

# Indian Regulatory Framework

## Why to read Law?

Awareness is important to become a CA as CA's are the first level of contact on legal matters. We have to advise our clients on many legal matters.

## Purpose of Indian Regulatory Framework?

To provide a set of uniform (same) rules and regulations that will govern the conduct of people interacting with each other in personal as well as business relationships.

## History of Law?

"Code of Hammurabi" is known for oldest law in written form. He carved the code on bulky stone slabs.

"Twelve Tables" is known as a set of laws was engraved on 12 bronze tablets in Rome which is considered as first most detailed code of any of the civilisations. Purpose of these tables was to protect the rights of public and to provide remedy for wrongs

## What is Law & Process of Making It?

Law - It 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.

### Process of Making A Law

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

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

Thereafter, it has to be passed in Rajya Sabha

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

Finally, It will be notified by the Government in the publication called Official Gazette of India

It is 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.

## Sources of Law

Main sources (4 points) - Constitution, statutes or laws made by Parliament and State Assemblies, Precedents or the Judicial Decisions, established Customs and Usages.

## Types of laws in the Indian Legal System

### **1 - Criminal Law**

- concerned with laws pertaining to violations of the rule of law or public wrongs and punishment of the same
- Governed under the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1973
- IPC, 1860, defines the crime, its nature, and punishments whereas the Crpc, 1973, defines exhaustive procedure for executing the punishments of the crimes.
- Example - Murder, rape, theft, fraud, cheating and assault

### **2 - Civil Law**

- Matters of disputes between individuals or organisations are dealt with under Civil Law
- Enforces the violation of certain rights and obligations through civil suit.
- Primarily focuses on dispute resolution rather than punishment.
- Administration of civil law are governed by the Code of Civil Procedure, 1908 (CPC).
- Further classified into Law of Contract, Family Law, Property Law, and Law of Tort.
- Example - breach of contract, non-delivery of goods, non-payment of dues.

### **3 - Common Law**

- Judicial precedent or a case law is common law.
- Judgment by the Supreme Court will be binding upon the courts in India (Article 141)
- Doctrine of Stare Decisis is the principle supporting common law, means "to stand by that which is decided."
- It reinforces the obligation of courts to follow the same principle or judgement provided by previous decisions if facts are similar or "on all four legs" with earlier decision.

### **4 - Principles of Natural Justice**

- Often known as Jus Natural, deals with certain fundamental principles of justice going beyond written law.
- Nemo judex in causa sua ("No one should be made a judge in his own cause, and it's a Rule against Prejudice),
- Audi alteram partem ("hear the other party or give the other party a fair hearing),
- Reasoned decision are the rules of Natural Justice.
- Judgement can override or alter a common law, but it cannot override or change statute.

## Enforcing the Law

Once a law is passed by Parliament, it's enforceability is the responsibility of executives.

Enforcement depends on whether it's a Central or State law, and the relevant government becomes the enforcing authority.

To manage this, functions are divided among various ministries. Each ministry is led by a Cabinet Minister and supported by junior ministers and civil servants.

### Ministries of Central Government

#### **1 - Ministry of Finance**

- concerned with the economy of India, serving as the Treasury of India.
- Concerns with taxation, financial legislation, financial institutions, capital markets, centre and state finances, and the Union Budget.
- CA's day to day life is highly impacted with this ministry
- Ministers preferred MoF as their portfolio
- MIMP function of MoF is presentation of Union Budget which is eagerly awaited as it provides rate of taxes and budget allocations.
- It is the apex controlling authority of four civil services namely -  
Indian Revenue Service, Indian Audit & Account service, Indian Economic Service & Indian Civil Accounts Service.
- Also, Apex authority of Indian Cost and Management Accounts Service

#### **Departments Under MoF**

- Economic Affairs
- Expenditure
- Revenue
- Financial Services
- Investment and Public Asset Management
- Public Enterprises

#### **2 - Ministry of Corporate Affairs (MCA)**

- Primarily concerned with administration of the Companies Act 2013, Companies Act 1956, the LLP Act, 2008, and the Insolvency and Bankruptcy Code, 2016.
- Responsible mainly for the regulation of Indian enterprises in the industrial and services sector.
- Run by civil servants of the ICLS cadre which are elected through the Civil Services Examination conducted by UPSC.
- The highest post, Director General of Corporate Affairs (DGCoA), is fixed at Apex Scale for the ICLS.

#### **3 - Ministry of Home Affairs**

- An interior ministry of India
- Mainly responsible for the maintenance of internal security and domestic policy
- Headed by Union Minister of Home Affairs

#### **Departments Under MoF**

- Border Management
- Internal Security
- Jammu, Kashmir and Ladakh Affairs
- Home
- States
- Official Language - Central Translation Bureau, Central Hindi Training Institute, Directorate of Census Operations.

#### **4 - Ministry of Law and Justice**

- Is a cabinet ministry, which deals with the
- management of the legal affairs, through the Department of Legal Affairs
- legislative activities through the Legislative Department
- administration of justice in India through the Department of Justice
- Concerned with advising the various Ministries of the CG.
- Legislative Department is concerned with drafting of principal legislation for the CG.

#### **Departments Under MoF**

- |                               |                          |                         |
|-------------------------------|--------------------------|-------------------------|
| ○ Department of legal affairs | ○ Legislative Department | ○ Department of Justice |
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#### **Statutory Authorities**

##### **1) Securities & Exchange Board of India (SEBI)**

- Regulatory body for securities and commodity market in India
- Under the ownership of MoF within Government of India
- Established on 12/04/1988 as an Executive body and was given Statutory powers on 30/01/1992 through SEBI Act, 1992.

##### **2) Reserve Bank of India (RBI)**

- India's Central Bank & regulatory body responsible for regulation of Indian banking system.
- Ownership of MoF, Government of India.
- Responsible for the control, issue and maintaining supply of the Indian rupee.
- Manages the country's main payment systems and works to promote its economic development.

#### **Divisions Under RBI**

- Bharatiya Reserve Bank Note Mudran (BRBNM) - prints and mints Indian currency notes (INR)  
Two currency printing presses - Nashik (Western India) & Dewas (Central India)
- National Payments Corporation of India - Regulate the payment and settlement systems.
- Deposit Insurance and Credit Guarantee Corporation - providing insurance of deposits and guaranteeing of credit facilities to all Indian banks.

##### **3) Insolvency and Bankruptcy Board of India (IBBI)**

- Regulator for overseeing insolvency proceedings and entities like Insolvency Professionals(IP), Insolvency Professional Agencies (IPA), Information Utilities (IU) in India.
- Established on 1 October 2016, statutory powers through the IBC, 2016.
- Covers Individuals, Companies, LLP's, Partnerships and Partnership firms.
- It will speed up the resolution process for stressed assets in the country.
- Attempts to simplify the process of insolvency and bankruptcy proceedings.
- Handles cases through two tribunals - NCLT & Debt recovery tribunal.

#### **The Indian Judicial System**

When there is a dispute between citizens or between citizens and the Government, these disputes are resolved by the judiciary.

### **Functions of The Indian Judicial System**

- Regulation of the interpretation of the Acts and Codes
- Dispute Resolution
- Promotion of fairness among the citizens of the land

### **Hierarchy of courts**

Supreme Court is at the top, followed by High courts and District courts.

Decisions of High court - Binding on respective states only

Decisions of Supreme court - Binding on all High courts under Article 121 of constitution.

Decision of Supreme court is final decision on the matter.

#### **1) Supreme Court**

- apex body of the judiciary
- Established on 26th January, 1950.
- Chief Justice of India is the highest authority (Article 126)
- Principal bench consist of 7 members including CJI.
- Presently - 34 members including CJI due to rise in no. of cases.
- Individual can Seek relief in SC by writ petition under Article 32.

#### **2) High Court**

- Highest court of appeal in each state and UT.
- There must be a HC in each state (Article 214)
- HC has has appellant, original jurisdiction, and Supervisory jurisdiction
- Article 227 limits a HC's power.
- Currently 25 High courts & 6 states share single HC.
- Individual can seek remedies against violation of fundamental rights by writ (Article 226)
- Oldest HC - Calcutta HC

#### **3) District Court**

- Below the High Courts are DC's.
- Civil Judge deal with Civil law matters i.e. contractual disputes & claim for damages.
- Courts of Sessions deals with Criminal matters.
- Pecuniary jurisdiction, can try suits valuing not more than Rupees two crore.
- 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 Court**

- Established in metropolitan cities in consultation with the HC where the population is ten lakh or more.
- Chief Metropolitan Magistrate has powers as Chief Judicial Magistrate
- Metropolitan Magistrate has powers as the Court of a Magistrate of the first class.

## Chapter – 2 – The Indian Contract Act, 1872

### **Unit 1 – Nature of Contracts**

#### **Contract [Section 2(h)]**

- Means - Agreement capable of being enforceable by law is called contract.
- Agreement [Section 2(e)] - Every promise and every set of promises forming consideration for each other.
- Promise [Section 2(b)] - When the person to whom the proposal is made signifies his assent there to, the proposal is said to be accepted. Proposal when accepted, becomes a promise.
- Agreement = Offer/Proposal + Acceptance + Consideration
- Contract = Agreement + Enforceability by law

#### **Difference between Agreement and Contract**

##### Basis (By ICAI)

1) Meaning	2) Scope	3) Legal Obligation	4) Nature
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#### **Essentials of a Valid Contract**

	By Sec - 10 of Indian Contract Act, 1872		Not By Sec - 10 but are considered essential
1	Agreement	1	Two parties
2	Free consent	2	Intention to create legal relationship
3	Competency of the parties	3	Fulfilments of legal formalities
4	Lawful consideration	4	Certainty of meaning
5	Legal object	5	Possibility of performance
6	Not expressly declared to be void [as per Section 24 to 30 and 56]	6	-

#### **Not By Sec - 10 but are considered essential**

##### **1) Two Parties:**

- One cannot contract with himself. It involves at least two parties (Offer & Acceptance)
- May be made by natural persons and by other persons having legal existence
- Identity of parties must be ascertainable.

**Case Law** - State of Gujarat vs Ramanlal S & Co.

##### **2) Parties must intend to create legal obligations:**

- There must be an intention on the part of the parties to create legal relationship
- Social or domestic type of agreements are not enforceable in court of law.



**Case Law - Balfour Vs Balfour****3) Other Formalities to be complied with in certain cases**

- A contract may be written or spoken (no difference), But in the interest of parties the contract must be written.
- Certain contracts requires some other formalities have to be enforceable. Ex - Insurance

**4) Certainty of meaning:**

- The agreement must be certain and not vague or indefinite.

**5) Possibility of performance of an agreement:**

- Terms of agreement should be capable of performance. Impossible act can't be enforced.

**By Sec - 10 of Indian Contract Act, 1872****1) Offer and Acceptance or an agreement:**

- Every promise and every set of promises, forming consideration for each other, is an agreement" and A proposal when accepted, becomes a promise".

**2) Free Consent:**

- Two or more persons are said to consent when they agree upon the same thing in the same sense viz consensus ad idem (meeting of minds)
- Consent would be considered as free consent if it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

**3) Capacity of the parties:**

- Capacity to contract means the legal ability of a person to enter into a valid contract.
- Section 11 of the specifies that every person is competent to contract who
  - ✓ (a) is of the age of majority according to the law to which he is subject and
  - ✓ (b) is of sound mind and
  - ✓ (c) is not otherwise disqualified from contracting by any law to which he is subject.

Qualification (a) - Person entering into contract must be of 18 years of age. Persons below 18 years of age are considered minor, therefore, incompetent to contract.

Qualification (b) - A person to be of sound mind i.e. he should be in his senses so that he understands the implications of the contract at the time of entering into a contract.

A lunatic, an idiot, a drunken person or under the influence of some intoxicant is not sound mind.

Qualification (c) - A person entering into a contract should not be disqualified by his status, in entering into such contracts.

Such persons are an alien enemy, foreign sovereigns, convicts etc. They are disqualified unless they fulfil certain formalities required by law.

**4) Consideration:**

- Referred to as 'quid pro quo' i.e. 'something in return'.
- May consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by other.

**5) Lawful Consideration and Object:**

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

**6) Not expressly declared to be void:**

- Agreement entered must not be which the law declares to be either illegal or void.
- An illegal agreement is an agreement expressly or impliedly prohibited by law.

**Types of Contracts (Total - 13 types)****On the basis of the validity (5 Types)****1) Valid Contract:**

- Agreement which is binding and enforceable is a valid contract. It contains all the essential elements of a valid contract.

**2) Void Contract:**

- Contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". Thus, a void contract is one which cannot be enforced by a court of law.

**3) Voidable Contract:**

- 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".
- Following is the situation where contract is voidable
  - ✓ Consent is not free under Coercion, undue influence, misrepresentation or fraud.
  - ✓ If a person promises to do something for another, but other person prevents him from performing his promise, Contract becomes voidable at the option of 1<sup>st</sup> person.
  - ✓ When a party to a contract promise to perform a work within a specified time, could not perform with in that time, Contract becomes voidable at the option of promisee.

**Distinction between a Void Contract and a Voidable Contract.****Basis (By ICAI)**

1) Meaning	2) Enforceability	3) Cause
4) Performance of Contract	5) Rights	



**4) Illegal Contract:**

- It is a contract which the law forbids to be made. (void ab initio & can't be enforced)
- 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.

**Difference between Void Agreement & Illegal Agreement****Basis (By ICAI)**

1) Scope	2) Nature of Punishment	3) Collateral Agreement
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**5) Unenforceable Contract:**

- Where a contract is good in substance but because of some technical defect i.e. absence in writing, barred by limitation etc. one or both the parties cannot sue upon it.

**On the basis of the formation of contract (4 Types)****1) Express Contracts:**

- If terms are expressed by words or in writing, it is an express contract.

**2) Implied Contracts:**

- It contrasts come into existence by implication i.e. by action or conduct of parties or course of dealings between them.
- Tacit Contracts: The word Tacit means silent. Tacit contracts are those that are inferred through conduct of parties without any words spoken or written.

**3) Quasi-Contract:**

- Quasi-contract is not an actual contract, but it resembles a contract.
- Law creates and enforces legal rights and obligations when no real contract exists. Such obligations are known as quasi-contracts.

**4) E-Contracts:**

- If Contract is entered using electronics means, it is known as e-commerce contracts.

**On the basis of the formation of contract (4 Types)****1) Executed Contract:**

- When the act is done or executed or forbearance is brought on record, then the contract is an executed contract. Consideration is the act or forbearance.

**2) Executory Contract:**

- In an executory contract, consideration is reciprocal promise or obligation. It is to be performed in future only, hence described as executory contracts.
- Kinds of Executory Contracts are as follows

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

### **Proposal Offer - [Sec 2(a)]**

- **Definition** - 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.

- **Essentials of a proposal/offer are**

1) Promisor or Offeror - The person making the proposal or offer

Offeree - The person to whom the offer is made

Promisee or Acceptor - The person accepting the offer.

2) For a valid offer, Party making it must express his willingness 'to do' or 'not to do' something

3) Willingness must be expressed with a view to obtain the assent of the other party.

4) Offer can be positive (Doing) as well as negative (Not Doing or Abstinence)

- **Classification of offer** - Offer can be classified as general, special/specific, cross, counter, standing/ open/ continuing offer.

1) General offer:

- Made to public at large & hence anyone can accept and do the desired act
- Anyone performing the conditions of offer can be considered to have accepted it.
- 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. (1893)

2) Special/specific offer:

- Made to a specific or an ascertained person.
- Can be accepted only by that specified person to whom the offer has been made.

**Case Law** - Boulton Vs. Jones

3) Cross offer:

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

**4) Counter offer:**

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

**5) Standing or continuing or open offer:**

- Offer which is allowed to remain open for acceptance over a period of time.

**• Essential of a valid offer****1) It must be capable of creating legal relations:**

- Offer must be such as in law is capable of being accepted and giving rise to legal relationship. If not, then it is not a valid offer in the eye of law.
- Social invitation accepted, does not create legal relations because it is not so intended.

**2) It must be certain, definite and not vague:**

- If terms are vague or indefinite, its acceptance can't create any contractual relationship.

**3) It must be communicated to the offeree:**

- Offer to be complete, must be communicated to the person to whom it is made, otherwise there can be no acceptance of it.
- Acceptance of an offer, in ignorance of offer, is not acceptance and does not confer any right on acceptor.

**Case Law** - Lalman Shukla v. Gauri Dutt

**4) It must be made with a view to obtaining the assent of the other party:**

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

**5) It may be conditional:**

- An offer can be made subject to any terms and conditions by the offeror.

**6) Offer should not contain a term the non-compliance of which would amount to acceptance:**

- Thus, one cannot say that if acceptance is not communicated by a certain time the offer would be considered as accepted.

**7) The offer may be either specific or general:**

- Any offer can be made to either public at large or to the any specific person.

**8) 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.**

- i) A statement of intention and announcement.

- ii) Offer must be distinguished from an answer to a question.

**Case Law** - Harvey vs. Facey [1893] AC 552

- iii) A statement of price is not an offer
- iv) An invitation to make an offer or do business.

#### 10) A statement of price is not an offer

- Invitation to offer - It is only a circulation of an offer, it is an attempt to induce offers and precedes a definite offer. It is an act precedent to making an offer. Acceptance of an invitation to an offer does not result in the contract and only an offer emerges in the process of negotiation

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

Basis (Not by ICAI)			
1) Meaning	2) Test of intention	3) Sequence	4) Example

#### Following are instances of invitation to offer to buy or sell:

- A Prospectus by a company to the public to subscribe for its shares.
- Display of goods for sale in shop windows.
- Advertising auction sales and
- Quotation of prices sent in reply to a query regarding price.

#### Acceptance [Section 2(b)]

- Definition - When the person to whom the proposal is made signifies his assent thereto, proposal is said to be accepted. The proposal, when accepted, becomes a promise & cannot be withdrawn or revoked.
- Legal Rules regarding a valid acceptance

#### 1) Acceptance can be given only by the person to whom offer is made:

- In case of a specific offer, it can be accepted only by the person to whom it is made.

**Case Law** - [Boulton vs. Jones (1857)] & [Carlill vs. Carbolic Smoke Ball Co. (1893)]

#### 2) Acceptance must be absolute and unqualified

- Acceptance is valid only if, it is absolute & unqualified and is also expressed in some usual & reasonable manner unless proposal prescribes the manner in which it must be accepted.
- If proposal prescribes the manner of acceptance, then it must be accepted accordingly.

#### 3) The acceptance must be communicated

- Acceptance must be communicated in some perceptible form.
- Any conditional or varying or too deviant conditions is no acceptance.
- Conditional acceptance is a counter proposal and has to be accepted by the proposer.

- Further when a proposal is accepted, the offeree must have the knowledge of the offer made to him. If he does not have the knowledge, there can be no acceptance.
- Acceptance must relate specifically to the offer made to be materialize into contract.
- Mere variation in language not involving any difference in substance would not make the acceptance ineffective.

4) Acceptance must be in prescribed mode:

- If mode of acceptance is prescribed in the proposal, Accept in that manner.
- But if proposer does not insist if it has been accepted otherwise - The proposer is presumed to have consented to the acceptance.

5) Time

- If time specified - Acceptance must be given within the specified time limit,
- If no time is stipulated - Acceptance within reasonable time and before the offer lapses.
- Reasonable time is nowhere defined & depend on facts and circumstances of each case.

6) Mere silence is not acceptance

- Acceptance cannot be implied from silence of offeree or his failure to answer, unless the offeree has in any previous conduct indicated that his silence is evidence of acceptance.

7) Acceptance by conduct/Implied Acceptance

- Performance of conditions of proposal, or acceptance of any consideration for a reciprocal promise, constitutes an acceptance of proposal i.e. Acceptance by conduct.
- Therefore, when a person performs the act intended by the proposer as the consideration for the promise offered by him, the performance of the act constitutes acceptance.

**Communication of Offer & Acceptance**

- Communication of offer (Sec - 4) - Communication of offer is complete when it comes to the knowledge of the person to whom it is made.
  - Thus, if a proposal is made by post, its communication will be complete when the letter containing the proposal reaches the person to whom it is made.
  - Mere receiving of the letter is not sufficient, he must receive or read the message contained in the letter.
- Modes of Communication of acceptance:
  - By any act (written or oral) and by omission (conduct or by forbearance to convey his willingness or assent).  
However, silence would not be treated as communication by 'omission'.
  - Communication also includes positive acts or signs so that other person understands what means to say or convey.

- A mere mental unilateral assent in one's own mind would not amount to communication.
  - When communication of acceptance is complete (Sec - 4)
    - 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;
    - As against the acceptor, when it comes to the knowledge of the proposer.
    - It is necessary that, letter is correctly addressed, adequately stamped and duly posted.
    - In the event of loss of letter in transit, wrong delivery, non-delivery etc., will not affect the validity of the contract.
  - Acceptance over telephone or telex or fax
    - When offer is made of instantaneous communication like telex, telephone, fax or through e-mail, the contract is only complete when the acceptance is received by the offeree.
    - However, in case of a call drops & disturbances in line, there may not be a valid contract.
  - Communication of special conditions:
    - Sometimes special conditions are conveyed & accepted tacitly or even without realizing it. Question here is whether these conditions can be considered to have been communicated? If such terms and condition are reasonable, communication is effective. But if it does not give reasonable notice on its face, Acceptor will not incur any obligation.
- Case Law** - [Raipur transport Co. vs. Ghanshyam [1956] A. Nag.145].

### Communication of Performance

- Communication of Acceptance from the viewpoint of proposer - when the acceptance is put into a course of transmission, when it would be out of the power of acceptor
- from the viewpoint of acceptor - It would be complete when it comes to the knowledge of the proposer.

### Revocation of Offer & Acceptance

- Communication of revocation (of the proposal or its acceptance) is complete as against the person who makes it - When it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it, and  
As against the person to whom it is made - When it comes to his knowledge.
- Acceptor can revoke his acceptance any time before the letter of acceptance reaches the offeror, if the revocation telegram arrives before or at the same time with the letter of acceptance, the revocation is absolute.
- Contract over Telephone- Contract is formed as soon as the offer is accepted but offeree must make it sure that his acceptance is received by offeror.



If telephone unexpectedly goes dead during conversation, Acceptor must confirm again that the words of acceptance were duly heard by the offeror.

**Modes of Revocation of Offer:**

- 1) By notice of revocation:
- 2) By lapse of time:
  - Time specified - After the lapse of specified time
  - No time specified - After reasonable time.
- 3) By non-fulfilment of condition precedent:
  - Where the acceptor fails to fulfill a condition precedent to acceptance the proposal gets revoked.
- 4) By death or insanity:
  - Death or insanity of the proposer would result in automatic revocation of the proposal but only if the fact of death or insanity comes to the knowledge of the acceptor.
- 5) By counter offer
- 6) By the non-acceptance of the offer according to the prescribed or usual mode
- 7) By subsequent illegality.

## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 2 – Consideration**

#### **What is Consideration? (Section - 2)**

- "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing something, such an act or abstinence or promise is called consideration for the promise".
- Consideration may consist of either some right, interest, profit or benefit accruing to one party or forbearance, detriment, loss or responsibility given, suffered or undertaken by other.

#### **Legal Rules regarding Consideration**

##### **1) Consideration must move at the desire of the promisor:**

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

**Case Law** - Durga Prasad v. Baldeo

##### **2) 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 no stranger to a contract.

**Case Law** - Chinnayya vs. Ramayya (1882)

##### **3) Executed and executory consideration:**

- 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.

##### **4) Consideration may be past, present or future:**

- If services being rendered in past at the request or desire of promisor, the subsequent promise is regarded as an admission that, past consideration was not gratuitous.

##### **5) Consideration need not be adequate:**

- It need not be approximately of equal value with the promise for which it is exchanged but it must be something which the law would regard as having some value. Something in return need not be equal to something given.
- If consent is freely given will not be void merely because consideration is inadequate. But if it is less & other party alleges that his consent was not free than this inadequate consideration can be taken as evidence in support of this allegation.

##### **6) Performance of what one is legally bound to perform:**

- Performance of an act by a person who is legally bound to perform the same cannot be consideration for a contract.
- But where a person promises to do more than he is legally bound to do or such a promise provided it is not opposed to public policy, is a good consideration.

**7) Consideration must be real and not illusory:**

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

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

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

**Suit by Third Party to a Contract**

- Consideration for an agreement may proceed from a third party, but third party cannot sue on contract. Only a person who is party to a contract can sue on it. Thus, Stranger to consideration is a valid and is different from stranger to a contract.
- Stranger to contract cannot sue is known as a "doctrine of privity of contract", It is however, subject to certain exceptions.

**1) In the case of trust,** Beneficiary can enforce his right, though he was not a party to contract between the settler and the trustee.

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

**3) In case of certain marriage contracts/arrangements,** Provision may be made for 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 contract,** when benefit under a contract has been assigned, Assignee can enforce the contract but such assignment should not involve any personal skill.

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

**6) In the case of covenant running with land,** Person who purchases land with notice that the owner of land is bound by certain duties affecting land, Covenant affecting the land may be enforced by successor of the seller.

**7) Contracts entered into through an agent:** Principal can enforce the contracts entered by his agent where agent has acted within the scope of his authority and in the name of principal.

**Validity of an Agreement without Consideration (Section 25)**

- Agreement made without consideration is void. Contract may be enforceable when consideration is there. However, there are certain exceptions to this rule.

In following cases, Agreement though made without consideration, will be valid & enforceable.

**1) Natural Love and Affection:** Following conditions must be fulfilled

- 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.

**2) Compensation for past voluntary services:** Promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, is enforceable.

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.

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

**4) Agency:** No consideration is necessary to create an agency. (Section 185)

**5) Completed gift:** In case of completed gifts, the rule no consideration no contract does not apply. Gifts do not require any consideration.

**6) Bailment:** No consideration is required to affect the contract of bailment. Section 148 defines bailment. No consideration is required to affect a contract of bailment.

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

**Case Law** - Kadarnath v. Gorie Mohammad

## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 3 – Other Essential Elements of a Valid Contract**

#### **Introduction**

- Agreement in order to be a contract, must satisfy the following conditions:
  - (I) Parties must be competent to contract;
  - (II) it must be made by the free consent of the parties;
  - (III) it must be made for a lawful consideration and with a lawful object;
  - (IV) it should not have been expressly declared as void by law.

#### **I) Capacity To Contracts**

- Meaning - Capacity refers to the competence of the parties to make a contract.
- Every person is competent to contract who (Sec. 11)

A) Has attained age of majority	B) Is of sound mind	C) Is not disqualified by any law to which he is subject to.
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#### **A) 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.
- A person less than that age even by a day would be minor for the purpose of contracting.

