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B.B.A. BANKING

THIRD YEAR

PAPER - IX : BUSINESS LAW

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BBA BANKING

THIRD YEAR

PAPER - IX : BUSINESS LAW

(Core Subject)

UNIT - I

Indian Contract Act 1872 : Contract – Meaning – Types – Essential elements – Nature of contract – Performance of contract – Discharge of contract – Remedies for breach of contract – Quasi contracts.

UNIT - II

Special contracts : Contract of Indemnity and Guarantee – Bailment and Pledge – Law of Agency.

UNIT - III

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Indian Stamp Act : Reasons for variations in stamp duty from State to State – Stamping of documents – Alternation of Stamped Document – Effect of document not being duly stamped. Limitation : Rationale behind prescribing period of limitation – Acknowledgement of debts and confirmation of balances – Part Payment.

BOOKS RECOMMENDED

- N.D. Kapoor - Mercantitle law
- D.F.Mulla - The & Indian Contract Act.
- Polloci & Mulla - Sale of goods and Partnership Act.
- S.M.Shah - Lectures on Company Law
- N.K.Randeria - Legal Decisions Affecting Bankers.
- Indian Stamp Act, Indian Limitation Act.

UNIT – I

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BUSINESS LAWS

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UNIT - I

BUSINESS LAWS

INTRODUCTION

Law means a 'set of rules'. Broadly speaking, it may be defined as the rules 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 living and social security.

Purpose to know law

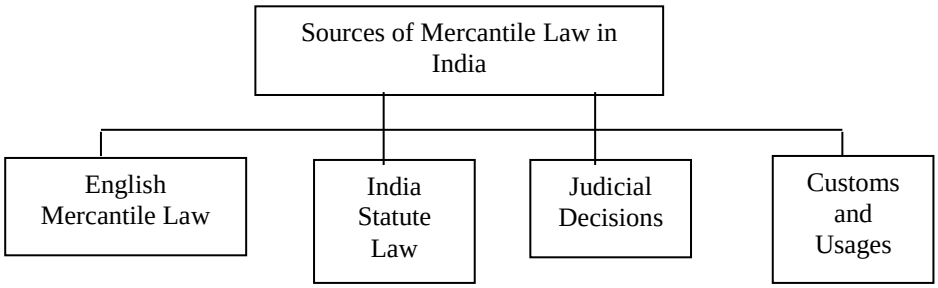
One should know the law to which he is subject because ignorance of law is not excuse. For example, if X is caught travelling in a train without ticket, he cannot plead that he was not aware of the rule regarding the purchase of ticket and therefore, he may be excused.

Meaning of Mercantile Law or Commercial Law

Mercantile law is not a separate branch of law. Basically, 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. It includes laws relating to various contracts, partnership, companies, negotiable instruments, insurance, carriage of goods, arbitration etc.

Sources of Mercantile Law

In India, mercantile law is basically an adaptation of the English Law with some modifications and reservations which are necessitated by the peculiar conditions prevailing in India. The main sources of the Indian mercantile law are shown below.



Let us discuss them one by one.

(a) English Mercantile Law English laws are the primary sources of Indian Mercantile Law. English laws are based on customs and usages of merchants in England.

(b) Indian Statute Law The various Acts passed by the Indian Legislature are the main sources of mercantile law in India, e.g. Indian Contract

Act, 1872, The Sale of Goods Acts, 1930, The Indian Partnership Act, 1932, The Negotiable Instruments Act 1881, The Companies Act, 1956.

(c) Judicial Decisions The Past judicial decisions of English courts and Indian courts are also one of the sources of law. Wherever the law is silent on a point, the judge has to decide the case according to the principle of equity, justice and good conscience. The past judicial decisions are followed by the courts while deciding similar cases before them.

(d) Customs and Usages The customs and usages of a trade are also one of the sources of mercantile law in India. These customs and usages govern the merchants of a trade in their dealings with each other.

The law of Contract

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.

Meaning of Contract

According to Section 2(h) of the Indian Contract Act, 1872, "An agreement enforceable by law is a contract". In other words, an agreement which can be enforced in a court of law is known as a contract.

Contract = An Agreement + Enforceability of an agreement

What is an Agreement ?

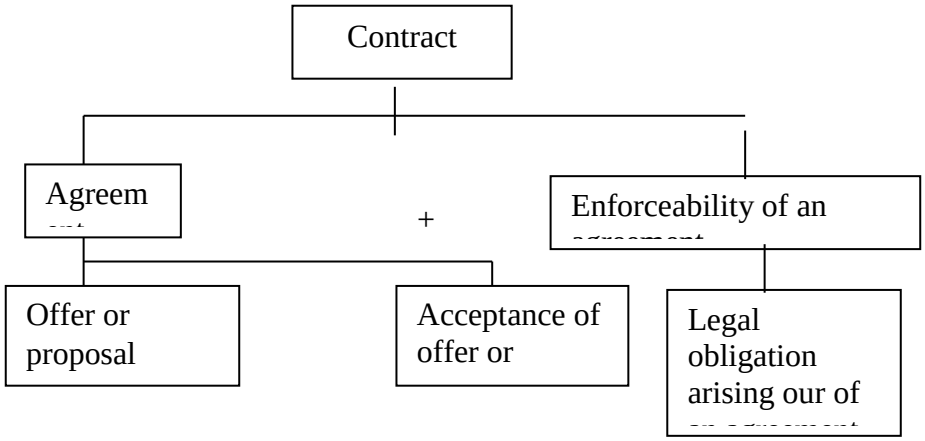
According to Section 2(e) of the Indian Contract Act, 1872, "Every promise and every set of promises forming the consideration for each other is an agreement". Now the question arises, 'what is promise?' According to Section 2(b) of the Indian Contract Act, 1872, "A proposal when accepted, becomes a promise".

