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CA FOUNDATION NOTES

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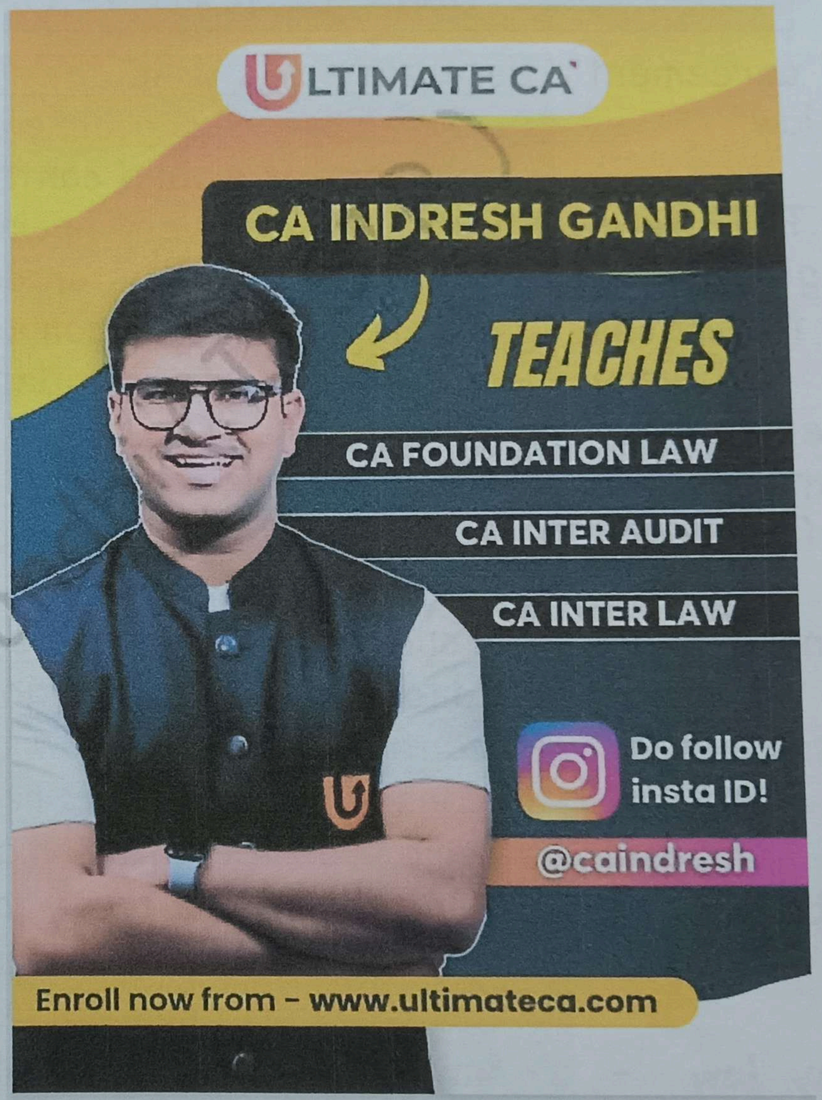
Indian Contract Act Charts



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UNIT 1 : NATURE OF CONTRACT

Contract - "an agreement enforceable by law"

Agreement - The term 'agreement' given in Section 2(e) of the Act is defined as- "every **promise** and every set of promises, forming the consideration for each other".
when the person to whom the proposal is made signifies his assent there to, the proposal is said to be accepted. Proposal when accepted, becomes a promise".

Enforceability by law - An agreement to become a contract must give rise to a legal obligation.

Essentials of a Valid Contract (As given by sec 10):-

- ✓ **Offer and Acceptance or an agreement** - An agreement is the first essential element of a valid contract. According to Section 2(e) of the Indian Contract Act, 1872, "Every promise and every set of promises, forming consideration for each other, is an agreement" and according to Section 2(b) "A proposal when accepted, becomes a promise". An agreement is an outcome of offer and acceptance for consideration.
- ✓ **Free Consent** - Two or more persons are said to consent when they agree upon the same thing in the same sense(consensus ad idem). It must be free. If it is caused by coercion, undue influence, fraud or, misrepresentation the voidable , if by mistake – Void.
- ✓ **Capacity of the parties** - a person to enter into a valid contract if person who attain • Age of majority • Is of sound mind • Not disqualified from contracting by any law to which he is subject
- ✓ **Consideration** - It is referred to as 'quid pro quo' i.e. 'something in return. A valid consideration may consist some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other
- ✓ **Lawful Consideration and Object** - .i.e. it must not be prohibited by law/defeat provisions of law/something immoral/opposed to public policy
- ✓ **Not expressly declared to be void** - Must not be either illegal or void. An illegal agreement is an agreement expressly or impliedly prohibited by law. A void agreement is one without any legal effects.

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Essentials of a Valid Contract (Not given in sec 10 still essential):-

Two Parties: It involves at least two parties one party making the offer and the other party accepting it. A contract may be made by natural persons and by other persons having legal existence. Case Law - State of Gujarat vs. Ramanlal S & Co

Parties must intend to create legal obligations : intention on the part of the parties to create legal relationship between them, Social or domestic type of agreements are not enforceable in court of law and hence they do not result into contracts. Case Law - Balfour v. Balfour

Possibility of performance of an agreement: should be capable of performance, an act impossible in itself cannot be enforced.

Other Formalities to be complied with in certain cases - writing or registration

Certainty of meaning - must be certain and not vague or indefinite

Basis	Agreement	Contract
Meaning	Every promise and every set of promises, forming the consideration for each other. (Promise + Consideration)	Agreement enforceable by law. (Agreement + Legal enforceability)
Scope	It's a wider term in both legal and social agreement.	It is used in a narrow sense that contract is only legally enforceable.
Legal obligation	It may not create legal obligation.	Necessarily creates a legal obligation.
Nature	All agreement are not contracts.	All contracts are agreements

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TYPES OF CONTRACT

On The Basis Of The Validity:

- **Valid Contract** - An agreement which is binding and enforceable is a valid contract. It contains all the essential elements of a valid contract
- **Void Contract** - A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.
- **Voidable Contract** - an agreement which is enforceable by law at the option of one or more parties thereto, but not at the option of the other or others is a voidable contract.
- **Illegal Contract** - The court will not enforce such a contract but also the connected contracts. All illegal agreements are void but all void agreements are not necessarily illegal
- **Unenforceable Contract** - Where a contract is good in substance but because of some technical defect it cannot sue upon it

On basis of the formation:-

- **Express Contracts:** A contract would be an express contract if the terms are expressed by words or in writing.
- **Implied Contracts:** Implied contracts in contrast come into existence by implication. proposal or acceptance is made otherwise than in words, the promise is said to be implied.
- **Tacit Contracts:** The word Tacit means silent. Tacit contracts are those that are inferred through the conduct of parties without any words spoken or written. (ATM Machine).
- **Quasi-Contract:** not an actual contract but it resembles a contract. Created by law under certain circumstances.
- **E-Contracts:** When a contract is entered into by two or more parties using electronics means - ED1 - Electronic Data Inter change/ Cyber contracts or mouse click contracts.

On basis of the performance:-

- **Executed Contract** - When the act is done or executed or the forbearance is brought on record, then the contract is an executed contract.
- **Executory Contract** - PENDING CONTRACT

1) Unilateral Contract: Unilateral contract is a one sided contract in which one party has performed his duty or obligation and the other party's obligation is outstanding.
2) Bilateral Contract: A Bilateral contract is one where the obligation or promise is outstanding on the part of both the parties.

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PROPOSAL/OFFER: when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

Classification Of Offer

General offer - offer made to public at large and hence anyone can accept and do the desired act. Until the general offer is retracted or withdrawn, it can be accepted by anyone at any time as it is a continuing offer. Case law - Carlill Vs. Carbolic Smoke Ball Co

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

Cross offer - When two parties exchange identical offers in ignorance at the time of each other's offer. There is no binding contract in such a case because offer made by a person cannot be construed as acceptance of the another's offer.

Counter offer: When the offeree offers to qualified acceptance of the offer subject to modifications and variations in the terms of original offer. Counter-offer amounts to rejection of the original offer. It is also called as Conditional Acceptance.

Standing or continuing or open offer: An offer which is allowed to remain open for acceptance over a period of time.

What is invitation to offer? - Where a party without expressing his final willingness proposes certain terms on which he is willing to negotiate he does not make an offer, but only invites the other party to make an offer on those terms. If a person has the intention of negotiating on terms it is called invitation to offer. An invitation to offer is always an act precedent to offer.

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Essential of a valid offer:

1. It must be capable of creating legal relations - Offer must be such as in law is capable of being accepted and giving rise to legal relationship. A social invitation, even if it is accepted, does not create legal relations because it is not so intended.
2. It must be certain, definite and not vague: Terms of an offer SHOULD NOT BE vague or indefinite.
3. It must be communicated to the offeree: An offer must be communicated to the person to whom it is made, otherwise there can be no acceptance of it. An acceptance of an offer, in ignorance of the offer, is not acceptance and does not confer any right on the acceptor. (Lalman Shukla v. GauriDutt) '
4. It must be made with a view to obtaining the assent of the other party
5. It may be conditional
6. Offer should not contain a term the non compliance of which would amount to acceptance
7. The offer may be either specific or general
8. The offer may be express or implied
9. Offer is Different from a mere statement of intention, an invitation to offer, a mere communication of information, A prospectus and Advertisement, from an answer to a question (Harvey vs. Facie).
10. A statement of price is not an offer

Standard forms of contracts:

➢ well established that a standard form of contract may be enforced on another who is subjectively unaware of the contents of the document, provided the party wanting to enforce the contract has given notice which, in the circumstances of a case, is sufficiently reasonable.

➢ But the acceptor will not incur any contractual obligation, if the document is so printed and delivered to him in such a state that it does not give reasonable notice on its face that it contains certain special conditions.

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COMMUNICATION OF OFFER AND ACCEPTANCE

Communication of offer - the communication of offer is complete when it comes to the knowledge of the person to whom it is made.

Communication of acceptance :

Modes - 1. Communication by act - include any expression of words whether written or oral.

2. Communication of acceptance by 'omission' to do something.

3. Communication of acceptance by conduct.

Communication of acceptance - In terms of Section 4 of the Act, it is complete,

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

Ø As against the acceptor, when it comes to the knowledge of the proposer.

Acceptance over telephone or telex or fax - complete when the acceptance is received by the offeree. However, in case of a call drops and disturbances in the line, there may not be a valid contract.

Communication of special conditions: Sometimes there are situations where there are contracts with special conditions. These special conditions are conveyed tacitly and the acceptance of these conditions are also conveyed by the offeree again tacitly or without him even realizing it. Lilly White vs. Mannuswamy

REVOCATION OF OFFER AND ACCEPTANCE: In terms of Sec 5 of the Act a proposal can be revoked at any time before the communication of its acceptance is complete as against the proposer. An acceptance may be revoked at any time before the communication of acceptance is complete as against the acceptor.

Revocation of proposal otherwise than by communication:

Modes :

- By notice of revocation
- By lapse of time
- By non fulfillment of condition precedent
- By death or insanity
- By counter offer
- By the non acceptance of the offer according to the prescribed or usual mode
- By subsequent illegality

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UNIT 2:-CONSIDERATION

Consideration is an essential element of a valid contract without which no single promise will be enforceable. Quid pro quo, i.e., 'something in return.

WHAT IS CONSIDERATION? - "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing something, such an act or abstinence or promise is called consideration for the promise".

SUIT BY A THIRD PARTY TO A CONTRACT- Doctrine of privity of contract" - The consideration for an agreement may proceed from a third party, the third party cannot sue on contract. Only a person who is party to a contract can sue on it. Thus, the concept of stranger to consideration is a valid and is different from stranger to a contract.

Exceptions - 1. In the case of trust, a beneficiary can enforce his right under the trust, though he was not a party to the contract between the settler and the trustee.

2. In the case of a family settlement, if the terms of the settlement are reduced into writing, the members of family who originally had not been parties to the settlement may enforce the agreement.

3. In the case of certain marriage contracts/arrangements, a provision may be made for the benefit of a person, he may file the suit though he is not a party to the agreement.

4. In the case of assignment of a contract, when the benefit under a contract has been assigned, the assignee can enforce the contract.

5. Acknowledgement or estoppel – where the promisor by his conduct acknowledges himself as an agent of the third party, it would result into a binding obligation towards third party.

6. In the case of covenant running with the land, the person who purchases land with notice that the owner of land is bound by certain duties affecting land, the covenant affecting the land may be enforced by the successor of the seller. 7. Contracts entered into through an agent: The principal can enforce the contracts entered by his agent where the agent has acted within the scope of his authority and in his name.

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LEGAL RULES REGARDING CONSIDERATION -

a) Consideration must move at the desire of the promisor: Consideration must be offered by the promisee or the third party at the desire or request of the promisor. Case law - Durga Prasad v. Baldeo

b) Consideration may move from promisee or any other person: consideration may proceed from the promisee or any other person who is not a party to the contract. there can be a stranger to a consideration but not stranger to a contract. Case law - Chinnayya vs. Ramayya

c) Executed and executory consideration - A consideration which consists in the performance of an act is said to be executed. When it consists in a promise, it is said to be executory.

d) Consideration may be past, present or future

e) Consideration need not be adequate - Consideration need not to be of any particular value. It need not be approximately of equal value with the promise for which it is exchanged but it must be something which the law would regard as having some value. section 25(2) - agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate. But as an exception if it is shockingly less and the other party alleges that his consent was not free than this inadequate consideration can be taken as an evidence in support of this allegation.

f) Performance of what one is legally bound to perform: The performance of an act by a person who is legally bound to perform the same cannot be consideration for a contract. Ex - an agreement by a client to pay to his counsel after the latter has been engaged, a certain sum over and above the fee, in the event of success of the case would be void, since it is without consideration.

g) Consideration must be real and not illusory

h) Consideration must not be unlawful, immoral, or opposed to public policy.

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VALIDITY OF AN AGREEMENT WITHOUT CONSIDERATION - Agreement made without consideration is void.

EXCEPTIONS:-

Natural Love and Affection - Conditions to be fulfilled under section 25(1)

- It must be made out of natural love and affection between the parties.
- Parties must stand in near relationship to each other.
- It must be in writing
- It must also be registered under the law.

A written and registered agreement based on natural love and affection between the parties standing in near relation to each other is enforceable even without consideration.

Compensation for past voluntary services: The following essential factors must exist:

- ✓ The services should have been rendered voluntarily.
- ✓ The services must have been rendered for the promisor.
- ✓ The promisor must be in existence at the time when services were rendered.
- ✓ The promisor must have intended to compensate the promisee.

Promise to pay time barred debt: Where a promise in writing signed by the person making it or by his authorised agent, is made to pay a debt barred by limitation it is valid without consideration.

Completed gift: the rule no consideration no contract does not apply

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

Charity: If a promisee undertakes the liability on the promise of the person to contribute to charity, there the contract shall be valid.

Bailment: No consideration is required to effect the contract of bailment

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UNIT 3 - OTHER ESSENTIALS OF A VALID CONTRACT

Capacity to Contract:- Capacity refers to the competence of the parties to make a contract.
Section 11 : A. has attained the age of majority, B. is of sound mind and C. is not disqualified from contracting by any law to which he is subject

Age of Majority: Every person domiciled in India shall attain the age of majority on the completion of 18 years of age and not before.

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

Contract by disqualified persons: Incompetency to contract may arise from political status, corporate status, legal status, etc. The following persons fall in this category: Foreign Soverigns and Ambassadors, Alien enemy, Convicts, Insolvent.

LAW RELATING TO MINOR -

1. A contract made with or by a minor is void ab-initio - Mohori Bibi vs. Dharmo Das Ghose
2. No ratification after attaining majority: void agreement can never be ratified.
3. A minor can always plead minority: A minor can always plead minority and is not stopped to do so even where he has taken any loan or entered into any contract by falsely representing that he was major.
4. No specific performance:
5. No insolvency

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LAW RELATING TO MINOR (Continued..)-

6. Minor can be a beneficiary or can take benefit out of a contract: - nothing in the Contract Act prevents him from making the other party bound to the minor - a promissory note duly executed in favour of a minor is not void and can be sued upon by him, because he though incompetent to contract, may yet accept a benefit. - A minor cannot become partner in a partnership firm. However, he may with the consent of all the partners, be admitted to the benefits of partnership.
7. Liability for necessaries: - A claim for necessaries supplied to a minor is enforceable by law. - Not liable - more than the value of the necessaries. - no personal liability of the minor, but only his property is liable. - Two conditions must be satisfied - 1. The contract must be for the goods reasonably necessary for his support in the station in life 2. The minor must not have already a sufficient supply of these necessaries. - Necessaries mean those things that are essentially needed by a minor - They cannot include luxuries or costly or unnecessary articles. Necessaries extend to all such things as reasonable persons would supply to an infant in that class of society to which the infant belongs. - Expenses on minor's education, on funeral ceremonies come within the scope of the word 'necessaries'.
8. Contract by guardian - how far enforceable: - Where the guardian makes a contract for the minor, which is within his competence and which is for the benefit of the minor, it will be valid contract. - guardian has no power to bind the minor for the purchase of immovable Property. - But a contract entered into by a certified guardian (appointed by the Court) of a minor, with the sanction of the court for the sale of the minor's property, maybe enforced by either party to the contract.
9. Partnership - A minor being incompetent to contract cannot be a partner in a partnership firm but he can be admitted to the benefits of partnership.
10. Minor can be an agent: A minor can act as an agent. But he will not be liable to his principal for his acts. A minor can draw, deliver and endorse negotiable instruments without himself being liable.

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LAW RELATING TO MINOR (Continued..)-

11. Minor cannot bind parent or guardian: In the absence of authority, express or implied, an infant is not capable of binding his parent or guardian, even for necessaries. The parents will be held liable only when the child is acting as an agent for parents.
12. Joint contract by minor and adult: In such a case, the adult will be liable on the contract and not the minor
13. Surety for a minor: In a contract of guarantee when an adult stands surety for a minor then he (adult) is liable to third party as there is direct contract between the surety and the third party.
14. Minor as Shareholder: Minor as Shareholder: A minor, being incompetent to contract cannot be a shareholder of the company. If by mistake he becomes a member, the company can rescind the transaction and remove his name from register. But, a minor may, acting though his lawful guardian become a shareholder by transfer or transmission of fully paid shares to him.
15. Liability for torts: A tort is a civil wrong. A minor is liable in tort unless the tort in reality is a breach of contract.

Section 13 : "two or more persons are said to consent when they agree upon the same thing in the same sense." Consent is free when not caused by:- Coercion, fraud, undue influence, misreprensentation, mistake.

Coercion (Section 15)- "It is committing, or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining, or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

Effects of coercion -

1. Contract is voidable at the option of the party whose consent was so obtained.
2. the rescission of voidable contract, the party rescinding a void contract should, if he has received any benefit, thereunder from the other party to the contract, restore such benefit so far as may be applicable, to the person from whom it was received.
3. A person to whom money has been paid or anything delivered under coercion must repay or return it.

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Undue influence (Section 16) - "A contract where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and he uses that position to obtain an unfair advantage over the other".

A person is deemed to be in position to dominate the will of another: The object must be to take undue advantage

Where he holds a real or apparent authority over the other. Ex:- master and servant, doctor and patient , etc	Where he stands in a fiduciary relationship : Where relation of trust and confidence exists between the parties to a contract. Ex:- father and son, solicitor and client, husband and wife, etc.	Mental distress: An undue influence can be used against a person to get his consent on a contract where the mental capacity of the person is temporaily or permanently affected by the reason of mental or bodily distress, illness or of old age.	Unconscionable bargains: Where one of the parties to a contract is in a position to dominate the will of the other and the contract is apparently unconscionable i.e., unfair, it is presumed by law that consent must have been obtained by undue influence.

Burden of proof: The burden of proving the absence of the use of the dominant position to obtain the unfair advantage will lie on the party who is in a position to dominate the will of the other.

