B.COM (H)-Core 2- Semester I

BUSINESS LAW

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SYLLABUS

(CORE – 2)

BUSINESS LAW

Objective: The objective of the course is to impart basic knowledge of the important business laws along with relevant case laws.

Unit I: The Indian Contract Act, 1872

1. Contract – meaning, characteristics and kinds, Essentials of a valid contract
2. Offer and acceptance (Definition, Rules, Communication and Revocation of offer and acceptance)
3. Consideration (Definition, Elements, Types, Rules), "No Consideration No Contract" and its exceptions; Capacity to Parties (Definition and Types)
4. Consent, Free consent, Coercion, Undue Influence, Fraud, Misrepresentation, Mistake
5. Legality of objects and Consideration
6. Void and Voidable agreements – Definition, Types and Distinction

Discharge of a contract – Modes of discharge, Breach and Remedies against breach of contract

7. Specific Contracts - Contingent contracts, Quasi, Contract of Indemnity, Guarantee, Bailment, Pledges

Unit II: The Sale of Goods Act, 1930

1. Contract of sale, meaning and difference between sale and agreement to sell
2. Conditions and warranties
3. Transfer of ownership in goods including sale by a non-owner
4. Unpaid seller – meaning, rights of an unpaid seller against the goods and the buyer

Consumers Protection Act, 1986 and Right to Information Act

a. Objectives and features of Consumers Protection Act
b. Definitions – Complainant, Complaint, Consumer, Consumer Dispute, Defect, Deficiency, District Forum, Person
c. Unfair trade practices

Consumer Protection Council (Central, State and District – their constitutions and objectives

Unit III: Partnership Laws

A. The Partnership Act, 1932
a. Definition – Partner, Partnership
b. Nature and Characteristics of Partnership
c. Types of Partners
d. Registration of a Partnership Firms and consequences of non-registration
e. Rights and Duties of Partners
f. Dissolution of firms – meaning and grounds
B. The Limited Liability Partnership Act, 2008
a. Definition
b. Salient Features of LLP
c. Advantages and disadvantages of LLP
d. Differences between: LLP and Partnership, LLP and Company

e. Incorporation of LLP

Unit IV: The Negotiable Instruments Act 1881

a. Definition, Features, Types, Parties of Negotiable Instruments: Promissory Note, bill of exchange, Cheque (Definition and Types)

b. Endorsement: Meaning and Types of Endorsement

c. Holder and Holder in Due Course, Privileges of Holder in Due Course.

d. Dishonour of Negotiable Instruments: Modes, Consequences, Notice of Dishonour; Noting and Protesting

e. Discharge of Negotiable Instruments: Meaning and Modes

Learning Outcomes: The students would be able to deal with the legal aspect of different business situations.

Text Books Recommended

1. Business Law, Garg K.C., Saareen,Sharma, Kalyani Publishers
2. Kumar, R. Legal Aspects of Business, Cengage Learning

Suggested Readings:

1. Arora Sushma – Business Law – Taxmann Publication
2. A Book of Business Laws-Jena B and Mohapatra-Himalaya Publishing House
3. Business Law, Ashok Sharma, V.K. Global Publication.
4. Business Laws: Das & Roy, Oxford University Press
5. Business Law- S K Matta, Geetika Matta, Vrinda Publications (P) Ltd
6. Business Law - Tejpal Singh, Pearson Publication
7. Kuchhal, M.C. and Vivek Kuchhal, Business Law, Vikas Publishing House, New Delhi.
8. Tulsian, P.C, Business Law, S.Chand
9. Maheshwari & Maheshwari, Business Law, National Publishing House, New Delhi.

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UNIT-1
LAW OF CONTRACT

AIMS AND OBJECTIVES:-

After studying this unit you should be able to understand :

- ❖ The concept of law
- ❖ The meaning of the term contract
- ❖ The classification of contract
- ❖ The meaning of the term agreement offer and acceptance
- ❖ The concept of special contract
- ❖ The concept of consideration
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UNIT – I

LAW OF CONTRACT

1.1 INTRODUCTION

The term law refers to rules of conduct enforced by the State to maintain peace and order in the society. Broadly speaking, law may be defined as the rules of conduct recognized and enforced by the state to control and regulate the conduct of people, to protect their property and contractual rights with a view to securing justice, peaceful living and social security.

1.1.1 Definition: Definitions of the term law by some eminent scholars are given below:

1. According to Salmond, "Law is the body of principles recognized and applied by the state in administration of justice".
2. Austin says, "A law is a rule of conduct imposed and enforced by the sovereign".
3. In the words of Holland, "law is a rule of external human actions enforced by sovereign political authority".
4. According to Woodrow Wilson, "Law is that portion of the established habit and thought of mankind which has gained distinct and formal recognition in the shape of uniform rules backed by authority and power of the government".

1.1.2 Mercantile Law

Law being a wider subject touches all walks of our life. There are various branches of law concerning specific aspects e.g., civil, criminal, administrative, constitutional, business, labour laws, etc.

The legal framework within which different business firms have to operate are largely governed by General Laws applicable to all forms of organisations-irrespective of their size and ownership. These laws fall into the category of mercantile laws. The terms business laws, commercial law and mercantile law are synonymous.

The term 'Mercantile Law' is used to denote that branch of law which is concerned with such matters as are usually the subject of what may be called mercantile transactions. Basically, mercantile law is a part of civil law which deals with the rights and obligations of mercantile persons arising out of mercantile transactions in respect of mercantile property. A mercantile person may be a single individual, a partnership or a joint stock company. These laws denote the aggregate body of legal rules connected with trade, industry and commerce. They provide for rules regarding the validity of making contracts and their performance. They deal with various types of contracts such as those relating to partnership, sale of goods, agency, bailment, indemnity and guarantee. Mercantile law also includes in its fold the laws relating to the joint stock companies, carriage of goods, negotiable instruments, insurance, arbitration, consumer protection, etc.

However, the scope of mercantile law is ever widening due to increasing complexities of business world.

The following laws are included in business or mercantile law:

1. Contract Act
2. Sale of Goods Act
3. Partnership Act
4. Companies Act
5. Negotiable Instruments Act
6. Banking Companies Act
7. Insurance Companies Act
8. Carriers and Carriage of Goods act
9. Commercial Securities Act
10. Patents and Copyright act
11. Insolvency Act
12. Arbitration Act

1.2 LAW OF CONTRACT

Law of contract is the most important and basic part of Mercantile law. It is not only the merchant or trader but every person who lives in the organised society, consciously or unconsciously enters into contracts from sunrise to sunset.

The law of contract is contained in the Indian Contract Act, 1872 which —

a. Deals with the general principles of law governing all contracts, and
b. Covers the special provisions relating to special contracts like bailment, pledge, indemnity, guarantee and agency.

When a person buys a computer or hires a taxi or goes to video library to buy a video cassette or takes a credit card fro a bank or gives loan to another or he does booking for an orchestra/DJ for marriage party, he enters into and performs a contract though he may be unaware of this fact.

Such contracts create legal relations giving rise to certain rights and obligations. The law of contract is designed to enforce rights and obligations in connection with the above activities.

The object of Law of Contract is to ensure that the rights and obligations created by a contract are honoured. That the expectations created by the promises of the parties to an agreement are fulfilled and that legal remedies are available to an aggrieved party against the party failing to perform his part of the agreement.

1.3 NATURE OF LAW OF CONTRACT

The law of contract is that branch of law which determines the circumstances in which a promise or an agreement shall be legally binding on the person making it. Unlike other branches of law, law of contract does not state a number of rights and duties, but lays down certain limiting principles within the framework of which the parties to an agreement may lay down their own terms and conditions. These will be upheld by the courts as long as they do not infringe upon any provisions of the law.

The contracts being the basis of most of the business transactions, the law of contract is of particular significance to people (i.e., traders, factory owners, partnership firms, joint stock companies, banks, insurance companies, etc.) engaged in trading, commercial and industrial activities.

In simple words, it may be said that the purpose of the law of contract is to ensure the realisation of reasonable expectation of the parties who enter into a contract.

1.4 THE INDIAN CONTRACT ACT, 1872

The law relating to contracts in India is contained in the Indian Contract Act, 1872. The Act came into force with effect from September 1, 1872. It is applicable to the whole of India except the State of Jammu & Kashmir. The Act deals with

a) The general principals of the law of contract (Secs. 1 to 75) which apply to all types of contracts irrespective of their nature and
b) Some special contracts only (Secs. 124 to 238)

The first six chapters of the Act (which embody the general principles) deal with the different stages in the formation of a contract, its essential elements, its performance or breach and the remedies for breach of contract. The remaining chapters deal with some of the special contracts, viz., indemnity and guarantee [Chapter VIII (Secs. 124 to 147)], bailment and pledge [Chapter

IX (Secs. 148 to 189)] and agency [Chapter X (Secs. 182 to 238)]. The Act does not affect any usage or custom of trade (Sec. 1, para 1).

The Act is not exhaustive

The Indian Contract Act does not profess to be a complete and exhaustive code because while enforcement it depends on English common law. It deals with the general principles of the law of contract and with some special contracts only. Some of the contracts not dealt with by the Act are those relating to partnership, sale of goods, negotiable instruments, insurance, bill of lading, etc. There are separate Acts which deal with these contracts.

According to Section 1, “Nothing herein contained shall affect the provisions of any statute, Act or Regulation not hereby expressly repealed, nor usage or custom of trade, not inconsistent with the provisions of this Act”.

1.5 CONTRACT

A contract is an agreement made between two or more parties which the law will enforce. A contract is an agreement to do or not to do an act. It is a legally binding agreement, which is enforceable at law.

1.5.1 Definition Sec. 2 (h) of the Indian Contract Act, 1872 defines contract as an agreement enforceable by law.

According to Salmond, “contract is an agreement creating and defining obligations between the parties”.

In the words of Sir William Anson, “a legally binding agreement made between two or more persons by which rights are acquired by one or more to acts or forbearances (abstaining from doing something) on the part of other or others”.

Halsbury defines contract as, an agreement between two or more persons which is intended to be enforceable at law and is constituted by the acceptance by one party of an offer made to him by the other party to do or to abstain from doing some act.

Sir Fredrick Pollock says, “Every agreement and promise enforceable at law is a contract”.

So, the subject matter of contract consists of two essential elements:

a) Agreement and
b) Its enforceability at law.

a) **Agreement:** An agreement is defined in Section 2 (e) as every promise or every set of promises forming the consideration for each other. A promise is defined in Section 2 (b) as a proposal when accepted becomes a promise.

   An agreement involves a proposal or offer by one party and acceptance of the same by the other party. It requires existence of two or more persons i.e., plurality of persons because a person cannot enter into an agreement with himself. It also implies that the parties have a common intention about the subject matter of their agreement. Two parties should be thinking of the same thing in the same sense at the same time. Thus, an agreement is the outcome of two consenting minds i.e., consensus ad idem.

   Thus, Agreement = Offer + Acceptance

b) **Enforceable at Law:** An agreement to become a contract must give rise to a legal obligation. The common acceptance formed and communicated between the two parties must create legal relations and not merely the relations which are purely social or domestic in nature.

   If the parties specify or the circumstances indicate that the parties intend to create legal relationship through it-even an agreement between husband and wife will be legally enforceable. On the other hand, if the two parties rule out legal obligation expressly the agreement will not be enforceable though it may be a trade agreement.

   Thus, **Contract = Agreement + Enforceability at Law**

Therefore, all contracts are agreements but all agreements are not contracts.

1.5.2 Essential Elements of a Valid Contract

According to Sec. 10, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void. All agreements are not contracts. Only that agreement which is enforceable at law is a contract. In order to become a contract, an agreement must have the following essential elements:

1. Offer and Acceptance: In order to create a valid contract, there must be two or more parties because an individual cannot enter into an agreement with himself. It implies that one party makes a lawful proposal (offer) and the other party makes a lawful acceptance of the offer. The term lawful means offer and its acceptance must confirm to the rules laid down in the Indian Contact Act regarding valid offer and acceptance and its communication. For example, if Kumar makes a proposal to sell his house to Mahesh for Rs. 50,00,000 and Mahesh accepts the proposal, there will be a valid agreement between the two.

2. Intention to Create Legal Relationship: When two parties enter into an agreement, their intention must be to create legal relationship between them. If there is no such intention on the part of the parties, there is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship, as such they are not contracts.

3. Lawful Consideration: An agreement to be enforceable by law must be supported by consideration. 'Consideration' means an advantage or benefit moving from one party to the other. For a valid contract, the consideration need not necessarily be in terms of a price — the consideration can even be in the past, present or future – but the consideration needs to real and lawful. [Secs.2 (d), 23 and 25]. As per Section 2 (d), " 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 to abstains from doing an act, such act or abstinence or promise is called a consideration for the promise".

4. Competency or Contractual Capacity of Parties: The parties to the agreement must be legally competent to enter into a valid contract. According to Section11 if the Act, every person is competent to contract if he:

(a) is of the age of majority,

(b) is of sound mind and

(c) is not disqualified from contracting by any law to which he is subject.

If a party suffers from any flaw in capacity, the agreement is not enforceable except in some special cases.

5. Free and Genuine Consent: It is essential to the creation of every contract that there must be free and genuine consent of the parties to the agreement. According to Section 13, the consent of the parties is said to be free when they are of the same mind on the material terms of the contract. The parties are said to be of the same mind when they agree about the subject matter of the contract in the same sense and at the same time. The identity of views is the pre-requisite. If such identity is not there, no agreement is possible. As per section 14, consent is said to be free when it is not caused by coercion or undue influence or fraud or mis-representation or mistake.

6. **Lawful Object:** The object of an agreement must be lawful. Object has nothing to do with consideration. It means the purpose or design of the contract. Thus, when one hires a house for use as a gambling house, the object of the contract is to run a gambling house. The object is said to be unlawful if —

a) it is forbidden by law;
b) it is of such nature that if permitted it would defeat the provisions of any law;
c) it is fraudulent;
d) it involves an injury to the person or property of any other and
e) the court regards it as immoral or opposed to public policy.

7. **Certainty of Meaning:** According to Section 29, agreements the meaning of which is not certain or capable of being made certain are void. The terms of the contract must be precise and certain and not vague or indefinite. A contract may be void on the ground of uncertainty. For example, a purported acceptance of an offer to buy lorry on hire-purchase terms does not constitute a contract if the hire-purchase terms are never agreed.

8. **Possibility of Performance:** If the act is impossible in itself, physically or legally, it cannot be enforced at law.

9. **Agreement not Declared Void or Illegal:** The agreement though satisfying all the conditions for a valid contract must not have expressly declared void by any law in force in the country. Agreements mentioned in Sections 24 to 30 of the Contract Act have been expressly declared void for example agreements in restraint of trade, marriage, legal proceedings, etc.

10. **Legal Formalities:** An oral contract is a perfectly valid contract, except in those cases except where writing, registration, etc. is required by some statute. In India, writing is required in cases of sale, mortgage, lease and gift of immovable property, negotiable instruments, memorandum and articles of association of a company, etc. Registration is required in case of documents coming within the scope of section 17 of the Registration Act.

If an agreement does not meet the above criteria, then it cannot be a contract. It will remain an agreement.

1.6 CLASSIFICATION OF CONTRACTS

Contracts may be classified into different categories depending upon their enforceability or validity, mode of creation or formation and extent of execution or performance.

A. CLASSIFICATION OF CONTRACTS ON THE BASIS OF ENFORCEABILITY

1. **Valid Contracts:** An agreement enforceable at law is a valid contract. An agreement becomes a contract when all the essentials of a valid contract as laid down in Section 10 are fulfilled. For example, A offers to sell his house for Rs. 10 lakhs to B and B agrees to buy it for this price is a valid contract.

   Agreements falling short of legal requirements of Section 10 are Invalid contracts. These are:

2. **Void Contract:** An agreement which was legally enforceable when entered into but which has become void later on due to certain reasons such as supervening impossibility of performance or illegality are known as void contracts for e.g. when a war breaks out between the importing country and exporting county.
3. **Void Agreements:** According to Section 2 (g), an agreement which is not enforceable by law by either of the parties is said to be void. A void agreement does not create any legal rights or obligations. It is void *ab initio*, i.e., from its very inception, for example, an agreement without consideration or with a minor.
4. **Voidable Contract:** An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others is a voidable contract [Sec. 2 (i)]. This happens when the essential element of free consent in a contract is missing. When the consent of a party to a contract is not free, i.e., it is caused by coercion, undue influence, misrepresentation or fraud, the contract is voidable at his option (Secs. 19 and 19-A). Thus, a voidable contract is valid and enforceable until it is repudiated by the party entitled to avoid it.
5. **Unenforceable Contract:** An unenforceable contract is one which cannot be enforced in a court of Law because of some technical defect such as absence of writing or where the remedy has been barred by lapse of time. The contract may be carried out by the parties concerned; but in the event of breach or repudiation of such a contract, the aggrieved party will not entitled to the legal remedies. Such contracts will not be enforced by the courts until and unless the defect is rectified.
6. **Illegal Contracts:** A contract which is either prohibited by law or otherwise against the policy of law is an illegal agreement. It is void *ab initio*. Thus, a contract to commit dacoity is an illegal contract and cannot be enforced at law. All illegal agreements are void but all void agreements or contracts are not necessary illegal.

B. CLASSIFICATION OF CONTRACTS ON THE BASIS OF FORMATION

A contract may be made in writing or by word of mouth or inferred from the conduct of the parties or the circumstances of the case. These are the modes of formation of a contract. Contracts may be classified according to the mode of their formation as follows:

1. **Express Contract:** If the terms of a contract are expressly agreed upon (whether by words spoken or written) at the time of formation of the contract, the contract is said to be an express contract. Where the offer or acceptance of any promise is made in words, the promise is said to be express (Sec. 9) and the resulting contract an express contract.
2. **Implied Contract:** Where the proposal or acceptance is made otherwise than in words, it is an implied contract.An implied contract is one which is inferred from the acts or conduct of the parties or course of dealings between them. So, where a person employs another to do some work, the law implies that the former agrees to pay for the work.
3. **Constructive or Quasi-Contract:** A quasi-contract is not a contract at all. It is a contract in which there is no intention on either side to make a contract, but the law imposes a contract. In such a contract, rights and obligations arise not by any agreement between the parties but by operations of law. It rests on the grounds of equity that "a person shall not be allowed to enrich himself unjustly at the expense of another". For example, a finder of lost goods is under an obligation to find out the true owner and return the goods.
4. **E-Com Contracts/Contracts over Internet:** An E-Commerce contract is one which is entered into between two parties via internet. In electronic commerce, different parties/persons create networks which are linked to other networks through EDI (Electronic Data Inter-change). This helps in expanding the area of operation in commercial transactions for any person using electronic mode. These are known as EDI contracts or cyber contracts or mouse click contracts.

C. CLASSIFICATION OF CONTRACTS ON THE BASIS OF PERFORMANCE

To the extent to which the contracts have been performed, these may be classified as —

1. **Executed Contract:** 'Executed' means that which is done. An executed contract is one where both the parties have performed their respective obligation or carried out the terms of the contracts. In other words, it is a completed contract. For example, A sells a T.V set for Rs. 30,000 to B. B pays the price and A hands over TV set to B.

2. **Executory Contract:** ‘Executory’ means that which remains to be carried into effect. An executory contract is one in which the contract is yet to be performed either wholly or partially or one or both the parties have yet to perform their obligations. For example, A agrees to make furniture for B for Rs. 20,000. A has yet to make furniture and B has not made the payment. So, both A and B are yet to perform their obligations. Suppose A has made the furniture but B has yet to make payment, it is executed on A’s part but executor on B’s part.

   On the basis of execution, the contracts may also be classified as follows:

   Unilateral Contract: A unilateral or one-sided contract is one in which only one party has to fulfill his obligation at the time of the formation of the contract, the other party having fulfilled his obligation t the time of the contractor before the contract comes into existence. Such contracts are also known as contracts with executed consideration. For example, A permits a railway coolie to carry his luggage and place it in a carriage. A contract comes into existence as soon as the luggage is placed in the carriage. But by that time coolie has already performed his obligation. Now only A has to fulfil his obligation, i.e., pay the reasonable charges to the coolie.

   Bilateral Contract: A bilateral contract is one in which the obligations on the part of both the parties to the contract are outstanding at the time of the formation of the contract. In this sense, bilateral contracts are similar to executory contracts and are also known as contracts with executory consideration.

OFFER AND ACCEPTANCE

1.7 OFFER

1.7.1 Meaning and Definition of Offer

The primary element of a valid contract is an agreement between the parties to the contract. An agreement comes into existence by a lawful offer by one party and lawful acceptance by the other party. An offer is a proposal by one party to another to enter into a legally binding agreement with him. According to Section 2 (c), “the person making the proposal is called the ‘promisor’ or offeror or proposer; the person to whom it is made is called the offeree or proposee and the person accepting the proposal is called the ‘promisee’ or acceptor.”The British refer to it as ‘offer’ but in the Indian Contract Act, it is called a ‘proposal’.

According to Section 2 (a) of the Indian Contract Act, “when one person signifies to another his willingness to do, or to abstain from doing, anything with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal”.

A person making the proposal expresses that he is willing to contract on the terms stated in it provided the other party to whom the proposal is made will likewise express his assent to the same terms. Section 2 (a) reveals three essential elements in an offer:

i) Expression of willingness to do or not to do something,

ii) made to another person i.e., a person cannot make an offer to himself,

iii) with the object of gaining the consent of the other person to such act or abstinence.

1.7.2 Types of Offer

Offers or proposals may be classified on the basis of —

1) How an offer is made?
2) To whom an offer is made?

1. **How an Offer is made:** An offer may be either express or implied from the conduct of the parties.

   a) **Express Offer:** An express offer is one which may be made by words spoken or written such as letter, telegram, telex, fax message, e-mail or through internet. For example, when A offers to sell his dissection box to B for Rs. 400, it is an express offer.

   b) **Implied offer:** An implied offer is one which may be gathered from the conduct of the party or the circumstances of the case. Stepping into a local bus, consuming eatables at a restaurant, shinning shoes by a shoe shiner, without being asked to do so etc. create implied promises to pay for the benefits enjoyed.

2. **To Whom an Offer is made:** An offer may be made to —

   a) a particular person or a particular group or body of persons,

   b) the public at large i.e., the whole world.

   a) Specific Offer: An offer made to a definite person or a body of persons is called a specific offer. A specific offer can usually be accepted only by the person or persons to whom it is made.

   b) General Offer: When an offer is addressed to the whole world, it is called a general offer. A general offer is accepted by any one.

For example, where A promises to give Rs. 100 to B if he brings back his missing horse, this is a specific offer and can only be accepted by B; but if A issues a public advertisement to the effect that he would give Rs. 500 to anyone who brings back his missing horse, such an advertisement amounts to a general offer and member of the public can accept the said offer by searching for and bringing back A's missing horse.

3. **Positive and Negative Offers:** A person may express his willingness to do something or to abstain from doing something e.g., it may be an offer to construct a wall to provide privacy or not to construct a wall so that free passage of light and air may not be obstructed.
4. **Cross Offers:** When two parties make identical offers to each other, in ignorance of each other's offer, such offers are known as cross offers. They shall not constitute acceptance of one's offer by the other.

1.7.3 Essentials of a Valid Offer

An offer becomes legally valid when it satisfies the following essential conditions:

1. **Offer must be Capable of Creating Legal Relations:** While making the offer, the aim of the offeror should be to primarily create a legal obligation. An offer that creates only social or moral obligation does not constitute a valid agreement or contract. A proposal to go to picnic or to play a cricket match does not create a legal obligation – it is not legally binding on the person making the proposal or the one who is accepting it. For example, if A invites B for lunch but, for some reason, is not at home when b comes for lunch, it does not have any legal obligation for A and b cannot sue A for not keeping his commitment because an invitation to lunch is a social affair and does not create a legal obligation for either party. An offer, therefore, must be such as would result in a valid contract when it is accepted.
2. **Offer must be Certain, Definite and not Vague:** No contract can come into existence if the terms of the offer are vague or loose and indefinite. Both the parties should be clear about the legal consequences arising out of contract. An indefinite or vague proposal is not a proposal from the legal point of view and its acceptance cannot create any contractual relationship. If a offers to B to take his building on a two-year lease if B repairs it thoroughly and 'furnishes it according to the latest style', it cannot be said to constitute an offer because it is too vague to result in a contractual relationship.
3. **Offer must be communicated to the Offeree:** There can be no offer by a person to himself.An offer, to be complete, must be communicated to the person to whom it is made so

that he can accept or not accept the offer. Unless the offer is communicated by the offeror (or by his agent) to the offeree, there can be no acceptance of the offer and as such, no agreement can be reached. An acceptance of an offer, in ignorance of the offer, is no acceptance and does not confer any right on the acceptor. If M has announced a reward to anyone who returned his lost dog. P brought the dog to M without having heard of the offer. Held P was not entitled to the reward [Fitch v. Snedaker, (1868) 38N.Y.288]

4. **Offer must be made with a view to obtaining the assent:** An offer must be distinguished from mere expression of intention. The offer to do or not to do something 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. **Offer should not contain a term the non-compliance of which may be assumed to amount to acceptance:** One cannot say while making the offer that if the offer is not accepted before a certain date, it will be presumed to have been accepted. For example, where S writes to P, "I will sell you my horse for Rs. 4,000and if you do not reply, I shall assume you have accepted the offer", there is no contract if P does not reply. However, if P is in possession of S' horse at the time the offer is made and he continues to use the horse thereafter, P's silence and his continued use of the horse amount to acceptance on his part of the terms of S's offer.
6. **An Offer may be Conditional:** An offer can be made subject to a condition. In that case, it can be accepted only subject to that condition. A conditional offer lapses when the condition is not accepted. Thus, a conditional offer by the management of a company to the trade union to pay a certain amount lapses when the condition is not accepted. A contract formed on a conditional offer is valid. In recent times, however, the courts have adopted certain protective measures for the aggrieved persons. Conditional offers are invalid where the terms are unreasonable or the offeree is unaware of the terms.
7. **Lapse of an Offer:** An offer lapses
   a) if either offeror or offeree dies before acceptance.
   b) if it is not accepted within i) the specified time or (ii) a reasonable time, if no time is specified.
   c) if the offeree does not make a valid acceptance, for example makes a counter offer or conditional acceptance or if a particular manner of acceptance has been requested, he

accepts in some other manner for example by sending a letter by mail when a reply by hand was requested.

d) an offer can also lapse by revocation. A person who makes an offer can withdraw it at any time before acceptance. A proposal may be made for a fixed period. The offer will automatically expire if it has not been accepted till then. Where no time limit has been specified, the offer will lapse after a reasonable time.

8. **An invitation to offer is not an offer:** An offer must be distinguished from an invitation to offer. In the case of an invitation to offer the aim is merely to circulate information of readiness to negotiate business with anybody who on such information comes to the person sending it. Such invitations are not offers in the eyes of law and do not become promises on acceptance. A price list is not an offer to sell the goods at the listed prices. It is an attempt to induce offers and not an offer in itself.
9. **Communication of Special Conditions:** When special terms and conditions are to be attached in a contract, they must not only be specifically stated but also communicated to the concerned party. It is the duty of the person who delivers a document to give adequate notice to the offeree of the terms and conditions contained in the document. When this is not done, the acceptor will not be bound by such terms. For example, a transport company accepts goods of A for being carried without any conditions. Subsequently it issues a circular to the consignors limiting its liability for the goods damaged or lost in transit. G is not bound by this condition since it is not communicated to him prior to the date of contract.

1.8ACCEPTANCE

1.8.1 Meaning and Definition of Acceptance

Acceptance of an offer is of primary importance for a valid agreement. When the offeree or the person to whom the offer is made, gives his acceptance, the offer is said to be accepted. An offer becomes a promise or an agreement only after its acceptance.

According to Section 2 (b) of the Indian Contract Act, “when the person to whom the offer is made signifies his assent thereto, the offer is said to be accepted. An accepted proposal is called a promise or an agreement”.

According to Sir William Anson, “An acceptance is to an offer what a lighted match is to a train of gun-powder. Just as a lighted match will blast a train load with gunpowder, an offer becomes an agreement after its acceptance”.

Except where a proposal prescribes a particular mode of acceptance, the acceptance may be made in several different ways. Acceptance may be express or implied. When acceptance is made by words, spoken or written, it is an express acceptance. If it is accepted by conduct, it is an implied acceptance.

When an offer is made to a particular person, it can only be accepted by the person to whom it is made. Acceptance by any other person is not a valid acceptance. But if it is a general offer, then anybody can accept it.

1.8.2**Essentials of a Valid Acceptance**

Acceptance of an offer is the very essence of a contract. As per the sections of the Act and the precedents set by court decisions, the legal rules as to acceptance are mentioned as under:

1. **Acceptance must be absolute and unconditional:** It must confirm with the offer. If it does, the offer or proposal becomes a promise. The acceptance, in order to be binding, must be absolute and unqualified [Sec. 7 (1)] in respect of all terms of the offer, whether material or immaterial, major or minor. A qualified acceptance is not a contractual acceptance. If the terms of acceptance are different from the terms of offer, it is termed as a counter offer and is not recognized by law as an acceptance until the original offeror accepts the qualified terms. If A offers to sell his land for Rs. 5,00,00 and B accepts the offer and encloses a cheque for Rs. 50,000 with a promise to pay the balance by monthly instalments of Rs. 15,000 each, it would not mean a contract between the two as the acceptance is unconditional.
2. **Acceptance must be Communicated to the Offeror:** To conclude a contract between the parties, the acceptance must be communicated to the offeror. If the acceptance is not communicated, the acceptance is not valid in terms of law. A mere resolve or mental determination on the part of the offeree to accept an offer, when there is no external manifestation of the intention to do so, is not sufficient [*BhagwanDassKedia v. GirdhariLal*, A.I.R (1966) S.C.543].
3. **Acceptance must be made within a reasonable time:** Acceptance to be valid must be made within the time allowed by the offeror and if no time is specified, it must be made4 within a reasonable time. What is a reasonable time is a question of fact depending on the particular circumstances. Acceptance may be made at any time till the offer is alive. Acceptance made after the offer has been withdrawn is invalid.

4. **Acceptance must be made according to the mode prescribed or usual or reasonable mode:** Acceptance has to be made in the manner prescribed or indicated by the offeror. Section 7 (2) states that if the acceptance is not made in the manner prescribed, the proposer may within a reasonable time after the acceptance is communicated to him, insist that the acceptance must be made in the manner prescribed. Failure on the part of the offeror to do so will imply that he has accepted although it is not in the desired manner. Where no mode of acceptance is prescribed, acceptance must be expressed in some usual and reasonable manner. Acceptance by mail is a very reasonable manner in such cases.
5. **The Acceptor must be aware of the proposal at the time of the offer:** Acceptance follows offer. If the acceptor is not aware of the existence of the offer and conveys his acceptance, no contract comes into being. There must be a knowledge of the offer before anyone could consent to it. An act done in ignorance of the offer of a reward cannot be called an acceptance.
6. **Acceptance must be given before the offer lapses or before the offer is revoked:** It means that acceptance must be made while the offer is in force i.e., before the offer has been revoked or offer has lapsed. A prospective resignation to quit a post is an offer and it can be withdrawn before the resignation is accepted by a competent authority. [Union of India vs. Gopal Chandra, AIR 1978 See694].
7. **Acceptance cannot be implied from silence:** No contract is formed if the offeree remains silent and does nothing to show that he has accepted the offer. The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer, unless the offeree has by his previous conduct indicated that his silence means that he accepts. Rakesh told Shyam , “I offer you my carfor Rs. 2,00,00. If you don’t reply me in 15 days time, I shall assume that you accept the offer.” Shyam kept silent. Held, there was no contract.

1.8.3 Communication of Offer, Acceptance and Revocation

A valid contract does not result from mere mental proposal and its mental acceptance. An offer and its acceptance are pre-requisites for a valid contract. When the contracting parties are physically present and negotiate in person, an agreement comes into existence the moment the offeree gives his absolute and unqualified acceptance to the proposal made by the offeror. Problems arise when the parties are at a distance and the proposal and its acceptance need to be communicated between the two.

According to Section 3 of the Indian Contract Act, the communication of an offer, its acceptance and revocation are deemed to be made by an act or its omission by the party offering, accepting or revoking. Such act or omission must have the effect of communicating such offer, acceptance or revocation.

A. Communication of an Offer (Section 4)

According to Section 4, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. For example, P proposes by letter to sell a house to S at a certain price. The communication of the proposal is complete when b receives the letter.

B. Communication of Acceptance (Section 4)

Communication of an acceptance is complete —

a) as against the proposer when it is put in course of transmission to him, so as to be out of power of the acceptors to withdraw the same.

b) As against the acceptor when it comes to the knowledge of the proposer.

For example, A proposes by a letter to sell a house to B at a certain price. B accepts A's proposal by letter sent by post. The communication of the acceptance is complete as against A, when the letter is posted, as against B when the letter is received by A.

The main difference the two is that the proposer is bound as soon as the acceptance letter is posted but the acceptor is not bound till the letter is received by the proposer. In other words, the acceptor has the option to revoke his acceptance of the proposal before it is received by the proposer.