Agreement = Offer or Proposal + Acceptance of Offer or Proposal

What is an Enforceability of Agreement?

An agreement is said to be enforceable by law if it create some legal obligation.

In the form of a graphic representation, the contract can be expressed as under:



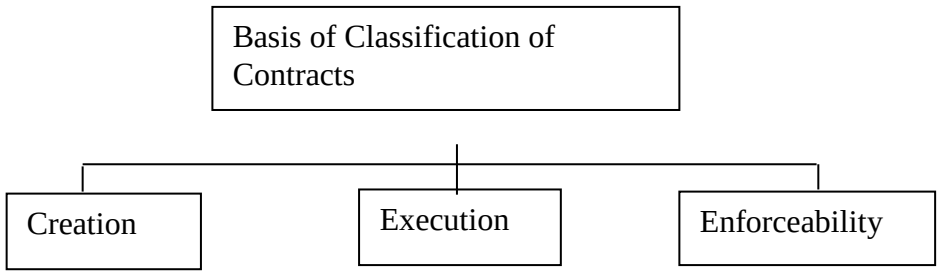
"The law of contracts is not the whole law of agreements". The law of contracts is the law of only those agreements which create legal obligations (i.e. an obligation which is enforceable by law). An obligation is the duty to do or not to do certain act. In other words, the law of contract is concerned with only those agreements where the parties have the intention to create legal obligations (i.e. the parties are bound to do or not to do certain act). In business or commercial agreements, the usual presumption is that the parties intend to create legal obligations.

Distinction between an Agreement and a contract

Basis of distinction	**An agreement**	**A contract**
1. What constitute ?	Offer an its acceptance constitute an Agreement	Agreement and its enforceability constitute a contract
2. Creation of legal obligation	An agreement may or may not create a legal obligation	A contract necessarily create a legal obligation.
3. One in other	Every agreement need not necessarily be a contract	All contracts are necessarily agreements
4. Binding	Agreement is not concluded or a binding contract	Contract is concluded and binding in the concerned parties

CLASSIFICATION OF CONTRACTS

The various bases on which the contracts can be classified are shown below.



Contracts on the Basis of Creation

On the basis of creation, the contracts may be classified as under:

(a) Express Contract Express contract is one which is made by words spoken or written.

(b) Implied Contract An implied contract is one which is made otherwise than by words spoken or written. It is inferred from the conduct of a person or the circumstances of the particular case.

Contracts on the Basis of Execution

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

(a) Executed Contract It is a contract where both the parties to the contract have fulfilled their respective obligations under the contract.

(b) Executory Contract It is a contract where both the parties to the contract have still to perform their respective obligations.

(c) Partly Executed and Partly Executory Contract It is a contract where one of the parties to the contract has fulfilled his obligation and the other party has still to perform his obligation.

Contracts on the Basis on Enforceability

On the basis of enforceability, the contracts may be classified as under.

(a) Valid Contract A contract which satisfies all the conditions prescribed by law is a valid contract.

(b) Void Contract The term 'Void Contract' is a contradiction is terms. But according to section 2 (j)of the Indian Contract Act, 1872, "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". In other words, a void contract is a contract which was valid when entered into but which subsequently became void due to impossibility of performance, change of law or some other reason.

(c) Void Agreement According to Section 2(g), "An agreement not enforceable by law is said to be void". Such agreements are void-ab-inittio which means that they are unenforceable right from the time they are made.

(d) Voidable Contract According so Section 2(i) of the Indian Contract Act, 1872, an agreement which is enforceable by law at the option of one or more of the parties thereon but not at the option of the other or others, is a voidable contract. In other words, "A voidable contract is one which can be set aside or repudiated or avoided at the option of the aggrieved party". Until the contract is set aside or repudiated by the aggrieved party, it remains a valid contract.

SELF EVALUATION QUESTIONS

True or False Questions

State with reasons whether the following statements are True or False:

1. Law is the body of principles enforced by judiciary.
2. Indian mercantile law is primarily an adaptation of the English law.
3. Mercantile law is applicable to business community only.