Power to set aside contract induced by undue influence- (Section 19A) contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

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Section 17 - Fraud

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

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

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

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

(4) any other act fitted to deceive;

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

Effect of Fraud upon validity of a contract:

-rescind the contract within a reasonable time

-sue for damages

-insist on the performance: on the condition that he shall be put in the position in which he would have been had the representation made been true.

Mere silence is not fraud

-A party to the contract is under no obligation to disclose the whole truth to the other party. 'Caveat Emptor' i.e. let the purchaser beware is the rule applicable to contracts.

-There is no duty to speak in such cases and silence does not amount to fraud. Similarly there is no duty to disclose facts which are within the knowledge of both the parties.

Silence is fraud:

-Where the silence itself is equivalent to speech.

-Where it is duty of the person to speak:-

- Contracts of marriage/ family settlement

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

Fiduciary Relationship: the person in whom confidence is reposed is under a duty to act with utmost good faith and make full disclosure of all material facts.

Share Allotment contracts: Persons issuing 'Prospectus' at the time of public issue of shares company have to disclose all material facts within their knowledge.

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Sec 18: Misrepresentation:

Misrepresentation means and includes -

-the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

-any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice or to the prejudice of any one claiming under him;

-causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Sec 19: Legal effects of agreements without free consent.

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

Exception - If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

MISTAKE: defined as innocent or erroneous belief which leads the party to misunderstand the others.

Mistake may be -Bilateral mistake is when both the parties to a contract are under a mistake. -Unilateral mistake is when only one party to the contract is under a mistake.

Mistake of Law: A mistake of law does not render a contract void as one cannot take excuse of ignorance of the law of his own country. But if the mistake of law is caused through the inducement of another, the contract may be avoided. Mistake of foreign law is excusable and is treated like a mistake of fact. Contract may be avoided on such mistake.

Mistake of fact: Where the contracting parties misunderstood each other and are at cross purposes, there is a bilateral or mutual mistake. Bilateral mistake - if relates to material fact, contract is void.

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LEGALITY OF OBJECT AND CONSIDERATION

- When it is forbidden by law: Acts forbidden by law are those which are punishable under any statute as well as those prohibited by regulations or orders made in exercise of the authority conferred by the legislature.
- When it defeats the provision of law: The court looks at the real intention of the parties to an agreement.
- When it is fraudulent: Agreements which are entered into to promote fraud are void
- When it defeats any rule for the time being in force in India
- When it involves injury to the person/property of another
- When it is immoral
- When consideration is opposed to public policy

Opposed to public policy -

1. **Trading with enemy:** Any trade with person owing allegiance to a Government at war with India without the licence of the Government of India is void, as the object is opposed to public policy. Here, the agreement to trade offends against the public policy by tending to prejudice the interest of the State in times of war.
2. **Stifling Prosecution** - An agreement to stifle prosecution i.e. "an agreement to present proceedings already instituted from running their normal course using force" tends to be a perversion or an abuse of justice; therefore, such an agreement is void.
   If compoundable offences settled - not opposed to public policy
   Uncompoundable - opposed to public policy.

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3. **Maintenance and Champerty:**

- Maintenance is an agreement in which a person promises to maintain suit in which he has no interest.
- Champerty is an agreement in which a person agrees to assist another in litigation in-exchange of a promise to hand over a portion of the proceeds of the action.
- The agreement for supplying funds by way of Maintenance or Champerty is valid unless
  1. It is unreasonable so as to be unjust to other party or
  2. It is made by a malicious motive like that of gambling in litigation or oppressing other party by encouraging unrighteous suits and not with the bonafide object of assisting a claim believed to be just.

4. **Traffic relating to Public Offices-**
   An agreement to traffic in public office is opposed to public policy, as it interferes with the appointment of a person best qualified for the service of the public. Public policy requires that there should be no money consideration for the appointment to an office in which the public is interested.
5. Agreements **tending to create monopolies**
6. **Marriage brokerage agreements:** An agreement to negotiate marriage for reward, which is known as a marriage brokerage contract, is void
7. **Interference with the course of justice** - An agreement whose object is to induce any judicial officer of the State to act partially or corruptly is void.
8. Interest against obligation
9. Consideration Unlawful in Part:
   Unlawful - Void
   Lawful - Valid

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VOID AGREEMENTS

Wagering agreement (Sec 30): An agreement by way of a wager is void. It is an agreement involving payment of a sum of money upon the determination of an uncertain event.

Agreement in restraint of trade(Sec27): An agreement by which any person is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void

Exceptions - 1. where a person sells the goodwill of a business and agrees with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or his successor in interest carries on a like business therein, such an agreement is valid. Such local limits must be reasonable

2. If an outgoing partner makes an agreement with the continuing partners that he will not carry on any business similar to that of the firm within a specified period or within specified local limits, such an agreement, thought in restraint of trade, will be valid, if the restrictions imposed are reasonable.

3. an agreement of service by which an employee binds himself, during the term of his agreement, not to compete with his employer is not in restraint of trade.

4. Trade Combinations to the extend they do not create monopoly

Agreement- the meaning of which is uncertain (Sec 29)

Agreement in restraint of marriage (Sec26): Every agreement in restraint of marriage of any person other than a minor, is void. So if a major agrees for good consideration not to marry, the promise is not binding and considered as void

Agreement in restraint of legal proceedings (Sec28): is the one by which any party thereto is restricted absolutely from enforcing his rights under a contract through a Court or which abridges the usual period for starting legal proceedings.

Exceptions - 1. A contract by which the parties agree that any dispute between them in respect of any subject shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable is a valid contract. 2. a contract by which the parties agree to refer to arbitration any question between them which has already arisen or which may arise in future, is valid; but such a contract must be in writing.

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WAGERING AGREEMENT (SECTION 30): the essence of a wager is that each side should stand to win or lose, depending on the way an uncertain event takes place in reference to which the chance is taken and in the occurrence of which neither of the parties has legitimate interest.

Transactions similar to Wager (Gambling):

1. Lottery transactions: A lottery is a game of chance and not of skill or knowledge. Where the prime motive of participant is gambling, the transaction amounts to a wager. lottery is sanctioned by the Government of India - person responsible for running the lottery will not be punished under the Indian Penal Code.
2. Crossword Puzzles and Competitions: Crossword puzzles in which prizes depend upon the correspondence of the competitor's solution with a previously prepared solution kept with the editor. Case Law: State of Bombay vs. R.M.D. Chamarbangwala Crossword puzzles, picture competitions and athletic competitions where prizes are awarded on the basis of skill and intelligence are the games of skill and hence such competitions are valid.
3. Speculative transactions : An agreement or a share market transaction where the parties intend to settle the difference between the contract price and the market price of certain goods or shares on a specified day, is a gambling and hence void.
4. Horse Race Transactions: A horse race competition where prize payable to the bet winner is less than Rs. 500, is a wager.

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Transactions resembling with wagering transaction but are not void:

1. Chit fund: In case of a chit fund, a certain number of persons decide to contribute a fixed sum for a specified period and at the end of a month, the amount so contributed is paid to the lucky winner of the lucky draw.
2. Commercial transactions or share market transactions: In these transactions in which delivery of goods or shares is intended to be given or taken, do not amount to wagers.
3. Games of skill and Athletic Competition
4. A contract of insurance: A contract of insurance is a type of contingent contract and is valid under law and these contracts are different from wagering agreements

UNIT 4 : PERFORMANCE OF CONTRACT

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

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

1. Actual Performance: Where a party to a contract has done what he had undertaken to do or either of the parties have fulfilled their obligations under the contract within the time and in the manner prescribed.

2. Offer to perform or attempted performance or tender of performance: It may happen sometimes, when the performance becomes due, the promisor offers to perform his obligation but the promisee refuses to accept the performance.

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Condition to be satisfied for Valid Tender/Attempted performance:-

- ✓ It must be unconditional
- ✓ It must be made at proper time and place
- ✓ Reasonable opportunity to examine goods.
- ✓ It must be for whole obligation.

Distinction Between Succession And Assignment:

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

BY WHOM A CONTRACT MAY BE PERFORMED (SECTION 40, 41 AND 42)

Promisor himself The intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor. contracts which involve the exercise of personal skill or diligence, or which are founded on personal confidence between the parties must be performed by the promisor himself.

Third persons: When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Agent: Where personal consideration is not the foundation of a contract, the promisor or his representative may employ a competent person to perform it

Legal Representatives: A contract which involves the use of personal skill or is founded on personal consideration comes to an end on the death of the promisor. Any other contract the legal representatives of the deceased promisor are bound to perform it unless a contrary intention appears from the contract. But their liability under a contract is limited to the value of the property they inherit from the deceased

Joint promisors (Sec42) : When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons must jointly fulfil the promise. If any of them dies, his legal representatives must, jointly with the surviving promisors, fulfil the promise. If all of them die, the legal representatives of all of them must fulfil the promise jointly.

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Liability Of Joint Promisor & Promisee

Section 42 : Devolution of joint liabilities:

If two or more persons have made a joint promise, ordinarily all of them during their life-time must jointly fulfil the promise.

After death of any one of them, his legal representative jointly with the survivor or survivors should do so.

After the death of the last survivor the legal representatives of all the original co-promisors must fulfil the promise.

Any one of joint promisors may be compelled to perform - Section 43:

Promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

If one of the joint promisors is made to perform the whole contract, he can call for a contribution from others.

Sharing of loss by default in contribution - If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Effect of release of one joint promisor- Section 44 :- A release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors, neither does it free the joint promisors so released from responsibility to the other joint promisor or promisors.

Rights of Joint Promisees -

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

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TIME AND PLACE FOR PERFORMANCE OF THE PROMISE :-

Time for performance of promise, where no application is to be made and no time is specified	A reasonable time
Time and place for performance of promise, where time is specified and no application to be made - Sec 47	On such day and the place at which the promise ought to be performed.
Application for performance on certain day to be at proper time and place - Sec 48	usual hours of business
Place for the performance of promise, where no application to be made and no place fixed for performance - Sec 49	Duty of the promisor to apply to promisee to appoint a reasonable place and to perform at such place.
Performance in manner or at time prescribed or sanctioned by promisee - Sec 50	In any manner/time which promisee prescribes/sanctions

PERFORMANCE OF RECIPROCAL PROMISE -

✓ **Promisor not bound to perform, unless reciprocal promise ready and willing to perform- Sec51-**
When a contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his promise unless the promisee is ready and willing to perform his reciprocal promise

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PERFORMANCE OF RECIPROCAL PROMISE -

- ✓ **Order of performance of reciprocal promises- Sec 52:** When the order of performance of the reciprocal promises is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

- ✓ **Liability of party preventing event on which the contract is to take effect - Section 53:** When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss he may sustain in consequence of the non performance of the contract.

- ✓ **Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises (Section 54):-** when the promises are reciprocal and dependent. If the promisor who has to perform his promise before the performance of the other's promise fails to perform it, he cannot claim performance of the other's promise, and is also liable for compensation for his non- performance.

- ✓ **Reciprocal promise to do certain things that are legal, and also some other things that are illegal Sec 57**

- ✓ **Alternative promise one branch being illegal- Section 58**

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PERFORMANCE OF RECIPROCAL PROMISE -

✓ **Effects of Failure to Perform at a Time Fixed in a Contract in which Time is Essential (Sec 55)-**

Ascertain whether time is intended to be of essence by the parties at the time of its formation Contract cannot be avoided where time is not essential: -

Contract cannot be avoided where time is not essential:
Where time is not essential, the contract cannot be avoided on the ground that the time for performance has expired, there the promisee is only entitled to compensation from the promisor for any loss caused by the delay.

Effect of acceptance of performance out of time: Even where time is essential the promisee may waive his right to repudiate the contract, when the promisor fails to perform the promise within the stipulated time He may accept performance at any time other than that agreed. In such an event, he cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of acceptance of the performance he has given a notice to the promisor of his intention to claim compensation.

✓ **Agreement to do Impossible Act**

❖ Initial Impossibility - (Impossibility existing at the time of contract): When the parties agree upon doing of something which is obviously impossible in itself the agreement would be void.

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

If unknown to the parties: Where both the promisor and the promisee are ignorant of the impossibility of performance, the contract is void If known to the promisor only: The promisee is entitled to claim compensation for any loss he suffered on account of nonperformance.

❖ Subsequent or Supervening impossibility (Becomes impossible after entering into contract)

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APPROPRIATION OF PAYMENTS

Application of payment where debt to be discharged is indicated (Sec 59): Where a debtor, owing several distinct debts to one person, makes a payment to him either with express intimation or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly

Application of payment where debt to be discharged is not indicated (Sec 60): Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, where its recovery is or is not barred by the law in force for the time being as to the limitation of suits. However he cannot apply the payment to the disputed debt.

Application of payment where neither party appropriates(Sec 61): Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payments shall be applied in discharge of each proportionately

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

Effect of novation, rescission & alteration of contract (Sec 62)

Effect of novation:

- The parties may substitute a new contract for the old. If they do so, it will be a case of novation.
- the old contract is discharged and consequently it need not be performed.
- new contract is substituted for it either between the same parties or between different parties the consideration mutually being the discharge of old contract

Effect of rescission

- When the parties agree to rescind it, the contract need not be performed
- no new contract comes to exist

Effect of alteration of contract - where the parties agree to alter contract, the original contract is rescinded, with the result that it need not be performed

Promisee may waive or remit performance of promise (Sec 63):

"Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit".

Effects of neglect of promisee to afford promisor reasonable facilities for performance (Sec67):

Promisor is excused for non-performance

Restoration of Benefit under a Voidable Contract (Sec 64):

"When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor.

Communication of rescission (Sec 66) -

In voidable contract, recission to be communicated to other party. Recission can be revoked as proposal is revoked

Obligations of Person who has Received Advantage under Void Agreement or contract that becomes void (Sec 65):

Either the advantage should be restored back or compensation should be paid.

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DISCHARGE OF CONTRACT

Discharge by lapse of time: If no action is taken by promisee of non-performance within specified period of limitation, he is deprived of remedy by law.

Discharge by mutual agreement - Novation, Rescission, Alteration and Remission

Discharge by performance - Actual/Attempted

Discharge by operation of law: Includes death of promisor, insolvency, etc.

Discharge by impossibility of performance - Supervening impossibility may take place owing to:

- ❖ an unforeseen change in law
- ❖ the destruction of the subject-matter essential to that performance;
- ❖ the non-existence or non-occurrence of particular state of things, which was naturally contemplated for performing the contract, as a result of some personal incapacity like dangerous malady;
- ❖ the declaration of a war (Section 56)

Discharge by breach of contract: Breach of contract may be actual breach or anticipatory breach.

Effects of **neglect of promisee to afford promisor reasonable facilities** for performance

Promisee may waive or remit performance of promise: discharge of contract by remission

Merger of rights: the inferior rights and the superior rights coincide and meet in one and the same person. In such cases, the inferior rights merge into the superior rights

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UNIT 5: BREACH OF CONTRACT AND ITS REMEDIES

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

ANTICIPATORY BREACH OF CONTRACT (Sec 39):

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

1. To either treat the contract as "rescinded and sue the other party for damages from breach of contract immediately without waiting until the due date of performance; Or
2. He may elect not to rescind but to treat the contract as still operative, and wait for the time of performance and then hold the other party responsible for the consequences of non performance. But in this case, he will keep the contract alive for the benefit of the other party as well as his own, and the guilty party, if he so decides on re-consideration, may still perform his part of the contract and can also take advantage of any supervening impossibility which may have the effect of discharging the contract

ACTUAL BREACH OF CONTRACT MAY BE COMMITTED-

- At the time when the performance of the contract is due.
- During the performance of the contract:

Actual breach of contract also occurs when during the performance of the contract, one party fails or refuses to perform his obligation under it by express or implied act.

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KINDS OF DAMAGES

Ordinary damages: When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage cause to him thereby, which naturally arose in the usual course of things from such breach, or which the parties know, when they made the contract, to be likely to result from the breach of it: Such compensation is not to be given for any remote and indirect loss or damage sustained by reasons of the breach. HADLEY vs. BAXENDALE

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

Nominal damages: Nominal damages are awarded where the plaintiff has proved that there has been a breach of contract but he has not in fact suffered any real damage. It is awarded just to establish the right to decree for the breach of contract. The amount may be a rupee or even 10 paise.

Pre-fixed damages: Sometimes, parties to a contract stipulate at the time of its formation that on a breach of contract by any of them, a certain amount will be payable as damage. It may amount to either liquidated damages (i.e., a reasonable estimate of the likely loss in case of breach) or a penalty (i.e., an amount arbitrarily fixed as the damages payable) as per section 74.

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

- for breach of promise to marry because it causes injury to his or her feelings; and
- for wrongful dishonour by a banker of his customer's cheque because in this case the injury due to wrongful dishonour to the drawer of cheque is so heavy that it causes loss of credit and reputation to him. A business man whose credit has suffered will get exemplary damages even if he has sustained no pecuniary loss. But a non-trader cannot get heavy damages in the like circumstances, unless the damages are alleged and proved as special damages

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PENALTY AND LIQUIDATED DAMAGES (SECTION 74): Section 74 provides that if a sum is named in a contract as the amount to be paid in case of a breach, the aggrieved party is entitled to receive from the party at fault a reasonable compensation not exceeding the amount so named (Section 74).

English Law: According to English law, the sum so fixed in the contract may be interpreted either as liquidated damages or as a penalty.

If the sum fixed in the contract represents a genuine pre-estimate by the parties of the loss, which would be caused by a future breach of the contract it is liquidated damages.

It is an assessment of the amount which in the opinion of the parties will compensate for the breach. Such a clause is effective and the amount is recoverable.

But where the sum fixed in the contract is unreasonable and is used to force the other party to perform the contract; it is penalty. Such a clause of disregarded and the injured party cannot recover more than the actual loss.

Indian Law: It makes no distinction between 'penalty 'and liquidated damages'. The Courts in India award only a reasonable compensation not exceeding the sum so mentioned in the contract. Section 74 of the Contract Act lays down if the parties have fixed what the damages will be, the courts will never allow more. But the court may allow less. A decree is to be passed only for reasonable compensation not exceeding the sum named by the parties. Thus, Section 74 entitles a person complaining of breach of contract to get reasonable compensation and does not entitle him to realise anything by way of penalty.

Exception : Where any person gives any bond to the Central or State government for the performance of any public duty or act in which the public are interested, on breach of the condition of any such instrument, he shall be liable to pay the whole sum mentioned therein.

Party rightfully rescinding contract, entitled to compensation (Sec 75) - A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through non-fulfilment of the contract

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REMEDIES FOR BREACH OF CONTRACT

Suit For Damages: Compensation for loss or damage caused by breach of contract (Sec 73)

➢ When a contract has been broken, the party who suffers by such a breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

➢ Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach

Suit For Specific Performance : Where damages are not an adequate remedy in the case of breach of contract, the court may in its discretion on a suit for specific performance direct party in breach, to carry out his promise according to the terms of the contract.

Rescission of contract

Suit for injunction: Where a party to a contract is negating the terms of a contract, the court may by issuing an 'injunction orders', restrain him from doing what he promised not to do.

Quantum Meruit: Where one person has rendered service to another in circumstances which indicate an understanding between them that it is to be paid for although no particular remuneration has been fixed, the law will infer a promise to pay. Quantum Meruit i.e. as much as the party doing the service has deserved. It covers a case where the party injured by the breach had at time of breach done part but not all of the work which he is bound to do under the contract and seeks to be compensated for the value of the work done. For the application of this doctrine, two conditions must be fulfilled:

➢ It is only available if the original contract has been discharged.

➢ The claim must be brought by a party not in default.

➢ The object of allowing a claim on quantum meruit is to recompensate the party or person for value of work which he has done. Damages are compensatory in nature while quantum merit is restitutory. It is but reasonable compensation awarded on implication of a contract to remunerate

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UNIT 6 - CONTINGENT CONTRACT AND QUASI CONTRACTS

Contingent Contract' (Sec 31) -"A contract to do or not to do something, if some event, collateral to such contract, does or does not happen". Contracts of Insurance, indemnity & guarantee fall under this category.

