the family diminished by births in the family.

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THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.3)

Kinds of Partnership

With regard to duration

Partnership at will (Section 7)

- Partnership at will is partnership when:
  i) no fixed period has been agreed upon for duration of partnership; &
  ii) there is no provision made as to determination of partnership.
- These 2 conditions must be satisfied before partnership can be regarded as partnership at will
- Where there is agreement between partners either for duration of partnership or for determination of partnership, it is not partnership at will
- Where partnership entered into for fixed term is continued after expiry of such term, it is to be treated as having become partnership at will
- Partnership at will may be dissolved by partner by giving notice in writing to all other partners of his intention to dissolve same

Partnership for fixed period

- Where provision is made by contract for duration of partnership, partnership is called 'partnership for fixed period'
- It is partnership created for particular period of time
- Such partnership comes to end on expiry of fixed period

With regard to extent of business

Particular partnership

- Partnership may be organized for prosecution of single adventure as well as for conduct of continuous business
- Where person becomes partner with another person in any particular adventure or undertaking partnership is called 'particular partnership'
- Partnership, constituted for single adventure or undertaking is, subject to any agreement, dissolved by completion of adventure or undertaking

General partnership

- Where partnership is constituted with respect to business in general, it is called general partnership
- In case of particular partnership liability of partners extends only to that particular adventure or undertaking, but it is not so in case of general partnership

Partnership Deed

- Partnership is result of agreement. It may be in writing or formed verbally. But it is desirable to have partnership agreement in writing to avoid future disputes.
- Document in writing containing various terms & conditions as to relationship of partners to each other is called 'partnership deed'. It should be drafted with care & be stamped.
- Where partnership comprises immovable property, instrument of partnership must be in writing, stamped & registered under Registration Act
- Partnership deed may contain following information:-

1. Name of partnership firm
2. Names of all partners
3. Nature & place of business of firm
4. Date of commencement of partnership
5. Duration of partnership firm
6. Capital contribution of each partner
7. Profit Sharing ratio of partners
8. Admission & Retirement of partner
9. Rates of interest on Capital, Drawings & loans
10. Provisions for settlement of accounts in case of dissolution of firm
11. Provisions for Salaries or commissions, payable to partners
12. Provisions for expulsion of partner in case of gross breach of duty or fraud

- Partnership firm may add or delete any provision according to needs of firm

Types of Partners

1. Active or Actual or Ostensible partner: He acts as agent of other partners for all acts done in ordinary course of business. In event of his retirement, he must give public notice in order to absolve himself of liabilities for acts of other partners done after his retirement
2. Sleeping or Dormant Partner: They share profits & losses & are liable to third parties for all acts of firm. They are, however not required to give public notice of their retirement from firm
3. Nominal Partner: Person who lends his name to firm, without having any real interest in it, is called nominal partner. He is not entitled to share profits of firm. Neither he invest in firm nor takes part in conduct of business. He is, however liable to third parties for all acts of firm
4. Partner in profits only: Partner who is entitled to share profits only without being liable for losses is known as partner for profits only and also liable to third parties for all acts of profits only
5. Incoming partners: Person who is admitted as partners into already existing firm with consent of all existing partners is called as "incoming partner". He is not liable for any act of firm done before his admission as partner
6. Outgoing Partner: Partner who leaves firm in which rest of partners continue to carry on business is called retiring or outgoing partner. Such partner remains liable to third parties for all acts of firm until public notice is given of his retirement
7. Partner by holding out (Partnership by estoppel) (Section 28): Where man holds himself out as partner, or allows others to do it, he is then stopped from denying character he has assumed and upon faith of which creditors may be presumed to have acted. Person may himself, by his words or conduct have induced others to believe that he is partner or he may have allowed others to represent him as partner. Result in both cases is identical. It is only person to whom representation has been made and who has acted thereon that has right to enforce liability arising out of 'holding out'

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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-

a) Every partner has right to take part in conduct of business

b) Every partner is bound to attend diligently to his duties in conduct of business

c) 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

d) 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-

a) Partner is not entitled to receive remuneration for taking part in conduct of business

b) Partners are entitled to share equally in profits earned, & shall contribute equally to losses sustained by firm

c) Where partner is entitled to interest on capital subscribed by him such interest shall be payable only out of profits

d) 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

e) Firm shall indemnify partner in respect of payments made & liabilities incurred by him-

i) in ordinary & proper conduct of business, &

ii) 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

f) Partner shall indemnify firm for any loss caused to it by his wilful neglect in conduct of business of firm

- Partner has following Rights:

i) 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

ii) 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

iii) 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

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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

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THE INDIAN PARTNERSHIP ACT, 1932 (Chart 3.6)

Relation of Partners to Third Parties

1. Partner to be Agent of Firm (Section 18)
- Partner is agent of firm for purposes of business of firm
- Partner indeed virtually embraces character of both principal & agent
- So far as he acts for himself & in his own interest in common concern of partnership, he may properly be deemed principal & so far as he acts for his partners, he may properly be deemed as agent