Distinction Between Void Agreement and Voidable Contract

Basis of Distinction	Void Agreement	Voidable Contract
1. Void – ab-inittio	It is void from the very beginning.	It is valid when made and continues to remain valid till it is repudiated by the aggrieved party.
2. Which essential element of contract is missing	It is void because an essential element of a valid contract (other than free consent) is missing.	It is voidable because the consent of a party is not free.
3. Enforceability	It cannot be enforced by any party	It continues to be enforceable if the aggrieved party does not repudiate the contract.
4. Right of third party	Third party does not acquire any rights.	A third party who purchases goods in good faith any for consideration before the contract is repudiated,

		acquires good title to those goods.
5. Effect of lapse of reasonable time	Even on the expiry of a reasonable time, it can never become a valid contract.	On the expiry of a reasonable time, it may become a valid contract if the aggrieved party does not repudiate the contract within reasonable time.
6. Damages	The question of damages does not arise.	The aggrieved party can claim damages.

(e) Illegal Agreement An illegal agreement is one the objects of which is unlawful. Such an agreement cannot be enforced by law. Thus, illegal agreements are always void ab-initio (i.e. void from the very beginning).

Distinction between Void Agreement and Illegal Agreement

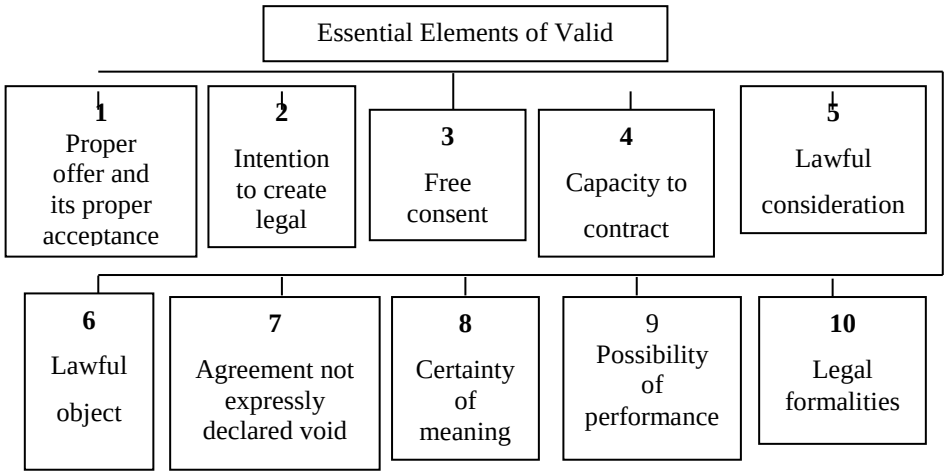
Basis of distinction	**Void agreement**	**Illegal agreement**
1. Void/illegal	All void agreements need not necessarily be illegal.	All illegal agreements are always void.
2. Effect on collateral agreements	The collateral agreements do not become void.	The collateral agreements also become void.
3. Restoration of benefit received	If a contract becomes void subsequently, the benefit received must be restored to the other party.	The money advanced or thing given can not be claimed back.

(f) Unenforceable Contract It is contract is actually valid but cannot be enforced because of some technical defect (such as not in writing, under stamped). Such contracts can be enforced if the technical defect involved ire removed.

ESSENTIALS OF A VALID CONTRACT

According to Section 10, "All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void".

The analysis of the provisions of Section 10 shows that a valid contract must have certain essential elements. These essential elements have been shown below.



Let us discuss these essential elements one by one:

1. **Proper offer and Acceptance** There must be at least two parties — one making the offer and the other accepting it.
2. **Intention of Create Legal Relationship** There must be an intention among the parties to create a legal relationship.
3. **Free Consent** There must be free consent of the parties to the contract. According to Section 14, Consent is said to be free when it is not caused by (i) coercion, (ii) undue influence, (iii) fraud, (iv) misrepresentation, or (v) Mistake. If the consent of the parties is not, free, then no valid contract comes into existence.
4. **Capacity of Parties** The parties to an agreement must be competent to contract. The person must be major, must be of sound mind and must not be declared disqualified from contracting by any law to which he is subject.
5. **Lawful Consideration** An agreement must be supported by lawful consideration. Consideration means something in return.
6. **Lawful Object** The object of an agreement must be lawful. According to Section 23 of the Indian Contract Act, 1872, "the object is considered lawful unless it is forbidden by law or is fraudulent or involves or implies injury to the person or property of another or is immoral or is opposed to public policy".
7. **Agreement not Expressly Declared Void** The agreement must not have been expressly declared void number the provisions of Sections 24 to 30 of the Indian Contract Act, 1872.

8. **Certainty of Meaning** The terms of the agreement must be certain and unambiguous.
9. **Possibility of Performance** The terms of the agreement must be such as are capable of performance. According to Section 56, "an agreement to do an impossible act is void".
10. **Legal Formalities** The agreement must comply with the necessary formalities' as to writing registration, stamping etc. if any required in order to make ti enforce able by law.

SELF EVALUATION QUESTIONS

True or False Questions

State with reasons whether the following statements are True or False:

4. Customs and usages are an important source of mercantile law.
5. Law of contract is the whole law of agreements.
6. Law of contract is the whole law of obligations.