C. Communication of Revocation of Proposal (Section 5)

Revocation implies 'taking back', 'recalling' or 'withdrawal'. It may be a revocation of the offer or acceptance. The communication of revocation is complete in the following situations:

i) As against the person who is revoking: A proposal may be revoked at any time before the communication of its acceptance is complete, as against the proposer, but not afterwards.

ii) As against the person to whom it is made: As against the person to whom the revocation is made, it is complete, when it comes to his knowledge.

   An offer can be revoked before acceptance and an acceptance can be revoked before its communication. Therefore, the communication of revocation of acceptance must reach the offeror before acceptance.

1.8.4 Modes of Revocation of an Offer (Section 6)

An acceptance of proposal needs to be made effective before it lapses. After the proposal has lapsed, no law can enforce its acceptance. According to Section 6 of the Act, a proposal may be revoked in any of the following ways:

1. **By Notice:** Section 4 and 5 of the Contract Act clearly stipulate that a proposer can revoke his proposal before the completion of the acceptance by sending a notice of revocation. Such notice needs to be clear and unambiguous and can be by word of mouth, by letter, telegram or telephone or it can be through behavior and action. The notice for the revocation of an offer should be communicated by the person who has made the offer or by his authorized representative.
2. **By Lapse of Time:** A proposal will come to an end by the lapse of time prescribed in such proposal for its acceptance or, if no time is so prescribed by the lapse of reasonable time. A reasonable time could be a few hours or it could be a week or more depending upon the circumstances of each case. Where the subject matter of the contract is an article, like gold, the prices of which fluctuate daily in the market, very short period will be regarded as reasonable. Where a person applied for shares of a company in June, he cannot be bound by an allotment made late in November.
3. **By Non-fulfilment of an Essential Precedent:** If the offeror has seta condition precedent to the acceptance of the offer, such condition needs to be met for a valid acceptance of the proposal. Non-fulfilment of an essential pre-condition nullifies \the proposal and its acceptance. Thus, X may offer to sell certain goods to Y on a condition that Y pays a certain amount before a certain date. The proposal is revoked if Y fails to pay the requested amount within given time.
4. **By Death or Insanity of the Proposer:** A proposal is revoked by the death or insanity of the proposer if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance. If the offer is accepted in ignorance of the death or insanity of the offeror, the acceptance is valid. According to English law, even if an offer is accepted in ignorance of the death of the offeror, it still cannot constitute a contract.
5. **By Counter Offer:** An offer comes to an end when the offeree makes a counter offer or rejects the offer. Where an offer is accepted with some modification in the terms of the offer or with some other condition not forming part of the offer, such qualified acceptance amounts to a counter offer. An offer once rejected cannot be revived. For example, X offers

to sell his house to Y for Rs.10, 000. Y replies offering to pay Rs. 8, 000. X refuses. Subsequently Y writes accepting the original offer has lapsed.

6. **By the non-acceptance of the offer according to the prescribed or usual mode:** The offer will also stand revoked if it has not been accepted according to the mode prescribed. According to Section 7, it is the duty of the offeror to inform the offeree that the acceptance does not meet the conditions prescribed in the offer. If the offeror does not do that and keeps quiet, he is deemed to have accepted the acceptance of the offer.
7. **By subsequent Illegality:** An offer lapses if it becomes illegal after it is made and before it is accepted. If there is a change in law that makes the contract contemplated by the offer illegal or incapable of performance, the offer comes to an end.

1.9 CONSIDERATION

1.9.1 Meaning

Consideration is one of the essential elements to support a contract. The law enforces only those promises which are made for consideration. Where one party promises to do something, it must get something in return. This something in return is called consideration. In everyday language, a consideration means ‘something for something’. If a person does, or promises to do, something, he expects (and is promised) something in return – which is the quid pro que or compensation – without which the promise is not valid. This something is called consideration. Consideration is the price that is paid for buying somebody’s promise. A consideration may be a profit or loss, a benefit or damage, or an obligation.

1.9.2 Definitions

According to Pollock, “consideration is the price for which the promise of other is bought and the promise thus given for value is enforceable.”

A most commonly accepted definition of consideration is given in the famous English case Currie v. Misa as “Some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other”.

Section 2 (d) of the Indian contract Act defines consideration as, “when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise”.

1.9.3 Essential Elements of Valid Consideration

As per the definition in Section 2 (d), a consideration has the following essential elements:

1. **It must move at the Desire of the Promisor:** Any act or abstinence constituting consideration must have been done at the desire or request of the promisor. If it is done at the instance of a third party or without the desire of the promisor, it will not be a good consideration. The desire of the promisor may be express or implied.
2. **It must move from the promisee or any other person:** Under the English law, consideration must move from the promisee. Under the Indian law, consideration may, move from the promise or any other person, i.e., even a stranger. This means that as long as there is consideration for a promise it is immaterial who has furnished it. But the stranger to consideration will be able to sue only if he is a party to the contract. In the case of Chinayya vs. Ramayya, a father left his entire property to his daughter under the condition that she will pay a certain amount of money annually to her uncle (i.e., father's younger brother). The daughter promised to pay the agreed amount annually, but stopped doing it after a time on the plea that no consideration moved from her uncle to herself, but the plea was rejected by the court. It was held that an indirect consideration had moved from her uncle. The law stipulates that 'a stranger to consideration can sue but a stranger to a contract cannot'.
3. **Consideration may be past, present or future:** The words used in Section 2 (d) — has done or abstained from doing (past); or does or abstains from doing (present); or promises to do or to abstain from doing (future) — indicates that consideration may be past, present or future. The Indian Contract Act recognises past, present and future considerations whereas the English law does not recognize a past consideration.

   When the consideration for a present promise was given before the date of promise, it is said to be **past consideration**. A past consideration, if given at the request of the promisor will support a subsequent consideration.

   When the consideration for a promise is given simultaneously with the promise, it is called **present or executed consideration**. A present consideration consists in doing or abstaining from doing something.

   A **future or executory consideration** is a promise to do or give something in return in future for the promise then made. It is also called a promise for the promise.

4. **Consideration need not be adequate:** Consideration means 'something in return'. This 'something in return' need not necessarily be equal in value to 'something given. The law simply provides that a contract should be supported by consideration. So long as consideration exists, the courts are not concerned as to its adequacy, provided it is of some value. Adequacy is for the parties to decide at the time of making the agreement. Inadequacy is no ground for refusing the performance of the promise, unless it is evidence of fraud.
5. **Consideration must be real and not illusory:** Though consideration need not be adequate, yet it must be real and not illusory. Thus, a promise to do that which a person is by law bound to do, does not amount to consideration. Consideration has also to be competent. If it is physically impossible, vague or legally impossible, uncertain or illusory, the contract cannot be enforced. Thus, a promise by a man to make two parallel lines meet is no good consideration.
6. **Consideration must be lawful:** The consideration for an agreement must be lawful. An agreement is void, if it is based on unlawful consideration. The consideration of an agreement is lawful unless
   i) It is forbidden by law, or
   ii) is of such a nature that if permitted it would defeat the provisions of any law, or
   iii) is fraudulent, or
   iv) involves or implies injury to the person or property of another, or
   v) the court regards it as immoral or opposed to public policy.
7. **Consideration must be something which the promisor is not already bound to do:** A promise to do what one is already bound to do, either by general law or under an existing contract, is not a good consideration for a new promise. There will be no detriment to the promise or benefit to the promisor over and above their existing rights or obligations.

1.9.4 No Consideration No Contract – Exceptions

Every agreement to be enforceable at law must me supported by valid consideration. The general rule is *ex nudo non oritur action,* i.e., an agreement made without consideration is void and is unenforceable except in certain cases. Sections 25 and 185 deals with the exceptions to this rule i.e., it specifies the cases where an agreement though made without consideration will be valid. These cases are:

1. **Natural Love and Affection [Section 25(1)]:** Where an agreement is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between the parties standing in a near relation to each other, it is enforceable even if there is no consideration. In simple words, a written and registered agreement based on natural love and affection between near relatives is enforceable even if it is without consideration [Ram Dass v. KrishanDev, A.I.R (1986) H.P.9]. In the case Rajlukhy vs. Bhootnath, a Hindu husband, after referring to quarrels and disagreements between himself and his wife, promised to pay a certain amount as allowance to his wife vide a written document that was duly registered; but the court held the agreement void since the essential element of love and affection between the parties was missing.
2. **Compensation for Services Rendered [Sec. 25 (2)]:** A promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or has performed an act for which the promisor was legally bound, is a valid contract even without consideration. But it is essential in this case that the act must have been voluntary, and done for the promisor who was in existence when the act was done, and must not have been done without expecting any consideration. In simple words, a promise to pay for a past voluntary service is enforceable. For example, P finds Q's purse and gives it to him. Q promises to give P Rs. 200. This is a contract. If M voluntarily supports N's infant son, and N promises to compensate m for the expense incurred in doing so, it would be a valid contract by law.
3. **Time – barred Debt [Sec. 25 (3)]:** According to section 25 (3), a promise by a debtor to pay a time –barred debt is enforceable provided it is made in writing and is signed by the debtor or his agent generally or specially authorized on his behalf. For example, A owes Rs. 2,00,000 to B, but the debt is time-barred under the Law of Limitation. Even so, if A gives a written promise to B to pay Rs. 1,00,000, it is deemed a valid contract.
4. **Completed gifts [Exp. 1 to Sec. 25]:** Explanation 1 to section 25 provides that the rule 'NO consideration, No Contract' shall not affect validity of any gifts actually made between the donor and the donee. Thus, if a person gives certain properties to another according to the provisions of the Transfer of Property Act, he cannot subsequently demand the property back on the ground that there was no consideration.
5. **Agency (Sec.** 185) According to Section 185 of the Indian Contract Act, no consideration is necessary in a contract of agency. A person who works as an agent for another is not legally

entitled to a consideration unless there is an agreement to such effect between the concerned parties.

6. **Guarantee (Sec.127):** A contract of guarantee is made without consideration.
7. **Remission (Sec.63):** No consideration is required for an agreement to receive less than what is due. This is called remission in law.
8. **When the promise is for a gift or donation:** Such a promise does not entail a consideration. Therefore, a promisor of a gift or donation is not liable to keep his promise and cannot be enforced to do so.

1.10 SPECIAL CONTRACT

Special contracts are a species of general contract itself; as such the principles of general contract are applicable to them. Special contracts include contract of indemnity and guarantee, bailment, pledge and agency. The special principles relating to them are contained in Chapter VIII (Sections 124 to 147), Chapter IX (Sections 148 to 181) and Chapter X (Sections 182 to 238).

1.11 INDEMNITY AND GUARANTEE

The contract of indemnity and contract of guarantee are specific types of contracts. The provisions relating to these contracts are contained in Sections 124 to 147 (Chapter VIII) of the Indian Contract Act, 1872.

1.11.1 Meaning and Definition of Contract of Indemnity

Ordinarily, the term indemnity means to make good any loss or to compensate any person who has suffered some loss. According to Section 124 of the Indian Contract Act, “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, is called a contract of indemnity”. The person who makes the promise to make good the loss is called the indemnifier. The person whose loss is to be made good is called indemnity holder.

A contract of indemnity refers to a promise made by one person to make good any loss or damage another has incurred or may occur by acting at his request or for his benefit. As such, a contract of indemnity is a type of contingent contract. The performance of the contract is dependent on happening or non-happening of a contingency, which may cause losses to another party. A contract of indemnity may be express or implied.

1.11.2 Essentials of the Contract of Indemnity

The definition of a contract of indemnity in Section 124 of the Indian Contract Act makes it clear that, besides having the basic elements of a valid contract, a contract of indemnity must have the following two elements:

a) The indemnifier expressly promises to indemnify the indemnity holder.
b) The promise is to protect the indemnity holder against loss that could be the result of an act on the part of the promisor (i.e., the indemnifier) or a third party.

1.11.3 Rights of Indemnity Holder (Section 125)

Section 125 enumerates the rights of an indemnity holder in a contract of indemnity. According to this section, an indemnity holder (or indemnified) is entitled to recover the following from the promisor:

1. **Right to Damages:** An indemnity holder is entitled to recover the amount of damage that he has been compelled to pay the other party in a suit to which the contract of indemnity is applicable.
2. **Right to Costs:** An indemnity holder is also entitled to claim all the costs which he has incurred for defending himself in a suit to which the promise of indemnity is applicable. Such costs may include all incidental charges and legal expenses paid in that suit.
3. **Sums paid under the conditions of compromise:** The indemnity holder is entitled to recover all sums which he may have paid under the terms of any compromise of any such suit, provided such compromise is not contrary to the orders of the promisor and was one which it would have been prudent for the indemnity holder to make.

1.11.4 Rights of the Indemnifier

When the indemnifier indemnifies an indemnity-holder, he has some rights on the indemnified. The Indian Contract Act is silent on the rights of the indemnifier but, as per the provisions of Section 141 and various court verdicts, the rights of the indemnifier are analogous to the rights of a surety, which are as under:

1. An indemnifier, after he has paid the damages under an indemnity, regains the rights he had delegated to the indemnified. But he gets these rights only after he has paid the damage, and not before.

2. If the indemnifier has indemnified the indemnity holder, he gets the right to sue third parties on behalf of the indemnified.
3. If the indemnified suffers any damages which are not covered by the contract of indemnity, the indemnifier is not bound by law to pay such damages.
4. The indemnifier is entitled to sue third parties only to the extent of the damages he has paid to the indemnified.

1.11.5 Definition of Contract of Guarantee

Section 126 of the Indian Contract Act defines a contract of guarantee as a contract to perform the promise, or discharge the liability, of a third person in case of his default. The contract of guarantee is made to ensure performance of a contract or discharge of obligation by the promisor. In case he fails to do so, the person giving assurance or guarantee becomes liable for such performance or discharge.

In a contract of guarantee, there are three parties, the creditor, the surety and the principal debtor. The person who gives the guarantee is called the **surety**, the person in respect of whose default the guarantee is given is called the **principal debtor** and the person to whom the guarantee is given is called the **creditor**. The contract can be oral or written; but English law stipulates it to be in writing. It may be expressed or implied and may even be inferred from the course of conduct of the parties concerned. For example, A advances loan of Rs. 50,000 to B and C promises to P that if B does not repay the loan, C will do so. This is a contract of guarantee. Here B is the principal debtor, C is the surety and A, the creditor.

A contract of guarantee is a tripartite agreement which contemplates the principal debtor, the creditor and the surety in it. There is a triangular relationship in which the following three collateral contracts may be distinguished:

i) As between creditor and principal debtor, there is a contract out of which the guaranteed debt arises.
ii) As between surety and creditor, there is a contract by which surety guarantees to pay to creditor, principal debtor’s debt in case of his default.
iii) As between surety and principal debtor, there is a contract that principal debtor shall indemnify surety in case surety pays in the event of a default by principal debtor. This contract, if it is not expressed between the parties, is always implied.

1.11.6 Purpose of Contract of Guarantee

Normally, the purpose of a contract of guarantee can be one of the following:

i) For the security of a loan given to a party,

ii) For the assurance of good conduct and honesty of an employee in service contracts and

iii) For indemnity of a third party from loss resulting from the non-payment of a debt**.**

1.11.7 Essential Features of a Contract of Guarantee

Like in a contract of indemnity, a contract of guarantee also must have all the essential elements of a valid contract. According to Section 126, the following are the essential features of a contract of guarantee —

1. **Existence of a Principal Debt:** A contract of guarantee pre-supposes the existence of a liability enforceable at law. If no such liability exists, there can be no contract of guarantee. The surety undertakes to be liable only if principal debtor fails to discharge his obligation.
2. **Benefit to principal debtor is sufficient consideration:** Section 127 clearly provides that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. Thus, any benefit received by the debtor is adequate consideration to bind the surety. There must be a fresh consideration moving from the creditor. Past consideration is no consideration for contract of guarantee.
3. **Consent of surety not obtained by misrepresentation or concealment:** A contract of guarantee is not a contract of uberrimaefidei i.e., one requiring complete disclosure of all the material facts by the principal debtor or the creditor to the surety before the contract is entered into by him. Thus, when a guarantee is given to a bank, it is not bound to inform the surety of matters affecting the credit of the debtor, or of any circumstances connected with the transaction which may render the position of the surety more onerous. The contract of guarantee is invalid in case of misrepresentation, concealment or when co-surety does not join.
4. A contract of guarantee may be either oral or written. It may be expressed or implied from the conduct of the parties.
5. Surety can be proceeded without proceeding against the principal debtor first.
6. A contract of guarantee can only be between at least three parties — surety, principal debtor and creditor.
7. Free consent of all parties is essential for a contract to be valid.

1.11.8 Distinction between Contracts of Indemnity and Guarantee

In both the contracts, the motive is to insure a person against the probable loss out of the deal. But there are many points of distinction between the two which are listed below:

1. **Function:** In a contract of indemnity, the indemnifier promises to protect the indemnified against the consequences of the conduct of the indemnity – holder or a third party whereas in a contract of guarantee, the surety promises to perform the obligation or promise of a third party.
2. **Parties to the Contract:** In a contract of indemnity, there are only two parties to the contract — the indemnifier and the indemnity – holder whereas in a contract of guarantee, there are three parties to the contract — the principal debtor, creditor and the surety.
3. **Object:** The purpose of contract of indemnity is a safety from an uncertain future event whereas the purpose of contract of guarantee is to assure the other party of the performance of an obligation.
4. **Liability:** In a contract of indemnity, the liability of the indemnifier is primary while in a contract of guarantee, the liability of the surety is secondary and arises only on the default of the principal debtor.
5. **Time of Occurrence:** Ina contract of indemnity, the liability of the indemnifier arises only on the happening of a contingency whereas in the case of a contract of guarantee, there is an existing debt or duty the performance of which is guaranteed by the surety.
6. **Scope:** In a contract of indemnity, the scope is limited and does not include contracts of guarantee whereas in a contract of guarantee, the scope is wide and includes the contracts of indemnity.
7. **Nature:** In a contract of indemnity, the contract is a security against loss whereas in a contract of guarantee, the contract is an assurance to the creditor.
8. **Purpose:** A contract of indemnity is for the reimbursement of a loss while a contract of guarantee is for the security of the creditor.
9. **Consideration:** In a contract of indemnity, the indemnifier receives a consideration from the indemnity-holder at the beginning of the contract, whereas in a contract of guarantee, the surety does not receive any consideration. The only consideration for the surety is the expected gain of the principal debtor.
10. **Right to Sue:** In a contract of indemnity, the indemnifier cannot sue a third party for loss in his own name, but must bring the suit on behalf of the indemnified. But in a contract of

guarantee, the surety, on discharging a debt payable by the principal debtor to the creditor, can sue the principal debtor in his own right.

11. **Number of Contracts:** in a contract of indemnity, there is only one original and independent contract between the indemnifier and the indemnity holder whereas in a contract of guarantee, there are three contracts — between the principal debtor and the creditor, between the creditor and the surety and an implied contract between the principal debtor and the surety.
12. **Competency to Contract:** All parties in a contract of indemnity must be competent to contract. As a special case, when a minor is a principal debtor, the contract of guarantee is still valid.
13. In the case of a contract of indemnity, it is not necessary for the indemnifier to act at the request of the indemnified, whereas in the case of a contract of guarantee, it is necessary that the surety should give the guarantee at the request of the debtor.

1.11.9 Kinds of Guarantee

The function of a contract of guarantee is to enable a person to get a loan, or goods on credit, or an employment. A guarantee may therefore be given for a) the repayment of debt, or b) the payment of the price of the goods sold on credit, or c) the good conduct or honesty of a person employed in a particular office. In the last case, the guarantee is called a 'fidelity' guarantee.

A guarantee may be one of various kinds, such as —

a) . **Absolute and conditional guarantee:** An absolute guarantee is one by which the guarantor unconditionally promises payment or performance of the contract on default of the principal debtor. A conditional guarantee is one which is not enforceable immediately on the default of the principal debtor, but some contingency other than such default must happen.

b) **General and special guarantee:** A general guarantee is one for acceptance by the public generally. It is a general promise to any one accepting it to be answerable for a debt in case of the failure of another person. A special guarantee is one which is addressed to a particular person who alone can take advantage of it and to whom alone the guarantor can be held responsible.

c) **Limited and unlimited guarantee:** A limited guarantee is ordinarily one restricted to a single transaction and in this sense it is different from a continuing guarantee. An unlimited guarantee is one which is unlimited either as to time or amount.

d) **Retrospective and prospective guarantee:** A guarantee given for an existing debtor obligation is called a retrospective guarantee. A guarantee given for future debt or obligation is called a prospective guarantee. A prospective guarantee is of two types—
specific guarantee and continuing guarantee

i) **Specific guarantee:** When a guarantee extends to a single transaction or debt, it is a specific guarantee. Such guarantee comes to an end with the discharge of a debt or the performance of a promise.

ii) **Continuing guarantee:** It means a guarantee which extends to a series of transactions. It is not limited to a single transaction but it is generally for an indefinite time or until revoked. It is prospective in its operation. The essence of a continuing guarantee is that it applies not to a specific number of transactions, but to any number of them and makes the surety liable for the unpaid balance at the end of the guarantee (Sec.129).

The **salient features** of a continuing guarantee are:

i) Such guarantee is valid for a series of continuing transactions provided the transactions are within the limits of the guarantee in terms of amount and time period.
ii) Such guarantee is only applicable to specific amount of money.
iii) The surety reserves the right to be kept informed about the probable future transactions.
iv) In the absence of an agreement to the contrary, the continuing guarantee terminates in the event of death of the guarantor.

Revocation of a continuing guarantee

A continuing guarantee is revoked as to future transactions in the following ways:

1. **By notice:** A continuing guarantee may at any time be revoked by the surety as to future transactions, by notice to the creditor (Sec. 130). In the event of revocation, the surety is not responsible to the creditor for any future transactions, but continues to be responsible for all such transactions that have been done till the notice of revocation of guarantee is received by the creditor.
2. **By surety's death:** According to Section 131, the death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions. The liability of the surety for the previous transactions, however, remains.
3. **By other modes:** A continuing guarantee is also revoked —

a) **By Novation** (Sec. 62): When the parties agree to substitute a new contract for the old contract or rescind or alter the old contract of guarantee, it will amount to revocation.

b) **By variance in the terms of contract** (Sec. 133): If any variation has been made in the terms of contract of guarantee between the creditor and the principal debtor without the knowledge or concurrence of the surety, the contract of guarantee is revoked..

c) **By release or discharge of the principal debtor** (Sec.134): When a creditor discharges principal debtor from the liability, the surety also gets discharged.

d) **By compounding with the principal debtor** (Sec. 135).

e) **By creditor's act or omission impairing surety's eventual remedy** (Sec. 139): Any act or omission by the creditor which repairs the eventual remedy of the surety against the debtor amounts to revocation of the contract of guarantee.

f) **By loss of security** (Sec. 141): When a creditor loses security under the contract, the surety gets discharged to the extent of the value of that security.

e) Invalid guarantee: If the guarantee is not covered by the contracts of absolute faith, the surety is not absolved of his obligation merely by proving that he was unaware of the contract between the principal debtor and the creditor. But the surety has the right to be kept informed by the party for whom he is giving the guarantee about the duration and amount of the guarantee. A guarantee becomes valid in the following situations:

i) **Guarantee obtained by misrepresentation** (Sec. 142): Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

ii) **Guarantee obtained by concealment** (Sec. 143): Any guarantee which the creditor has obtained by means of keeping silence as to the material circumstances is invalid.

iii) **Guarantee on the condition of joining co-sureties** (Sec.144): Where a person gives a guarantee upon a contract that a 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. This means if the surety agrees to be only one of several co-sureties, he will not be liable unless the other execute the guarantee.

1.11.10 Liability of Surety

Section 128 of the Contract Act defines the nature and extent of surety's liability.

1. **Liability of surety is of secondary nature**: Ina contract of guarantee, the principal debtor is primarily liable to pay or discharge liability. It is only at his default, the liability of the surety arises and he may be called upon to discharge it. The creditor is not required to give any notice to this effect to the surety.
2. **Liability of the surety is contingent**: In a contract of guarantee, the liability of the surety is contingent or conditional in nature. It may or may not arise when the principal debtor commits default. And it is not certain that he will default. In practice, generally he discharges his liability to the satisfaction of the creditor.
3. **Liability of the surety is immediate in nature**: Once the principal debtor commits default, immediately the creditor may proceed against the surety. It is not necessary that he should first exhaust his remedies against the principal debtor. Thus, on default by the principal debtor, the creditor instead of suing the principal debtor can file a suit against the surety.
4. **Liability of surety is 'co-extensive':**In a contract of guarantee, the liability of the surety is co-extensive with that of the principal debtor. He is liable for those sums that the principal debtor is liable. His liability cannot be more than that of the principal debtor. In case the principal debtor is scaled down or extinguished by the creditor or by the operation of the law, either in whole or in part, the liability of the surety would also be reduced or extinguished to the same extent.
5. **Surety may limit his liability**: Though the liability of the surety is co-extensive with that of principal debtor, he has a right to limit his liability. He can do this by declaring it expressly at the time of making the contract. In such an instance, the liability of the surety will not go beyond the limit as declared by him.
6. **Liability in continuing guarantee**: In the case of continuing guarantee, the liability of the surety extends to a series of transaction over a period of time and not to a specific number of series but to any number of them. It makes the surety liable for unpaid balance at the end of guarantee.
7. **Liability of the surety where the original contract between the principal debtor and the creditor is void or voidable**: In a contract of guarantee, there are two independent contracts, one between the principal debtor and the creditor and another between the

creditor and the surety. Since the law does not treat the principal debtor and the creditor is void, the surety will be liable as if he were the principal debtor.

1.11.11 Discharge of Surety from Liability

A surety is said to be discharged when his liability comes to an end.The liability of a surety comes to an end under the following circumstances:

1. **Revocation by notice** (Section 130): In case of continuing guarantee, a surety is discharged from liability when he gives due notice to the creditor in respect of any future transactions. In such a case, the surety would not be responsible for future transactions which may be made by the principal debtor after the surety has revoked the contract of guarantee.
2. **Discharge by variation in terms of contract** (Section 133): If a variation is made in the terms of the contract between the principal debtor and the creditor, without the surety's consent, the surety is discharged from liability as to transactions made after the variance. But the variation must be such as materially affects the position of the surety.
3. **Revocation by death** (Section 131): The death of the surety operates as a revocation of the continuing guarantee, in the absence of a contract to the contrary, so far as regards future transactions. But such revocation does not affect transactions which were executed prior to the death of the surety.
4. **Release or discharge of principal debtor** (Section 134): This section provides for two kinds of discharge from liability.
   a) If the creditor makes any contract with the principal debtor by which the latter is released, the surety is discharged. But if the principal debtor is discharged in insolvency, this will not operate as a discharge of the surety.
   b) The surety is also discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.
5. **Discharge of surety on composition or extension of time or promise not to sue** (Sec. 135): This section provides three modes of discharge from liability, namely —
   a) **Composition with principal debtor:** The liability of the surety will be discharged where a creditor in composition with his principal debtor accepts a lesser amount in full satisfaction of his claim.
   b) **Promise to give time:** A contract between the creditor and the principal debtor by which the creditor promises to give time to the principal debtor discharges the surety

c) **Promise not to sue:** Where the creditor under an agreement with the principal debtor promises not to sue him, the surety is discharged.

6. **By creditor's act or omission impairing surety's eventual remedy** (Sec.139)**:** A surety is discharged if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired. It is the duty of the creditor not to do anything which is inconsistent with the rights of the surety.
7. **By the creditor losing his security** (Section 141)**:** Where the creditor loses or parts with the securities without the consent of the surety, the surety is discharged to the extent of the value of securities.
8. **By concealment or misrepresentation** (Section 142 and 143)**:** Where a surety is induced to enter into a contract of guarantee by a misrepresentation or concealment on the part of the creditor concerning a material part of the transaction, such misrepresentation or concealment operates to discharge the surety from his liability on the guarantee. Sections 142 & 143 will not apply if the misrepresentation or concealment is by debtor and creditor has no knowledge of it.
9. **By the failure on the part of some person or persons to join the surety** (Sec.144): Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

1.11.12 Rights of Surety

Under the Indian Contract Act, a surety has the following rights against the principal debtor, the creditor and the co-sureties:

A. **Rights against principal debtor:** The surety can exercise the following two rights against the principal debtor:

   a) **Right of subrogation** (Sec. 140): When the principal debtor has committed the default and the surety pays the debt to the creditor, the surety will stand in the shoes of the creditor and will be invested with all the rights which the creditor had against the debtor.

   b) **Right to claim indemnity** (Sec. 145): in every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to recover from the principal debtor all payments properly made. After the surety makes payment under the guarantee, he becomes a creditor of the principal debtor and can recover from the latter the amount paid, he can recover that damage also.

B. Rights against the creditor

Section 141 provides the following rights to a surety against the creditor —

a) A surety is entitled to the benefit of every security which the creditor has at the time when the contract of suretyship is entered into irrespective of whether the surety knows of the existence of such security or not; and

b) If the creditor loses or without the consent of the surety parts with such security, the security is discharged to the extent of the value of the security.

c) The surety has a right any time before the guaranteed debt has become due and before he is called upon to pay, to require the creditor to sue the principal debtor. However, the surety will have to indemnify the creditor for any expenses or loss resulting there from.

d) The surety is entitled, on being sued by the creditor, to rely on any set off or counter-claim which the debtor might possess against the creditor.

C. Rights against co-sureties

Right of contribution: When a debt is guaranteed by two or more sureties, they are called co-sureties. The co-sureties are liable to contribute, as agreed, towards the payment of the guaranteed debt. When one of the co-sureties makes payment to the creditor, he has a right to claim contribution from the other co-surety or co-sureties. The doctrine of contribution applicable here is not founded on contract but on equity i.e., there is equality of burden and benefit as between co-sureties. This rule is contained in Secs. 146 and 147.

a) Co-sureties liable to contribute equally (Sec. 146): Where there are two or more co-sureties for the same debt or duty and the principal debtor makes a default, the co-sureties, in the absence of any contract to the contrary are liable to contribute equally to the extent of the default. This principle will apply whether their liability is joint oe several, and whether their liability arises under the same or different contracts, and whether with or without the knowledge of each other.

b) Liability of co-sureties bound in different sums (Sec.147): Where the co-sureties have agreed to guarantee different sums, they have to contribute equally subject to the maximum amount guaranteed by each one. The fact that the sureties are liable jointly or severally under one contract or several contracts, or without the knowledge of each other, is immaterial.

As between the co-sureties, the right of contribution arises only when a co-surety has paid more than he is liable to pay. And if a co-surety obtains from the creditor any security of the principal debtor, the other co-sureties have a right to share in the proceeds of the security. To, sum up, it may be said that, between co-sureties, there is equality of burden and benefit.

c) **Release of a co-surety** (Sec. 138): Where there are co-sureties, a release by the creditor of one of them does not discharge the others, neither does it free the surety so released from his responsibility to the other sureties.

1.12 BAILMENT

1.12.1 Meaning: The term Bailment is derived from a French word "ballier" which means 'to deliver'. It means any kind of 'handing over' of goods from one person to another. Bailment implies 'voluntary change of possession from one person to another'. It involves change of possession and not transfer of ownership. It denotes a contract resulting from delivery. Section 148 of the Contract Act defines bailment as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person who delivers the goods is called the bailor and the person to whom they are delivered is called bailee. Common examples of bailment are giving cloth to the tailor to make a coat, delivering a car for repair, delivering goods to a railway company for carriage from one place to another, etc.

Sections 148 to 181 contained in Chapter IX of the Contract Act deal with the law relating to bailment. The Contract Act deals with the general principles relating to a contract of bailment and some special types of bailment, namely, pledges, repair and finder of lost goods. The rest are dealt with under other Acts namely Carriers Act, Railways Act, etc.

1.12.2 Definition of Contract of Bailment

A contract of bailment, like a contract of indemnity or guarantee, is a special type of business contract. A contract of bailment is a contract in which one person delivers some goods for some purpose and, when the purpose is accomplished, the goods are returned or otherwise disposed of according to the directions of the person delivering them. A contract of bailment is one in which a specific property, and the rights to it, of one person is transferred to another for a specific period. The ownership of such property or goods remains with the person owning the property, but the right of possession is transferred to the other person.

1.12.3 EssentialFeatures of Bailment

The essential features of bailment as stated in Section 148 of the Contract Act are as follows:

(i) Delivery of goods: The first important feature of bailment is the delivery of goods from one person to another. Delivery involves change of possession from one person to another and not a change of ownership. Mere custody without possession does not create bailment.

(ii) Delivery of goods must be for some purpose. Section 148 requires that there must not only be a delivery of goods, but the delivery must be for some purpose. Where some goods are delivered by mistake, there is no bailment. Delivery of goods being for a purpose, the bailee is bound to return the goods as soon as the purpose is achieved.

(iii) Contract: Bailment is based upon a contract between the parties. The relationship of bailer and bailee is the creation of a contract. The contract may be expressed or implied. In certain exceptional cases, bailment is implied by law as between a finder of goods and the owner.

(iv) Movable goods: The bailment can only be of movable goods. Money is not included in movable goods. Transfer of immovable property does not constitute bailment.