#### **Law relating to Minor's agreement/Position of Minor**

1) Void-ab-initio	2) Ratification	3) Beneficiary	4) Plead minority
5) Necessaries	6) Guardian	7) Specific perform.	8) Insolvency
9) Partnership	10) Agent	11) Parents/Guardian	12) Joint contract
13) Guarantor	14) Shareholder	15) Liability for torts	

#### **1) Contract made with or by a minor is void ab-initio:**

- Minor is not competent to contract & any agreement with or by minor is void from the very beginning.

**Case Law:** Mohori Bibi vs. Dharmo Das Ghose (1903),

#### **2) No ratification after attaining majority as the original agreement is void ab initio and a void agreement can never be ratified.**

#### **3) Minor can be a beneficiary or can take benefit out of a contract**

- Though a minor is not competent to contract, nothing in the Contract Act prevents the minor from making the other party bound to him.

- Thus, 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.
- 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 (Sec. 30 of Indian Partnership Act, 1932).

#### 4) A minor can always plead minority

- Minor can always plead minority and is not stopped to do so even where he has taken any loan or entered into any contract by falsely representing that he was major.
- Rule of estoppel can't be applied against minor, i.e. he can plea his minority in defence.

#### 5) Liability for necessities (Sec. 68)

- Claim for necessities supplied to minor or to any other person whom such minor is legally bound to support is enforceable by law.
- But a minor is not liable for any price that he may promise and never for more than the value of the necessities.
- There is no personal liability of minor, but only his property is liable.
- To render minor's estate liable for necessities two conditions must be satisfied.
  - ✓ Contract must be for goods reasonably necessary for his support in life.
  - ✓ Minor must not have already a sufficient supply of these necessities.
- 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, funeral ceremonies come within the scope of necessities.

#### 6) Contract by guardian - how far enforceable:

- Though a minor's agreement is void, his guardian can, enter into a valid contract on minor's behalf.
- Where, guardian makes a contract for minor, which is within his competence and which is for the benefit of minor, there will be valid contract which the minor can enforce.
- But all contracts made by guardian on behalf of a minor are not valid.
- For instance, guardian of a minor has no power to bind the minor by a contract for the purchase of immovable Property. But a contract entered into by a certified guardian of a minor, with the sanction of court for sale of minor's property, may be enforced.

#### 7) No specific performance

- A minor's agreement being absolutely void, there can be no question of specific performance of such an agreement.



**8) No insolvency**

- Minor cannot be declared insolvent as he is incapable of contracting debts and dues are payable from the personal properties of minor and he shall never be held personally liable.

**9) Partnership**

- Minor being incompetent to contract cannot be a partner but under Sec. 30 of the Indian Partnership Act, he can be admitted to the benefits of partnership.

**10) Minor can be an agent**

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

**11) Minor cannot bind parent or guardian**

- In the absence of authority, express or implied, an infant is not capable of binding his parent or guardian, even for necessities.
- Parents will be held liable only when the child is acting as an agent for the parents.

**12) Joint contract by minor and adult**

- Adult will be liable on the contract and not the minor.

**13) Surety (Guarantor) 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 surety and the third party.

**14) Minor as Shareholder:**

- Minor being incompetent to contract cannot be a shareholder of the company.
- If by mistake he becomes a member, Company can rescind the transaction and remove his name from register.
- But, a minor may, acting through his lawful guardian become a shareholder by transfer or transmission of fully paid shares to him.

**15) Liability for torts:**

- Tort is a civil wrong.
- Minor is liable in tort unless the tort in reality is a breach of contract.  
Thus, if minor borrowed a horse for riding only, he was held liable when he lent the horse to one of his friends who jumped and killed the horse.  
Similarly, minor was held liable for his failure to return certain instruments which he had hired and then passed on to a friend.

**B) Person of sound mind (Sec. 12)**

- A person is said to be of sound mind if, at the time when he makes a contract is capable of understanding it and of forming a rational judgement as to its effect upon his interests."

- Person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.
- Person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.
- Position of unsound mind person making a contract is void.

### **C) Contract by disqualified persons**

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

### **II) Free Consent**

- Definition of Consent (Sec. 13) - Two or more persons are said to consent when they agree upon the same thing in the same sense."
- Parties are said to have consented when they agreed upon the same thing in the same sense.
- When parties make some fundamental error as to nature of transaction, or person dealt with or subject-matter of agreement, they have not agreed upon same thing in same sense, and there cannot be consent. A contract cannot arise in the absence of consent.
- Consent may be free or not free. Only free consent is necessary for the validity of a contract.
- Definition of Free Consent (Sec. 14) - Consent is said to be free when it is not caused by:
  - A) Coercion (Sec. 15) or
  - B) Undue Influence (Sec. 16) or
  - C) Fraud (Sec. 17) or
  - D) Misrepresentation (Sec. 18) or
  - E) Mistake subject to Sec. 20, 21, & 22
- When consent to an agreement is caused by coercion, fraud, misrepresentation, or undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. When the consent is vitiated by mistake, the contract becomes void.

#### **A) Coercion (Sec. 15)**

- Meaning - Coercion is committing, or threatening to commit, any act forbidden by Indian Penal Code or unlawful detaining, or threatening to detain any property, prejudice of any person whatever, with the intention of causing any person to enter into an agreement."
- It is not necessary that, Coercion must proceed from a party to contract, nor subject of the coercion must be the other contracting party, it may be directed against any third person.
- Effects of coercion (Sec. 19)

- Voidable at the option of party whose consent was so obtained.
- Person to whom money has been paid or anything delivered under coercion must repay or return it. (Sec. 72)
- Threat to commit suicide - Whether is it coercion?
  - Suicide though forbidden by Indian Penal Code is not punishable, as a dead man cannot be punished.
  - But Sec. 15 declares that committing or threatening to commit any act forbidden by Indian Penal Code is coercion.
  - Hence, a threat to commit suicide will be regarded as coercion.

### **B) Undue influence (Sec. 16)**

- Meaning - Contract is said to be induced by 'undue influence' where the relations subsisting between parties are such that one of the party is in a position to dominate the will of the other and he uses that position to obtain an unfair advantage over the other.
- Essential ingredients under this provision are
  - 1) Relation between the parties:
    - A person can be influenced by other when a near relation between the two exists.
  - 2) Position to dominate the will:
    - Relation exist in a manner that one of them is in a position to dominate the will of other.
    - A person is deemed to be in such position in the following circumstances:
      - i) Real and apparent authority:  
Where a person holds a real authority over other  
Example - Master & servant, doctor & patient, etc.
      - ii) Fiduciary relationship:  
Where relation of trust & confidence exists between parties.  
Example - Father & son, solicitor & client, husband & wife, creditor & debtor, etc.
      - iii) Mental distress:  
Undue influence can be used against a person to get his consent on a contract where the mental capacity of the person is temporarily or permanently affected by the reason of mental or bodily distress, illness or of old age.
      - iv) Unconscionable bargains:  
Where one party is in a position to dominate the will of other & the contract is apparently unconscionable i.e., unfair, it is presumed by law that consent must have been obtained by undue influence.  
Example - Money-lending transactions and in gifts.
  - 3) Object must be to take undue advantage in getting consent of other.

4) Burden of proof: When a party to contract decides to avoid the contract on the ground of undue influence, he has to prove that-

- The other party is in position to dominate his will,
- the other party actually used his position to obtain his consent,
- transaction is unfair or unconscionable.

5) Effect of undue influence- (Sec. 19A)

- Contract is voidable at the option of the party whose consent was so caused.
- Such contract may be set aside either absolutely or upon such terms and conditions as to the Court may seem fit, if party entitled to avoid it has received any benefit thereunder.

### C) Fraud (Sec. 17)

- Definition - Fraud means and includes any of the following acts committed by a party to a contract, or his connivance or by agent, with an intent to deceive another party or his agent, or to induce him to enter into the contract:
  - Suggestion as a fact, which is not true by any person, who does not believe it to be true;
  - Active concealment of a fact by one having knowledge or belief of the fact;
  - A promise made without any intention of performing it;
  - Any other act fitted to deceive;
  - Any such act or omission as the law specially declares to be fraudulent.
- The following are the essential elements of the fraud:
  - i) There must be a representation or assertion and it must be false.  
However, silence may amount to fraud or an active concealment may amount to fraud.  
Question - Whether Silence is fraud or not?  
Answer - Silence is fraud in following situations:
    - ✓ There is duty to speak.
    - ✓ When silence is equal to speech.
  - ii) Representation must be related to a fact.
  - iii) Representation should be made before the conclusion of the contract with the intention to induce the other party to act upon it.
  - iv) Representation or statement should be made with a knowledge of its falsity or without belief in its truth or recklessly not caring whether it is true or false.
  - v) The other party must have been induced to act upon the representation or assertion.
  - vi) The other party must have relied upon the representation and must have been deceived.
  - vii) The other party acting on the representation must have consequently suffered a loss.
- Effect of Fraud upon validity of a contract:

- When consent to an agreement is caused by fraud, the contract is voidable at option of the party defrauded and he has the following remedies:
  - ✓ He can rescind the contract within a reasonable time.
  - ✓ He can sue for damages.
  - ✓ He can insist on performance of contract on the condition that he shall be put in the position in which he would have been had the representation made been true.
- Exception: In the following cases, contract is not voidable:
  - ✓ If the party whose consent was caused by silence which amounting to fraud, had the means of discovering the truth with ordinary diligence.
  - ✓ A fraud which did not cause the consent of the party to agreement.

#### D) Misrepresentation (Sec. 18)

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

#### Difference between Coercion and Undue influence:

Basis (By ICAI)		
1) Nature of Action	2) Criminal Action	3) Relationship between parties
4) Exercised by whom	5) Enforceability	6) Position of benefits received

#### Distinction between fraud and misrepresentation:

Basis (By ICAI)	
1) Intention	2) Knowledge of truth
3) Rescission & claim for damages	4) Means to discover the truth

#### E) Mistake

- Mistake may be defined as innocent or erroneous belief which leads the party to misunderstand the others.
- Mistake may be either mistake of law or mistake of fact.
  - Mistake of Law: It is further classified as mistake of Indian law or foreign law.
    - ✓ Mistake of Indian Law: A person cannot be allowed to get any relief on the ground that it had done a particular act in ignorance of law.



- ✓ Mistake of foreign law: Such a mistake is treated as mistake of fact and the agreement in such a case is void.
- Mistake of fact: It is of two types - (i) Bilateral Mistake, (ii) Unilateral Mistake
  - ✓ Bilateral mistake: Where both parties to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void (Sec. 20)
  - Cases of Bilateral Mistakes - It can be quality/ existence/ identity/ title/ price/ quantity of the subject matter
  - ✓ Unilateral Mistake: Contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. (Sec. 22)

### III) Legality of Object And Consideration (Sec. 23)

- In each of the following cases, consideration or object of an agreement is said to be unlawful

1) Forbidden by Law	2) Defeat the provision	3) Fraudulent
4) Injury to person/ property	5) Immoral	6) Opposed to public policy

- i) When consideration or object is forbidden by law:

- Acts forbidden by law are those which are punishable under any statute as well as those prohibited by regulations or orders.

- ii) When consideration or object are of such a nature that, if permitted, not directly but indirectly it would defeat the provisions of law, Agreement is void.

- iii) When it is fraudulent: Agreements which are entered into to promote fraud are void.

- iv) The general term "injury" means criminal or wrongful harm. The object or consideration is unlawful as it involves injury to the person or property of another. Ex - Copyright

- v) When consideration is immoral.

- vi) When consideration is opposed to public policy:

- In the name of public policy, freedom of contract is restricted by law only for the good for the community.

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

1) Trading with enemy	2) Stifling prosecution	3) Maintenance & Champerty
4) Public offices/titles	5) Creating monopolies	6) Marriage brokerage agr.
7) Interference with justice	8) Interest against obligation	9) Consideration unlawful in part

- 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 prejudice to the interest of the State in times of war.

## 2) Stifling Prosecution:

- 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 void.
- The principle is that one should not make a trade of felony. The compromise of any public offence is generally illegal.
- However, Indian Criminal Procedure Code provides a statutory list of compoundable offences and an agreement to drop proceeding relating to such offences with or without the permission of the Court, in consideration the accused promising to do something for the complainant, is not opposed to public policy and hence valid.

## 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.
  - ✓ It is unreasonable so as to be unjust to other party or
  - ✓ It is made by a malicious motive and not with bonafide object of assisting a claim.

## 4) Trafficking relating to Public Offices and titles

- Agreement to trafficking 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.
- Following are the examples of agreements that are void:
  - ✓ Agreement to pay money to a public servant in order to induce him to retire from his office so that another person may secure the appointment is void.
  - ✓ An agreement to procure a public recognition like Padma Vibhushan for reward.

## 5) Agreements tending to create monopolies are opposed to public policy and therefore void.

## 6) Marriage brokerage agreements

- Agreement to negotiate marriage for reward, which is known as a marriage brokerage contract, is void, as it is opposed to public policy.
- Note: Marriage bureau only provides information and doesn't negotiate marriage for reward, therefore, it is not covered under this point.

## 7) Interference with the course of justice:

- An agreement whose object is to induce any judicial officer of the State to act partially or corruptly is void, as it is opposed to public policy;

8) Interest against obligation, the object of such agreements is opposed to public policy.

9) Consideration Unlawful in Part:

- If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."
- There is no promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole.
- Where legal part of a contract can be severed from illegal part, the bad part may be rejected and the good one can be retained. But where the illegal part cannot be severed, the contract is altogether void.

#### **IV) Expressly declared Void Agreements**

1	Made by incompetent parties (Sec. 11)	6	Agreement in restraint of marriage (Sec. 26)
2	Agreements made under Bilateral mistake of fact (Sec. 20)	7	Agreements in restraint of trade (Sec. 27)
3	Agreements the consideration or object of which is unlawful (Sec. 23)	8	Agreement in restraint of legal proceedings (Sec. 28)
4	Agreement the consideration or object of which is unlawful in parts (Sec. 24)	9	Agreement the meaning of which is uncertain (Sec. 29)
5	Agreements made without consideration (Sec. 25)	10	Wagering Agreement (Sec. 30)
		11	Agreements to do impossible Acts (Sec. 56)

Note: Point number 1,2,3,4,5,9 - Already discussed.

Point number 11 will be discussed in Chapter 5.

6) Agreement in restraint of marriage (Sec. 26)

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

7) Agreement in restraint of trade (Sec. 27)

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

- But this rule is subject to following exceptions:
  - ✓ where a person sells goodwill of a business and agrees with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or his successor in interest carries on a like business therein, such an agreement is valid. The local limits must be reasonable.
  - ✓ If an outgoing partner makes an agreement with 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. (Sec.36 of IPA, 1932)
  - ✓ Similarly, Agreement between partners not to carry on competing business during the continuance of partnership is valid. (Sec 11 of IPA, 1932)
- But 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.

#### 8) Agreement in restraint of legal proceedings (Sec. 28)

- It is the one by which any party thereto is restricted absolutely from enforcing his rights under a contract through a Court or which abridges the usual period for starting legal proceedings. A contract of this nature is void.
- However, there are certain exceptions to the above rule:
  - ✓ 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.
  - ✓ Similarly, a contract by which the parties agree to refer to arbitration any question between them which has already arisen or which may arise in future, is valid; but such a contract must be in writing.

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

- It is void, but where meaning thereof is capable of being made certain, agreement is valid.

#### 10) Wagering agreement (Sec. 30)

- 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.
- Essence of a wager is that each side should stand to win or lose, depending on the way an uncertain event takes place
- Essentials of a Wager
  - i) There must be a promise to pay money or money's worth.
  - ii) Promise must be conditional on an event happening or not happening.
  - iii) There must be uncertainty of event.

- iv) There must be two parties, each party must stand to win or lose.
- v) There must be common intention to bet at the timing of making such agreement.
- vi) Parties should have no interest in the event except for stake.

### **Transactions similar to Wager (Gambling)**

#### **1) Lottery transactions:**

- 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.
- Even if the lottery is sanctioned by the Government of India it is a wagering transaction.
- The only effect of such sanction is that the person responsible for running the lottery will not be punished under the Indian Penal Code.
- Lotteries are illegal and even collateral transactions to it are tainted with illegality (Section 294A of 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 of a newspaper is a lottery and therefore, a wagering transaction.
- 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.
- According to the Prize Competition Act, 1955 prize competitions in games of skill are not wagers provided the prize money does not exceed ` 1,000.

#### **3) Speculative transactions:**

- An agreement or a share market transaction where parties intend to settle the difference between contract price and market price of certain goods or shares on a specified day, is a gambling and hence void.

#### **4) Horse Race Transactions where prize payable to bet winner is less than ` 500, is a wager.**

### **Transactions resembling with wagering transaction but are not void**

#### **1) Chit fund (Sec. 30)**

- In case of a chit fund, a certain number of persons decide to contribute a fixed sum for a specified period and at the end of a month, the amount so contributed is paid to the lucky winner of the lucky draw.

#### **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:**

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

**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.

**Distinction between Contract of Insurance and Wagering Agreement**

Basis (By ICAI)			
1) Meaning	2) Consideration	3) Insurable Interest	4) Indemnity
5) Enforceability	6) Premium	7) Public Welfare	

## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 4 – Performance of Contracts**

#### **Performance of a Contract (Section 37)**

- **Means** fulfilment of obligations to the contract.  
Parties to a contract must either perform, or offer to perform, their respective promises unless such performance is dispensed with or excused under ICA or any other law.
- **Types:** Performance may be actual or attempted.
  - **Actual Performance:** Where party to contract has done what he had undertaken to do or either of parties has fulfilled their obligations within time and manner prescribed.
  - **Offer to perform/Attempted performance/Tender of performance:** When performance becomes due, Promisor offers to perform his obligation but promisee refuses to accept.

#### **Conditions to be Satisfied for a Valid Tender or Attempted Performance**

- 1) It must be unconditional.
- 2) It must be made at proper time and place.
- 3) Reasonable opportunity to examine goods.
- 4) It must be for whole obligation.

#### **By Whom a Contract May be Performed (Section 40 to 42)**

##### **1) Promisor himself**

- If it was the intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor.
- If contract involves exercise of personal skill or diligence, or which are founded on personal confidence between parties must be performed by promisor himself.

##### **2) Agent**

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

##### **3) Legal Representatives**

- Contract which involves use of personal skill or is founded on personal consideration comes to an end on the death of the promisor.
- Unless a contrary intention appears, Legal representatives of deceased promisor are bound to perform, But their liability is limited to the value of property inherited from deceased.

##### **4) Third persons (Section 41)**



- When promisee accepts performance from third person, he can't afterwards enforce it against promisor although promisor has neither authorised nor ratified the act of third party.

### **5) Joint promisors (Section 42)**

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

### **Distinction between Succession & Assignment**

**Succession** - When benefits of a contract are succeeded to by process of law, then both burden and benefits attaching to the contract devolve on legal heir. However, the liability will be limited to the extent of the property inherited by him.

**Assignment** - Benefit of a contract can only be assigned but not the liabilities thereunder, because when liability is assigned, a third party gets involved therein.

Thus, Debtor cannot relieve himself of his liability to creditor by assigning to someone else his obligation to repay debt.

Further, where the benefit is coupled with a liability or when a personal consideration has entered into making of contract then benefit cannot be assigned.

### **Liability of Joint Promisor & Promisee**

#### **Devolution of joint liabilities (Section 42)**

- Ordinarily all joint promisors during their life time must jointly fulfil the promise.
- After death of any one of them, his LR jointly with survivor or survivors should do so.
- After death of last survivor, the LR 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 absence of express agreement to contrary, compel any one or more of such joint promisors to perform the whole of the promise.
- Each promisor may compel contribution other joint promisor to contribute equally with himself to performance of promise, unless a contrary intention appears from the contract.
- Sharing of loss by default in contribution by any one of two or more joint promisors, the remaining joint promisors must bear the loss arising from such default in equal shares.
- Hence, the liability is of both joint & several, in the absence of a contract to the contrary.

#### **Effect of release of one joint promisor (Section 44)**

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

**Rights of Joint Promisees (Section 45)**

- In case of joint promise unless a contrary intention appears from contract, right to claim performance rests, as between them during their joint lives, & after death of any of them, with the representative of such deceased person jointly with survivor or survivors, and after death of last survivor, with representatives of all jointly.

**Time & Place for Performance of Promise (Section 46 to 50)**

- **Time for performance where no application to be made & no time is specified (Section 46)** - Engagement must be performed within a reasonable time.
- **Time & place for performance where time is specified & no application to be made (Section 47)** - Promisor may perform it at any time during usual business hours, on such day and place at which promise ought to be performed.
- **Application for performance on certain day to be at proper time and place (Section 48)** - Promisor has not undertaken to perform it without application by promisee, it is the duty of promisee to apply for performance at a proper place and within usual business hours.
- **Place for performance of promise, where no application to be made and no place fixed for performance (Section 49)** - It is the duty of the promisor to apply to the promisee to appoint a reasonable place for performance of promise, and to perform it at such a place.
- **Performance in manner or at time prescribed or sanctioned by promisee (Section 50)** - Performance of promise may be made in any such manner or at any time which the promisee prescribes or sanctions.

**Reciprocal promise (Section 51 to 58)****Performance of Reciprocal Promise (Section - 51)**

- When contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his promise unless promisee is ready & willing to perform his reciprocal promise.

**Order of performance of reciprocal promises (Section 52)**

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

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

- When one party to contract prevents the other from performing his promise, Contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from other party for any loss he may sustain in consequence of non- performance of contract.

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

- If promises are reciprocal & dependent and where if 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, & also liable for compensation for his non- performance.

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

- When party to a contract promises to do certain thing at or before specified time, & fails to do any such thing at or before specified time, Contract becomes voidable at the option of promisee, if the intention of parties was that time should be of essence of contract.
- Effect of such failure when time is not essential - Contract does not become voidable but promisee is entitled to compensation from promisor for any loss occasioned to him by such failure.
- Effect of acceptance of performance at time other than agreed upon - If contract becomes voidable on account of promisor's failure to perform at the time agreed, and promisee accepts performance at any time other than agreed, Promisee cannot claim compensation for any loss occasioned by non-performance at the time agreed, unless, at the time of acceptance, he gives notice to promisor of his intention to do so.

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

- **Types of Impossibility** of performance (a) initial impossibility, (b) subsequent impossibility.
- **Initial Impossibility** (Impossibility existing at the time of contract): When parties agree upon doing of something which is impossible in itself, agreement would be void. The fact of impossibility may be and may not be known to the parties.
  - **If known to parties:** It would be observed that an agreement constituted, quite unknown to parties, may be impossible of being performed and hence void.
  - **If unknown to parties:** Where both the promisor and the promisee are ignorant of the impossibility of performance, the contract is void.
  - **If known to promisor only:** Where at the time of entering into a contract, the promisor alone knows about the impossibility of performance, or even if he does not know though

he should have known it with reasonable diligence, the promisee is entitled to claim compensation for any loss he suffered on account of non-performance.

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

In other words, sometimes, Performance of a contract is quite possible when it is made, But subsequently some event happens which renders it impossible or unlawful. Such impossibility is called the subsequent or supervening or post-contractual impossibility.

**Effect** – Contract becomes void & parties are discharged from further performance contract.

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

- The first set of promises is a valid contract, but the second is a void agreement.

**Alternative promise' one branch being illegal (Section 58)**

- Legal branch alone can be enforced".

**Appropriation of Payments (Section 59 to 61)**

- Sometimes, a debtor owes several debts to same creditor and makes payment, which is not sufficient to discharge all the debts. In such cases, Appropriation of payment applies.
- **Application of payment where debt to be discharged is indicated (Section 59)**
  - Where a debtor owing several distinct debts to one person, makes payment either with express intimation or under circumstances implying that payment is to be applied to discharge of some particular debt, payment if accepted, must be applied accordingly.
- **Application of payment where debt to be discharged is not indicated (Section 60)**
  - Where a debtor has omitted to intimate and there are no other circumstances indicating to which debt payment is to be applied, Creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, where its recovery is or is not barred by the law. However, he cannot apply the payment to disputed debt.
- **Application of payment where neither party appropriates (Section 61)**
  - Where neither party makes any appropriation, Payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law. If the debts are of equal standing, Payments shall be applied in discharge of each proportionately.

**Contracts which need not be performed with the consent of both parties (Section 62 to 67)****1) Effect of novation, rescission, and alteration of contract (Section 62)**

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

**Effect of novation:** Parties may substitute a new contract for the old. The old contract is discharged and consequently it need not be performed.

On Novation, some new contract is substituted for old contract either between the same parties or between different parties.

Novation can take place only by mutual agreement between the parties.

**Effect of rescission:** When parties to a contract agree to rescind it, Contract need not be performed.

In rescission, only the old contract is cancelled and no new contract comes to exist in its place. Both in novation and in rescission, contract is discharged by mutual agreement.

**Effect of alteration:** Where parties to a contract agree to alter it, the original contract is rescinded & need not to be performed.

Terms of contract may be so altered by mutual agreement that the alteration may have the effect of substituting a new contract for the old one.

Distinction between novation and alteration is very slender (nominal).

**Difference between Novation and alteration:**

Basis (Not Given By ICAI)		
1) Meaning	2) Substitution of contract	3) Parties to contract

**2) Promisee may waive or remit performance of promise (Section 63)**

- Contract may be discharged by remission. Every promisee may dispense with or remit, wholly or in part, the performance of promise made to him, or may extend the time for performance or may accept any satisfaction which he thinks fit.

**3) Restoration of Benefit under a Voidable Contract (Section 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.  
Party rescinding contract shall, if he has received any benefit from another party to such contract, restore such benefit, to the person from whom it was received".

**4) Obligations of Person who has Received Advantage under Void Agreement or contract that becomes void (Section 65)**



- When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

#### **5) Communication of rescission (Section 66):**

- A contract voidable at the option of one party can be rescinded; but rescission must be communicated to other party in the same manner as a proposal is communicated. Similarly, rescission may be revoked in the same manner as a proposal is revoked.

#### **6) Effects of neglect of promisee to afford promisor reasonable facilities for performance (Section 67):**

- If promisee neglects or refuses to afford the promisor reasonable facilities for performance of his promise, Promisor is excused by such neglect or refusal for any non-performance caused thereby.

#### **Discharge of a Contract**

- A contract is discharged when obligations created by it come to an end.  
A contract may be discharged in any one of the following ways

##### **1) Discharge by performance:**

- When parties to contract fulfil their obligations arising under the contract within the time and manner prescribed. Discharge by performance may be
  - Actual performance - when each party has done what he had agreed to do under the agreement.
  - Attempted performance or Tender of Performance - When promisor offers to perform his obligation, but the promisee refuses to accept it.