OFFER AND ACCEPTANCE

VALID OFFER

Meaning of Offer [Section 2 (a)

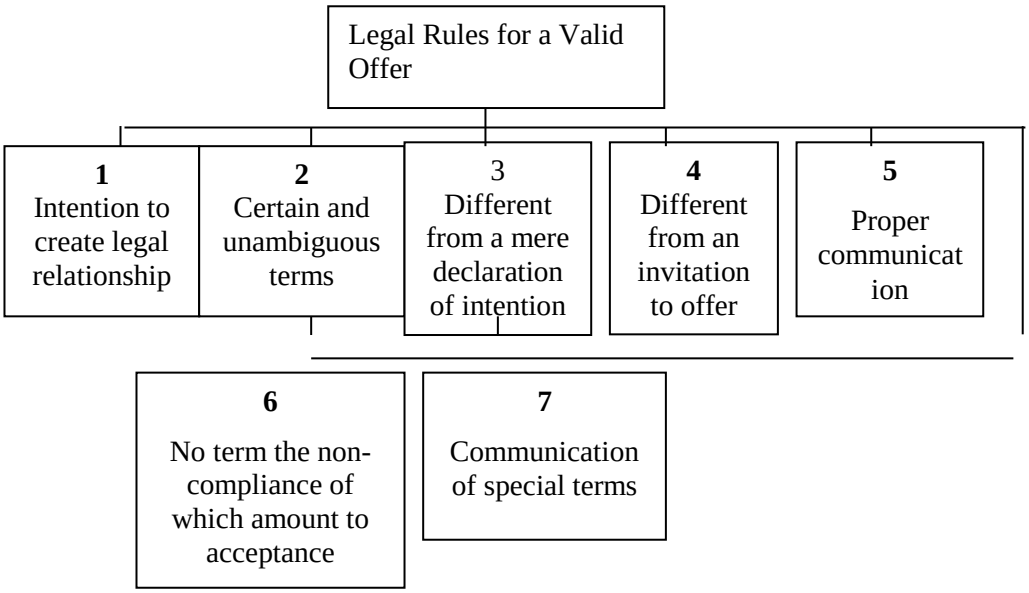
An offer is the starting point in the making of an agreement. An offer is also called 'proposal'. According to Section 2(a) of The Indian Contract Act, 1872, "A person is said to have made the proposal when he signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that offer to such act or abstinence".

Meaning of "Offerer" (or 'Promisor'), Offerce (or Promisee)

The person making the proposal is called the offer or proposer. The person to whom the proposal is made is called the 'offeree' or 'proposee'.

Legal Rules for a Valid Offer

An offer to be valid must fulfil the conditions shown below.



(a) Intention of Create Legal Relationship An offer must intend to create legal relations. An offer must be such that when accepted, it will create legal relationship among the parties.

(b) Certain and Unambiguous Terms The terms of the offer must be certain and unambiguous and not vague. If the terms of the offer are vague, not contract can be entered in to because it is not clear as to what exactly the parties intended to do.

(c) Different from a Mere Declaration of Intention The offer must be distinguished from a mere declaration of intention. Such statement or

declaration merely indicates that an offer will be made or invited in future.

(d) Different from an Invitation of Offer An offer must be distinguished from an invitation to offer. In case of an invitation of offer, the person making an invitation invites others to make an offer to him.

(e) Communication An offer must be communicated to the person to whom it is made.

(f) No Term the Non-compliance of which Amounts to Acceptance. The offer must not contain a term the non-compliance of which would amount to acceptance. It means that while making the offer, the offerer can not say that if offer is not accepted before a certain date, it will be presumed to have been accepted.

(g) Communication of Special Terms or Standard Form Contracts The special terms of the offer must also be communicated along with the offer. If the special terms of the offer are not communicated, the offeree will not be bound by those term.

ACCEPTANCE

Meaning of Acceptance

Acceptance means giving consent to the offer. It is an expression by the offeree of his willingness to be bound by the terms of the offer. According to Section 2(b) of the Indian Contract Act, 1872, "A proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. A proposal when accepted becomes a promise".

In other words, an acceptance is the consent given to offer.