2. Implied Authority of Partner as Agent of Firm (Section 19)
- 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
- In absence of any usage or custom of trade to contrary, implied authority of partner does not empower him to:

a) Submit dispute relating to business of firm to arbitration
b) open banking account on behalf of firm in his own name
c) compromise or relinquish any claim or portion of claim by firm
d) withdraw suit or proceedings filed on behalf of firm
e) admit any liability in suit or proceedings against firm
f) acquire immovable property on behalf of firm
g) transfer immovable property belonging to firm
h) enter into partnership on behalf of firm

- 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

3. Extension & Restriction Of Partners' Implied Authority (Section 20)
- Implied authority of partner may be extended or restricted by contract between partners
- Under following conditions, restrictions imposed on implied authority of partner by agreement shall be effective against third party:

a) third party knows about restrictions, &
b) third party does not know that he is dealing with partner in firm

4. Partner's Authority In An Emergency (Section 21)
- 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, & such acts bind firm

Effect of Admission by Partner Section 23

- Admission or representation made by partner concerning affairs of firm is evidence against firm, if it is made in ordinary course of business
- 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.
- Section speaks of admissions & 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.

Effect of Notice to Acting Partner Section 24

- 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
- Notice to one is equivalent to notice to rest of partners of firm, just as notice to agent is notice to his principal
- Notice must be actual & not constructive. It must be received by working partner & 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

Liability to Third Party

1. Liability Of Partner For Acts Of Firm (Section 25): Every partner is liable, jointly with all other partners & also severally, for all acts of firm done while he is partner. Partners are jointly & 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.

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.
- 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:

a) in ordinary course of business of firm
b) with authority of partners

3. Liability Of firm For Misapplication By Partners (Section 27): Where-

a) partner acting within his apparent authority receives money or property from third party & misapplies it, or
b) firm in course of its business receives money or property from third party, & money or property is misapplied by any of partners while it is in custody of firm,

firm is liable to make good loss

Rights of Transferee of Partner's Interest Section 29

- 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 & privileges as original partner.
- Rights of such transferee are as follows:

1. During continuance of partnership, such transferee is not entitled
a) to interfere with conduct of business,
b) to require accounts, or
c) to inspect books of firm
He is only entitled to receive share of profits of transferring partner & he is bound to accept profits as agreed to by partners, i.e., he cannot challenge accounts
2. On dissolution of firm or on retirement of transferring partner, transferee will be entitled, against remaining partners:
a) to receive share of assets of firm to which transferring partner was entitled, &
b) for purpose of ascertaining share, he is entitled to account as from date of dissolution
- Partner cannot by transferring his own interest, make anybody else partner in his place, unless other partners agree to accept that person as partner

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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 euect.

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 Offcial 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

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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.

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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-ou 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

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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.

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 auect 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.

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

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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 not withstanding 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 suflcient 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 attainting 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.

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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-

a) he has been found to be of unsound mind by Court

b) he is undischarged insolvent; or

c) he has applied to be adjudicated as insolvent & his application is pending

Minimum number of partners (Section 6)

ii) 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)

individuals & at least one of them shall be resident in India

ii) If in LLP, all partners are bodies corporate or in which one or more partners are individuals & bodies corporate, at least 2 individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners

iii) Resident in India: For purposes of this section, term "resident in India" means person who has stayed in India for period of not less than 182 days during immediately preceding one year

Characteristic/Salient Features of LLP

1. Body corporate: LLP is body corporate formed & incorporated under this Act & is legal entity separate from its partners
2. 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
3. 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
4. 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
5. LLP Agreement: Mutual rights and duties of the partners within LLP are governed by agreement between partners
6. 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
7. 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
8. Limited Liability: Every partner of a LLP is, for purpose of business of LLP, agent of LLP, but not of other
9. Management of Business: Partners in LLP are entitled to manage business of LLP. But only designated partners are responsible for legal compliances partners
10. 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
11. 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
12. Investigation: Central Government shall have powers to investigate the affairs of LLP
13. Compromise or Arrangement: Any compromise or arrangement including mergerand amalgamation of LLPs shall be in accordance with provisions of LLP Act, 2008
14. 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
15. E-Filling of Documents: Every form or application of document required to be filed or delivered under the act and rules made thereunder, shall be filed in computer readable electronic form on its website www.mca.gov. in & authenticated by a partner or designated partner of LLP by the use of electronic or digital signature.
16. 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.