Essentials of a contingent contract:

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

Difference between Contingent and Wagering Contract:-

- ✓ **Meaning:** A contingent contract is a contract to do or not to do something with reference to a collateral event happening or not happening. A wagering agreement is a promise to give money or money's worth with reference to an uncertain event happening or not happening.
- ✓ **Reciprocal promises:** Contingent contract may not contain reciprocal promises. A wagering agreement consists of reciprocal promises.
- ✓ **Uncertain event:** In a contingent contract, the event is collateral. In a wagering contract, the uncertain event is the core factor.
- ✓ **Nature of contract:** Contingent contract may not be wagering in nature. A wagering agreement is essentially contingent in nature.
- ✓ **Interest of contracting parties:** Contracting parties have interest in the subject matter in contingent contract. The contracting parties have no interest in the subject matter.
- ✓ **Doctrine of 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-valid. Wagering-void.

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RULES RELATING TO ENFORCEMENT OF CONTINGENT CONTRACT

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

Enforcement of contracts contingent on an event not happening: Where a contingent contract is made contingent on a non-happening of an event, it can be enforced only when it's happening becomes impossible.

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

Contingent on happening of specified event within the fixed time: Sec 35 says that Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, becomes void if, at the expiration of time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

"**Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time**, may be enforced by law when the time fixed has expired, and such event has not happened or before the time fixed has expired, if it becomes certain that such event will not happen".

Contingent on an impossible event: Not enforceable (Void)

QUASI CONTRACTS are based on principles of equity, justice and good conscience. A quasi or constructive contract rest upon the maxims, "No man must grow rich out of another person's loss". These relations are called as quasi-contractual obligations. In India it is also called as 'certain relation resembling those created by contracts.

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Salient Features Of Quasi Contracts:

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

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CASES DEEMED AS QUASI CONTRACTS

1. Claim for necessaries supplied to persons incapable of contracting (Sec 68): If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. To establish his claim, the supplier must prove not only that the goods were supplied to the person who was minor or a lunatic but also that they were suitable to his actual requirements at the time of the sale and delivery.

2. Payment by an interested person (Sec 69): A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

3. Obligation of person enjoying benefits of non-gratuitous act (Sec 70): where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to pay compensation to the former in respect of, or to restore, the thing so done or delivered. It thus follows that for a suit to succeed, the plaintiff must prove: that he had done the act or had delivered the thing lawfully; that he did not do so gratuitously; and that the other person enjoyed the benefit.

4. Responsibility of finder of goods (Sec71): is same responsibility as if he were a bailee.

5.Money paid by mistake or under coercion (Sec 72): person who receives must repay or return it.

UNIT 7:- CONTRACT OF INDEMNITY AND GUARANTEE

Contract of Indemnity (Sec 124) :-

It is "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person."

Scope:-

Restricted to loss caused by himself or any other person. Loss occasioned by accident/act of god is not covered.
Exception - Gajanan Moreshwar v/s Moreshwar Madan (1942)

Parties to Contract of Indemnity :-

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

Mode of Contract of indemnity :-

1. Express - when a person expressly promises to compensate the other from loss.
2. Implied - when it is inferred from conduct of parties or from the circumstances of the case.

Contract of indemnity must fulfil all the essentials of valid contract.

Fire and marine insurance - contract of indemnity
Life insurance - not a contract of indemnity

Rights of indemnity holder when sued (Sec 125) :-

He is entitled to recover - all the damages, costs of suit, other sums.

Liability of indemnifier - commences as soon as the liability of indemnity holder becomes absolute and certain.

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Contract of Guarantee (Sec 126):-

A contract of guarantee is a contract to perform the promise made or discharge the liability, of a third person in case of his default.

Three Parties Involved:-

1) Surety - person who gives guarantee.
2) Principal debtor - person in respect of whose default the guarantee is given.
3) Creditor - person to whom the guarantee is given.

Tripartite agreement between parties involved:-

1) Principal contract - between principal debtor and creditor
2) Secondary contract - between creditor and surety
3) Implied contract - between surety and principal debtor.

Essential features of Guarantee:-

1. **Purpose** :- To secure payment of debt.
2. **Consideration** must be there - may be direct/indirect
3. **Existence of liability** - Liability must be legally enforceable, not time barred
4. No misrepresentation/concealment(sec142 & 143)
5. May be oral/written
6. Joining of co-surety (Sec 144) - if condition is imposed for other surety to join then he must join.

Types of Guarantee

Specific Guarantee:-

- Guarantee which extends to single debt/specific transaction
- Surety's liability ends when debt is discharged.

Continue Guarantee (Sec 129) :-

- Guarantee which extends to a series of transaction
- Surety's liability continues until revocation of guarantee.

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Nature and Extent of Surety's liability (Sec 128) :-

1. Co - Extensive with that of the principal debtor unless otherwise provided.
2. Secondary in nature - liable only if default by principal debtor
3. Where a debtor cannot be held liable because of defect in document, the liability of surety also ceases.
4. A creditor may choose to proceed against a surety first.

Modes of discharge

By Revocation of guarantee :-

1) By Notice (Sec130) - continuing guarantee may be revoked by surety for future transaction. Past transaction liability remains. Specific Guarantee can only be revoked if liability is not accrued.
2) By Surety's death (Sec 131) :- Estate remains liable for past transactions.
3) By Novation (Sec 62)

By Conduct of Creditor:-

1) Variance in terms without assent of surety.(Sec 133)
2) By release/discharge of principal debtor(PD) - discharged if creditor enters into fresh/new contract or does any act/omission which leads to discharge of PD. (Sec 134)
3) By composition, promise to give time and promise not to sue with PD. (Sec135)
4) By Creditor's act/omission impairing surety's eventual remedy. (Sec 139)

On Invalidation of contract of Guarantee:-

1. Guarantee obtained by misrepresentation. (Sec 142)
2. Guarantee obtained by concealment (Sec 143)
3. Guarantee on the contract that creditor shall not act until co surety join. Such co surety does not join. (Sec 144)

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Cases where surety is not discharged

1. When agreement is made by creditor with third person not with PD to give time to PD (Sec 136)
2. Mere forbearance on the part of creditor to sue the PD or enforce any remedy against him (Sec 137)

Rights of Surety

Rights against co sureties (:-

["Co-sureties (meaning)- When the same debt or duty is guaranteed by two or more persons, such persons are called co-sureties"]

1) Co-Sureties liable to contribute equally - Each surety is required to contribute equally. (Sec 146)
2) Liability bound in different sums - principle of equal contribution is subject to maximum limit fixed by surety of his liability. (Sec 147)

Rights against principal debtor :-

1) Rights of subrogation (Sec 140) :- On the payment of the guaranteed debt/performance of the guaranteed duty, surety steps into the shoes of the creditor.
2) Implied promise to indemnify surety (Sec 145) :- The surety is entitled to recover from PD whatever sum he has rightfully paid under guarantee, but not sums which he paid wrongfully.

Right against Creditor:-

1) Surety's right to benefit of creditor's securities (Sec 141) :- Entitled to benefit of every security which creditor has against PD whether surety is aware of its existence or not. If creditor loses or parts with security without consent of surety, surety is discharged to extent of value of such security.
2) Right to set off:- Surety has benefit to claim set off if the PD had any against the creditor.
3) Right to share reduction:- Surety has right to claim proportionate reduction in the liability if PD becomes insolvent.

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UNIT 8:- BAILMENT AND PLEDGE

Bailment - to deliver

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

Parties to bailment:-

1) Bailor : Person delivering goods
2) Bailee: Person to whom goods are delivered.

Types of Bailment

On the basis of benefit

- For exclusive benefit of bailor
- For exclusive benefit of bailee
- For mutual benefit of bailor and bailee.

On the basis of reward

- Gratuitous Bailment:- when provider of service does it free of charge.
- Non-Gratuitous Bailment:- where both the parties get some benefit.

Essential Elements:-

1. Contract - Express/Implied. Consideration not necessary.
2. Delivery of goods - Bailment is only for movable goods never for immovable property and money. Delivery is of two types:- i)Actual delivery - goods are physically handed over ii) Constructive - delivery is made by doing anything that has effect putting goods in possession of other person.
3. Purpose:- Goods are delivered with some purpose.
4. Change in Possession of goods.
5. Return of goods in same form as given or altered as per bailor's direction.

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Duties and rights

Duties of Bailor:-

1. Disclose known Facts:- a) In case of gratuitous bailment: bound to disclose any fault in goods known by him.(Sec 150)
   b)In case of non gratuitous bailment:-bailor is responsible for damage whether he was aware or not aware of faults in the goods.
2. To pay necessary expenses (Sec 158):- a)In gratuitous bailment - bailor is liable to pay necessary + extraordinary expenses b)Non - gratuitous bailment - liability to pay extraordinary expenses.
3. Duty to indemnify the bailee for premature termination (Sec 159) - must compensate bailee for loss/damage suffered by him
4. Indemnify any loss sustained by bailee (Sec 164)
5. Responsibility to receive back the goods. (Sec 164)

Duties of Bailee:-

1. Take reasonable care of goods (Sec 151 & 152)
2. Not to make inconsistent use of goods. (Sec 153 & 154)
3. Not to mix the goods(Sec 155, 156& 157) :-i)Mixes with own goods with consent, both parties have proportionate interest ii)Mixes with own goods without consent but can be separated - liable to expense of separation iii)Mixes with own goods without consent and cannot be separated - compensate fully.
4. Return the goods(Sec 161 & 160)
5. Return accretion from goods (Sec 163)
6. Not to setup adverse title.

Rights of a Bailor:-

1. Right to terminate bailment. (S.153)
2. Right to demand back the goods(S.159
3. Right to file suit against wrong doer.
4. Right to sue bailee
5. Right to compensation

Rights of Bailee:-

1. Right to deliver goods to any one of joint owners.
2. Right to indemnity
3. Right to claim compensation in case of faulty goods.
4. Right to claim necessary expenses
5. Right to apply to court to decide title of goods.
6. Right of particular lien
7. Right of general lien

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Termination of Bailment:-

1. On expiry of stipulated period
2. On fulfillment of the purpose
3. By notice in the following cases :- i) if bailee acts in a manner inconsistent with the terms of bailment ii)Gratuitious bailment
4. By death of either bailor/bailee
5. Destruction of the subject matter

Right of Lien:-

Lien is the right of a person to retain the goods belonging to another until his claim is satisfied or some debt due to him is repaid.

Types of Lien:-

Particular lien (Sec 170):- It is a right to retain only the particular goods in respect of which the claim is due. Where bailee has rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has right to retain such goods.

General lien (Sec 171):- It is a right to retain the goods not only for demands arising out of the goods retained but for a general balance of account in favour of certain persons.

Finder of lost goods (S. 168) :-

- ✓ Person who finds some goods which do not belong to him, is called the finder of the goods.
- ✓ Duty -to find the true owner and surrender the goods to him.
- ✓ the finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him but has a right to retain the goods against the owner until he receives such compensation
- ✓ where the owner has offered a specific reward on the lost goods, the finder may sue the owner for such reward, and may retain the goods until then.
- ✓ When finder of thing commonly on sale may sell it (Sec 169) - if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it— (1) when the thing is in danger of perishing or of losing the greater part of its value, or (2) when the lawful charges of the finder in respect of the thing found amount to two thirds of its value.

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Pledge(Sec 172):- The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

Essentials of Contract of pledge:-

1. All the essentials of bailment.
2. There shall be a bailment for security against payment or performance of the promise
3. The subject matter of pledge is goods
4. Goods pledged for shall be in existence
5. There shall be the delivery of goods from pledger to pledgee

Duties of Pawnor:-

1. Pay Debt, 2. Indemnify Pawnee, 3. Disclose all the faults, 4. Pay extra ordinary expenses, 5. Pay deficit if Pawnee sells goods due to default by Pawnor.

Duties of Pawnee:- Same as bailee

Pledge by Non- Owners when acted in good faith:-

1. By Mercantile agent acting with consent of owner
2. By person in possession under voidable contract
3. By pawnor who has limited interest
4. By co-owner in possession with consent of all owner
5. By seller/buyer in possession.

Rights of a Pawnee/ Pledgee:

1. Right to retain the pledged goods - pawnee may retain goods not only for non payment of debt but also for interest and expenses.
2. Right to retain subsequent debts - Pawnee can retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged only when there is a contract to this effect.
3. Pawnee's right to extraordinary expenses incurred – doesnot have right to retain but can sue pawnor for such expenses.
4. Pawnee's right where pawnor makes default : he may bring a suit against pawnor and retain goods pledged or he may sell the thing on reasonable notice to pawnor.

Rights of Pawnor:-

1. Same Rights as Bailor
2. Right to redeem goods pledged after payment of the debtor or performance of promise.

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UNIT 9:- AGENCY

Agent means a person employed to do any act for another or to represent another in dealing with the third persons. Principal means a person for whom such act is done or who is so represented.

Test of Agency

(a) Whether the person has the capacity to bind the principal and make him answerable to the third party.

(b) Whether he can establish privity of contract between the principal and third parties.

If the answer to these questions is in affirmative (Yes), then there is a relationship of agency.

- Person qualified to appoint agent must be – major and of sound mind.
- Person qualified to be agent – any person but if it is minor or of unsound mind – principal bound by the acts and shall not proceed against him.
- No consideration necessary to be agent – acceptance of office is sufficient consideration.

Extent of Agent's Authority :-

1. In Normal Circumstances - has authority to do every lawful thing which is necessary. An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.
2. In Emergency - to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Valid emergency consists of –

- ✓ No opportunity to communicate with principal
- ✓ Actual and definite commercial necessity is must
- ✓ Acted bonafide and for the benefit of principal
- ✓ Most reasonable & practical course of action taken
- ✓ Must have possession of goods

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Modes of creation of agency

Express authority - when authority is given by words, spoken or written.

Implied authority - An authority is said to be implied when it is to be inferred from the circumstances of the case, conduct of the parties and things spoken or written, or in the ordinary course of dealing, may be accounted from the circumstances of the case.

1. Agency by Estoppel:-
Where the principal by his conduct or statement willfully induces another person to believe that a certain person is his agent, he is subsequently prevented or estopped from denying the fact of agency.
Essentials for estoppel:-
- ✓ Representation must be made
- ✓ May be expressed/implied
- ✓ It must state that agent has authority
- ✓ Third party must be induced
- ✓ Third party must believe and made contract on that faith.

2.Agency by Necessity: arises due to some emergent circumstances. When emergency arises, agent acquires special power to prevent principal from loss.

3.Agency by operation of law:- Where law treat one person as agent of another.

4.Effect of ratification:- Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.
Essentials for ratification:-
a. May be express or implied; b. Full knowledge of facts; c. Whole transaction must be ratified; d. Ratification not put a third party to damages; e. Within reasonable time; f. Communication; g. Act to be ratified must be valid.

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Sub Agent :- is a person employed by, and acting under the control of, the original agent in the business of the agency.

General Rule - The appointment of sub agent is not lawful, because the agent is a delegatee and a delegatee cannot further delegate.

Exception where an agent can appoint Sub-agent:

(1) if the terms of original appointment states it.

(2) there is **customs of the trade** which requires it

(3) if unforeseen emergency arises

If sub agent properly appointed - Principal liable to third parties, agent liable to principal, sub agent liable to agent for his acts.

If sub agent appointed without authority - agent liable to principal and third parties, principal responsible for acts of sub agent, sub agent answerable only to agent.

Rules of Sub-Agent -

1. Work under control and directions of agent. 2. Agent delegates a part of his own duties to Sub Agent. 3. No privity of contract between principal and sub-agent. 4. Sub-agent is responsible to the agent only. 5. Agent is responsible to the principal for the acts of the sub- agent. 6. Sub-agent has no right of action against the principal for remuneration due to him.

Substituted Agent:- A person appointed by agent to act for principal with knowledge and consent of principal.

Agent's duty for naming such agent - exercising ordinary prudence.

Rules of Substituted Agent -

1. Works under the instructions of the principal.
2. Agent does not delegate any part of his task to a substituted agent.
3. Privity of contract exists between a principal and a substituted agent.
4. Responsible to the principal.
5. Agent is not responsible to the principal for the acts of the substituted agent.
6. Substituted agent can sue the principal for remuneration due to him.

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Duties and obligation of agent:-

- ✓ Duty to follow instructions of principal or customs of trade - When the agent acts otherwise and any loss is sustained by the Principal, he must indemnify him, and, if any profit accrues, he must account for it.
- ✓ Duty of reasonable care and skill
- ✓ Duty to render proper accounts – Not only accounts but also supported by vouchers.
- ✓ Agent's duty to communicate with principal
- ✓ Duty not to deal on his own account - should not deal on his own account without first obtaining the consent of the principal, otherwise the principal may— (a) repudiate the transaction, (b) claim from the agent any benefit which may have resulted to him from the transaction.
- ✓ Duty not to make secret profit – must act in good faith.
- ✓ Duty not to delegate
- ✓ Duty to pay all sums received on the behalf of principal
- ✓ Duty not to use any confidential information received in course of agency.

Principal's liability to Third Parties:- An agent does all acts on behalf of the principal but incurs no personal liability.

- ✓ Principal's liability for the Acts of the Agent: Principal liable for the acts of agents which are within the scope of his authority.
- ✓ Principal's liability when agent exceeds authority – if the excess part can be separated – then principal not liable for only that part. If it cannot be separated – principal not liable at all. However, if principal induces third party to believe that act was authorized, then principal is liable.
- ✓ Consequences of notice given to agent – Any notice given to/information obtained in course of business will have same legal consequence as if it is given to or obtained by agent.
- ✓ Principal's liability for the agent's fraud, misrepresentation or torts – if matter falls under agent's authority, then such fraud/misrepresentation will be treated as done by principal. If agent acts beyond authority, principal is not liable.

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Rights of Agent

Right of retain out of sums received on principal's account :
Agent can retain
(a) all moneys due to himself in respect of advances made
(b) in respect of expenses properly incurred by him
(c) his remuneration.

The right can be exercised on any sums received on account of the principal in the business of agency.

Right to remuneration: In normal course - as per terms, If not in terms - as per custom. Agent guilty of misconduct - not entitled to remuneration.

Agent's lien on principal's property:
, an agent is entitled to retain the goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursement and services in respect of the same has been paid or accounted for him.
Conditions for this right -
- ✓ Agent should be lawfully entitled to such commission
- ✓ Possession of property should not be by unlawful means.

Lien is lost when :-
- ✓ Possession is lost
- ✓ Agent waives his right
- ✓ Agent's lien is subject to contract to contrary.

Right to indemnity:-
a) Right of indemnification for lawful acts done - bound to indemnify agent against all consequences of lawful acts done in his authority.
b) Right of indemnification when acts are done in good faith except when acts done by agent are in violation of any penal laws
c) Non liability of employer of agent to do a criminal act:- if agent is appointed to do criminal act - principal not bound to indemnify the loss.

Right to compensation for injury caused by principal's neglect.

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Agent's Liability to third Party – Cases where agent is personally liable :

1. When contract made on behalf of merchant resident abroad/foreign principal
2. When agent does not disclose the name of principal
3. Principal non existent/incompetent
4. Pretended agent
5. When the agent exceeds his authority.

Agency is irrevocable:- if the agent becomes personally interested in the subject matter of agency.

Effects of termination:-

Termination does not take effect until it is known to agent as well as third party.

Termination of agent's authority leads to termination of all the sub agent's authority.

Rights of Third Parties:-

Right to parties to a contract made by undisclosed agent - Third party has same rights as against principal as he had against agent. If principal discloses himself before completion of contract, then third party may refuse to fulfil the contract.

Performance of contract with agent supposed to be principal - When agent does not disclosed that he is acting as an agent and the principal requires the performance of the contract then the principal can obtain such performance subject to the rights and obligations between agent and third party

Option to Third Person- sue the Agent or the Principal: Right of person dealing with agent personally liable: third party dealing with such agent may hold agent or principal, or both of them, liable.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable: When third party induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

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Termination of Agency

Revocation –
Principal at any time may revoke the authority at any time.
Cannot revoke when authority partly exercised – will be liable for acts already done.
Compensation for revocation – if revocation is pre mature without cause, compensation is necessary
Notice of revocation – when principal has justified reason to revoke, reasonable notice to be served.
Revocation can be expressed/implied.