(v) Return of goods: Bailment of goods is always for some purpose and is subject to the condition that when the purpose is achieved the goods will be returned to the bailor or disposed of according to his directions. If there is no contract to deliver back or otherwise to dispose of the goods according to his directions, there is no bailment at all.

1.12.4 Kinds of Bailment

Bailment may be classified under the following heads:

1. **Voluntary and Involuntary Bailments:** Voluntary bailment is the outcome of an express contract between the parties, whereas involuntary bailment arises by the operation of law. Examples of involuntary bailment are in case of finder of goods, person to whom goods have been sent wrongly or in excess of the quantity ordered or bailee’s heirs in case of bailee’s death.
2. **Gratuitous and non-gratuitous bailment:** Where the bailee keeps the goods for the bailor without reward, it is a gratuitous bailment. Where some consideration passes between the parties, it is a non-gratuitous bailment or bailment for reward e.g., a motor car let out for hire,

goods given to a carrier at a price, articles given to a person for being required for remuneration, etc.

3. Bailment may also be classified in accordance to the **benefit derived by the parties.** Thus, a bailment may be —
    a) *For the exclusive benefit of the bailor*, as the delivery of some valuables to a neighbor for safe custody, without charge.
    b) *For the exclusive benefit of the bailee*, as the lending of a bicycle to a friend for his use without charge.
    c) *For the mutual benefit of the bailor and the bailee*, as the hiring of a bicycle or giving of a watch for repair. In these cases, consideration passes between the bailor and the bailee.

1.12.5 Rights of a Bailor

(i) Enforcement of bailee's duties: As a matter of fact, duties of the bailee are rights of the bailor. A bailor can enforce such rights in a court of law. A bailor has the following rights against the bailee:

(a) Right to claim compensation for loss caused to the goods by negligence of the bailee.

(b) Right to claim compensation for unauthorised mixing of boiled goods with the bailee's own goods.

(c) Right to claim damages for unauthorised use of goods.

(d) Right to demand goods back after the expiry of purpose or period.

(e) Right to claim any natural accretion to the goods bailed.

The following rights are provided to the bailor by the Contract Act.

(ii) Right of termination (Section 153): A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment. In such a case, the bailor can terminate the bailment.

(iii) Restoration of goods lent gratuitously: When goods are lent gratuitously the bailor can demand their return whenever he pleases, even though he lent it for a specified time or purpose. But if the bailee suffers any loss exceeding the benefit actually derived by him from the use of such goods because of premature return of goods, the bailor shall have to indemnify the bailee. (Sec. 159)

(iv) Right to file a suit against any wrong-doer : If a third party does some wrongful act and deprives the bailee from the use of goods bailed or does some injury to the goods bailed, the bailor has a right to file a suit against the wrong-doer and claim compensation from him (Sec. 180).

1.12.6 Rights of a Bailee

The duties of a bailor are the rights of the bailee. The bailee can, by law, enforce the bailor to honour his commitment in the case of a default. Under the provisions of the Indian contract Act, the rights of the bailee are as under:

i) **Bailment by several joint owners:** If several joint owners of goods bail them, the bailee may deliver them back to or according to directions of, one joint owner, without the consent of all, in the absence of an agreement to the contrary (Secction 165).

ii) **Right to Compensation (Section 164 and 166):** If the bailor has no right to bail the goods or to receive them back or to give directions regarding them and consequently the bailee is exposed to some loss, the bailee has the right to damages from the bailor.

iii) **Right to Remuneration:** The bailee is entitled to lawful charges for providing services. But where the goods are bailed and work is to be carried on them by the bailee, and the bailee is to receive no remuneration, the bailee is entitled to claim the necessary expense incurred by him. This right can be claimed by gratuitous bailee only (Sec 158).

iv) **Right to Claim Damages:** The bailee has a right to known the faults in the goods bailed to him, of which the bailor is aware and which materially interfere with the use of them or expose the bailee to extraordinary risks. A bailee is entitled to receive compensation from the bailor for any loss or damages arising directly from such faults in the goods bailed. (Sec. 150).

v) **Right of third person claiming goods bailed:** If a person, other than the bailor, claims the goods bailed, the bailee may apply to the court to stop delivery of goods to the bailor and to decide the title to the goods (Section 167).

vi) **Right to inter-plead:** Under the provisions of sections 166 and 167, if the title of the bailor to the goods is defective, and the bailee, in good faith, delivers them back to, according to the directions of the bailor, the bailee is not responsible to the owner of goods for such delivery.

If a person other than the bailor claims the goods bailed, the bailee may apply to the court to stop the delivery of goods to the bailor and to decide the title of goods.

vii) **Right to Sue:**Bailee can sue any person who has wrongfully deprived him of the use or possession of the goods bailed or has done them an injury. His remedies against wrong doers are the same as those of the owner. An action may, therefore, be brought by the bailee or the bailor. (Sec. 180)

viii) **Right against premature termination of bailment:** According to Section159, when the goods are lent gratuitously, if the bailor demands the return of goods before the expiry of the period of bailment, and the bailee suffers a loss in such return that exceeds the benefit actually derived by him from the use of such goods, the bailee has the right to claim such expense from the bailor. The bailee has this right only when he has acted as per the directions of the bailor for the duration of bailment, and the loss to him by premature termination is greater than the profit he has made during the period the goods were in his custody.

ix) **Right of lien:** The bailee enjoys the right to lien too. According to section 170, where the legal charges of the bailee in respect of the goods bailed have not been paid, the bailee may retain the goods. The right of the bailee to retain the goods is known as 'particular lien'. It is important to note here that the bailee can only retain the goods — he cannot sell the goods. According to Section 171, some specific types of bailees have the right to the goods or property (which is in their possession) until all their claims are satisfied, even if the claims are not with respect to the goods or property being held under bailment. General lien is available only to banks, factors, wharfingers, attorneys of the High Court and brokers of insurance policies.

1.12.7 Duties of a Bailor

The duties and responsibilities of a bailor are enumerated below:

(i) **Duty to disclose known defects:** According to Section 150, it is the duty of the bailor to point out all the defects in the goods that he is delivering which are known to the bailor or which can cause damage to the bailee if he is unaware of such defects. If the bailor does not make such disclosure, he is responsible for any damage caused to the bailee by such faults. In case the goods are bailed for hire, the duty of the bailor is still greater. He is responsible even for those faults which are not known to him. In gratuitous bailment, however, the bailor is responsible only for those faults which are known to him and which are not disclosed.

(ii) Duty to bear extraordinary expenses of bailment: Where the bailment is gratuitous and the bailee is to receive no remuneration, the bailor shall pay the bailee all the necessary expenses incurred for the purpose of bailment (Sec 158).

(iii) Duty to indemnify bailee: Under Section 164, a bailor is responsible to the bailee for any loss due to his imperfect title in the goods bailed. As such the bailee has a right to be indemnified by the bailor when the latter's title is defective.

(iv) Duty to receive back the goods: The bailor is under a duty to receive back the goods when they are returned by the bailee on the expiry of the term of bailment or on fulfilment of the purpose of bailment.

(v) Duty to bear normal risks: It is the duty of the bailor to bear the risk of normal loss, deterioration and destruction of the things bailed if the bailee has taken reasonable care of the things bailed.

(vi) Duty to indemnify bailee for loss in case of premature termination of gratuitous bailment: A gratuitous bailment can be terminated by the bailor at any time even though the bailment was for a specified time or purpose. But in such a case, the loss accruing to the bailee from such premature termination should not exceed the benefit he has derived out of the bailment. If the loss exceeds the benefit, the bailor shall have to indemnify the bailee (Sec. 159).

1.12.8 Duties of a Bailee

i) Duty of reasonable care: According to Section 151, a bailee is under a duty to take as much care of the goods entrusted to him as a man of ordinary prudence would take of his own goods of similar bulk, quality and value. The duty of the bailee starts as soon as the bailee accepts delivery or receives property.

ii) Duty not to make unauthorised use of goods: Goods must be used by the bailee strictly for the purpose for which they have been bailed to him. An unauthorised use of goods would make the bailee absolutely liable for any loss or damage to the goods. Even an act of god or inevitable accident would be of no defence. (Sec.154).

iii) **Duty not to mix bailor's goods with his own goods:** A bailee is under a duty not to mix the goods bailed with his own goods. If he mixes up his own goods with those of the bailor, following rules shall apply.

a) Section 155 provides that if the bailee, with the consent of the bailor mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest in proportion to in their respective shares in the mixture thus produced.

b) Section 156 provides that where goods are mixed without the consent of the bailor, and if the goods can be separated or divided, the property in the goods will remain in the parties respectively. The bailee is bound to bear the expenses of the separation or division and also any damage arising from such unauthorised mixing.

c) Where the goods mixed cannot be separated, Section 157 becomes applicable. In such a case, the bailor is entitled to be compensated by the bailee for the loss of the goods.

iv) **Duty not to set up any adverse title against the bailor:** A bailee is not authorised to set up the plea of justertii, that is to say, that the goods belong to a third person. The bailee is estopped from challenging the right of the bailor to receive the goods back. (Sec. 147 of the Indian Evidence Act, 1872).

v) **Duty to return any accretion to the goods:** A bailee is bound to deliver to the bailor any increase or profit accruing from the goods bailed. Section 163 provides that the bailor is entitled to the profits accruing from the goods bailed unless there is a contract to the contrary.

vi) **Duty to return the goods:** Section 160 imposes a duty on the bailee to return or deliver the goods bailed. He must deliver back the goods as soon as the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished. If he failed to so, he is responsible to the bailor for any loss (Sec.161) notwithstanding the exercise of reasonable care on his part.

vii) **Duty not to do any act inconsistent with the terms of bailment:** According to Section 153, if the bailee does any act with respect to the goods in bailment which is inconsistent with the terms of the contract, the bailor, if he so desires, can terminate the contract of bailment and recover the goods under bailment.

1.12.9 Bailee'sLien

Lien signifies the right of a person, who has possession of the goods of another, to retain such possession until a debt due to him has been satisfied. It is a right in one person to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied.

Possession is essential for exercising the right of lien. It is therefore also called ‘possessory lien’ in order to create a lien the possession must be lawful, not for a particular purpose and continuous. If the right to possession terminates, the lien also terminates. The right of lien arises by statute, or by express or implied contract, or by a general course of dealing between the parties in a particular trade. It implies that, under lien, the right is limited to the possession of some item or goods and does not extend to its sale, or making any change to such item or goods.

Bailees’s lien may be of two types — Particular lien and General lien.

Particular Lien: A particular lien is a right of the bailee to retain the goods in his custody until he receives due remuneration for the services rendered in respect of them. Where a bailee has spent some labour or money on the goods bailed, he has a right of retaining possession of those goods until his claim in respect of them is satisfied. Sec 170 of the Contract Act deals with bailee’s particular lien.

According to the provisions of law, the following persons are the holders of particular lien:

a) Finders of Goods — Section 168

b) Bailees — Section 170

c) Pawnees — Section 173

d) Agents — Section 221

e) Unpaid Sellers — Section 71, Sale of Goods Act

General Lien: A general lien implies the right to retain all the goods or any property (which is in the possession of the holder) of another until all the claims of the holder are satisfied. This is a right to retain the property of another for a general balance of account. In general lien, it is not essential that the demand is related to something which is in possession of the holder. It can be related to a past or a present liability of the person whose property is in lien. A general lien is a privilege which is available to selected categories of people by law. The Indian Contract Act specifies the following persons who are entitled by law to general lien as per section 171 — bankers, factors, wharfingers (those who have the care of, or own, a structure built especially along the shore, for loading or unloading vessels), attorneys of High Courts, Insurance brokers and others who give such rights by a written contract. These persons are entitled, in the absence of a contract to the contrary, to retain possession of the goods bailed to them as security until their claims are fully satisfied.

1.12.10 Termination of Bailment

A contract of bailment terminates in the following cases:

1. If the contract of bailment is for a specified period, the bailment terminates as soon as the specified period expires.
2. If the contract of bailment is for a specific purpose, the bailment terminates as soon as the purpose is achieved.
3. Where a bailee does something which is inconsistent with the terms of the contract, the bailment is terminated (section 153).
4. Where the bailment is gratuitous, the bailor may terminate the bailment even before the specified time or before the purpose is fulfilled (\Section 159).
5. The death of bailor or bailee terminates a gratuitous bailment (section 162).

1.13 PLEDGE

1.13.1 Meaning and Definition

According to Section 172, the bailment of goods as security for payment of a debt or performance of a promise is called ‘pledge’. The bailor is, in this case, called the ‘pledger’ or’pawnor’ and the bailee is called the ‘pawnee’ or ‘pledgee’. For example, Mahesh delivers his jewellery to rakesh as a security for a loan of Rs. 1,00,000. This is a contract of pledge. Mahesh is the pawnor and Rakesh is the pawnee.

A pledge is a bailment for security. If the purpose of bailment is to provide security for the payment of a loan or the performance of a promise, then such bailment is called a pledge. In a contract of pledge, the pawnor delivers the goods to the pawnee. Such delivery may be actual or constructive, but it can only be of movable property. A pledge for the immovable property is called ‘mortgage’. If because of the bulk of the property or for some other reason, actual delivery is impracticable, a symbolic delivery will suffice (as for example, the delivery of the keys to a safe deposit box.

1.13.2 Essentials Features of a Valid Pledge

The essential features of a valid pledge are:

1. **Pledge is only of movable goods:** movable goods are any movable item, like valuables or jewellery, shares of companies, documents or government securities. Immovable property is beyond the scope of a pledge.
2. **Pledge involves judicial possession of goods:** Only a person who is the lawful owner of a movable property can pledge such property. Mere possession of goods does not give the possessor a right to pledge such goods. For example, an employee who is in possession of some goods of the employer cannot pledge the goods he possesses because he does not have judicial possession of the goods.
3. **Pledge involves transfer of possession:** In a contract of pledge, the goods pledged must be transferred from the pawnor (pledger) to the pawnee (pledgee). The transfer can be actual or constructive, but a pledge cannot be without a transfer.
4. **Pledge can only be of a saleable commodity:** This is an essential feature of a contract of pledge. The main reason for this is that, if the pawnor is not able to clear his debt, the pawnee can recover the amount of the loan by selling the goods that have been pledged to him. Therefore, anything that is not saleable cannot be pledged.
5. **Pledge involves return of goods:** When the object of the pledge is accomplished, or after a stipulated time, the pawnee returns the goods in his possession to the pawnor, the contract is terminated.

1.13.3 Rights and Duties of Pawnor and Pawnee

Rights and duties of pawnor and pawnee are almost similar to those of bailor and bailee.

A. Rights of Pawnor or Pledger

1. **Right to get back the goods pledged:** According to section 160and 161, on the performance of promise at the stipulated time or repayment of loan and interest, if any, the pawnor is entitled to get back the goods pledged with the pawnee.
2. **Right to increase or profit:** According to Section163, if there is any increase in the value of, or profit from, the goods in pledge, the pawnor has the right to such increase or profit.
3. **Right to compensation:** If the goods under pledge are not taken care of, or are not used rightly and are damaged or deteriorated because of it, the pawnor has the right to claim compensation for such damage or loss.
4. **Right to get profit in case of sale:** According to Section176, in case of default on the part of the pawnor, if the goods under pledge are sold by the pawnee and the amount received from

such sale exceeds the amount of loan plus interest payable, the pawnor has the right to get back the surplus.

5. **Defaulting pawnor's right:** According to section 177, if there is a time limit fixed for the repayment of a loan or the performance of a promise, and the pawnor makes a default in doing that, then he has the right later, before the goods are actually sold, to get the goods released on the payment of the amount of loan plus the expenses incurred by the pawnee because of such default.
6. **Preservationand maintenance of the goods:** The pawnor has a right to see that the pawnee, like bailee, preserves the goods pledged and properly maintains them.
7. **Rights of an ordinary debtor:** The pawnor has, in addition to the above rights, the rights of an ordinary debtor which are conferred on him by various statutes meant for the protection of debtors.

B. Duties of Pawnor or Pledger

The duties of a pawnor or pledger are as under:

1. **To pay the debt:** It is the duty of the pawnor to pay his debt and the interest on it by the date and in the manner agreed to in the contract.
2. **To disclose the defects in goods:** According to Section 150, the pawnor is obliged to disclose the defects, if any, are in his knowledge that may cause inconvenience or harm to the pawnee, in the goods at the time of making the pledge.
3. **To repay the necessary expenses:** According to Section 175, if the pawnee has, during the course of the contract, incurred any reasonable expense on the maintenance or upkeep of the goods in pledge, the pawnor is duty–bound to pay such expense to the pawnee.
4. **Duty after sale:** In case of default in the payment of loan on the part of the pawnor, if the goods under the pledge are sold and the sale proceeds are less than the amount of loan plus interest payable, the pawnor is bound by law to pay such difference.

C. **Rights of Pawnee or Pledgee**

The rights of a pawnee or pledge are as under:

1. **Right of retainer to goods:** According to Section173, the pawnee has the right to retain the goods till the amount of the loan and the interest payable is paid to him by the pawnor. But Section 174 clearly specifies that the pawnee is entitled to retain only such goods that have

been pledged against a particular loan and the pawnor cannot retain the goods against a loan other than that for which the goods were pledged.

2. **Right of retainer for subsequent advances:** When the pawnee lends money to the same pawnor after the date of the pledge, it is presumed that the right of retainer over the pledged goods extends to subsequent advances also. This presumption can be rebutted by a contract to the contrary.
3. **Right to extraordinary expenses:** According to Section 175, the pawnee is entitled to receive from the pawnor any extraordinary expenses incurred by him for the preservation of the goods pledged.
4. **Right in case the pawnor makes default:** According to Section 176, if the pawnor defaults to redeem his pledge, the pawnee can exercise the following rights:
   a) File a suit against the pawnor for breach of promise and may retain the goods in his possession as collateral security.
   b) Sell the goods pledged after giving the pawnor a reasonable notice of sale.
   c) Recover from the pawnor any deficiency arising on the sale of the goods by him. But he shall have to hand over the surplus, if any, realized ion the sale of the goods to the pawnor.
5. **Right against true owner in case the pawnor's title is defective:** If the pawnor has obtained the possession of good pledged by him under a voidable contract, i.e., by fraud, undue influence or coercion and the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods provided he acts in good faith and is not aware of the pawnor's defect of title. (Sec. 178-A).

D. Duties of Pawnee or Pledgee

The duties of pawnee includes the following:

1. **To take reasonable care of goods pledged:** The pawnee is bound under Section 151 to take reasonable care of the goods that are pledged with him.
2. **Not to make improper use of goods pledged:** According to Section 154, the pawnee should not make improper use of goods under his control under a pledge.
3. **Not to mix the goods pledged with his own goods:** it is the duty of the pawnee under Sections 156 and 157 not to mix his own goods with the goods of the pawnor pledged to him.

4. **To return the goods pledged after the performance of the contract:** According to Section 160, after the payment of the loan or the performance of his promise by the pawnor, the pawnee is obliged to return the goods under pledge. Section 163 stipulates that the pawnee should also return the increase in the value of goods to the pawnor.

   If the pawnee defaults in the performance of his duties, then he is responsible to the pawnor just as a bailor is responsible to the bailee.

1.14. SUMMARY

Law: Law means a "set of rules". Broadly speaking, Law may be defined as the rule of conduct recognised and enforced by the state to control and regulate the conduct of people , to protect their property and contractual rights with a view to securing justice, peaceful leaving and social security.

Mercantile law: it is a part of civil law which deals with the rights and obligations of mercantile persons arising out of mercantile transactions in respect of mercantile property.

Contract: Section 2(h) of The Indian Contract Act defines a contract as, "an agreement enforceable at law."

Essentials of valid contract: The following are the essential element of a valid contract:
i) offer and acceptance ii) Agreement iii) Competent Parties iv) Free consent
v) Consideration vi) Legal object Vii) Legal formalities viii) Certainty of meaning ix) Possibility of Performance x) Not declared to be void

Quasi Contract: These contracts are created by the circumstances where one person has done something for another or paid money on his behalf, and the other persons enjoyed thebenefit of the same. It is a kind of contract by which one party is bound to pay money in consideration of something done or suffered by the other party.

Contract of Indemnity: A contract of Indemnity refers to a promise made by one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.

Contract of Guarantee: According to section 126, a contract of a guarantee is a contract to perform the promise or to discharge the liability of a third person in case of his default.

Contract of bailment: The term bailment is derived from a French word baillior which means to deliver. It means any kind of handing over. It involves change of possession and not transfer of ownership. Section 148 of the Contract act defines bailment as the delivery of goods by one person to another for some purpose upon a contract that they shall,when the purpose is accomplished, be returned or otherwise disposed off according to the directions of the person delivering them.

Bailor: The person who delivers the goods is called bailor.

Bailee: the person to whom they are delivered is called bailee.

Lien: Lien is a right of aperson to retain that which is in his possession and which belongs to another, until the demand of a person in possession are satisfied.

Pledge: Pledge is the bailment of goods as security for the payment of a debt or performance of a promise. Bailor in this case , is called the ‘pawner’ and thebailee is called the ‘pawnee’.

1.15. SELF ASSESSMENT QUESTIONS

1) Define the term contract . What are the essentials of valid contract?
2) A contract is defined as an agreement enforceable by law. Discuss
3) All contracts are agreements but all agreements are not contracts . Explain
4) Explain the meaning of the term ‘law’. Differentiate it from Mercantile Law.
5) “ The law of contract is not the whole law of agreements nor is it the whole law of obligations”-(Salmond). Comment
6) ‘A contract is a contract from the time it is made and not from the time performance is due’. Comment
7) Explain clearly the meaning of acceptance of an offer when each communication of acceptance not necessary? How does an offer lapse?
8) What is acceptance to an offer? Discuss the legal rules for a valid acceptance.
9) Give at least one example when a contract is valid without consideration.
10) Define consideration . Discuss rules relating to consideration.
11) State the exceptions to the rule “ no consideration no contract”.
12) What is the contract of indemnity? Give instances of liability to indemnify arising by operation of law.
13) Define a contract of guarantee. How and in what respect is it different from a contract of indemnity?
14) Explain the rights of surety against creditor .
15) What are the differences between a contract of guarantee and a contract of indemnity?
16) Define bailment.
17) What are the requisite of a contract of bailment? Explain
18) Explain the meaning of gratuitous and non-gratuitous bailment.
19) Define pledge. In what way does pledge differ from bailment.
20) What do you mean by lien ?and differentiate between general lien and particular lien.

UNIT-2

SALE OF GOODS ACT 1930

AIMS AND OBJECTIVE

After studying this lesson you should be able to understand :-

- The meaning of contract of sale
- Describe the meaning of agreement to sale
- Differentiate between conditions and warranties
- The transfer of ownership in goods
- Performance of contract of sale
- Enumerate the rules regarding the transfer of ownership
- Describe the rights of an unpaid seller

CONTENT

2.1:Introduction

2.2. Contact of Sale

2.3. Condition and Warranties

2.4. Doctrine of Caveat Emptor

2.5. Transfer of Ownership

2.6. Performance of Contract

2.7. Unpaid seller and his rights

2.8. Summary

2.9. Self-Assessment Questions

UNIT_II

SALES OF GOODS ACT

2.1 Introduction

The sale of goods is the most common of all commercial contracts. The law relating to it is contained in the Sale of Goods Act, 1930. The law came into force from July 1, 1930. The Act extends to the whole of India except the state of Jammu and Kashmir. Before 1930, the rules governing the sale of goods were a part of the Indian contract Act, 1872, wherein sections 76 to 123 incorporated the laws regarding the sale of goods. The presently Act contains 66 sections.

The Sales of Goods Act today incorporates all such amendments that have been made since the act was enacted in 1930. The Act today is much wider in scope and covers all aspects of the sale of goods. It clarifies the difference between a ‘sale’ and an ‘agreement to sell’, and covers such issues as ‘ownership’ and ‘transfer’ of goods. It also deals with sale by auction, delivering the goods to the transporter and the laws that govern the stoppage of goods in transportation.

2.2 CONTRACT OF SALE

2.2.1 Meaning and Definition

According to Section 4 (1), “A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a certain price”.

According to Blackstone, when one person transfers the ownership of goods to another the consideration of a price, a sale is have to be made.

A ‘contract of sale’ is a wide term and it includes a sale (or absolute sale) and an agreement to sell (or conditional sale) [Sec. 4 (2)]. According to Section 4 (3), when the right of ownership of goods is transferred from the seller to the buyer under a contract, the transaction is called a sale; but when the transfer of ownership is to be made at some future date, or is to be made on the fulfillment of some condition, the contract is called an ‘agreement to sell’. When the condition in such agreement has been fulfilled, or the transfer of ownership of goods has occurred, the agreement to sell becomes a sale. The property (ownership) in goods shall not be transferred from the seller to the buyer until and unless some condition is fulfilled for the completion of the contract of sale.

A contract of sale may be express i.e., made in writing or by words, or may be implied from the conduct of the parties.

2.2.2 Essentials of a Contract of Sale

To constitute a valid contract of sale, the following essentials must be present:

1. **Valid Contract:**A contract of sale is just like any other contract made under Indian Contract Act, 1872. Therefore, to constitute a valid contract of sale it should satisfy all the essentials of a valid, contract namely a valid offer, a valid acceptance, free consent of the parties, a valid and lawful consideration, parties must be competent to contract and lawful object etc.
2. **Two parties:** To constitute a contract of sale, there must be a transfer or agreement to transfer the property in goods by the seller to the buyer. It means that there must be two persons, one the seller and the other the buyer. 'Buyer' means a person who buys or agrees to buy goods [Sec. 2 (1)]. 'Seller' means a person who sells or agrees to sell goods [Sec.2 (13)]. The seller and the buyer must be two different persons, for a man cannot purchase his own goods. The parties must be competent to contract.
3. **Agreement for the transfer of ownership:** To constitute a valid contract of sale, there should be immediate transfer or an agreement to transfer the general property in goods sold or agreed to be sold. It is essential to transfer the general property in the goods from the seller to the buyer with or without physical possession of the goods.
4. **Goods:** The subject-matter of the contract of sale must be goods, the property which is to be transferred from the seller to the buyer. According to section 2(7), goods means every kind of movable property other than actionable claims and money; and includes stock and shares; growing crops, grass, trees and things attached to or forming part of the land which are agreed to be severed it before sale or under contract of sale.
5. **Price:** To constitute a valid contract of sale, consideration for transfer must be money paid or promised. Where there is no money consideration, the transaction is not a contract of sale, as for instance goods given in exchange for goods or as remuneration for work or labour.

2.2.3 Distinction between Sale and Agreement to Sell

The distinction between a sale and an agreement to sell is very necessary to determine the rights and the liabilities of the parties to the contract. The main points of distinction are:

1. **Nature of contract:** An agreement to sell is an executory contract, a contract pure and simple and no property passes; whereas a sale is an executed contract plus a conveyance.

2. **Transfer of property:** In sale, the property in goods passes from seller to buyer immediately at the time of contract and buyer becomes the owner of the goods immediately. But in an agreement to sell, the property in goods passes from seller to buyer at some future date or subject to the fulfillment of certain conditions.

3. **Risk of loss:**Unless there is a contract to the contrary, in a sale, if the goods are destroyed, the risk of loss falls on the buyer even if the goods were in the possession of the seller because the risk of loss passes with the ownership. But in an agreement to sell, if goods are destroyed the risk of loss falls on the seller even if the goods were in the possession of buyer because ownership has not passed from the seller to the buyer and the risk passes with the ownership.
4. **Consequences of the breach:** On breach of an agreement to sell by the seller, the buyer has only a personal remedy against the seller. But if after a sale, the seller breaks the contract the buyer may sue for delivery of the goods or for damages. In an agreement to sell, if the buyer fails to accept the goods the seller may sue for damages only and not for the price. In a sale, if the buyer does not pay the price, the seller may sue him for the price even though the goods are still in his possession.
5. **Insolvency of the buyer:** In a sale, if the buyer is adjudged an insolvent, the seller in the absence of a lien over the goods is bound to deliver the goods to the Official Receiver or Assignee. The seller will, however, be entitled to a rateable dividend for the price of the goods. In an agreement to sell, when the buyer becomes insolvent before he pays for the goods, the seller may not part with the goods until he is paid for.
6. **Insolvency of the seller:** In a sale, if the seller becomes insolvent before the delivery of goods, the buyer is entitled to recover the goods from the Official Receiver or Assignee as he (buyer) is the legal owner of the goods. In an agreement to sell, if the buyer has already paid the price and the seller becomes insolvent, the buyer can claim only a rateable dividend and not the goods because property in them is not yet passed to him.
7. **General and particular property:**An agreement to sell creates a right in personam (right against a particular individual) while a sale creates a right in rem right against the whole world). In case of an agreement to sell the buyer and seller get remedy against each other in case of breach of an agreement. Whereas in case of sale, the buyer gets an absolute right of ownership and this right of the buyer is recognised by the whole world.
8. **Right of re-sell:** In a sale, the seller cannot resell the goods, even if he is in possession of the goods after sale (except in certain case, as for example, a sale by a seller in possession

after sale under Sec. 30, or a sale by an unpaid seller under Sec. 54). If he does so, the subsequent buyer does not acquire title to the goods. In an agreement to sell, the seller may sell the goods since ownership is with the seller.

9. **Right of Usage:** In a sale, the buyer has the right to use the goods he buys, i.e., he becomes the sole owner of goods and can use them in any manner. But an agreement to sell being only a contract between the buyer and seller, it does not give the buyer the right to use the goods till the ownership of good is transferred to the buyer.

2.2.4 Formation of a Contract

Section 5 lays down the formalities of the contract of sale as under:

a) A contract of sale is made by an offer to buy or sell goods for a price. The contract may provide for the immediate delivery of goods or immediate payment of the price or both, or for the delivery or payment by installments, or that the delivery or payment or both shall be postponed.

b) A contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

2.3 CONDITIONS AND WARRANTIES

Before a contract of sale is entered into a seller frequently makes representations or statements with reference to the goods which influence the buyer to clinch the bargain. Such statements when made before entering into the contract are known as representations. Such representations or statements differ in character and importance. Whether any statement or representation made by the seller with reference to the goods is a stipulation forming part of the contractor is a mere representation (such as expression of an opinion) forming no part of the contract, depends on the construction of the contract.If there are no such representations, the ordinary rule of law — 'caveat emptor', i.e., "let the buyer beware" — applies. This means the buyer gets the goods as they come and it is no part of the seller's duty to point out the defects in the goods to the buyer. On the other hand, if it forms an integral part of the contract and other party relies upon such a representation, it will be stipulation within the meaning of Section 12 of the Act and may be either treated as a condition or a warranty.

2.3.1 Meaning of Conditions and Warranties

A stipulation in a contract of sale with reference to goods which are subject matter there of, may be a condition or a warranty. All the stipulations in a contract of sale are not of equal importance.

Some of them are essential to the main purpose of the contract which are called conditions and some are collateral to he main purpose of the contract which are called warranties.

A. CONDITIONS: Section 12 (2) of the sale of Goods Act defines a condition as “a stipulation essential to the main purpose of the contract, the breach of which gives right to treat the contract as repudiated”. In other words, if an express stipulation is a part of the contract, i.e., its fulfillment is essential to be completed, it is deemed to be a condition. If the condition is not met, the aggrieved party is entitled to terminate the contract. It may well be said that ‘condition’ is the foundation of the edifice of a contract of sale — the moment it is broken, the whole edifice collapses, and the contract terminates.

Essentials of Conditions

1. It is essential to the main purpose of the contract.
2. The non-fulfillment of condition causes irreparable damage to the aggrieved party which would defeat the very purpose for which the contract is made.
3. The breach of a condition gives a right to the aggrieved party to rescind the contract and recover the damages for breach of condition

B. WARRANTIES: According to section12 (3), “A warranty is a stipulation collateral to the main purpose of the contract, thee 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”. It is clear from the definition that warranty is not an essential object of the contract; it only helps expedite the execution of the contract.

Essentials of Warranties

1. It is collateral to the main purpose of the contract.
2. The breach of warranty causes damage to the aggrieved party and does not defeat the main purpose of the contract.
3. The aggrieved party can only claim the damages for breach of warranty but can not repudiate the contract.

If the condition of the contract is violated, the contract terminates. The injured party is entitled to repudiate the contract, to refuse the goods and if he has already paid for them, to recover the price. But if the warranty is violated, the contract does not terminate — only the aggrieved party can file a suit for recovery of damages only. It does not give right to reject the goods and treat the contract as repudiated because the buyer is not solely dependent on it on a contract of sale—he only recognizes it as being related to the contract and being helpful in its execution.

2.3.2 Difference between a Condition and Warranty

Following are the main points of distinction between the conditions and warranties:

1. **Nature:** condition is a stipulation which is essential to the main object of the contract whereas warranty is a stipulation which is collateral to the main object of the contract.
2. **Consequences of Breach:** The breach of condition gives the aggrieved party to repudiate the contract and claim damages from the defaulting party, whereas the breach of warranty does not entitle the aggrieved party to repudiate the contract and only entitles the aggrieved party a right to claim damages from the other party.
3. **Legal Effect:** The contract ceases to be legal on the breach of condition whereas a breach of warranty does not have any legal effect on the contract.
4. **Option of Treatment:** In the case of condition, a breach of condition can be treated as a breach of warranty as an option on the part of the aggrieved party and the aggrieved party can only be compensated by damages it receives from the other party whereas in breach of warranty there is no such option available to the aggrieved party i.e., breach of warranty can never be treated as breach of condition.