SELF EVALUATION QUESTIONS

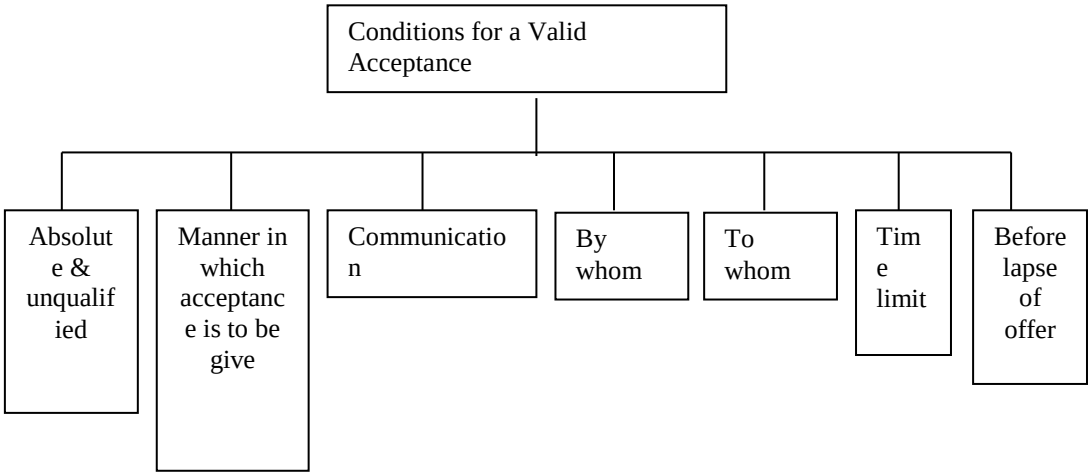
True or False Questions

State with reasons whether the following statements and True or False:

7. An express offer must be in writing.
8. A bid at an auction is an express offer.
9. An advertisement to pay reward to anyone who traces the missing boy of the advertiser is a specific offer.

Legal Rules for a Valid Acceptance

An acceptance to be valid must fulfil certain conditions which are shown below.



Conditions for a Valid Acceptance

(a) Absolute and Unqualified According to Section (7) (1) of the Indian Contract Act, 1872, "In order to convert a proposal into a promise, the acceptance must be absolute and unqualified".

(b) Manner According to Section 7 (2) of the Indian Contract Act, 1872, the acceptance of an offer must be given in the following manner.

(a) If the proposal does not prescribe the manner in which it is to be accepted. (b) If the proposal prescribes the manner in which it is to be accepted.	The offer must be accepted in some usual and reasonable manner. The offer must be accepted in the prescribed manner.

(c) Communication The acceptance must be signified (i.e. indicated or declared). In other words, the acceptance is complete only when it has been communicated to the offerer. A mere mental determination to accept is no acceptance in the eyes of law unless there is some external manifestation of that determination by words or conduct.

(d) By Whom Acceptance must be communicated by the offeree himself or by a person who has the authority to accept.

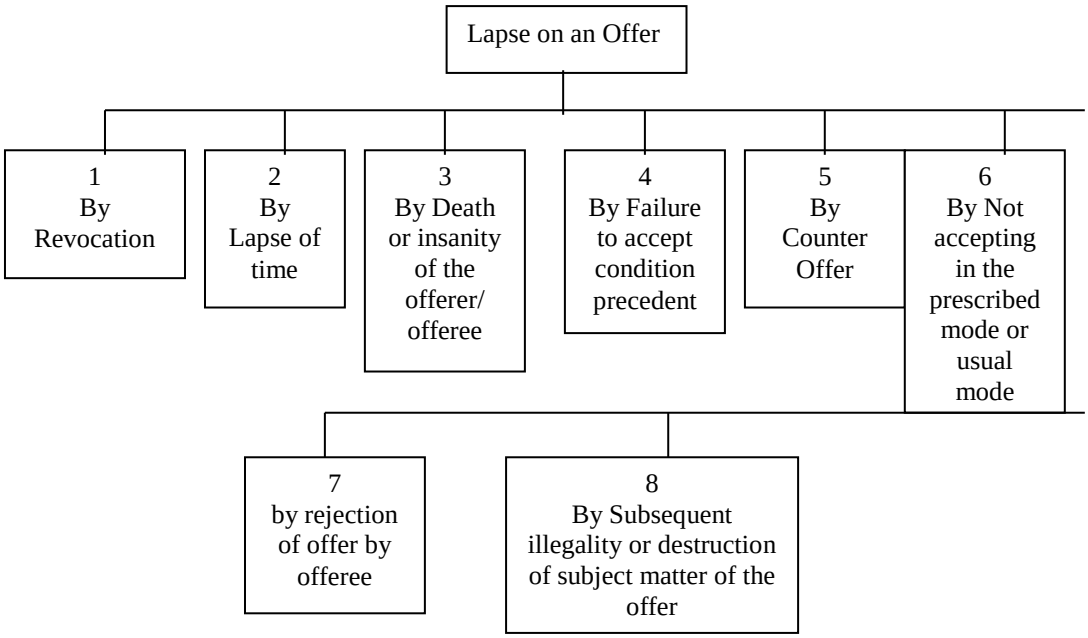
(e) To Whom Acceptance must be communicated to the offerer himself. In other words, if acceptance is communicated to an unauthorised person, it will not give rise to legal relations.

(f) Time Limit The acceptance must be given within the time prescribed (if any) or within a reasonable time (if on time is prescribed).

(g) Before Lapse of Offer The acceptance must be given before the offer lapses or is withrawn.

LAPSE OF AN OFFER

An offer must be accepted before it lapses (i.e. comes to an end). An offer may come to end in any of the ways shown.



(a) By Revocation An offer lapses if the offerer revokes the offer before its acceptance by the offeree.