On Principal's Insolvency

On expiry of time – in case of agency for fixed term.

Renunciation by agent:- Agent may renounce the business of agency in same manner principal can revoke. However, rules as to compensation, notice will remain same as revocation. If agent renounces without proper notice, he will be liable for damages.

On Death/ Insanity of principal/agent

Completion of business

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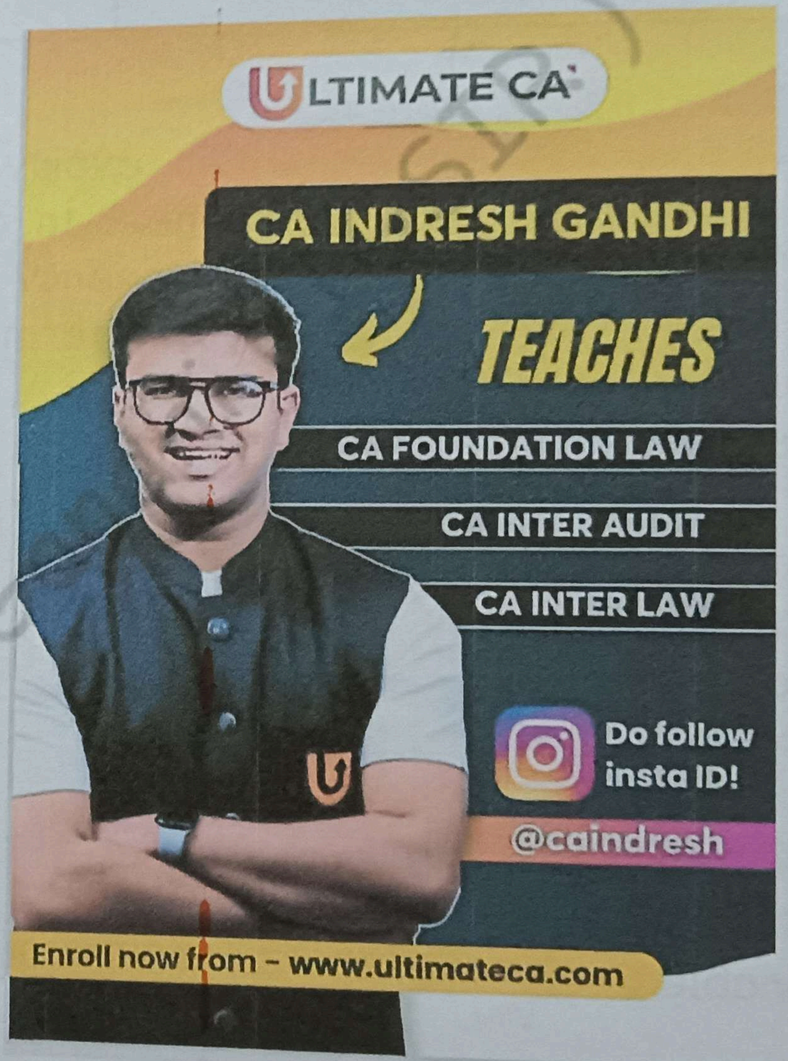
Limited Liability Partnership Act Charts



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LLP Act, 2008

Applicability

The LLP Act, 2008 is applicable to the whole of India.

Contents

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

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

Second Schedule:- deals with conversion of a firm into LLP

Third Schedule:- deals with conversion of a private company into LLP.

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

Non-Applicability

Indian Partnership Act, 1932 is not applicable to LLPs.

Meaning of LLP

- ✓ It is is a new form of legal business entity with limited liability.
- ✓ It is an alternative corporate business vehicle.
- ✓ It provides the benefits of limited liability at low compliance cost
- ✓ It allows its partners the flexibility of organising their internal structure.
- ✓ LLP itself will be liable for the full extent of its assets, the liability of the partners will be limited.
- ✓ LLP is hybrid between company and partnership as it contains elements of both.

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Important Definitions

Body Corporate company as defined in clause (20) of section 2 of the Companies Act, 2013 and includes - LLP under this act, LLP incorporated abroad/company incorporated outside India. Does not include - a corporation sole, co-operative society& any other body corporate as notified.

Business - includes every trade, profession, service and occupation except any activity notified by Central Govt.

Designated Partner - any partner designated as such pursuant to section 7.

Partner - means any person who becomes a partner in the LLP in accordance with the LLP agreement

Entity - any body corporate and includes, for the purposes of sections 18, 46, 47, 48, 49, 50, 52 and 53, a firm setup under the Indian Partnership Act, 1932.

Financial Year - the period from the 1st day of April of a year to the 31st day of March of the following year

Small LLP:- Contribution upto Rs.25Lakhs & Turnover for immediately preceeding FY upto Rs. 40 Lakhs or which fulfils prescribed terms and conditions

Foreign LLP - means a LLP formed, incorporated or registered outside India which establishes a place of business within India

LLP - means a partnership formed and registered under this Act.

LLP Agreement - any written agreement between the partners of the LLP or between the LLP and its partner.

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Partner (Section 5) -

Any individual or body corporate may be a partner in a LLP. However, an individual shall not be capable of becoming a partner of a LLP, if–

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

(b) he is an undischarged insolvent; or

(c) he has applied to be adjudicated as an insolvent and his application is pending

Minimum number of Partners -

- ✓ Atleast two partners
- ✓ If number reduced below 2 and LLP carries on business for more than 6 months with one partner, then such partner is personally liable.

Designated Partners (Section 7):-

- ✓ at least two designated partners who are individuals and at least one of them shall be a resident in India.
- ✓ If in LLP, all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners.
- ✓ Resident in India: For the purposes of this section, the term resident in India means a person who has stayed in India for a period of not less than 120 days during the financial year.

Difference between partnership and LLP

- Regulating act - LLP act, 2008 and Indian Partnership Act, 1932.
- LLP body corporate while partnership is not
- LLP is separate legal entity while partnership is not.
- LLP is created by legal process while partnership is created by agreement
- Registration of LLP is mandatory while it is voluntary in partnership
- LLP has perpetual succession while partnership does not.
- LLP's name should have LLP suffix while there is no such rule for partnership
- Partners in LLP have limited liability while in partnership - unlimited liability
- There are atleast two designated partners in LLP while in partnership is not essential.

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Characteristic of LLP:-

1. LLP is a body corporate.
2. Perpetual Succession – LLP can continue its existence irrespective of changes in partners.
3. Separate Legal Entity – LLP is liable to full extent of asset and liability.
4. Mutual Agency - All partners will be the agents of the LLP alone. No one partner can bind the other partner by his acts.
5. LLP Agreement - Mutual rights and duties of the partner are governed by an agreement.
6. Artificial Legal Person
7. Common Seal
8. Limited Liability- partners liability is limited.
9. Management of business is done by partners.
10. Minimum (refer section 7) and Maximum number (no limit) of partners
11. Business for profit only – Cannot be formed for charitable purpose
12. Investigation:- CG has powers to investigate an LLP
13. Conversion into LLP - Any firm, private company/unlisted public company can convert into LLP.
14. E-filing of Documents - Every form/application of document required to be filed shall be filed in electronic form on its website www.mca.gov.in and authenticated by a partner/designated partner of LLP by electronic/digital signature.

Advantages of LLP Form:-

1.Is organised and operates on basis of agreement, 2.Provides flexibility without detailed legal and procedural requirements ,3.Easy to form, 4.All partners enjoy limited liability, 5.Flexible capital structure, 6.Easy to dissolve

Effect of Registration:-

LLP will be capable of -

- ✓ Suing and being sued
- ✓ Doing the suffering such other acts and things as body corporate may lawfully do and suffer
- ✓ Having a common seal if it decides to have one
- ✓ Acquiring, owning, holding and developing or disposing property whether movable/immovable/tangible /intangible

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Statement made by - advocate/CS/CA/Cost Accountant and any one who subscribed to incorporation document that all the requirements are complied with

If a person makes a statement- he knows to be false or does not believe to be true - punished with - imprisonment up to 2 years and fine not less than Rs. 10,000 which may extend to Rs. 5 Lakhs.

Incorporation of LLP

Two or more persons associated for carrying on business shall subscribe their names to incorporation document

Statement to be filed

+

Incorporation Document with fees

Filed with Registrar

Registrar shall within 14 days:-

- ✓ Register the incorporation document
- ✓ Give a certificate that LLP is incorporated with name therein

Certificate shall be signed and authenticated with the official seal by the registrar and is the conclusive evidence that the LLP is incorporated

Document in prescribed form shall state -

- ✓ Name
- ✓ Proposed business
- ✓ Address of registered office
- ✓ Name and address of each of the partners
- ✓ Name and address of designated partners of the LLP on incorporation;
- ✓ contain such other information as prescribed.

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Name :

(1) Every limited liability partnership shall have either the words "limited liability partnership" or the acronym "LLP" as the last words of its name.

(2) No LLP shall be registered by a name which, in the opinion of the Central Government is—

(a) undesirable; or

(b) identical or too nearly resembles to that of any other LLP or a company or a registered trade mark of any other person under the Trade Marks Act, 1999.

Reservation of name (Section 16):

A person may apply in prescribed form and fees to the Registrar for the reservation of a name. Upon receipt of an application under and on payment of the prescribed fee, the Registrar may reserve the name for a period of 3 months from the date of intimation.

Change of Name of LLP

A LLP on its first registration/on its registration by a new body corporate is registered by a name which is identical with or too nearly resembles to —

(a) that of any other LLP or a company;

(b) or a registered trade mark name of propreitor

then on an application, the CG may direct that such LLP to change its name or new name within a period of 3 months from the date of issue of such direction.

Such application shall be maintainable within a period of 3 years from the date of incorporation or registration or change of name of the LLP under this Act

If LLP changes its name as asked - it shall within 15 days from name change inform registrar. Registrar will then provide new certificate with 30 days of receipt of information

If LLP does not comply with direction, CG shall allot a new name and registrar will provide a new certificate.

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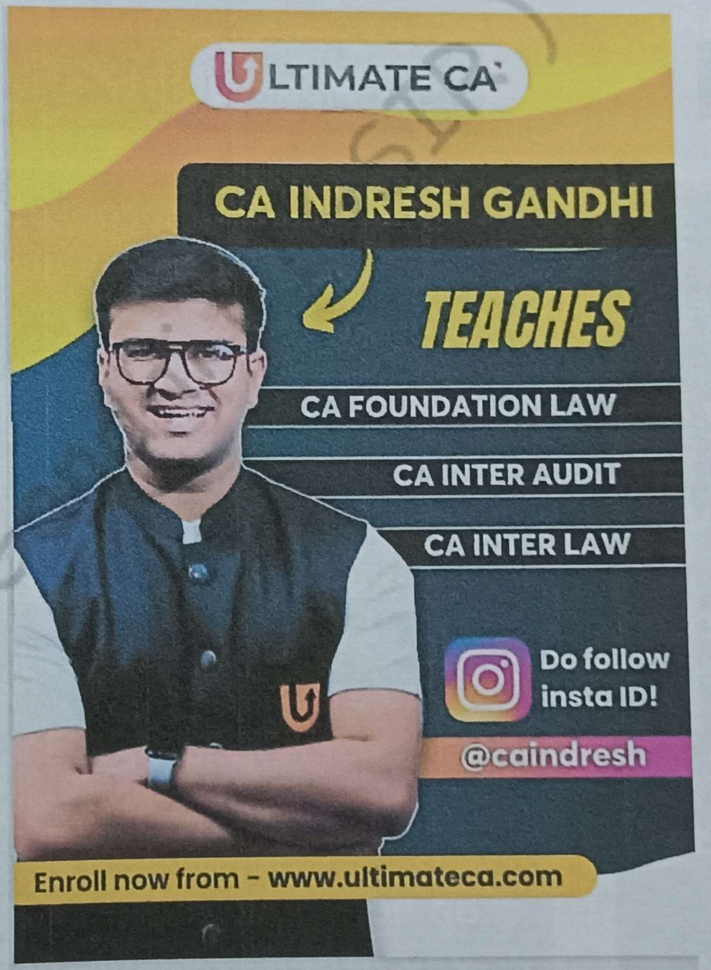
Companies Act Charts



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Companies Act 2013

Contents

Contains -
- ✓ 470 sections and seven schedules.
- ✓ Act is divided into 29 Chapters
- ✓ Substantial part is rules

Aims -
- ✓ To improve Corporate governance
- ✓ Simply regulations
- ✓ Strengthen interest of minority and whistle blowers
- ✓ Class action suits

Applicability

- ✓ Companies incorporated under this Act or under any previous company law.
- ✓ Insurance companies, Banking companies, Companies engaged in the generation or supply of electricity (except where provision inconsistent with IRDA Act,1999/ Banking regulation Act,1949/ Electricity Act,2003)
- ✓ Any other company governed by any special Act for the time being in force
- ✓ Any other company as specified by CG

Meaning of company

Section 2(20) of the Companies Act, 2013 -

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

Chief Justice Marshall

"a corporation is an artificial being, invisible, intangible, existing only in contemplation of law."

Professor Haney

"A company is an incorporated association, which is an artificial person created by law, having a separate entity, with a perpetual succession and a common seal."

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Features of Company

Separate legal entity -

- ✓ Its existence is distinct and separate from that of its members.
- ✓ A company can own, enjoy and dispose property, have bank account, raise loans, incur liabilities and enter into contracts in its own name.
- ✓ Even members can contract with company, acquire right against it or incur liability to it.
- ✓ For the debts of the company, only its creditors can sue it and not its members.
- ✓ A member does not even have an insurable interest in the property of the company. The leading case on this point is of Macaura Vs. Northern Assurance Co. Limited (1925)

Perpetual Succession -

- ✓ Members may die or change, but the company goes on till it is wound up on the grounds specified by the Act.
- ✓ Since a company is an artificial person created by law, law alone can bring an end to its life.
- ✓ Its existence is not affected by the death or insolvency of its members.

Limited Liability -

In case of limited liability company/ company limited by guarantee/unlimited liability, liability of member shall be limited/limited to extent of amount guaranteed/unlimited respectively.

Artificial Legal Person -

- ✓ It is legal/judicial as created by law
- ✓ It has separate legal entity, therefore can sue and be sued in its own name.
- ✓ Company is artificial person - can only act through human agency.

Common Seal - (Optional)

Common seal is the official signature of a company, which is affixed by the officers and employees of the company on its every document. In case a company does not have a common seal, the authorization shall be made by two directors/by a director & CS.

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Corporate Veil -

The term Corporate Veil refers to the concept that members of a company are shielded from liability connected to the company's actions. If the company incurs any debts or contravenes any laws, the corporate veil concept implies that members should not be liable for those errors. In other words, they enjoy corporate insulation. Company is identified separately from its members.

Lifting of corporate veil - Cases where company law disregards the principle that the company is a legal entity distinct and separate from its shareholders or members

- **Trading with Enemy** - Test of control/character of people at helm is ascertained to determine the same (Case Law - Daimler Co. Ltd. vs. Continental Tyre & Rubber Co.)
- **To protect revenue/tax** -When entity is used to evade/circumvent tax.[Case law - Juggilal vs.Commissioner of Income Tax AIR (SC)/Dinshaw Maneckjee Petit]
- **To Avoid Legal obligation** - When sole purpose of formation of the entity is to use it as a device to reduce bonus to workmen - veil is lifted. (Case law - (The Workmen Employed in Associated Rubber Industries Limited, Bhavnagar vs. The Associated Rubber Industries Ltd., Bhavnagar and another).
- **Formation of subsidiaries to act as agents** - (Case law -Merchandise Transport Limited vs. British Transport Commission (1982))
- **Company formed for fraud/improper conduct or to defeat law** - Where the device of incorporation is adopted for some illegal or improper purpose [Gilford Motor Co. vs. Horne]

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Class of Company - On the basis of liability

Company Limited by Share

- ✓ When the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares.
- ✓ It implies for meeting the debts of the company, the shareholder may be called upon to contribute only to the extent of the amount, which remains unpaid on his shareholdings.
- ✓ His separate property cannot be encompassed to meet the company's debt.

Company Limited by Guarantee

- ✓ defines it as the company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up.
- ✓ In a company limited by share - member may be called at any time to discharge liability whereas in case of guarantee only at the time of winding up.
- ✓ Case law - Narendra Kumar Agarwal vs. Saroj Maloo

Unlimited

- ✓ No Limit on Liability of member
- ✓ The liability ceases on when he ceases to be member
- ✓ Liability is not unlimited till the time Company is not wound up. Member can be called to contribute only in the event of winding up of Company.
- ✓ Liability of each member extends to amount of Company's debt and liabilities. However, he can claim contribution from other members

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Class of Companies - on the basis of members

One person Company -

- ✓ Is a company which has only one person as a member.
- ✓ Minimum paid up capital - no limit prescribed
- ✓ Memorandum of OPC will contain name of nominee/successor of the member and such person will give his written consent to be filed with registrar. - such nominee can withdraw his consent at any time. Name of nominee can be changed at any time by giving notice to registrar - this change is not deemed to be alteration to memorandum.
- ✓ Person eligible to be form OPC/be nominee shall be - 1. Resident in India or has stayed in India for not less than 120 days in preceding FY. 2.Non- minor. 3.Eligible only to form one OPC 4. Natural Personal + Indian Citizen
- ✓ OPC cannot be converted to section 8. also, cannot carry out NBFC activities incl. investment in other corporates.

Private Company:-

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

Small Company -

- ✓ A private company
- ✓ Paid up capital - not more than Rs. 4 Crore Or Turnover - not more than Rs. 40 crores.
- ✓ Should not be - Section 8 company - Holding or a Subsidiary company

Public Company -

- ✓ Is not a private company
- ✓ Shares freely transferable.
- ✓ No minimum paid up capital requirement.
- ✓ Minimum number of members - 7.
- ✓ Maximum numbers of members - No limit. Subsidiary of a public company is deemed to be a public company.

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Class of Companies - on basis of Control

Holding and Subsidiary Companies

- ✓ "Subsidiary company" in relation to holding company, means a company in which the holding company—
  - (i) controls the composition of the Board of Directors; or
  - (ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.

Provided that such class of holding companies shall not have layers of subsidiaries beyond such numbers.

- ✓ A company is a holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies.
- ✓ Pvt. Co. subsidiary to public co. - deemed to be public

Associate Company

In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

- ✓ Significant Influence - means control of at least twenty per cent of total voting power, or control of or participation in business decisions under an agreement
- ✓ "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

Class of Companies - on the basis of Access to Capital

Listed company -
As per the definition given in the section 2(52) of the Companies Act, 2013, it is a company which has any of its securities listed on any recognised stock exchange.

Unlisted company -
means company other than listed company.

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Other Companies

Government Company –
means any company in which not less than 51% of the paid-up share capital is held by-
(i) the Central Government, or
(ii) by any State Government or Governments,
(iii) or partly by the Central Government and partly by one or more State Governments, and the section includes a company which is a subsidiary.

Foreign Company [Section 2(42)]-
It means any company or body corporate incorporated outside India which - has a place of business in India whether by itself or through an agent, physically or through electronic mode; and conducts any business activity in India in any other manner.

Formed to promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc. Such company intends to apply its profit in promoting its objects and prohibiting the payment of any dividend to its members.

Section 8 company

Registration - CG can register such company without addition of limited or private limited. Registrar will register on application. It shall enjoy privileges and obligations of limited company after registration.

Revocation of License - CG may revoke license if in violation of conditions under section 8 after giving written notice and opportunity of being heard. On Revocation - CG may direct such company to Converts its status and change its name ;Wind - up; Amalgamate with another company having similar object.

Penalty/Punishment - default in complying with this section - Company - Fine - Rs. 10 Lakh to 1 cr . Director/officer - Rs. 25000 to 25 lakhs. If fraudulent affair- Fine - Section 447 of Act.