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THE LIMITED LIABILITY PARTNERSHIP ACT, 2008 (Chart 4.2)

INCORPORATION OF LLP

Incorporation document (Section 11)

1. For LLP to be incorporated:
a) 2 or more persons associated for carrying on lawful business with view to profit shall subscribe their names to incorporation document;
b) incorporation document shall be filed in prescribed manner & fees, with Registrar of State in which registered office of LLP is to be situated; &
c) Statement to be filed:
i) there shall be filed along with incorporation document, statement in prescribed form,
ii) made by either advocate, or CS or CA or CWA, who is engaged in formation of LLP &
iii) by any one who subscribed his name to incorporation document, that all requirements of this Act & rules made thereunder have been complied with,
iv) in respect of incorporation & matters precedent & incidental thereto

2. Incorporation document shall:
a) be in prescribed form;
b) state name of LLP;
c) state proposed business of LLP;
d) state address of registered office of LLP;
e) state name & address of each of persons who are to be partners of LLP on incorporation;
f) state name & address of persons who are to be designated partners of LLP on incorporation;
g) contain such other information concerning proposed LLP as may be prescribed
3. If person makes statement as discussed above which he-
a) knows to be false; or
b) does not believe to be true, shall be punishable with imprisonment upto 2 years & fine Rs. 10,000 to Rs. 5 Lakhs

Incorporation by registration (Section 12)

1. When requirements imposed by clauses (b) & (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 -
a) register incorporation document; &
b) give certificate that LLP is incorporated by name specified therein
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
3. Certificate issued under clause (b) of sub-section (1) shall be signed by Registrar & authenticated by his official seal
4. Certificate shall be conclusive evidence that LLP is incorporated by name specified therein

Registered office of LLP and change therein (Section 13)

1. Every LLP shall have registered office to which all communications & notices may be addressed & where they shall be received
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 & any other address specifically declared by LLP for purpose in prescribed form & manner
3. LLP may change place of its registered office & file notice of change with Registrar in prescribed form & manner & such change shall take euect only upon such filing
4. If LLP contravenes provisions of this section, LLP & its every partner be punishable with fine Rs. 2,000 to Rs. 25,000

Effect of registration (Section 14)

On Registration, LLP shall by its name, be capable of -
i) suing & being sued
ii) acquiring, owning, holding, & developing or disposing of property, whether movable or immovable, tangible or intangible
iii) having common seal, if it decides to have one &
iv) doing and suffering such other acts & things as bodies corporate may lawfully do & suffer

Name (Section 15)

1. Every LLP shall have either words "limited liability partnership" or acronym "LLP" as last words of its name
2. No LLP be registered by name which, in opinion of CG is -
a) undesirable; or
b) identical or too nearly resembles to other partnership firm or LLP or body corporate or registered trade mark, or trade mark which is subject matter of application for registration of any other person under Trade Marks Act, 1999

Reservation of Name (Section 16)

1. Person may apply in prescribed form & manner with fee to Registrar for reservation of name set out in application as-
a) name of proposed LLP; or
b) name to which LLP proposes to change its name
2. Upon receipt of application under sub-section (1) & 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 from date of intimation by Registrar

Change of name of LLP (Section 17)

1. Where CG is satisfied that LLP has been registered under name which-
a) is name referred to in Section 15(2); or
b) is identical with or too nearly resembles name of any other LLP or body corporate or other name as to be likely to be mistaken for it
CG may direct such LLP to change its name, & LLP shall comply with said direction within 3 months after date of direction or such longer period as CG may allow
2) i) LLP which fails to comply with direction given under sub-section (1) be punishable with fine Rs. 10,000 to Rs. 5 Lakhs
ii) Designated partner of such LLP be punishable with fine Rs. 10,000 to Rs. 1 Lakh

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THE LIMITED LIABILITY PARTNERSHIP ACT, 2008 (Chart 4.3)

PARTNERS AND THEIR RELATIONS

I. Eligibility to be partners (Section 22): On incorporation of LLP, persons who subscribed their names to incorporation document shall be its partners & other person may become partner of LLP as per LLP agreement

II. Relationship of partners (Section 23):

1. Mutual rights & duties of LLP & its partners be governed by LLP agreement between partners, or between LLP & its partners
2. LLP agreement & any changes be filed with Registrar in prescribed form, manner & accompanied by prescribed fees
3. Agreement in writing made before incorporation of LLP between persons who subscribe their names to incorporation document may impose obligations on LLP, provided such agreement is ratified by all partners after incorporation of LLP
4. In absence of agreement as to any matter, mutual rights & duties of partners & mutual rights & duties of LLP & partners be determined by provisions set-out in First Schedule

III. Cessation of partnership interest (Section 24):

1. Person may cease to be partner of LLP in accordance with agreement, by giving notice in writing of not less than 30 days to other partners of his intention to resign as partner
2. Person shall cease to be partner of LLP:

a) on his death or dissolution of LLP; or
b) if he is declared to be of unsound mind by competent court; or
c) if he has applied to be adjudged as insolvent or declared as insolvent.