(b) By Lapse of Time An offer lapses if it is not accepted within the fixed time (in any prescribed in the offer) or within reasonable time (if no time is prescribed in the offer).

(c) By Death or Insanity of the Offeror or Offeree An offer lapses by the death or insanity of the offerer if the fact of his death or insanity comes to the knowledge of the acceptor before he makes his acceptance.

(d) By Failure to Accept Condition Precedent An offer lapses if it is accepted without fulfilling the conditions of the offer.

(e) By Counter Offer An offer lapses if the counter offer is made because a counter offer amounts to rejection of the original offer. Counter means making a fresh offer instead of accepting the original offer.

(f) By no Accepting in the Prescribed Mode or Usual Mode An offer if it is not accepted in the specific manner (if any, prescribed in the offer) or in some usual and reasonable manner (if no manner ha been prescribed in the offer).

(g) By Rejection of Offer by Offeree An offer lapses if it is rejected by the offeree. An offer is said to be rejected if the offeree expressly rejects it

or accepts it subject to certain condition. It may be noted once an offer is rejected, it can not be revived subsequently.

(h) By Subsequent illegality or Destruction of Subject Matter of the Offer An offer lapses if it becomes illegal or the subject matter is destroyed before its acceptance by offeree.

SELF EVALUATION QUESTIONS

True or False Questions

State with reasons whether the following statement are True or False:

10. An advertisement to sell goods by auction is an offer.
11. An advertisement offering reward to anyone who finds the lost dog of the advertiser is not an offer.
12. An acceptance of an invitation for dinner does not create any legal obligations.

DISCHARGE OF A CONTRACT

MEANING OF DISCHARGE OF A CONTRACT

Discharge of a contract means termination of the contractual relations between the parties to a contract. A contract is said to be discharged when the rights and obligations of the parties under the contract come to an end.

MODES OF DISCHARGES OF CONTRACT

A contract may be discharged in various modes shown.

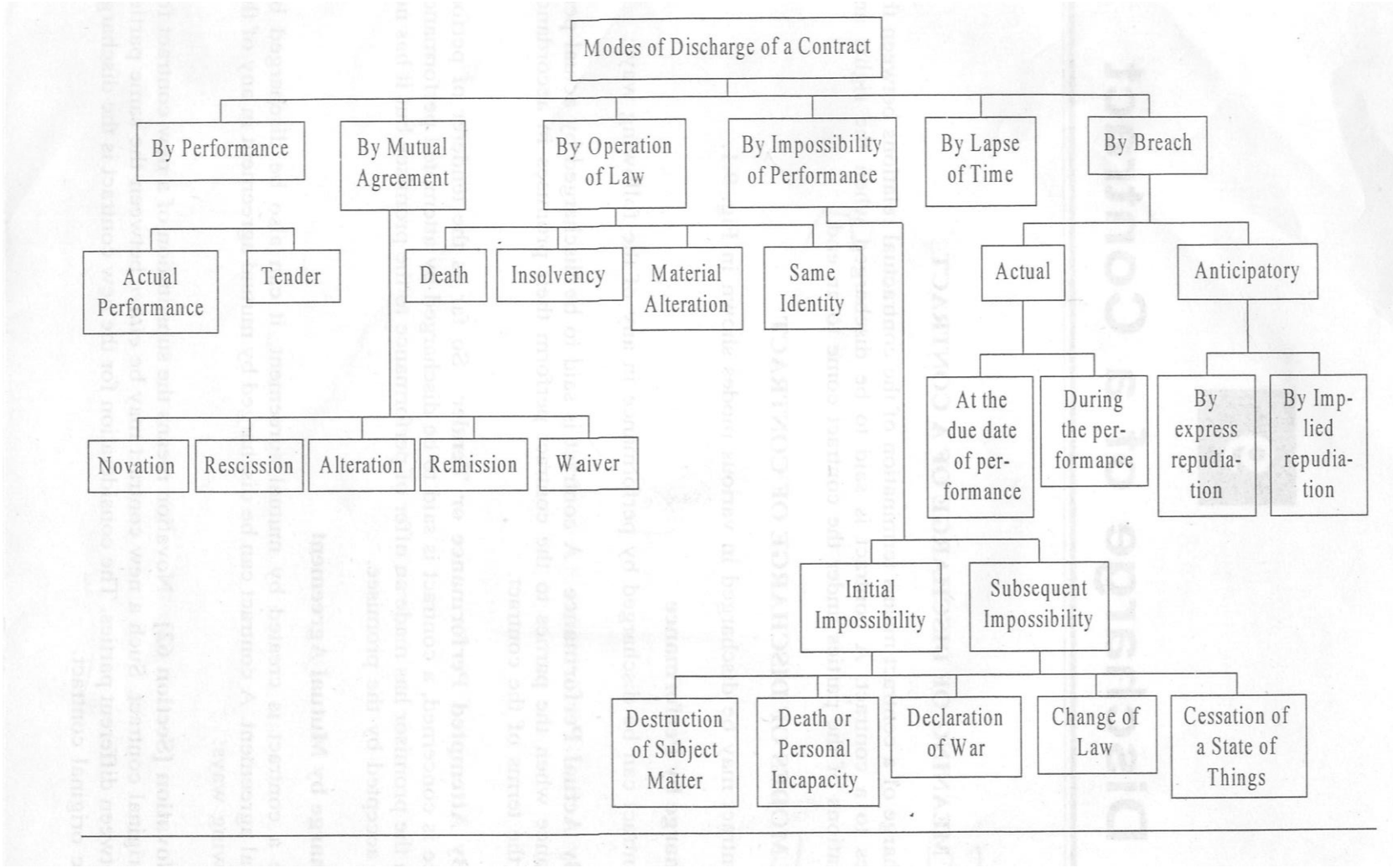
(a) Novation (Sec. 62) Novation means the substitution of a new contract for the original contract. Such a new contract may be either between the same parities or between different parties. The consideration for the new contract is the discharge of the original contract.