##### **2) Discharge by mutual agreement (Section 62):**

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

##### **3) Discharge by impossibility of performance (Section 56):**

- If impossibility exist from the very start, it would be impossibility ab initio. Alternatively, it may supervene. Supervening impossibility may take place owing to:
  - An unforeseen change in law;
  - Destruction of the subject-matter essential to that performance;
  - 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;
  - Declaration of a war



**4) Discharge by lapse of time:**

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

**5) Discharge by operation of law:**

- A contract may be discharged by operation of law which includes by death of the promisor, by insolvency etc.

**6) Discharge by breach of contract:**

- Breach of contract may be
  - Actual breach - If one party defaults in performing his part of contract on the due date.
  - Anticipatory breach - A person repudiates a contract before the stipulated time for its performance has arrived, he is deemed to have committed anticipatory breach.
- If one party to a contract breaks the promise, the party injured thereby has right of action for damages and also discharged from performing his part of the contract.

**7) Promisee may waive or remit performance of promise (remission) (Section 63):**

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

**8) Effects of neglect of promisee to afford promisor reasonable facilities for performance (Section 67):**

- If any promisee neglects or refuses to afford the promisor reasonable facilities for performance of his promise, Promisor is excused.

**9) Merger of rights:**

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

## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 5 – Breach of Contracts**

#### **Anticipatory Breach of Contract**

- **Meaning** - It is a breach occurring before the time fixed for performance has arrived.
  - When promisor refuses altogether to perform his promise & signifies his unwillingness even before the time for performance has arrived, it is called Anticipatory Breach.
- It may take either of **following two ways**:
  - Expressly by words spoken or written, and
  - Impliedly by the conduct of one of the parties.
- **Action of Promisee** - Promisee may put an end to contract, unless he has signified, by words or conduct, his acquiescence (assent) in its continuance."
- **Effect**: Promisee is excused from performance or further performance. Also gets an option:
  - To either treat the contract as "rescinded & sue the other party for damages immediately without waiting until the due date of performance OR
  - Elect not to rescind but to treat the contract as still operative & wait for the time of performance and then hold the other party responsible for non-performance.
 But in this case,
  - ✓ He will keep the contract alive for benefit of other party as well as his own, and
  - ✓ Guilty party may still perform his part of contract if he so decides, and
  - ✓ can also take advantage of any supervening impossibility which may have effect of discharging the contract.

#### **Actual Breach of Contract**

- **Meaning** - It is a case of refusal to perform the promise on the scheduled date.
  - Parties are bound to perform, but when one breaks the contract by refusing to perform his promise, he is said to have committed a breach.
- Actual breach of contract may be committed-
  - At the time when the performance of the contract is due
  - During the performance of the contract

#### **Remedies for Breach of Contract**

1) Suit for Damages	2) Rescission of Contract	3) Suit for specific performance	4) Suit for Injunction	5) Suit upon quantum meruit
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## 1) Suit for Damages

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

### Types of Damages

#### i) **Ordinary damages**

- When contract has been broken, Party who suffers by such breach is entitled to receive, compensation for any loss or damage which naturally arose in usual course of things or which parties know, when they made the contract, to be likely to result from breach of it.
- Such compensation is not to be given for any remote and indirect loss or damage.

**Case Law** - Hadley vs. Baxendale

#### ii) **Vindictive or Exemplary damages**

- These damages 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.
- Business man whose credit has suffered will get it even if has sustained no pecuniary loss.  
But a non-trader cannot get heavy damages in like circumstances, unless proved as special damages.

#### iii) **Nominal damages**

- Awarded where plaintiff has proved that there has been a breach of contract but he has not in fact suffered any real damage.
- Awarded just to establish right to decree. The amount may be a rupee or even 10 paise.

#### iv) **Damages for deterioration caused by delay**

- Damages can be recovered from carrier even without notice.
- 'Deterioration' not only implies physical damages to goods but also loss of special opportunity for sale.

#### v) **Pre-fixed damages**

- Parties to a contract stipulate at the time of its formation that on a breach, A certain amount will be payable as damages. It may be either liquidated damages or a penalty.
- The aggrieved party is entitled to receive reasonable compensation not exceeding the amount so named in case of breach from the party at fault. (Sec - 74)

### **Penalty And Liquidated Damages (Section 74)**

- **Meaning** - Parties to a contract may provide, the amount of compensation payable in case of failure to perform the contract.
  - Liquidated Damages - Sum fixed represents a genuine pre-estimate by parties of the loss, it is liquidated damages which in the opinion of parties will compensate for breach.
  - Penalty - 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 disregard and the injured party cannot recover more than the actual loss.
- **English Law:** Sum so fixed may be interpreted either as liquidated damages or penalty.
- **Indian Law:** No distinction between 'penalty' and liquidated damages.

Courts in India award only a reasonable compensation not exceeding the sum so mentioned in the contract, But the court may allow less as well.

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

### **Difference between Penalty & Liquidated Damages (Basis not given by ICAI)**

- Common Point - Both are payable on breach of contract
- Penalty: If the sum is excessively high compared to probable damage or if extra payment is imposed for delay, it is a penalty.

Liquidated Damages: A genuine pre-estimate of damage, not intended to intimidate.
- Court's Role: Courts assess whether the amount is a penalty or liquidated damages, regardless of expression of words used by parties. If sum is extravagant - Penalty even if termed as liquidated damages in the contract.
- Essence of penalty is *terrorem* & Essence of Liquidated damages is pre-estimated damages.
- English vs. Indian Law: English law distinguishes; Indian courts focus on actual loss and award reasonable compensation, not exceeding the fixed sum.

### **2) Rescission of contract**

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

### 3) Quantum Meruit

- **Meaning** - If 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 fixed, the Law will infer a promise to pay, i.e. as much as the party doing service has deserved.
- If party injured by breach had at time of breach done part but not all of work which he is bound to do under contract shall 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.
- **Object** of quantum meruit - Recompensate the party or person for value of work which he has done. Damages are compensatory in nature while quantum meruit is restitutory. It is but reasonable compensation awarded on implication of a contract to remunerate.
- The claim for quantum meruit arises in the **following cases**:
  - When an agreement is discovered to be void or when a contract becomes void.
  - When something is done without any intention to do so gratuitously.
  - Where there is an express or implied contract to render services but there is no agreement as to remuneration.
  - When one party abandons or refuses to perform the contract.
  - Where a contract is divisible and the party not in default has enjoyed the benefit of part performance.
  - When an indivisible contract for a lump sum is completely performed but badly, the person who has performed the contract can claim lump sum, but other party can make a deduction for bad work.

### 4) Suit for specific performance

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

### 5) Suit for injunction

- Where a party to a contract is negating the terms of a contract, Court may by issuing an 'injunction orders', restrain him from doing what he promised not to do.
- Party rightfully rescinding contract, entitled to compensation which he has sustained through non-fulfilment of the contract. (Section 75)

## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 6 – Contingent & Quasi Contract**

#### **Contingent Contract (Section 31)**

- Contract may be absolute or a contingent. An Absolute contract is one where the promisor undertakes to perform the contract in any event without any condition.
- "A contract to do or not to do something, if some event, collateral to such contract, does or does not happen" is known as contingent contract.
- Contracts of Insurance, indemnity and guarantee fall under this category.
- Meaning of collateral Event: "An event which is neither a performance directly promised as part of contract, nor the whole of the consideration for a promise".

#### **Essentials of a contingent contract**

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

#### **Rules Relating to Enforcement (Section 32 to 36)**

- 1) Enforcement of contracts contingent on an **event happening** (Section 32)
  - Enforceable - if an uncertain future event happens, it cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void".
- 2) Enforcement of contracts contingent on an **event not happening** (Section 33) says that
  - Enforceable - if an uncertain future event does not happen, it can be enforced only when the happening of that event becomes impossible and not before".
- 3) A contract would **cease to be enforceable** (Unenforceable) if it is contingent upon conduct of a living person & when that living person does something to make the 'event' or 'conduct' as impossible of happening (Section 34)



- 4) Contingent on happening of specified event **within the fixed time** (Section 35)
- Enforceable - if a specified uncertain event happens within fixed time. If at the expiration of time fixed such event has not happened or becomes impossible before time fixed, it becomes void.
- 5) Contingent on specified event **not happening within fixed time** (Section 35)
- Enforceable - if a specified uncertain event does not happen within a fixed time may be enforced 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".
- 6) Contingent on an **impossible** event (Section 36)
- Enforceable - if an impossible event happens are void, whether the impossibility of event is known or not to the parties to agreement at the time when it is made.

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

Basis (By ICAI)			
1) Meaning	2) Reciprocal promises	3) Uncertain event	4) Nature of contract
5) Interest	6) Doctrine of mutuality of lose and gain		7) Effect of contract

#### **Quasi Contracts**

- A valid contract must contain certain essential elements, but sometimes the law implies a promise imposing obligations on one party and conferring right in favour of the other even in the absence of essential elements of valid contract.
- Such cases are not contract in the strict sense, but Court recognises them as relations resembling those of contracts and enforces them as if they were contracts. These are known as quasi contracts as they create same obligations as in the case of regular contract. It is also called as certain relation resembling those created by contracts.
- Quasi or Constructive contract are based on principles of equity, justice and good conscience.
- Maxims - "No man must grow rich out of another person's loss".

#### **Salient features of quasi contracts:**

- 1) Such a right is always a right to money & generally to a liquidated sum of money.
- 2) It does not arise from any agreement of parties concerned, but is imposed by law &
- 3) This right is available not against all world, but against a particular person or persons only.

#### **Cases Deemed as Quasi Contracts**

- 1) Claim for necessities supplied to persons incapable of contracting (Section 68)

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

## 2) Payment by an interested person (Section 69)

- 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 (Section 70)

- If a person lawfully does anything for another or delivers anything to him not intending to do so gratuitously (free) & such other person enjoys the benefit thereof, Such other person is bound to pay compensation or to restore the thing so done or delivered.
- Plaintiff must prove that he did not do so gratuitously & other person enjoyed the benefit.

## 4) Responsibility of finder of goods (Section 71)

- Person who finds goods belonging to another & takes them into his custody is subject to same responsibility as if he were a bailee.
- Thus, a finder of lost goods has to take proper care of the property as man of ordinary prudence would take, He has no right to appropriate the goods and He must restore the goods if the owner is found.

## 5) Money paid by mistake or under coercion (Section 72)

- Person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it. Every kind of payment of money or delivery of goods for every type of 'mistake' is recoverable.

## Difference between quasi contracts and contracts

Basis (By ICAI)	
1) Essential for the valid contract	2) Obligation

## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 7 – Contract of Indemnity & Guarantee**

#### **Contract of Indemnity**

- **Meaning of Indemnity** - "Security against loss" or "to make good the loss" or "to compensate the party who has suffered some loss".
- **Meaning of Contract of Indemnity** (Sec - 124) - "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person."
- **Parties** in case of Contract of Indemnity:
  - Party who promises to indemnify/ save the other party from loss- "indemnifier",
  - Party who is promised to be saved against the loss- "indemnified" or "indemnity holder".
- The definition of indemnity restricts the **scope** as it covers only the loss caused by:
  - the conduct of the promisor himself, or
  - the conduct of any other person.Thus, loss occasioned by an accident, or an act of God/ natural event is not covered.
- **As per English Law** - Indemnity means promise to save another harmless from the loss. It covers every loss whether due to negligence of promisee or by natural calamity or accident.
- **Mode of contract of indemnity:**
  - Express - When a person expressly promises to compensate the other from loss.
  - Implied - When it is to be inferred from conduct of parties or from circumstances.Contract of indemnity is like any other contract & must fulfil all essentials of a valid contract.
- **Note:** Contract of Fire Insurance or Marine Insurance is always a contract of indemnity. But there is no contract of indemnity in case of contract of Life Insurance.

#### **Rights of Indemnity-holder when sued (Section 125):**

- The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor/indemnifier -
  - all damages which he may be compelled to pay in any suit
  - all costs which he may have been compelled to pay in bringing/ defending the suit and
  - all sums which he may have paid under the terms of any compromise of suit.

#### **When does the liability of an indemnifier commence?**

- Indian Contract Act, 1872 is silent on this.  
However, based on judicial pronouncements - Liability of an indemnifier commences as soon as the liability of the indemnity-holder becomes absolute and certain.

### **Contract of Guarantee (Section 126)**

- **Meaning** - It is a contract to perform the promise made or discharge the liability, of a third person in case of his default.
- **Parties involved** in a contract of guarantee
  - Surety - Person who gives the guarantee
  - Principal debtor - Person in respect of whose default the guarantee is given
  - Creditor - Person to whom the guarantee is given
- Contract of guarantee is a **tripartite agreement** between principal debtor, creditor and surety.
  - A principal contract between the principal debtor and the creditor.
  - A secondary contract between the creditor and the surety.
  - An implied contract between the surety and the principal debtor whereby principal debtor is under an obligation to indemnify surety; if surety is made to pay or perform.

### **Essential Features/Requisites of a Valid Guarantee**

#### **1) Purpose**

- Guarantee being to secure the payment of a debt, And existence of recoverable debt is necessary. If there is no principal debt, there can be no valid guarantee.

#### **2) Consideration**

- Contract of guarantee should be supported by consideration. Without consideration it is void, but there is no need for a direct consideration between surety & creditor.
- Consideration received by principal debtor is sufficient consideration to surety for giving the guarantee, but past consideration is no consideration. (Section - 127)
- Even if the principal debtor is incompetent to contract, guarantee is valid. But, if surety is incompetent to contract, the guarantee is void.

#### **3) Existence of a liability**

- There must be an existing liability or a promise whose performance is guaranteed which shall must be enforceable by law and not time-barred.

#### **4) No misrepresentation or concealment (Section 142 and 143)**

- Guarantee if obtained using misrepresentation made by creditor, or with his knowledge & assent, concerning a material part of the transaction, is invalid (Section 142)

- Guarantee which the creditor has obtained by means of keeping silence as to material circumstances, is invalid (Section 143).

#### 5) Writing not necessary (Section 126)

- Guarantee may be either oral or written.

#### 6) Joining of the other co-sureties (Section 144)

- Where a person gives a guarantee upon a contract that, creditor shall not act upon it until another person has joined in it as co-surety, the Guarantee is not valid if that other person does not join.
- Guarantee by a surety is not valid if a condition imposed by a surety is that some other person must also join as a co-surety, but such other person does not join as a co-surety.

### Types of Guarantees

#### 1) Specific Guarantee

- Guarantee which extends to a single debt/ specific transaction.  
Surety's liability comes to an end when the guaranteed debt is duly discharged or the promise is duly performed.

#### 2) Continuing Guarantee [Section 129]

- Guarantee which extends to a series of transaction.  
Surety's liability continues until the revocation of the guarantee.
- Essence - It applies to any number of transactions and makes the surety liable for unpaid balance at the end of guarantee.

### **Distinction between a Contract of Indemnity and a Contract of Guarantee**

#### Basis (By ICAI)

1) Number of parties	2) Nature of Liability	3) Time of Liability	4) Time to Act
5) Right to sue third party	6) Purpose	7) Competency to Contract	

### Nature And Extent of Surety's Liability (Section 128)

- Liability of surety is co-extensive with principal debtor unless otherwise provided in contract.
- Liability of surety is of secondary nature as he is liable only on default of principal debtor.
- If debtor can't be liable on account of any defect in document, Liability of surety also ceases.
- Creditor may choose to proceed against a surety first, unless agreement to contrary.

**Liability of Two Persons, Primarily Liable, Not Affected By Arrangement Between them that one shall be surety on other's default (Section 132)**

- Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on default of other, the liability towards third person is not affected even if third party is aware about its existence.

**Discharge of a Surety**

- Surety is said to be discharged when his liability as surety comes to an end.
- Modes of discharge of surety are discussed below:

<b>1) By revocation</b> <ul style="list-style-type: none"> <li>○ By Notice</li> <li>○ By Death</li> <li>○ By Novation</li> </ul>	<b>2) By conduct of creditor</b> <ul style="list-style-type: none"> <li>○ By Variance in terms</li> <li>○ By release of Prin Debtor</li> <li>○ By compounding</li> </ul> <b>Surety not discharged</b> <ul style="list-style-type: none"> <li>○ Agreement with 3<sup>rd</sup> party</li> <li>○ Forbearance</li> <li>○ Impairing surety remedy</li> </ul>	<b>3) By invalidation of guarantee</b> <ul style="list-style-type: none"> <li>○ Misrepresentation</li> <li>○ Concealment</li> <li>○ Co-surety joins</li> </ul>
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**1) By revocation of the Contract of Guarantee**

**i) Revocation of continuing guarantee by Notice (Section 130)**

- Continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditors. Once revoked, surety is not liable for any future transaction.
- However, surety is liable for all transactions that happened before notice was given.
- Specific guarantee can be revoked only if liability to the principal debtor has not accrued.

**ii) Revocation of continuing guarantee by surety's death (Section 131)**

- Death of surety operates as revocation of continuing guarantee as to future transactions taking place after death of surety unless contract to contrary.
- However, Surety's estate remains liable for past transactions taken place before death.

**iii) By novation [Section 62]**

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

**2) By conduct of the creditor**

**i) By variance in terms of contract (Section 133)**



- Where there is any variance in terms of contract between principal debtor & creditor without surety's consent, it would discharge surety for all transactions subsequent to such variance.

**ii) By release or discharge of principal debtor (Section 134)**

- Surety is discharged if creditor
  - ✓ enters into a fresh/ new contract by which principal debtor is released, or
  - ✓ does any act or omission legal consequence of which is discharge of principal debtor.

**iii) Discharge of surety when creditor compounds or gives time or agrees not to sue [Sector 135]**

- A contract between the creditor & principal debtor, by which creditor makes a composition, or promises to give time, or promises not to sue, the principal debtor, discharges surety, unless surety assents to such contract.
  - **Composition:** Creditor makes a composition with the principal debtor without consulting surety; the latter is discharged.  
Composition involves variation of the original contract; therefore, surety is discharged.
  - **Promise to give time:** When the time for payment comes, the Surety has the right to require the principal debtor to pay off the guaranteed debt.  
It is a duty of the creditor not to allow the principal debtor more time for payment.
  - **Promise not to sue:** If the creditor under an agreement with the principal debtor promises not to sue him, Surety is discharged.  
**Reason** - Surety is entitled to call upon creditor at any time for payment of debt when it is due and this right is positively violated when creditor promises not to sue principal debtor.

**Cases where surety is not discharged**

**i) When agreement made with third person to give time to principal debtor [Section 136]**

**ii) Creditor's forbearance to sue does not discharge surety [Section 137]**

- Mere forbearance on the part of creditor to sue or to enforce any other remedy does not discharge the surety unless contract to contrary.

**iii) By creditor's act or omission impairing surety's eventual remedy [Section 139]**

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

**3) By the invalidation of contract of guarantee (Explanation same as before, already covered)**

- i) Guarantee obtained by misrepresentation [Section 142]
- ii) Guarantee obtained by concealment [Section 143]
- iii) Guarantee on contract that creditor shall not act on it until co-surety joins (Section 144)

### **Rights of a Surety**

- Following rights are available to a surety;

<b>1) Against Creditor</b>	<b>2) Against Principal Debtor</b>	<b>3) Against Co-Sureties</b>
<ul style="list-style-type: none"> <li>○ Benefit of Cr. Security</li> <li>○ Set off</li> <li>○ Share reduction</li> </ul>	<ul style="list-style-type: none"> <li>○ Subrogation</li> <li>○ Indemnification</li> </ul>	<ul style="list-style-type: none"> <li>○ Equal Contribution</li> <li>○ Different Contribution</li> </ul>

### **Right against the Creditor**

- 1) Surety's right to benefit of creditor's securities [Section 141]
  - Surety is entitled to the benefit of every security which the creditor has against principal debtor at the time when contract of suretyship is entered into, whether surety knows of existence of such security or not.
  - If creditor loses or without consent of surety, parts with such security, Surety is discharged to the extent of the value of security.
- 2) Right to set off
  - If creditor sues surety for payment of principal debtor's liability, Surety may have the benefit of set off, if any, that the principal debtor had against the creditor.
- 3) Right to share reduction
  - Surety has right to claim proportionate reduction in his liability if principal debtor becomes insolvent.

### **Right against the principal debtor**

- 1) Rights of subrogation [Section 140]
  - Where, a guaranteed debt has become due, or in case of default by principal debtor to perform, Surety, upon payment or performance, is invested with all the rights which the creditor had against the principal debtor.
  - This right is known as right of subrogation. The surety steps into the shoes of creditor.
- 2) Implied promise to indemnify surety [Section 145]
  - In every contract of guarantee there is an implied promise by principal debtor to indemnify the surety.
  - The surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he paid wrongfully.

**Rights against co-sureties**

- When same debt or duty is guaranteed by two or more persons are called co-sureties"
- 1) Co-sureties liable to contribute equally (Section 146)
    - Each surety is liable to contribute equally for discharge of whole debt or part of debt remains unpaid by debtor, unless otherwise agreed.
  - 2) Liability of co-sureties bound in different sums (Section 147)
    - Principal of equal contribution is subject to maximum limit fixed by a surety to his liability.
    - Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 8 – Bailment & Pledge**

#### **What is Bailment (Section 148)**

- 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:**
  - Bailor: The person delivering the goods.
  - Bailee: The person to whom the goods are delivered.
- **Essential Elements:**
  - 1) **Contract**
    - Bailment is based upon a contract which may be express or implied.
    - No consideration is necessary to create a valid contract of bailment.
  - 2) **Delivery of goods**
    - It involves delivery for some purposes.
    - Bailment is only for moveable goods and never for immovable goods or money.
    - The delivery of the possession of goods is of the following kinds:
      - ✓ Actual Delivery: When goods are physically handed over to the bailee by the bailor.
      - Constructive Delivery: Delivery is made by doing anything that has effect of putting goods in the possession of bailee or person authorized to hold them on his behalf.
  - 3) **Purpose**
    - The goods are delivered for some purpose. The purpose may be express or implied.
  - 4) **Possession:**
    - In bailment, possession of goods changes either by physical or constructive delivery but it doesn't lead to change of ownership and bailor continues its ownership.
    - Where a person is in custody without possession, he does not become a bailee.
  - 5) **Return of goods:**
    - Bailee is obliged to return the goods physically to the bailor.
    - Returned in same form as given or may be altered as per bailor's direction.
    - Exchange of goods should not be allowed, even not those of higher value.
- **Types of bailment**
  - On the basis of benefit, bailment can be classified into three types

- ✓ For the exclusive benefit of bailor
- ✓ For the exclusive benefit of bailee
- ✓ For mutual benefit of bailor and bailee
- On the basis of reward, bailment can be classified into two types:
  - ✓ Gratuitous Bailment: Gratuitous means free of charge.  
It is one when the provider of service does it gratuitously i.e. free of charge for the exclusive benefits of bailor or bailee.
  - ✓ Non-Gratuitous Bailment: Non gratuitous bailment means where both the parties get some benefit i.e. bailment for the benefit of both bailor & bailee

### **Duties of A Bailor [Section 150, 158, 159, 164]**

1) Disclose Faults	2) Pay necessary exp	3) Pre-mature termination	4) Responsibility
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#### **1) Bailor's duty to disclose faults in goods bailed [Section 150]**

- Gratuitous bailment: Bailor is bound to disclose faults in goods bailed, of which the bailor is aware and which materially interfere with use of them or expose the bailee to extraordinary risks;  
If he doesn't disclosure - Responsible for damage arising to bailee directly from faults.
- Non- gratuitous bailment: If goods are bailed for hire, Bailor is responsible for such damage, whether he was or was not aware of existence of such faults.  
Case Law - Hyman & Wife v. Nye & Sons (1881),
- Sometimes, goods bailed are of dangerous nature. In such cases it is the duty of the bailor to disclose the nature of goods.

#### **2) Duty to pay necessary expenses [Section 158]**

- Gratuitous bailment - Bailor shall repay to bailee the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of bailment.
- Non-gratuitous bailment - Bailor is liable to pay extraordinary expenses only.

#### **3) Duty to indemnify the Bailee for premature termination [Section 159]**

- Bailor must compensate the bailee for the loss or damage suffered by bailee that is in excess of the benefit received, where he had lent the goods gratuitously and decides to terminate the bailment before the expiry of the period of bailment.

#### **4) Bailor's responsibility to bailee [Section 164]**

- Indemnify for any loss - Bailor to indemnify bailee for any loss which bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them (defective title in goods).
- Receive back the goods - Bailor must receive back the goods when the bailee returns them after the time of bailment has expired or purpose of bailment has been accomplished.

If bailor refuses to take delivery when offered at proper time - Bailee can claim compensation for all necessary expenses incurred for the safe custody.

### **Duties of a Bailee**

1) Reasonable Care	2) No unauthorized use	3) No mixing
4) Return the goods	5) Return any extra profit accruing	6) Adverse title

#### **1) Take reasonable care of the goods (Section 151 & 152)**

- Bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take care of his own goods of the same bulk, quality and value, as the goods bailed. (Section 151)
- Exception: Bailee when not liable for loss, etc., of thing bailed [Section 152]  
Bailee is not responsible for loss, destruction or deterioration of the thing bailed, if he has taken reasonable care as required under section 151 unless special contract made.

#### **2) Not to make inconsistent use of goods (section 153 & 154)**

- If bailee makes any use of goods bailed which is not according to terms & conditions of bailment, he is liable to compensate bailor for any loss or destruction of goods. (Sec 154)
- Contract of bailment is voidable at the option of the bailor, if the bailee does not use the goods according to the terms and conditions of bailment. (Sec 153)

#### **3) Not to mix the goods (Section 155, 156 and 157)**

- If Bailee, mixes the goods bailed with his own goods, with the consent of bailor, both the parties shall have an interest in proportion to their respective shares in the mixture thus produced (Section 155).
- If mixes without consent of bailor but the goods can be separated or divided, property in the goods remains in the parties respectively; but bailee is bound to bear the expense of separation or division and any damage arising from the mixture (Section 156).
- If mixes without consent of bailor and in such a manner that it is impossible to separate the goods bailed from other goods and to deliver them back, Bailor is entitled to be compensated by bailee for loss of the goods (Section 157).

#### **4) Return the goods (Section 160 & 161)**

- It is the duty of bailee to return, or deliver according to the bailor's directions, the goods bailed without demand, as soon as the time for which they were bailed, has expired, or the purpose for which they were bailed has been accomplished. [Section 160]
- If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. [Section 161]

#### **5) Return an accretion from the Goods [Section 163]**



- Bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed unless contract to contrary.