3. Former partner is to be regarded still being partner of LLP unless:

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

4. Cessation of partner from LLP does not by itself discharge partner from any obligation to LLP or to other partners or to any other person which he incurred while being partner.
5. Where partner of LLP ceases to be partner, unless otherwise provided in LLP agreement, former partner or person entitled to his share in consequence of death or insolvency of former partner, shall be entitled to receive from LLP:

a) amount equal to capital contribution of former partner actually made to LLP; &
b) his right to share in accumulated profits of LLP, after deduction of accumulated losses of LLP, determined as at date former partner ceased to be partner.

6. Former partner or person entitled to his share in consequence of death or insolvency of former partner shall not have any right to interfere in management of LLP

IV. Registration of changes in partners (Section 25):

1. Every partner shall inform LLP, change in his name or address within 15 days
2. LLP shall:

a) where person becomes or ceases to be partner, file notice with Registrar within 30 days from date he becomes or ceases to be partner; &
b) where there is change in name or address of partner, file notice with Registrar within 30 days of such change

3. Notice filed with Registrar under sub-section (2):

a) shall be in such form & accompanied by such fees as may be prescribed;
b) shall be signed by designated partner of LLP & authenticated in prescribed manner &
c) if it relates to incoming partner, shall contain statement by such partner that he consents to becoming partner, signed by him & authenticated in prescribed manner

4. If LLP contravenes provisions of sub-section (2), LLP & every designated partner of LLP be punishable with fine Rs. 2,000 to Rs. 25,000
5. If any partner contravenes provisions of sub-section (1), such partner shall be punishable with fine Rs. 2,000 to Rs. 25,000
6. Person who ceases to be partner of LLP may himself file with Registrar notice referred to in sub-section (3) if he has reasonable cause to believe that LLP may not file notice with Registrar & Registrar shall obtain confirmation from LLP unless LLP has also filed such notice

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

EXTENT AND LIMITATION OF LIABILITY OF LLP AND PARTNER

I. Partner as agent (Section 26):

Every partner of LLP is, for purpose of business of LLP, agent of LLP, but not of other partners

II. Extent of liability of LLP (Section 27):

1. LLP is not bound by anything done by partner in dealing with person if:

a) partner has no authority to act for LLP in doing particular act; &
b) person knows that he has no authority or does not know or believe him to be partner of LLP

2. LLP is liable if partner of LLP is liable to any person as result of wrongful act or omission on his part in course of business of LLP or with its authority
3. Obligation of LLP whether arising in contract or otherwise, shall be solely obligation of LLP
4. Liabilities of LLP shall be met out of property of LLP

III. Extent of liability of partner (Section 28):

1. Partner is not personally liable, directly or indirectly for obligation referred to in sub-section (3) of section 27 solely by reason of being partner of LLP.
2. Provisions of section 27(3) & sub-section (1) of this section shall not auect personal liability of partner for his own wrongful act or omission, but partner shall not be personally liable for wrongful act or omission of any other partner of LLP

IV. Holding out (Section 29):

1. Person who by words spoken or written or by conduct, represents himself, or knowingly permits himself to be represented to be partner in LLP is liable to any person who has on faith of any such representation given credit to LLP, whether person representing himself or represented to be partner does or does not know that representation has reached person so giving credit
2. Where after partner's death business is continued in same LLP name, continued use of that name or of deceased partner's name as part thereof shall not of itself make his legal representative or his estate liable for any act of LLP done after his death

V. Unlimited liability in case of fraud (Section 30):

1. In case of fraud:

a) In event of act carried out by LLP, or its partners, with intent to defraud creditors of LLP or any other person, or for fraudulent purpose, liability of LLP & partners who acted with intent to defraud creditors or for any fraudulent purpose be unlimited for all debts or other liabilities of LLP
b) However, in case such act is carried out by partner, LLP is liable to same extent as partner unless it is established by LLP that such act was without knowledge or authority of LLP.

2. Where business is carried on with such intent or for such purpose as mentioned in sub-section (1), every person who was knowingly party shall be punishable with imprisonment upto 2 years & fine Rs. 50,000 to Rs. 5 Lakhs
3. Where LLP or partner or designated partner or employee of such LLP has conducted affairs of LLP in fraudulent manner, then without prejudice to criminal proceedings which may arise under any law for time being in force, LLP & any such partner or designated partner or employee shall be liable to pay compensation to any person who has suuered any loss or damage by reason of such conduct.