(b) Rescision (Sec. 62) Rescission means cancellation of the contract by any party or all the parties to a contract.

(c) Alteration (Sec. 62) Alteration means a change in the terms of a contract with mutual consent of the parties. Alteration discharges the original contract and creates a new contract. However, parties to the new contract must not change.

(d) Remission (Sec. 63) Remission means acceptance by the promises of a leser fulfillment of the promise made. According to section 63.

(e) Waiver Waiver means intentional relinquishment of a right under the contract. Thus, it amounts to releasing a person of certain legal obligation under a contract, e.g. A promises to supply goods to Y. Subsequently, Y exempts X from carrying out the promise. This amounts to waiving the right of performance on the part of Y.


Modes of Discharge of a Contract
By Performance
By Mutual Agreement
By Operation of Law
By Impossibility of Performance
By Lapse of Time
By Breach
Actual Performance
Tender
Death
Insolvency
Material Alteration
Same Identity
Actual
Anticipatory
Novation
Rescission
Alteration
Remission
Waiver
At the due date of performance
During the performance
By express repudiation
By Implied repudiation
Initial Impossibility
Subsequent Impossibility
Destruction of Subject Matter
Death or Personal Incapacity
Declaration of War
Change of Law
Cessation of a State of Things

SELF EVALUATION QUESTIONS

True or False Questions

State with reasons whether the following statements are True or False.

13. Substitution of a new contract in place of an existing contract is called alteration.
14. Cancellation of contract is called remission.
15. In case the goods are sold on credit and a debt is not recovered within three years from the date of grant of credit, the debt becomes time barred and is discharged by lapse of time.

Discharge by operation of law

A contract may be discharged by operation of law in the following cases:

(a) By Death of the Promisor A contract involving the personal skill or ability of the promisor is discharged on the death of the promisor.

(b) By Insolvency When a person is declared insolvent, he is discharged from his liability up to the date of his insolvency.

(c) By Unauthorised Material Alteration If any party makes any material alternation in the terms of the contract without the approval of the other party, the contract comes to an end.

(d) By the Identity of Promisor and Promisee When the promisor becomes the promisee, the other parties are discharged.

SELF EVALUATION QUESTIONS

True or False Questions

State with reasons whether the following statements are True or False.

16. The death of the promisor always discharges the contract.
17. The insolvency of the promisor discharges the contract .
18. An agreement to do an impossible act is voidable at the option of the promisee.

REMEDIES FOR BREACH OF CONTRACT

MEANING OF BREACH OF CONTRACT

A breach of contract occurs if any party refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. In case of breach, the aggrieved party (i.e. the party not at fault) is relieved from performing his obligation and gets a right to proceed against the party at fault. A breach of contact may arise in two ways, (a) anticipatory breach and (b) actual breach.

ANTICIPATORY BREACH OF CONTRACT

Meaning of Anticipatory Breach of Contract (sec. 39)

Anticipatory breach occur when the party declares his intention of not performing the contract before the performance is due. Thus, when a party refuses to perform a contract even before it is due for performance, it is called anticipatory breach.

Modes of Declaring an Intention not Performing the Contract (Sec. 39)

A party may declare his intention of not performing the contract in the following two ways:

(a) When a party to a contract has refused to perform his promise.

(b) When a party to a contract has disabled himself from performing his promise in its entirety.

Consequences of Treating contract as Operative

In case of anticipatory breach, if the aggrieved party treats the contract as operative and waits till the due date for performance, the consequences will be as follows:

(a) The promisor may perform his promise on or before the due date of performance and the promiseee will be bound to accept the performance.

(b) The promisor may take advantage of the discharge by supervening impossibility arising between the date of breach and the due date of the performance and in such a case, the promisee shall lose his right to sue for damages.

SELF EVALUATION QUESTIONS

True of False Questions

State with reasons whether the following statements are True or False:

19. Anticipatory breach of a contract takes place at the time when the performance is due.
20. Actual breach of a contract may take place during the performance of the contract.
21. In case of anticipatory breach of contract, the aggrieved party must rescind the contract and sue for damages for breach of contract at the time of such breach.