It can call General meeting on 14 days' notice. Requirement of minimum no. of director, independent director, Nomination and Remuneration Committee and Shareholders Relationship Committee

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Dormant company :-

Where a company is formed and registered under this Act for

- ✓ a future project or
- ✓ to hold an asset or intellectual property and
- ✓ has no significant accounting transaction,

such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

"Significant accounting transaction" means any transaction other than—

- ✓ payment of fees to the Registrar;
- ✓ payments made to fulfil the requirements of this Act or any other law;
- ✓ allotment of shares to fulfil the requirements of this Act; and
- ✓ payments for maintenance of its office and records.

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

Nidhi Company:-

A company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be. Nidhi Companies are created mainly for cultivating the habit of thrift and savings amongst its members.

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Public Financial Institutions (PFI):

The following institutions are to be regarded as public financial institutions:

(i) the Life Insurance Corporation of India;
(ii) the Infrastructure Development Finance Company Limited,
(iii) specified company referred to in the Unit Trust of India Act, 2002;
(iv) institutions notified by the Central Government under section 4A(2) of the Companies Act, 1956 so repealed under section 465 of this Act;
(v) such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India.

Conditons for an institution to be notified as PFI

- Established or constituted by or under any Central or State Act
- At least 51% of the paid-up share capital is held/controlled by the CG or by any State Govt./s or partly by the CG and partly by one or more State Govts.

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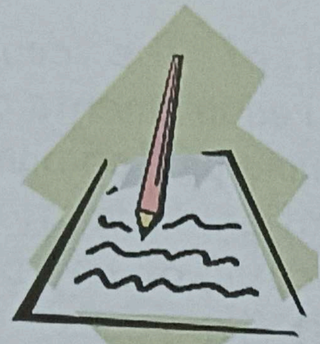
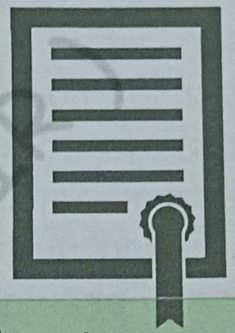
Incorporation of Company

Subscribers -
- ✓ For Public co. - 7 persons or more
- ✓ For Private co. - 2 persons or more
- ✓ For OPC - one person



File Documents

Registrar - verify all the documents



Then issue a certificate of incorporation

On and from the date in certificate - registrar will allot corporate identity number(CIN) - which is unique identification number for the company

Company shall maintain and preserve at its registered office copies of all the documents and information filed.

If a person at time of incorporation/or if company already incorporated by furnishing false information/incorrect information/suppression of material fact - of which such person is aware - then he will liable u/s 447 of the act.

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Documents to be filed with Registrar –

- ✓ MOA and AOA signed by all the subscribers
- ✓ Declaration by person who is engaged in the formation of the company (Advocate/CA/CS/Cost Accountant)and by a person named in the articles that all the requirements of this act and the rules.
- ✓ A declaration from each of subscribers to memorandum and from person named as first directors stating:
  1. he is not convicted for any offence with respect to promotion, formation or management of company,
  2. he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years,
  3. and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief
- ✓ Address for correspondence till registered office is established
- ✓ the particulars (names, including surnames or family names, residential address, nationality) of every subscriber to the memorandum along with proof of identity
- ✓ the particulars (names, including surnames or family names, the Director Identification Number, residential address, nationality) of the persons mentioned in the articles as the subscribers to the Memorandum and such other particulars including proof of identity as may be prescribed; and
- ✓ the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Ministry of Corporate affairs has simplified the process of form filling for incorporation through Simplified proforma for incorporating company electronically (SPICe)

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Order of the Tribunal:

Where a company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, tribunal may -

- ✓ Pass such orders as it thinks fit for regulation of management including changes in MOA and AOA
- ✓ Liability of members - unlimited
- ✓ Remove of name of company from register of companies
- ✓ Pass order of winding up
- ✓ Pass any other order as it deems fit

But before passing any order company will be given - opportunity of being heard and transactions entered into by the company will be taken into consideration.

Effect of Registration:

- ✓ From the date of Incorporation - registered company shall be capable of exercising all the functions of company under this act.
- ✓ the company becomes a legal person separate from the incorporators; and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association [Hari Nagar Sugar Mills Ltd. vs. S.S. Jhunjhunwala].
- ✓ A company on registration acquires a separate existence and becomes a legal person separate and distinct from its members [State Trading Corporation of India vs. Commercial Tax Officer].
- ✓ a company may purchase shares of another company and thus become a controlling company. However, merely because a company purchases all shares of another company it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity [Spencer & Co. Ltd. Madras vs. CWT Madras]. The mere fact that the entire share capital has been contributed by the Central Government and all its shares are held by the President of India and other officers of the Central Government does not make any difference in the position of registered company and it does not make a company an agent either of the President or the Central Government [Heavy Electrical Union vs. State of Bihar].

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Share and Share Capital - the contributions of persons to the common stock of the company form the capital of the company. The proportion of the capital to which each member is entitled, is his share.

Classification of shares :-

- ✓ Authorized/Nominal/Registered Capital:- Capital authorized by MOA to be maximum amount of share capital of company.
- ✓ Issued Capital:- It means capital issued from time to time for subscription. Part of authorized capital and includes share allotted for other than cash. Obligatory to disclose in balance sheet.
- ✓ Subscribed Capital:- part of the capital which is for the time being subscribed by the members of a company.
- ✓ Called up Capital:- It is part of the capital which has been called for payment. It is the total amount called up on the shares issued.
- ✓ Paid up Capital:- It is the total amount paid or credited as paid up on shares issued. It is equal to called up capital less calls in arrears.

Shares (Section 2(84)):-

- ✓ 'share' which means a share in the share capital of a company and includes stock.
- ✓ Share is an interest in the company(Borland Trustees vs. Steel Bors. & Co. Ltd.)
- ✓ Shares are movable property transferable in the manner provided in articles
- ✓ Every share in a company a company having a share capital shall be distinguished by its distinctive number.

Kinds of Share Capital:-

- ✓ Equity Share Capital:- with voting rights; or with differential rights as to dividend, voting or otherwise in accordance with prescribed rules
- ✓ Preference share capital:-part of the issued share capital of the company which carries or would carry a preferential right with respect to— payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up.

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Memorandum of Association (MOA) - is in fact its charter; it defines its constitution and the scope of the powers of the company with which it has been established under the Act

Object of registering a MOA:-

- ✓ Contains object and thereby identifies scope beyond which company's action cannot go.
- ✓ Enables to know the company's powers and what activities can be engaged in.
- ✓ Every person dealing with the company is presumed to have knowledge of MOA.
- ✓ Helps shareholder understand where his money is being used and risks related to the same.

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

Table A - MOA form for company limited by shares.

Table B - MOA form of a company limited by guarantee and not having a share capital.

Table C - MOA form of a company limited by guarantee and having a share capital.

Table D - MOA form of an unlimited company.

Table E - MOA form of an unlimited company and having share capital.

Contents of MOA :-

a) Name clause - last word : limited for public and Government company, private limited for private company, OPC for OPC, not applicable to section 8 and electoral trust if formed under section 8.
b) Registered Office clause - state of office.
c) Object Clause -If there is change in activities not reflected in the name, company should change its name within 6 months of such activity change.
d) Liability Clause - in case of company limited by share - amount unpaid on share. In case of limited by guarantee - Amount of contribution of each member 1) to the assets of company in case of winding up; 2) to the costs, charges and expenses of winding up and for adjustment of rights of contributories
e) Capital Clause - Amount of authorized capital divided into share of fixed amount.
f) Association Clause - details of subscribers along with number of shares taken by him.

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Additional points on MOA :-

1. Other contents of MOA - Including the clauses mentioned above - it shall also contain -
   - ✓ In case of OPC - name of nominee
   - ✓ May contain other provisions for ex:- rights of various class of shares.
2. MOA is to printed, divided into paragraphs, numbered consecutively and signed by atleast 7/2/1 person(s) in case of public/private/one person company respectively. It is to be noted that a company can subscribe to MOA however, a minor cannot.
3. Also, MOA Cannot contain anything contrary to the provision of the Companies Act. If it does, it shall be devoid of any legal effect.

Doctrine of Ultra Vires:-The meaning of the term ultra vires is simply "beyond (their) powers".

- ✓ When an act is performed, which though legal in itself, is not authorized by the object clause of the memorandum, or by the statute, it is said to be ultravires the company, and hence null and void. and is therefore not binding on the company. The impact of the doctrine of ultra vires is that a company can neither be sued on an ultra vires transaction, nor can it sue on it.
- ✓ An act which is ultravires, the company cannot be ratified even by the unanimous consent of all the shareholders [Ashbury Railway Carriage and Iron Company Limited v. Riche-(1875)]. An act which is ultravires the directors, but intravires the company can be ratified by the members of the company through a resolution passed at a general meeting. If an act is ultravires the Articles, it can be ratified by altering the Articles by a Special Resolution at a general meeting.
- ✓ An ultra vires contract can never be made binding on the company. It cannot become "Intravires" by reasons of estoppel, acquiescence lapse of time, delay or ratification.
- ✓ The disadvantages of this doctrine outweigh its main advantage namely to provide protection to the shareholders and creditors. Although it may be useful to members in restraining the activities of the directors, it is only a nuisance in so far as it prevents the company from changing its activities in a direction which is agreed by all.

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Articles of Association (AOA) - Rules and Regulations for the company including the bye laws of the company. Defines the duties, rights and powers of the director and company and form in which business will be carried on (Ashbury Carriage Vs. Riches). [S.S. Rajkumar vs. Perfect Castings (P) Ltd.].

Content and model of AOA (Section 5):-

(1) Contains regulations for management of company.

(2) Inclusion of matters as prescribed and any additional if required.

(3) Contain provisions for entrenchment (for protection): implement provision that specific provision of article can only be altered if restrictive provision than special resolution are met.

(4) Inclusion of entrenchment provision will be made on formation/by amendment in articles which is agreed by all in case of private company and by special resolution in case of public company.

(5) Company can also on formation/amendment of entrenchment provision notice will be given to registrar.

(6) Forms of articles - Specified in table F,G,H, I and J as applicable to such company.

(7) Company may adopt all the rules in model articles applicable.

(8) Company registered after commencement of this act - If model articles are not excluded/modified then they will be considered as registered articles.

Basis	MOA	AOA
Objective	Defines objective of company.	Determine how the objective of company are achieved.
Relationship	Company with world	Company and its members
Alteration	Altered only under certain circumstances and in manner provided	Altered by passing a special resolution
Ultra Vires	Act beyond the MOA cannot be ratified.	Act beyond AOA can be ratified by shareholders

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Doctrine of Indoor Management (Turquand Rule):-

- ✓ Exception to the doctrine of Constructive Notice.
- ✓ Outsiders are not deemed to have notice of internal affairs of the company. [The Royal British Bank vs. Turquand]
- ✓ Persons dealing with company are presumed to have read the registered documents and to see that the proposed dealing is not inconsistent therewith, but they need not enquire into the regularity of internal proceedings as required by MOA & AOA.
- ✓ Exceptions to the doctrine of Indoor Management/turquand rule:-
  1. Actual/Constructive knowledge of irregularity :- Rule does not protect any person dealing with company who has notice of irregularity. (Howard vs. Patent Ivory Manufacturing Co.) (Morris v Kansseen)
  2. Suspicion of irregularity :- The protection of rule is also not available where the circumstances surrounding the contract are suspicious and therefore invite inquiry. (Anand Bihari Lal vs. Dinshaw & Co.) (Haughton & Co. v. Nothard, Lowe & Wills Ltd.)
  3. Forgery: The rule applies only to irregularities which might otherwise affect a transaction but it cannot apply to forgery which must be regarded as nullity.

Doctrine of Constructive Notice:-

- ✓ Any person can inspect any document kept by registrar including certificate of incorporation or make record or get copy or extracts of the same.
- ✓ MOA and AOA are public documents.
- ✓ Therefore, it is duty of the party dealing with company to inspect these documents and confirm the validity of contract. It is presumed that a person has knowledge of the contents and documents whether he has read or not.
- ✓ He is not only presumed to have read but also understood the document.
- ✓ Every person dealing with company has constructive notice of MOA,AOA as well related documents.

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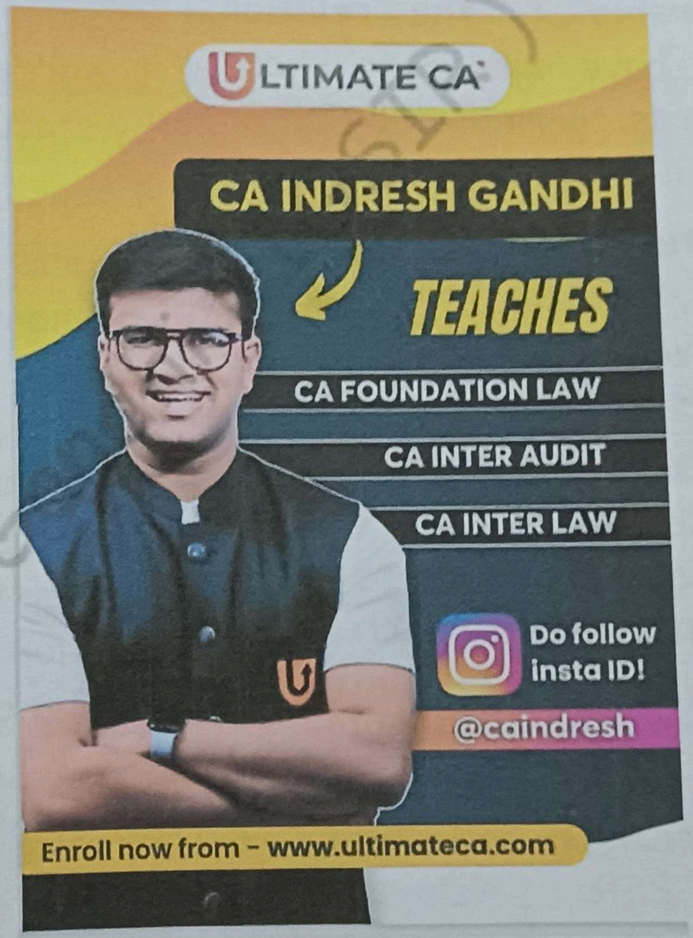
Partnership Act Charts



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General Nature of Partnership

Definition:-

Section 4 - 'Partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm', and the name under which their business is carried on is called the 'firm name'.

Partnership Deed - The document in writing containing various terms and conditions as to the relationship of the partners to each other is called the 'partnership deed'. It contains - 1. NAME - firm, partners, 2. Nature and place of the business of the firm, 3.Date - Commencement & Duration, 4.Partners - Capital Contribution , PSR , Admission & Retirement, Rate of Interest on capital, Drawings. 5.Provision- settlement of accounts, Salaries or commissions, expulsion, etc.

True test of Partnership - Must be proved that -

1. Agreement: Partnership is created by agreement and not by status

2. Sharing of Profit: The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners. It is only a prima facie evidence and not conclusive evidence. Cumulative effect of all relevant facts such as written or verbal agreement, real intention and conduct of the parties, other surrounding circumstances etc., are to be considered while deciding the relationship between the parties and ascertaining the existence of partnership.

3. Agency : Each partner carrying on the business is the principal as well as an agent of other partners. So, the act of one partner done on behalf of firm, binds all the partners.Santiranjan Das Gupta Vs. Dasyran Murzamull (Supreme Court).

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Elements of Partnership:-

Association of 2 or more person:-

Only persons recognized by law can enter into an agreement of partnership. Therefore, a firm, since it is not a person recognized in the eyes of law cannot be a partner. A minor cannot be a partner in a firm, but with the consent of all the partners, may be admitted to the benefits of partnership . maximum number of partners (Section 464 - Companies Act 2013 - 50 max).

Agreement:-

It is result of agreement between people. May be oral or written.

Business:-

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

Agreement To Share Profits:

Partners must agree to share the profits. But an agreement to share losses is not an essential element. It is open to one or more partners to agree to share all the losses. However, in the event of losses, unless agreed otherwise, these must be borne in the profit-sharing ratio.

Business Carried On By All Or Any Of Them Acting For All:

Cardinal principle of the partnership Law. There should be a binding contract of mutual agency between the partners. An act of one partner in the course of the business of the firm is in fact an act of all partners. Each partner carrying on the business is the principal as well as the agent for all the other partners. He is an agent in so far as he can bind the other partners by his acts and he is a principal to the extent that he is bound by the act of other partners. KD Kamath & Co.

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Difference between Partnership and Joint Stock Company:-

- ✓ Legal Status - firm is not legal entity whereas joint stock is separate legal entity.
- ✓ Agency - Every partner is agent of other partners as well as of firm whereas member is not agent of other member or of company.
- ✓ Distribution of profits - profits are distributed among the partners according to the deed whereas there is no compulsion to distribute its profit.
- ✓ Extent of liability - partners have unlimited liability whereas liability of member depends on the type of company.
- ✓ Transfer of shares - Share in firm cannot be transferred without consent of all partners whereas transfer of shares in company are subject to article.
- ✓ Management - Partners are entitled to take part in management whereas members are not.
- ✓ Registration- Not compulsory for firm but compulsory for company.
- ✓ Max. No. - firm:50, company - Pvt co. - Min 2, max 200; Public co. - Min -2, Max - no limit.

Difference between partnership and club:-

- ✓ Relationship :- persons forming firm are called partners whereas persons forming club are called members.
- ✓ Partner have interest in property of firm whereas members of club don't.
- ✓ Dissolution:- Change in partners affect the existence of firm whereas change in member of club doesn't.

Difference between Partnership and HUF :-

- ✓ Partnership is created by agreement whereas HUF is created by birth in family.
- ✓ Death of member :- Firm - leads to dissolution, HUF - no dissolution
- ✓ Management :- Firm - all partners, HUF - karta
- ✓ Every partner has authority to bind the firm whereas HUF only karta has authority.
- ✓ Liability:- Partner - unlimited; karta - unlimited and co parcener - liable only to extent of share.
- ✓ Firm is governed by Partnership act; HUF by hindu law.

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Difference between Partnership and Co ownership -

- ✓ Partnership arises out of a contract whereas co ownership can arise out of agreement/operation of law
- ✓ Partner is agent of other partners whereas co owner is not agent of other.
- ✓ Profits and losses needs to be shared whereas co owner cannot be shared.
- ✓ Share in partnership is transferable on consent of all the partners whereas transfer of share of co owner can be made without any consent.

Difference between Partnership and Association -

- ✓ Partnership evolves out of setting up a relation of agency between two or more persons who have entered into a business for gains. Whereas Association evolves out of social cause where there is no motive to earn and share profits.

Kinds of Partnership Firms

With regard to duration

Partnership at will:-

- ✓ No Fixed period for partnership &
- ✓ No provision made for determination of partnership
- ✓ If partnership for fixed term, continues after the fixed term then it is treated as partnership at will.
- ✓ It can be dissolved by giving written notice to all partners.

Partnership for a fixed period:-

- ✓ Created for fixed period of time.
- ✓ It comes to an end on expiry of such fixed period.

With regard to the extent of the business

Particular Partnership:-

- ✓ Organized for prosecution of single adventure as well as conduct of continuous business.
- ✓ Such partnership can be dissolved by completion of adventure.

General Partnership:-

- ✓ Partnership is constituted with respect to business in general.

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Types of Partners

Active Partner:- 1. Becomes a partner by agreement. 2. Actively participates in business. 3. Acts as an agent of other partners. 4. Public notice for his retirement.

Partner by holding out 1. When a person represents himself or knowingly permits himself, 2. To be represented as a partner in a firm (when in fact he is not) 3. He is liable, like a partner in the firm.

Sleeping Partner:- 1. Not active part in business. 2. Liable like any other partner. 3. No public notice of retirement. 3. His insanity doesn't dissolve firm.

Partner in Profit Only:- 1. Entitled to share profits only. 2. Not liable for the losses. 3. Liable to third parties for all acts of profits only.

Incoming Partner:- 1. Person who comes into a partnership firm already in existence with the consent of all existing partners. 2. No liability for any acts of the firm done before his admission as a partner.