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

VI. Whistle blowing (Section 31):

1. Court or Tribunal may reduce or waive penalty leviable against any partner or employee of a LLP, if such partner or employee of LLP has provided useful information during investigation; or when information given by partner or employee leads to LLP or any partner or employee of LLP being convicted under this Act or any other Act
2. No partner or employee of LLP may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against terms & conditions of his LLP or employment merely because of his providing information or causing information to be provided pursuant to sub-section (1)

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THE LIMITED LIABILITY PARTNERSHIP ACT, 2008 (Chart 4.4)

FINANCIAL DISCLOSURES

I. Maintenance of books of account, other records & audit, etc. (Section 34):

1. Proper Books of account: LLP shall maintain such proper books of account as may be prescribed relating to its affairs for each year of its existence on cash basis or accrual basis & according to double entry system of accounting & shall maintain same at its registered office for such period as may be prescribed
2. Statement of Account & Solvency: Every LLP shall, within period of 6 months from end of each financial year, prepare Statement of Account & Solvency for said financial year as at last day of said financial year in such form as may be prescribed, and such statement shall be signed by designated partners of LLP.
3. Every LLP shall file Statement of Account & Solvency within prescribed time, prepared pursuant to sub-section (2) with Registrar every year in such form & manner & accompanied by such fees as may be prescribed
4. Accounts of LLP be audited in accordance with prescribed rules. CG may, by notification in Official Gazette, exempt class of LLP from requirements of this sub-section
5. LLP which fails to comply be punishable with fine Rs. 25,000 to Rs. 5 Lakhs

Every designated partner be punishable with fine Rs. 10,000 to Rs. 1 Lakh

II. Annual return (Section 35):

1. Every LLP shall file annual return duly authenticated with Registrar within 60 days of closure of its financial year in such form & manner & accompanied by such fee as may be prescribed.
2. Any LLP which fails to comply be punishable with fine Rs. 25,000 to Rs. 5 Lakhs, Designated partner be punishable with fine Rs. 10,000 to Rs. 1 Lakh

CONVERSION INTO LLP

I. Conversion from firm into LLP (Section 55): Firm may convert into LLP in accordance with provisions of this Chapter & Second Schedule

II. Conversion from private company into LLP (Section 56): Private company may convert into LLP in accordance with provisions of this Chapter & Third Schedule

III. Conversion from unlisted public company into LLP (Section 57): Unlisted public company may convert into LLP in accordance with provisions of this Chapter & Fourth Schedule

IV. Registration & euect of conversion (Section 58):

a) Registration:

i) Registrar, on satisfying that firm/ Private Co./ Unlisted Public Co., complied with provisions of various Schedules, Act & rules, register documents, issue certificate of registration stating that LLP is registered under this Act from date specified in certificate

ii) LLP within 15 days of date of registration, inform concerned Registrar of Firms/ Companies, with which it was registered under Indian Partnership Act, 1932 or Companies Act, 2013 about conversion & particulars of LLP

iii) Upon such conversion, partners of firm/ shareholders of Private Co. or Unlisted Public Co. & LLP to which such firm or such Co. has converted, & partners of LLP be bound by provisions of Schedules applicable to them

iv) Upon such conversion, on & from date of certificate of registration, euects of conversion shall be as specified in various schedules

b) Effect of Registration: On & from date of registration specified in certificate of registration issued under various Schedule,

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

ii) all tangible (movable or immovable) & intangible property vested in firm or company, all assets, interests, rights, privileges, liabilities, obligations relating to firm or Co, as case may be, & whole of undertaking of firm or company, shall be transferred to & shall vest in LLP without further assurance, act or deed; &

iii) firm or company,be deemed to be dissolved & removed from records of Registrar of Firms or ROC

FOREIGN LLP

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

WINDING UP & DISSOLUTION

I. Winding up & dissolution (Section 63): Winding up of LLP may be either voluntary or by Tribunal & LLP, so wound up may be dissolved

II. Circumstances in which LLP may be wound up by Tribunal (Section 64): LLP may be wound up by Tribunal:

a) if LLP decides that LLP be wound up by Tribunal;
b) if, for period of more than 6 months, number of partners of LLP is reduced below 2;
c) if LLP is unable to pay its debts;
d) if LLP has acted against interests of sovereignty & integrity of India, security of State or public order;
e) if LLP has made default in filing with Registrar Statement of Account & Solvency or annual return for any 5 consecutive financial years; or
f) if Tribunal is of opinion that its just & equitable that LLP be wound up

III. Rules for winding up & dissolution (Section 65): Central Government may make rules for provisions in relation to winding up & dissolution of LLP

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THE LIMITED LIABILITY PARTNERSHIP ACT, 2008 (Chart 4.5)

MISCELLANEOUS

1. Business transactions of partner with LLP [section 66]: Partner may lend money to & transact other business with LLP & has same rights & obligations with respect to loan or other transactions as person who is not partner

11. Application of provisions of Companies Act [section 67]:

1. CG may, by notification in Official Gazette, direct that any of provisions of Companies Act, 1956 specified in notification apply to LLP; or apply with such exception, modification & adaptation, as may be specified, in notification.

2. Copy of every notification proposed to be issued under sub-section (1) be laid in draft before each House of Parliament, while it is in session, for 30 days which may be comprised in one session or in two or more successive sessions, & if, before expiry of session immediately following session or successive sessions aforesaid, both Houses agree in making modification in notification or both Houses agree in disapproving issue of notification or both Houses agree that no notification shall be issued, or, as case may be, shall be issued only in such modified form as may be agreed upon by both Houses.