2.3.4 Express and Implied Conditions and Warranties

The conditions or warranties of a contract of sale may be express or implied. The conditions and warranties that have been specified by the parties in express words either spoken or written at the time of making contract are called express conditions and warranties. Implied conditions and warranties (contained in Secs. 14 to 17) are the ones that are applicable in a contract of sale by operation of law. These are the conditions and warranties which do not form a part of contract of sale at the time of contract between the parties, but they automatically come into existence by operation of law. In the case of implied conditions and warranties, the purpose of the law is to infer the intention of the parties when making the contract because in the absence of a contract to the contrary, such warranties and conditions are deemed to be part of the contract. Sec. 16 (4) further provides that an express warranty or condition does not negative an implied warranty or condition unless the express warranty or condition is inconsistent with the implied warranty or condition.

A. Implied Conditions

A contract of sale has the following implied conditions:

1. **Condition as to title** (Section 14): Subject to a contrary intention, there is an implied condition on the part of the seller that in the case of a sale, he has a right to sell goods and that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass. This is called condition as to title.
2. **Sale by Description** (Sec. 15): Where goods are sold by description, there is an implied condition that the goods shall correspond with the description given by the seller, i.e., the goods must be what they are described to be. If the description of the article tendered is different in any respect, it is not the article bargained for and the other party is not bound to take it. The word description has not been defined in the Act. It usually means a particular class, kind or variety of goods.
3. **Sale by Sample as well by Description** (Sec 15): If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods shall correspond with the sample, if the goods do not also correspond with the description. In other words, there is an implied condition that the goods shall correspond both with the sample as well as with the description.
4. **Condition as to quality or fitness**[Sec. 16(1)]: Subject to the provisions of this Act and of any other law for the time being in force, there is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. The buyer must examine the goods thoroughly before he buys them in order to satisfy himself that the goods will be suitable for the purpose for which he is buying them.
5. **Condition as to merchantability**[Sec. 16 (2)]: There is always an implied condition in a contract of sale that the goods purchased should be of a merchantable quality. In order to apply the implied condition as to merchantability, the following requirements must be satisfied, namely :

(a) The goods should have been bought by description and

(b) from a seller who deals in the goods of that description.

6. **Sale by sample**[Sec. 17]: In a contract of sale by sample, there is a term in the contract, express or implied that the bulk of the goods are, or shall be equal to the sample. In a contract of sale by sample, there is an implied condition.
   a) that the bulk shall correspond with the sample in quality.
   b) that the buyer shall have reasonable opportunity of comparing that bulk with the sample.

c) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample.

7. **Condition implied by custom or usage of trade** [Sec. 16(3)]: An implied condition as to quality or fitness for a particular purpose may be annexed by custom or usage of trade. If an order for goods is placed with the manufacturer, it is an implied condition that the goods supplied must be manufactured by the seller and not procured from others.

8. **Condition as to Wholesomeness:** When the goods are eatables and other provisions, in addition to the implied conditions as to merchantability, there is another condition that the goods shall be wholesome, i.e., the article should be fit for consumption and are not injurious to the health of the consumer.

B. Implied Warranties

The implied warranties in a contract of sale are as follows:

1. **Implied warranty of quiet and peaceful possession**: According to Section14 (6), the contract of sale, has an implied warranty that the buyer has the right to quiet and peaceful possession of goods, which implies that, when the buyer has received the possession of goods, he has the right to use and enjoy them. The implied warranty of quite possession is a warranty against disturbance of possession. On breach of this warranty, the seller is liable to the buyer in damages.
2. **Implied warranty of freedom from charge or encumberance** [Sec.14 (c)]: There is an implied warranty on the part of the seller that the goods are free from any charge or encumberance. A breach of this warranty will occur when the buyer discharges the amount of encumberance.On breach of this warranty, the remedy of the buyer is to sue for damages.
3. **Implied warranty annexed by usage of trade** [Section 16(3)]: A warranty as to fitness for a particular purpose may be annexed to a contract of sale by a custom or usage of trade.
4. **Implied warranty to disclose dangerous nature of goods:** If the goods are easily destroyable (e.g., inflammable), or dangerous to handle, it becomes the duty of the seller to forewarn the buyer of the danger in handling such goods so that the buyer takes specific care in their usage, otherwise he will be liable in damages. That is the reason why some medicines come with labels, warning the consumer to keep them in a cool dry place, or to use them only according to the advice of a registered medical practitioner.

2.4 DOCTRINE OF CAVEAT EMPTOR

As a general rule, the doctrine of caveat emptor or ‘buyer beware’ is applicable in a contract of sale, unless the contract does not specify anything to the contrary. Caveat emptor means ‘Let the buyer beware’ i.e., in a contract of sale of goods, the seller is under no obligation to reveal unflattering truths about the goods sold and thatordinarily, a buyer must buy goods only after satisfying himself of their quality or fitness. If he makes a bad choice, he can’t blame the seller and claim damage. In other words, it is not a part of the seller’s duty in a contract of sale to give to the buyer, an article suitable for a particular purpose unless such purpose is made known to the seller. It therefore, becomes the duty of the buyer not to take a chance but to take care and examine the goods before he buys and satisfy himself that the goods meet his requirements.

Section 16 of the sale of Goods Act endorses this doctrine when it lays down that there is no implied condition or warranty in a contract of sale about the quality or usability of goods transferred under the contract for specific requirements. In other words, the seller is not bound by any implied condition in a contract of sale about the quality and usability of goods, and the entire responsibility rests with the buyer.

2.4.1 Exceptions to the rule of caveat emptor:

If this law is adhered to strictly to letter, there would be many buyers who would be put to trouble. Every buyer is not clever enough or has the skill to evaluate the goods in terms of their quality and suitability. To protect the interest of such buyers, the law provides some exceptions to the rule (Section 16).

1. **Where the buyer relies on the skill and judgement of the seller:** The doctrine of caveat emptor will not apply and the seller will be held liable for breach of implied condition as to quality or fitness of the goods, if the buyer has known to the seller the particular purpose for which he required the goods or how he intends to use them and the buyer has relied on the skill and judgement of the seller, who deals in such goods.
2. **Merchantable quality of goods:** Where the goods are bought by description from a seller who deals in goods of that description, there is an implied condition that goods shall be of merchantable quality. But if the buyer has examined the goods there is no implied condition as regards defects which such examination ought to have revealed [Sec.16 (2)].
3. **Consent by fraud:** The doctrine of caveat emptor shall not apply to all those purchases which have been made by a buyer under a contract where his consent was obtained by the

seller by fraud i.e, where the buyer relies on false representation of the seller and suffers damages.

4. **Usage of trade:** An implied condition or warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade. [Sec. 16 (3)].
5. **Sale by description:** When the sale of goods is made by description, it involves some implied conditions and warranties and the caveat emptor doctrine is not applicable. The goods sold must match their description, otherwise the buyer can refuse to accept the goods and is entitled to receive damages from the seller.
6. **Sale under a patent or a trade name:** in the case of contract for the sale of a specified article under its patent or other trade name, there is no implied condition that the goods shall be reasonably fit for any particular purpose [Proviso to Sec. 16(1)].

2.5 TRANSFER OF OWNERSHIP

A sale contract transfers the ownership of goods from one person to another in exchange for an agreed price. There are three stages in the performance of a contract of sale of goods by a seller, viz. the transfer of property in the goods; the transfer of possession of the goods (i.e., delivery) and the passing of the risk. The term 'property in goods' should be differentiated from the term 'possession of goods'. 'Property in goods' means ownership of goods whereas 'possession of goods' refers to the custody or control of goods. Without the transfer of ownership of goods, there cannot be a contract of sale. The transfer of ownership of goods from the seller to the buyer is the core of a contract of sale and as such, it becomes important to know as to when the property in goods passes from the seller to the buyer.

2.5.1 Meaning of Transfer of Ownership or Title

Transfer of ownership implies the transfer of all rights to the property in goods from the seller to the buyer by virtue of which the buyer can use the goods as he desires, and this right of the buyer cannot be restricted.

It is to be noted that transfer of ownership and transfer of possession of goods are two words with different meanings. A person may be the owner of goods even if the goods are not in his possession. If a person who has the right of ownership of goods sells the goods (even if they are not in his possession), the right of ownership is transferred from the seller to the buyer of goods.

The transfer of possession of goods does not necessarily mean that property in goods has also been transferred. Similarly, the transfer of property in goods does not essentially amount to transfer of possession of goods from the seller to the buyer. Transfer of possession and transfer of ownership can occur at different times and not always be simultaneous.

2.5.2 Importance of Transfer of Ownership

Transfer of ownership from the seller to the buyer is important in a contract of sale for the following reasons:

1. **Risk follows Ownership:** Unless otherwise agreed, risk follows ownership whether delivery has been made or not and whether price has been paid or not. Thus, the risk of loss as a rule lies on the owner. Sec. 26 provides in this regard that, unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. But if delivery has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party at fault. Thus, 'risk' and 'property' or 'ownership' goes together.
2. **Only owner can sue:** When the goods are in any way damaged or destroyed by the action of third parties, it is only the owner of the goods who can take action against them.
3. **Insolvency of the seller or the buyer:** In the event of insolvency of the seller or the buyer, the question whether the Official Receiver or Assignee can take over the goods or not depends on whether the property in the goods has passed from the seller to the buyer.
4. **Suit for price:** The seller can sue for the price, unless otherwise agreed, only if the goods have3 become the property of the buyer.

2.5.3 Time When the Property Passes

When does the transfer of ownership pass from the seller to the buyer is an important issue in the contract of sale. Normally, it is agreed between the parties when such transfer will take place; but, in the absence of such agreement, the Act stipulates when the transfer of ownership will deemed to be effected in a sale of contract. The primary rules for ascertaining when the property in goods passes to the buyer are as follows:

1. Goods must be ascertained: Where there is a contract for the sale of unascertainedgoods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. (Sec. 18). A contract to sell unascertained goods is not a complete sale, but an agreement to sell.

2. **Intention of the parties:** Where there is a contract for the sale of specific or ascertained goods, the property in them passes to the buyer at the time when the parties intend it to pass

[Sec.19 (1)]. For the purpose of ascertaining the intention of the parties, regard shall be had to terms of contract, the conduct of the parties and the circumstances of the case [Sec. 19 (2)].

Where the intention of the parties cannot be ascertained: Where the intention of the parties as to the time when the property in the goods is to pass to the buyer cannot be ascertained from the contract, the rules contained in Sections 20 to 24 apply [Sec.19(3)].

1. **Ascertained or Specific Goods** (Secs. 20 to 22): Ascertained or specific goods refer to such goods that have been identified or specified by the parties at the time of making the contract, and the seller does not have to make any modification or addition to the goods. The rules relating to the transfer of property in specific goods are as follows:

a) **Goods in a deliverable state:** Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when, the contract is made. The fact that the time of payment of the price or the time of delivery of goods, or both, is postponed does not prevent the property in goods passing at once (Sec.20) Goods are deemed to be in a deliverable state when the buyer agrees to accept the delivery of goods and the goods are in a condition that they can be delivered.

b) **Goods not in a deliverable state:** Section 21 lays down that where there is a contract for the sale of specific goods not in a deliverable state i.e., the seller has to do something to the goods to put them into a deliverable state, the property does not pass until such thing is done and the buyer has notice of it. Something means an act, like collecting the goods, severing the goods, or packing or loading the goods or filling them in containers, etc.

c) **When the price of goods is to be ascertained by weighing, testing, etc.**: Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof (Sec.22).

2. **Unascertained Goods (Sec. 23):** Until goods are ascertained there is merely an agreement to sell. Unascertained goods refer to such goods that have not been identified when the contract is made; only a description of the goods has been given in the contract. The rules governing the transfer of ownership of unascertained goods are as follows:

a) **Goods must be ascertained:** Where there is a contract for the sale of unascertained goods, the property in the goods does not pass to the buyer until the goods are ascertained (Sec.18). Until goods are ascertained there is merely an agreement to sell.

b) **Goods must be appropriated:** Section 23 deals with the question of passing of property in the case of a contract for the sale of unascertained or future goods by description. Section 23 (1) further provides that in such cases, when the goods in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in goods passes to the buyer. The assent to the appropriation may be given either before or after appropriation is made. However, the appropriation of the goods must take place before there has been a breach of contract by either party.

The word appropriation has not been defined in the Act. It means an overt act showing an intention to identify and determine the specific goods as those to which the bargain of the parties shall apply. Appropriation is generally made by the seller by putting the goods into boxes, or gunny bags, or in the case of fluids into bottles or other suitable containers with the assent of the buyer. The assent of the buyer may be express or implied.

c) **Goods must be delivered to the carrier:** According to Section 23 (2), "Where, in pursuance of the contract, the seller delivers the goods to buyer or to a carrier or other bailee (whether named by the bailee or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract". It is important to note that mere delivery of goods does not transfer the ownership of goods to the buyer. The seller may reserve his right of disposal with the intention that he receives his payment before he transfers his ownership to the goods. In such case, the Bill of Lading or the Railway Receipt is in the name of the seller or his agent so that ownership of the seller is secured and is not transferred to the buyer.

3. **Goods sent on approval, or on sale or return (Sec. 24):** When goods are sold under a contract of sale or return or in approval, the sale is a conditional sale. According to Section 24, in such cases, the property passes to the buyer ––

   i) when the buyer signifies his approval or acceptance to the seller; or

ii) does any other act adopting the transaction; e.g., sells the goods to a third party or pledges the goods with a third party,

iii) where the buyer does not signify his approval or acceptance but retains the goods without giving notice of rejection, in such a case

a) if a time has been fixed for the return of the goods, on the expiration of such time; and

b) if no time has been fixed on the expiration of a reasonable time.

2.5.6 Contracts Involving Sea Routes

F.A.S. Contracts: F.A.S stands for "free alongside ship". The property in goods sold under an F.A.S. contract passes from the seller to the buyer when the goods are delivered alongside the ship named by the buyer under a contract of carriage.

F.O.B Contracts(Named port of shipment)**:** F.O.B. stands for "free on board". In a F.O.B. contract, the seller is to put the goods on board a ship at his own expense, for carriage to the buyer. Thereupon the delivery is complete and the property and risk in goods pass to the buyer. Normally, the terms of the contract must specify the ship to which the goods are to be delivered. The seller does not insure the goods, and the buyer has to do it if he likes. The seller, however, must give notice of putting the goods on board the ship to enable the buyer to insure the goods. In the absence of a contract to the contrary, payment in an F.O.B. contract becomes due on the delivery of goods to the ship. The price under an F.O.B. contract includes the cost of the goods and all expenses upto and including delivery on board the ship. Thereafter, all expenses have to be paid by the buyer. The property in the goods does not pass to the buyer until the goods are delivered on board the ship. If the seller is prevented from putting the goods on board the ship by failure of the buyer to name a ship, the seller can sue for damages for non-acceptance and not for the price.

C.I.F. Contracts(Named port of destination): the words C.I.F stands for "cost, insurance and freight". Under such a contract, the seller himself has to pay the cost of the goods, insurance charges during transit to the buyer and the freight. The price agreed to be paid between the parties to a contract of sale includes all these three. A C.I.F contract is performed by thedelivery of documents (bill of lading, insurance policy, invoice, certificate of origin, etc.) representing the goods to the buyer, through a bank. The documents are usually delivered by the bank against payment of the price, or against payment of the price, or against acceptance of a draft (bill of exchange). This protects both the seller and the buyer. The seller continues to be the owner of goods until the buyer pays for the goods and gets the documents. If, in the meantime, the goods are lost at sea, the buyer or the seller, whoever is the owner at the time of the loss, can recover the amount from the insurer. If, on receiving the goods, the buyer finds that they are not according to the contract, he may reject them and recover the price paid by him.

Ex-ship Contracts(Named ship and named port of delivery)**:** These are contracts under which the seller undertakes to give delivery to the buyer from a ship which has arrived at the port of delivery at his (seller's) expense and has reached a place therein which is usual for the delivery of the goods of the kind in question. In such contracts, the property in the goods does not pass to the buyer until the goods are actually delivered to him. In the case of an ex-ship contract, the property and risk in the goods do not pass to the buyer until they are delivered at the port of destination. The goods are at the seller's risk during the voyage and there is no obligation on him to effect an insurance on behalf of the buyer.

2.5.7 Sale by Non-owners

In the case of transfer of ownership of goods from the seller to the buyer, it is presumed that the seller is a full owner of the goods, and on transfer the buyer also becomes an absolute owner of the goods. But where the seller is not an absolute owner of the goods, the buyer will not get a better title than what the seller himself has. As a general rule, "no one can give that which one has not got". This is expressed in Latin maxim "*nemodat quod non habet*"which means that no one can pass a better title than he himself has. If a person transfer articles not belonging to him, the transferee gets no title although he may have acted in good faith and may have acted in good faith and may have paid for the goods.

The rule of "nemodat quod non habet" is incorporated in Section 27of the sales of goods Act. A person who has no title to property can convey none. This rule is meant to protect the true owner and the fact of, an innocent and bonafide purchaser from the non-owner cannot dislodge the claim of the true owner.

Exceptions to the rule

The rule that a person who buys goods from another, not the owner, acquires no title is subject to certain exceptions. The following are the various exceptions to the rule:

1. **Sale by a person not the owner or title by estoppel** (Sec. 27): Where the owner by his conduct, or by an act or omission, leads the buyer to believe that the seller has the authority

to sell and induces the buyer to buy the goods, he shall be stopped from denying the fact of want of authority of the seller. The buyer in such a case gets a better title than that of the seller. For example, B sells A’s bicycle to C. A is present when the sale is made, but he makes no comment, nor does he say that the bicycle belongs to him. Here A’s conduct convinces B that he is the owner of the bicycle. In such a case, A, because of his conduct, cannot later say that B had no right to sell the bicycle and b will have a good title to it.

2. **Sale by a mercantile agent** (Proviso to Sec. 27): When a mercantile agent has the possession of goods or the documents of title to the goods with the consent of the owner of the goods, and sells the goods in the ordinary course of business, a sale made by the mercantile agent is deemed to be as good as made by the owner of goods who has a good title to the goods. But, in such circumstances, the buyer must have acted in good faith, and must not have the knowledge that the seller has no authority to sell the goods. A mercantile agent means an agent having in the customary business, has, as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods.
3. **Sale by one of several joint owners (Sec. 28):** According to section 28, where one of the several joint owners, who has sole possession of the goods, by permission of co-owners, sells the goods, the buyer gets the complete ownership of the goods. But this is only possible when the buyer has acted in good faith and paid price for it, and had no notice about the seller’s right to sell the goods.
4. **Sale by a person in possession under a voidable contract** (Sec.29): Section 29 deals with the case of sale by a person who has obtained possession of goods under a voidable contract. It provides that when the seller of goods has obtained their possession under a voidable contract, but the contract has not been rescinded at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller’s defect of title. This exception is limited to contracts of sale voidable under sections 19 and 19A of the Contract Act, i.e., voidable on the ground of coercion, fraud, misrepresentation and undue influence. It does not extend to all voidable contracts. If the contract under which the seller obtains goods is void, then even an innocent buyer of the goods from such a seller does not acquire title to the goods.

5. **Sale by seller in possession after sale** [Sec. 30 (1)]**:** Section 30 (1) provides that where a seller, has sold goods but continues to be in possession of them or of the documents of title to the goods and sells them either himself or through a mercantile agent to a third person who buys in good faith and without notice of the previous sale, the buyer gets a good title.
6. **Sale by buyer in possession after sale** [Sec. 30 (2)]**:** Section 30 (2) deals with a case where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or documents of title to the goods and sells them either himself or through an agent, the buyer who acts in good faith and without notice of any lien or other right of the original seller in respect of the goods, gets a good title to the goods.
7. **Sale by an unpaid seller** [Sec. 54 (3)]**:**Section 54 (3) of the Act provides that when an unpaid seller who has exercised his right of lien or stoppage in transit to get the possession of the goods (of which the ownership has passed to the buyer) resells the goods, the buyer acquires a good title to the goods against the original buyer.
8. **Exceptions in other Acts:** Under certain Acts, a person although he is not the owner of the goods may sell the goods and pass a better title than he himself has.
   a) Under section 169 of the Contract Act, a finder of the goods has the power to sell the goods under certain conditions and the buyer will acquire a better title.
   b) Under Section 176 of the Contract Act, a pawnee of goods has the power to sell the goods pawned under certain conditions and he passes a better title than he himself has.
   c) In some cases, a special power of sale is given to officers of court, liquidators of companies, receivers of insolvent's estate, custom officers for duties remaining unpaid, etc. All these persons are not owners, yet they sell properties of others, and convey a better title to the buyers than they themselves possess.
   d) Bills of exchange and negotiable instruments form an important exception to the general rule and a thief or finder of such instrument if payable to bearer or endorsed in blank, can give a good title to a bonafide purchaser for value without notice.
9. **Sale in market overt:** 'Market overt' means an "open, public and legally constituted market" where goods are openly bought and sold according to the normal practices of the trade without any restrictions. Where goods are sold in market overt, the buyer acquires a good title to them irrespective of the seller's title provided —
   a) The goods are sold in accordance with the usage of the market; and

b) The buyer bought the goods in good faith and without notice of any defect or want of title on the part of the seller.

2.6 PERFORMANCE OF CONTRACT

2.6.1 Meaning and Definition

According to Section 31 of the Sale of Goods Act, the gist of a contract of sale is the performance of their obligations by the parties to the contract. Performance of a contract of sale means as regards the seller, delivery of the goods to the buyer, and as regards the buyer, acceptance of the delivery of the goods and payment for them, in accordance with the terms of the contract of sale. The contract is completed when both parties have carried out their obligations.

If the contract contains any special terms as to delivery and acceptance, these must be complied with. In the absence of a contract to the contrary, delivery of the goods and payment of price are concurrent conditions, that is, both these must take place at the same time i.e., the seller must be willing and ready to deliver the goods and the buyer must be willing to and ready to accept the goods and pay the price to the seller,as in, for instance, a cash sale over a shop counter (Sec. 32). A contract of sale always involves reciprocal promises, the seller promising to deliver the goods and the buyer to accept and pay for them.

2.6.2 DELIVERY OF GOODS

As per the terms of the contract, essentially the most important obligation of the seller is to deliver the goods. Section 2 (2) of the Act defines delivery as the “voluntary transfer of possession of goods from one person to another”. Delivery is a bilateral act. Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or his agent. (Sec.33). the goods must be in a deliverable state before the delivery can be made. Depending upon what the parties have agreed to, the delivery can be concurrent or at a future date, or in instalments.

Essentials Elements of Delivery

The essential elements of delivery are:

i) A person has possession;

ii) He transfers that possession to another person;

iii)He does so voluntarily.

The essence of delivery is voluntary transfer of possession from one person to another.

2.6.3 Modes of Delivery

According to Section 33 of the Sale of Goods Act, the delivery of goods in a sale of contract is any such act which both the parties to the contract deem to constitute 'delivery' or which transfer the control and possession of goods to the buyer or, with the consent of the buyer, to a third party nominated by the buyer. Delivery of goods may be made in any of the following ways:

a) **Actual Delivery:** An actual delivery is a physical delivery of goods. It takes place when the goods are physically handed over by the seller to the buyer or his duly authorized agent. (Sec. 33). Any act of the seller or his agent that results in delivering the goods in the possession of the buyer is deemed to be actual delivery.

b) **Symbolic Delivery:** When the goods are of such large quantity or weight or bulky and incapable of actual delivery, the delivery of title documents of the goods, or any other document or thing that serves as a proof of the transfer of possession to the buyer is deemed to constitute delivery; for example, delivering the key of the warehouse where the goods are stored, or the Bill of Lading or Railway Receipt to the buyer constitutes what is called symbolic delivery of goods.

c) **Constructive Delivery or delivery by attornment**[Sec.36 (3)]**:** Such delivery is also known as fictitious delivery. A delivery is constructive, when it is made without any change in the actual possession of the goods. Here only there is an acknowledgement by the third person (e.g., bailee) who is in possession of the goods of the seller at the time of the sale to the buyer that he holds the goods on his behalf. There is only a change in the legal character of possession. Such delivery is deemed to take place in the following situations:

    i) Where the seller in possession of the goods agrees to hold them on behalf of the buyer after sale;

    ii) Where the buyer is in possession of the goods before the sale and the seller agrees to the buyers holding the goods as owner. The character of possession is changed from that of a bailee for the seller to that of the owner; and

    iii) Where a third party like a warehouseman, who was holding the goods as a bailee of the seller agrees after a sale to hold them as the bailee of the buyer.

2.6.4 Rules regarding delivery of goods

Under the provisions of the Sale of Goods Act, the rules that apply to the delivery of goods are as under:

1. **Mode of delivery**(Sec. 33)**:** Delivery of the goods sold may be made by doing anything which the parties agree or which has the effect of putting the goods in the possession of the buyer or his duly authorized agent. Delivery of goods may be effected in any of the three modes, namely, actual, symbolic or constructive.
2. **Delivery and payment are concurrent conditions** (Sec. 32): Delivery of the goods and payment of the price must be according to the terms of the contract. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, i.e., the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.
3. **Effect of part delivery** (Sec. 34)**:** A delivery of the part of the goods in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole. But a delivery of the goods, with an intention of severing it from the whole, does not operate a delivery of the remainder.
4. **Buyer to apply for delivery** (Sec. 35)**:** Apart from any express contract, theseller of goods is not bound to deliver them until thebuyer applies for delivery. Where the goods are subsequently acquired by the seller, he should intimate this to the buyer and the buyer should then apply for delivery. Unless otherwise agreed, the buyer has no cause of action against the seller, if he does not apply for delivery.
5. **Place of delivery:** As a general rule, the contract of sale specifies where the good shave to be delivered, and it is the duty of the seller to deliver the goods at the place specified in the contract of sale. If there is no specific agreement as to place of delivery in the contract, the rules laid down in Section 36 (1) are —
   a) that the goods sold are to delivered at the place at which they are at the time of the sale, and
   b) 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
   c) if the goods are not in existence at the time of the agreement to sell, i.e., future goods, they are to be delivered at the place at which they are to be manufactured or produced.

6. **Time of delivery**[Sec. 36 (2)]**:** Where under the contract of sale, the seller is bound to send the goods to the buyer, but if no time is fixed, the seller is bound to send them within a reasonable time. Demand or tender of delivery should be made at a reasonable hour. What is a reasonable hour is a question of fact [Sec. 36 (4)].
7. **Goods in possession of a third person:** When at the time of the sale, the goods are with a third party, there is no delivery by the seller to the buyer until such third party acknowledges to the buyer that he holds them on his behalf. But where the goods have been sold by the issue or transfer of any document of title to goods, e.g., a railway receipt or a bill of lading, such third party's consent is not required.
8. **Cost of delivery [Sec.** 36 (5)]: Unless otherwise agreed, all expenses of and incidental to making of delivery are borne by the seller, bit all expenses of and incidental to obtaining of delivery are borne by the buyer.
9. **Delivery of wrong quantity** (Sec**.**37): The seller is under a duty to comply with the order of the buyer in kind, quality and quantity. Delivery of goods must be of exact quantity ordered. Delivering an excess or a lesser quantity of goods is called a delivery of wrong quantity, but a marginal difference either way is not deemed to delivery of wrong quantity unless the goods are very expensive, like gold, platinum or diamonds. If the difference in quantity is marginal, the buyer does not have the right to refuse to accept the delivery of goods. A defective delivery entitles the buyer to reject the goods. Section 37 provides for three different contingencies which may arise in case of a defective delivery. These are —
   i) **Delivery of goods less than contracted for:** According to section 37 (1), if the seller makes the delivery of goods to the buyer in a lesser quantity than agreed to in the contract, the buyer is entitled to refuse to accept the goods. But, if the buyer accepts the goods, he shall pay for them at the contract rate. If the goods have been rejected for short delivery, the seller can make, within the time limit, another delivery in accordance with the terms of the contract.
   ii) **Delivery of goods in excess of quantity contracted for:** According to Section 37 (2), where the seller delivers to buyer a quantity of goods larger than he contracted to sell, the buyer may, i) accept the whole; or ii) reject the whole; or iii) accept the quantity he ordered and reject the excess. In case the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

iii) Delivery of goods contracted for mixed with others: According to section 37 (3), where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

The provisions of Section 37 are subject to any usage of trade, special agreement, or course of dealing between the parties.

10. Instalment deliveries (Sec. 38): Unless otherwise agreed, the seller is not entitled to deliver the goods by instalment and if he does so, the buyer is not bound to accept the goods. [Sec. 38 (1)]. The parties may, however, agree that the goods are to be or may be delivered by instalments.

When the delivery of goods is in instalments and each instalment is to be paid for separately, and if one or more instalments are not delivered or the goods delivered are defective, or if the buyer refuses to take the delivery of, or neglects to make payment for, one or more instalments, and the contract is deemed to have terminated, the question as to which party is liable to for the damages depends upon the circumstances of the case and the terms of the original contract.

11. Delivery to carrier or wharfinger (Sec. 39): According to Section 39 —

i) Where in pursuance of the contract of sale, goods are delivered to a carrier for the purpose of transmission to the buyer or to a wharfinger for safe custody, delivery of goods to them is prima facie deemed to be a deliveryof the goodsto the buyer [Sec. 39 (1)].

ii) In such a case, the seller must enter into a reasonable contract with the carrier or wharfinger on behalf of the buyer for the safe transmission or custody of the goods. If the seller omits to do so, and if the goods are destroyed, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages [Sec.39 (2)].

iii) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, the seller must inform the buyer in time to get the goods insured otherwise the goods will be at the seller's risk during such sea transit [Sec. 39 (3)].

12. Goods delivered at a distant place (Sec. 40): where the seller of goods agrees to deliver the goods at his own risk at a place other than that where they are sold, the buyer shall take risk of any natural deterioration in the goods incident to the transit, unless otherwise agreed.

13. **Buyer's right of examining the goods :** i) Section 41 (1) specifies that, where there has been no previous examination of the goods the mere fact that the buyer has taken delivery of them, does not amount to an acceptance until he has had a sufficient opportunity of examining the goods, so as to see if they correspond with the contract.

    ii) Section 41 (2) lays down that, if there is no contract to the contrary, and if the buyer wants to examine the goods before they are delivered to satisfy himself that the goods conform to specifications, the seller is bound to provide such opportunity to the buyer to examine the goods. The seller cannot hold the buyer liable to accept the goods without examining them.

14. **When acceptance is complete on delivery**(Sec.42)**:** Acceptance of goods means the assent of the buyer that he has received the goods under the contract of sale. According to section 42, the buyer is deemed to have accepted the goods in the following circumstances —

    i) When he intimates to the seller that he has accepted the goods; or

    ii) When the goods have been delivered to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller, for instance where he resells the goods or uses the goods as an owner or makes some changes in the goods delivered to him; or

    iii) Where the buyer retains the goods beyond a reasonable time without intimation of rejection to the seller.

15. **Buyer not bound to return rejected goods** (Sec. 43): Section 43 provides that where the goods are delivered to the buyer and he refuses to accept them, he is not bound to return the goods to the seller. It would be sufficient if he intimates to the seller that he refuses to accept the goods. However, the provisions of this rule are subject to a contract between the parties.

16. **Liability of the buyer for neglecting or refusing delivery of goods (Sec. 44):** Section 44 of the sale of Goods Act specifies that when the seller is ready and willing to deliver the goods and the seller actually requests the buyer to take delivery and the buyer does not, within a reasonable time after such request, takes delivery of the goods, the buyer becomes liable to the seller for —

    i) Any loss occasioned by his neglect or refusal to take delivery, and

    ii) A reasonable charge for the care and custody of the goods.

The section further provides that the seller shall be entitled to exercise the above rights, even though the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

2.7 UNPAID SELLER AND HIS RIGHTS

2.7.1 Definition of unpaid seller

A person who has sold good to another person but has not been paid for the goods, or has been paid partially, is called an unpaid seller.

According to Section 45 (1) of the Sale of Goods Act, an unpaid seller is one —

a) Who has not been paid the whole of the price of the goods he has supplied, or has been partially paid for the goods.

b) Who has been given a negotiable instrument like a bill of exchange that has been received as a conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise. It is immaterial whether the seller is directly involved in the transaction, or he is acting through his agent.

'Seller' means not only the actual seller, but also any person who is in the position of a seller, e.g., an agent of the seller to whom a bill of lading has been endorsed, or a consignee or agent who has himself paid for the goods or is directly responsible for the price [Sec. 45 (2)].

2.7.2 Rights of an Unpaid Seller

The Sale of Goods Act has expressly given two kinds of rights to an unpaid seller of goods, namely —

A. Rights against the goods

a) When the property in the goods has passed

i) Right of lien

ii) Right of stoppage of goods in transit

iii) Right if re-sale

These rights of an unpaid seller do not depend upon agreement, express or implies between the parties. They arise by the implication of law.

b) When property in the goods has not passed

i) Right of withholding delivery.