#### 6) Not to setup Adverse Title

- Bailee must not set up a title adverse to that of the bailor. He must hold the goods on behalf of and for the bailor. He cannot deny the title of the bailor.

#### Rights of a Bailor

1) Termination	2) Demand Back	3) Suit against wrong doer
4) Sue the bailee	5) Compensation	

#### 1) Right to terminate the bailment [Section 153]

- Contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of bailment.

#### 2) Right to demand back the goods (Section 159)

- In Gratuitous bailment - Bailor can demand back the goods at any time even before the expiry of the time fixed or achievement of the object.
- Due to premature return of goods, if bailee suffers any loss, which is more than the benefit actually obtained by him, bailor has to compensate the bailee.

#### 3) Right to file a suit against a wrong doer [Section 180 and section 181] (Discussed further)

#### 4) Right to sue the bailee for enforcing all the liabilities and duties of him.

#### 5) Right to compensation:

- If any damage is caused to goods bailed because of unauthorized use or unauthorized mixing of goods, Bailor has a right to claim compensation for the same.

#### Rights of a Bailee

1) Deliver to joint bailor	2) Indemnity	3) Compensation for faulty goods	4) Claim necessary expenses
5) Apply court for title	6) Particular Lien	7) General Lien	

#### 1) Right to Deliver the Goods to any one of the joint bailors [Section 165]

- If several joint owners bailed the goods, Bailee has a right to deliver them to any one of the joint owners unless there was a contract to the contrary.

#### 2) Right to indemnity (Section 166)

- Indemnification for any loss arising to him by reasons that, bailor was not entitled to make the bailment or to receive back the goods or to give directions in respect to them.

- If bailor has no title to goods & bailee delivers them back in good faith, or according to directions of bailor, bailee shall not be responsible to owner for such delivery.
- Bailee can also claim all necessary expenses incurred for gratuitous bailment.

### 3) Right to claim compensation in case of faulty goods (Section 150)

- Bailee is entitled to receive compensation for any loss caused to him due to failure of bailor to disclose any faults in the goods known to him.
- If bailment is for hire, bailor will be liable, even though not aware of existence of faults.

### 4) Right to claim necessary expenses (Section 158)

- Gratuitous bailment, bailor shall repay the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of bailment.

### 5) Right to Apply to Court to Decide the Title to the Goods [Section 167]

- If the goods bailed are claimed by the person other than the bailor, the bailee may apply to the court to stop its delivery and to decide the title to the goods.

### 6) Right of particular lien for payment of services [Section 170]: (Discussed in next pages)

### 7) Right of general lien (Sec. 171): (Discussed in next pages)

### Rights of Bailor and Bailee Against any wrong doer (Third party) (Section 180)

- If a third person wrongfully deprives the bailee of the use or possession or does any injury to goods bailed, Bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made.

Either bailor or bailee may bring a suit against a third person for such deprivation or injury.

- Apportionment of relief or compensation obtained by such suits [Section 181]:
  - Whatever is obtained by way of relief or compensation in such suit shall be dealt with according to the respective interests of bailor bailee.

### Termination of Bailment

1) Expiry of period	2) Fulfillment of purpose	3) By Notice
4) By death	5) Destruction of subject matter	

1) On expiry of stipulated period (Specified period over)

2) On fulfilment of the purpose (Specific purpose fulfilled)

3) By Notice:

- If bailee acts in a manner which is inconsistent with the terms of bailment - Bailor can terminate the contract of bailment by giving a notice to bailee.
- Gratuitous bailment can be terminated - At any time by giving a notice to bailee.

However, termination should not cause loss to bailee in excess of benefit derived by him. In case loss exceeds the benefit, Bailor must compensate bailee for such a loss (Sec. 159)

4) By death: Gratuitous bailment terminates upon the death of either bailor or bailee.

5) Destruction of the subject matter:

- Bailment is terminated if the subject matter of bailment is destroyed or there is a change in the nature of goods which makes it impossible to be used for bailment.

### **Finder of Lost Goods (Section 168 & 169)**

- **Right of finder of lost goods - may sue for specific reward offered [Section 168]**

- A person who finds some goods which do not belong to him, is called finder of the goods.
- It is the duty of finder of goods to find the true owner and surrender the goods to him.
- Finder has no right to sue the owner for compensation for trouble and expense voluntarily incurred in finding the owner and preserving the goods found.
- But he has a right to retain the goods until he receives such compensation;
- If the owner has offered a specific reward on the lost goods, 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 [Section 169]**

- If the owner cannot be found with reasonable diligence, or if he refuses to pay the lawful charges of the finder, the finder may sell it -
  - ✓ when the thing is in danger of perishing or of losing the greater part of its value or
  - ✓ when the lawful charges of finder in respect of the thing found amount to two thirds of its value.

### **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** - (i) Particular Lien (ii) General Lien

- **Particular Lien:**

- It is a right to retain only the particular goods in respect of which the claim is due.
- If bailee has rendered any service involving exercise of labour or skill in respect of the goods bailed, he has right to retain them until he receives due remuneration for services rendered for goods bailed unless contract to contrary. (Sec. 170)

- **General Lien:**

- 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 (in the absence of a contract to the contrary).

- This right is available to Bankers, factors, wharfingers, policy brokers and attorneys of law. (Sec. 171)
- In case of general lien, the goods cannot be sold but can only be retained for dues. The right of lien can be waived through a contract.

### **Difference between Bailee's General and Particular Lien**

Basis (Not given by ICAI)				
1) Section	2) General Balance	3) Automatic	4) Labor or Skill	5) Persons

### **Pledge (Section 172 to 182)**

- Meaning - Bailment of goods as security for payment of a debt or performance of a promise is called "pledge". (Sec. 172)
- Pawnor - The bailor is in this case called the "pawnor".
- Pawnee - The bailee is called the pawnee/pledgee.

### **Essentials of Contract of Pledge**

- Since pledge is a special kind of bailment, therefore all the essentials of bailment are also the essentials of the pledge. Apart from that, the other essentials of the pledge are
  - There shall be a bailment for security against payment or performance of the promise.
  - The subject matter of pledge is goods,
  - Goods pledged for shall be in existence,
  - There shall be the delivery of goods from pledger to pledgee

### **Rights of Pawnee/Pledgee**

1) Retain	2) Subsequent debts	3) Extraordinary exp	4) Rights in default
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#### **1) Right to retain the pledged goods [Section 173]**

- Pawnee may retain the goods pledged for payment or interest of debt or performance of promise and for all necessary expenses incurred for possession or preservation of goods.

#### **2) Right to retention of subsequent debts [Section 174]**

- Pawnee can retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged only if there is a contract to this effect.

#### **3) Pawnee's right to extraordinary expenses incurred [Section 175]**

- Pawnee is entitled to receive extraordinary expenses incurred for preservation of goods.
- However, he does not have the right to retain the goods for such expenses, but he can sue the pawnor for such expenses.

#### **4) Pawnee's right where pawnor makes default [Section 176]**

- If pawnor makes default in payment of debt or performance or promise in stipulated time, Pawnee has the following rights:
  - ✓ Pawnee may bring a suit against pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or
  - ✓ He may sell the thing pledged on giving the pawnor reasonable notice of sale.
    - If proceeds of such sale are less than amount due - Pawnor is still liable for balance.
    - If proceeds of sale are greater than amount due - Pawnee shall pay the surplus to the pawnor.

### **Rights of a pawnor**

- As the bailor of goods, pawnor has all the rights of the bailor. Along with that he also has:
  - 1) Right to redeem [Section 177]
    - If pawnor makes default in payment of debt or performance of promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them, but he must pay in addition any expenses which have arisen from his default.

### **Duties of the Pawnee**

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

### **Duties of a Pawnor**

- 1) Pawnor is liable to pay the debt or perform the promise as the case may be.
- 2) To compensate pawnee for any extraordinary expenses incurred for preserving the goods.
- 3) To disclose all the faults which may put the pawnee under extraordinary risks.
- 4) Indemnify the pawnee for loss occurred to pawnee due to defect in pawnor's title to goods.
- 5) If the pawnee sells the good due to default by the pawnor, the pawnor must pay the deficit.

### **Pledge by Non-owners**

- Meaning - Ordinarily, Owner or any person authorized by him can pledge the goods. But law has recognised certain exceptions.

1) M. Agent	2) Voidable Contract	3) Limited Interest	4) Co-owner	5) Possession
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### **1) Pledge by mercantile agent [Section 178]**

- Mercantile agent in the possession of goods or document of title with the consent of owner can pledge them while acting in the ordinary course of business.
- Such Pledge shall be valid as if were made with authority of the owner of goods, Provided Pawnee acted in good faith and had no notice that Pawnor has no authority to pledge.

### 2) Pledge by person in possession under voidable contract [Section 178A]

- When Pawnor has obtained possession of goods pledged by him under a voidable contract, but the contract has not been rescinded at the time of pledge, the pawnee acquires a good title provided he acts in good faith and without notice of pawnor's defect of title.

### 3) Pledge where pawnor has only a limited interest [Section 179]

- Where a person pledges goods in which he has only a limited interest i.e. pawnor is not the absolute owner of goods, the pledge is valid to the extent of that interest.

### 4) Pledge by a co-owner in possession

- Where goods are owned by many person and with the consent of other owners, goods are left in possession of one of the co-owners. Such a co-owner may make a valid pledge.

### 5) Pledge by seller or buyer in possession:

- A seller in whose possession the goods have been left after sale or a buyer who with the consent of seller, obtains possession before sale, can make a valid pledge, provided pawnee acts in good faith and has no knowledge of defect in title of pawnor.

### Difference between Bailment And Pledge

Basis (By ICAI)		
1) Meaning	2) Parties	3) Purpose
4) Consideration	5) Right to sell the goods	6) Right to use of goods



## **Chapter – 2 – The Indian Contract Act, 1872**

### **Unit 9 – Agency**

#### **What is Agency**

- The Indian Contract Act, 1872 does not define the word 'Agency', but Section 182 defines  
Agent - A person employed to do any act or to represent another in dealing with third persons  
Principal - A person for whom such act is done or who is so represented.

#### **Test of Agency (If answer is yes, relation of agency exist)**

- Whether, person has capacity to bind the principal & make him answerable to third party.
- Whether he can establish privity of contract between principal and third parties.
- **Rule of Agency** is based on the maxim "Qui facit per alium, facit per se" i.e., he who acts through an agent is himself acting.

#### **Appointment And Authority of Agents**

- **Who may employ an agent (Section 183)**
  - Any person who has attained majority according to the law to which he is subject, and who is of sound mind, may employ an agent.
  - Thus, a minor or a person of unsound mind cannot appoint an agent.

#### **Who may be an agent (Section 184)**

- Any person may become an agent i.e. even a minor or a person of unsound mind.
- But as a rule of caution, a minor or a person of unsound mind should not be appointed as an agent because he is incompetent to contract and in case of his misconduct or negligence, principal shall not be able to proceed against him.
- Consideration not necessary (Sec. 185) - No consideration is necessary to create an agency. Acceptance of office of an agent is regarded as a sufficient consideration.

#### **Creation of Agency**

- Relation of agency arises whenever one person called the agent has authority to act on behalf of another called the principal and consents to act.
- Relationship of principal and agent may be created in any of the following ways - (Sec. 186)
  - Express Authority - Authority by words spoken or written.
  - Implied Authority - Authority by circumstances, conduct of parties, or in the ordinary course of dealing, may be accounted from the circumstances of the case.
- Implied Agency includes: -

1) Estoppel

2) Necessity

3) Operation of law

4) Ratification

**1) Agency by Estoppel [Section 237]**

- Principal by his conduct or statement willfully induces another person to believe, a certain person is his agent, he is subsequently prevented or estopped from denying fact of agency.

• Agency by estoppel may be created when following essentials are fulfilled:

- Principal must have made a representation;
- Representation may be express or implied;
- It must state, agent has an authority to do certain act although really he has no authority;
- Principal must have induced the third person by such representation; and
- Third person must have believed the representation and made the contract on that belief.

**2) Agency by Necessity**

- Agency of necessity arises due to some emergent circumstances.
- In Emergency, A person is authorised to do what he cannot do in ordinary circumstances. Thus, agent acquires extra-ordinary or special authority to prevent his principal from loss.

3) Agency by **Operation of Law** - Law treats one person as an agent of another.

**4) Rights of person as to acts done for him without his authority, i.e ratification [Sec. 196]**

- 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 - Same effects will follow as if they had been performed by his authority.
- Ratification means approving a previous act or transaction.
- It may be express or implied by the conduct of persons on whose behalf the act was done.

**Essentials of a valid Ratification**

i) Ratification may be expressed or Implied [Section 197]

ii) Knowledge requisite for valid ratification [Section 198]

- No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

iii) The whole transaction must be ratified [Section 199]

- There can be ratification of an act in entirety or its rejection in entirety.
- Principal cannot ratify a part of transaction which is beneficial to him and reject the rest.

iv) Ratification cannot injure third person [Section 200]

- When the interest of third parties is affected, principle of ratification does not apply.

- Ratification cannot relate back to the date of contract if third party has in intervening time acquired rights.

v) Ratification must be made within reasonable time

vi) Communication of Ratification:

- Ratification must be communicated to the other party.

vii) Act to be ratified must be valid and not be void or illegal

### **Extent of Agent's Authority (Two Principles)**

#### **i) Agent's authority in normal circumstances [Section 188]**

- Agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.
- 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.

#### **ii) Agent's authority in an emergency [Section 189]**

- Agent has authority, in an 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.
- To constitute a valid agency in an emergency, following conditions must be satisfied.
  - ✓ Agent should not be in a position or have any opportunity to communicate with his principal within the time available.
  - ✓ There should be actual & definite commercial necessity for agent to act promptly.
  - ✓ Agent should have acted bonafide and for the benefit of the principal.
  - ✓ Agent should have adopted the most reasonable and practicable course under the circumstances, and
  - ✓ Agent must have the possession of principal's goods which are subject of contract.

### **Sub-Agents**

- When agent cannot delegate [Section 190]
  - Agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade or from nature of agency a sub-agent must be employed.
- Sub-agent [Sec 191] - He is a person employed by, and acting under control of original agent.
- **General Rule:** Agent is a delegatee and a delegatee cannot further delegate. This is based on the Latin principle "delegatus non potest delegare".

Contract of agency is of a fiduciary character. It is based on the confidence reposed by the principal in the agent and that is why a delegatee cannot further delegate.

• **Exception where an agent can appoint Sub-agent:**

- Appointment would be valid if the terms of appointment originally contemplated it.
- Sometimes customs of the trade may provide for appointment of sub agents.
- Where in the course of the agent's employment, unforeseen emergency arise making it necessary for him to delegate the authority that was given to him by the principal.

**Representation of principal by sub-agent properly appointed [Section 192]**

- Where a sub-agent is properly appointed,
  - Principal is liable to third parties for the acts of the sub-agent.
  - Agent is responsible to the principal for the acts of the sub-agent.
  - Sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or willful wrong.

**Agent's responsibility for sub-agent appointed without authority [Section 193]**

- Where an agent, without authority has appointed a person to act as a sub-agent,
  - Agent is responsible for his acts both to the principal and to third persons;
  - Principal is not responsible for the acts of the sub agent,
  - Sub agent is not responsible to the principal at all. He is answerable only to the agent.

**Substituted Agent**

- Substituted Agent is a person appointed by agent to act for principal, with the knowledge & consent of principal. Substituted agents are not sub agents. They are agents of the principal.

**Relation between principal and person duly appointed by agent to act in business of agency [Section 194]**

- Where an agent, holding an express or implied authority to name another person to act for the principal, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of business of agency as is entrusted to him.

**Agent's duty in naming such person [Section 195]**

- In selecting such agent for his principal, Agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

**Difference Between a Sub-Agent And a Substituted Agent**

Basis (Not by ICAI)			
1) Control & Direction	2) Delegation	3) Privity of contract	4) Responsible

5) Agent responsible	6) Remuneration	7) Appointment	8) Agent's Liability
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### **Duties And Obligations of an Agent**

1) Follow Inst	2) Care/Skill	3) Proper A/cs	4) Communicate	5) Own account
6) Secret Pft	7) Delegation	8) Sums received	9) Confidential Info	

#### **1) Duty to follow instructions or customs (Sec. 211)**

- Agent is bound to conduct business according to the direction given by principal,
- Absence of any such directions - Follow customs in doing business of the same kind.
- Acts otherwise - Indemnify the principal if any loss is sustained and if any profit accrues, he must account for it.

#### **2) Duty of reasonable care and skill (Sec. 212)**

- Agent is bound to conduct business with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill.
- Agent is always bound to act with reasonable diligence and to use skills as he possesses;
- He must compensate to his principal in respect of direct consequences of his own neglect, want of skill or misconduct, but not in respect of indirect or remote loss of damage.

#### **3) Duty to render proper accounts (Sec. 213)**

- Agent is bound to render proper accounts to his principal on demand.
- Rendering accounts doesn't mean showing accounts but accounts supported by vouchers.

#### **4) Agent's duty to communicate with principal (Sec. 214)**

- Duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

#### **5) Duty not to deal on his own account**

- Agent should not deal on his own account without first obtaining the consent of the principal, otherwise the principal may -
  - ✓ repudiate the transaction, (Sec. 215)
  - ✓ claim any benefit which agent may have resulted from the transaction. (Sec. 216)

#### **6) Duty not to make secret profits**

- Duty of an agent not to make any secret profit as his relationship with principal is of fiduciary nature and this requires absolute good faith in the conduct of agency.
- Secret Profit means any advantage obtained by the agent over and above his agreed remuneration and which he would not have been able to make but for his position as agent.

#### **7) Duty not to delegate (Sec. 190)**



- Agent cannot lawfully employ to perform acts which he has expressly or impliedly undertaken to perform personally, unless by ordinary custom of trade or nature of agency sub-agent, must be employed.

#### 8) Agent's duty to pay sums received for principal (Sec. 218)

- Agent is bound to pay principal all sums received on his account subject to deductions.

#### 9) Duty not to use any confidential information received in the course of agency against the principal.

#### Rights of an Agent

1) Retain Sum	2) Remuneration	3) Lien	4) Indemnity	5) Compensation
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#### 1) Right of retain out of sums received on principal's account (Sec. 217)

- Agent to retain out of any sums received on account of principal for following payments:
  - ✓ all moneys due to himself in respect of advances made
  - ✓ in respect of expenses properly incurred by him in conducting such business
  - ✓ such remuneration as may be payable to him for acting as agent.

Note: This right can be exercised on any sums received in business of agency.

#### 2) Right to remuneration (Sec. 219)

- Agent is entitled for remuneration in the normal course as per the contract.
- Absence of agreed amount - Entitled for usual remuneration which is custom in business.
- However, an agent who is guilty of misconduct is not entitled to any remuneration in respect of that part of the business which he has misconducted (Sec. 220)

#### 3) Agent's lien on principal's property (Sec. 221)

- Agent is entitled to retain goods, papers & other property whether movable or immovable, of principal received by him until amount due to himself for commission, disbursement & services has been paid or accounted for him unless contract to contrary.
- The conditions of this right are:
  - ✓ Agent should be lawfully entitled to receive a sum of money by way of commission earned or disbursement made or services rendered in proper execution of business.
  - ✓ Property over which, lien is to be exercised should belong to principal & received by agent in his capacity during the course of his ordinary duties as an agent.
  - ✓ If agent obtains possession by unlawful means, he cannot exercise particular lien.
- The agent's right to lien is lost in the following cases:
  - ✓ When possession of property is lost.
  - ✓ When agent waives his right. Waiver may arise out of agreement express or implied.
  - ✓ The agent's lien is subject to a contract to contrary.



#### 4) Right to indemnity

##### i) Right of indemnification for lawful acts (Sec. 222)

- Principal is bound to indemnify agent against all consequences of lawful acts done in exercise of his authority.

##### ii) Right of indemnification against acts done in good faith (Sec. 223)

- Where agent acts in good faith on the instruction of principal, he is entitled for indemnification of any loss or damage from the principal.
- However, agent cannot claim any reimbursement or indemnification for any loss etc. arising out of acts done by him in violation of any penal laws of the country.

##### iii) Non-liability of employer of agent to do a criminal act (Sec. 224)

- Where one person employs another to do an act which is criminal, Employer is not liable to agent, either express or implied to indemnify him against the consequences of that act.

##### iv) Right to compensation for injury caused by principal's neglect (Sec. 225)

- Principal must compensate his agent in respect of injury caused to such agent due to principal's neglect or want of skill.
- Every principal owes the duty of care, and not to expose agent to unreasonable risks.

#### Principal's Liability To Third Parties

- Agent does all acts on behalf of the principal but incurs no personal liability, liability remains with principal unless contract to contrary because there is no privity of contract and no consideration between agent and third party. Agent also cannot personally enforce contracts entered into by him on behalf of principal.

##### 1) Principal's liability for the Acts of the Agent which are within authority of agent (Sec. 226)

##### 2) Principal's liability when agent exceeds authority (Sec. 227)

- When an agent does more than he is authorised to do, and when the part which is within his authority can be separated from the part which is beyond his authority, is binding between him and his principal.
- Principal not bound when excess of agent's authority is not separable (Sec. 228)
- Exception: Liability of principal inducing belief that agent's unauthorized acts were authorized (Sec. 237)

When agent has without authority done acts or incurred obligations on behalf of principal, the principal is bound if he has by his words or conduct induced third persons to believe that such acts and obligations were within the scope of agent's authority.

##### 3) Consequences of notice given to agent (Section 229)

- Any notice given to or information obtained by agent in the course of business transacted by him for principal, shall have same legal consequence as if it had been given to or obtained by principal against third party.

4) Principal's liability for the agent's fraud, misrepresentation or torts (Sec. 238)

- Misrepresentations made, or frauds committed, by agents acting in the course of business for principals, have same effect as agreements made by the principals but do not affect their principals if done in matters which do not fall within the agent's authority.

**Personal Liability of Agent To Third Parties**

- Agent cannot personally enforce nor be bound by contracts on behalf of principal unless contract to contrary. (Sec. 230)
- **Following are the exceptions where agents is presumed to have agreed to be personally bound:**
  - 1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad/foreign principal, the presumption is that the agent undertakes to be personally liable for the performances of such contract.
  - 2) Where the agent does not disclose the name of his principal or undisclosed principal, there arises a presumption that he himself undertakes to be personally liable.
  - 3) Non-existent or incompetent principal: Where the principal, though disclosed, cannot be sued, the agent is presumed to be personally liable.
  - 4) Pretended agent - If the agent pretends but is not an actual agent, and the principal does not rectify the act but disowns it, the pretended agent will be himself liable (Sec. 235).
  - 5) When agent exceeds authority or misleads the third person in believing that the agent he has the requisite authority in doing the act, then agent can be made liable personally for breach of warranty of authority.

**Rights of Third Parties**

- 1) Rights of parties to a contract made by undisclosed agent (Sec. 231)
  - If agent makes a contract with a person who neither knows nor has reason to suspect that he is dealing with an agent, his principal may require performance of contract but the other contracting party has same right against principal as he would had against agent.
  - If principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known before, who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

## 2) Performance of contract with agent supposed to be principal (Section 232)

- When agent does not disclose that he is acting as an agent and the principal requires the performance of contract then the principal can obtain such performance subject to the rights and obligations subsisting between agent and other party to contract.

## 3) Option to Third Person- sue the Agent or the Principal:

- Right of person dealing with agent personally liable (Sec. 233)
  - ✓ In cases where the agent is personally liable, person dealing with him may hold either him or his principal, or both of them, liable.
- b) Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable (Sec. 234)
  - ✓ When a person who has made a contract with an agent induces him to act upon the belief that, principal only will be held liable, or induces the principal to act upon the belief that agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

## Revocation of Authority

- **Termination of agency** (Sec. 201) - Means putting an end to the legal relationship between principal and agent.
- **Modes of termination** are as follows

1) Revocation	2) By Agents	3) Completion of business
4) Death or Insanity	5) Principal's Insolvency	6) Expiration of time

### 1) Revocation (Sec. 203 & 204)

- Agency may be terminated by principal revoking the authority of agent at any time before the authority has been exercised so as to bind the principal.
- However, It can't be revoked after the authority has been partly exercised by agent.
- Compensation for revocation if there is premature revocation without sufficient cause by principal. (Sec. 205)
- Notice of revocation (Sec. 206)
  - When principal revokes the authority, he must give reasonable notice of such revocation to agent, otherwise, he can be liable to pay compensation for any damage caused to agent.
- Revocation & renunciation may be expressed or implied in the conduct of principal. (Sec. 207)

### 2) Renunciation by agent (Sec. 206)

- Agent may renounce in the same manner in which the principal has the right of revocation.

- If agency is for a fixed period, agent would have to compensate for any premature renunciation without sufficient cause to principal. (Sec. 205)
- Reasonable notice of renunciation is necessary and the length (time period) of notice is to be determined by the same principles which apply to revocation by the principal.
- If agent renounces without proper notice - Make good any damage resulting to principal.

3) Agency is automatically & by operation of law terminated on completion of business.

4) Death or insanity

- Agency is determined automatically on the death or insanity of principal or agent.
- Winding up of a company or dissolution of partnership has the same effect.
- Acts done by agent before death would remain binding.

5) Principal's insolvency - Agency ends on the principal being adjudicated insolvent.

6) On expiry of time:

- If agent has been appointed for fixed term, Expiration of term puts an end to agency, whether purpose has been accomplished or not, agency comes to an automatic end.

#### **When the agency is irrevocable?**

- When the agent is personally interested in the subject matter of agency the agency becomes irrevocable in the absence of an express contract. (Sec. 202)

#### **Effects of Termination (Sec. 208)**

**1) Termination of agent's authority takes effect as to agent & as to third persons (Sec. 208)**

- Termination does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

**2) Agent's duty on termination of agency by principal's death or insanity (Sec. 209)**

- When an agency is terminated by the principal dying or becoming of unsound mind, agent is bound to take all reasonable steps for the protection and preservation of interests entrusted to him on behalf of the representatives of his late principal.

**3) Termination of sub-agent's authority (Sec. 210)**

- Termination of authority of agent causes termination of authority of all sub-agents appointed by him (subject to rules).

## **Chapter – 3 – The Sale of Goods Act, 1930**

### **Unit – 1 – Formation of the Contract of Sale**

#### **Basics**

- The Act came into force from 1st July 1930 and extends to whole of India.
- Sale of Goods Act, 1930 is an Act to define and amend the law relating to the sale of goods. (Deals with only movable property)
- For immovable property, Transfer of Property Act, 1882 is applicable.