Nominal Partner:- 1. Partner only in name. 2. Not entitle to share the profits. 3. Liable as a real partner. 4. Public notice of his retirement. 5. His insanity does not dissolve firm.

Sub Partner:- 1. Partner agrees to share his share of profits in a partnership firm with an outsider; such an outsider is called a sub-partner. 2. Neither has rights against the firm nor is he liable for the debts of firm.

Outgoing / Retiring Partners:- 1. Retirement, expulsion, insolvency or death. 2. Rest of the partners continues to carry on business. 3. Remains liable to third parties for all acts of the firm until public notice of retirement is given.

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Relations of Partners to One Another

1. General Duties of Partner:-

Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

2. Duty To Indemnify For Loss Caused By Fraud:

Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

3.Determination Of Rights And Duties Of Partners By Contract Between The Partners:

The mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing. Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing. Agreements in restraint of trade - Sec 27 shall be applied.

4. The Conduct Of The Business (Section 12):

- every partner has a right to take part in the conduct of the business. If there is an agreement with respect to this then that prevails unless there illegal act or breach of trust.
- every partner is bound to attend diligently to his duties in the conduct of the business.
- Right to be consulted - Difference arising in matters:- Ordinary matters- Decided by majority. Change in nature of business - Consent of all.
- every partner (active or sleeping) has a right to have access to and to inspect and copy any of the books of the firm.
- in the event of the death of a partner, his heirs or legal representatives or their duly authorised agents shall have a right of access to and to inspect and copy any of firm's books.

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5. Mutual Rights and Liabilities:- Subject to a contract between the partners -

Right to remuneration No additional remuneration in addition to his share in the profits unless express or customary.

Right to share Profits - Share Equally profits & losses

Interest on Capital: express agreement + trade custom + statutory provision which entitles him to such interest.

Interest on advances: - Int @ 6%p.a., While interest on capital account ceases to run on dissolution, the interest on advances keep running even after dissolution and up to the date of payment.

Right to be indemnified: If partner makes payment in the ordinary and proper conduct of the business of the firm as well as in the performance of an act in an emergency for protecting the firm - Payments which prudent man would make.

Right to indemnify the firm: A partner must indemnify the firm for any loss caused to it by wilful neglect in the conduct of the business of the firm.

RIGHTS AND DUTIES OF PARTNERS AFTER A CHANGE IN THE FIRM

- after a change in the firm
- after the expiry of the term of the firm
- where additional undertakings are carried out

Same as those in previous operation

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PARTNERSHIP PROPERTY

1. THE PROPERTY OF THE FIRM: **Includes** property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.
2. **Property of a partner:** Where the property is exclusively belonging to a person, it does not become a property of the partnership merely because it is used for the business of the partnership, such property will become property of the partnership if there is an agreement.
3. APPLICATION OF THE PROPERTY OF THE FIRM: Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business

Personal Profit Earned By Partners (Section 16) - subject to contract between the partners,-

1. If a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;
2. If a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

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Relation of Partners to third parties.

Partner to be Agent Of Firm – a partner is agent of the firm for the purpose of the business of the firm. Embraces the character of both a principal and an agent.

Implied Authority of Partner as Agent of Firm – The act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

Include –

1.Purchase goods. 2.Sell the goods. 3.Settle accounts. 4.Receive payment of firm. 5.Engage servants for firm. 6.Engage a lawyer to defend an action brought against the firm. 7.Borrow money for firm's business. 8.Pledge the goods of the firm as security for the repayment of borrowings made for firm's business. 9.Draw, accept, and endorse bill of exchange and other negotiable instruments in the name of the firm.

Does not Include –

1. Submit a dispute to arbitration. 2. Opening a bank account.
3. Compromising or relinquishing any claim.
4. Withdrawal a suit or proceeding.
5. Admit any liability in a suit or proceeding.
6. Acquire immovable property. 7. Transfer immovable property.
8.Enter into partnership on behalf of the firm.

Extension & Restriction Of Partners' Implied Authority(consent of all the partners necessary):It maybe extended/restricted by contract between partners. Restriction imposed on implied authority of partner shall be effective – The third party knows about the restrictions, and the third party does not know that he is dealing with a partner in a firm.

Partner's Authority In Emergency- to do all such acts for the purpose of protecting firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstance , and such acts bind the firm.

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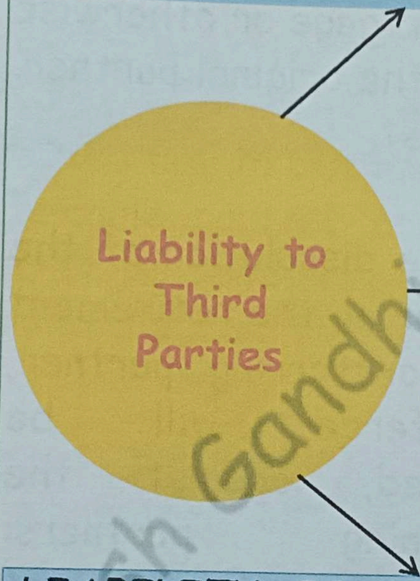
MODE OF DOING ACT TO BIND FIRM: In order to bind a firm - shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

EFFECT OF ADMISSIONS BY A PARTNER - an admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

EFFECT OF NOTICE TO ACTING PARTNER - Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner. It must be received by a working partner and not by a sleeping partner.

LIABILITY OF PARTNER FOR ACTS OF THE FIRM : partners are jointly and severally responsible to third parties for all acts which come under the scope of their express or implied authority.



LIABILITY OF THE FIRM FOR WRONGFUL ACTS OF A PARTNER : Where, by the wrongful act or omission of a partner in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefore to the same extent as the partner.

LIABILITY OF FIRM FOR MISAPPLICATION BY PARTNERS:
Firm is Liable in both cases -

1. where a partner acts within his authority and due to his authority as partner, he receives money or property belonging to a third party and misapplies that money or property.
2. when such money or property has come into the custody of the firm and it is misapplied by any of the partners.

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Rights Of Transferee Of A Partner's Interest

A share in a partnership is transferable like any other property, but as the partnership relationship is based on mutual confidence, the assignee of a partner's interest by sale, mortgage or otherwise cannot enjoy the same rights and privileges as the original partner. Other partners should agree to transfer interest.

During the continuance of partnership, such transferee is not entitled:
- to interfere with the conduct of the business
- to require accounts, or
- to inspect books of the firm.

He is only entitled to receive the share of the profits of the transferring partner and he is bound to accept the profits as agreed to by the partners, i.e., he cannot challenge the accounts.

On the dissolution of the firm or on the retirement of transferring partner, transferee will be entitled, against the remaining partners:
- to receive the share of the assets of the firm
- for the purpose of ascertaining the share

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

Rights of Minors Admitted To The Benefits Of Partnership

1. Right to his agreed share of the profits
2. Access to, inspect and copy the accounts of the firm
3. Sue the partners for accounts or for payment of his share but only **when severing** his connection with the firm, and not otherwise.
4. On attaining majority he may within 6 months elect to become a partner or not to become a partner. If he elects to become a partner, then he is entitled to the share to which he was entitled as a minor. If he does not, then his share is not liable for any acts of the firm after the date of the public notice served to that effect

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Liabilities of Minors Admitted To The Benefits Of Partnership

Before attaining majority:

a) confined only to the extent of his share in the profits and the property of the firm.

b) no personal liability for the debts of the firm incurred during his minority

c) cannot be declared insolvent, but if the firm is declared insolvent his share in the firm vests in Official Receiver.

After attaining majority:

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

Where he has elected not to become partner he may give public notice that he has elected not to become partner and such notice shall determine his position as regards the firm. If he fails to give such notice he shall become a partner in the firm on the expiry of the said six months.

When he becomes partner: If the minor becomes a partner on his own willingness or by his failure to give the public notice within specified time -

a) He becomes personally liable - since he was admitted to the benefits of partnership

b) His share in the property and the profits of the firm remains the same to which he was entitled as a minor.

When he elects not to become a partner:

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

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

c) entitled to sue the partners for his share of the property and profits

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LEGAL CONSEQUENCES OF PARTNER GOING OUT

RETIREMENT OF A PARTNER:

- ✓ A partner may retire: with consent of all or as per deed or if partnership is at will, by giving notice in writing to all the other partners.
- ✓ Discharge of retiring partner for acts of the firm done before his retirement 1.By an agreement b/w third party and remaining partners. 2.By an implied agreement to above effect. (E.g. Dealing between such third party and the reconstituted firm, after he (the third party) had the knowledge of the retirement.)
- ✓ A retiring partner continues to be liable as partner after the retirement until public notice is given of the retirement.

DEATH OF A PARTNER:

1.The firm is dissolved unless otherwise specifically provided in deed.
2.The estate of the deceased partner is not liable for any act of the firm done after his death.
3.No public notice is required of the death of a partner.

EXPULSION OF A PARTNER:

Three conditions: (a) As per contract between the partners & (b) Majority of the partners & (c) In good faith.
If condition not fulfilled - Partner may claim re-instatement as a partner, or may sue for the refund of his share of capital and profits in the firm.
(Good faith includes -interest of the firm +served with notice + oppo to be heard)

INSOLVENCY OF A PARTNER:

1.The insolvent partner ceases to be a partner on the date on which the order of adjudication is made. 2.The firm is dissolved unless otherwise specifically provided in deed.
3.The estate of the insolvent is not liable for the acts of the firm done after the date of the order of adjudication.
4.The firm is not liable for any act of the insolvent partner after the date of the order of adjudication.
5.No public notice is required for insolvency.

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LEGAL CONSEQUENCES OF PARTNER COMING IN:-

INTRODUCTION OF PARTNER :

- ✓ No person shall be introduced as a partner into a firm without the consent of all the existing partners or as per deed.
- ✓ Admitted partner not liable for any acts of the firm done before he became a partner unless he agrees.
- ✓ Liability for the acts of the old firm only if: 1. the new firm assumes the liabilities of the old firm, and 2. the creditors accept the new firm as their debtor

RIGHTS OF OUTGOING PARTNER:-

To carry on competing business:- but he may not- (i) use the firm name; (ii) represent himself as carrying on the business of firm, or (iii) solicit the customers who were dealing with the firm before he ceased to be a partner.

To Subsequent profits :- If final settlement is pending, legal representatives of the deceased partner or the retiring partner are entitled to any of the following two options: (a) Share of the profit earned after the death or retirement. (b) Claim interest at the rate of 6% per annum on the amount of his share in the property.

REVOCATION OF CONTINUING GUARANTEE BY CHANGE IN FIRM

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

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REGISTRATION OF FIRMS

REGISTRATION OF FIRMS -ROF may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated - Statement of Fees + Fees , stating –

1. **Name** – Firm , other places where firm carries on business , partner address in full
2. place or principal place of business of the firm,
3. Date – Partner joined , Duration of firm

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

1. Each person signing the statement shall also verify it in the manner prescribed.
2. A firm name shall not contain any of the following words, namely: Crown', Emperor', 'Empress', 'Empire', 'Imperial', 'King', 'Queen', 'Royal', or words expressing or implying the sanction, approval or patronage of Government except when the State Government signifies its consent to the use of such words as part of the firm-name by order in writing.

REGISTRATION (SECTION 59): Registrar is satisfied + he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

LATE REGISTRATION ON PAYMENT OF PENALTY (SECTION 59A-1): 100/year + Penalty of ROF

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CONSEQUENCES OF NON - REGISTRATION

RIGHTS AFFECTED BY NON REGISTRATION:

1. **No suit in a civil court by firm or other co-partners against third party** : A registered firm can only file a suit against a third party and the persons suing have been in the register of firms as partners in the firm.
2. **No relief to partners for set-off of claim:** If value is more than 100 then firm or partner cant claim set off.
3. **Aggrieved partner cannot bring legal action against other partner or the firm:** A partner of an unregistered firm (or any other person on his behalf) is precluded from bringing legal action against the firm or any person alleged to be or to have been a partner in the firm. But, such a person may sue for dissolution of the firm or for accounts and realization of his share in the firm's property where the firm is dissolved.
4. **Third party can sue the firm:** In case of an unregistered firm, an action can be brought against the firm by a third party.

RIGHTS NOT AFFECTED BY NON REGISTRATION :-

1. Right of third parties to sue the firm or any partner.
2. Power of an Official Assignee or Receiver or the Court.
3. Right of the partners to sue for the dissolution of the firm or for the accounts of a dissolved firm or for the realization of the property of a dissolved firm.
4. Rights of the firm or partners of firm having no place of business in India.
5. Right to sue or claim a set-off if the value of the suit upto Rs. 100.
6. Rights of partners to sue for the criminal proceedings against the other partners of the firm and against the third parties.

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Dissolution of firm :- means the discontinuation of the legal relation existing between all the partners of the firm

Dissolution of Partnership :- when only one or more partners retires or becomes incapacitated from acting as a partner due to death, insolvency or insanity, the partnership is dissolved, but the rest may decide to continue.

Difference between dissolution of firm and partnership:-

Basis	Dissolution of Firm	Dissolution of Partnership
Continuance of business	involve discontinuation of business.	does not affect continuation of business
Winding Up	involves winding up	Involves only reconstitution
Order of Court	May be by order of court.	Cannot be ordered by court.
Scope	involves dissolution of partnership	May or not involve dissolution of firm.
Final Closure of books	involves final closure.	Does not involve final closure.

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MODES OF DISSOLUTION OF FIRM

Without order of Court or Voluntary Dissolution:-

a. Dissolution by Agreement (Section 40): with the consent of all the partners or as per the contract between the partners.

b. Compulsory dissolution:- It happens when - 1.All but one of the partners are adjudicated as insolvent. 2.By the happening of an event which makes partnership unlawful.

c. Dissolution on the happening of certain contingencies:- 1.Where Firm is constituted for fixed term/particular adventure, such term/adventure is completed. 2.By death of partner, 3.By adjudication of partner as insolvent

d. Dissolution by notice of partnership at will : Can be dissolved when one of partners gives written notice to all the other partners. Date of dissolution shall be date mentioned in notice as such, if not mentioned then date of communication of notice.

DISSOLUTION BY COURT

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

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

Misconduct: Where a partner is guilty of conduct which is likely to affect prejudicially the carrying on of business, the court may order for dissolution of the firm. Not necessary that it must relate to the conduct of business.

Insanity/unsound mind: Where a partner (not a sleeping partner) has become of unsound mind, the court may dissolve the firm on a suit of the other partners or by the next friend of the insane partner. Temporary sickness is no ground for dissolution of firm.

Persistent breach of agreement: wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conduct himself in matters relating to the business that it is not reasonably practicable for other partners to carry on the business in partnership with him, then the court may dissolve the firm at the instance of any of the partners. Following comes in to category of breach of contract: Embezzlement, Keeping erroneous accounts, Holding more cash than allowed, Refusal to show accounts etc.

Just and equitable grounds - As per court. Cases involve - Deadlock in management, partners are not on talking terms, loss of substratum, gambling on stock exchange.
Continuous/Perpetual losses

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CONSEQUENCES OF DISSOLUTION

Liability for acts of partners done after dissolution:

Section 45 has two fold objectives: 1. To protect third parties dealing with the firm who had no notice of prior dissolution and 2. To protect partners of a dissolved firm from liability towards third parties.

However, there are exceptions to the rule there will be no liability for subsequent acts in the case of: the estate of a deceased partner, an insolvent partner, or a dormant partner.

Right of partners to have business wound up after dissolution:

partners have right to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among themselves according to their rights.

Continuing authority of partners for purposes of winding up :

After dissolution, the partner's act bind the firm and other mutual rights continue as is for the purpose of winding up and completing the unfinished transaction.

However, firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

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Mode of Settlement of partnership accounts : Rules for settlement:-

1.Losses,including deficiencies of capital SHALL be paid first out of profits, Capital lastly partner: PSR

2.The assets of the firm must be applied in the following manner and order: a. debts of the firm to third parties, b. paying to each partner rateably what is due to him from capital, c. paying to each partner rateably what is due to him on account of capital, d. the residue shall be divided among the partners in PSR.

Payment of firm debts and separate partner debts -

Property of firm first applied to debt of firm then to separate debts. Separate partner property first applied to separate debts.

Negotiable Instruments Act Charts



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Negotiable Instruments (NI)

Meaning of Negotiable Instruments:-

Negotiable Instruments is an instrument (the word instrument means a document) which is freely transferable (by customs of trade) from one person to another by mere delivery or by indorsement and delivery. The property in such an instrument pass to a *bonafide* transferee for value.

The Act does not define the term 'Negotiable Instruments'. However, Section 13 of the Act provides for **only three kinds of negotiable instruments** namely bills of exchange, promissory notes and cheques, payable either to order or bearer.

It is to be noted that Hundies, Treasury Bills, Bearer Debentures, Railway Receipts, Delivery Orders, Bill of Lading etc. are also considered as negotiable instruments either by mercantile custom or usage.

1. A negotiable instrument is payable to order when:
   a. It is expressed to be so payable.
   b. When it is expressed to be payable to a specified person and does not contain words prohibiting its transfer. (i.e. it is transferrable by indorsement and delivery)
2. A negotiable instrument is payable to bearer when:
   a. When it is expressed to be so payable e.g. pay bearer
   b. When the only or last indorsement on the instrument is an indorsement in blank

Characteristics of NI:

1. in writing,
2. Signed,
3. Freely transferable,
4. Title free from defects,
5. Can be transferred any number of times,
6. Unconditional promise or order to pay money
7. Certainty of sum payable, time of payment & payee,
8. Delivery

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Particulars	Promissory Note (PN)	Bills of Exchange (BOE)	Cheque
Meaning	an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.	A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.	A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.
Parties	Maker: The person who makes the promise to pay is called the Maker. He is the debtor and must sign the instrument. Payee: Payee is the person to whom the amount on the note is payable.	Drawer: The maker of a bill of exchange. Drawee: The person directed by the drawer to pay is called the 'drawee'. He is the person on whom the bill is drawn. Payee: The person named in the instrument, to whom the money is directed to be paid.	Drawer: The person who draws a cheque i.e., makes the cheque (Debtor). Drawee (always banker): The specific bank on whom cheque is drawn. He makes the payment of the cheque. Payee: The person named in the instrument (i.e., the person in whose favour cheque is issued), to whom the money is directed to be paid. (Can be drawer/third party)

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Particulars	Promissory Note (PN)	Bills of Exchange (BOE)	Cheque
Characteristics	(a) In Writing, (b) Express Promise to pay, (c) Definite and unconditional promise, (d) Signed by maker, (e) Promise to pay money only, (f) Promise to pay a certain sum, (g) Payee must be certain, (h) Stamped	(a) In Writing, (b) Express Order to pay, (c) Definite and unconditional order, (d) Signed by drawer, (e) Order to pay money only, (f) Certain sum, (g) Drawer, Drawee & Payee must be certain, (h) Stamped	(a) All the essentials of a BOE (b) Drawn on a specified banker. (c) Payable on demand. A cheque does not require: (a) Stamping; or (b) acceptance;
Specimen	Specimen of Promissory note ₹ 10,000 Lucknow April 10, 2022 Three months after date, I promise to pay Shri Ramesh (Payee) or to his order the sum of Rupees Ten Thousand, for value received. Stamp Sd/- Ram To, Shri Ramesh, B-20, Green Park, Mumbai. (Maker)	Specimen of Bill of Exchange Mr. A (Drawer) 48, MP Nagar, Bhopal (M.P.) April 10, 2022 ₹ 10,000/- Four months after date, pay to Mr. B (Payee) a sum of Rupees Ten Thousand, for value received. To, Mr. C (Drawee) 576, Arera Colony, Bhopal (M.P.) Signature Mr. A	Specimen of Cheque Date..... Pay ..... a sum of Rupees..... ₹ A/C No. 12345678910 ABC Bank 622, Vijay Nagar, Indore (M. P.) Signature 01212 1125864 000053 38

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CLASSIFICATION OF NEGOTIABLE INSTRUMENT

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

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

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

An inland instrument remains inland even if it has been endorsed in a foreign country.