B. Rights against the buyer of goods personally

i) Right to sue for price

ii) Right to sue for damages

iii) Right to see for interest

iv) Repudiation of contract before due date

A. Rights against Goods

According to Section 46, when the buyer has not paid the full or partial price of the goods supplied to him, the seller who has transferred the ownership of goods to the buyer has the following rights with regards to the goods:

i) Right of Lien [Secs.46(1) (a) and 47 to 49]

Lien is the right to retain possession of goods until payment in respect of them is paid [Sec. 46 (1)]. According to section 47, if the seller of goods has not been paid, and the ownership of goods has been transferred to the buyer but the goods are in the possession of the seller, the seller has the right to retain the goods till he receives the price of goods from the buyer. Section 47 (1) describes the circumstances in which an unpaid seller may exercise his right of lien —

a) When the goods have been sold without any stipulation as to credit;

b) Where the goods have been sold on credit, but the term of credit has expired;

c) Where the buyer becomes insolvent.

Termination of Lien [Sec. 49]: The right of lien is linked with the possession of the goods and this right is lost if the possession is lost. According to Section 49, the lien of an unpaid seller terminates in the following circumstances:

a) By delivery to carrier: When the seller delivers the goods to a carrier or any other bailee for the purpose of transmission to the buyer without reserving the right of disposal of goods, the right of lien is lost, but the seller still has a right to stoppage in transit.

b) By delivery to buyer: the right of lien is also lost when the buyer or his agent lawfully obtains the possession of goods.

c) By waiver: when the seller has waived the right of lien on the goods, which may be express or implied, the right of lien is lost. A waiver is express where the contract itself provides that the seller shall not be entitled to retain possession of the goods even if the buyer does not pay the price of the goods. A waiver is implied where the seller sells the goods on credit or grants a fresh term of credit.

d) By tender of price: where the buyer tenders price for the goods purchased by him, the seller no more remains an unpaid seller, therefore his right of lien is lost.

ii) Right of Stoppage in Transit (Sections 50-52)

The right of stoppage in transit means the right to stop the goods in transit after the unpaid seller has parted with the possession of the goods, to resume possession of goods thereof and to retain the same till the payment or tender of price. The right can be exercised by the seller under the following circumstances —

i) The seller must be unpaid

ii) The seller must have parted with the possession of the goods and the buyer must not have acquired it.

iii) The buyer has become insolvent before paying for the goods.

iv) The property must have passed from the seller to the buyer.

The buyer is said to be 'insolvent' when he has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of insolvency or not [Sec. 2 (8)].

The right to stoppage is an extension of the right of lien, but it arises only on the insolvency of the buyer and when the goods are in transit [Sec.46 (1) (b]. This right is available only when the goods are neither in the possession of the seller nor that of the buyer, but are in the possession of a middleman for the purpose of transmission to the buyer.

iii) Right of re-sale (Section 54)

This limited right of re-sale is conferred by the section 54 which also enumerated the circumstances under which the right of re-sale may be exercised. The unpaid seller can re- sell the goods —

a) Where the goods are of a perishable nature; or

b) Where he has exercised his right of lien or stoppage in transit and gives notice to the buyer of his intention to re-sell the goods and the buyer does not within a reasonable time pay or tender the price.

c) Where the seller expressly reserves a right of resale in case the buyer makes default. [Sec. 54 (4)].

b) i) Right of withholding delivery [Sec. 46 (2)]

Where the property in goods has not passed to the buyer, the unpaid seller has in addition to other remedies against the buyer personally, a right of withholding delivery of goods which are the subject-matter of the contract. This right is similar to and co-extensive with his right of lien and stoppage in transit where the property has passed to the buyer. This right can be exercised even if the sale was on credit or that the goods were specific or unascertained.

B. Rights of an unpaid seller against the buyer personally

In addition to his rights against the goods, these are the rights which an unpaid seller may enforce against the buyer personally. These rights of the seller against the buyer are called rights in personam as against the rights in rem (i.e., rights against the goods). An unpaid seller has the following rights against the buyer personally:

1. **Suit for price** (Sec. 55):
   a) Where property has passed: Where under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods, the seller may sue him for the price of the goods [Sec. 55 (1)].
   b) Where property has not passed: Where under a contract of sale, the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods may not have passed and the goods have not been appropriated to the contract [Sec. 56 (2)].
2. **Suit for damages for non-acceptance** (Sec. 56): Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for non-acceptance. The measure of damages is determined by the rules contained in sections 73 and 74 of the Indian Contract Act.
3. **Repudiation of contract before due date** (Sec. 60): Where the buyer repudiates the contract before the date of delivery, the seller may either —
   a) Treat the contract as subsisting and wait till the date of delivery. Or
   b) He may treat the contract as rescinded and sue for damages for the breach. This rule is known as the "rule of anticipatory breach of contract".
4. **Suit for Interest** [Sec. 61(2) (a)]: Where there is a specific agreement between the seller and the buyer as to interest on the price of the goods from the date on which payment becomes due, the seller may recover interest from the buyer. If however, there is no specific agreement to this effect, the seller may charge interest on the price when it becomes due from such day as he may notify to the buyer. In the absence of a contract to the contrary, the court may award interest to the seller in a suit by him at such rate as it thinks fit on the amount of the

price from the date of the tender of the goods or from the date on which the price was payable.

2.8.SUMMARY

Contract of sale: Section 4 of the Sale of Goods Act defines a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to a buyer for a price.

A contract of sale consists of the following:

i) Sale

ii) Agreement to sell

Goods: the term goods means " every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, and things attached to or forming part of the land which are agreed to be severed before sale under the contract of sale."

Price: Price is " as money consideration for a sale of goods." Money means " legal tender money in circulation" . Old and rare coins are not included in the definition of the term money.

Condition: 'A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to reject goods and treat the contract as repudiated'.

Warranty: ' A warranty is stipulation collateral to the main purpose of the contract , the breach of which gives rise to the claim damages but not a right to reject goods and treat the contract as repudiated'

Transfer of ownership: Transfer of ownership means the transfer of property of the goods from the seller to the buyer which constitute an ownership in the buyer. A contract of sale of goods involves transfer of ownership from seller to the buyer. It is important to know the precise moment of time at which property in goods passes from the seller to the buyer.

Delivery: Delivery of goods implies voluntary transfer of possession of goods from seller to buyer.

Unpaid seller: Unpaid seller means a seller who has not been paid or tendered the whole of the price of the goods sold or who had received a bills of exchange or any other negotiable instrument as a conditional payment which is subsequently dishonoured.

Rights of unpaid seller: There are two types of rights under the sale of goods act 1930.

i) Rights of an unpaid seller against the goods.

ii) Rights of an unpaid seller against the buyer personally.

2.9. SELF ASSESSMENT QUESTION

1) Define a contract of sale and discuss essentials of a valid contract of sale.
2) How is a contract of sale different from an agreement to sale?
3) Explain the term goods under the sale of goods act 1930.
4) Differentiate between condition and warranty.
5) Describe various types of goods.
6) Briefly discuss the implied conditions and warranties in a contract of sale.
7) What are the exceptions to this rule of' caveat emptor'?
8) Explain with example, the rules governing the transfer of ownership of goods from seller to buyer.
9) What is meant by reservation of the right of disposal in a contract of sale of goods?
10) Explain in brief the rules relating to the delivery of goods.
11) Define an unpaid seller. Explain his right against the buyer's personally.
12) When can the seller resale the goods?
13) What is meant by the right of stoppage in transit in respect of sale of goods.
14) What is meant the right of lien in respect of sale of goods?
15) Explain in brief the rules relating to the delivery of goods.

UNIT-3

PARTNERSHIP LAWS

After studying this unit, you should be able to:

- The concepts, nature and of partnership
- Registration of firm and exception and
- Types of partners, rights and duties of partners
- Implied authority of partners, incoming and outgoing partners
- Dissolution of partnership and partnership firm

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3.0 THE PARTNERSHIP ACT, 1932

The Indian partnership act'1932 section.4 of the Indian partnership Act, 1932 defines Partnership in the Following Terms: Partnership is the relation between Person who has agreed to share the profit of a business carried on by all or any of them acting for all.

Essential Elements of Partnership

1. There must be at least two persons.
2. That it is the result of an agreement.
3. That it is organised to carryon a business.
4. That the persons concerned agree to share the profits of the business5. That the busin ess is to be carried on by all or anyone of them acting for all.

Agreement: Partnership must be the result of an agreement between two or more persons. An agreement from which relationship of Partnership arises may be express. It may also be implied from the act done by partners and from a consistent course of conduct being followed, showing mutual understanding between them. It may be oral or in writing.

Sharing profits of the business: First, there must exist a business i.e. trade, occupation and profession. The motive of the business is the acquisition of gains. Therefore there can be no partnership where there is no intention to carry on the business and to share the profit thereof. Secondly, there must be an agreement to share profits. The agreement to share losses is not an essential element. However in the event of losses, unless agreed otherwise, these must be born in the profit sharing ratio.

Business carried on by all or any of them acting for all: Each partner carries on the business as a principle as well as the agent on behalf of the other partners. This is the cardinal principle of the partnership Law.

3.1 NATURE AND CHARACTERISTICS OF PARTNERSHIP

3.1.1. Nature:

`Partnership is a form of business in which two or more persons come together with their resources to invest in a common business with the purpose of sharing the profits of the business.

There are some limitations of Sole proprietorship viz limited capital, no risk sharing, limited skill etc. Partnership is the solution to such problems faced by a sole proprietor. In a partnership a few persons can come together to start a new business with an agreement to share the profits and losses of the business.

1. Two or more Persons:

Minimum number of persons to start a partnership is two however there is no maximum limit on the number of partners according to the Indian Partnership Act. But the Indian Companies Act has restricted the number of partners in a Banking Business to ten and for any other business it is 20.

2. Agreement among Partners:

Partnership comes into existence by an agreement among the partners willing to enter into a partnership. The agreement can be written or oral. Partnership is not the result of any operation of Law. It is the result of an agreement on the basis of which the rights and duties of the partners are defined.

3. Business:

The purpose of a Partnership firm is to carry on a business. The business must be legal. Any agreement to share the profits of an illegal business is not partnership. Also joint ownership of a property can not be termed as partnership. The business must be continuous in nature. Coming together for a single venture is not partnership.

4. Agreement to share profits:

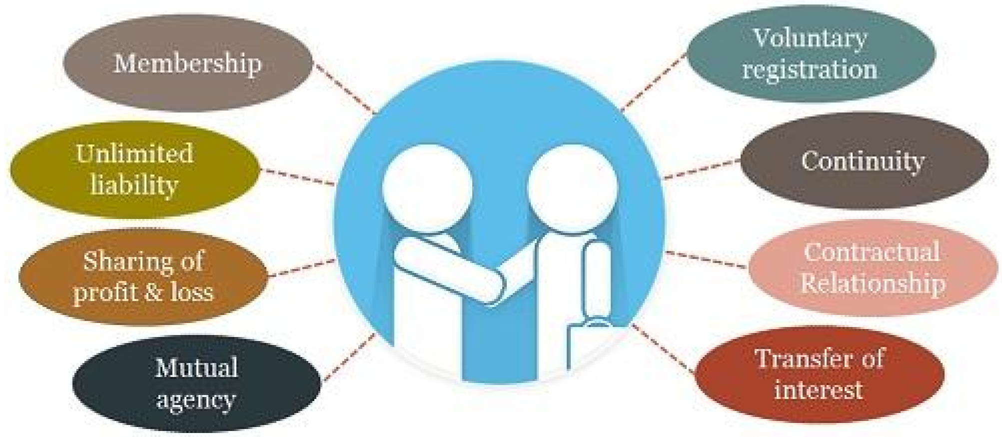
In a Partnership business the main aim of the partners is to carry on some business for the purpose of earning profits. They share the profits or losses of the business among themselves according to a predetermined ratio. If there is no agreement over the profit sharing ratio these are to be shared equally. A person not having the right to share profits cannot be called partner. However the partners can agree that one or more partners among is not liable to share the losses.

5. Business is to be carried on by all or any of them acting for all:

Each partner has the right to participate in the proceedings of the business. The business can be carried by any one or more of them or by all of them. Some partners may be sleeping i.e. they are not actively involved in the activities of the firm. Each partner is an agent as well as a principal. As an agent he can bind all the other partners by his acts. As a principal he is bound by the acts of the other partners.

These were the essentials of a partnership firm. In the absence of any of these a partnership business cannot come into existence.

3.1.2. Characteristics Of partnership:



1. **Membership**: At least **two** persons are required to begin a partnership while the maximum number of members is limited to **100**. Further, all the individuals entering into partnership must be legally competent to do so, as they have to enter into a contract to become partners. Thus, minors, insolvent and lunatic persons cannot become members, but a minor can be admitted to partnership, to share profits.
2. **Unlimited liability**: The members of a partnership have unlimited liability, i.e. they are **collectively and individually liable** for the firm’s debts and obligations. So, if in case business assets are not adequate to repay liabilities, personal assets of all or any partner can be claimed by the creditors to realise the outstanding amount.

3. **Sharing of profit and loss**: The main purpose of the partnership is to share profit in the **agreed ratio**. However, in the absence of any agreement between partners, the business profits or losses are divided equally among all the partners.
4. **Mutual Agency**: The partnership business is undertaken by all the partners or any of the partners, who acts on behalf of all the partners. So, every partner is a principal as well as an agent. Further, the **acts of partners bind each other as well as the firm**.
5. **Voluntary Registration**: The registration of partnership is not mandatory, but it is **recommended**, as it offers certain benefits, **e.g.**in case of any conflict among partners, any partner can file suit against other partner or if there is any dispute between firm and outside party, then also the firm can file a case against that party.
6. **Continuity**: There is a **lack of continuity** in partnership, like death, bankruptcy, retirement or insanity of any partner can lead the **partnership to end**. Although, if the remaining partners want to continue operations, they can do so by a fresh agreement.
7. **Contractual Relationship**: The relation subsisting between partners is due to the contract, which may be **oral, written or implied**.
8. **Transfer of interest**: **Mutual consent** of all the partners is a must for transferring the interest in the firm to any external party.

In a partnership, the decision making is done with the mutual consent of all the partners. They share among themselves the decision making and control of the regular business operation.

3.2 REGISTRATION OF FIRMS

The Act does not make the registration of partnership firms compulsory in India nor does the Act impose any penalties for non-registration. However, certain disabilities are provided in s 69 of the Act for unregistered firms and their partners. The procedure for registration is very simple and the disadvantages of non-registration are so great that generally the partners of a firm would like to get the firm registered.

Section 58 and 59 deal with the procedure for the registration of a firm. The registration of a firm may be affected by submitting to the Registrar of Firms a statement in the prescribed form and accompanied by the prescribed fee. The Registrar of Firms are appointed by the State Government and State Government is also to define the areas within which the Registrars shall exercise their powers and perform their duties. The application for registration has to be made in the prescribed form, and the same has to be accompanied by the prescribed fee. The State Government has been authorised to make rules prescribing the fee but that shall not exceed the maximum fees specified in Schedule 1, The application must state the following:

a) The firm's name,

b) The place or principal place of business of the firm,

c) The names of any other places where the firm carries on business,

d) The date when each partner joined the firm,

e) The names in full and permanent addresses of the partners, and

f) The duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf. Each person signing the statement shall also verify it in the manner prescribed.

A firm may be got registered at any time after the creation of partnership. It is not necessary that it should be registered at the time of its formation. Moreover, the Act does not lay down any time limit within which the firm should be registered. Therefore, there is no period of limitation either for the original registration, or recording of subsequent changes, as contemplated in s 63 of the Act. Thus, the concept of any limitation period or that of reasonable time cannot be introduced either for original registration or for subsequent changes in a firm. Hence, any legislation by the State Government laying down any time limit either for original registration or for recording of subsequent changes will be ultra vires the Partnership Act and, therefore, bad in law. The Registrar of Firms cannot reject an application for recording changes in the constitution of the firm on the ground of inordinate delay in submitting the application.

If a firm remains unregistered, the firm and its partners would suffer from the disabilities mentioned in s 69. If the firm is registered but some partner or partners have not been registered, e.g., they join after the registration of the firm, such partners who are not registered, will be subject to the disabilities mentioned in s 69 91) and (2).

A firms name shall not contain any of the following words, namely: -

Crown, Emperor, Empress, 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.

When the Registrar is satisfied that the above-mentioned requirements have been complied with, he shall record an entry of the statement in the register called the Register of Firms, and shall file the statement. This amounts to the registration of the firm.

3.2.1. Penalty for furnishing false particulars (Section 70)

Information given to the Registrar through various documents filed with him in connection with the registration of a firm serves the purpose of making the third parties conversant with the firm and the partners so that third parties dealing with the firm are not misled. Correct and complete information should be available with the Registrar. Section 70 imposes penalty for making any false declaration in any document filed with the Registrar. According to Section 70:

Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

3.2.2. Power to make Rules (section 71)

Section 71 grants power to the State Government to make rules prescribing the fees payable, statements to be submitted, regulating the procedure to be prescribed by the Registrar when disputes arise, filing of documents, inspection of documents, and with regard to carrying out the purposes of Chapter VII concerning the Registration of Firms.

In Salem Chit Funds v State of Tamil Nadu, it has been held by the Madras High Court that Rule 3A of the T.N. Partnership (Registration of Firms) Rules, 1932 requiring every registered firm to file with the Registrar a declaration to the effect that registered firm had been carrying on its business or has been in operation during the financial year is intra virus rule making power. Therefore, the requirement of the filing of the return every year was held to be valid.

3.2.3 Subsequent changes and alterations (Sub section 60-65)

Sometimes after the registration, there may be some changes as in the firm's name or the principal place of business, or closing or opening of branches by the firm, or in the names and addresses of the partners, or consequent on the dissolution of the firm or by an order of The court, etc. the alterations may have to be recorded by the Registrar. The Act contains the following provisions in this connection:

1) Alteration in the firm's name and principal place of business.- When there is an alteration in the firm's name or in the location of principal place of business of a registered firm, the same kind of formalities as have been mentioned in Section 58 are to be observed. When the Registrar is satisfied that the necessary formalities have been complied with, he shall amend the entry in the Register of Firms.

2) Closing and opening of branches.- When there is closing or opening of branches of an already existing firm, any partner or agent of the firm may send intimation thereof to the Registrar, who shall then make necessary changes in the Register of Firms.

3) Changes in names and addresses of partners.- In case there is any change in the name or permanent address of any partner of a registered firm, an initiation of the alteration may be sent by any partner or agent of the firm to the Registrar. The Registrar shall then make necessary changes in the Register of Firms.

4) Changes in the constitution of the firm or on dissolution of the firm. - Changes in the constitution of the firm may occur either on the introduction of a partner to the firm, or when a partner ceases to be a partner by retirement, expulsion, insolvency, or death.

No fresh registration is needed on the death of a partner or otherwise in case of a change in the constitution of the firm, but it is sufficient to notify the Registrar, who can make a note in the relevant register. When change in the constitution of the firm occurs or the firm is dissolved, its notice thereof, may be given to the Registrar by the incoming or outgoing partner, or by any of the continuing partners or by a duly authorised agent of any of the above stated persons. Like registration of a firm, the notice of the change in the constitution of the firm or its dissolution is not compulsory. However, in the case of retirement or expulsion of a partner or on the dissolution of a firm, public notice of such retirement, expulsions or dissolution has to be given, otherwise the liability of the partners for the act of each other continues to be the same as before. In the case of a registered firm, public notice includes notice to the Registrar under Section 63.

When a minor has been admitted to the benefits of partnership, such a minor on attaining the age of majority has to give a public notice of his election as to whether he becomes a partner or not. Public notice in the case of a registered firm also includes notice to the Registrar.

5) Rectification of mistakes (s 64).- Section 64 (1) empowers the Registrar to correct any mistake which may have been there in the Register of Firms in order to bring the Register relating to any firm in conformity with the documents filed under this Chapter.

Sometimes there may be some mistake in the documents filed with the Registrar or in the records of the Registrar. Section 64 (2) provides that on application made by all the parties who have signed documents relating to a firm, the Registrar may rectify any mistakes in such documents in the records or note thereof made in the Register of Firms.

6) Amendment of Register by order of Court (s 65).-

Sometimes as a consequence of a decision relating to a registered firm, the need for amendment in the entry in the Register of Firms may arise. In such a case, the Court deciding any matter relating to a registered firm has been empowered by s 65 to direct the Registrar to make any amendment in the entry of the Register of Firms as may become necessary as a consequence of the decision.

3.2.4. Inspection of documents and grant of copies (sub section 66 & 67)

The Register of Firms shall be open to inspection by any person on payment of such fees as may be prescribed. Moreover, all statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and payment of such fee as may be prescribed.

Maximum fee which can be charged for inspection of any document or obtaining copies from the Registrar has been mentioned in Schedule I. The State Government has, however, been empowered to prescribe such charges in respect of the above, but such charges cannot exceed the maximum amount mentioned in Schedule.

3.2.5 Evidentiary value of entries in the Register of Firms (section 68)

The following rules have been stated in s 68 to explain the evidentiary value of entries in the Register of Firms:

1. The documents filed with the Registrar, on the basis of which he prepares his record and Register of Firms, shall be conclusive proof of the facts contained therein as against any person by whom or on whose behalf such document was signed. Therefore, if a persons name is there in the Register of Firms as a partner, he would be liable as a partner. The object of the provision is to compel the partners to have the changes in the constitution of the firm notified to the Registrar. When a partner retires or is expelled or the firm is dissolved, the partners continue to be liable for the act of each other unless a public notice of such retirement, or expulsion, or dissolution, of the firm is given. Public notice in the case of a registered firm includes notice to the Registrar of Firms.

2. A certified copy of an entry relating to a firm in the Register of Firms may be produced to prove either the registration of the firm or some other statements, etc. filed with the Registrar.

3.2.6 Effects of Non-Registration (Section 69)

It contains the provision describing the effects of non-registration of a partnership firm.

Effect of non-registration.—

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

3.2.7. Suit only by an authorised person

It is held that the suit becomes bad for non-compliance of mandatory provision contained in Section 69(2) requiring the filing of the suit by a partner or an authorised person. Such suit is liable to be dismissed. Such defect cannot be cured by subsequent incorporation of verification and signatures by a partner.

1. Suits between the firm and the third parties

According to Section 69 (2), if the firm is unregistered, no suit to enforce a right arising from a contract can be instituted by the firm or its partners against a third party. Sub Section (2) also requires two conditions to be fulfilled before a suit can be instituted against a third party:

i. The firm must be a registered firm;41

ii. The persons suing must be shown in the Register of Firms as partners of the firm.

To enforce the rights against third parties, it is not enough that the firm is registered; it is further necessary that “the person suing is or has been shown in the Register of Firms as a partner in the firm.”

3.2.8. Claim of set-off or other proceedings

According to sub-section (3), the disabilities mentioned above also apply to a claim of set-off or other proceedings to enforce a right arising from a contract. For example, if third party brings an action against the firm to recover some money, the firm cannot say that the third party also owes some money to the firm and, therefore, the claim of third party should be adjusted against the claim of the firm, which means the unregistered firm cannot claim a set off.

3.2.9. Disabilities also apply to other proceedings

The disabilities mentioned in sub-sections (1) and (2) also apply to „other proceedings to enforce a right arising from a contract.. An action was brought to enforce the agreement and the appointment of the arbitrator. The disagreeing partner contended that such a right of the other partner was not enforceable as the firm was unregistered. The Supreme Court held that the suit was not maintainable.

3.2.10. Claim under section 65, Indian Contract Act also barred

The question arose whether an action could be brought against these minors for the return of the benefit received by them under Section 65 of the Indian Contract Act. It was held that the suit for the return of benefit under Section 65 of the Contract Act was also barred under Section 69 of the Partnership Act, as it was an unregistered firm.

3.2.11. Unregistered Firm and Section 9, Arbitration and Conciliation Act, 1996

A mere look at the aforesaid provision shows that the suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party would be barred at its very inception. To attract the aforesaid bar to the suit, the following conditions must be satisfied:

i) That the plaintiff-partnership firm on the date of the suit must not be registered under the provisions of the Partnership Act and consequently or even otherwise, the person suing is not shown in the Register of Firms as partners of the firm, on the date of the suit.

ii) Such unregistered firm or the partners mentioned in the sub-section must be suing the defendant-third party.

iii) Such a suit must be for enforcement of a right arising from a contract of the firm with such a third party.

3.2.12. Suit by unregistered firm- Subsequent registration while suit was pending would cure the defect

The bar contained under section 69 applies to filing of the suit by the firm. It does not insist that the transactions, which are subject-matter of the suit, in relation to, or by a firm, shall be those which take place after the firm is registered. Once a firm was registered, there is nothing in law to disable it from bringing about claims or from pursuing remedies in a Court of law, in relation to transactions, which preceded such registration. Even where a suit was filed by an unregistered firm, two courses are open to it, for ensuring compliance with the requirement, or overcoming the prohibition contained in s 69. It could return the suit and file it after the firm is registered, or, secure registration even while the suit was pending.

3.2.13. Maintainability of petition by unregistered firm

A firm could also be landlord, though in the strict legal sense, the firm had no juristic personality and was only a compendious expression to describe the relationship between the partners. Once it was shown that a partner was receiving the rent, an unregistered firm can also be a landlord. Therefore, petition by unregistered firm as landlord for eviction of tenant was not barred by s 69 (2) of the Partnership Act.

3.3. EXCEPTIONS

The disabilities discussed above are not applicable to the unregistered firm in the following exceptional cases:

3.3.1. Suit for dissolution etc. [Section 69 (3) (a)]

Section 44 mentions certain circumstances under which on the suit of a partner the court may dissolve a firm. Section 69 (3) (a) permits a suit even by the partners of an unregistered firm to sue for the dissolution of a firm or for the accounts of a dissolved firm. In case the firm has already been dissolved, the partners of the unregistered firm can realise the property of the dissolved firm. In case the firm has already been dissolved, the partners of the unregistered firm can realise the property of the dissolved firm. The right includes enforcing a claim arising from contract prior to dissolution. The disability for non-registration works only during the subsistence of the partnership.

4.3.2. Suit on behalf of an insolvent partner [Section 69 (3) (b)]

Section 69 (3) (b) mentions another exception when an action would be brought on behalf of an insolvent partner against an unregistered firm. It provides that an official assignee, receiver of Court have a power to bring an action to realise the property of the insolvent partner. Dismissal of suit under s 69(1) is no bar to a subsequent suit under Section 69(3)

4.3.3. Suit where provisions relating to Registration of Firms do not apply [Section 69(4)(a)]

Section 69 (4) (a) exempts such firms from the operation of the provisions of this section whose place of business is not in India or whose place of business is in such areas, where because of notification under s 56, this Chapter does not apply. It has already been noted above that s 56provides that the Government of any State may, by notification in the Official Gazette, direct that the provisions of this Chapter shall not apply to that State or to any part thereof specified in the notification.

3.3.4. When value of the suit does not exceed Rs. 100 [Section **69(4)(b)]** Section **69 (4)**

(b) Provides an exception for firms having small claims. If the value of the suit does not exceed Rs. 100/-, an unregistered firm or its partner can bring an action against the third party. Once the registration is made, it would continue to be valid in the eyes of law until the same was cancelled. Thus, there is no nee of fresh registration on the death of a partner or when there is otherwise any change in the constitution of the firm. In such cases, it is sufficient to notify the Registrar about the change so that he could note the same in the relevant register. Registration subsequent to the filing of the suit If the firm is not registered “no suit shall be instituted” either between the partners inter se or against any third party. In case the firm is unregistered, such a suit shall be liable to be dismissed. There is no specific provision in the Act for the dismissal of the suit suomoto. A plea for the dismissal of the suit on the ground of non-registration has to be made. If the plaintiff admits that his suit is on behalf of an unregistered partnership, the Court must immediately dismiss the suit in view of the express and mandatory provisions of Section 69. In M/s Jammu Cold Storage v M/s Khairati Lal and Sons,65 M/s Khairati Lal and Sons instituted a suit to recover a sum of Rs. 1000/- from m/s Cold Storage and General Mills Ltd on 15th April 1959. The firm was not registered on that day but it was got registered subsequently on 30th May1959. It was held by the J & K High Court that since the firm was not registered on the date of the institution of the suit, the suit cannot proceed further and it must be dismissed.

3.4. TYPES OF PARTNERSHIP

3.4.1. By duration:

- **Partnership at will**: Partnership existing as per the will of the partners.
- **Particular partnership**: When the partnership is created, to carry on a certain project, for a specified time.

3.4.2. By liability:

- **General Partnership**: Partnership in which partners have unlimited and joint liabilities. All the partners can take part in the management, and they are bound by the acts of one another as well as of the firm.
- **Limited Partnership**: The type of partnership in which except one partner all the partners have limited liability.

This form of business organisation is easy to set up because it does not require any fees or process. In addition to this, partners enjoy **tax benefit**, as in, the profit earned or loss incurred by the business **pass through to the partner's personal income tax return**.

The different kinds of Partners that are found in Partnership Firms are as follows:

1. Active or managing partner:

A person who takes active interest in the conduct and management of the business of the firm is known as active or managing partner.

He carries on business on behalf of the other partners. If he wants to retire, he has to give a public notice of his retirement; otherwise he will continue to be liable for the acts of the firm.

2. Sleeping or dormant partner:

A sleeping partner is a partner who ‘sleeps’, that is, he does not take active part in the management of the business. Such a partner only contributes to the share capital of the firm, is bound by the activities of other partners, and shares the profits and losses of the business. A sleeping partner, unlike an active partner, is not required to give a public notice of his retirement. As such, he will not be liable to third parties for the acts done after his retirement.

3. Nominal or ostensible partner:

A nominal partner is one who does not have any real interest in the business but lends his name to the firm, without any capital contributions, and doesn’t share the profits of the business. He also does not usually have a voice in the management of the business of the firm, but he is liable to outsiders as an actual partner

4. Sleeping vs. Nominal Partners*:*

It may be clarified that a nominal partner is not the same as a sleeping partner. A sleeping partner contributes capital shares profits and losses, but is not known to the outsiders.

A nominal partner, on the contrary, is admitted with the purpose of taking advantage of his name or reputation. As such, he is known to the outsiders, although he does not share the profits of the firm nor does he take part in its management. Nonetheless, both are liable to third parties for the acts of the firm.

4. Partner by estoppel or holding out:

If a person, by his words or conduct, holds out to another that he is a partner, he will be stopped from denying that he is not a partner. The person who thus becomes liable to third parties to pay the debts of the firm is known as a holding out partner.

There are two essential conditions for the principle of holding out : (a) the person to be held out must have made the representation, by words written or spoken or by conduct, that he was a partner ; and (6) the other party must prove that he had knowledge of the representation and acted on it, for instance, gave the credit.

5. Partner in profits only:

When a partner agrees with the others that he would only share the profits of the firm and would not be liable for its losses, he is in own as partner in profits only.

6. Minor as a partner:

A partnership is created by an agreement. And if a partner is incapable of entering into a contract, he cannot become a partner. Thus, at the time of creation of a firm a minor (i.e., a person who has not attained the age of 18 years) cannot be one of the parties to the contract. But under section 30 of the Indian Partnership Act, 1932, a minor 'can be admitted to the benefits of partnership', with the consent of all partners. A minor partner is entitled to his share of profits and to have access to the accounts of the firm for purposes of inspection and copy.

He, however, cannot file a suit against the partners of the firm for his share of profit and property as long as he remains with the firm. His liability in the firm will be limited to the extent of his share in the firm, and his private property cannot be attached by creditors.

On his attaining majority, he has to decide within six months whether he will become regular partner of withdraw from partnership. The choice in either case is to be intimated through a public notice, failing which he will be treated to have decided to continue as partner, and he becomes personally liable like other partners for all the debts and obligations of the firm from the date of his admission to its benefits (and not from the date of his attaining the age of majority). He also becomes entitled to file a suit against other partners for his share of profit and property.

7. Other partners:

In partnership firms, several other types of partners are also found, namely, secret partner who does not want to disclose his relationship with the firm to the general public. Outgoing partner, who retires voluntarily without causing dissolution of the firm, limited partner who is liable only up to the value of his capital contributions in the firm, and the like.

However, the moment public comes to know of it he becomes liable to them for meeting debts of the firm. Usually, an outgoing partner is liable for all debts and obligations as are incurred before his retirement. A limited partner is found in limited partnership only and not in general **partnership**

3.5 RIGHTS AND DUTIES OF PARTNERS

3.5.1. Rights of partner

a) Every partner has a right to take part in the conduct and management of business.

(b) Every partner has a right to be consulted and heard in all matters affecting the business of the partnership.

(c) Every partner has a right of free access to all records, books and accounts of the business, and also to examine and copy them.

(d) Every partner is entitled to share the profits equally.

(e) A partner who has contributed more than the agreed share of capital is entitled to interest at the rate of 6 per cent per annum. But no interest can be claimed on capital.

(f) A partner is entitled to be indemnified by the firm for all acts done by him in the course of the partnership business, for all payments made by him in respect of partnership debts or liabilities and for expenses and disbursements made in an emergency for protecting the firm from loss provided he acted as a person of ordinary prudence would have acted in similar circumstances for his own personal business.

(g) Every partner is, as a rule, joint owner of the partnership property. He is entitled to have the partnership property used exclusively for the purposes of the partnership.