#### **Definitions**

##### **1) Buyer & Seller [Section 2(1) & 2(13)]**

Buyer means a person who buys or agrees to buy goods

Seller means a person who sells or agrees to sell goods

##### **2) Goods [Section 2(7)]**

- "Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass & things attached to or forming part of land, which are agreed to be severed/ separated from land before sale or under contract of sale.
- 'Actionable claims' are claims, which can be enforced only by an action or suit, e.g., debt. A debt is not a movable property or goods. The Fixed Deposit Receipts (FDR) are 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.

#### **Classification of Goods**

##### **1) Existing Goods (Sec - 6) - In existence at the time of the contract of sale**

**1a) Specific goods [Sec - 2(14)] - Goods identified & agreed upon at the time of contract of sale**

**1b) Ascertained Goods - Identified in accordance with agreement after contract of sale is made.**

When out of a lot or out of large quantity of unascertained goods, the number or quantity contracted for is identified, such identified goods are called ascertained goods.

**1c) Unascertained goods - not specifically identified or ascertained at the time of making of the contract. They are indicated or defined only by description or sample.**

**2) Future Goods [Section 2(6)] - Goods to be manufactured or produced or acquired by the seller after making the contract of sale. (It is always agreement to sell)**



**3) Contingent Goods [Section 6(2)]** - Depends upon an uncertain contingency (event) are called 'contingent goods' (It is always agreement to sell) In the case of contingent goods also, the property does not pass to the buyer at the time of making the contract.

### **Delivery - It's Forms & Derivatives [Section 2(2)]**

Means voluntary transfer of possession from one person to another.

Delivery of goods may be made by doing anything, which has the effect of putting the goods in the possession of the buyer, or any person authorized to hold them on his behalf.

<b>Voluntary transfer of possession by one person to another</b>		
Actual delivery	Constructive delivery	Symbolic delivery

**Actual delivery:** Goods are physically delivered to buyer. Transfers of physical possession of goods to the buyer or to a third person authorised.

**Constructive delivery:** Transfer is effected without any change in the custody or actual possession. It takes place when a person in possession of goods belonging to seller acknowledges to buyer that he holds the goods on buyer's behalf i.e. delivery by attornment (acknowledgement)

**Symbolic delivery:** Delivery of a thing in token of transfer of something else, i.e., delivery may be made by handing over documents of title, like bill of lading or railway receipt 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.

### **Document of title to Goods & Document showing title to Goods**

- "Document of title to goods" - Document amounts to a document of title only where it shows an unconditional undertaking to deliver the goods to holder of the document as proof of the possession or control of goods either by endorsement or by delivery (E.g - Railway receipt etc)
- However, 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.

### **Mercantile Agent [Section 2(9)]**

Agent in the customary course of business.

### **Property [Section 2(11)]**

Means 'ownership' or general property (not special property). In every contract of sale, the ownership of goods must be transferred by the seller to the buyer,



**Insolvent [Section 2(8)]**

When he ceases to pay his debts or cannot pay his debts as they become due.

**Price [Section 2(10)]**

Means money consideration for a sale of goods. Value of goods expressed in monetary terms.

**Quality [Section 2(12)]** of goods includes their state or condition.

**Sale & Agreement to sell (Section 4)**

- The following elements must co-exist so as to constitute a contract of sale:
  - There must be at least two parties,
  - the seller and the buyer and the two must be different persons.
  - Subject matter of must necessarily be goods covering only movable property. May be either existing goods or future goods.
  - A price in money (not in kind) should be paid or promised. But there is nothing to prevent the consideration from being partly in money and partly in kind.
  - Transfer of property from seller to the buyer must take place. Contract of sale made by an offer for a price and acceptance of such offer.
  - A contract of sale may be absolute or conditional.
  - All other essential elements of a valid contract must be present in the contract of sale.

**Difference between:****The differences between Sale & Agreement to sell**

1) Transfer of property	2) Nature	3) Remedies for breach	4) Liability of party
5) Burden of risk	6) Nature of rights	7) Right of resale	

**The differences between Sale & Hire Purchase**

1) Time of Passing Property	2) Position of Party	3) Termination of Contract
4) Burden of risk of Insolvency of Buyer	5) Transfer of Title	6) Resale
8) Insolvency of Buyer	9) Insolvency of Seller	

**The differences between Sale & Bailment**

1) Transfer of Property	2) Return of Goods	3) Consideration
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**The differences between Sale & 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.

**How Contract of Sale is Made (Section 5)**

- Contract of sale may be made in any of the following modes:
  - Made by an offer to buy or sell goods for a price and acceptance of such offer.
  - Immediate delivery of the goods or
  - Immediate payment of price, but delivery to be made at some future date; or
  - Immediate delivery and an immediate payment of price; or
  - Delivery or payment or both are to be made in instalments; or
  - Delivery or payment or both are to be made at some future date.

**Subject Matter of Contract of Sale**

- **Existing or future goods (section 6)**
  - Goods which form the subject matter may be either existing goods (Acquired/Owned/Possessed) or future goods or contingent goods (Acquisition depends upon contingency which may or may not happen.)
- **Goods perishing before making of contract (Section 7)**
  - If there is contract for sale of specific goods, Contract is void if the goods without the knowledge of seller have, at the time when contract was made, perished or damaged that they are no longer answer to their description given in contract.
- **Goods perishing before sale but after agreement to sell (Section 8)**
  - If there is agreement to sell specific goods & subsequently goods without any fault on the part of seller or buyer, perish or damaged that they are no longer answer to their description before the risk passes to buyer, Agreement is avoided or becomes void.
- **Perishing of future goods**
  - If future goods are specific, Destruction of such goods will amount to supervening impossibility & Contract shall become void.

**Ascertainment of Price (Section 9)**

- 'Price' means monetary consideration for sale of goods. Price may be fixed by the contract, or agreed to be fixed in a manner provided by the contract, (e.g., by a valuer), or determined by the course of dealings between the parties.

**Agreement to sell at valuation (Determination of price by third party) (Section 10):**

- If there is an agreement to sell goods on terms that price has to be fixed by third party & he either does not or cannot make such valuation, the agreement will be void.
- In case, third party is prevented by either party from fixing the price, the party at fault will be liable to damages to other party who is not at fault.
- However, Buyer who has received & appropriated the goods must pay a reasonable price.

## **Chapter – 3 – The Sale of Goods Act, 1930**

### **Unit 2 – Conditions & Warranties**

#### **Stipulations as to time (Section 11)**

- Stipulations - Seller usually makes certain statements or representations (About quality, nature, price) with a view to induce the intending buyer to purchase the goods. Representation which forms a part of contract of sale & affects contract is called a stipulation.
- Stipulation, as regard to time for the payment of price is not deemed to be of the essence of a contract of sale unless a different intention appears, But delivery of goods must be made without delay. Stipulation as to time of delivery are usually the essence of the contract.

#### **Introduction – Conditions & Warranties (Section 12)**

- **Condition** - "A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated".
- **Warranty** - "A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated".
- Whether it 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.
- **Difference between conditions and warranties**

1) Meaning	2) Right in case of breach	3) Conversion of Stipulations
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#### **When Condition is to be treated as Warranty (Section 13)**

- In the following cases, Contract is not avoided even on account of a breach of a condition (Party can claim damages only)
  - Buyer altogether waives the performance of the condition. A party may for his own benefit, waive a stipulation. It should be a voluntary waiver by buyer.
  - Buyer elects to treat the breach of the conditions, as one of a warranty. He may claim only damages instead of repudiation. Here, Buyer has decided to treat it as a warranty.
  - Contract is non-severable and Buyer has accepted either whole goods or part thereof.
  - Where the fulfilment of any condition or warranty is excused by law by reason of impossibility or otherwise.

**Express & Implied Condition & Warranties (Section 14-17)**

'Conditions' and 'Warranties' may be either express or implied.

Express conditions are those which are agreed upon between the parties at the time of contract.

Implied conditions are those, which are presumed by law to be present in the contract.

**Following conditions are implied conditions unless contract show a different intention.**

**1) Condition as to title [Section 14(a)]**

- First implied condition on the part of seller is - In case of a sale, he has a right to sell, & In case of agreement to sell - he will have right to sell unless agreement to the contrary.
- If seller's title/ownership is defective, Buyer must return the goods to the true owner and recover the price from the seller.

**2) Sale by description [Section 15]**

- There is an implied condition that the goods shall correspond with the description.
- This rule is based on the principle that "if you contract to sell peas, you cannot compel the buyer to take beans."
- The buyer is not bound to accept and pay for the goods which are not in accordance with the description of goods.
- If goods tendered do not correspond with the description, it would be breach of condition entitling the buyer to reject the goods whether the buyer is able to inspect them or not.

**3) Sale by sample [Section 17]**

- 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 latent defect rendering them un-merchantable, which would not be apparent on reasonable examination of the sample. If the defects are latent, then the buyer can avoid the contract. means goods shall be free from any hidden defect.

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

- The bulk shall correspond both with the sample and the description.
- In case the goods correspond with sample but do not tally with description or vice versa or both, the buyer can repudiate the contract.

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

- Ordinarily, no implied condition as to quality or fitness of goods sold for any particular purpose.

However, Reasonable fitness may be implied provided following conditions are fulfilled:

- ✓ Buyer 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.

- This implied condition will not apply if goods sold under trademark or patent name.
- Where the goods can be used for only one purpose, the buyer need not to tell the seller the purpose for which he requires the goods.
- General rule, it is the duty of the buyer to examine the goods thoroughly before he buys to satisfy that goods will be suitable for his purpose.  
This is known as rule of caveat emptor which means "Let the buyer beware".

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

- Where goods are bought by description, there is an implied condition that the goods shall be of merchantable quality. There are 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, if buyer has examined goods, there shall be no implied condition as regards defects which such examination ought to have revealed.
- Merchantable quality means goods of such a quality and condition as a man of ordinary prudence would accept them as goods of that description.

#### **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.

#### **Following are implied warranties**

Implied Warranties: It is a warranty which the law implies into the contract of sale, It is presumed that the parties have incorporated it into their contract unless expressly excluded.

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

- Buyer shall have & enjoy quiet possession of goods. If the possession of the goods, is later on disturbed in buyers' possession, he is entitled to sue the seller for breach of warranty.

#### **2) Warranty as to non-existence of encumbrances [Section 14(c)]**

- Goods shall be free from any charge or encumbrance in favour of any third party not declared or known to buyer before or at the time of contract.

#### **3) Warranty as to quality or fitness by usage of trade [Section 16(3)]**

- Implied warranty as to quality or fitness for a particular purpose may be annexed or attached by the usage of trade.
- The rule is 'let the buyer beware' i.e., the seller is under no duty to reveal unflattering truths about the goods sold, but this rule has certain exceptions.



**4) Disclosure of dangerous nature of goods:**

- Where the goods are dangerous in nature and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger. If not, Seller may be liable in damages.

**Caveat Emptor (Section 16)**

- Doctrine of 'Caveat Emptor' means 'let the buyer beware'.

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, 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.

**Exceptions:**

1) Fitness as to quality or use

2) Goods purchased under patent or brand name

3) Goods sold by description

4) Goods of Merchantable Quality

- But where the buyer has examined the goods, this rule shall apply if the defects were such which ought to have not been revealed by ordinary examination

5) Sale by sample

6) Goods by sample as well as description

7) Trade Usage

- Implied warranty or condition as to quality or fitness for a particular purpose may be annexed by usage of trade & if seller deviates, Rule of Caveat Emptor is not applicable

8) Seller actively conceals a defect or is guilty of fraud

- If seller sells by misrepresentation or fraud & Buyer relies on it or Seller actively conceals some defect which couldn't be discovered by buyer on a reasonable examination, then the rule will not apply. Buyer has a right to avoid contract & claim damages.

**Note: Point no. 1 to 6 descriptions are same as earlier. (Already Covered)**



## **Chapter – 3 – The Sale of Goods Act, 1930**

### **Unit – 3 – Transfer of Ownership & Delivery of Goods**

#### **Introduction**

- Sale of goods involves transfer of ownership. Risk prima facie passes with the property.
- If goods are lost or damaged, the burden of loss will be borne by owner of goods
- If goods are damaged by third party, it is the owner who can take action.

#### **Passing of Property (Section 18-26)**

- Passing of property implies passing of ownership.
- If property has passed to buyer, Risk in the goods sold is that of buyer and not of seller, though the goods may still be in the seller's possession.
- **Rules regarding transfer of property depends on two basic factors:**
  - **Identification of Goods (Sec - 18)** - Unascertained goods, Property cannot pass to buyer unless and until the goods are ascertained. The buyer can get ownership right on the goods only when goods are specific & ascertained.
  - **Intentions of parties [Sec - 19(1)]** - Property is transferred at such time as the parties to the contract intend it to be transferred. For ascertaining the intention, regard shall be to the terms of the contract, the conduct of the parties and the circumstances of the case.

#### **Primary Rules for Passing of Property**

##### **A) Property (Specific or ascertained goods) passes when intended to pass (Section 19)**

- Property in them is transferred to the buyer at such time as the parties to contract intend it to be transferred. (Intention - Terms, Conduct, Circumstances)
- **Stages of goods while passing of specific goods when it is**
  - **In a deliverable state (Sec 20):** When the contract is made, & it is immaterial of payment or time of delivery, only condition is goods must be ready for delivery.
  - **To be put into a deliverable state (Sec 21):** Where the seller is bound to do something to goods, Property doesn't pass until such thing is done & buyer has notice thereof.
  - **In a deliverable state, but seller has to do anything to ascertain price (Sec 22):**  
Where the seller is bound to weigh/measure/test/Some other act or thing to ascertain

price, Property does not pass until such act or thing is done and buyer has notice thereof.

### **B) Unascertained goods [Section 18]**

- No property in goods is transferred to buyer unless & until the goods are ascertained.

**Following are the rules of passing of property of unascertained goods**

#### **1) Sale of unascertained goods by description and Appropriation [Section 23(1)]:**

- Appropriation involves selection of goods with the intention of using them in performance of contract with the mutual consent of seller & buyer. The essentials are:
  - There is a contract for sale of unascertained or future goods.
  - Goods should conform to the description and quality stated in the contract.
  - Goods must be in a deliverable state.
  - Goods must be unconditionally appropriated (with no right to disposal) to the contract either by delivery to the buyer or his agent or the carrier.
  - Appropriation must be made by seller with assent of buyer or buyer with assent of seller.
  - Assent may be express or implied.
  - Assent may be given either before or after appropriation.

#### **2) Delivery of the goods to the carrier [Section 23(2)]:**

- Where seller delivers the goods to buyer or carrier or bailee for transmission to buyer & doesn't reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

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

- When goods are delivered to buyer on approval or "on sale or return" Property therein passes-
  - when he signifies his approval or acceptance or does any other act adopting the transaction;
  - if he does not signify his approval or acceptance but retains the goods without giving notice of rejection, then,
    - if time has been fixed for return - on the expiration of such time, and,
    - if no time has been fixed - on the expiration of a reasonable time; or
  - he does something to goods which is equivalent to accepting the goods
- Buyer under contract of 'sale or return' is deemed to have exercised his option when he does any act exercising domination over the goods.  
Failure or inability to return the goods to seller does not necessarily imply selection to buy.

- **Sale for cash only or Return -**

Where goods have been delivered by a person on "sale or return" on the terms that, goods were to remain the property of the seller till they are paid for, Property does not pass to buyer until the terms are complied with, i.e., cash is paid for.

#### **4) Reservation of right of disposal (Section 25) (To secure price before passing property)**

- In case of sale of specific goods or appropriation, Seller may, by terms of the contract reserve the right to dispose of the goods, until certain conditions have been fulfilled. In such a case property will not pass till the condition imposed by the seller has been fulfilled.
- **Circumstances under which the right to disposal may be reserved (presumed)**
  - If goods are shipped or delivered to railway administration for carriage, and by bill of lading or railway receipt, the goods are deliverable to order of the seller or agent, then the seller will be prima facie deemed to have reserved to the right of disposal.
  - Where seller draws a bill on buyer for price & sends to him bill of exchange together with bill of lading or railway receipt, to secure acceptance or payment, Buyer must return the bill of lading, if he does not accept or pay the bill.  
If wrongfully retains bill of lading or the railway receipt, Property doesn't pass to him.

#### **Risk Prima Facie Passes with Property (Section -26)**

- Goods remain at seller's risk until property transferred to buyer unless otherwise agreed, but if transferred to buyer, goods are at buyer's risk whether delivery made or not.
- **Exception to the rule that 'risk follows ownership.'**
  - Where delivery been delayed through the fault of either buyer or seller, goods are at the risk of party in fault for any loss which might not have occurred but for the fault.
  - Duties & liabilities of seller or buyer as bailee for the other party remain unaffected.

#### **Transfer of Title by Non-Owners (Section 27-30)**

- **General rule** - Seller cannot transfer a better title to buyer than he himself has. If seller is not the owner, buyer also will not become the owner (title of buyer shall be same as of seller) Latin maxim "Nemo dat quod non habet" which means that no one can give what he has not got.
- **Exceptions:** Non-owner can convey better title to the bona fide purchaser of goods for value.

#### **1) Sale by a Mercantile Agent:**

It would pass a good title in the following circumstances;

- If he was in possession of goods or documents with the consent of the owner;

- If sale was made by him when acting in the ordinary course of business as a mercantile agent; and
- If buyer had acted in good faith and has at the time of the contract of sale, no notice of the fact that the seller had no authority to sell.

## **2) Sale by one of the joint owners (Sec 28):**

If one of several joint owners of goods has sole possession of goods by permission of the co-owners, Property is transferred to any person who buys in good faith & has no notice that the seller has no authority to sell.

## **3) Sale by a person in possession under voidable contract (Sec 29):**

Buyer would acquire a good title provided that the contract had not been rescinded until the time of the sale.

## **4) Sale by one who has already sold goods but continues in possession thereof [Section 30(1)]**

If such person sells them to third person, and if such person obtains the delivery in good faith & without notice of the previous sale, he would have good title to them. Pledge or other disposition of goods or documents of title by seller in possession are equally valid

## **5) Sale by buyer obtaining possession before property in goods has vested in him [Sec - 30(2)]**

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

**Exception** - Hire-purchase agreement which gives only an option to buy unless it amounts to sale.

## **6) Effect of Estoppel:**

Where owner (actively suffered other person as true owner or authorised person to sell) is estopped from denying seller's authority to sell, the transferee will get a good title as against the true owner.

## **7) Sale by an unpaid seller [Sec 54(3)]:**

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

## **8) Sale under the provisions of other Acts:**

- Sale by an Official Receiver or Liquidator will give the purchaser a valid title.
- Purchase of goods from a finder of goods will get a valid title
- Sale by Pawnee can convey a good title to the buyer

### **Performance of the Contract of Sale**

- Performance of a contract of sale implies delivery of goods by seller & acceptance of delivery & payment of price for them by buyer in accordance of the terms of contract.
- **Definition of Delivery** [Section 2(2)]: Delivery means voluntary transfer of possession from one person to another.
  - Physical possession is not important. Buyer to be placed in a position, that he can exercise his right over the goods.
  - If possession is taken through unfair means, there is no delivery.
  - Delivery of goods is of three types: - Actual, Symbolic & Constructive
- **Payment and delivery are concurrent conditions** (Section 32): Seller shall be ready & willing to give possession in exchange of price, & buyer shall be ready & willing to pay the price in exchange for possession of the goods unless otherwise agreed,

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

- 1) **Delivery (Sec - 33)**: Delivery may be made by doing anything which the parties agree or which has effect of putting goods in possession of buyer or person authorised by buyer.
- 2) **Effect of part delivery (Sec - 34)**: Delivery of part, in progress of delivery of whole has the same effect, for the purpose of passing of property in such goods, but delivery of part with an intention of severing it from the whole, does not operate as a delivery of the remainder.
- 3) **Buyer to apply for delivery (Sec - 35)**: Seller is not bound to deliver until buyer applies for it.
- 4) **Place of delivery [Sec - 36(1)]**: Whether it is for buyer to take possession or for seller to send them to buyer is a question depending in each case of contract, express or implied. Apart from any such contract,
  - goods sold are to be delivered at the place at which they are at the time of the sale, and
  - goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell or
  - if goods are not in existence, at the place at which they are manufactured or produced.
- 5) **Time of delivery [Sec - 36(2)]**: Where under contract, Seller is bound to send the goods to buyer, but no time for sending is fixed, Seller is bound to send them within a reasonable time.
- 6) **Goods in possession of a third party [Sec - 36(3)]**: There is no delivery unless and until such third person acknowledges to the buyer that he holds the goods on his behalf.



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

**8) Expenses for delivery [Sec - 36(5)]:** The expenses of and incidental to putting the goods into a deliverable state must be borne by the seller in the absence of a contract to the contrary.

**9) Delivery of wrong quantity [Sec - 37]:** Following are the cases subject to any usage of trade, special agreement or course of dealing between the parties.

- Seller delivers a quantity **less than** he contracted to sell, Buyer may reject them (All), but if Buyer accepts the goods so delivered he shall pay for them at the contract rate.
- Seller delivers a quantity **larger than** he contracted to sell, Buyer may accept the goods included in contract & reject the rest, or he may reject the whole. If accepts the whole of the goods so delivered, he shall pay for them at the contract rate.
- Seller delivers the goods he contracted to sell **mixed** with goods of a different description not included in contract, Buyer may accept the goods which are in accordance with the contract and reject remaining, or may reject the whole.

**10) Instalment deliveries (Sec - 38):** Buyer is not bound to accept delivery in instalments unless otherwise agreed. Rights, Liabilities & payments thereon determined by parties.

**11) Delivery to carrier [Sec - 39(1)]:** Delivery of goods to carrier for transmission to buyer, is prima facie deemed to be delivery to buyer subject to terms of contract.

**12) Deterioration during transit (Sec - 40):** The liability for deterioration necessarily incidental to the course of transit will fall on buyer, though Seller agrees to deliver at own risk.

**13) Buyer's right to examine the goods (Sec - 41):** If previously not examined, Buyer is entitled to reasonable opportunity of examining goods to ascertain its conformity with contract. Seller is bound, to afford buyer a reasonable opportunity of examination, subject to contract.

**Rule related to Acceptance of Delivery of Goods (Sec - 42):**

Acceptance is deemed to take place when the buyer-

- intimates to 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 goods after lapse of reasonable time, without intimating to seller about rejection.



**Buyer not bound to return rejected goods (Sec - 43):** Where goods are delivered & buyer refuses to accept them, having right so to do, he is not bound to return them to seller unless otherwise agreed but it is sufficient if he intimates to the seller

**Liability of buyer for neglecting or refusing delivery of goods (Sec - 44)**

When Seller is ready & willing to deliver and requests buyer to take delivery, & Buyer doesn't within a reasonable time take delivery, he is liable to seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for care & custody of goods.

Provided, nothing shall affect rights of seller where the neglect or refusal of buyer amounts to a repudiation of the contract.

## **Chapter – 3 – The Sale of Goods Act, 1930**

### **Unit – 4 – Unpaid Seller**

#### **Unpaid Seller [Section 45(1)]**

- Seller of goods is deemed to be an 'Unpaid Seller' when,
  - The whole of price has not been paid or tendered & seller had an immediate right of action for the price.
  - When BoE or other NI has been received as conditional payment, & condition on which it was received has not been fulfilled by reason of dishonour of instrument or otherwise.
  - Seller includes any person who is in the position of a seller.

#### **Rights of an Unpaid Seller (Section - 46)**

<b>Against The Goods</b>		<b>Against The Buyer</b>
Property - Passed to buyer <ul style="list-style-type: none"> <li>• Lien (In possession)</li> <li>• Stoppage in Transit (In Insolvency)</li> <li>• Resale</li> </ul>	Property - Not passed to buyer <ul style="list-style-type: none"> <li>• Lien</li> <li>• Stoppage in Transit</li> <li>• Resale</li> <li>• Withholding Delivery</li> </ul>	<ul style="list-style-type: none"> <li>• Suit for Price</li> <li>• Suit for Damages</li> <li>• Suit for Interest</li> </ul>

#### **Rights of Unpaid Seller Against The Goods**

##### **1) Seller's Lien (Section - 47)**

- Rights of lien: Unpaid seller has right of lien on goods for the price while he is in possession (no possession, no lien) until the payment or tender of price of such goods.
- It is the right to retain possession & refusal to deliver until price due is paid or tendered.
- Lien can be exercised even where he is in possession as agent or bailee for the buyer.
- This right can be exercised by him in following cases only:
  - where goods have been sold without any stipulation of credit; (i.e., on cash sale)
  - where goods have been sold on credit but the term of credit has expired; or
  - where the buyer becomes insolvent.

##### **Part Delivery (Section - 48)**

- Unpaid seller has made part delivery, he may exercise lien on 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)**

- The unpaid seller loses his right of lien under the following circumstances:

- When he delivers goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of goods.
- Where buyer or his agent lawfully obtains possession of goods.
- Where seller has waived the right of lien.
- By Estoppel i.e., where seller by conduct leads third parties to believe lien does not exist.
- **Exception:** Unpaid seller does not lose his lien by reason that he has obtained a decree for the price of the goods.

## 2) Right of stoppage in transit (Section 50 to 52):

- Means right of stopping the goods while they are in transit, to regain possession & to retain till the full price is paid.
- This is an extension of lien as it entitles to regain possession even when parted with goods.
- It is exercised only when the following conditions are fulfilled:
  - The seller must be unpaid.
  - He must have parted with the possession of goods.
  - The goods are in transit.
  - The buyer has become insolvent.
  - The right is subject to provisions of the Act. [Section 50]

### Duration of transit (Section 51):

- From the time when they are delivered to carrier or other bailee for transmission to buyer, until buyer or his agent takes delivery of them from such carrier or other bailee.
- **Right of stoppage in transit is lost or comes to an end in the following cases:**
  - When buyer or other bailee obtains delivery.
  - Buyer obtains delivery before arrival of destination with or without consent of carrier.
  - Carrier or other bailee acknowledges to buyer or agent that he holds goods, unless seller has reserved right of disposal of goods.
  - Carrier wrongfully refuses to deliver goods to buyer.
  - Goods are delivered to carrier hired by buyer; the transit comes to an end.
  - Part delivery made to buyer; transit will end for remaining which are in transmission.
  - Goods are delivered to a ship chartered by buyer; transit comes to an end.

### How stoppage in transit is effected (Section 52):

- By taking actual possession of goods, or by giving notice of his claim to carrier or other bailee in whose possession the goods are.  
Notice may be given either to the person in possession of goods or his principal. Effectual only when, principal communicate it to his servant or agent to prevent in time delivery to buyer.