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

Liability of drawer of foreign bill: regulated by law of place in which instrument is made.

Liability of acceptor and endorser: regulated by law of place where instrument is payable.

Inchoate Instrument: It means an instrument that is incomplete in certain respects. The principle of this rule of an inchoate instrument is based on the principle of estoppel.

Liability on drawing inchoate instrument: The holder cannot recover the amount in excess of the amount intended to be paid by the signor. The holder in due course can recover any amount on such instrument provided it is covered by the stamp affixed on the instrument.

Ambiguous Instrument: Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly. Thus, an instrument which is vague and cannot be clearly identified either as a bill of exchange, or as a promissory note, is an ambiguous instrument.

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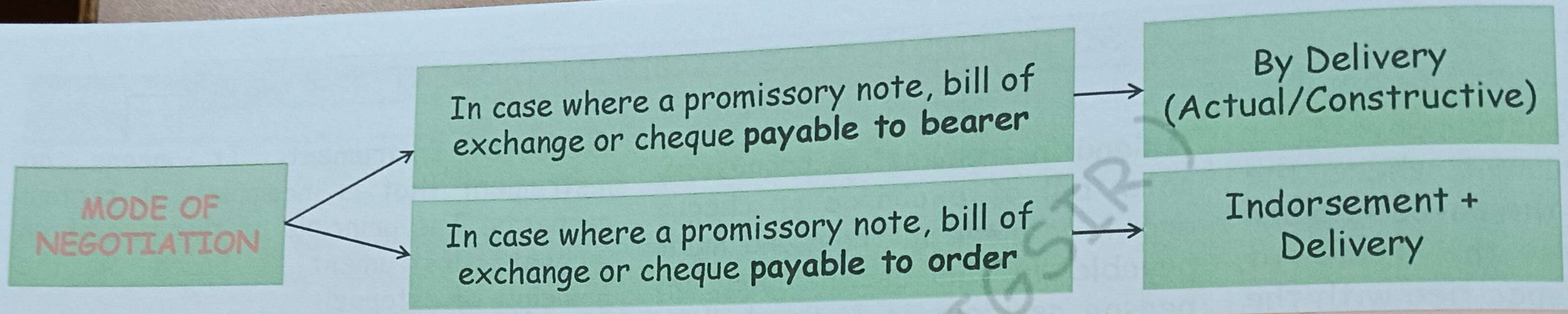

Importance of Delivery in Negotiation:- The delivery must be voluntary, and the object of delivery should be to pass the property in the instrument to the person to whom it is delivered. The delivery can be, actual or constructive.

Actual delivery takes place when the instrument changes hand physically.

Constructive delivery takes place when the instrument is delivered to the agent, clerk or servant of the indorsee on his behalf or when the indorser, after indorsement, holds the instrument as an agent of the indorsee.

When an instrument is conditionally or for a special purpose only, the property in it does not pass to the transferee, even though it is indorsed to him, unless the instrument is negotiated to a holder in due course. The contract on a negotiable instrument until delivery remains incomplete and revocable. The delivery is essential not only at the time of negotiation but also at the time of making or drawing of negotiable instrument. The rights in the instrument are not transferred to the indorsee unless after the indorsement the same has been delivered. If a person makes the indorsement of instrument but before the same could be delivered to the indorsee the indorser dies, the legal representatives of the deceased person cannot negotiate the same by mere delivery thereof.

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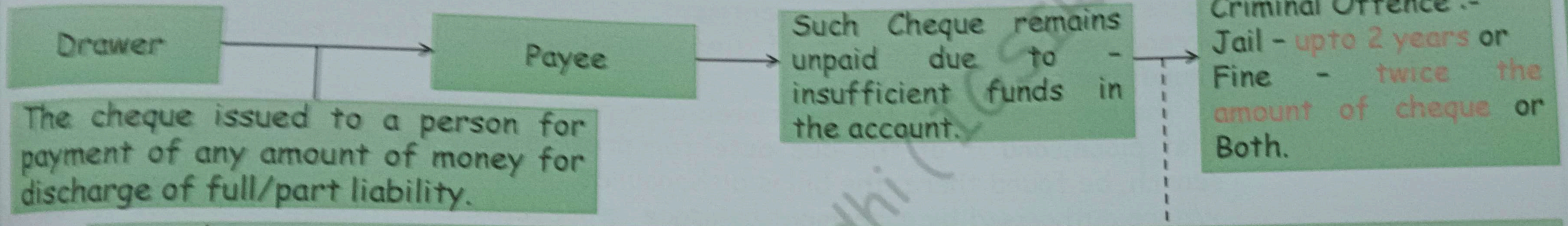
Dishonour of Cheques for Insufficiency of Funds in the Accounts:-



Given that:-

- ✓ The cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier.
- ✓ The demand for payment has been made by giving a notice in writing to drawer within 30 days of receipt of information of unpaid cheque from bank.
- ✓ The drawer fails to make payment within 15 days of receipt of such notice.
- ✓ we may conclude that compliant can be filed after 45 days of dishonor of the cheque i.e., **30 days of notice period +15 days of the receipt of the said notice.**
- ✓ Presumption will be in the favor of holder however drawer may prove otherwise.
- ✓ It shall not be a defence in a prosecution of an offence that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated.

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Presentation of Instruments :-

Presentation for acceptance	BOE should be presented for acceptance within reasonable time and in business hours. In default of such presentment, no party thereto is liable thereon to the person making such default. If the drawee cannot, after reasonable search, be found, the bill is dishonoured. If the bill is directed to the drawee at a particular place, it must be presented at that place, and if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured. Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.
Presentment of PN for sight	within a reasonable time after it is made and in business hours on a business day
Drawee's time for deliberation	The holder must allow the drawee 48 hours (exclusive of public holidays) to consider whether he will accept it.
Presentment for payment	PN, BOE and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder. In default of such presentment, the other parties thereto are not liable thereon to such holder.
Hours for presentment	Presentment for payment must be made during the usual hours of business, and, if at a banker's within banking hours.

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for payment of instrument payable after date	A PN or BOE, made payable at a specified period after date or sight thereof, must be presented for payment at maturity.
for payment of promissory note payable by instalments	presented for payment on the third day after the date fixed for payment of each instalment; and non-payment on such presentment has the same effect as non-payment of a note at maturity.
for instrument payable at specified place.	payable at a specified place and not elsewhere must, be presented for payment at that place.
where no exclusive place specified	must be presented for payment at the place of business (if any) or at the usual residence, of the maker, drawee or acceptor thereof.
when maker, etc., has no known place of business or residence	such presentment may be made to him in person wherever he can be found.
Presentment of cheque to charge drawer	presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer.
Presentment of cheque to charge any other person	be presented within a reasonable time after delivery thereof by such person.
Presentment of instrument payable on demand	must be presented for payment within a reasonable time after it is received by the holder.

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Excuse for delay in presentment for acceptance or payment Delay in presentment for acceptance or payment is excused if the delay is caused by circumstances beyond the control of the holder

When presentment unnecessary (Section 76)

No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases:

- ✓ Maker, drawee or acceptor prevents the presentment,
- ✓ Payable at business place & that's closed on business day during usual business hours,
- ✓ Payable at specified place & liable party doesn't attend place,
- ✓ Not payable at specified place & liable party not found after due search,
- ✓ Liable party engaged to pay notwithstanding non presentment,
- ✓ Liable party makes part payment,
- ✓ Liable party waives off his right to take advantage.
- ✓ If drawer could not suffer damage from want of such presentment.

Rules of Compensation:-

1. The holder is entitled to the amount due upon the instrument plus the expenses properly incurred in presenting, noting and protesting it.
2. an endorser who has paid the amount due on the same is entitled to the amount so paid with interest at 18% per annum from the date of payment until realisation thereof, together with all expenses caused by the dishonour and payment;
3. when the person charged and such endorser reside at different places or person charged and instrument payable are at two different places , the endorser is entitled to receive such sum at the current rate of exchange between the two places;
4. the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

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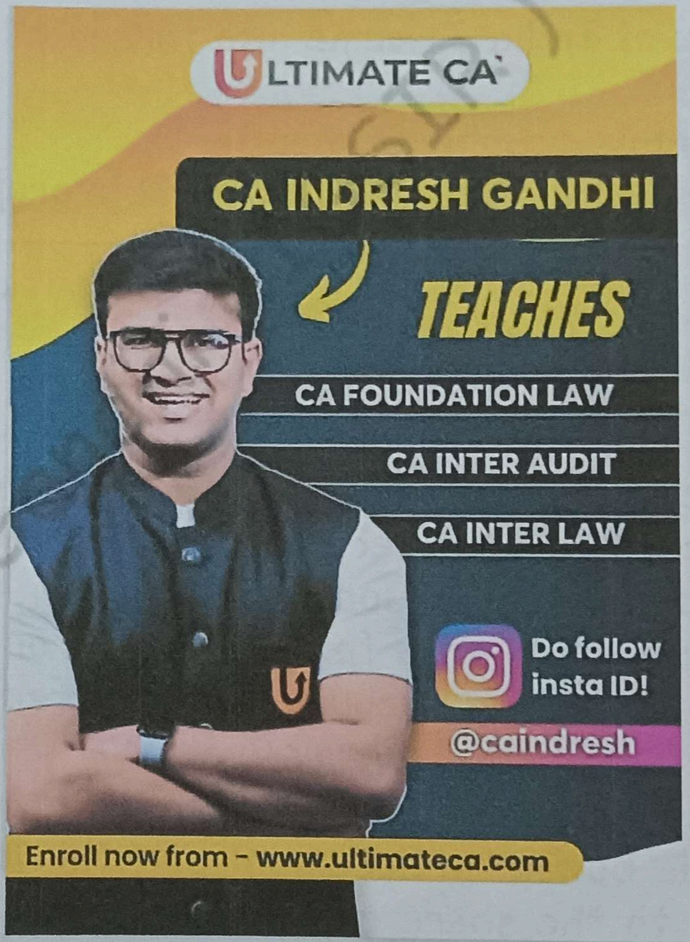
Sale of Goods Act Charts



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UNIT -1: FORMATION OF THE CONTRACT OF SALE

Introduction -

It extends to the whole of India. It came into force on 1st July, 1930.

Scope -

- sale of goods which means movable properties.
- The Act is not applicable for the sale of immovable properties like land, shop or house etc

Definition: -

1. **Buyer and Seller:** 'Buyer' means a person who buys or agrees to buy goods [Section 2(1)]. 'Seller' means a person who sells or agrees to sell goods.

2. **"Document of title to goods"** includes bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, multimodal transport document, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or is for authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.
The list is only illustrative and not exhaustive.
There is a difference between a 'document showing title' and 'document of title'. A share certificate is a 'document' showing title but not a document of title. It merely shows that the person named in the share certificate is entitled to the share represented by it, but it does not allow that person to transfer the share mentioned therein by mere endorsement on the back of the certificate and the delivery of the certificate.

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3. Mercantile Agent [Section 2(9)]: It means an agent who in the customary course of business has, as such agent, authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of the goods.

4. Goods and other related terms: "Goods" means every kind of movable property other than actionable claims and money
and includes stock and shares, growing crops, grass, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.
Actionable claims' are claims, which can be enforced only by an action or suit, e.g., debt The Fixed Deposit Receipts (FDR) are considered as goods.
Goods" include both tangible goods and intangible goods like goodwill, copyrights, patents, trademarks etc. Stock and shares, gas, steam, water, electricity and decree of the court are also considered to be goods.

Types Of Goods

- Existing :- those owned or possessed or acquired at the time of contract of sale.
  - Specific goods:- identified and agreed upon at the time a contract of sale is made
  - Ascertained Goods :- identified in accordance with the agreement after the contract of sale is made.
  - Unascertained goods:- not specifically identified or ascertained at the time of making of the contract.
- Future :- goods to be manufactured or produced or acquired after making the contract of sale. Always agreement to sale and not actual sale.
- Contingent:- The acquisition of which by the seller depends upon an uncertain contingency (uncertain event)

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5. Delivery - its forms and derivatives: It means voluntary transfer of possession from one person to another

Forms of delivery

a) Actual delivery: When the goods are physically delivered to the buyer. Actual delivery takes place when the seller transfers the physical possession of the goods to the buyer or to a third person authorised to hold goods on behalf of the buyer

b) Constructive delivery: When it is effected without any change in the custody or actual possession of the thing as in the case of delivery by attornment (acknowledgement) Constructive delivery takes place when a person in possession of the goods belonging to the seller acknowledges to the buyer that he holds the goods on buyer's behalf.

c) Symbolic delivery: When there is a delivery of a thing in token of a transfer of something else, i.e., delivery of goods in the course of transit may be made by handing over documents of title to goods, like bill of lading or railway receipt or delivery orders or the key of a warehouse containing the goods is handed over to buyer. Where actual delivery is not possible, there may be delivery of the means of getting possession of the goods.

6. Property - 'Property' here means 'ownership' or general property. The property in the goods means the general property i.e., all ownership right of the goods. It is quite possible that the general property in a thing may be in one person and a special property in the same thing may be in another e.g., when an article is pledged. The general property in a thing may be transferred, subject to the special property continuing to remain with another person i.e., the pledgee who has a right to retain the goods pledged till payment of the stipulated dues.

7. Quality of goods includes their state or condition.

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8. Insolvent [Section 2(8)]: A person is said to be insolvent when he ceases to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not

9. Price [Section 2(10)]: Price means the money consideration for a sale of goods. It is the value of goods expressed in monetary terms. It is the essential requirement to make a contract of sale of goods.

ELEMENTS TO CONSTITUTE A CONTRACT OF SALE:-

- There must be at least two parties
- subject matter of the contract must be Movable Goods.
- A transfer of property in goods from seller to the buyer must take place
- A price in money (not in kind) should be paid or promised
- A contract of sale may be absolute or conditional.
- All other essential elements of a valid contract must be present

Sale and contract for work and labour:

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

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Difference Between Sale And Agreement To Sale:-

- ✓ In case of sale, the property in the goods passes to the buyer immediately whereas in agreement to sale Property in the goods passes to the buyer on future date or on fulfilment of some condition.
- ✓ Sale is an executed contract whereas agreement to sale is executory contract.
- ✓ In case of sale, the seller can sue the buyer for the price of the goods because of the passing of the property therein to the buyer whereas in agreement to sale The aggrieved party can sue for damages only and not for the price, unless the price was payable at a stated date.
- ✓ In case of sale, A subsequent loss or destruction of the goods is the liability of the buyer. Whereas in case of agreement to sale Such loss or destruction is the liability of the seller.
- ✓ In case of sale, burden of risk is on buyer whereas in case of agreement risk is on the seller.
- ✓ Sale Creates Jus in rem means right against the whole world. Whereas agreement to sale creates Jus in personam means rights against a particular party to the contract.

Difference between sale and hire purchase:-

- ✓ In case of sale, Property in the goods is transferred to the buyer immediately at the time of contract. Whereas in hire purchase, the property in goods passes to the hirer upon payment of the last instalment.
- ✓ In sale, The position of the buyer is that of the owner of the goods. In hire purchase, The position of the hirer is that of a bailee till he pays the last instalment.
- ✓ In case of sale, The buyer cannot terminate the contract and is bound to pay the price of the goods. Whereas in hire purchase, The hirer may, if he so likes, terminate the contract by returning the goods to its owner without liability.
- ✓ In case of sale, The buyer can pass a good title to a bona fide purchaser from him. Whereas hirer cannot pass any such title.
- ✓ The buyer in sale can resell the goods whereas hire purchaser cannot.
- ✓ In case of sale, The seller takes the risk of any loss resulting from the insolvency of the buyer. Whereas in hire purchase, owner has no such risk.

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Difference between Sale and bailment:-

- ✓ In case of sale, The property in goods is transferred from the seller to the buyer. So, it is transfer of general property. However, in bailment There is only transfer of possession of goods from the bailor to the bailee for any of the reasons like safe custody, carriage etc. So, it is transfer of special property.
- ✓ The return of goods in contract of sale is not possible. However, The bailee must return the goods to the bailor on the accomplishment of the purpose.
- ✓ In case of sale, The consideration is the price in terms of money. However, in bailment The consideration may be gratuitous or non-gratuitous.

CONTRACT OF SALE HOW MADE:-

1. an offer to buy or sell goods for a price and acceptance of such offer
2. may be immediate delivery
3. There may be immediate payment of price, but it may be agreed that the delivery is to be made at some future date.
4. may be immediate delivery of the goods and an immediate payment of price
5. may be agreed that the delivery or payment or both are to be made in instalments
6. may be agreed that the delivery or payment or both are to be made at some future date

Ascertainment of price : 'Price' means the monetary consideration for sale of goods.

The price in the contract of sale may be-

- fixed by the contract,
- fixed in a manner provided by the contract
- determined by the course of dealings between the parties.

Agreement to sell at valuation (Section 10):

Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of third party and such third party cannot or does not make such valuation, the agreement is thereby avoided: Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefore.

Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in default.

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SUBJECT MATTER OF CONTRACT OF SALE

Existing or future goods :
May be either existing goods that are acquired, owned or possessed by the seller, or future goods.
There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.
Whereby a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Goods perishing before making of contract:
Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description contract.

Goods perishing before sale but after agreement to sell:
Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided or becomes void.

Perishing of future goods: If the future goods are specific, the destruction of such goods will amount to supervening impossibility and the contract shall become void.

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Unit 2 : CONDITIONS & WARRANTIES

STIPULATION AS TO TIME (SECTION 11) – Time for the payment of price unless stipulated is not deemed to be of the essence of a contract of sale. But delivery of goods must be made without delay.

CONDITIONS AND WARRANTIES:

At the time of selling the goods, a seller usually makes certain statements or representations with a view to induce the intending buyer to purchase the goods. Such representations are generally about the nature and quality of goods, and about their fitness for buyer's purpose.

A representation which forms a part of the contract of sale and affects the contract, is called a stipulation. The more significant stipulations contained in a contract of sale of goods have been called as "Conditions", while the less significant stipulation have been given the name "Warranties".

"A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated".

"A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated" Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

WHEN CONDITION TO BE TREATED AS WARRANTY - cases where a breach of condition be treated as a breach of warranty - buyer loses his right to rescind the contract and can claim damages only.

- voluntary waiver by buyer.
- claim only damages instead of repudiating the contract. Here, the buyer has not waived the condition but decided to treat it as a warranty.
- Where the fulfilment of any condition or warranty is excused by law by reason of impossibility or otherwise
- Where the contract is non-severable and the buyer has accepted either the whole goods or any part.

IMPLIED CONDITIONS

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

2. Sale by description - Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description. Buyer can reject goods if it is not as per description.
Rule - "if you contract to sell peas, you cannot compel the buyer to take beans. The Act, however, does not define 'description'.
• where the class or kind to which the goods belong has been specified, e.g., 'Egyptian cotton', "java sugar", etc., and
•where the goods have been described by certain characteristics essential to their identification, e.g., jute bales of specified shipment, steel of specific dimension.

3.Sale by sample - In a contract of sale by sample, there is an implied condition that-
• the bulk shall correspond with the sample in quality.
• the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
• the goods shall be free from any defect rendering them un-merchantable, which would not be apparent on reasonable examination of the sample. This condition is applicable only with regard to defects, which could not be discovered by an ordinary examination of the goods. If the defects are latent, then the buyer can avoid the contract. This simply means that the goods shall be free from any latent defect i.e. a hidden defect.

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

5. Condition as to quality or fitness - There is no implied condition as to the quality or fitness of the goods sold for any particular purpose. However, the condition as to the reasonable fitness of goods for a particular purpose may be implied if the buyer had made known to the seller the purpose of his purchase and relied upon the skill and judgment of the seller to select the best goods and the seller has ordinarily been dealing in those goods This implied condition will not apply if the goods have been sold under a trademark or a patent name. There is implied condition of the part of the seller that the goods supplied shall be reasonably fit for the purpose for which the buyer wants them, provided the following conditions are fulfilled:

- The buyer should have made known to the seller the particular purpose for which goods are required. The buyer should rely on the skill and judgement of the seller.
- The goods must be of a description dealt in by the seller, whether he be a manufacturer or not.