(h) A partner has power to act in an emergency for protecting the firm from loss, but he must act reasonably.

(i) Every partner is entitled to prevent the introduction of a new partner into the firm without his consent.

(J) Every partner has a right to retire according to the Deed or with the consent of the other partners. If the partnership is at will, he can retire by giving notice to other partners.

(k) Every partner has a right to continue in the partnership.

(l) A retiring partner or the heirs of a deceased partner are entitled to have a share in the profits earned with the aid of the proportion of assets belonging to such outgoing partner or interest at six per cent per annum at the option of the outgoing partner (or his representative) until the accounts are finally settled.

3.5.2. Duties of Partners:

(a) Every partner is bound to diligently carry on the business of the firm to the greatest common advantage. Unless the agreement provides, there is no salary.

(b) Every partner must be just and faithful to the other partners.

(c) A partner is bound to keep and render true, proper, and correct accounts of the partnership and must permit other partners to inspect and copy such accounts.

(d) Every partner is bound to indemnify the firm for any loss caused by his will full neglect or fraud in the conduct of the business.

(e) A partner must not carry on competing business, nor use the property of the firm for his private purposes. In both cases, he must hand over to the firm any profit or gain made by him but he must himself suffer any loss that might have occurred.

(f) Every partner is bound to share the losses equally with the others.

(g) A partner is bound to act within the scope of his authority.

(h) No partner can assign or transfer his partnership interest to any other person so as to make him a partner in the business.

3.6 IMPLIED AUTHORITY

Implied authority, also known as “usual authority,” is the authority of an agent acting on behalf of another person or entity. The person acting with implied authority does what is reasonably necessary in order to effectively perform his duties. The acts undertaken surrounding the use of implied authority depend on the circumstances and the case. To explore this concept, consider the following *implied authority* definition.

1. Authority that is not specifically expressed or defined in writing, but which an employee or agent assumes to possess in order to conduct business on behalf of an agency.

Each partner in a business has the implied authority to act in the name of the company. Such acts are binding on the other partners, so long as they fall within the ordinary course of the company's normal business. Such acts of implied authority may include:

- Buying or selling goods on behalf of the company
- Accepting payments on debts owed to the firm
- Accepting, making, or issuing bills on the firm's behalf
- Taking on a new lease on the firm's behalf

On the other hand, implied authority does not authorize a partner to:

- Submit a company dispute to arbitration.
- Relinquish any claim made by the firm
- Withdraw or proceed in a legal suit
- Admit liability in a legal suit against the firm
- Purchase property on the firm's behalf
- Enter a new partnership on the firm's behalf

Apparent Authority

Apparent authority arises when someone logically concludes an individual has the authority to act on behalf of another person or entity to do business or enter into contracts. Typically, this belief stems from the person's actions leading to the belief that they have been given authority to act. Not all acts performed under apparent authority are legally binding.

Example : Bob works as a cashier at a stationery shop. Though Bob does not order products or price them, he gives a price quote to a customer who calls requesting customized stationery. While Bob does not have the actual authority to give customers price quotes, his position providing customer service gives him the apparent authority to do so. Even though the company did not authorize Bob to give price quotes to customers, the costumer would be entitled to the price Bob quoted, since the customer reasonably assumed that Bob had the authority to make such an offer. The company must uphold the oral agreement made between Bob and the customer.

Related Legal Terms and Issues

- **Agent –** a person who acts on behalf of another person or entity
- **Agency –** a business or organization that has been established to provide goods or services
- **Infer –** come to a conclusion based on reasoning or evidence rather than from specific statements
- **Liable –** responsible according to the law

3.7. INCOMING AND OUTGOING PARTNERS

It has already been observed that according to section 25: "Every partner is liable… for all the acts of the firm done while he is a partner." S 31 (2) confirms this rule and states an incoming partner "does not thereby become liable for any act of the firm done before he became a partner." It is clear that as a general rule the liability of an incoming partner begins from the date of his joining the firm.

Nothing can, however, prevent a partner from agreeing to be liable for the acts done before his admission. If he makes such an agreement with his co-partners, the same will be binding only between him and the co-partners and the third parties cannot take advantage of such an agreement. The creditors can make him liable if they can show that the incoming partner had agreed with them, expressly or impliedly, for being liable towards them for the acts done before his admission. The basis of liability for the past acts in such a case will be the agreement rather than the fact of his admission as a partner.

In Central Bank of India v Tarseema Compress Wood Mfg. Co.,3 after a 4th partner was admitted to a partnership firm, which earlier consisted of only three partners, all of them gave the following undertaking to the bank:

"We are jointly and severally responsible to the bank for the liabilities of the firm with the bank. The bank may recover its claim and dues from any or all of the partners of the firm and the assets of any deceased partner." The fourth partner in this case had undertaken liability which existed prior to his joining the firm and he was, therefore, held to be jointly and severally liable in respect of such liability. The position of a minor becoming a partner under s 30 is, however, different. His liability towards third parties does not commence from the date of his becoming a partner, but it relates back to the date of his admission to the benefits of partnership

3.7.1 Introduction of a new partner- Liability of incoming partner in respect of pre-existing debts

New partner could be held liable if he had assumed liability and creditor had accepted him as debtor. Documents on record showed that new partner had acknowledged pre-existing liability and was also trying to clear the dues. Act of Bank in not withdrawing facilities of newly constituted firm proved that Bank wished that it should assume the liabilities. Therefore, new partner was liable to pay the pre-existing debts. The fact that new partnership deed did not provide for assumption of such liability was immaterial.

3.7.2. Outgoing Partners

Subsection 32 to 38 deal with different ways in which a partner may cease to be a partner and his rights and liabilities thereafter. These provisions pertain to situations when the outgoing partner ceases to be a partner, but the firm is not dissolved and it continues with the remaining partners. A partner may cease to be a partner in the following ways:

a) By retirement;

b) By expulsion;

c) By insolvency;

d) By death.

a) Retirement of a Partner (Section 32)

Retirement here means voluntary withdrawal of a partner from the firm, as opposed to expulsion, when a partner is made to quit. It covers such cases where on the withdrawal of a partner from the firm, the firm is not dissolved but the business of the firm is continued with the remaining partners.

Retirement of partner.- Use of the word „retire in section 32 of the Partnership Act, 1932 is confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them. Where a partner withdraws from a firm by dissolving it, it shall be dissolution and not retirement.

Retirement of a partner from a firm does not dissolve it, in other words, it does not determine partnership inter se between all the partners. I only serves the partnership between the retiring partner and continuing partners, leaving the partnership amongst the latter unaffected and the firm continues with the changed constitution comprising of the continuing partners.

Section 32 provides for retirement of a partner but there is no express provision in the Act for the separation of his share and the intention appears to be that it would be determined by agreement between the parties.

Section 37 deals with rights of outgoing partners. Although the principle applicable to such cases is clear but at times some complicated questions arise when disputes are raised between the outgoing partner or his estate on the one hand and the continuing or surviving partners on the other in respect of subsequent business. Such disputes are to be resolved keeping in view the facts of each case having due regard to Subsection 37 of the Act.

Section 48 deals with the mode of settlement of accounts between the partners after dissolution of the partnership firm. The plaintiff had retired from the firm on 5.4.1971 after selling his share in the partnership firm. Once he had retired from the partnership firm, he had no right to claim any further share in the profits of the firm. A finding of fact is also recorded that the defendants had not paid the value of the share of the plaintiff pursuant to the agreement for retiring from the firm. If the defendants have failed to pay the value of the share of the plaintiff as agreed to, it has become a debt on the defendants and the plaintiff is entitled to recover the same with interest. After the retirement from the partnership firm and particularly when the firm was reconstituted with new partners, there was no question of using the plaintiffs share for earning profit in the reconstituted firm. The High Court, despite specific request by the counsel for the plaintiff in A.S. No. 481 of 1979 to give a direction regarding the date on which the valuation of the plaintiffs share shall be arrived at, did not give a direction but directed the trial court to make inquiry into valuation and decide the date taking into account that his share was not paid till then. There is no nexus or reason to say that the relevant date for valuation of the share of the plaintiff is the date when the Commissioner valued his share, that too after a long lapse of time and taking note of the events that the plaintiff had retired from the firm on 5.4.1971 having sold his share and the firm had been reconstituted with new partners.

How can a partner retire

According to section 32(1),a partner may retire-

a) With the consent of all the other partners,

b) In accordance with an express agreement by the partners, or

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

a) With the consent of all the other partners As a general rule, no partner can retire whenever he likes. The partnership business depends upon the continued support from all the partners. The retirement of a partner might mean a serious dislocation of a whole business. A partner can, therefore, retire with the consent of all the other partners. Such consent may be express or implied.

In accordance with express agreement by the partners

In case the agreement between the partners themselves condones the requirement of the consent of them all. A partner may retire accordingly. For instance, the partnership deed provides that a partner may retire with the consent of the majority of other partners or by giving one year‟s notice, a partner can retire in accordance with such an agreement. In partnership at will by a notice to others In case of partnership at will, a partner may retire by giving a notice in writing to all the other partners of his intention to retire. In a partnership at will, a partner has also a right to get the firm dissolved by giving a notice in writing to all other partners of his intention to dissolve the firm. In a partnership at will, a partner may retire by giving a notice in writing to all the other partners of his intention to retire by giving a notice in writing to all the other partners of his intention to retire.

3.8. MODE OF DISSOLUTION OF PARTNERSHIP

The reconstitution of a partnership firm takes place on account of admission, retirement or death of a partner. In such a situation while the existing partnership is dissolved, the firm may continue under the same name if the partners so decide. In other words, it results in the dissolution of a partnership but not that of the firm. According to Section 39 of the partnership Act 1932, the dissolution of partnership between all the partners of a firm is called the dissolution of the firm. That means the Act recognises the difference in the breaking of relationship between all the partners of a firm and between some of the partners; and it is the breaking or discontinuance of relationship between all the partners which is termed as the dissolution of partnership firm. This brings an end to the existence of firm, and no business is transacted after dissolution except the activities related to closing of the firm as the affairs of the firm are to be wound up by selling firm’s assets and paying its liabilities and discharging the claims of the partners.

3.8.1 Dissolution of Partnership

As stated earlier dissolution of partnership changes the existing relationship between partners but the firm may continue its business as before. The dissolution of partnership may take place in any of the following ways:

(1) Change in existing profit sharing ratio among partners;

(2) Admission of a new partner;

(3) Retirement of a partner;

(4) Death of a partner;

(5) Insolvency of a partner;

6) Completion of the venture, if partnership is formed for that; and

(7) Expiry of the period of partnership, if partnership is for a specific period of time;

3.8.2. Dissolution of a firm

Dissolution of a partnership firm may take place without the intervention of court or by the order of a court, in any of the ways specified later in this section. It may be noted that dissolution of the firm necessarily brings in dissolution of the partnership. Dissolution of a firm takes place in any of the following ways:

3.8.2.1. Dissolution by Agreement: A firm is dissolved:

(a) With the consent of all the partners or

(b) In accordance with a contract between the partners.

3.8.2.2. Compulsory Dissolution: A firm is dissolved compulsorily in the following cases:

(a) When all the partners or all but one partner, become insolvent, rendering them incompetent to sign a contract;

(b) When the business of the firm becomes illegal; or

(c) When some event has taken place which makes it unlawful for the partners to carry on the business of the firm in partnership, e.g., when a partner who is a citizen of a country becomes an alien enemy because of the declaration of war with his country and India.

3.8.2.3. On the happening of certain contingencies:

Subject to contract between the partners, a firm is dissolved :

(a) If constituted for a fixed term, by the expiry of that term;

(b) If constituted to carry out one or more ventures, by the completion thereof;

(c) By the death of a partner;

(d) By the adjudication of a partner as an insolvent.

3.8.2.4. Dissolution by Notice: In case of partnership at will, the firm may be dissolved if any one of the partners gives a notice in writing to the other partners, signifying his intention of seeking dissolution of the firm.

3.8.2.5. Dissolution by Court: At the suit of a partner, the court may order a partnership firm to be dissolved on any of the following grounds:

(a) When a partner becomes insane;

(b) When a partner becomes permanently incapable of performing his duties as a partner;

(c) When a partner is guilty of misconduct which is likely to adversely affect the business of the firm; 2015-16 228 Accountancy – Not-for-Profit Organisation and Partnership Accounts

(d) When a partner persistently commits breach of partnership agreement;

(e) When a partner has transferred the whole of his interest in the firm to a third party;

(f) When the business of the firm cannot be carried on except at a loss; or

(g) When, on any ground, the court regards dissolution to be just and equitable.

QUESTIONS

Long answer type questions.

1. Define partnership. How would you determined whether a group of persons does or does not constitute a partnership?
2. “Mere participation in the profits of trade is not a conclusive test of the existence of partnership.”discuss.
3. “the law of partnership is only an extension of law of agency.”Discuss.
4. The relation of partnership arises from contract and not from status.”Comment.
5. Enumerate the rights and duties of all type partners.
6. Explain clearly the nature and extent of authority of a partner to bind the firm.
7. How can a partner firm be dissloved? Explain fully the circumstance in which court may order dissolution of a firm and Explain various methods of dissolution of a firm.
8. If there is no provision in the partnership deed, how settlement of accounts of the firm be done after the dissolution of a firm.

9. The Indian partnership act has effectively ensured the registration of firms without making it compulsory. What do you meant by “limited liability partnership”?Discuss the silent feature of limited liability.
10. Discuss the nature of limited liability given in the act. and Explain the legal position, liability and change in the designated partners.
11. When a partner of a limited liability partnership may case to be a partner?Discuss the extent of liability of limited liability partnership and its partners.
12. Explain the legal provisions regarding registration of change in name and address of the partners and Explain the the liability of limited liability partnership and its partners in case of fraud.

Short type of answer.

1. Define partnership.
2. Distinguish between partnership and hindu undivided family by business.
3. Distinguish between partnership and co-ownership.
4. Discuss various kinds of partnership.
5. Explain implied Authority.
6. Whhat is meant by dissolution of partnership.
7. What is meant by dissolution of firm.
8. Distinguish between dissolution of partnership and dissolution of partnership and dissolution firm.
9. What is meant by the registration of the firm.
10. What is partnership Deed.
11. Define limited liability partnership.
12. Who can be partners in a limited liability partnership firms.
13. What is the eligibility criterion to be partners in a limited liability partnership?
14. Write the extent of liability of a partner in LLP?

UNIT-4

NEGOTIABLE INSTRUMENTS

AIMS AND OBJECTIVES

After studying this unit you should be able understand:

- ❖ The meaning of negotiable instrument
- ❖ Various types of negotiable instrument
- ❖ Different parties concerned with the various types of negotiable instrument
- ❖ Liabilities of parties to a negotiable instrument.
- ❖ Significance of acceptance of negotiable instrument
- ❖ Discharge of parties

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4.8. Parties to Negotiable Instrument

4.9. Dishonour of a Negotiable Instrument

4.10. Discharge of a Negotiable Instrument

4.11. Summary

4.12. Self-Assessment Questions

UNIT-IV

NEGOTIABLE INSTRUMENTS

4.1 INTRODUCTION

There are certain documents which are freely used in commercial transactions and monetary dealings. These documents, if they satisfy certain conditions, are known as 'negotiable instruments'. The law relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881, which deals with promissory notes, bills of exchange and cheques. It is based, except where conditions in India require a departure, mainly upon the English Law as to negotiable instruments and judicial decisions. The Act was enacted in India in 1881. The Act is applicable throughout India except in the state of Jammu and Kashmir from the 1st of March, 1, 1882. Though the Act recognizes only three kinds of negotiable instruments, it includes all other instruments which have the features of negotiability. Section 137 of the Transfer of Property Act, 1882 recognises the negotiability of instruments by law or custom. Thus, in India, government promissory notes and hundis have been held to be negotiable by usage or custom. The Negotiable Instruments Act does not affect the provisions of Secs. 31 and 32, of the Reserve Bank of India Act, 1934. The Act was amended by the Banking, Public Financial Institutions and Negotiable Laws (Amendment) Act, 1988 wherein a new chapter XVII was incorporated for penalties in case of dishonor of cheques due to insufficiency of funds in the account of drawer of the cheque. The Act has been further amended recently by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 redefining the term 'cheque' and making the above punishment more harsh. In the amendment of 2002, in addition to the changes made in certain Sections including 138, 141 and 142, five new Sections (143 to 147) were inserted.

4.2 MEANING AND DEFINITION

Meaning: The word 'negotiable' means "transferable from one person to another in return for consideration" and 'instrument' means a "written document by which a right is created in favour of some person". Therefore, a negotiable instrument is a document which entitles a person to a sum of money and which is transferable from one person to another by mere delivery or by endorsement and delivery.

Definition: A negotiable instrument is a method of transferring a debt from one person to another. The term 'negotiable instrument' as such is not defined in the Negotiable Instruments

Act. Section 13, however, says that “a negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer. The definition, as it is, says that a negotiable instrument ‘means’ and not ‘means and includes’. Therefore, any other instrument which satisfies the conditions of negotiability can be added to the list of negotiable instruments.

According to Justice Willis, “a negotiable instrument is one, the property and the title in which is acquired by anyone who takes it as bonafide and for value notwithstanding any defect in the title of the person from whom he took it”.

According to Thomas, “A negotiable instrument is one which is, by a legally recognized custom of trade or law, transferable by delivery or by that endorsement and delivery in such circumstance that a) the holder of it for the time being may sue on it in his own name, and

b) the property in it passes free from equities, to a bonafide transferee for value, notwithstanding any defect in the title of the transferor”.

The above definitions make it clear that a negotiable instrument is different from other commodities.

An instrument is a negotiable instrument if it satisfies two conditions, namely —

a) That the instrument should be freely transferable (by delivery or by endorsement and delivery) by the custom of the trade and
b) That the person who obtains it in good faith and for value should get it free from all defects, and thus be entitled to recover the money of the instrument in his own name.

Documents such as Share warrants, Port trust or Improvement Trust Debentures, railway receipts or railway bond payable to bearer are considered equivalent to negotiable instruments either by mercantile custom or by other enactments like the Companies Act. However, money orders and postal orders, deposit receipts, share certificates, Bills of lading, dock warrant, I.O.U. etc., are not negotiable instruments. Though they are transferrable by delivery and endorsements, yet they are not able to give better title to the bonafide transferee for value than what the transferor has.

4.3 Essential Characteristics of a Negotiable Instrument

The essential characteristics of a negotiable instrument are as follows:

1. **Property:** The possessor of the negotiable instrument is presumed to be the owner of the property contained therein. A negotiable instrument does not merely give possession of the

instrument but right to property also. The property in negotiable instrument means complete right of ownership and not merely a right of possession.

2. **Freely Transferable:** the property in negotiable instrument passes from one person to another by delivery, if the instrument is payable to bearer, and by endorsement and delivery if it is payable to order.
3. **Good title:** A holder in due course i.e., a person, who is a bonafide transferee of a negotiable instrument for value, gets a good title even if the transferor had the defective title. The general principal laid down in the maxim "nemodat quod non habet" does not apply to negotiable instruments.
4. **Right to sue in own name:** Where the negotiable instrument is dishonoured, the transferee of that negotiable instrument has right to sue in his own name for the recovery of the amount. A negotiable instrument can be transferred any number of times till its maturity and the holder of the instrument need not give any notice of transfer to the party liable on the instrument to pay.
5. **Presumptions:** There are certain presumptions which are applicable to all negotiable instruments, e.g., consideration has been paid under it, order of endorsement and that of reasonable time. These presumptions are dealt with in Secs. 118 and 119.
6. **Prompt payment:** A negotiable instrument ensures the holder prompt payment because in the case of dishonour, the goodwill of the persons who are party to that negotiable instrument may be adversely affected and ruin their credibility.
7. **Writing:** A negotiable instrument must be in writing.
8. **Signature:** A negotiable instrument must be authenticated by the signature of the maker.
9. **Consideration:** The consideration is not mentioned on the negotiable instrument. It is presumed that the negotiable instrument has been drawn for a valuable consideration.

4.4 Types of Negotiable Instruments

Negotiable instruments may be:

1. **Negotiable by Statute:** The Negotiable Instruments Act mentions only three types of negotiable instruments (Sec.13). These are promissory notes, bills of exchange and cheques. These are negotiable by statute.
2. **Instruments Negotiable by Custom or Usage:** There are certain other instruments which have acquired the character of negotiability by usage or custom of trade. The Courts in India

usually follow the practice of English Courts in according the character of negotiability to other instruments. Sec. 137 of the Transfer of Property Act also recognizes the negotiability of instruments by law or custom. Thus, in India, Government promissory notes, treasury bills, banker's drafts and pay orders, *hundis*, delivery orders and railway receipts for goods, share warrants, port trust debentures, Indira VikasPatras, have been held to be negotiable by usage or custom.

Therefore, even though the Negotiable Instruments Act acknowledges the existence of other kinds of negotiable instruments, it specifically mentions three kinds of negotiable instruments, viz., promissory notes, bills of exchange or cheques.

4.5 PROMISSORY NOTE

4.5.1 Definition

According to Sec. 4 of the Indian Negotiable Instruments Act, 1881, "A promissory note is an instrument in writing (not being a bank note or 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".

4.5.2 Parties to a Promissory Note

There are two parties to a promissory note. They are

i) **Maker:** He is the debtor who makes the promissory note promising to pay a specified sum after the expiry of a specified duration. There may be one or more makers of a promissory note.

ii) **Payee:** He is the creditor in whose favour the promissory note is made.

For example, if X signs an instrument containing the following conditions:

i) I promise to pay Y or order Rs. 2,000, or

ii) I acknowledge myself to be indebted to Y to the extent of Rs. 2,000 payable on demand, for value received, then the instrument will qualify as a promissory note.

However, if X signs an instrument containing any of the following conditions, it will not be a promissory note.

i) I am indebted to Y for Rs. 2,000, or

ii) I promise to pay Y Rs. 2,000 along with any other sum which may be payable to him.

4.5.3 Essential Characteristics of Promissory Note

For an instrument to become a promissory note, it must have the following essential elements:

1. **It must be in writing:** A promissory note must always take the form of a written document. Mere verbal promise to pay will not do. The instrument may be written on any paper, on any bahi or book or any other substitute for paper. The writing may be in pencil or ink. Writing includes printing, photography and lithography.
2. **The promise to pay must be express:** The essential of a promissory note is an express promise to pay. A mere acknowledgement of debt without express promise to pay is not a promissory note. A mere implied promise will not do.
3. **The promise to pay must be unconditional:** A promissory note must contain an unconditional promise to pay. The promise to pay must not depend on the happening of a contingency which may or may not happen. A conditional promissory note is not negotiable and hence invalid. But when an instrument is payable on the happening of an event which is certain to happen, though the time of its happening may be uncertain, it is a promissory note. Similarly, an undertaking to pay money at a particular place or after a specified time is unconditional, and the document is a promissory note.
4. **It must be signed by the maker:** The signature of the maker on the face of the note is the most essential feature. It may be a thumb-mark, initials or any other mark. In the absence of the signature of the maker, an instrument cannot be called a promissory note. Signature means the writing of a person's name in order to authenticate and give effect to the contract contained in the instrument. It is at the same time essential that the mind of the signer must accompany the signature.
5. **The maker must be certain:** The maker of the note must be definite. The note must show on its face the person who is liable as a maker. The maker is taken as certain if from the description of the maker, sufficient indication follows about his identity. He may be described by his name or designation. A promissory note may be made by two or more makers, and they may be liable thereon jointly or severally.
6. **Promise must be to pay a certain sum:** The amount promised to be paid by the promissory note must be certain and definite and must not be capable of contingent additions or subtractions.The promise must be to pay a definite sum and nothing else. The sum payable is certain when —

   i) it is payable with interest. But if the rate of interest is not stated in the instrument it is not a promissory note.

ii) it is payable at an indicated rate of exchange.

iii)it is payable by instalments, with a provision that on default being made in payment, the balance unpaid shall become due [Sec. 5, para 3].

7. **The promise should be to pay money and money only:**Money means legal tender money and not old and rare coins. It is essential that the medium of payment must be money only and not bonds, bills or any other article. Thus, a document containing a promise to pay money and paddy is not a promissory note.
8. **The payee must be certain:** It is essential to the validity of a promissory note that the person who is to receive the money should be capable of being ascertained from the instrument itself. Where a document does not specify the person to whom the money is to be paid, it is not a promissory note. It is to be noted that the maker and the person who is to receive the payment cannot be one and the same person. A bank note or a currency note is not a promissory note as both are treated as money itself.
9. **Other formalities:** Formalities like number, place, date, attestation, etc, are usually found in the promissory note, but they are not essential in law. It is not essential to the validity of a promissory note that it should contain the name of the place where it is made or the place where it is payable. A promissory note must be properly stamped under the Indian Stamp Act, 1899 and must also be properly cancelled. The words "value received" is also unnecessary.
10. It may be payable on demand or after a definite period of time: Where no time is mentioned, the note is payable on demand. The expression 'on demand' means payable immediately or forthwith.
11. **It cannot be made payable to bearer on demand:**The Reserve Bank of India Act, 1934 prohibits issue of such promissory notes except by the Reserve Bank of India itself or the Central Government.

    Lack of any of the requirements mentioned in Sec. 4 will not make a document a promissory note.

Specimen form of Promissory Note

Rs. 5,000	Bengaluru March 24, 2019
On demand, I promise to pay Mr. Suresh Padhi or order a sum of rupees five thousand, value received.	
To Suresh Padhi Q No. 29/5 Phase I, KananVihar, Bengaluru	R. Stamp Sd/ Mahesh

4.6 BILL OF EXCHANGE

4.6.1 Definition

According to Section 5 of the Negotiable Instruments Act, 1881, "A bill of exchange is an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. A bill of exchange is sometimes also called a draft.

4.6.2 Parties to a Bill of Exchange

There are three parties to the bill of exchange.

i) **Drawer:** He is the person who draws and signs the bill of exchange. He is also known as the creditor because he has the right to receive money from another person. In other words, he is the person who gives the order to pay or who makes the bill.

ii) **Drawee:** he is the person on whom the bill of exchange is drawn, i.e., he is the person who accepts the bill of exchange and is liable to pay the money thereon on the due date. He is also known as the payer or the acceptor. In other words, drawee is the person who is directed to pay.

iii) **Payee:** He is the person who has the right to receive the payment of the bill of exchange on the due date. In other words, the person to whom or to whose order the money is directed to be paid called payee.

In some cases, the drawer and the payee may be one and the same person or they may be different persons. The drawer or the payee who is in possession of the bill is called the holder. The holder must present the bill to the drawee for his acceptance. When the drawee accepts the bill, by writing the word 'accepted' and then signing it, he is called the 'acceptor'. When the holder endorses the bill, note or cheque, he is called the endorser. The person to whom the bill, note or cheque is endorsed is called the endorsee. When in the bill or in any endorsement thereon the name of any person is given in addition to the drawee to be referred to in the case of need, such person is called a drawee in case of need. (Sec. 7, para 2). The name of the drawee in case of need may be given in the bill by the drawer at the time when it is drawn or by some subsequent endorser. The resort is to be had to the 'drawee in case of need only' when the bill is dishonoured by non-acceptance or non-payment.

4.6.3 Essentials of a Bill of Exchange

The essential elements of a bill are more or less the same as of a promissory note and are subject to same formalities as regards date, place, stamp, signature, etc. in order that an instrument may be called a bill of exchange, it should satisfy the following conditions —

1. It must be in writing.
2. It must contain an unconditional order to pay.
3. It must be signed by the drawer.
4. There must be three parties to the instrument and the parties must be certain.
5. The order must be to pay a certain sum of money.
6. The instrument must contain an order to pay money and money only.
7. It must comply with the formalities as regards date, consideration, stamp, etc. A bill must be affixed with the necessary stamp.

Briefly speaking, before a document can be called a bill of exchange, the drawer must be certain, the order must be certain, the drawee must be certain, the payee must be certain and the sum payable must also be certain. These are popularly called the five certainties of a bill of exchange.

Specimen Form of Bill of Exchange

Cuttack
July 20, 2019

Two months after date, pay to P or order, the sum of Rs 5,000 (Rupees five thousand only) for value received.

To
Mr. Ram
Sector 6, Rourkela

Stamp

Sd/- Ravi

4.6.4 Distinction between a Bill of Exchange and a Promissory Note

The points of distinction between a bill of exchange and promissory note are mentioned below:

1. **Parties:** There are three parties to a bill of exchange, namely, the drawer, the drawee and the payee; while in a promissory note there are only two parties — maker and payee.
2. **Nature of Payment:** In a bill of exchange, there is an unconditional order to pay, while in a promissory note there is an unconditional promise to pay.
3. **Acceptance:** A bill of exchange requires an acceptance of the drawee before it is presented for payment, while a promissory note does not require any acceptance since it is signed by the person who is liable to pay.
4. **Liability:** The liability of the maker of a promissory note is primary and absolute, while the liability of drawer of bill of exchange is secondary and conditional. It is only when the drawee fails to pay that the drawer would be liable as a surety.
5. **Notice of dishonour:** In case of dishonour of bill of exchange either due to non-payment or non-acceptance, notice must be given to all persons liable to pay. But in case of a promissory note, notice of dishonor to the maker is not necessary (Sec. 93).
6. **Maker's position: T**he drawer of a bill of exchange stands in immediate relationship with the acceptor and not the payee. While in case of a promissory note, the maker stands in immediate relationship with the payee.
7. **Nature of acceptance:** A promissory note can never be conditional, while a bill of exchange can be accepted conditionally.
8. **Copies:** A bill of exchange can be drawn in sets, but a promissory note cannot be drawn in sets.
9. **Payable to bearer:** A promissory cannot be made payable to a bearer, while a bill of exchange can be so drawn provided it is not payable to bearer on demand.
10. **Payable to maker:** In a promissory note, the maker cannot pay to himself. While in the case of a bill of exchange, the drawer and the payee may be one person.
11. **Protest:** Foreign bills must be protested for dishonor when such protest is required by the law of the place where they are drawn (Sec. 104). But no such protest is required in the case of promissory note.
12. **Applicability of certain provisions:** Certain provisions like presentment of acceptance (Sec. 61), acceptance (Sec. 75), acceptance for honour (Sec. 108) and bill in sets (Sec. 132) are applicable only to a bill of exchange, they are not applicable to a promissory note.

13. The maker of a promissory note is the debtor and he himself undertakes to pay. The drawer of a bill of exchange is the creditor who directs the drawee (his debtor) to pay.

14. The maker of a promissory note corresponds in general to the acceptor of a bill. But the maker of the note cannot undertake to pay conditionally whereas the acceptor may accept the bill conditionally because he is not the originator of the bill.

4.7 CHEQUE

4.7.1 Meaning and Definition

A cheque is the means by which a person who has funds in the hand of a bank withdraws the same or some part of it.

Section 6 of the Negotiable Instruments Act defines a cheque as 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.

The expression 'cheque in electronic form' means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system.

'A truncated cheque' means a cheque which is truncated during the course of a clearing cycle, either by the 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.

'Clearing house' means the clearing house managed by the Reserve Bank of India or a clearing house recognized as such by the Reserve Bank of India [Sec. 6 as substituted by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002].

A cheque is a special kind of bill of exchange; but it has the following two additional qualifications, viz.,—

i) It is always drawn on a specified banker, and

ii) It is always payable on demand without any days of grace.

4.7.2 Essentials of a Cheque

All cheques are bills of exchange, but all bills of exchange are not cheques. A cheque being a bill of exchange must possess the following requirements:

1. A cheque must be drawn upon a specified banker.

2. A cheque must be payable on demand.
3. A cheque must be signed by the drawer.
4. A cheque must be an unconditional order to pay a certain amount of money to or to the order of a specified person or to the bearer of the cheque.
5. A cheque must be dated.

A cheque unlike a bill of exchange does not require acceptance as it is intended for immediate payment.

The usual form of bank cheque is shown below.

No……..	Date……2007
PUNJAB NATIONAL BANK	
SubziMandi, Delhi-110007	
Pay………………………………………………………………………. or bearer the sum of Rs. ………………………………………………………………………………..	
Rs. …………………………….	
Sd / –	

4.7.3 Distinction between a Bill of Exchange and a Cheque

Cheques and bills of exchange are in many respects governed by the same rules and principles as they have many points in common. Both are negotiable instruments. There are three parties in a cheque as well as in a bill of exchange. There is an unconditional order to pay in a cheque and bill of exchange.

A cheque differs from a bill of exchange in the following respects:

1. **Drawee:** A bill of exchange may be drawn on any person, including a banker, but a cheque is always drawn on a bank or banker. Thus, all bills are not cheques whereas all cheques are necessary bills.
2. **Acceptance:** A cheque does not require any acceptance. While a bill must be accepted before the drawee can be called upon to make payment upon it.
3. **Days of grace:** A cheque is payable on demand without any days of grace, but a bill of exchange is normally entitled to three days of grace unless it is payable on demand.
4. **Payment:** A cheque is always payable on demand immediately whereas a bill may be payable on demand or after expiry of a certain period after date or sight.