- When notice is given to carrier or other bailee in possession, he shall re-deliver goods to, or according to the directions of seller. Expenses of re-delivery shall be borne by the seller.

### **Distinction between Right of Lien and Right of Stoppage in Transit**

Basis (Not given by ICAI)				
1) Essence	2) Possession	3) Insolvency	4) Beginning	5) Ending

### **Effect of stoppage:**

- Contract is not rescinded when seller exercises his right of stoppage in transit. Contract still remains in force and the buyer can ask for delivery of goods on payment of price.

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

- Right of lien or stoppage in transit is not affected by the buyer selling or pledging the goods unless seller has assented to it.

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

- When seller has assented to sale, mortgage or other disposition of goods made by buyer. When document of title has been transferred to buyer and buyer transfers it to a person who has bought goods in good faith & for value, then, the proviso stipulates as follows:
  - If the last transfer is by way of sale, right of lien or stoppage in transit is defeated, or
  - If the last 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, pledgee may be required by unpaid seller to use other goods or securities of pledger available to him to satisfy his claims in the first instance.

### **3) Right of re-sale [Section 54]:**

- The unpaid seller can exercise the right to re-sell the goods under the following conditions:
  - If goods are of perishable nature: Buyer need not be informed of intention of resale.
  - Where notice is given to buyer of intention to re-sell & after receipt, Buyer fails within a reasonable time to pay or tender the price, the seller may resell the goods.
  - On resale, Seller is entitled to recover the difference between contract price (CP) & resale price (RP) from buyer as damages & retain the profit if RP is higher than CP.
  - The above is possible only if notice is given for resale. If resold without notice, Seller cannot recover the loss on resale. Also, profit if any be returned to original buyer.
  - Subsequent buyer acquires good title against original buyer, despite the fact that notice of re-sale has not been given by seller to original buyer.
  - Seller is said to have reserved his right of resale if it is expressly agreed between parties that in case of buyer's default in payment, Seller will resell the goods.
 Also, no notice is required in resale & also entitled to recover damages without notice.

- If property in goods has not passed to buyer: Unpaid seller has in addition to his remedies a right of withholding delivery of goods. This right is called "quasi-lien". This is an additional right used in case of agreement to sell.

### **Rights of Unpaid Seller Against the Buyer (Section 55-61)**

- The rights of the seller against the buyer personally are called rights in personam and are in addition to his rights against the goods. The right against the buyer are as follows:

#### **1) Suit for price (Section 55)**

- In case of Sale - If property has passed to buyer he wrongfully neglects or refuses to pay according to terms of contract, Seller may sue him for price of the goods.
- In case of Agreement to sell - If property has not passed to buyer but where price is payable on a certain day irrespective of delivery & buyer wrongfully neglects or refuses to pay, Seller may sue him although goods have not been appropriated to the contract.

#### **2) Suit for damages for non-acceptance (Section 56):**

- Where buyer wrongfully neglects or refuses to accept and pay, Seller may sue him for damages for non-acceptance.

#### **3) Repudiation of contract before due date (Section 60):**

- Where buyer repudiates the contract before date of delivery, Seller may treat the contract as rescinded and sue for damages for breach (Anticipatory breach)

#### **4) Suit for interest [Section 61]:**

- If Specific agreement between parties as to interest on price of goods from the date on which payment becomes due, Seller may recover interest from buyer.  
If no specific agreement, Seller may charge it when it becomes due from such day as he may notify to the buyer.
- If absence of contract to contrary, Court may award it in a suit at such rate as it thinks fit from the date of tender of goods or from the date on which price was payable.

### **Remedies of Buyer Against the Seller (Breach by seller)**

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

#### **1) Damages for non-delivery [Section 57]:**

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

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

- Buyer can appeal to court for specific performance. Court can order this only when goods are ascertained or specific. This remedy subject to following conditions:
  - ✓ Contract must be for sale of specific & ascertained goods.

- ✓ Power of court to order this is subject to provisions of Specific Relief Act 1963.
- ✓ It empowers court to order it where damages would not be an adequate remedy.
- ✓ It will be granted as remedy if goods are of special nature or are unique.

### **3) Suit for breach of warranty (Section 59):**

- Where there is breach of warranty or buyer elects to treat breach of condition as breach of warranty, Buyer is not entitled to reject the goods, But he may set up against the seller the breach of warranty in diminution or extinction of price or sue the seller for damages for breach of warranty.

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

- Where either party of sale repudiates the contract before date of delivery, Other may either treat the contract as subsisting & wait till date of delivery, or he may treat contract as rescinded and sue for damages for the breach.

### **5) Suit for interest:**

- Nothing in this Act shall affect the right of seller or buyer to recover interest or special damages, where by law it may be recoverable, or to recover the money paid where consideration for payment has failed.
- In the absence of a contract to contrary, Court may award interest at such rate as it thinks fit from the date on which payment was made.

### **Auction Sale (Section - 64)**

- It is a mode of selling property by inviting bids publicly & property is sold to highest bidder. Auctioneer is an agent of seller governed by the Law of Agency. He may sell his own property as principal & need not disclose this fact that he is so selling.
- Legal Rules of Auction sale to regulate the sale by auction:

#### **a) Where goods are sold in lots**

- Each lot is prima facie deemed to be subject of a separate contract of sale.

#### **b) Completion of contract of sale**

- Sale is complete when auctioneer announces its completion by fall of hammer or in any other customary manner. Until such announcement, any bidder may retract from his bid.

#### **c) Right to bid may be reserved:**

- It may be reserved expressly by or on behalf of seller & where it is done so, Seller or any one person on his behalf may bid at the auction.

#### **d) Where the sale is not notified by seller**



- Where sale is not notified, it shall not be lawful for seller to bid himself or to employ any person to bid, or for auctioneer knowingly to take any bid from seller or any such person, & any sale contravening this rule may be treated as fraudulent by buyer.

**e) Reserved price**

- The sale may be notified to be subject to a reserve or upset price.

**f) Pretended bidding**

- Seller use pretended bidding to raise the price, Sale is voidable at option of buyer.

**Inclusion of Increased or Decreased Taxes in Contract of Sale (Section 64A)**

- Where after a contract has been made but before performance, tax revision takes place i.e. tax is being imposed, increased, decreased or remitted, Parties would become entitled to read the price of goods accordingly.
- Following taxes are applied on the sale or purchase of goods:
  - Any duty of customs or excise on goods,
  - Any tax on the sale or purchase of goods
- Buyer would have to pay increased price where tax increases & may derive benefit of reduction if taxes are curtailed.
- The effect of provision can, however, is excluded by an agreement to the contrary.

## Chapter - 6

### The Companies Act, 2013

#### Basics

- Contains - 470 sections, 7 schedules, 29 chapters
- Aim - To improve corporate governance, simplify regulations, strengthen minority interest
- **Applicability -**

a) Companies Incorporated under this act or under previous company law	b) Insurance company	c) Banking company
d) Company engaged in generation or supply of electricity	e) Any other company governed by any special act for the time being in force	f) Any other body corporate specified by CG.
<b>Note:</b> In case of (b), (c), (d) - Except where provision inconsistent with IRDA Act, 1999/ Banking Regulation Act, 1949/ Electricity Act, 2003		

#### Meaning & Features of Company

**Definition** - Section 2(20) of the Companies Act, 2013 defines the term 'company'. "Company means a company incorporated under this Act or under any previous company law".

#### Features of a Company

##### **1) Separate Legal Entity:**

- When a company is registered, it is clothed with a legal personality (Same rights & powers)
- Its existence is distinct and separate from that of its members.
- Company can own property, have bank a/c, raise loans, incur liabilities & enter into contracts.
- It is at law, a person, which is different from the subscribers to the MOA.
- 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.
- Shareholders are not owners of company's capital & assets even though contributed by them.
- Member doesn't even have an insurable interest in the property of the company

**Case Law:** Macaura Vs Northern Assurance Co. Ltd. (1925)

##### **2) Perpetual Succession:**

- Members may die or change, but the company goes on till it is wound up
- Shares of the company may change hands infinitely but that does not affect the existence.

- Since a company is an artificial person created by law, law alone can bring an end to its life.
- Its existence is not affected by the death or insolvency of its members.

### 3) Limited Liability

- Limited liability company - The liability of the members limited to the extent of nominal value of shares held by them. (Max liability - Up to the unpaid value of shares)
- Company limited by guarantee - Amount guaranteed by them and that too only when the company goes into liquidation.
- Unlimited company, the liability of its members is unlimited as well.

### 4) Artificial Legal Person:

All points of Separate legal entity plus:

- It can do everything which any natural person can do except be sent to jail, take an oath, marry or practice a learned profession.
- Company is an artificial person, it can act only through some human agency, viz., directors.
- Directors act as its agency, but they are not the "agents" of the members of the company.
- For authentication, directors can either on their own or through the common seal

### 5) Common Seal:

- Company works through the agency of human beings. Common seal is the official signature which is affixed by the officers & employees of the company on its every document.
- Common seal is the symbol of its incorporation.
- The Companies (Amendment) Act, 2015 has made the common seal optional
- The documents which need to be authenticated by a common seal will be required to be so done, only if the company opts to have a common seal.
- In case a company does not have common seal, Authorization shall be made by two directors or by a director and the Company Secretary, wherever the company has appointed CS.

### Corporate Veil Theory

- Members of a company are shielded from liability connected to the company's actions.
- Company incurs any debts or contravenes any laws, the corporate veil concept implies that members should not be liable for those errors.
- Thus, the shareholders are protected from the acts of the company.
- Shareholder can't be held liable for acts of company even though he holds entire share capital.

**Case Law:** Salomon Vs. Salomon and Co Ltd.

### Lifting of Corporate Veil

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

Only in following circumstances, the Courts are willing to lift the corporate veil:

**1) Determine the character of the company** - Daimler Co. Ltd. vs. Continental Tyre & Rubber Co (Test of control is adopted to determine company as friend or foe)

**2) To protect revenue/tax** - Dinshaw Maneckjee Petit (Corporate entity is used to evade or circumvent tax, court will disregard the corporate entity)

**3) To avoid a legal obligation** - Workmen Employed in Associated Rubber Industries Limited, Bhavnagar vs. The Associated Rubber Industries Ltd., Bhavnagar and another (New company is created to reduce the gross profit)

**4) Formation of subsidiaries to act as agents** - Merchandise Transport Limited vs. British Transport Commission (1982) (Parent & Subsidiary are treated as one commercial unit)

**5) Company formed for fraud/improper conduct or to defeat law** - Gilford Motor Co. vs. Horne (Device of incorporation is adopted for some illegal or improper purpose)

### Classes of Companies Under the Act (16 Types)

#### On the basis of liability:

##### **1) Company limited by shares [Section - 2(22)]:**

- when 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.
- Shareholder's separate property cannot be encompassed to meet the company's debt.
- Ownership of the assets remains with the company, because of its nature as a legal person. Shareholders are not the co-owners of the assets even though contributed by them.
- Rights & duties of a shareholder as co-owner is measured by his shareholdings.

##### **2) Company limited by guarantee [Section 2(21)]**

- Liability of its members limited to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of winding up.
- Members cannot be called upon to contribute beyond that stipulated sum.
- It does not raise its initial working funds from its members. Useful only where no working funds are needed or where these funds can be held from other sources like donation, etc.
- The common features between a 'guarantee company' and 'the company having share capital' are legal personality and limited liability. Both of them have to state in their memorandum that the members' liability is limited.

- Point of distinction is Guarantee co. members may be called upon to discharge their liability only after commencement of winding up, but Company Ltd by shares may be called upon to do so at any time, either during the company's life-time or during its winding up.

**Case Law:** In Narendra Kumar Agarwal vs. Saroj Maloo,

### 3) Unlimited company [Section 2(92)]

- Company not having any limit on the liability of its members.
  - Liability of a member ceases when he ceases to be a member.
  - Liability extends to whole amount of the company's debts and liabilities. (Claim Contribution)
  - So long as the company is a going concern - the liability on the shares is the only liability.
  - Creditors can institute proceedings for winding up of the company for their claims.
- The official liquidator may call the members for their contribution which can be unlimited.

#### On the basis of members:

### 1) One person company [Section 2(62)]

- Companies Act, 2013 defines OPC as a company which has only one person as a member.
- OPC is a private Ltd co. with minimum paid up share capital prescribed and having one member.
- Member can be the sole member and director of OPC.
- Minimum paid up capital - no limit prescribed.
- Memorandum shall indicate the name of the other person, who shall, in the event of subscriber's death or his incapacity to contract, become the member of OPC.
- Other person shall give his prior written consent in prescribed form and the same shall be filed with Registrar at the time of incorporation of company. (Right to withdraw may be given)
- At any time, member of opc can change the name of such other person by giving notice to co. & co. shall intimate the same to Registrar. (Such change is not deemed to be alteration of MOA)
- Only a natural person who is an Indian citizen whether resident in India or otherwise-
  - ✓ shall be eligible to incorporate a One Person Company;
  - ✓ shall be a nominee for the sole member of a One Person Company.

**"Resident in India" means** a person who has stayed in India for a period of not less than one hundred and twenty days during the immediately preceding financial year.

- No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.
- No minor shall become member or nominee of OPC or can hold share with beneficial interest.
- OPC can't be incorporated or converted section 8 co. Can be converted to private or public co.
- OPC can't carry out Non-Banking Financial Investment activities including investment in securities of any body corporate.

### 2) Private Company [Section 2(68)]



- Means a company having a minimum paid-up share capital prescribed, and which by its articles,
  - restricts the right to transfer its shares;
  - except in case of OPC, limits the number of its members to two hundred;
  - prohibits any invitation to the public to subscribe for any securities of the company;
- Provided, where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:
- Following shall not be included in the number of members
  - persons who are in the employment of the company; and
  - persons who, having been formerly in the employment of the company, have continued to be members after the employment ceased,
- Number of members - Min - 2, Max - 200, OPC - 1
- Small company & One person company can be formed as private company.

### **Small Company [Section 2(85)]**

- means a company, other than a public company whose
  - PUSC does not exceed 4 crore rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
  - turnover of which as per profit and loss account for the immediately preceding financial year does not exceed Forty crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees;
- Exceptions: This clause shall not apply to (a) holding company or a subsidiary company (b) section 8 company (c) a company or body corporate governed by any special Act.

### **3) Public company [Section 2(71)]**

- means a company which is not a private company & has minimum PUSC, prescribed
- Provided that a company which is a subsidiary of a company, shall be deemed to be public company even where such subsidiary company continues to be a private company in its articles;
- Shares freely transferable.
- Number of members - Min - 7, Max - No limit

### **On the basis of control:**

#### **1) Holding and subsidiary companies [Section 2(46)] & [Section 2(87)] respectively.**

- Holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies. (Company includes body corporate)
- Subsidiary company in relation to any other company (that is to say the holding company), means a company in which the holding company,
  - controls the composition of the Board of Directors;
  - or 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.



- Controls the BoD means that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
- A Company shall be deemed to be a subsidiary company of the holding company even if the control is of another subsidiary company of the holding company.
- Private company, which is subsidiary of a public company shall be deemed to be public company
- Holding companies shall not have layers of subsidiaries beyond numbers as may be prescribed.

## **2) Associate company [Section 2(6)]**

- 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;

### **On the basis of access to capital:**

#### **1) Listed company [Section 2(52)]**

- Company which has any of its securities listed on any recognised stock exchange.

#### **2) Unlisted company**

- Company other than listed company.

### **Other Companies:**

#### **1) Government company [Section 2(45)]**

- Any company in which not less than 51% of the PUSC is held by Central Government, or by any State Government or Governments, or partly by Central and partly by one or more State Governments, & includes subsidiary of such a Government company.
- PUSC shall be construed as "total voting power", where shares with differential voting rights have been issued.

#### **2) 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.

#### **3) Section 8 Company (Charitable objects)**

- promote the charitable objects & intends to apply its profit in promoting its objects and prohibiting the payment of any dividend to its members.

Can call it's general meeting in 14 days instead of 21 days.

A partnership firm can also be a member of Section 8 company.

- License - Section 8 allows the CG to register person or association of persons as a company with limited liability without the addition of words 'Limited' or 'Private limited' to its name. Registrar on application will register the company and it will enjoy privileges of limited co.
- Revocation of license - The CG may by order revoke the licence of the company where the company
  - contravenes any of the requirements or conditions subject to which a licence issued or
  - where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest,

On Revocation - Registrar shall put 'Limited' or 'Private Limited' to its name.

Before Revocation - CG must give a written notice of its intention & opportunity of being heard.

- Order of the Central Government: Where a licence is revoked, CG may in the public interest order to amalgamate with another company registered under this section having similar objects, to form a single company (with such conditions as CG deem fit) or wound up.
- Penalty/punishment in contravention of any of the requirements of this act:  
Company - Not less than 10 lakhs but may extend to 1 crore and  
Director & Every officer in default - Fine not less than 25 thousand but may extend to 25 lakhs. (If fraud, liable under section 447)

#### 4) Dormant company (Section 455)

- 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 Registrar to get the status.
- "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.
- Significant accounting transaction means any transaction other than
  - (a) payment of fees by a company to the Registrar
  - (b) payments made by it to fulfil the requirements of this Act or any other law
  - (c) allotment of shares to fulfil the requirements of this Act; and
  - (d) payments for maintenance of its office and records.

#### 5) Nidhi Companies [Section 406(1)]

Nidhi Companies are created for cultivating the habit of thrift and savings amongst its members.

#### 6) Public Financial Institutions (PFI) [Section 2(72)]

- Following institutions are to be regarded as public financial institutions
  - LIC of India, established under the Life Insurance Corporation Act, 1956;
  - Infrastructure Development Finance Company Limited,
  - specified company referred to in the Unit Trust of India
  - institutions notified by the CG under Companies Act, 1956 so repealed
  - institution notified by the CG in consultation with the RBI
- No institution shall be so notified unless -
  - it has been established or constituted by or under any Central or State Act
  - Not less than 51% of PUSC is held or controlled by Central or by any State Government or Governments or partly by Central and partly by one or more State Governments.

### **Mode of Registration/Incorporation of Company**

#### **Promoters [Section 2(69)]**

- Means a person who has been
  - named as such in a prospectus or is
  - identified by the company in the annual return referred to in section 92; or
  - who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
  - in accordance with whose advice, directions, or instructions the BoD is accustomed to act.
- Persons who form the company are known as promoters. It is they who conceive the idea of forming the company. They take all necessary steps for its registration.  
However, Persons acting only in a professional capacity are not regarded as promoters.

#### **Formation of company (Section - 3)**

- Public company - 7 or more persons, Private company - 2 or more persons, One person company - One person can form a company for any lawful purpose by subscribing their names to MOA.

#### **Incorporation of Company (Section - 7)**

Procedure to be followed for incorporation of a company.

- File the following documents to the registrar of the registered office jurisdiction
  - the memorandum and articles of the company duly signed by all the subscribers
  - Declaration by person who is engaged in formation of the company and by a person named in the articles that all the requirements of this Act and the rules made there under in respect of registration have been complied with.
  - Declaration from each of the subscribers to the memorandum and first directors that
    - ✓ he is not convicted of any offence in connection with promotion, formation or management of any company, or

- ✓ he has not been found guilty of any fraud or misfeasance or breach of duty to any company during the last five years,
- ✓ that all the documents filed with the Registrar contain information that is correct and complete and true to the best of his knowledge and belief.
- the address for correspondence till its registered office is established;
- the particulars of every subscriber to the memorandum along with proof of identity.
- the particulars of the interests of first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company
- Particulars provided in this provision shall be of the individual subscriber and not of professional engaged in the incorporation
- Issue of certificate of incorporation on registration: Registrar shall register all the documents and information in the register and issue a certificate of Incorporation.
- Allotment of Corporate Identity Number (CIN): Registrar shall allot to the company a CIN number, which shall be a distinct identity for the company on & from date mentioned in CoI.
- Maintenance of copies of all documents and information: Company shall maintain and preserve at its RO copies of all documents & information as originally filed till its dissolution.
- Furnishing of false or incorrect information or representation or suppression of material fact at the time of incorporation - If any person furnishes any false or incorrect particulars or suppresses any material information which he is aware or, in any of documents filed with the Registrar in relation to the registration, he shall be liable for action of fraud u/s 447.
- Company already incorporated by above (Post Incorporation): Where, at any time after the incorporation if the above is proved, then the promoters, first directors & the persons making declaration under this section shall be liable for fraud under section 447.
- Order of the Tribunal: Company has been incorporated by above (F/I/R/S) , then the Tribunal may, on an application made to it, on being satisfied that the situation so warrants, -
  - pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum & articles, in public interest or in the interest of the company and its members and creditors; or
  - direct that liability of the members shall be unlimited; or
  - direct removal of the name of the company from the register of companies; or
  - pass an order for the winding up of the company; or
  - pass such other orders as it may deem fit

Provided that before making any order, Company shall be given reasonable opportunity of being heard & the Tribunal shall take into consideration the transactions entered into by the company,

**Simplified Proforma for Incorporating Company Electronically (SPICe)**

MCA has taken various initiatives for ease of business. It has simplified the process of filing of forms for incorporation of a company through SPICe.

**Effect of Registration of Company (Section 9)**

- From the date of incorporation mentioned in CoI, It shall be a body corporate by the name contained in the memorandum.
- All points of Separate Legal Entity
- There comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association
- Company may purchase all shares of another company but it will not end the corporate character of another company and each company is a separate juristic entity
- Mere fact that the entire share capital has been contributed by the CG and all its shares are held by the President of India does not make any difference in the position of company and it does not make a company an agent either of the President or the Central Government

**Effect of Memorandum & Articles when registered (Section 10)**

- Memorandum & articles when registered, shall bind the company and members as if they respectively had been signed an agreement to observe all the provisions of MoA & AoA
- All monies payable by any member to company under M/A shall be a debt due from him to co.

**Classification of Capital**

- Capital means share-capital, divided into shares of fixed amount.
- Contributions of persons to the common stock of company form the capital.
- Proportion of the capital to which each member is entitled, is his share.
- A share is not a sum of money; it is rather an interest made up of various rights.

**1) Nominal or authorised or registered capital [Section 2(8)]**

- As is authorised by memorandum to be the maximum amount of share capital of the company.
- It is to be registered being max amount authorised to raise & upon which stamp duty is paid.
- Usually fixed estimated amount, company will need including working capital & reserve capital.

**2) Issued capital [(Section 2(50)]**

- Means such capital as the company issues from time to time for subscription.
- Part of authorised capital offered by company for subscription and includes the shares allotted for consideration other than cash.
- Schedule III makes it obligatory to disclose its issued capital in balance sheet.

**3) Subscribed capital [(Section 2(86)]**



- Means such part of capital which is subscribed by the members of a company.
- It is the nominal amount of shares taken up by the public.
- Notice/Advertisement/Business letter/Bill head/letter paper/other official communication issued shall state the Authorised, Subscribed and paid-up capital in conspicuous characters.
- Default - Company and Every officer - penalty 10000 & 5000 respectively. [Section 60].

#### **4) Called-up capital [Section 2(15)]**

- such part of capital, which has been called for payment on shares issued.

#### **5) Paid-up capital**

- Total amount paid or credited as paid up on shares issued. Called up less calls in arrears.

#### **Shares [Section 2(84)]**

- 'Share' means a share in the share capital of a company and includes stock.
- It represents proportion of the interest of the shareholders measured by a sum of money.
- Shares/Debentures/Other interest of members are a movable property (Manner as per AOA)
- Shares shall be numbered & distinguished by its distinctive number. (Not applicable for holder of beneficial interest in the records of a depository)

#### **Kinds of share capital (Section 43)**

1) Equity share capital - Means all share capital which is not preference share capital

- Equity share capital with voting rights;
- Equity share capital with differential rights as to dividend, voting or otherwise

2) Preference Share Capital - Means that 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 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.

**Exception:** In case of private company - Section 43 shall not apply where MOA & AOA provides.

#### **Memorandum of Association**

- It is in fact its charter; it defines its constitution and the scope of the powers of the co.
- It is the very foundation on which the whole edifice (structure) of the company is built.
- Object of registering a memorandum of association:
  - Contains object for which company is formed, identifies possible scope of its operations beyond which it cannot go. (If it does so, It will be ultra virus the company & void)



- Enables shareholders, creditors & all those who deal with company to know what its powers are and what activities it can engage in.
- Memorandum is a public document (Sec - 399) Consequently, every person entering into a contract with company is presumed to have the knowledge of conditions contained therein.
- Shareholders must know purposes for which his money can be used & what risks he is taking in making the investment.
- As per Section 4, Memorandum of a company shall be drawn up in such form as given in tables.
  - Table A - MOA of a company limited by shares.
  - Table B - company limited by guarantee and not having a share capital.
  - Table C - company limited by guarantee and having a share capital.
  - Table D - Unlimited company not having share capital.
  - Table E - Unlimited company and having share capital.

**Note:** The MOA & AOA of a company must be as closed to model forms, as possible.

- Memorandum must be printed, divided into paragraphs, numbered consecutively, and signed by at least seven persons (two in the case of a private company and one in the case of One Person Company) in the presence of at least one witness, who will attest the signatures.
- Company being a legal person can through its agent, subscribe to the memorandum. Minor cannot be a signatory as he is not competent to contract. Guardian of a minor who subscribes will be deemed to have subscribed in his personal capacity.
- MOA cannot contain anything contrary to provisions of the Companies Act. (No legal effect) All other documents of company must comply with provisions of the Memorandum.
- Content of the memorandum: The memorandum of a company shall state -
  - Name Clause - Name of company with the last word "Limited" in case of a public limited company, or the last words "Private Limited" in case of a private limited company. In the case of OPC, the words "One Person Company", should be included below its name. Government company's name must end with the word "Limited". This clause is not applicable on Section 8 companies. Section 8 company shall include the words as given under The Companies (Incorporation) Rules, 2014.
  - Registered Office Clause - the State in which the RO of the company is to be situated;
  - Object Clause - Objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof

**Note:** If company has changed its activities which are not reflected in its name, it shall change name in line with activities within a period of 6 months from change of activities.