6. Condition as to Merchantability - two requirements for this condition to apply: • Goods should be bought by description. • The seller should be a dealer in goods of that description. Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

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

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IMPLIED WARRANTIES: implied warranties are read into every contract of sale unless they are expressly excluded by the express agreement of the parties.

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

Warranty as to non-existence of encumbrances : An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time the contract is entered into.

Warranty as to quality or fitness by usage of trade : An implied warranty as to quality or fitness for a particular purpose may be annexed or attached by the usage of trade.

Disclosure of dangerous nature of goods: Where the goods are dangerous in nature and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger. If there is a breach of warranty, the seller may be liable in damages.

CAVEAT EMPTOR- means 'let the buyer beware'. When sellers display their goods in the open market, it is for the buyers to make a proper selection or choice of the goods. If the goods turn out to be defective, he cannot hold the seller liable. The seller is in no way responsible for the bad selection of the buyer. The seller is not bound to disclose the defects in the goods which he is selling.
It is the duty of the buyer to satisfy himself before buying the goods that the goods will serve the purpose for which they are being bought. If the goods turn out to be defective or do not serve his purpose or if he depends on his own skill or judgment, the buyer cannot hold the seller responsible.

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EXCEPTIONS TO CAVEAT EMPTOR

1. Fitness as to quality or use: Where the buyer makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment and the goods are of a description which is in the course of seller's business to supply, it is the duty of the seller to supply such goods as are reasonably fit for that purpose. Case law - Priest vs. Last

2. Goods of Merchantable Quality: Where the goods are bought by description from a seller who deals in goods of that description there is an implied condition that the goods shall be of merchantable quality. The rule of Caveat Emptor is not applicable. This rule shall apply if the defects were such which ought to have not been revealed by ordinary examination.

3. Goods purchased under patent or brand name: there is no implied condition that the goods shall be fit for any particular purpose.

4. Sale by sample: this rule does not apply if the bulk does not correspond with the sample.

5. Goods sold by description: there is an implied condition that the goods shall correspond with the description. If it is not so, then seller is responsible.

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

7. Goods by sample as well as description: the rule of Caveat Emptor is not applicable in case the goods do not correspond with both the sample and description or either of the condition

8. Seller actively conceals a defect or is guilty of fraud: Where the seller sells the goods by making some misrepresentation or fraud and the buyer relies on it or when the seller actively conceals some defect in the goods so that the same could not be discovered by the buyer on a reasonable examination, then the rule of Caveat Emptor will not apply. In such a case the buyer has a right to avoid the contract and claim damages.

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Risk prima facie passes with the property. In case where goods are lost or damaged, the burden of loss will be borne by the person who is the owner at the time when the goods are lost or damaged.

PASSING OF PROPERTY:- Passing of property implies passing of ownership. The risk in the goods sold is that of buyer and not of seller, though the goods may still be in the seller's possession.

↓

Depends upon two basic Factors:-

Identification of Goods: Section 18 provides that where there is a contract of sale for unascertained goods, the property in goods cannot pass to the buyer unless and until the goods are ascertained. The buyer can get the ownership right on the goods only when the goods are specific and ascertained.

Intentions of parties: The property in goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 19(2) further provides that for the purpose of ascertaining the intention of the parties regard shall be: - terms - conduct of the parties - circumstances of the

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The Primary Rules Determining The Passing Of Property From Seller To Buyer Are As Follows:

1. Property (Specific or ascertained goods) passes when intended to pass (Section 19):

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

Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

- Specific goods in a deliverable state (Sec 20) - The property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.
- Specific goods to be put into a deliverable state (Section 21): The property does not pass until such thing is done and the buyer has notice thereof.
- Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price (Section 22): The seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

2. Goods sent on approval or "on sale or return" (Section 24) : The property therein passes to the buyer-

- signifies his approval or acceptance to the seller
- retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time;
- does something to the good which is equivalent to accepting (Pledging)

Sale for cash only or Return - Unless cash is paid for property Sale for cash only or Return

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3. Goods must be ascertained:- No property in the goods is transferred to the buyer unless and until the goods are ascertained. [Section 18]

The rules in respect of passing of property of unascertained goods are as follows:

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

b) **Delivery to the carrier [Section 23(2)]:** Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

4. Reservation of right of disposal (Section 25):-To secure that the price is paid before the property in goods passes to the buyer. Where there is contract of sale of specific goods or where the goods have been subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, as the case may be, reserve the right to dispose of the goods, until certain conditions have been fulfilled. In such a case in spite of the fact that the goods have already been delivered to the buyer or to a carrier or other bailee for the purpose of transmitting the same to the buyer, the property therein will not pass to the buyer till the condition imposed, if any, by the seller has been fulfilled.

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Circumstances under which the right to disposal may be reserved:

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

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

RISK PRIMA FACIE PASSES WITH PROPERTY (SECTION 26) :-

unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

However, It provides that where delivery of the goods has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault

TRANSFER OF TITLE BY NONOWNERS

Sale by person not the owner (Section 27) - The seller can sells only such goods of which he is the absolute owner. If the seller is not the owner of goods, then the buyer also will not become the owner i.e. the title of the buyer shall be the same as that of the seller. This rule is expressed in the Latin maxim "Nemo dat quod non habet" which means that no one can give what he has not got.

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Exceptions to transfer of title by non- owners: In the following cases, a non-owner can convey better title to the bona fide purchaser of goods for value.

Sale by a Mercantile Agent : Good Title will be passed in following cases –

- possession of the goods or documents with the consent of the owner
- sale in the ordinary course of business
- buyer had acted in good faith & no notice of the fact that the seller had no authority to sell.

Mercantile Agent means an agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods

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

Sale by one who has already sold the goods but continues in possession thereof: If a person has sold goods but continues to be in possession of them or of the documents of title to them, he may sell them to a third person, and if such person obtains the delivery thereof in good faith and without notice of the previous sale, he would have good title to them, although the property in the goods had passed to the first buyer earlier. A pledge or other disposition of the goods or documents of title by the seller in possession are equally valid.

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

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Exceptions to transfer of title by non- owners: In the following cases, a non-owner can convey better title to the bona fide purchaser of goods for value.

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

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

Sale by a person in possession under voidable contract - CUFM

Sale under the provisions of other Acts - • Official Receiver or Liquidator • Purchase of goods from a finder of goods • A sale by pawnee can convey a good title to the buyer

PERFORMANCE OF THE CONTRACT OF SALE : The performance of a contract of sale implies delivery of goods by the seller and acceptance of the delivery of goods and payment of price for them by the buyer in accordance of the terms of the contract.

Delivery means voluntary transfer of possession from one person to another. For delivery, physical possession is not important. The buyer should be placed in a position so that he can exercise his right over the goods. If the possession is taken through unfair means, there is no delivery of the goods. Delivery of goods is of three types: Actual , Actual , Constructive

Duties Of Seller And Buyer (Section 31): It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

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Payment and delivery are concurrent conditions : The seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Rules Regarding Delivery of goods

1. Delivery :	Anything which has effect of putting goods in possession of buyer or any other person concerned
2. Effect of part delivery:	A delivery of part of goods, in progress of the delivery of the whole has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.
3. Buyer to apply for delivery:	Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.
4. Place of delivery:	Goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell or if not then in existence, at the place at which they are manufactured or produced.
5. Time of delivery:	If time fixed – Within time otherwise Reasonable Time
6.Goods in possession of a third party:	Where the goods at the time of sale are in possession of a third person, there is no delivery unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

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7. Time for tender of delivery	Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is reasonable hour is a question of fact.
8. Expenses for delivery	The expenses of and incidental to putting the goods into a deliverable state must be borne by the seller in the absence of a contract to the contrary.
9. Delivery of wrong quantity :	Delivered Goods < Contracted for – Buyer May entire reject them but if accepts then pay for whole Delivered Goods > Contracted for - the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate. Goods mixed with different description - The buyer may accept the goods which are in accordance with the contract and reject, or may reject the whole.
10. Instalment deliveries:	Unless otherwise agreed, the buyer is not bound to accept delivery in instalments
11. Delivery to carrier:	Subject to the terms of contract, the delivery of the goods to the carrier for transmission to the buyer, is prima facie deemed to be delivery to the buyer
12. Deterioration during transit:	Where goods are delivered at a distant place, the liability for deterioration necessarily incidental to the course of transit will fall on the buyer, though the seller may agree to deliver at his own risk.
13. Buyer's right to examine the goods:	Buyer has reasonable opportunity to examine goods so that they are in conformity with the contract.

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Rule related to Acceptance of Delivery of Goods : Acceptance is deemed to take place when the buyer-

- intimates to the seller that he had accepted the goods; or
- does any act to the goods, which is inconsistent with the ownership of the seller; or
- retains the goods after the lapse of a reasonable time

Buyer not bound to return rejected goods : Buyer is not bound to return them to the seller, but it is sufficient if he intimates that he refused to accept them.

Liability of buyer for neglecting or refusing delivery of goods : Buyer is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods.

UNIT – 4: UNPAID SELLER (UPS/UP seller)

UNPAID SELLER – When

1. whole of the price has not been paid or tendered and the seller had an immediate right of action for the price.
2. BOE/NI has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

RIGHTS OF UNPAID SELLER:

1. a lien on the goods for the price while he is in possession of them
2. In case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;
3. a right of re-sale

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RIGHT OF UNPAID SELLER AGAINST THE GOODS

1. Seller's lien (Section 47) -

UP seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:-

- Goods sold without stipulation of credit
- Credit given but expired
- Buyer become insolvent The seller may exercise his right of lien notwithstanding that he in possession of the goods as agent or bailee for the buyer.

Part delivery (Section 48): He may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Termination of lien (Section 49): UPS loses lien when

- delivers the goods to a carrier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- when the buyer or his agent lawfully obtains possession of the goods;
- by waiver

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

2. Right of stoppage in transit (Section 50 to 52): when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit. He may resume possession of the goods as long as they are in the course of transit and may retain them until paid or tendered price of the goods.

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Duration of transit (Section 51):

1. Goods deemed to be in transit – Delivered to carrier or other bailee for the purpose of transmission to the buyer until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.
2. If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.
3. When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.
4. Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage in transit is effected (Section 52):- 1.By taking actual possession of Goods , 2.By giving notice not to deliver goods.

Where the notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery shall be borne by the seller.

Right of Lien	Right of Stoppage in Transit
retain possession	regain possession.
Seller should be in possession of goods	possession with carrier & buyer not acquired possesion
Buyer may or may not be insolvent	Insolvent buyer
Before right of lien	begins when the right of lien ends.

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Effects of sub-sale or pledge by buyer (Section 53): The right of lien or stoppage in transit is not affected by the buyer selling or pledging the goods unless the seller has assented to it.

Exceptions where unpaid seller's right of lien and stoppage in transit are defeated:

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

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

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

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

CA Pradeep Gandhi TGSIR

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UPS Can Resell Goods In Following Conditions -

- ✓ Where the goods are of a perishable nature.
- ✓ Where the property in goods has not passed to the buyer
- ✓ Where an unpaid seller who has exercised his right of lien or stoppage in transit resells the goods - Acquires good title even if notice not given.
- ✓ A re-sale by the seller where a right of re-sale is expressly reserved in a contract of sale • No req of notice • Can sell on buyers default • Can recover damages from original buyer
- ✓ Where he gives notice to the buyer of his intention to re-sell the goods: If after the receipt of such notice the buyer fails within a reasonable time to pay or tender the price, the seller may resell the goods. Seller has Right to - • Diff between CP & Resale price • Retain Profit - only when he has given notice of resale to buyer. Thus if goods are resold W.O giving notice - Seller cannot recover loss, if profit then return to original buyer.

RIGHTS OF UNPAID SELLER AGAINST THE BUYER

Suit for price - • the property in the goods has passed to the buyer and the buyer refuses to pay as per terms the seller may sue him for the price of the goods. • Where under a contract of sale, the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

Suit for damages for non-acceptance: Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non acceptance.

Repudiation of contract before due date : the seller may treat the contract as rescinded and sue damages for the breach - anticipatory breach of contract.

Suit for interest - can be recovered only if specific agreement is there. If no specific agreement - the seller may charge interest on the price when it becomes due from such day as he may notify to the buyer.

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REMEDIES OF BUYER AGAINST THE SELLER - If the seller commits a breach of contract, the buyer gets the following rights against the seller:

1. **Suit for specific performance :** The court can order for specific performance only when the goods are ascertained or specific. This remedy is allowed by the court subject to these conditions - • must be for the sale of specific and ascertained goods • power of the court to order specific performance • Court will order only when specific damages is not adequate remedy • It will be granted as remedy if goods are of special nature or are unique

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

3. **Suit for breach of warranty :** Where there is breach of warranty on the part of the seller, or where the buyer elects to treat breach of condition as breach of warranty, the buyer is not entitled to reject the goods only on the basis of such breach of warranty.
But he may -
• set up against the seller the breach of warranty in diminution or extinction of the price;
• sue the seller for damages for breach of warranty

4. **Repudiation of contract before due date** - • Other party may treat contract as valid & wait for delivery or,
• Treat as rescinded & sue for damages for breach

5. **Suit for interest:** • Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages, in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed. In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller from the date on which the payment was made.

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AUCTION SALE (SECTION 64)

Where goods are sold in lots: each lot is prima facie deemed to be subject of a separate contract of sale.

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

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

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

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

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

AUCTION SALE (SECTION 64) :-An 'Auction Sale' is a mode of selling property by inviting bids publicly and the property is sold to the highest bidder. When he sells, he is only the agent of the seller. He may, however, sell his own property as the principal and need not disclose the fact that he is so selling.

INCLUSION OF INCREASED OR DECREASED TAXES IN CONTRACT OF SALE (SECTION 64A):
The buyer would have to pay the increased price where the tax increases and may derive the benefit of reduction if taxes are curtailed. Its upon parties to make an agreement to contrary.

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

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

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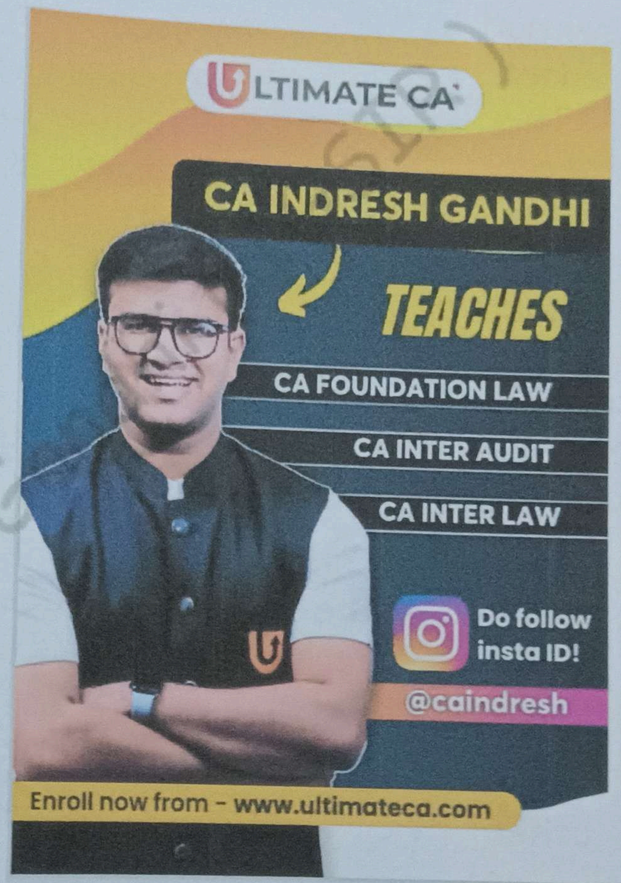
Indian Regulatory Framework Charts

CA Indresh Gandhi (SIR)



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Introduction:

Awareness of law is essential to become a full-fledged Chartered Accountant. This is because a Chartered Accountant is the first level of contact on many legal matters. So, we should possess knowledge of law so that we can advise our management and clients on legal matters at a basic or threshold level.

The purpose of a regulatory framework is to provide a set of uniform rules and regulations that will govern the conduct of people interacting with each other in personal as well as business relationships.

What is Law?

Law is a set of obligations and duties imposed by the government for securing welfare and providing justice to society. India's legal framework reflects the social, political, economic, and cultural aspects of our vast and diversified country.

Sources of Law:-

The main sources of law in India are

- ✓ Constitution,
- ✓ the statutes or laws made by Parliament and State Assemblies,
- ✓ Precedents or the Judicial Decisions of various Courts and in some cases, established Customs and Usages.

The Process of making Law:-

When a law is proposed in parliament it is called a Bill.

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After discussion and debate, the law is passed in Lok Sabha

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Thereafter, it has to be passed in Rajya Sabha.

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It then has to obtain the assent of the President of India.

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Finally, the law will be notified by the Government in the publication called the Official Gazette of India. The law will become applicable from the date mentioned in the notification as the effective date. Once it is notified and effective, it is called an Act of Parliament.

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Types of laws in Indian Legal System

Criminal law

Criminal law is concerned with laws pertaining to violations of the rule of law or public wrongs and punishment of the same. Criminal Law is governed under the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1973 (Crpc). The Indian Penal Code, 1860, defines the crime, its nature, and punishments whereas the Criminal Procedure Code, 1973, defines exhaustive procedure for executing the punishments of the crimes.

Murder, rape, theft, fraud, cheating and assault are some examples of criminal offences under the law.

Civil Law

Matters of disputes between individuals or organisations are dealt with under Civil Law. Civil courts enforce the violation of certain rights and obligations through the institution of a civil suit. Civil law primarily focuses on dispute resolution rather than punishment.

The act of process and the administration of civil law are governed by the Code of Civil Procedure, 1908 (CPC). Civil law can be further classified into Law of Contract, Family Law, Property Law, and Law of Tort.

Some examples of civil offences are breach of contract, non-delivery of goods, non-payment of dues to lender or seller defamation, breach of contract, and disputes between landlord and tenant.

Common Law:

A judicial precedent or a case law is common law. A judgment delivered by the Supreme Court will be binding upon the courts within the territory of India under Article 141 of the Indian Constitution. The doctrine of *Stare Decisis* is the principle supporting common law. It is a Latin phrase that means "to stand by that which is decided." The doctrine of Stare Decisis reinforces the obligation of courts to follow the same principle or judgement established by previous decisions while ruling a case where the facts are similar or "on all four legs" with the earlier decision.

Principles of Natural Justice:

Natural justice, often known as Jus Natural deals with certain fundamental principles of justice going beyond written law.

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Structure of Indian Judicial System:- When there is a dispute between citizens or between citizens and the Government, these disputes are resolved by the judiciary.

The **functions** of judiciary system of India are: Regulation of the interpretation of the Acts and Codes, Dispute Resolution, Promotion of fairness among the citizens of the land.

In the **hierarchy of courts**, the Supreme Court is at the top, followed by the High Courts and District Courts.

1. **Supreme Court:** The Supreme Court is the apex body of the judiciary. It was established on 26th January, 1950. The Chief Justice of India is the highest authority appointed under Article 126. The principal bench of the Supreme Court consists of seven members including the Chief Justice of India. An individual can seek relief in the Supreme Court by filing a writ petition under Article 32.
2. **High Court:** The highest court of appeal in each state and union territory is the High Court. In India, there are twenty-five High Courts, one for each state and union territory, and one for each state and union territory. An individual can seek remedies against violation of fundamental rights in High Court by filing a writ under Article 226.
3. **District Court**:-The Courts of District Judge deal with Civil law matters i.e. contractual disputes and claims for damages , etc. The Courts of Sessions deals with Criminal matters. Jurisdiction means the power to control. Courts get territorial Jurisdiction based on the areas covered by them. Cases are decided based on the local limits within which the parties reside or the property under dispute is situated.
4. **Metropolitan Courts:**-Metropolitan courts are established in metropolitan cities in consultation with the High Court where the population is ten lakh or more. Chief Metropolitan Magistrate has powers as Chief Judicial Magistrate and Metropolitan Magistrate has powers as the Court of a Magistrate of the first class.

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