5. **Presentment:** A bill of exchange must be duly presented for payment to the acceptor or else the drawer of the bill will be discharged from liability. The drawer of a cheque is not necessarily discharged from his liability by delay of the holder in presenting it for payment. He is discharged only to the extent of the damage, if any, suffered by him.
6. **Crossing:** A cheque may be crossed but there is no such provision in the case of a bill of exchange.
7. **Notice of dishonour:** When a cheque is not met, notice of dishonor is not necessary. Want of assets in the hands of the banker is sufficient notice. It is necessary to give a notice of dishonor in order to make the drawee of a bill liable.
8. **Payable to bearer on demand:** A cheque can be drawn payable to bearer on demand. But a bill of exchange cannot be so drawn.
9. **Stamp:** A cheque does not require any stamp whereas a bill, except in certain cases, must be stamped.
10. **Countermanding of payment:** A cheque may be revoked by countermand of payment. Moreover, in the case of a cheque the notice of customer's death or insolvency automatically requires the bank not to make the payment of the cheque. The payment of a bill, however, cannot be countermanded.
11. **Noting and protesting:** A cheque is not noted or protested for dishonor and is generally inland. But in the case of a bill of exchange, there can be noting and protest under Sections 99 and 100 of the Negotiable Instruments Act in order to obtain the proof that a bill of exchange is dishonoured.
12. **Protection:** A banker is given necessary protection with regard to payment of cheques in certain circumstances. No such protection is available to the drawee or acceptor of a bill of exchange.

4.7.4 Crossing of Cheques

There are two types of cheques: open cheques or bearer cheques and crossed cheques.

Open Cheque: A cheque which is payable in cash across the counter of a bank is called an open cheque. These need not be put through a bank account. When such a cheque is in circulation, a great risk attends it, if its holder loses it, its finder may be go to the bank and get payment unless its payment has already been stopped. If the open cheque goes to wrong hands and from him it is transferred to a holder in due course, the holder in due course will get a good title in the cheque and the rights of the original holder would be affected thereby.

With a view to avoid such risks and protect the owner of cheque, a system of crossing was introduced.

Crossed cheque:A cheque is one on which two parallel transverse lines with or without the words '& Co.' are drawn. These lines are drawn on the upper left hand corner of the cheque. The payment of such a cheque can be obtained through a banker. Thus, crossing is a direction to the drawee banker to pay the amount of money on a crossed cheque generally to a banker or a particular banker so that the party who obtains the payment of the cheque can be easily traced. The crossing compels the holder to prevent the cheque through a "quarter of known respectability and credit" and affords security and protection to the owner of the cheque, as cheque is payable only through a banker.

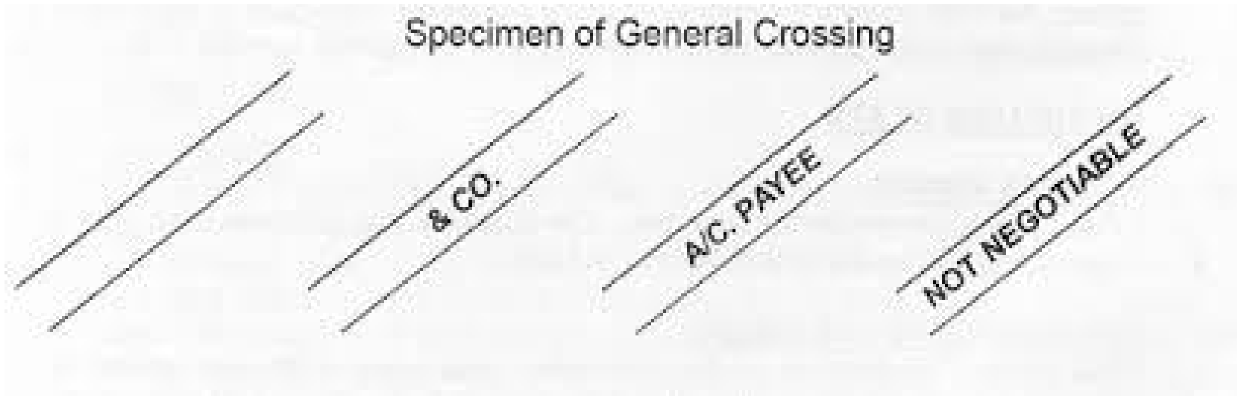
4.7.5 Types of Crossing

There are two types of crossing provided by the Negotiable Instruments Act, namely general crossing and special crossing.

A. **General crossing:** A cheque is said to be crossed generally when it bears across its face an addition of —
   a) The words 'and company' or any abbreviation there of, between two parallel lines, either with or without the words not negotiable, or
   b) Two parallel transverse lines simply, either with or without the words 'not negotiable' (Sec. 123).

Two transverse lines are essential for general crossing, though not for special crossing. The lines must be drawn across the face of the cheque. Where a cheque is crossed generally, the drawee banker shall not pay it unless it presented by a banker (Sec. 126). It means that a drawee bank is not to make the payment of the cheque at the counter but the payment is to be made only to another bank that collects the cheque on behalf of the holder. In case of general crossing, therefore, the holder may get the cheque collected through some bank. Collecting bank may be any bank of the choice of the holder.

Specimens of general crossing

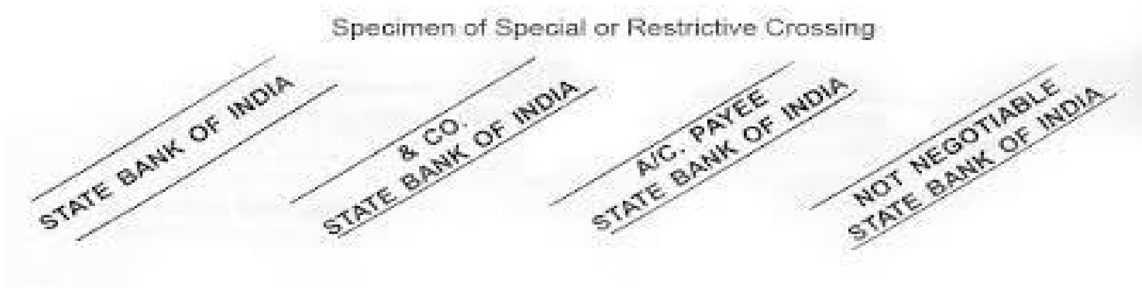


B. Special Crossing: Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable', the cheque is deemed to be crossed specially (Sec. 124). Transverse lines are not necessary in case of a special crossing. A special crossing makes the cheque safer than a general crossing because the payee or holder receives the payment except through the banker named on the cheque. The payment of a specially crossed cheque can be obtained only through the particular banker whose name appears across the face of the cheque or between the transverse lines, if any. Where a cheque is crossed specially the banker on whom it is drawn shall pay it only to the banker on whom it is crossed, or his agent for collection (Sec. 126, para 2).

C. Restrictive crossing: In addition to the two statutory types of crossing, there is another type of crossing which has been adopted by commercial and banking usage. . It has the effect of restricting the payments in certain ways. In this type of crossing, the words 'A/c Payee' are added to the general or special crossing. The addition of these words makes the cheque non-transferable.

The words 'A/c Payee' on a cheque are a direction to the collecting banker that the amount collected on the cheque is to be credited to the account of the payee. If he credits the proceeds to a different account, he is prima facie guilty of negligence and will be liable to the true owner for the amount of the cheque. It should however be noted that 'A/c Payee' cheques are negotiable.

Specimens of special and restrictive crossing



D. Not Negotiable Crossing (Sec. 130): A cheque may be crossed with the words 'not negotiable' on it. The effect of these words is that the cheque cannot be negotiable i.e., the endorsee will not acquire a title better than that of the endorser. The effect of the words 'not negotiable' on a crossed cheque is that the title of the transferee of such a cheque cannot be better than that of its transferor. The crossing of a cheque not negotiable does not render the instrument non-transferable. It only takes away the main feature of negotiability which is that a holder with a defective title can give a good title to a subsequent holder in due course. Anyone who takes a cheque marked 'not negotiable' takes it at his own risk.

The object of crossing a cheque 'not negotiable' is to afford protection to the drawer or holder of the cheque against miscarriage or dishonesty in the course of transit by making it difficult to get the cheque so crossed, until it reaches its destination.

4.7.6 Who may cross a cheque

Section 125 deals with the crossing of a cheque after its issue. It provides that a cheque may be crossed by any of the following:

1. **The Drawer:**While issuing a cheque, the drawer can cross the cheque generally or specially. If a cheque is crossed by the drawer, he has the right to cancel the crossing by writing the words, pay cash, across the cheque and by putting down his full signature on the cheque.
2. **The Holder:** The holder can also cross the cheque in the following manner:
   i) If the cheque is not crossed, he can cross the cheque generally or specially,
   ii) If the cheque is crossed generally, he may cross it specially, and
   iii) If the cheque is crossed generally or specially, he may add the words not negotiable.
3. **The Banker:** The banker can also cross the cheque in the following manner:
   i) If the cheque is not crossed and sent to the bank for collection, banker can cross the cheque generally.
   ii) If the cheque is crossed generally and sent to the bank for collection, bank can cross the cheque specially.

iii) If the cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

The crossing of a cheque is an instance of an alteration that is authorized by the Act.

4.8 PARTIES TO NEGOTIABLE INSTRUMENTS

The various parties to the three different kinds of negotiable instruments are:

A. Parties to a Promissory Note

1) **Maker or drawer:** He is the person who makes the promissory note in which he promises to pay another person a fixed sum of money.
2) **Payee:** The person who has to receive the payment for the promissory note is called the payee.
3) **Holder:** He is the person who has the right to possess the promissory note in his name and to receive the amount due thereon. He may either be the original payee or the endorsee who has purchased the promissory note.
4) **Endorser:** he is the holder of a promissory note who endorses it in favour of another person.
5) **Endorsee:** he is the person in whose name the promissory note has been endorsed.

B. Parties to a Bill of Exchange

1) **Drawer:** The drawer is the person who draws the bill of exchange.

2) **Drawee:** The drawee is the person on whom the negotiable instrument has been drawn and who is directed to pay.

3) **Acceptor:** The person who accepts the bill of exchange and is liable for the amount thereon is called the acceptor. Normally, the drawee is also the acceptor of the bill; however, some other person may also accept it on behalf of the drawee.

4) **Payee:** The person who has to receive the payment of the bill of exchange is known as the payee. The payee is usually the drawer or the person ordered by the drawer as payee.

5) **Holder:** Holder of a bill of exchange means any person who is legally entitled to the possession of it and to receive or recover the amount due thereon from the parties. He is either the payee or endorsee. In case the bill has been drawn as payable to bearer, the bearer of the instrument shall be the holder thereof.

6) **Endorser:** when the holder of a bill of exchange endorses it in favour of another person, then he is known as the endorser.
7) **Endorsee:** the endorsee is the person in whose name the bill of exchange is endorsed.
8) **Drawee in case of need:** The drawer of a bill or even an endorser may write in the instrument the name of as person directing the holder to resort to such person in case on need. Such a person is called a drawee in case of need. He is merely in the position of a drawee who has not accepted the bill. The bill cannot be presented to him for acceptance but only for payment. Where a drawee in case of need is mentioned in the bill, such a bill is not dishonoured until it has been dishonoured by such drawee in case of need. The effect of this provision is to make the presentment of the drawee in case of need obligatory on the part of the holder.
9) **Acceptor for honour:** Any person may voluntarily become a party to a bill as an acceptor by accepting it for the honour of the drawer or of any person. When the original drawee refuses to accept a bill or in case the bill is presented for better security by the Notary public and the original drawee refuses to grant the same, the some other person may accept the bill in order to save the honour and reputation of the drawer or any other endorser and bind himself by an acceptance. Such a person is known as an acceptor for honour. The effect of such acceptance is that the bill is treated as alive and is not considered to be dishonoured till it is dishonoured by the acceptor for honour.

C. Parties to a Cheque

1) **Drawer:** He is the person who draws the cheque.
2) **Drawee:** The drawee in the case of a cheque is always a bank on which the cheque is drawn.
3) **Payee:** He is the person who is to receive payment for the cheque.
4) **Holder:** Holder of a cheque is a person who is legally entitled to the possession of the cheque.
5) **Endorser:** The person who endorses the cheque in favour of another person is called the endorser.
6) **Endorsee:**The endorsee is the person in whose name cheque is endorsed.

4.8.1 HOLDER OF A NEGOTIABLE INSTRUMENT

There are three different kinds of holders in relation to negotiable instruments. They are — a) holder, b) holder for value and c) holder in due course.

a) **Holder:** According to Sec. 8, holder means, "any person entitled in his own name to the possession of a promissory note or bill of exchange or cheque and to recover or receive the amount due thereon from the parties thereto. A person in order to be a holder should possess two rights — he should be entitled to the possession of the instrument in his own name (whether as bearer or as payee or endorsee) and he should be entitled to receive or recover the payment in his name.

   The position of a holder of a bill is important for a number of reasons. No person other than a holder can sue upon a negotiable instrument. Where the note, bill or cheque is lost or destroyed, its holder is the person entitled at the time of such loss or destruction. Where a person obtains possession of an instrument by theft or under a forged endorsement, he is not a holder, as he cannot obtain or recover the payment of the instrument. But where a person (e.g., the heir of a deceased holder) in absence of a holder can give a valid discharge to the maker or acceptor of the instrument, he acquires the status of a holder and can sue on the instrument to recover the amount due thereon.

b) **Holder for value:**If any person is the holder of a negotiable instrument, the value of which has been paid at anytime in the past, then he is known as a holder for value. Who actually has paid the value is not a relevant question. Such a holder does not acquire the instrument for any consideration but even he has all rights of payment against all the prior parties. However, such holder has no rights against the person who has actually paid the value.

c) **Holder in due course:** According to Sec.9, holder in due course means, "any person who for consideration becomes the possessor of a promissory note, a bill of exchange or cheque if payable to the bearer or to the payee or endorsee thereof (if payable to order), before the amount mentioned on it becomes payable and without having sufficient cause to believe that any defect exist in the title of the person from whom he derived the title". In case of bearer instruments, the holder in due course means aperson who has acquired its possession for consideration before the amount mentioned in it became payable. In case of an instrument payable by order, the holder in due course means a person who became the payee or endorsee of the instrument before the amount mentioned in it became payable.

4.8.2 Distinction between Holder and Holder in due course

The distinguishing points between holder and holder in due course are:

1. **Meaning:** Holder means any person entitled in his own name to the possession of the negotiable instrument and to recover or receive the amount due thereon from the parties thereto. A holder in due course on the other hand, means a holder who takes the instrument in good faith for consideration before it is overdue and without any notice of defect in the title of the person who transferred it to him.
2. **Consideration:** A person who claims to be a holder in due course must show that he acquired the instrument for consideration. However, consideration may not pass from a holder of the instrument.
3. **Title:** Holder of a negotiable instrument does not acquire a better title than that of the person from whom he acquired the instrument. But a holder in due course gets a good title even though there was a defect in the title of any prior parties to the instrument.
4. **Liability:** A holder in due course can sue all prior parties to a negotiable instrument until the instrument is duly satisfied. Whereas a holder of the instrument can enforce it against the person who has signed it and also against the transferor from whom he obtained it.
5. **Maturity:** A person will be a holder in due course only if he acquires the instrument before the amount mentioned in it became payable. But a holder may acquire the instrument even after it has become due for payment.

4.9 DISHONOUR OF A NEGOTIABLE INSTRUMENT

4.9.1 Meaning

The liability of parties to a negotiable instrument generally arise when the instrument is presented or acceptance or payment. Dishonour denotes a state where the acceptance or payment is refused. There are some instruments which are presented for acceptance and dishonour arises when its acceptance or payment is refused. There are some instruments which are not presented for acceptance and these are dishonoured on account of the non-payment. A bill of exchange as it requires acceptance is dishonoured either on account of non-acceptance or non-payment. The dishonour of promissory note and cheques becomes important on account of non-payment.

4.9.2 Definition

A negotiable instrument is said to be dishonoured when the drawee (debtor) refuses to accept the same or make payments thereon. Therefore, an instrument may be dishonoured by the following two modes:

A. Dishonour by non-acceptance

B. Dishonour by non-payment

A bill of exchange may be dishonoured by both the above modes viz., by non-acceptance (since only bills require acceptance) or non-payment, whereas a cheque or a promissory note can only be dishonoured by non-payment. When a negotiable instrument is dishonoured, the holder must give a notice of dishonor to all the parties in order to make them liable on the instrument. If he fails to do so, except in cases where notice of dishonor may be excused, he forfeits his right of action against the prior parties entitled to the notice of dishonor (Sec. 93).

A. Dishonour by Non-acceptance (Sec. 91)

A bill of exchange is dishonoured by non-acceptance in any one of the following situations:

i) If the drawee does not accept the bill within 48 hours from the time of presentment though it is duly presented for acceptance;
ii) If there are several drawees (who are not partners) and all of them do not accept;
iii) when presentment for acceptance is excused and the bill is not accepted;
iv) when the drawee is incompetent to contract;
v) when the drawee gives a qualified acceptance;
vi) when the drawee is a fictitious person or after reasonable search cannot be found.

If a drawee in case of need is mentioned in a bill, the bill is not deemed to be dishonoured unless it is dishonoured by such drawee in case of need also (Sec. 115).

B. Dishonour by Non-payment (Sec. 92)

A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same. An instrument is also dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid (Sec. 76).

4.9.3 Differences between dishonour by non-acceptance and dishonour by non-payment

The main differences between dishonour by non-acceptance and dishonour by non-payment are pointed below:

1. **Occurrence:** Dishonour by non-acceptance occurs when the bill is presented by the drawer to the debtor for acceptance and acceptance is not granted by him whereas dishonour by non-payment occurs when the maker of the promissory note, the acceptor of a bill of exchange or the bank (in case of a cheque) refuses to make payment thereof.
2. **Filing a suit:** In case of dishonour by non-acceptance, a suit cannot be filed against the debtor, since he is not a party to the instrument before he accepts the same whereas in case of dishonour by non-payment, the holder can file a suit if he has served notice of dishonour on all other parties.
3. **Purpose of filing a suit**: In case of dishonour by non-acceptance, the creditor can file a suit only for the recovery of the amount of the loan, whereas in case of dishonour by non-payment, the drawer can file a suit for recovering the noting and protesting charges, interest, etc., along with the amount of the loan.

4.9.4 Notice of Dishonour

According to Section 93, when a negotiable instrument is dishonoured by non-acceptance or by non-payment, the holder of the instrument or some party to it who is liable thereon, must give a notice of dishonor to all the parties whom he wants to make liable on the instrument. If he does not give this notice, except in cases when notice of dishonor may be excused, all the prior parties liable thereon are discharged of their liability. Each party, on receiving such notice if dishonour, must, within reasonable time of receiving such notice, serves upon all such parties, whom he intends to hold liable on the instrument (Sec. 95).

Object of notice of dishonour

The object of notice of dishonor is to inform the party liable on the instrument about the liability which accrues as a result of the dishonor of the instrument. The notice is necessary whatever the nature of the instrument, i.e., whether it is payable at sight or on demand or whether it is an accommodation bill. If the holder neglects to give such notice within a reasonable time from the date of dishonor, all the prior parties liable on the instrument and entitled to notice are discharged.

Notice by whom

1. **Notice by holder or any prior party:** Notice of dishonor may be given by the holder or any of the parties liable on the instrument (Sec. 93).

2. **Chain method of giving notice of dishonor:** A party receiving notice of dishonor must, in order to render any prior party liable to himself, give notice of dishonor to such party within a reasonable time, unless such party otherwise receives due notice (Sec. 95).But if a notice is given by a stranger it would be a mere nullity.
3. **Notice by principal or agent:** If an instrument deposited with an agent for presentment is dishonoured, the notice of dishonor may be given either by the agent or by the principal himself. The agent may give notice to his principal within a reasonable time, and the principal may give notice within a reasonable time to the parties sought to be held liable (sec. 96).

Notice to whom

1. **Notice to all parties whom the holder seeks to make liable:** Notice of dishonor must be given to all parties whom the holder seeks to make liable. Notice of dishonor need not be given to the acceptor of a bill of exchange or the maker of a promissory note or the drawee of a cheque (Sec. 93), because they are parties primarily liable upon the instrument.
2. **Notice to party or his agent, or to legal representative or assignee:** Notice of dishonor may be given to the party liable or his duly authorized agent, or, where he has died, to his legal representative, or, where he has been declared insolvent, to his assignee (Sec. 94). When the party to whom the notice of dishonor is dispatched is dead, but the party dispatching the notice is ignorant of his death, the notice is sufficient (Sec. 97).

Form of notice

1. The notice of dishonor may be oral or written. If it is written, it may be sent by post.
2. It may be in any form but it must clearly indicate that the instrument has been dishonoured and in what way, and that the party to whom it is being given will be liable on the instrument.
3. It must be given within a reasonable time at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended (Sec. 94).

When the notice of dishonor is not necessary (Sec. 98)

In the following circumstances, the notice of dishonor is not required:

1. When the party entitled to receive such notice voluntarily waives his right thereto.
2. When the drawer has himself ordered against making the payment on such instrument, the notice of dishonour need not be served on the drawer.

3. When the party liable on the instrument does not incur any loss due to non-service of the notice.
4. When the party entitled to such notice of dishonor cannot be found even after due search.
5. When the notice of dishonor cannot be served due to circumstances beyond the control of the holder.
6. When the acceptor himself is the drawer.
7. When the promissory note ceases to be negotiable.
8. When the party entitled to the notice of dishonor promises unconditionally pay the dishonoured instrument.

4.9.5 NOTING AND PROTESTING

A. Noting

When a promissory note or bill of exchange is dishonoured by non-acceptance or by non-payment, then the holder of such instrument can, after giving due notice of dishonor, sue any or all prior parties liable thereon. In case of any negotiable instrument has been dishonoured, then the holder can get such dishonour noted on the instrument by the Notary Public. In such a case the Notary makes a formal demand upon the maker or drawee or acceptor, for acceptance or payment, as the case may be. On refusal by the maker or the drawee or acceptor, he records the noting on the instrument. As per the Negotiable Instruments Act, 'noting' means the recording of the fact of dishonor by a Notary Public upon the instrument, or upon a paper attached thereto or partly upon each, within a reasonable time after dishonour (Sec. 99). In short, noting is a convenient way of certifying that the instrument has been dishonoured.

The Notary Public is an officer appointed by the State Government for certifying the negotiable instrument or for noting the dishonor of bills of exchange or promissory notes under the Negotiable Instruments Act.

Noting must contain the following particulars:

i) the fact of dishonor;
ii) the date of dishonor;
iii) the reasons, if any, assigned for such dishonor;
iv) if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured; and
v) the Notary's charges (Sec. 99)

Noting is not compulsory in the case of an inland bill or note. The omission to get the instrument noted does not in any way affect the rights of the holder thereof.

B. Protest

When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may within a reasonable time, cause such dishonor to be noted and certified by a Notary Public. Such certificate is called a ‘protest’ (Sec. 100). In other words, a protest is the formal notarial certificate attesting the dishonour of a bill or note. It is based upon noting.

Contents of a protest

The following are the essential contents of a protest —

i) The instrument or a literal transcript of the instrument.

ii) The name of the person for whom and against whom the instrument has been protested.

iii) The fact of, and reason for, dishonour.

iv) The place and time of dishonour.

v) The signature of the notary Public.

vi) In case of an acceptance for honour or payment for honour, the name of the person accepting or paying and the name of the person for whose honour it is accepted or paid (Sec. 101).

Protest for better security:when the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached before the maturity of the bill, the holder may, within a reasonable time, through a Notary Public, demand a better security from the acceptor. If the acceptor refuses to give a better security, the fact may also be noted ands certified by the Notary Public. Such certificate is called a ‘protest for better security’ (Sec. 100).

The acceptor is not bound to give such security. On a refusal by the acceptor to give a better security, the holder has no immediate right of action against the drawer and the endorsers. He shall have to wait till the maturity of the bill.

Advantages of protest

1. It affords an authentic evidence of dishonour to the drawer and endorsers.

2. In a suit upon an instrument which has been dishonoured, the court shall, on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

Notice of protest: When a promissory note or bill of exchange is required by the law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions. The notice may be given by the Notary Public who makes the protest (Sec. 102).

Protest for non-payment after dishonour by non-acceptance: Where a bill of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, is dishonoured by non-acceptance, it need not be presented again for payment. It may be protested at the place specified for payment unless it is paid before or at maturity (Sec. 103).

Protest of Foreign Bills: Foreign Bills of exchange must be protested for dishonour when such protest is required by the law of the place where they are drawn (Sec. 104)

4.10 DISCHARGE OF A NEGOTIABLE INSTRUMENT

In relation to the negotiable instruments, the word ‘discharge’ is used in two senses, viz.,

A) Discharge of the instrument, and

B) Discharge of one or more of the parties from liability thereon.

An instrument is said to be discharged when all rights of action under it are completely extinguished and when it ceases to be negotiable. This would happen when the party who is ultimately liable on the instrument is discharged from liability. In such a case, even a holder in due course does not acquire any rights under the instrument. If, on the other hand, one or more of the parties is/are discharged from liability, the instrument continues to be negotiable and the parties continue to be liable on it. The discharge of one or more of the parties to a bill or note does not discharge the instrument.

A. Discharge of an Instrument

An instrument is said to be discharged when all the rights contained therein are terminated and the instrument ceases to be negotiable. Even the holder in due course does not get any rights in the instrument in such a situation.

The different modes of discharge of an instrument are as follows:

1. **By payment in due course:** This is the most obvious and the usual mode of discharge of an instrument and of the parties to it. The instrument is discharged by payment made in due course by the party who is primarily liable to pay (i.e., the maker or the acceptor), or by a person who is accommodated in case the instrument was made or accepted for his accommodation. The payment of the amount due on the instrument must be made at or after

the maturity to the holder of the instrument if the maker or acceptor is to be discharged (Sec. 78). A payment by a party who is secondarily liable does not discharge the instrument. Again, any person liable to pay is entitled to have the instrument shown to him before payment. On payment, he is entitled to have the instrument delivered up to him (Sec. 81).

Payment of Interest: If a rate of interest is specified in the promissory note or bill of exchange, interest shall be calculated on the principal amount at the specified rate from the date of the instrument until tender or realization of the amount (sec. 80). If no rate of interest is specified, the law implies an agreement to pay interest at 18 percent per annum [rate increased from 6 to 18 percent per annum by the Banking, Public financial Institutions and Negotiable Instruments (Amendment) Act, 1988] in spite of any collateral agreement which is not incorporated in the instrument.

2. **By party primarily liable becoming holder:** If the maker of a note or the acceptor of a bill becomes its holder at or after its maturity in his own right(i.e, he has an absolute title and does not hold it conditionally or as an agent), the instrument is discharged (Sec. 90).
3. **By express waiver:** When the holder of a negotiable instrument at or after its maturity absolutely and unconditionally renounces in writing or gives up his rights against all the parties to the instrument, the instrument is discharged. The renunciation must be in writing unless the instrument is delivered up to the party primarily liable.
4. **By cancellation:** Where an instrument is intentionally cancelled by the holder or his agent and the cancellation is apparent thereon, the instrument is discharged. Cancellation may take place by crossing out signature on the instrument, or by physical destruction of the instrument with the intention of putting an end to the liability of the parties to the instrument. Cancellation through inadvertence or mistake will not discharge the party whose name has been cancelled. (Sec. 82)
5. **By discharge as a simple contract:** A negotiable instrument may be discharged in the same w3ay as any other contract for the payment of money. This includes, for example, discharge of an instrument by novation or rescission or by expiry of period of limitation..

B. Discharge of a party or parties

The holder of a negotiable instrument can hold each of the prior parties liable on the instrument until he receives the payment thereon. Therefore, the liability of the parties to the instrument comes to an end only when the instrument is fully paid. However, if any party to a negotiable instrument is relieved of his liability thereon, the instrument continues to be negotiable and all the other parties remain liable thereon. For example, if a bill of exchange is not presented for payment on the due date, then all the endorsers to the bill are relieved of their liability, but the acceptor continues to be liable thereon.

A party or parties to a negotiable instrument is/are discharged in any one of the following ways:

1. **By payment in due course:** When, on the date of maturity of the instrument, the holder is made payment in due course, both the instrument and all the parties to the instrument are relieved of their liability thereon [Sec. 82 (c)].
2. **By cancellation:** When the holder of a negotiable instrument or his agent cancels the name of a party on the instrument with intent to discharge him, such party and all subsequent parties, who have a right of recourse against the party whose name is cancelled, are discharged from liability to the holder [Sec. 82 (a)]. The subsequent parties are in the position of sureties to the prior party whose name is cancelled and discharge of the principal debtor automatically discharges the sureties.
3. **By release:** Where the holder of a negotiable instrument releases any party to the instrument of its liability in any manner other than cancellation, i.e., by cutting the name of the party on the instrument, such party ceases to be liable on the instrument; for example, if the holder releases the debtor by accepting only partial payment of the amount of the instrument. [Sec. 82 (b)]. Sec. 63 of the Indian Contract Act, 1872 also enunciates this rule.
4. **By allowing the drawee more than 48 hours:** In case the holder of a negotiable instrument allows the drawee more than 48 hours (exclusive of public holidays) to decide whether to accept the instrument or not, then all the prior parties who do not consent to the allowance of extra time to the drawee are relieved of their liability towards the holder (Sec. 83).
5. **By non-presentment of cheque:** Where a cheque is not presented by the holder for payment within a reasonable time of its issue and the drawer suffers actual damage through the delay because of the failure of the bank, he is discharged from the liability to the extent of such damage. In determining what a reasonable time is, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (Sec. 84).

6. **Cheque payable to order:** When a cheque payable to order purports to be endorsed by the payee and the bank makes the payment thereof in due course, the bank is relieved of its liability thereon even if the endorsement is subsequently proved to be false. Where a cheque is expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof. It makes no difference even if any endorsement whether in full or in blank appears on the cheque and even if any such endorsement purports to restrict or exclude further negotiation (Sec.85).
7. **Draft drawn by one branch on another:** Where any draft (that is an order to pay money) drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course (Sec. 85-A).
8. **Parties not consenting discharged by qualified acceptance:** If the holder of a bill of exchange acquiesces (assents) in a qualified acceptance, all the previous parties whose consent is not obtained to such acceptance are discharged from liability (Sec.86). They will, however, be liable if on a notice being given to them they give their assent to such acceptance.
9. **By operation of law:** The parties to a negotiable instrument may also be relieved of their liability thereon by the operation of any law. This includes discharge —
   a) **By an order of insolvency court, discharging the insolvent.**
   b) **By merger:** When a judgement is obtained against the acceptor, maker or endorser, the debt under the bill is merged into judgement debt.
   c) **By lapse of time,** i.e., when the remedy becomes time-barred.
10. **By material alteration:** A material alteration of a negotiable instrument renders the same void against persons who were parties thereto before such alteration unless they have consented to the alteration (Sec. 87).
11. **Discharge by payment of altered instrument:** When a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed, payment on such an instrument discharges the party liable if he pays according to the apparent tenor of the instrument (as altered) at the time of payment and otherwise in due of course. Such a payment cannot be questioned even if

it is proved that the instrument has been altered or that the cheque was originally crossed [sec. 89 (1)].

12. **Bill in acceptor's hand:** If any instrument which has been negotiated returns into the hands of the acceptor on maturity or thereafter, i.e., the acceptor becomes the holder thereof, then all the rights contained in the instrument come to an end (Sec. 90).

Where the cheque is an electronic image of a truncated cheque, any difference in apparent tenor of such electronic image and the truncated cheque shall be a material alteration and it shall be the duty of the bank or the clearing house to ensure the exactness of the apparent tenor of electronic image of the truncated cheque while truncating and transmitting the image. [Sec. 89 (2) inserted by the negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002].

Material Alteration

An alteration is material which —

a) alters the character or identity of the instrument, or which shakes the very foundation of the instrument, or
b) changes the rights and liabilities of the parties, or any of the parties to the instrument or
c) alters the operation of the instrument.

Any change in an instrument which causes it to speak a different language in effect from that which it originally spoke, or which changes the legal identity or character of the instrument either in its term or the relation of the parties to it, is a material alteration. It makes no difference whether the alteration is beneficial or prejudicial.

Instances of material alteration: The following alterations are considered as material alterations as per law —

a) alteration in the date of the instrument,
b) alteration in the amount payable,
c) alteration in the time of payment,
d) alteration in the rate of interest,
e) alteration in the place of payment,
f) addition of place of payment,
g) alteration in the parties to the instrument.

In certain situations, a material alteration to the negotiable instrument also does not relieve the parties thereto of their liabilities. In other words, such alterations are not considered material in the sense to relieve the parties to the instrument of their liability.

Alterations authorized by the Act: The following alterations, though material, are permitted by the Act, and do not invalidate the instrument:

a) filling blanks of an inchoate instrument (sec. 20).
b) conversion of a blank endorsement into an endorsement in full (sec. 49).
c) crossing of an open cheque (sec. 125)**.**

Alterations not vitiating the instrument: In the following cases, the alteration of a negotiable instrument will not vitiate or avoid the instrument:

a) an alteration, though in a material part, made before the instrument is issued.
b) an alteration made for the purpose of correcting a mistake, e.g., the correction of mistake in a bill dated 1989 instead of 1998.
c) an alteration made to carry out the common intention of the original parties, e.g., the subsequent insertion of the words ‘or order’ where the drawer of a bill forgets to use these words.
d) an alteration made with the consent of the parties.
e) an alteration which is not material.