- Liability clause - Liability of members whether limited or unlimited, and also state in the case of a company limited by shares - liability is limited to the amount unpaid, & in the case of a company limited by guarantee - Amount up to which each member undertakes to contribute
  - to the assets of the company in the event of its being wound-up while he is a member at the time of winding up or within one year after he ceases to be a member before winding up for payment of debts & liabilities contracted before he ceases to be a member,
  - to the costs, charges & expenses of winding-up & for adjustment contributories.
- Capital Clause - Amount of authorized capital divided into share of fixed amounts and the number of shares with the subscribers, indicated opposite their names, which shall not be less than one share. (This clause will not apply to company not having share capital)
- Association Clause - Details of subscribers to form company. MOA shall conclude with this clause. Every subscriber to MOA shall take at least one share, and shall write against his name, the number of shares taken by him.
- Succession Clause - In the case of OPC, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

### Articles of Association

- Articles of a company are its rules & regulations framed to manage its internal affairs.
- Articles play a part subsidiary to memorandum of association.
- It provides the mode & form in which the business/changes of company is to be carried on.
- The document containing the articles of association of a company (the Magna Carta) is a business document; hence it has to be construed strictly.
- It regulates domestic management of a company and creates certain rights and obligations between the members and the company.
- Articles are the bye-laws of company according to which director & other officers are required to perform their functions as regards to management, accounts & audit of company.
- Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles
  - Contains regulations: Articles shall contain the regulations for management of company.
  - Inclusion of matters: Also contain such matters, as are prescribed under the rules. Also include additional matters as may be considered necessary for its management.
  - Contain provisions for entrenchment: Articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures which are more restrictive than special resolution, are met or complied with.

- Manner of inclusion of the entrenchment provision: Made either on formation of a company, or by an amendment in the articles agreed to by all the members in case of private company & agreed by special resolution in case of public company.
- Notice to the registrar of the entrenchment provision: Whether made on formation or by amendment, the company shall give notice to the Registrar in the manner prescribed.
- Forms of articles: Articles shall be specified in Tables, F, G, H, I & J in Schedule I.
- Model articles: Company may adopt all or any of the regulations contained in the model articles applicable to such company. (If do not exclude or modify the model applicable, it shall be applicable in same manner as if they were contained in the registered article)

### Difference between MOA & AOA

1) Objectives	2) Relationship	3) Alteration	4) Ultra Virus
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### Doctrine of Ultra Vires

- Meaning of the term ultra vires is simply "beyond (their) powers".
- Fundamental rule of Company Law that the objects can be departed from only to the extent permitted by the Act,
- The impact of ultra vires is that a company can neither be sued nor can it sue on it.
- Memorandum is a "public document", it is open to public inspection.  
Therefore, when one deals with a company is deemed to know about the powers of company. If enter into a transaction which is ultra vires the company, you cannot enforce it against it.
- An act which is ultra vires the company being void, cannot be ratified by the shareholders of the company.
- Ultra vires contract can never be made binding on the company. It cannot become "Intravires".  
Case law: Ashbury Railway Carriage and Iron Company Limited v. Riche
- When an act is performed, which though legal in itself, is not authorized by object clause of the memorandum, it is said to be ultravires the company, and hence null and void.
- An act which is ultravires, the company cannot be ratified even by the unanimous consent.
- An act which is ultravires the directors, but intravires the company can be ratified by the members of the company through a resolution passed at a general meeting.
- If an act is ultravires the Articles, it can be ratified by altering the Articles by a Special Resolution at a general meeting.

### Doctrine of Indoor Management

**Doctrine of Constructive Notice:**

Any person can inspect, make a record, get a copy or extracts of any document kept with registrar on payment of prescribed fee. (Sec - 399)

- MOA & AOA when registered become public documents, hence available for inspection
- It is therefore, the duty of every person dealing with a company to inspect its documents and make sure that his contract is in conformity with their provisions
- But whether a person reads them or not, it will be presumed that he has knowledge of the contents & also understood them in true perspective of all the documents, This kind of presumed/implied notice is called constructive notice.
- Thus, if a person enters into a contract which is beyond the powers of the company or outside the authority of directors, he cannot acquire any rights under the contract against the company.

**Doctrine of Indoor Management/ Turquand Rule**

It is the exception to the doctrine of constructive notice.

- It does not in any sense mean that outsiders are deemed to have notice of the internal affairs of the company.
- If an act is authorised by the articles or memorandum, an outsider is entitled to assume that all the detailed formalities for doing that act have been observed.

**Case Law:** Royal British Bank vs. Turquand.

**• Exceptions to the doctrine of Indoor Management:**

- Actual or constructive knowledge of irregularity: Rule does not protect any person when the person dealing with the company has notice, whether actual or constructive, of irregularity.

**Case law:** Howard vs. Patent Ivory Manufacturing Co.

- Suspicion of Irregularity: The doctrine in no way rewards those who behave negligently. Where the person dealing with the company is put upon an inquiry, it is the duty of the outsider to make the necessary enquiry.

**Case law:** Anand Bihari Lal vs. Dinshaw & Co.

- Forgery: The doctrine of indoor management applies only to irregularities which might otherwise affect a transaction but it cannot apply to forgery as it is nullity.

**Case law:** Ruben v Great Fingall Consolidated.

## **Chapter – 4 – The Indian Partnership Act, 1932**

### **Unit – 1 – General Nature of Partnership**

#### **Definition (Section - 4)**

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

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

#### **Elements of Partnership**

##### **1) Association of Two or More Persons:**

- Partnership is an association of 2 or more persons. Only persons recognized by law can enter into an agreement of partnership.
- Minor can't be a partner in a firm, but with consent of all partners, may be admitted to benefits of partnership.
- firm, since it is not a person recognized in the eyes of law cannot be a partner.
- Maximum No. of Partners - IPA - silent but section 464 of the Companies Act, 2013 put a limit of 50 partners.

##### **2) Agreement:**

- Partnership is the result of an agreement. There must be a voluntary contractual agreement.
- It may be express or implied, It may be oral or in writing.

##### **3) Business:**

- There must be some business. (Includes every trade, occupation & profession)
- Motive of business is "acquisition of gains"
- No Partnership, If no intention to carry business & to share profits.

##### **4) Agreement to Share Profits:**

- Sharing of profit is essential, No partnership where only one partner gets whole profits.
- But sharing of losses is not essential, Any manner of PSR is allowed.
- In lossess, unless otherwise agreed, these must be borne in PSR.

##### **5) Business carried on by all or any of them acting for all:**

- There should be a binding contract of mutual agency (This is cardinal principal of partnership)
- Act of one partner in the course of business is an act of all partners.
- Each partner is principal as well as the agent for all other partners.
- Agent as he can bind other partners and principal as he is bound by other partners.



- True test of partnership is mutual agency rather than sharing of profits. (No mutual agency, No partnership)

**In KD Kamath & Co. - SC has held two essential conditions for partnership**

- Sharing of profits as well as losses and
- Business must be carried on by all or any of them acting for all.
- If exclusive power & control by agreement is vested with one partner, These are not destructive of partnership theory if above 2 conditions are satisfied.

### **True Test of Partnership (Section - 6)**

#### **1) There was an agreement between all the persons concerned; (Section - 5)**

- Agreement/Relationship is created by agreement and not by status.
- Member of HUF or a Burmese buddhist husband and wife are not partners in business.

#### **2) Agreement was to share the profits of a business and**

- 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.
- The receipt of profits or payment contingent upon earning does not itself make the following persons as partners of the business
  - by a lender of money to persons engaged or about to engage in business
  - by a servant or agent as remuneration
  - by a widow or child of a deceased partner, as annuity, or
  - by a previous owner or part owner of business, as consideration for the sale of the goodwill or share thereof.
- Sharing of profit is an essential element to constitute a partnership. But, it is only a prima facie evidence and not conclusive evidence.
- When there is no specific agreement as to determination of partnership, Refer Sec - 6.
- All relevant facts such as written or verbal agreement, real intention, conduct of the parties, other surrounding circumstances etc., are to be considered while deciding the partnership.

#### **3) Business was carried on by all or any of them acting for all (Point 5 of elements)**

**In Santiranjan Das Gupta Vs. Dasyran Murzamull (SC looked to conclude no partnership)**

- Parties have not retained any record of terms and conditions of partnership.
- Partnership business has maintained no accounts of its own, which would be open to inspection
- No account of the partnership was opened with any bank.
- No written intimation was conveyed to Deputy Director of Procurement w.r.t new partnership.

### **Partnership Vs. Joint Stock Company**



1) Legal Status	2) Agency	3) Profit distribution	4) Extent of Liability
5) Property	6) Transfer of Shares	7) Management	8) Registration
9) Winding Up	10) No. of Members	11) Duration of Existence	

### Partnership Vs. Club

1) Definition	2) Relationship	3) Interest in Prop.	4) Dissolution
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### Partnership Vs. Hindu Undivided Family

1) Mode of Creation	2) Death of Member	3) Management	4) Authority to bind
5) Liability	6) Closure of A/cs	7) Governing Law	8) Capacity of minor
9) Continuity	10) No. of Members	11) Share in the business	

### Partnership Vs. Co-ownership

1) Formation	2) Implied Agency	3) Nature of Interest	4) Trf of Interest
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### Partnership Vs. Association

1) Meaning	2) Example
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### Kinds of Partnership

#### 1) Partnership at Will (Section - 7)

- No fixed period has been agreed upon for the duration of the partnership; and
- No provision made as to the determination of the partnership.
- If there is an agreement either for duration determination, then it is not partnership at will.
- Where a partnership entered into for a fixed term is continued after the expiry of such term, it is to be treated as having become a partnership at will.
- A partnership at will may be dissolved by any partner by giving notice in writing to all the other partners of his intention to dissolve the same.

#### 2) Partnership for a fixed period

- Provision is made by contract for duration of the partnership
- Created for a particular period of time, Ends after expiry of the fixed period.

#### 3) Particular partnership

- Organized for the prosecution of single adventure or conduct of a continuous business

- person becomes a partner with another person in any particular adventure or undertaking
- Subject to any agreement, dissolved by the completion of the adventure or undertaking.

#### 4) General partnership

- Constituted w.r.t the business in general. (Business is not known)
- Different from particular partnership & LLP.
- Liability of partner in particular partnership extends only to that adventure, but not so in case of general partnership.

#### Partnership Deed

- Partnership is the result of an agreement
- No formalities required, may be in writing or verbal, but desirable in writing to avoid disputes.
- Contains various T&C as to the relation of partners to each other is called partnership deed.
- Should be drafted with care and stamped according to the Stamp Act, 1899.
- If Immovable property, Instrument must be in writing, stamped & registered.

#### Contain the following information's:

1) Name of the partnership firm.	2) Names of all the partners.
3) Nature & Place of business of firm	4) Date of commencement of partnership.
5) PSR of partners	6) Admission & Retirement of partner
7) Rates of Int on capital, drawings & Loans.	
8) Provisions for settlement of accounts in the case of dissolution of the firm.	
9) Provisions for expulsion of a partner in case of gross breach of duty or fraud.	
Note: A partnership firm may add or delete any provision according to the needs of the firm.	

#### Types of Partners:

##### 1) Active or Actual or Ostensible partner

- Acts as an agent of other partners for all acts done in the ordinary course of business
- On retirement, he must give a public notice in order to absolve himself of liabilities.

##### 2) Sleeping or Dormant Partner:

- Share Profit & Losses but are not liable to third parties.
- Also, no public notice required on retirement.

##### 3) Nominal Partner:

- lends his name to the firm, without having any real interest in it,

- Neither invest, nor takes any part in business but are liable to third parties for all acts.

#### **4) Partner in profits only:**

- Entitled to share the profits only without being liable for the losses
- Also liable to third parties for all acts.

#### **5) Incoming partners:**

- Admitted as a partner into an already existing firm with consent of all the existing partners
- Remains liable to third parties for all acts of firm until public notice is given of his retirement.

#### **6) Outgoing partners:**

- Partner who leaves a firm in which the rest of the partners continue to carry on business
- Remains liable to third parties for all acts of firm until public notice is given of his retirement.

#### **7) Partner by holding out/Partnership by estoppel (Section 28):**

- Where a man holds himself out as a partner, or allows others to do it, he is then stopped from denying the character he has assumed and upon the faith of which creditors may be presumed to have acted.
- A person may himself, by his words or conduct have induced others to believe that he is a partner or he may have allowed others to represent him as a partner.
- Only the person to whom the representation has been made and who has acted thereon that has, right to enforce liability arising out of 'holding out'.
- It is not necessary to show that purpose of representation was a fraudulent intention.
- Section 28 is also applicable to a former partner who has retired from the firm without giving proper public notice of his retirement.

In such cases a person who, even subsequent to the retirement, give credit to the firm on the belief that he was a partner, will be entitled to hold him liable.

## **Chapter – 4 – The Indian Partnership Act, 1932**

### **Unit – 2 – Relations of Partners**

#### **Relation of Partners to One Another**

##### **1) General Duties of Partners (Sec - 9)**

- > Carry business on greatest common adv.
- > Render full information
- > Utmost good faith
- > Render a/cs to each other (Kept by one, prima facie proper person to explain)

##### **2) Duty to indemnify for Loss caused by fraud (Sec - 10)**

- > Make good the loss sustained by firm
- > Amount bought - Divided between partners
- > If fraud, Co-partners can throw whole consequences upon him.

##### **3) Rights & Duties by Contract (Sec - 11)**

- > Subject to the provisions of this Act determined by contract
- > Varied by consent of all the partners

##### **4) Conduct of the Business (Sec - 12)**

- i) Take part in the conduct of business
- ii) Attend diligently in the conduct of business
- iii) Right to be consulted
  - > Difference - Majority but no change in the nature of business without the consent of all.
- iv) Access to books of accounts (allowed to all)
- v) Right of LR/H/A
  - > Access, Inspect, take copies of BoA.

##### **5) Mutual Rights & Duties (Sec - 13)**

###### **i) Right to remuneration**

- > No remuneration for taking part in business subject to express agreement or dealings.
- But, If customary to pay remuneration, partner can claim it even without

###### **ii) Right to share Profits**

- > If no agreement is made, partners will share profit and loss equally. If agreement made, It will prevail. Also there is no connection between PSR and capital contribution.

###### **iii) Interest on Capital**

- > Following elements required for interest on capital -

(i) Express agreement or Practice of partnership (ii) Trade custom (iii) Statutory provision

###### **iv) Interest on advances**

- > Claim interest @6% per annum on amount paid in addition to capital contribution.

-> It will keep running even after dissolution and up to the date of payment.

**v) Right to be indemnified**

-> In respect of payments made and liabilities incurred in ordinary conduct & emergency.

**vi) Right to indemnify the firm**

-> For loss caused by it by wilful misconduct of the business of the firm.

**Partnership Property (Section - 14)**

The property which is deemed as belonging to the firm in the absence of any contract

- All property, rights and interests which partners may have brought into the common stock as their contribution to the common business;
- All the property, rights and interest acquired or purchased by or for the firm
- Goodwill of the business.

**Note:** Whether it is property of firm or not will depend upon the intention of the partners. Partners may by agreement convert exclusive property, into a partnership property.

**About Goodwill**

- It is the value of reputation of a business house in respect of profits expected in future over and above the normal level of profits
- Partnership firm is dissolved every partner has a right, to have the goodwill of business sold
- It can be sold separately or along with the other properties of the firm.
- Agreement in restraint of trade in case of sale of goodwill is valid if the restrictions imposed are reasonable.

**Application of Property of the firm (Section - 15)**

- Property of the firm shall be held and used exclusively for the purpose of the firm.
- In partnership, there is a community of interest which all the partners take in the property.
- Partner doesn't have any proprietary interest in the assets of the firm.
- Every partner of the firm has a right see that all the assets of the partnership are applied to and used for the purpose of partnership business.

**Personal Profit Earned by Partners (Section - 16)**

- 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 firm or the firm name, he shall account for that profit and pay it to firm, subject to contract.
- 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.

**Rights & Duties of Partners after a change in the Firm (Section 17)**

According to section 17, subject to contract between the partners-

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

The rights & duties will be the same as those as it was in it's previous operations.

### Relation of Partners to Third Parties

#### **1) Partner to be an agent of firm (Sec - 18)**

- > Character of both principal & Agent
- > Difference between mere agent and partner agent is community of interest.
- > Agent only for the purpose of business of the firm.

#### **2) Implied authority of partner as agent of the firm (Sec - 19)**

- > 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.
- > Authority to bind the firm is called Implied Authority
- > In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower
  - i) Submit a dispute relating to the business to arbitration
  - ii) Open a banking account on behalf of the firm in his own name
  - iii) Compromise or relinquish any claim or portion of a claim by the firm;
  - iv) Withdraw a suit or proceedings filed on behalf of the firm;
  - v) Admit any liability in a suit or proceedings against the firm;
  - vi) Acquire immovable property on behalf of the firm;
  - vii) Transfer immovable property belonging to the firm; and
  - viii) Enter into partnership on behalf of the firm.

#### **Mode of Doing Act to bind the firm (Sec - 22)**

In order to bind a firm. the act or instrument executed should be executed in the firm name with an intention to bind the firm.

#### **Implied authority have following restrictions:**

- > Act done must be within scope of authority and relate to usual business of firm.
- > Act is done for normal conduct of business
- > Act to be done in the name of the firm with an intention to bind the firm

#### **If partnership be of a general commercial nature,**

- > he may pledge or sell the partnership property;
- > he may buy goods on account of the partnership;
- > he may borrow money, contract debts and pay debts on account of the partnership;
- > he may draw, make, sign, endorse, transfer, negotiate and procure to be discounted, Promissory notes, bills of exchange, cheques and other negotiable papers in the name and on



account of the partnership.

### 3) Extension & Restriction of Partners Implied Authority (Sec - 20)

- > Restrictions imposed on the implied authority of a partner by agreement shall be effective against a third party, when third party knows about it and third party does not know that he is dealing with a partner in a firm.
- > Any one partner, or even a majority of the partners, cannot restrict or extend the implied authority, Consent of all partners is required for the restriction.

### 4) Partner's Authority in an Emergency (Sec - 21)

- > A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

### Effect of Admissions by a Partner (Section - 23)

- Partners, as agents can make binding admissions but only in ordinary course of business.
- Admission will not bind the firm if the authority is limited and other party knows about it.

### Effect of Notice to Acting Partner (Section - 24)

- The notice to a partner, who habitually acts in business of the firm, relating to affairs of the firm, operates as a notice to the firm. Notice to one is equivalent to notice to all.
- Exception - Fraud, committed by or with the consent of that partner.
- Notice must be actual and not constructive
- Must be received by a working partner and not by a sleeping partner
- Notice must relate to firm's business then only it will constitute notice to firm.

### Liability to third parties (Section - 25 to 27)

#### 1) Liab of partner for acts of the firm (Sec - 25)

- > Partners are jointly & severally liable for all acts which comes under the scope of their express or implied authority because the act is done towards business of firm.
- > Act means rights enforceable by or against the firm.
- > Act to be enforceable must

#### 2) Liab of firm for wrongful acts of partner (Sec - 26)

- > Firm is liable to the same extent as partner for any loss or injury caused to third party by the wrongful act of partner done in the ordinary course of business & within authority of partner.
- > Method employed by partner in doing wrongful or unauthorised act would not

#### 3) Liab of firm for mis-application by partner (Sec-27)

- > If partner acts within the authority and received money or property of third party and misapplies it (Not necessary that money should come in its custody)
- OR
- If money or property comes into the custody of firm and

have been done while he was a partner.

affect the question.  
-> All partners liable to third party for loss or injury caused to him by the act of any partner acting in ordinary course.

misapplied by any partner  
The firm will be liable in both the cases.  
-> If receipt was not in authority of partner, It can't be said that money received by firm, hence firm not liable unless money comes into firm's custody or control.

### Rights of Transferee of a Partner's Interest (Section - 29)

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

#### **Rights of such a transferee**

i) During the continuance of partnership, transferee is only entitled to receive share of profit & he is bound to accept it, cannot challenge it.

- **Such transferee is not entitled to**

(a) Interfere with conduct of business (b) Require accounts (c) Inspect books

ii) **On Dissolution of firm or Retirement of transferring partner, Transferee is entitled**

(a) To receive the share of assets of firm to which transferring partner was entitled

(b) For the purpose of ascertaining share, entitled to accounts as

**Note:** Partner can transfer it's share but only after approval from other all partners.

### Minors admitted to the benefits of partnership (Section - 30)

- Minor cannot be bound by contract because a minor's contract is void.
- Minor can't become partner in partnership firm as he is incompetent to contract but he can be admitted to the benefits of partnership with the consent of all partners under section 30.

#### **Rights of a Minor**

- > Agreed share of profit
- > Access, Inspect & copy of accounts of the firm
- > Sue the partners for A/cs or payment of his share but only when he is

#### **Liabilities of Minor**

##### **Before Majority**

- > Confined only to the extent of his share of profits & property
- > No personal liability

##### **After Majority**

- > Within 6 months of majority or after knowledge that he is admitted to the benefits of partnership, Whichever date is later - Decide whether to remain partner or leave the firm

severing his connection with the firm.  -> On majority, may within 6 months elect to become partner or not to become. If become a partner - Entitled to share as earlier If does not - His share is not liable for any act of firm after public notice.	for debts of the firm  -> Can't declare as insolvent but if firm is declared insolvent then minor's share vest with the official assignee/receiver. (Can claim from official assignee)	-> If became partner wilfully or failure to give public notice - Personally liable to third parties for all acts of firm since he was admitted to the benefits of partnership & his share remains same as earlier.  -> Not to become partner - Rights & Liabilities remains same up to date of public notice, Failure to give it within 6 months will make minor liable as partner. - Share not liable after public notice. - Can sue partners for shares. Note: Notice to registrar on becoming partner or not to become partner is mandatory.
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### **Legal consequences of Partner Coming in & Going out (Section - 31 to 35)**

- Any change (Admission, Retirement, Expulsion, Insolvency etc) in relationship of partner will result in reconstitution of firm.

### **Introduction of a partner (Section -31)**

- No new partners can be introduced into a firm without the consent of all existing partners.

### **Rights and liabilities of new partner:**

- Liabilities ordinarily commence from the date when he is admitted, unless he agrees to be liable for obligations incurred by the firm prior to the date.
- The new firm may agree to assume liability for the existing debts of the old firm, and creditors may agree to accept the new firm as their debtor and discharge the old partners.
- The creditor's consent is necessary in every case to make the transaction operative.
- Novation is the technical term in a contract for substituted liability.
- But a mere agreement amongst partners cannot operate as Novation.
- Partnership of two partners automatically dissolved by death of one (Sec 31 will not apply)

### **Retirement of a Partner (Section -32)**

- A partner may retire - (i) with the consent of all other partners ii) By express agreement iii) By giving notice in writing to all other partners of his intention to retire in case of partnership at will.

- Retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm
- Partners continue to be liable to third parties before retirement, until public notice is given. (Not liable if third party deals with firm without knowing that he was a partner.)
- In the event of retirement, partnership business will not come to an end. (Supreme court in Vishnu Chandra Vs Chandika Prasad)

### **Expulsion of a Partner (Section - 33)**

- **If all these conditions are not present, the expulsion is not deemed to be in bona fide interest**
    - i) Power of expulsion must have existed in a contract between the partners
    - ii) the power has been exercised by a majority of the partners; and
    - iii) it has been exercised in good faith.
  - **The test of good faith as required under Section 33(1) includes three things:**
    - i) Expulsion must be in the interest of the partnership
    - ii) Partner to be expelled is served with a notice
    - iii) He is given an opportunity of being heard.
- If a partner is otherwise expelled, the expulsion is null and void.

**Note:** Expulsion doesn't result in dissolution of partnership neither invalid expulsion puts an end to the partnership, even if it is partnership at will, It will be deemed to continue as before.

### **Insolvency of a Partner (Section - 34)**

- Where a partner in a firm is adjudicated as an insolvent, he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is hereby dissolved.
- Estate of a partner so adjudicated is not liable for any act of firm & the firm is not liable for any act of the insolvent, done after the date of order of adjudication is made.

### **Effects of Insolvency**

- i) Insolvent partner cannot be continued as a partner.
- ii) He will be ceased to be a partner from the date on which the order of adjudication is made.
- iii) Estate of Insolvent partner is not liable for acts of the firm done after the date of order.
- iv) firm is also not liable for any act of the insolvent partner after the date of order.
- v) Ordinarily, insolvency of partner results in dissolution of firm; but the partners are competent to agree among themselves that the adjudication will not give rise to dissolution of firm.

### **Liability of Estate of Deceased Partner (Section - 35)**

- Ordinarily, the effect of the death of a partner is dissolution of the partnership,

- But partners are competent to agree that, death of one will not have the effect of dissolving.
- Estate of the deceased partner may be absolved from liability for the future obligations of the firm, it is not necessary to give any notice either to the public or the persons having dealings with the firm. (No public notice required in case of death)

#### **Rights of Outgoing partner to carry on Competing Business (Section - 36)**

- An outgoing partner may carry on business competing with that of the firm and he may advertise such business, but subject to contract to the contrary, he may not,
  - (a) use the firm name,
  - (b) represent himself as carrying on the business of the firm or
  - (c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.
- Agreement in restraint of trade valid if reasonable to make an agreement with partners that on ceasing of partnership, he will not carry on any similar business within a specified period or within specified local limits.

#### **Rights of Outgoing Partner in certain cases to share subsequent profits (Section - 37)**

- When a partner dies or otherwise ceased to be partner, and the remaining partners continue the business using the firm's property without settling accounts with the outgoing partner or their estate
- The outgoing partner or his estate is entitled to either:
  - a) A share in the profits earned since their exit (to the extent attributable to the use of their share in the property) Or
  - b) Interest at 6% p.a. on the amount of their share in the firm's property
- However, if the continuing partners purchase the outgoing/deceased partner's interest (and the option to do so is properly exercised), then the outgoing partner or their estate is not entitled to any further profits or interest.

#### **Revocation of Continuing Guarantee by change in firm (Section - 38)**

- A continuing guarantee given to a firm or to third party in respect of the transaction of a firm is, revoked as to future transactions from the date of any change in the constitution of the firm. (in the absence of an agreement to the contrary,



## **Chapter – 4 – The Indian Partnership Act, 1932**

### **Unit – 3 – Registration & Dissolution of a Firm**

#### **Registration of Firms (Section - 58, 59, 59A-1)**

##### **Application for Registration (Section - 58)**

- Registration of a firm may be effected at any time by sending
- by post or delivering to Registrar of the area in which any place of business situated or proposed to be situated,
- a statement in the prescribed form and fee, stating-

1) firm's name	2) Place or principal place of business	3) Names of other business places	4) Date when each partner joined
5) Full name & permanent address of partners		6) Duration of the firm	

- Statement shall be signed & verify by all partners, or by their agents specially authorised
- 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 of Firm (Section - 59)**

- Registrar is satisfied then, → record an entry of the statement in RoF & file the statement.  
→ Issue Certificate of Registration
- Effective date - Registration is deemed to be completed as soon as an application in prescribed form, fee & necessary details of partnership is delivered to Registrar.
- Recording of an entry in the RoF is a routine duty of Registrar.
- Registration may also be effected even after a suit has been filed by the firm but in that case it is necessary to withdraw the suit first and get the firm registered & then file a fresh suit.