III. Electronic filing of documents [section 68]:

1. Any document required to be filed, recorded or registered under this Act may be filed, recorded or registered in prescribed manner & conditions

2. Copy of any document electronically filed with Registrar, issued by Registrar & certified by affixing digital signature as per IT Act, 2000 to be true copy be admissible evidence as equal to validity with original document.

3. Any information supplied by Registrar, certified by him by affixing digital signature to be true extract be admissible in evidence & be presumed, unless evidence to contrary is adduced, to be true extract there such document.

IV. Payment of additional fee [section 69]: Any document or return required to be filed or registered under this Act with Registrar, if not filed or registered in time provided may be filed or registered upto period of 300 days from date within which it should have been filed, on payment of additional fee of ₹ 100 for every day of such delay in addition to the as is payable for filing of such document or return.

However, such document or return may, without prejudice to any other action or liability under this Act, also be filed after such period of 300 days on payment of fee & additional fee specified in this section

	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 avect 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 avect 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 is 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.	Therefisnoprovisionforsuchpartners 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 registar 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.

	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 auairs 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

Distinction between LLP & Partnership Firm

Distinction between LLP & Limited Liability Company (LLC)

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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

Company

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"

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

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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

Corpoarte Veil will be lifted

- 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

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THE COMPANIES ACT, 2013 (Chart 5.3)

Classes of Companies under the Act

On the basis of Liability

Companies Limited by Shares Sec 2(22)

- It is co. where liability of its member is limited by MOA to amount unpaid on shares held by them
- Shareholder may be called upon to contribute only to extent of amount, which remains unpaid on his shareholdings
- Though shareholder is co-owner of company, he is not co- owner of company's assets

Companies Ltd by Guarantee Sec 2(21)

- Company having liability of its members limited by MOA to such amount as members may respectively undertake by memorandum to contribute to assets of Co. in event of its being wound up
- Liability of member of a guarantee company is limited upto stipulated sum mentioned in memorandum

Unlimited company Sec 2(92)

- Company not having any limit on liability of its members
- Liability of each member extends to amount of Company's debt & liabilities but, he can claim contribution from other members
- Liability is not unlimited till the time Company is not wound up, member can be called to contribute only in event of winding up

On the basis of Access to Capital

Listed company Section 2(52)

o. which as any of its ecurities listed n any recognised change

Unlisted company

Company other than listed company

On the basis of Membership

OPC Sec 2(62)

- Company which has only one person as member
- OPC is separate legal entity with limited liability of member whereas in sole proprietary, liability of owner is not restricted & it extends to owner's entire assets constituting of official & personal
- OPC is private limited company with minimum paid up share capital as may be prescribed & has at least one member

Private Company Sec 2(68)

- No minimum paid-up capital requirement
- Minimum number of members – 2 (except if Pvt Co is OPC - 1)
- Maximum number of members – 200, excluding present employee-cum-members & employee-cum-members
- Right to transfer shares restricted
- Prohibition on invitation to subscribe to securities of Co.
- Small company is Pvt Co., with Paid up capital – not more than Rs. 50 lakhs or Turnover – not more than Rs. 2 crores. It should not be – Section 8 Co. or Holding or Subsidiary Co.
- OPC can be formed only as Pvt Co.

Public Company Sec 2(71)

- It is not private company (Articles do not have restricting clauses)
- Shares freely transferable
- No minimum paid up capital requirement
- Minimum number of members – 7
- Maximum numbers of members – No limit
- Subsidiary of public company is deemed to be public company
- Section 3(1)(a)- Co. may be formed for any lawful purpose by seven or more persons, where company to be formed is to be public company

On the basis of Control

Holding Company Sec 2(46)

- It means company of which such companies are subsidiary companies
- Expl: expression "company" includes anybody corporate.

Subsidiary Company Sec 2(87)

- In relation to any other co. (i.e Holding Co.) means company in which Holding Co.-
  i) controls composition of BOD; or
  ii) exercises or controls more than one-half of total voting power either at its own or together with one or more of its subsidiary companies
- Such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond prescribed numbers

Associate company Sec 2(6)

- In relation to another Co. means Co. in which that other co. has significant influence, but which is not subsidiary co. of co. having influence & includes JV Co.
- Expl-
  a) Significant influence: Control of at least 20% of total voting power, or control of, or participation in business decisions under agreement;
  b) JV: Joint arrangement whereby parties that have joint control of arrangement have rights to net assets of arrangement

Others Companies

Government Company Section 2(45)

- Government Co. means any Co. in which not less than 51% of paid-up share capital is held by-
  i) CG, or
  ii) SG or
  iii) partly by CG & SG & includes company which is Subsidiary Co. of such Government Co.