Effect of material alteration

The effect of material alteration of a negotiable instrument is only to discharge those who become parties thereto prior to the alteration. But if an alteration is made in order to carry out the common intention of the original parties,it does not render the instrument void. Any material alteration, if made by an endorsee, discharges his endorser from all liability to him in respect of the consideration thereof (Sec.87).

The rule as contained in Sec. 87 is based on a sound policy and may be defended on two grounds:

i. that no man should be permitted to take chance of committing a fraud without running any loss by an event when it is detected, and
ii. that by the alteration the identity of the instrument is destroyed, and to hold one of the parties under such circumstances would be to make him liable for something to which he never agreed.

4.11. SUMMARY

Negotiable Instrument: According to section 13(1), Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to the bearer. According to *Willis* a negotiable instrument is one the property in which is acquired by anyone who takes it bonafide, and for value in spite of any defect of title in the person from whom he took it.

Types of negotiable instrument:

i) Promissory note: It is an instrument in writing 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.

ii) Bill of Exchange: It 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 certain person or to the bearer of the instrument.

iii) Cheque: it isa bill of exchange drawn on a specified banker and expressed to be payable otherwise than on demand and it includes the electronic image of truncated and cheque in the electronic form.

Parties to Bill of Exchange: i) Drawer, **ii)** Drawee, **iii)** Payee

Parties to Promissory Note: i) Maker,**ii)** Payee

Parties to Cheque: i) Drawer,**ii)** Drawee,**iii)**Payee

Holder: A person who is entitled in his own name to the possession of the instrument and who has also the right to receive or recover the amount due thereon from the parties thereto.

Holder in due course: Any person who for valuation consideration become the possessor of a negotiable instrument payable to bearer or the endorsee or payee thereof, if payable to order before the amount mentioned in the document becomes payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derives this title.

Negotiation: The term negotiation means transfer of an instrument from one person to another person so as to constitute that person the holder of the instrument.

Delivery: delivery is the voluntary transfer of the possession of the instrument.

Dishonour: A negotiable instrument may be dishonoured either by non-acceptance or non-payment.

Crossing of Cheque: A cheque is said to be crossed when two parallel lines with or without any word are drawn across it's face. A crossing is a direction to the paying banker to pay the money generally to the banker or a particular banker as the case may be.

4.12. SELF ASSESSMENT QUESTION

1) What is a negotiable instrument?what are its essential characteristics?

2) Define bill of exchange. How does it differ from promissory notes?

3) What is a cheque? Why are cheque and bill of exchange treated as negotiable instrument?

4) Who is a holder in due course of a negotiable instrument? In what respect does it differ from a holder.

5) Who are the important parties to a negotiable instrument? What do you know of their capacities to draw, make, accept, endorse,negotiate such instrument?

6) Distinguish between bill of exchange and promissory notes.

7) What do you mean by noting and protesting? What are its effects?

8) What is meant by noting? What are its contents?

9) What is meant by payment in due course in respect of a negotiable instrument?

10) Describe different modes of discharge of liability of parties with regard to a negotiable instrument.

UNIT-4

CONSUMER PROTECTION ACT

AIMS AND OBJECTIVES

After studying this unit you will be able to understand:

- The meaning of certain terms related with the consumer protection act 1986
- The objective and functioning of consumer protection council
- The procedure adopted by different agencies in redressing consumerdisputes
- The meaning of environment protection act 1986
- State the power of the central government concerning protection and improvement of environment.
- Various provisions concerning prevention and control of environment pollution.
- The provisions concerning actions taken and offences committed under the act.

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UNIT-4

CONSUMER PROTECTION ACT 1986

4.1. About Consumer Protection Act

The post-independence period witnessed a change in focus towards industrialization and economic development which led to the increase in consumer as well as the consumption of goods and services. This in turn led to the consumer exploitation on the part of the business enterprises. Consequently there was a growing consumer awareness which led to consumer movement throughout the country. This led to the enactment of the Consumer Protection Act, 1986. The Consumer Protection Act, 1986 came into effect from 15th April, 1987 except chapter 3rd (regarding Consumer Disputes Redressal Agencies) which came into effect from1st July, 1987. The Act has been enacted to provide for better protection and promotion of consumer rights through the establishment of consumer councils and other authorities for settlement of customer's disputes. The Act is applicable to the whole of India except the state of Jammu and Kashmir.

Under the Act, consumer disputes redressal agencies have been set up throughout the country at the district level, state level and national level to provide simple, inexpensive and speedy justice to the consumers having complaints against defective goods, deficient services, unfair and restrictive trade practices. The Act was amended in the years 1991, 1993 and 2002.

4.2. Meaning of Consumer

Section 2 (1) (d) of the Act defines the word 'consumer' and it includes the following persons —

a) A person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment. It also includes any other user of such goods when such use is made with the approval of the buyer. The expression, however, does not include a person who obtains such goods for resale or for any commercial purpose.

b) A person who hires or avails of any services for consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment. It also includes any other beneficiary of such services with the approval of the first mentioned person. But a consumer does not include a person who avails of such services for any commercial purpose.

The words ‘commercial purpose’ does not include use by a consumer of goods brought and used by him and services availed by him exclusively for the purpose of earning his livelihood by means of self-employment.

The courts have included the following under the meaning of consumer:

a) A railway passenger is a ‘consumer’.
b) An employee who is a member of Employees’ Provident is a consumer and duties performed by Regional Provident Commissioner under such scheme are services and thus delay in release of provident fund and complaint for deficiency in service are maintainable.
c) A person registering himself for release of L.P.G., connection with a distributor is a ‘consumer’, though at that time he pays nothing and the payment is deferred till the time of release of gas connection.
d) A person using electricity for a commercial purpose is a ‘consumer’.
e) Nominee under a policy of insurance is a ‘consumer’.

4.3.Meaning of Service

Section 2 (1) (O) of the Act defines the word ‘service’. It means service of any description which is made available to potential users. It includes facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding, or both, housing construction, entertainment, amusement or purveying of news or other information. But it does not include the rendering of any service free of charge or under a contract of personal service.

Some of the important decisions taken by the courts related with the meaning of service are —

a) The relationship of teacher and student of an educational institution is not a service on hire because student is not such a consumer who is linked any way with the buyer of any economic goods and hire has not been linked with education, teacher and student.
b) Grant of overdraft facility by bank to its customer, being not without consideration, amounts to providing of ‘service’.
c) The services rendered by the government servant under the Central Government Health Scheme are not covered by the term ‘service’ as defined in the Act.

d) An employee who is a member of Employees' Provident is a consumer and duties performed by Regional Provident Commissioner under such scheme are services and thus delay in release of provident fund and complaint for deficiency in service are maintainable.

4.4. Unfair Trade Practice

Section 2 (1) (r) of the Consumer Protection Act, 1986 defines unfair trade practice as a means of trade practice for the purpose of promoting sale, use or supply of any goods, provision of service, adopts any unfair method or unfair or deceptive practice. Unfair trade practices include the following practices:

1. **Misleading advertisements and false representation:** This means practice of making any statement, whether orally or in writing or by visible representation, which includes:
   a) Falsely representing that goods or services are of a particular standard, quality, quantity, grade, composition, style or model
   b) Falsely representing any second hand, rebuild, renovated or reconditioned old goods as new goods.
   c) False representation on part of seller about sponsorship, performance, characteristics, etc., of the goods or services.
   d) False or misleading representation concerning the need for or the usefulness of any goods or services.
   e) Making to the public any representation that purports to be a warranty or a guarantee, a promise to replace, maintain or repair which is either misleading or no reasonable prospect of carrying it out.
   f) Materially misleading the public about the price at which products, goods services are being sold.
2. **Bargain sale:** It means publication of advertisement, whether in newspaper or otherwise, for the sale or supply at the bargain price of goods or services that are not intended to be offered for sale or supply at the bargain price. Here bargain price means a price stated in any advertisement to be a bargain price, by reference to any ordinary price or otherwise or a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price having regard to the price at which the product advertised

or like products are ordinarily sold. An illustration for this is a dealer selling spurious/sub-standard suiting, etc. falsely claiming it to be a well-known brand.

3. **Offering gifts, prizes with the intention of not providing and lottery:** The offering of gifts, prizes or other items with the intention of not providing the, or creating an impression that something is being offered free of charge when it is actually covered by the amount charged in the transaction as a whole is considered as an unfair trade. Moreover, the conduct of any contest, lottery, game of chance for the purpose of promoting directly or indirectly, the sale, use or supply of any product, etc. is also considered as an unfair trade practice.
4. **Non-confirming to the prescribed standards:** The sale or supply of any goods which do not comply with the standards prescribed by the competent authority relating to performance, composition, contents, design or packaging is considered as means of an unfair trade practice. An example of this is selling products which do not comply with ISI certification.
5. **Hoarding or destruction of goods:** The hoarding or destruction of goods, or refusal to sell the goods intentionally, so that the cist of those or similar goods rises, will amount to unfair trade practice.

4.5.RIGHTS OF THE CONSUMERS AND RELIEFS AVAILABLE TO CONSUMERS

Section 6 of the Act recognizes the following rights:

a) **Right to safety:** the right to be protected against the marketing of goods and services which are hazardous to life and property.

b) **Right to be informed:** the right to be informed about the quality, quantity, potency, purity, standard and price of goods orservices, as the case may be, so as to protect the consumeragainst unfair trade practices.

c) **Right to choose:** the right to be assured, wherever possible, access to a variety of goods and services at competitive prices.

d) **Right to be heard:** the consumers interests will receive due consideration at appropriate forums.

e) **Right to seek redressal:** against unfair practices or restrictive trade practices or unscrupulous exploitation of consumers.

f) **Right to consumer education:** the right to acquire the knowledge and skill to be an informed consumer.

The consumers in case of their grievances can approach any of the three tier quasi-judicial redressal machinery envisaged in the Act. Any consumer or recognized consumer association or the Central government or State Government could file a complaint with any of the redressal forums. The filing of complaints with the redressal forums depends upon the value of the goods or services and the compensation claimed. If the value of the goods or services and the compensation is within Rs. 20 lakhs, then the complaint can be filed in the district forum within the local limits of whose jurisdiction the opposite party actually resides or carries on business or has a branch office or personally works for gain or where the cause of action, wholly or in part, arises (Sec. 11).

If the value of the goods or services and compensation claimed exceeds Rs. 20 lakhs, but does not exceed Rs. 1 crore, complaint can be filed before the State Commission (Section 17). In the event of the value of goods or services and the compensation claimed exceeds Rs. 1 crore, then the complaint can be filed before the National Commission (Section 21).

A complaint should contain the following information:

1. The name, description and address of the complainant and the opposite party.
2. The facts relating to the complaint and when and where it arouse.
3. Documents, if any, in support of the allegations contained in the complaint.
4. The relief which the complainant is seeking.

The complaint should be addressed to the President of the forum. A copy of the complaint within 21 days of the date of its admission by the forum should be given to the opposite party mentioned in the complaint, directing him to give his version of the case within a maximum of 30 days. In the case of denial on the part of the opposite party, the district forum will proceed in the manner specified under Sec. 13 (c) (g) of the Act. In cases where the alleged defective goods require analysis, it will be sent to the laboratory for testing by the district forum. On receipt of the report from the appropriate laboratory, a copy of the report will be forwarded to the opposite party. A reasonable opportunity to the complainant as well as the opposite party, of being heard as to the correctness of the report, shall be given by the district forum. District forum has the same power as that of the civil court under the Civil Procedure Code, 1908.

If the allegations made by the complainant are found to be true by the district forum, the opposite party may be directed to remove the defect in the goods, replace the goods, return the complainant the price, give certain amount as compensation to the complainant, discontinue the unfair trade practice, not to offer the hazardous products, etc. any person aggrieved by an order made by the district forum shall appeal to the state commission within 30 days from the date of the order. The procedure applicable to State commissions is similar to that of district forums. Any person aggrieved by the order of the State Commission shall appeal to the National Commission within 30 days of the order. Appeals heard before the State or National Commission shall be heard and disposed of within a period of 90 days.

4.6. CONSUMER PROTECTION COUNCILS

The Consumer Protection Act postulates establishment of Consumer Protection Councils at the Central and State levels for the purpose of spreading consumer awareness. The objects of the Councils, as per the Act, shall be to promote and protect the rights of the consumers such as:

- The right to be protected against the marketing of goods and services which are hazardous to life and property
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices;
- The right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
- The right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums
- The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers and
- The right to consumer education.

1. Central Consumer Protection Council

The Consumer Protection Act empowers the Central Government to establish a Central Consumer Protection Council consisting of the Minister in charge of consumer affairs in the Central Government as its Chairman and such number of other official and non-official members representing such interests as may be prescribed. Under the Consumer Protection Council Rules 1987, the membership of the Council is restricted to 150 members including the Central Minister in charge of Consumer Affairs as the Chairman. The term of the Council is three years. To monitor the implementation of the recommendations of the Council, the Central Government may constitute a standing working group from amongst the members of the council under the Chairmanship of the Member Secretary of the Council. The Council shall meet as and when necessary, but at least one meeting of the Council shall be held at such time and place as the Chairman may think fit.

2. State Consumer Protection Council The Consumer Protection Act provides for the establishment of State Consumer Protection Councils by the State Governments. The State Council shall consist of a Minister in charge of consumer affairs in the State Government as its Chairman and such number of other official or non-official members representing such interests as may be prescribed by the State Government and ten nominees of the Central Government. The State Council shall meet as and when necessary but not less than two meetings shall be held every year at such time and place as the Chairman may think fit.

3. District Consumer Protection Council

In order to promote and protect the rights of consumers, within the district, the Consumer Protection Act, provides for the establishment of a District Consumer Protection Council in every district. It shall consist of the Collector of the district as its Chairman and such number of other official and non-official members representing such interests as may be prescribed by the State Government. It shall meet as and when necessary but not less then two meetings shall be held every year. The Chairman shall decide the time and place of the meeting.

4.7. CONSUMER DISPUTE REDRESSAL AGENCIES

The act provides for three agencies to be established for redressal of consumer disputes as given below

- **District Forum:** These forums are set by the district of the state concerned in each district wherein it consists of President and two members of which one should be a woman and is appointed by the State Government. In this, the complaining party should not make a complaint more than 20 Lacs and once the complaint is filed the goods are sent for testing and if they found defective the accused party should compensate and if the party is dissatisfied can make an appeal with state commission within 30 days.

- **State Commission:** This is set up by each state It consists of President and two members. Complains should be at least 20 lacs and exceed not more than 1 crore. The goods are sent for testing and if found defective are asked for replacement or compensation. If not satisfied can make an appeal within 30 days in front of the National Commission.

- **National Commission:** Consist of President and 4 members. The complaint must exceed an amount of 1 crore. The goods are sent for testing and if found defective are asked for replacement or compensation.

4.8. Finding of the District Forum and appeal

(1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:—

- (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;

- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- (d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.
- Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit;
- (e) to remove the defects in goods or deficiencies in the services in question;
- (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat it;
- (g) not to offer the hazardous goods for sale;
- (h) to withdraw the hazardous goods from being offered for sale;
- (ha)to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;
- (hb)to pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:
- Provided that the minimum amount of sum so payable shall not be less than five per cent. of the value of such defective goods sold or service provided, as the case may be, to such consumers:
- Provided further that the amount so obtained shall be credited in favour of such person and utilized in such manner as may be prescribed;
- (hc)to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;
- (i) to provide for adequate costs to parties.
- (2) Every proceeding referred to in sub-section (1) shall be conducted by the President of the District Forum and at least one member thereof sitting together:
- Provided that where a member, for any reason, is unable to conduct a proceeding till it is completed, the President and the other member shall continue the proceeding from the stage at which it was last heard by the previous member.
- (2A) Every order made by the District Forum under sub-section (1) shall be signed by its President and the member or members who conducted the proceeding:
- Provided that where the proceeding is conducted by the President and one member and they differ on any point or points, they shall state the point or points on which they differ and refer the same to the other member for hearing on such point or points and the opinion of the majority shall be the order of the District Forum.
- (3) Subject to the foregoing provisions, the procedure relating to the conduct of the meetings of the District Forum, its sittings and other matters shall be such as may be prescribed by the State Government.
- 15. Appeal. — Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed:
- Provided that the State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not finding it within that period.

- Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty per cent. of that amount or twenty-five thousand rupees, whichever is less:

4.9. THE ENVIRONMENT (PROTECTION) ACT, 1986 (EPA)

Introduction

The Environment (Protection) Act was enacted in the year 1986. It was enacted with the main objective to provide the protection and improvement of environment and for matters connected therewith. The Act is one of the most comprehensive legislations with pretext to protection and improvement of environment.

The Constitution of India also provides for the protection of the environment. Article 48A of the Constitution specifies that the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country. Article 51 A further provides that every citizen shall protect the environment.

4.10.Premises of the Act

It is now generally accepted that environment is threatened by a wide variety of human activities ranging from the instinctive drive to reproduce its kind to the restless urge of improving the standards of living, development of technological solutions to this end, the vast amount of waste, both natural and chemical, that these advances produce. Paradoxically, this urge to grow and develop, which was initially uncontrolled is now widely perceived to be threatening as it results in the depletion of both living and non-living natural resources and life support systems. The air, water, land, living creatures as well as the environment in general is becoming polluted at an alarming rate that needs to be controlled and curbed as soon as possible.

The 1986 Act was enacted in this spirit. From time to time various legislations have been enacted in India for this purpose. However, all legislations prior to the 1986 Act have been specific relating to precise aspects of environmental pollution. However, the 1986 Act was a general legislation enacted under Article 253 (Legislation for giving effect to international agreements.—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body) of the Constitution, pursuant to the international obligations of India. India was a signatory to the Stockholm Conference of 1972 where the world community had resolved to protect and enhance the environment.

The United Nations conference on human environment, held in Stockholm in June 1972, proclaimed that "Man is both creator and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has reached when through the rapid acceleration of science and technology man has acquired the power to transform his environment in countless ways and on unprecedented scale. Both aspects of man's environment, the natural and man made are essential to his well being and to the enjoyment of basic human rights even the right to life itself".

While several legislations such as The Water (Prevention and Control of Pollution) Act, 1974 and The Air (Prevention and Control of Pollution) Act, 1981 were enacted after the Conference, the need for a general legislation had become increasingly evident. The EPA was enacted so as to overcome this deficiency.

4.11. Objectives

As mentioned earlier, the main objective of the Act was to provide the protection and improvement of environment and for matters connected therewith. Other objectives of implementation of the EPA are:

- To implement the decisions made at the UN Conference on Human Environment held at Stockholm in June, 1972.
- To enact a general law on the areas of environmental protection which were left uncovered by existing laws. The existing laws were more specific in nature and concentrated on a more specific type of pollution and specific categories of hazardous substances rather than on general problems that chiefly caused major environmental hazards.
- To co-ordinate activities of the various regulatory agencies under the existing laws
- To provide for the creation of an authority or authorities for environmental protection
- To provide a deterrent punishment to those who endanger human environment, safety and health

4.12.Scope and Applicability

The Environment (Protection) Act is applicable to whole of India including Jammu & Kashmir. It came into force on November 19, 1986.

4.13. Definitions of Variuos terms under this act

Section 2 of the EPA deals with definitions. Some important definitions provided in the Section are:

Section 2 (a) “Environment” includes water, air, and land and the interrelationship that exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property. This definition is not exhaustive but an inclusive one.

Section 2 (b) “Environmental Pollutant” means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be injurious to environment.

Section 2 (c) “Environmental Pollution” means the presence in the environment of any environmental pollutant6 . This implies the imbalance in environment. The materials or substances when after mixing in air, water or land alters their properties in such manner, that the very use of all or any of the air water and land by man and any other living organism becomes lethal and dangerous for health.

Section 2 (e) “Hazardous Substance” means any substance or preparation which, by reasons of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or environment.

4.14. Powers of Central Government to take measures to Protect and Improve Environment

According to the provisions of the Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. Such measures may include measures with respect to all or any of the following matters, namely:
a) co-ordination of actions by the State Governments, officers and other authorities-
(a) under this Act, or the rules made thereunder, or

(b) under any other law for the time being in force which is relatable to the objects of this Act;

1. b) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;
2. c) laying down standards for the quality of environment in its various aspects;
3. d) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever: Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;
4. e) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;
5. f) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;
6. g) laying down procedures and safeguards for the handling of hazardous substances;
7. h) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;
8. i) carrying out and sponsoring investigations and research relating to problems of environmental pollution;
9. j) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;
10. k) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;
11. l) collection and dissemination of information in respect of matters relating to environmental pollution;
12. m) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;
13. n) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

The Central Government may, if it considers it necessary or expedient so to do for the purpose of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under section (5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise and powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

As considerable adverse environment impact has been caused due to degradation of the environment with excessive soil erosion and water and air pollution due to certain development activities therefore it is necessary to protect the environment. This can be achieved only by careful assessment of a project proposed to be located in any area, on the basis of an environment impact assessment and environment management plan for the prevention, elimination or mitigation of the adverse impacts, right from the inception stage of the project.

The Central Government has passed certain notifications laying that the expansion or modernization of any existing industry or new projects listed shall not be undertaken in any part of India, unless it gets environmental clearance by the Central Government, or the State Government.

4.15. Powers of the Court

The Act does not curtail the powers of the Supreme Court. It has from time to time in various matters issued directions and orders to control pollution. Some such important cases pertaining to protection of environment are:

- Directions issued to control vehicular pollution

In Mehta v Union of India (1998) 6 SCC 63, in order to control the chaotic traffic conditions and vehicular pollution, the Supreme Court issued the following directions.

(a) All commercial/transport vehicles which are more than 20 years old should be phased out and not permitted to ply in Delhi after October 1998

(b) All such commercial /transport vehicles which are 17 to 19 years old (3200) shall not be permitted to ply in the National Capital Territory, Delhi after 1998;

(c) Such of the commercial /transport vehicles which are 15 and 16 years old (4962) shall not be permitted to ply after December 31, 1998

The Supreme Court made this order applicable to all commercial/transport vehicles whether registered in the National Capital Territory of Delhi or outside (but ply in Delhi) which are of more than stipulated age and which do not have any authority to paly in Delhi.

- **Protection of Coastline of India**

In Indian Council for Enviro-Legal Action v Union of India22 the Supreme Court in regard to the 600 kms long coast line emphasized that that it would be the duty and responsibility of the coastal states and Union Territories in which the stretch exists, to see that the notifications issued, declaring the coastal stretches should be properly and duly implemented. Further the various restrictions on the setting up and expansion of industries, operation or process, etc. in the regulation Zone should be strictly enforced.

In the same case the court enunciated the principle further that the polluter pays. Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person irrespective of the fact whether he took reasonable care while carrying on his activity. Under this principle it is not the role of the Government to meet the costs involved in either prevention of such damage or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident on the taxpayer. The responsibility of repairing the damage is that of the offending industry.

- **Other cases**

In *Vellore Citizen Welfare Forum v. Union of India & others* the polluter principle as interpreted by the Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferer as well as the cost of reversing the damaged ecology.

In Goa Foundation v Diksha Holdings Pvt. Ltd the court observed that with a view to protect the ecological balance in the coastal areas, notifications having been issued by the Central Government, there ought not to be any violation and prohibited activities should not be allowed to come up within the area declared as CRZ notification. The court also emphasised that no activities which would ultimately lead to unscientific and unsustainable development and ecological destruction should be allowed.

4.16. Prevention, Control and Abetment of Environment Pollution

Chapter III of the EPA deals with prevention, Control and abetment of Environmental Pollution. Some important provisions of this chapter provide that, No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed. No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safe guards as may be prescribed. Where the discharge of any environmental pollutant in excess of the prescribed standards occurs or is apprehended to occur due to any accident or other unforeseen act or event, the person responsible for such discharge and the person in charge of the place at which the discharge occurs shall be bound to prevent or mitigate the environmental pollution. and shall also:

(a) intimate the fact of such occurrence or apprehension of such occurrence; and

(b) be bound, if called upon, to render all assistance. On receipt of such information, the authorities or agencies shall cause such remedial measures to be taken as are necessary to prevent or mitigate the environmental pollution.

The expenses incurred by any authority or agency may be recovered from the person concerned as arrears of land revenue or of public demand.

4.17. Penalties

Section 15 provides for Penalties for contravention of the provisions of the Act as well as the Rules, Orders and Directions. Whoever fails to comply with or contravenes any of the provisions, rules, orders or directions of this Act shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both. In case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues.

If the failure or contravention continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which, may extend to seven years.

Offences by Companies

Offences by Companies are dealt with under Section16. Where any offence is committed by a company, every person who, at the time the offence was committed, was directly incharge of, and was responsible to, the company for the conduct of the business of the company shall be deemed to be guilty of the offence.

If he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of such offence he shall not be liable to any punishment.

Where the offence has been committed with the consent or connivance of or is attributable to any neglect on part of , any director, manager, secretary or other officer of the company, such person shall be deemed to be guilty of the offence

- **Cognizance of Offences and Bar of Jurisdiction of Civil Courts**

As per the provisions of Section 19 of the EPA, no court shall take cognizance of any offence under this Act except on a complaint made by:

(a) the central Government or any authority or officer authorized in this behalf by that Government; or

(b) any person who has given notice of not less that 60 days, of the alleged offence and his intention to make a complaint, to the Central Government or the authority or officer authorized.

Section 22 provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of anything done, action taken or order or direction issued by the Central Government or any other authority or officer in pursuance of any power conferred under the Act.

4.18. The National Environment Appellate Authority

The National Environment Appellate Authority (NEAA) was set up as an independent body to address cases in which environmental clearances granted by the ministry of environment are challenged by civil society.

On January 30, 1997, the President of India, in exercise of the powers conferred under Article 123 (123. Power of President to promulgate Ordinances during recess of Parliament.— (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.) of the Constitution, promulgated an Ordinance to provide for the establishment of the NEAA to hear appeals with respect to restriction of areas in which any industries, operations and processes shall not be carried out or shall be carried out subject to the safeguards as provided under the EPA. The Ordinance was later on repealed with the enactment of the National Environment Appellate Authority Act, 1997.

The NEAA Act, which was granted presidential assent on 26th March, 1997 came into force from 9.4.97. This Act provides for the establishment of a NEAA. The Act was enacted with the following object:

To hear appeals with respect to restriction of areas in which any industry, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the EPA and for matters connected therewith or incidental thereto.

This is to bring in transparency in the process, accountability and to ensure smooth and expeditions implementation of developmental schemes and projects. Jurisdiction of the Act

Any aggrieved person may file an appeal within thirty days of passing of an order granting environmental clearance in the areas in which any industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the EPA. It is further provided that the Authority may entertain an appeal even after the expiry of the said term if a sufficient cause for delay in filing such an appeal exists. The Authority is required to dispose off the appeal within ninety days from the date of filing of the same. However, the Authority may, for reasons that are to be recorded in writing, dispose off the appeal within a further period of thirty days.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

4.19.SUMMARY

Consumer Protection Act

Consumer Protection Act has been implemented(1986) or we can bring into existence to protect the rights of a consumer. It protects the consumer from exploitation that business practice to make profits which in turn harm the well being of the consumer and society.

This right help to educate the consumer on the right and responsibilities of being a consumer and how to seek help or justice when faced exploitation as a consumer. It teaches the consumer to make right choices and know what is right and what is wrong.

Who is a consumer according to the Consumer Protection Act, 1986?

A consumer is one that buys good for consumption and not for the resale or commercial purpose. The consumer also hires service for consideration.

- If any defect found the seller should remove the mentioned defects from the whole batch or the goods affected. For example, there have been cases where car manufacturing unit found a defect in parts of the vehicle usually they remove the defect from every unit or they call of the unit.
- They should replace the defective product with a nondefective product and that product should be of similar configuration or should be the same as the product purchased.

The salient features of Consumer Protection Act are- The Consumer Protection Act covers all public, private and cooperative sectors.This applies to all the goods and services until and unless the Union government exempts it.Provisions of the Consumer Protection Act are compensatory in nature.

Consumer Protection Councils

The Consumer Protection Act postulates establishment of Consumer Protection Councils at the Central and State levels for the purpose of spreading consumer awareness. The objects of the Councils, as per the Act, shall be to promote and protect the rights of the consumers such as:

- The right to be protected against the marketing of goods and services which are hazardous to life and property
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices;
- The right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
- The right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums
- The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers and
- The right to consumer education.

Central Consumer Protection Council

The Consumer Protection Act empowers the Central Government to establish a Central Consumer Protection Council consisting of the Minister in charge of consumer affairs in the Central Government as its Chairman and such number of other official and non-official members representing such interests as may be prescribed. Under the Consumer Protection Council Rules 1987, the membership of the Council is restricted to 150 members including the Central Minister in charge of Consumer Affairs as the Chairman. The term of the Council is three years. To monitor the implementation of the recommendations of the Council, the Central Government may constitute a standing working group from amongst the members of the council under the Chairmanship of the Member Secretary of the Council. The Council shall meet as and when necessary, but at least one meeting of the Council shall be held at such time and place as the Chairman may think fit.

State Consumer Protection Council The Consumer Protection Act provides for the establishment of State Consumer Protection Councils by the State Governments. The State Council shall consist of a Minister in charge of consumer affairs in the State Government as its Chairman and such number of other official or non-official members representing such interests as may be prescribed by the State Government and ten nominees of the Central Government. The State Council shall meet as and when necessary but not less than two meetings shall be held every year at such time and place as the Chairman may think fit.

District Consumer Protection Council

In order to promote and protect the rights of consumers, within the district, the Consumer Protection Act, provides for the establishment of a District Consumer Protection Council in every district. It shall consist of the Collector of the district as its Chairman and such number of other official and non-official members representing such interests as may be prescribed by the State Government. It shall meet as and when necessary but not less then two meetings shall be held every year. The Chairman shall decide the time and place of the meeting.

Redressal: Three Tier System Under Consumer Act

- **District Forum:** These fora are set by the district of the state concerned in each district wherein it consists of President and two members of which one should be a woman and is appointed by the State Government. In this, the complaining party should not make a complaint more than 20 Lacs and once the complaint is filed the goods are sent for testing and if they found defective the accused party should compensate and if the party is dissatisfied can make an appeal with state commission within 30 days.
- **State Commission:** This is set up by each state It consists of President and two members. Complains should be at least 20 lacs and exceed not more than 1 crore. The goods are sent for testing and if found defective are asked for replacement or compensation. If not satisfied can make an appeal within 30 days in front of the National Commission.
- **National Commission:** Consist of President and 4 members. The complaint must exceed an amount of 1 crore. The goods are sent for testing and if found defective are asked for replacement or compensation

Environment Protection act 1986

It is now generally accepted that environment is threatened by a wide variety of human activities ranging from the instinctive drive to reproduce its kind to the restless urge of improving the standards of living, development of technological solutions to this end, the vast amount of waste, both natural and chemical, that these advances produce. Paradoxically, this urge to grow and develop, which was initially uncontrolled is now widely perceived to be threatening as it results in the depletion of both living and non-living natural resources and life support systems. The air, water, land, living creatures as well as the environment in general is becoming polluted at an alarming rate that needs to be controlled and curbed as soon as possible.

The 1986 Act was enacted in this spirit. From time to time various legislations have been enacted in India for this purpose. However, all legislations prior to the 1986 Act have been specific relating to precise aspects of environmental pollution. However, the 1986 Act was a general legislation enacted under Article 253 (Legislation for giving effect to international agreements.—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body) of the Constitution, pursuant to the international obligations of India. India was a signatory to the Stockholm Conference of 1972 where the world community had resolved to protect and enhance the environment.

The United Nations conference on human environment, held in Stockholm in June 1972, proclaimed that "Man is both creator and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has reached when through the rapid acceleration of science and technology man has acquired the power to transform his environment in countless ways and on unprecedented scale. Both aspects of man's environment, the natural and man made are essential to his well being and to the enjoyment of basic human rights even the right to life itself".

While several legislations such as The Water (Prevention and Control of Pollution) Act, 1974 and The Air (Prevention and Control of Pollution) Act, 1981 were enacted after the Conference, the need for a general legislation had become increasingly evident. The EPA was enacted so as to overcome this deficiency.

4.20. SELF-ASSESSMENT QUESTIONS

1) Explain the provisions of the consumer Protection Act regarding establishment, objectives and meetings of the Central and State Consumer Protection Councils.
2) Enumerate briefly the establishment and working of different consumer dispute redressal agencies established under the Consumer Protection Act, 1986.
3) Write a note on the need and objectives of the environment Protection Act,1986.
4) What are the general powers of the Government under the Environment Protection Act1986?
5) Write note on penalties and offences under the Environment Protection Act,1986.
6) What are the objective of Consumer Protection Act 1986?
7) Explain the redressal agencies available to the consumer under the consumer protection act?
8) What are the different rights available to the consumers?
9) Name the few legislations enacted in India for the protection of the Environment.
10) What are the penal provisions of the environmental protection act 1986?
11) Write short note on the prevention, control and abatement of environmental pollution.

12) Describe the concept of environment.