##### **Late Registration on payment of penalty (Section - 59A-1)**

- If the statement of any firm is not sent or delivered within the time specified then, firm may be registered on payment of penalty of 100Rs per year of delay or a part thereof to Registrar.

##### **Consequences of Non-Registration (Section 69)**

- Registration of firms is not compulsory as per IPA, yet the consequences or disabilities of non-registration have a persuasive pressure for their registration

##### **1) No suit in a civil court by firm or other co-partners against third party**



- cannot bring an action against the third party for breach of contract entered
- unless the firm is registered and the persons suing are or shown in the RoF as partners

## 2) No relief to partners for set-off of claim

- If an action is brought against the firm by a third party,
- Neither the firm nor partner can claim any set-off, if the suit be valued for more than Rs 100.

## 3) Aggrieved partner cannot bring legal action against other partner or the firm:

- Partner of an unregistered firm is precluded from bringing legal action against the firm or alleged partner or have been a partner in the firm
- May sue for dissolution or for accounts & realization of his share when firm is dissolved

## 4) Third party can sue the firm - Action can be brought against the firm by a third party.

**Exceptions - non-registration of a firm does not, however effect the following rights:**

- 1) Right of third parties to sue the firm or any partner
- 2) Right of partners to sue for dissolution or settlement of A/cs or for realization of property.
- 3) Power of an Official Assignees, Receiver of Court to release the property of insolvent partner
- 4) Right to sue or claim a set-off if the value of suit does not exceed Rs 100 in value.
- 5) Right to suit and proceeding instituted by legal representatives or heirs of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

## Extra Note on Filing of Suit

- To file a suit, check if suit must be instituted by or on behalf of the firm which had been registered & person(all) suing had been shown as partner in the register of firms
- No notice to registrar required for subsequent dealings, In case business was carried on after death of one of the partners
- In case of new partner admission, notified to Registrar required who shall make a record of the notice in the entry relating to the firm in the Register of firms

## Dissolution of Firm (Section 39 to 47)

As per Section 39, Dissolution of partnership between all partners of a firm is called the 'dissolution of the firm'.

## Difference between Dissolution of Firm & Dissolution of Partnership

1) Cont. of Business	2) Winding up	3) Order of court	4) Scope
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## 5) Final closure of books of accounts

**Mode of Dissolution of Court**

Without Court Intervention/ Voluntary	With Court Intervention
1) Dissolution by Agreement (Sec - 40) → By Consent of all or subject to contract	1) Insanity/ Unsound Mind → Temporary sickness is no ground
2) Compulsory Dissolution (Sec - 41) → All partners/All except one - Insolvent → Any event making business Unlawful (Doesnot affect lawful business)	2) Permanent Incapacity → May result from physical disability or illness etc.
3) Happening of Certain Contingencies (S - 42) → Expiry of Fixed term → Completion of adventure or undertaking → Death of a partner → Adjudication of a partner as insolvent	3) Misconduct → Affect prejudicially the carrying on business → Not necessary that it is related to business → Imp is adverse effect on business
4) Notice of Partnership at Will → By any partner in writing stating intention → Date of dissolution mentioned - Same date Date not mentioned - Date of comm of notice	4) Persistent Breach of Agreement → Wilfully or persistent breach relating to management or conduct or reasonable not practical to carry on business Cases - Embezzlement, Erroneous A/c, Holding more cash than allowed, Refusal to show A/cs
	5) Transfer of Interest → Interest wholly transferred or charged
6) Continuous Perpetual Losses	7) Just & Equitable Grounds → Deadlock in management, Partners are not talking, Loss of substratum, Gambling

**Consequences of Dissolution (Sec - 45 to 55)****1) Liability for acts of partners done after dissolution (Section 45):**

- Partners continue to be liable unless public notice is given.
- Provided deceased partner estate, Adjudicated Insolvent or who is not known to the person dealing with the firm (sleeping partner) not liable as no public notice required.
- Objective of Notice - It seeks to protect third parties dealing with firm and also to protect partners of dissolved firm from liability towards third parties.

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

- Every partner or representative entitled to have property of firm to be applied in payment of debts and liabilities of firm and to have surplus distributed according to their rights.

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

- After dissolution, Authority of partner to bind the firm continues as necessary to wind up the affairs of the firm and to complete transactions begun but unfinished.
- Provided firm not liable for adjudicated insolvent & not affect liability of Partner by estoppel.

**4) Mode of Settlement of partnership a/cs (Sec - 48):** Following rules, subject to contract

- Losses including deficiencies of capital = Profits → Out of capital → Partners individually, if necessary, in proportion of PSR.
- Assets including deficiencies of capital applied = Debt of the firm to third parties → To each partner due to him from capital → To each partner due to him on account of capital → Residue if any to be divided by partner in proportion of profits

**5) Payment of firm debts and of separate debts (Section 49):**

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

- Property of the firm = payment of the debts of firm, surplus, if any partners separate debts
- Separate property of partner = Payment of his separate debts, surplus, if any, payment of debts of the firm.

# Limited Liability Partnership Act, 2008

## Basics

- Applicability - Whole of India
- Enacted to - make provisions for the formation and regulation of LLP
- LLP Act, 2008 has 81 sections and 4 schedules

First Schedule - Mutual rights and duties of partners, as well LLP and its partners where there is absence of a formal agreement

Second Schedule - conversion of a firm into LLP.

Third Schedule - conversion of a private company into LLP.

Fourth Schedule - conversion of unlisted public company into LLP.

- Administering the LLP Act, 2008 - Ministry of Corporate Affairs and the Registrar of Companies (ROC) (C.G has authority to frame rules)

## Meaning & Concept of LLP

- LLP is a new form of legal business entity with limited liability.
- Liability of the partners will be limited
- Alternative corporate business vehicle
- LLP itself will be liable for the full extent of its assets
- Allow the partners the flexibility of organising their internal structure

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

## Important Definitions

### **1) Body Corporate [(Section 2(1)(d)]**

It means a company as defined in clause (20) of section 2 of the Companies Act, 2013 and includes

- a limited liability partnership registered under this Act;
- a limited liability partnership incorporated outside India; and
- a company incorporated outside India,

**but does not include**

- a corporation sole;

- a co-operative society registered under any law for the time being in force; and
- any other body corporate (not being a company as defined in clause (20) of section 2 of the Companies Act, 2013 or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf.

## **2) Financial Year [Section 2(1)(l)]**

"Financial year", in relation to a LLP, means the period from the 1st day of April of a year to the 31st day of March of the following year.

However, in the case of a LLP incorporated after the 30th day of September of a year, the financial year may end on the 31st day of March of the year next following that year.

In keeping with the Income tax law, the financial year for LLP should always be from 1st April to 31st March each year.

**3) Foreign LLP [section 2(1)(m)]:** It means a LLP formed, incorporated or registered outside India which establishes a place of business within India.

## **4) Limited liability partnership agreement [Section 2(1)(o)]**

It means any written agreement between the partners of the LLP or between the LLP and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that LLP.

**5) Partner [Section 2(1)(q)]:** Means any person who becomes a partner in the LLP in accordance with the LLP agreement.

**6) Small Limited Liability Partnership [Section 2(1)(ta)]:** means a limited liability partnership—

- Contribution of which, does not exceed twenty-five lakh rupees or such higher amount, not exceeding five crore rupees, as may be prescribed; and
- the turnover of which, as per the Statement of Accounts and Solvency for the immediately preceding financial year, does not exceed forty lakh rupees or such higher amount, not exceeding fifty crore rupees, as may be prescribed; or
- which meets such other requirements as may be prescribed, and fulfils such terms and conditions as may be prescribed.

**Note:** Definition of Entity, Business, Designated Partner & LLP are skipped as irrelevant.

**Non-applicability of the Indian Partnership Act, 1932 (Section 4):** IPA shall not apply to LLP.

## **Partners (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—

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

**Minimum number of partners (Section 6):**

- Every LLP shall have at least two partners.
- If at any time the number of partners of a LLP is reduced below two and the LLP carries on business for more than six months while the number is so reduced, the person, who is the only partner of the LLP during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the LLP incurred during that period.

**Clarification:**

**Designated partners (Section 7):**

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

**Clarification:** During the financial year -

**Characteristics of LLP**

**1) Body Corporate [2(1)(d)], Perpetual Succession, Separate Legal Entity, Artificial Legal Person, Limited Liability** - Same content as of Companies act, 2013.

**2) Mutual Agency** - All partners will be the agents of the LLP alone. No one partner can bind the other partner by his acts. Individual partners are shielded from other partners acts.



**3) LLP Agreement** - Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners. Flexibility to partner to devise the agreement as per their choice. Absence of LLP Agreement - Follow LLP Act, 2008 (First Schedule)

**4) Common Seal [Section 14(c)]** - Act through its partners and designated partners. May have a common seal (not mandatory). Remain under the custody of some responsible official and it shall be affixed in the presence of at least 2 designated partners of the LLP

**5) Management of Business** - Partners are entitled to manage but only designated partners are responsible for legal compliances.

**6) Minimum and Maximum number of Partners** - At least two partners and shall also have at least 2 individuals as designated partners, of whom at least one shall be resident in India. There is no maximum limit.

**Clarification:**

**7) Business for Profit Only** - Essential requirement for forming LLP with a view to earn profit. Cannot be formed for charitable or non-economic purpose.

**8) Foreign LLPs [2(1)(m)]** - formed, incorporated, or registered outside India which established as place of business within India. Foreign LLP can become a partner in an Indian LLP.

**Note:** Definition of Investigation, Compromise or Arrangement, Conversion of LLP, E-Filing of documents are skipped as irrelevant.

**Advantages of LLP Form:**

- organized and operates on the basis of an agreement
- provides flexibility without imposing detailed legal and procedural requirements.
- Easy to form
- All partners enjoy limited liability
- Flexible capital structure
- Easy to dissolve

**Incorporation of LLP (Section: 11)**

- Following incorporation document shall be filed in such manner and with such fees, as may be prescribed with the Registrar of the State in which the RO of the LLP is to be situated;

Name of LLP	Proposed Business	Address of Registered office
Name & Address of each partner	Name & Address of each designated partner	other information prescribed

- Along with Incorporation Document, statement to be filed in prescribed form

Made by either advocate, CA, CS, Cost Accountant engaged in formation of LLP and by anyone who subscribed his name to the incorporation document, that all the requirements of this Act and the rules made thereunder have been complied with, in respect of incorporation and matters precedent and incidental thereto.

- Penalty - If a person makes a statement which he knows to be false or does not believe to be true, shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than ` 10,000 but which may extend to ` 5 Lakhs.

#### **Incorporation by registration (Section 12):**

- Registrar shall retain the incorporation document
- Registrar shall within a period of 14 days register the incorporation document and issue a certificate signed by registrar and authenticated by his official seal
- Certificate shall be conclusive evidence that LLP is incorporated by name specified therein

#### **Registered office of LLP and change therein (Section 13):**

- Every LLP shall have a registered office to which all communications and notices may be addressed and where they shall be received.
- A document may be served on a LLP or a partner or designated partner thereof by sending it by post at the registered office and any other address specifically declared by the LLP
- A LLP may change the place of its registered office and file the notice of such change with the Registrar in such form and manner and subject to such conditions as may be prescribed and any such change shall take effect only upon such filing.
- Penalty - If the LLP contravenes any provisions of this section, the LLP and its every partner shall be liable to a penalty of Rs 500 for each day during which the default continues, subject to a maximum of 50,000 for the LLP and its every partner.

#### **Effect of registration (Section 14):** On registration a LLP shall, by its name, be capable of

- Suing and being sued;
- doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.
- acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible;
- having a common seal, if it decides to have one;

**Name (Section 15):**

- Every LLP shall have either the words "limited liability partnership" or the acronym "LLP" as the last words of its name.
- No LLP shall be registered by a name which, in the opinion of the Central Government is undesirable or 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 such form and manner prescribed to the Registrar for the reservation of a name as the name of a proposed LLP or the name of existing LLP to change its name.
- Registrar may reserve the name for a period of 3 months from the date of intimation by the Registrar if he is satisfied, subject to the rules prescribed by the Central Government

**Change of name of LLP (Section 17):**

LLP, on its first registration or on re-registration, if its registered name is identical with or too nearly resembles to any other LLP or a company or a registered trade mark of a proprietor under the Trade Marks Act, 1999,

then on an application of such LLP or proprietor or company,

the Central Government may direct such LLP to change its name or new name within a period of 3 months from the date of issue of such direction.

**Note:** An application of the proprietor of the registered trademarks shall be maintainable within a period of 3 years from the date of incorporation or registration or change of name of the LLP

**Notice to Registrar** - Where a LLP changes its name or obtains a new name, it shall within a period of 15 days from the date of such change, give notice of the change to Registrar along with the order of the Central Government,

Registrar shall carry out necessary changes in the certificate of incorporation & within 30 days of such change, LLP shall change its name in the LLP agreement.

**Default of LLP** - The CG shall allot a new name to the LLP & Registrar shall enter the new name in the register of LLP and issue a fresh certificate of incorporation, which the LLP shall use thereafter. Nothing shall prevent LLP to change its name subsequently as per Section 16.

**Note:** Difference between LLP & Company, LLP & Partnership Firm - Cover From Book.

# Negotiable Instruments Act, 1881

## Meaning of Negotiable Instruments

- Negotiable Instruments is an instrument (document) which is freely transferable 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. (Applicable to whole of India)

## Kinds of Negotiable Instruments

- 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.

## Characteristics of Negotiable Instruments

1) Writing	2) Signed	3) Freely transferable	4) Holder's title is free from defects.
4) Transferred any number of times	5) Promise or order to pay money only	6) Sum payable, time of payment & payee must be certain	7) Must be delivered (Drawing not sufficient)

## Promissory Note (Section - 4)

- A 'promissory note' is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.
- In case of promissory note - Customer is the Drawer i.e. Maker/Debtor/Payer and the supplier is the Drawee i.e. Bearer/Creditor/Payee

### 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)

### Parties to Promissory Note

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

- Essential Characteristics of a Promissory Note

- In writing - An oral promise to pay is not sufficient. There must be an express promise to pay. Mere acknowledgment of debt is insufficient.
  - The promise to pay should be definite and unconditional. (Dependent on happening or non-happening of an event are not PN's) However, promise to pay may be subject to condition which according to ordinary experience of mankind is bound to happen.
  - Must be signed by the maker otherwise it is incomplete and ineffective.
  - Pay money only.
  - Pay a certain sum. But if the amount payable can be easily ascertained - PN is valid.
  - Maker & Payee must be certain, definite and different persons.
- A promissory note cannot be made payable to the bearer [Section 31 of RBI Act, 1934]  
Only RBI or the Central Government can make or issue a PN 'payable to bearer'.
- Must be properly stamped & cancelled in accordance with the Indian Stamp Act

### Bills of Exchange (Section - 5)

- 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.

#### Specimen of Bill of Exchange

<p>Mr. A (Drawer) 48, MP Nagar, Bhopal (M.P.) April 10, 2022</p>	
<p>₹ 10,000/- Four months after date, pay to Mr. B (Payee) a sum of Rupees Ten Thousand, for value received.</p>	<p>To, Mr. C (Drawee) 576, Arera Colony, Bhopal (M.P.)</p>
	<p>Signature Mr. A</p>

#### Parties to Bill of Exchange

- 1) Drawer - The maker of a bill of exchange.
- 2) Drawee: Person directed by drawer to pay is called 'drawee' on whom bill is drawn. On acceptance, called an acceptor and is liable for payment primarily and unconditional.
- 3) Payee: Person named to whom or to whose order money is directed to be paid.

- Essential characteristics of bill of exchange

1) Writing	2) Express order to pay	3) Definite & Unconditional	4) Must sign the instru.
5) Certain Sum	6) Money only	7) Must be Stamped	
8) Drawer, drawee, and payee must be certain. May not necessarily be three different persons. One can play the role of two. As per Section 31 of RBI Act, 1934, BoE can't be made payable to bearer on demand.			



However, BoE payable on demand, in which name of the payee is mentioned, is valid.

- Difference between promissory note and bill of exchange

1) Definition	2) Nature	3) Parties	4) Acceptance	5) Payable to bearer
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### Cheque (Section - 6)

- 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.
- Payable on demand means payable whenever holder chooses to present it to drawee (banker).
- Cheque in the electronic form-means a cheque drawn in electronic form by using any computer resource, and signed in a secure system with a digital signature (with/without biometric signature) and asymmetric crypto system or electronic signature, as the case may be;
- "A truncated cheque" means a cheque which is truncated during a clearing cycle, either by the clearing house (managed by clearing house) or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.
- Cheque is also a bill of exchange but is drawn on a banker and payable on demand.

#### Specimen of cheque

Date:.....	Signature
Pay ..... a sum of Rupees..... A/C No. 12345678910	01212 1125864 000053 38
ABC Bank 622, Vijay Nagar, Indore (M. P.)	

#### Parties to Cheque

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

- Essential Characteristics of a cheque



- All the essential characteristics of a BoE.
- Must be drawn on a specified banker.
- It must be payable on demand.

### Classification of Negotiable Instruments

"Bearer instrument" and "order instrument" [Section 13]

**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 (payable to a specified person and does not contain words prohibiting its transfer), such instrument can be negotiated by indorsement and delivery.

### Inland instrument [Sections 11]

Place where Instrument is drawn and made payable	Residence of Person on whom Instrument is drawn	Nature of Instrument
P/N, BOE, C drawn/made in India	+ Payable in India OR	are Inland Instruments
	+ drawn upon a person resident in India.	

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

### Foreign instrument [Sections 12]

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

**Note:** The liability of the maker or drawer of a foreign PN or BoE or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable unless contract to the contrary. (Section 134).

### Inchoate Instrument

- Means an instrument that is incomplete in certain respects

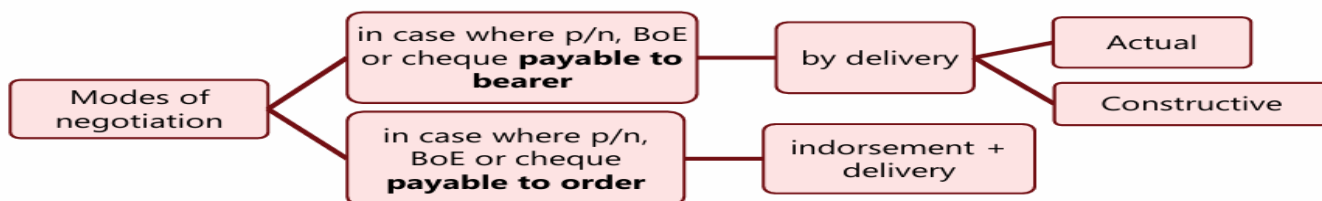
- Drawer/Maker/Acceptor/Indorser of NI may sign & deliver it to another person in his capacity leaving instrument either wholly blank or having written on it the word incomplete.
- This gives a power to its holder to make it complete by writing any amount either within limits specified therein or within the limits specified by the stamp's affixed on it.  
Principle of inchoate instrument is based on the principle of estoppel.
- The person signing and delivering the inchoate instrument is liable both to a holder and holder in due course.
- Holder of such an instrument cannot recover the amount in excess of the amount intended to be paid by the signor.
- Holder in due course can, however, recover any amount on such instrument provided it is covered by the stamp affixed on the instrument.
- In the absence of delivery, the signer is not liable. Also instrument must be stamped

### Ambiguous Instrument (Section 17)

- Where an instrument may be construed either as a PN or BoE, Holder may at his discretion treat it as either. Thus, An instrument which is vague & cannot be clearly identified either as a BoE, or as a PN, is an ambiguous instrument. However, after exercising his option, Holder can't change that it is other kind of instrument.

### Negotiation (Transfer) of Negotiable Instruments (Section 14)

- NI's & its rights are freely transferable from one person to another by negotiation. There is a transfer of ownership of the instrument.



### Negotiation by delivery (Section 47)

- A PN, BoE or cheque payable to bearer is negotiable by delivery thereof, subject to Instrument obtained by unlawful means or for unlawful consideration,

**Exception:** A PN, BoE or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable unless such event happens (except in the hands of a holder for value without notice of the condition).

### Negotiation by indorsement (Section 48)

- A PN, BoE or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof, subject to Instrument obtained by unlawful means or for unlawful consideration,

### **Importance of Delivery in Negotiation [Section 46]**

- Delivery is essential whether payable to bearer or order for effecting the negotiation. It must be voluntary, and the object should be to pass the property in the instrument.
- The delivery can be, actual or constructive.  
Actual delivery takes place when the instrument changes hand physically.  
Constructive takes place when it is delivered to the agent, clerk or servant of indorsee on his behalf or when indorser, after indorsement, holds instrument as an agent of the indorsee.
- When Instrument is conditionally or for special purpose only, the property in it does not pass to the transferee, even though indorsed, unless instrument is negotiated to a HIDC.
- Contract on a NI remains incomplete and revocable until delivery.  
Delivery is essential not only at time of negotiation but also at time of making/drawing of NI. Rights in instrument are not transferred to indorsee unless after indorsement delivered.
- If a person makes the indorsement but before delivery to indorsee, Indorser dies, the LR of the deceased person cannot negotiate the same by mere delivery thereof. (Section 57)  
LR is not an agent of deceased. Therefore, cannot complete the instrument if it was executed by the deceased but could not be delivered because of his death.

### **Dishonour of Cheque for Insufficiency of Funds (Section 138)**

- Where any cheque drawn by a person on an account maintained by him with a banker
  - for payment of any amount of money
  - to another person from that account
  - for the discharge, in whole or in part, of any debt or other liability (legally enforceable) is returned by the bank unpaid, either because of the -
    - Amount standing to the credit of that a/c is insufficient to honor the cheque, or It
    - Exceeds the amount arranged to be paid from that a/c by an agreement made with bankSuch person shall be deemed to have committed an offence (criminal in nature) & shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both.
- A cheque given as gift/donation/security/discharge of a mere moral obligation/for an illegal consideration, would be outside the purview of this section
- Provided that this section shall not apply, unless:

- Cheque presented within validity period i.e. within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier.
  - Demand for payment through the notice in writing to drawer of cheque, within 30 days of the receipt of information from bank regarding the return of cheque as unpaid, and
  - Failure of drawer to make payment to the payee or to HIDC within fifteen days of the receipt of the said notice.
- Therefore, we may conclude that complaint 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.
  - Sec 138, applies when a cheque is dishonoured on account of stop payment instructions sent by drawer to banker in respect of post- dated cheque irrespective of insufficiency of funds.
  - Penalty: Dishonour of cheque is a criminal offence and is punishable with imprisonment up to 2 years or fine up to twice the amount of cheque or both.

#### **Presumption in favor of Holder (Section 139)**

- When a cheque is dishonoured, it shall be presumed that the holder received the cheque for the discharge, in whole or in part, or any debt or other liability unless the contrary is proved.

#### **Defence not allowed in any prosecution under section 138 (Section 140)**

- 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 in that section.

#### **Presentment of Instruments**

<b>Presentment for Acceptance (Section 61)</b>	
BoE payable after sight (No time/place specified)	Reasonable time in Business Hour & Day
In Default	No party is liable
If drawee can't be found after reas. Search	Bill is dishonoured.
Directed at particular place	Present at that place (Not found - Dish)
Agreement or usage	Through post office registered letter
<b>Presentment of promissory note for sight [Section 62]</b>	
Present	Reasonable time in business hour & day.
<b>Drawee's time for deliberation [Section 63]</b>	

Holder must allow the drawee for acceptance 48 hours (Exclusive of public holidays) to consider whether he will accept it.

### Presentment for payment [Section 64]

<b>All points same as for acceptance of Sec - 61</b>	Exception: Where a PN is payable on demand and not at specified place, no presentment is necessary in order to charge the maker.
<b>Hours for presentment (Sec - 65)</b>	Usual hours (Banking hours in case of banks)
<b>Payable after date or sight (Sec - 66)</b>	Must be presented for payment at maturity.
<b>Payable by Instalments (Sec - 67)</b>	On the third day after date fixed for each instalment
<b>Instalment payable at specified place (Sec -68)</b>	At that place
<b>No exclusive place specified (Sec - 70)</b>	At the place of business or At usual residence of maker/drawee/acceptor
<b>When maker etc has no known place of business or residence (Sec - 71)</b>	wherever he can be found.
<b>cheque to charge drawer (Sec - 72)</b>	at the bank upon which it is drawn
<b>cheque to charge any other person (Sec - 73)</b>	presented within a reasonable time after delivery thereof by such person.
<b>payable on demand (Sec - 74)</b>	within a reasonable time after receiving.
<b>by or to agent/LR/assignee (Sec - 75)</b>	May be made to agent/LR/Assignee
<b>Excuse for delay in presentment for acceptance or payment (Sec - 75A)</b>	If caused by circumstances beyond control of holder. When cause of delay ceases - Present within Reasonable time

### When presentment unnecessary (Section 76) (Instrument dishonoured at due date)

- If the maker/drawee/acceptor intentionally prevents the presentment or  
 Payable at place of business - Closes such place on business day in business hours, or  
 Payable at some other specified place - neither he nor any person authorised to pay it attends at such place during the usual business hours, or  
 Not being payable at any specified place, he cannot after due search be found;

- Against the party sought to be charged, if he has engaged to pay without presentment.
- If after maturity, party with knowledge that the instrument was not presented makes a part payment or promises to pay the amount due thereon in whole or in part, or otherwise waives his right to take advantage of any default in presentment.
- Against drawer, if the drawer could not suffer damage due to non-presentment.

**Liability of banker for negligently dealing with bill presented for payment (Section 77)**

- If the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss.

**Rules of Compensation (Section - 117) (Rules in case of dishonour of PN, BoE or Cheque)**

- Holder is entitled to amount due with expenses incurred in presenting, noting & protesting it;
- When person charged resides at place different from that at which instrument was payable, Holder is entitled to receive sum at current rate of exchange between the two places;
- Endorser liable if paid amount due, entitled to amount so paid with interest at 18% per annum from date of payment until tender thereof with expenses caused by dishonour and payment;
- when person charged & such endorser reside at different places, Endorser is entitled to receive such sum at the current rate of exchange between the two places;
- Party entitled to compensation can draw a bill on the party liable to compensate him, payable at sight/demand, for amount due with all expenses incurred, accompanied by instrument dishonoured and the protest (if any).  
If such bill is dishonoured, make compensation in same manner as in case of original bill.