Foreign Company Section 2(42)

- It means any Co. or body corporate incorporated outside India which:
  i) has place of business in India whether by itself or through agent, physically or through electronic mode; &
  ii) conducts any business activity in India in any other manner

Companies with charitable objects Section 8

- Formed for promotion of commerce, art, science, religion, charity, protection environment, sports, etc
- Requirement of minimum share capital does not apply
- Uses its profits for promotion of objective for which formed
- Does not declare dividend to members
- Operates under special licence from CG
- Need not use word Ltd./ Pvt. Ltd. in its name & adopt more suitable name club, chambers of commerce
- Licence revoked if conditions contravened
- On revocation, CG may direct it to Convert its status & change its name/ Wind – up/ Amalgamate with another company having similar object
- Can call its GM by giving clear 14 days notice instead of 21
- Requirement of min no. of directors, independent dir. does not apply
- Need not constitute Nomination & Remu & Shareholders Relationship Committee
- Partnership firm can be member of Section 8 Co.

Dormant Company Section 455

Where Co. is formed & registered for future project or to hold asset or intellectual property & has no significant accounting transaction, such Co. or Inactive Co. may make application to ROC in prescribed manner for obtaining status of Dormant Co.

- Significant accounting transaction: Other than:
  i) Payment of fees by Co. to registrar
  ii) Payments made by it to fulfill requirements of this or other law
  iii) Allotment of shares to fulfill requirements of this Act
  iv) Payments for maintenance of its office & records

Nidhi companies Section 406

- Company incorporated as nidhi with object of cultivating habit of thrift savings amongst its members

Section 464 - Prohibition of association or partnership of persons exceeding certain number: 1) No association or partnership consisting of more than 50 persons be formed for carrying on any business that has for its object acquisition of gain by association or partnership or by individual members thereof, unless it is registered as company under this Act or is formed under any other law for the time being in force. However, this shall not apply to HUF or association or partnership by professionals who are governed by special Acts. Every member of association or partnership carrying on business in contravention of sub-section (1) shall be punishable with fine upto Rs. 1 lakh & shall also be personally liable for all liabilities incurred in such business

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THE COMPANIES ACT, 2013 (Chart 5.4)

MODE OF REGISTRATION/INCORPORATION OF COMPANY

Promoters

- Promoter means person:
  a) who has been named as such in prospectus or is identified by co. in annual return referred to u/s 92
  b) who has control over affairs of co., directly or indirectly whether as shareholder, director or otherwise
  c) in accordance with whose advice, directions or instructions BOD of co. is accustomed to act.
- Persons who form co. are known as promoters.
- It is they who conceive idea of forming co.
- They take all necessary steps for its registration
- Persons acting only in professional capacity e.g., solicitor, banker, accountant etc. are not regarded as promoters

Formation of Company

- In case of public co., any 7 or more persons can form co. for any lawful purpose by subscribing their names to MOA & complying with requirements of this Act in respect of registration.
- 2 or more persons can form private co. & one person where co. to be formed is One Person Company

Incorporation of Company (Section 7)

i) Filing of documents & information with registrar :

a) memorandum & articles of co. duly signed by all subscribers to MOA
b) declaration by person who is engaged in formation of co.
c) declaration from each of subscribers to memorandum & from persons named as first directors, if any, in AOA stating that-
- he is not convicted of any offence in connection with promotion, formation or management of any co.
- 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
- & that all documents filed with Registrar for registration of co. contain information that is correct & complete & true

d) address for correspondence
e) particulars of every subscriber to MOA along with proof of identity
f) particulars of persons mentioned in articles as subscribers to MOA
g) particulars of interests of persons mentioned in AOA as first directors

ii) Issue of certificate of incorporation on registration: Registrar on basis of documents & information filed, shall register all documents & information in register & issue certificate of incorporation in prescribed form to effect that proposed co. is incorporated

iii) Allotment of Corporate Identity Number (CIN): On & from date mentioned in certificate of incorporation, Registrar shall allot to co. corporate identity number, which shall be distinct identity for co. & which shall also be included in certificate

iv) Maintenance of copies of all documents & information: Co. shall maintain & preserve at its registered office copies of all documents & information as originally filed, till its dissolution under this Act

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

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. & persons making declaration under this sec shall each be liable for action for fraud under sec 447

vii) Order of Tribunal:
a) pass such orders, as it may think fit, for regulation of management of co. including changes, if any, in its memorandum & articles, in public interest or in interest of co. & its members & creditors; or
b) direct that liability of members shall be unlimited
c) direct removal of name of co. from register of companies; or
d) pass order for winding up of co.
e) pass such other orders as it may deem fit: Provided that before making any order,-
- Co. shall be given reasonable opportunity of being heard in matter
- Tribunal shall take into consideration transactions entered into by co., including obligations, if any, contracted or payment of any liability

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

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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 [illegible] as means of putting end to [illegible] 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 sharecapital 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.

I. Nature of shares

a) 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

b) 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.

c) Shares shall be numbered: Every share in co. having share capital, shall be distinguished by its distinctive number. Every share shall be numbered.

II. Kinds of share capital

a) Equity share capital: All share capital which is not preference share capital;

i) with voting rights; or

ii) with differential rights as to dividend, voting or otherwise in accordance with prescribed rules.

b) Preference share capital: Part of issued share capital of co. which carries or would carry preferential right with respect to-

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

ii) repayment, in case of winding up or repayment of capital, of amt of share capital paid-up or deemed to have been paid-up

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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 confessed 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 closed 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 atleast 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

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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:

i) 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

ii) Act which is ultravires company cannot be ratified even by unanimous consent of all shareholders

iii) Act which is ultravires directors, but intravires Co. can be ratified by members of company through resolution passed at GM

iv) 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:

i) 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, &

ii) 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:

a) 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

b) 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.

c) 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

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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

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

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INDIAN CONTRACT ACT,1872 (Chart 1.15)

Remedies for Breach of Contract

SUIT FOR DAMAGES

1. Compensation for loss or damage caused by breach of contract (Section 73): When contract has been broken, party who sues by such breach is entitled to receive, from party who has broken contract, compensation for any loss or damage caused to him thereby, which naturally arose in usual course of things from such breach, or which parties knew, when they made contract, to be likely to result from breach of it.

2. Compensation for failure to discharge obligation resembling those created by contract: When obligation resembling those created by contract has been incurred & has not been discharged, any person injured by failure to discharge it is entitled to receive same compensation from party in default, as if such person had contracted to discharge it & had broken his contract

3. Remedy by way of Damages or Kind of Damages:

a) Ordinary damages: Party who suffered by breach is entitled to receive, from party who has broken contract, compensation for loss or damage cause to him, which naturally arose in usual course of things from such breach, or which parties know, when they made contract, to be likely to result from breach of it

b) Special damages: Where party to contract receives notice of special circumstances affecting contract, he will be liable not only for damages arising naturally & directly from breach but also for special damages

c) Vindictive or Exemplary damages: These damages may be awarded only in two cases -

i) for breach of promise to marry,

ii) for wrongful dishonour by banker of his customer's cheque

d) Nominal damages: Where plaintiff has proved that there has been breach of contract but he has not in fact suffered any real damage. It is awarded just to establish right to decree for breach of contract

e) Damages for deterioration caused by delay: Damages can be recovered from carrier even without notice

f) Pre-fixed damages: Parties to contract stipulate at time of its formation that on breach of contract by any of them, certain amount will be payable as damage. It may amount to either liquidated damages or penalty

Penalty and Liquidated Damages

- Parties to contract may provide before hand, amount of compensation payable in case of failure to perform contract. Indian law makes no distinction between penalty & liquidated damages, courts allow reasonable compensation not exceeding sum so mentioned in the contract
- Distinction between liquidated damages & penalty

a) If sum payable is so large as to be far in excess of probable damage on breach, it is certainly penalty

b) Where sum is expressed to be payable on certain date and further sum in event of default being made, latter sum is penalty because mere delay in payment is unlikely to cause damage

c) If sum fixed is extravagant or exorbitant, court will regard it is as penalty even if, it is termed as liquidated damages in contract

d) Essence of penalty is payment of money stipulated as terrorem of offending party. Essence of liquidated damages is genuine pre-estimate of damage

Rescission of contract

- When contract is broken by one party, other party may treat contract as rescinded. In such case he is absolved of all his obligations under contract and is entitled to compensation for any damages that he might have suffered

Quantum Meruit

- Where one person has rendered service to another in circumstances which indicate an understanding between them that it is to be paid for although no particular remuneration has been fixed, the law will infer promise to pay. Quantum Meruit i.e. as much as party doing service has deserved.
- For application of this doctrine, two conditions must be fulfilled:

i) It is only available if the original contract has been discharged

ii) Claim must be brought by a party not in default

- Claim for quantum meruit arises in following cases:

a) When agreement is discovered to be void or when contract becomes void

b) When something is done without any intention to do so gratuitously

c) Where there is an express or implied contract to render services but there is no agreement as to remuneration

d) When one party abandons or refuses to perform contract

e) Where contract is divisible and party not in default has enjoyed benefit of part performance

f) When an indivisible contract for lump sum is completely performed but badly person who has performed contract can claim lump sum, but other party can make deduction for bad work

Suit for specific performance

- Where damages are not adequate remedy in case of breach of contract, court may in its discretion on suit for specific performance direct party in breach, to carry out his promise according to terms of contract

Suit for injunction

- Where party to contract is negating terms of contract, court may by issuing an 'injunction orders', restrain him from doing what he promised not to do.
- Party rightfully rescinding contract, entitled to compensation (Section 75): Person who rightfully rescinds contract is entitled to compensation for any damage which he has sustained through non-fulfilment of contract

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