Amount of Damages

The amount of damages in each of the options exercised by an aggrieved party will be calculated as under:

Option exercised	Amount of damages
I. When the aggrieved party rescinds the contract at the date of breach	The amount of damages will be equal to the difference between the price prevailing on the date of breach and the contract price.
II. When the aggrieved party does not rescind the contract at the date of breach	The amount of damages will be equal to the difference between the price prevailing on the due date of performance and the contract price.

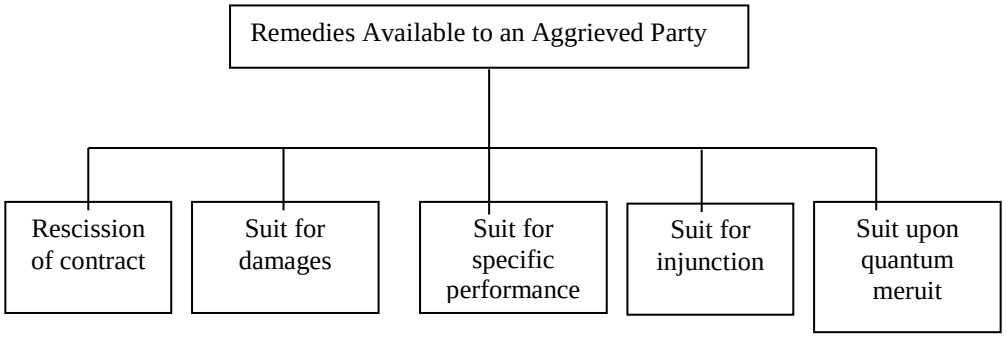
REMEDIES FOR BREACH OF CONTRACT

Meaning of Remedy

A remedy is the course of action available to an aggrieved party (i.e. the party not at default) for the enforcement of a right under a contract.

Remedies for Breach of Contract

The various remedies available to an aggrieved party are shown below.



Remedies Available to an Aggrieved Party

1. Rescission of Contract (Section 39) Rescission means a right not to perform obligation.

In case of breach of a contract, the promisee may put an end to the contract. In such case, the aggrieved party is discharged from all the obligations under the contract and is entitled to claim compensation for the damage which he has sustained because of the non-performance of the contract.

2. Suit for Damages Damages are monetary compensation allowed for loss suffered by the aggrieved party due to breach of a contract. The object of awarding damages is not to punish the party at fault but to make good the financial loss suffered by the aggrieved party due to the breach of contract.

3. Suit for Specific Performance Suit for specific performance means demanding the court's direction to the defaulting party to carry out the promise according to the terms of the contract.

4. Suit for Injunction Suit for injunction means demanding court's stay order. Injunction means an order of the court which prohibits a person to do a particular act. Where a party to a contract does something which he promised not to do, the court may issue an order prohibiting him from doing so.

5. Suit for Quantum Meruit Quantum Meruit means as much as is earned. Right to Quantum Meruit means a rights to claim the compensation for the work already done.

SELF EVALUATION QUESTIONS

True of False Questions

State with reasons whether the following statements are True or False:

22. In case of anticipatory breach of contract, if the promisee decides not to rescind the contract, the contract shall remain alive for the benefit of both the parties.
23. In case of actual breach of a contract, the contract becomes void if the time is the essence of the contract.
24. In case of actual breach of a contract, if performance beyond stipulated time is accepted, the promisee can claim the compensation for any loss occasioned by the non-performance of the promise at the stipulated time if he gives notice of his intention to do so.

Meaning of consent and free consent

Consent, it means acquiescence or act of assenting to an offer. two or ore persons are said to consent when they agree upon the same thing in the same sense:

Free consent is said to be free when it is not caused by

1. Coercion as defined in sec. 15 or
2. Undue influence as defined in sec. 16 or
3. Fraud as defined in sec. 17 or
4. Misrepresentation as defined in sec. 18 or
5. Mistake, subject to the provisions of sec's, 20,21 and 22.

When there is no consent, there is no contract. salmond describes it as error in consensus. If there is no consensus ad idem, there is no contract. One such circumstance which interfers with consensus ad idem is mistake

When a person is compelled to enter into a contract by the use of force by the other party of under a threat, coerction is said to be mployed. Coercion is the committing or threatenning to commit. Any act gorbidden by the indian penal code. 1860 or the unlawful detaining. Or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. Is unmaterial wheter the indian penal code. 19\860 is or is not in force in the place where the coerction is employed (sec. 15)

The treat amounting to coercion need not necessarily proceed form a party to the contract. It may proceed even from a stranger to the contract. Likewise, it may be directed against any body not necessarily the other contracting party. The intention of the person using coercion should, however, be to cause any person to enter into an agreement.

UNDUEINFLUENCE

Sometimes a party is compelied to enter into an agreement against his will as a result of unfair persuasion by the other party. This happens when a

special kind of relationship exists between the parties such that one party is in a position to exercis undue influence over the other.

A person is deemed to be in a position to dominate the will of another

a) Where he holds a real or apparent authority over the other. e.g., the relationship between master and servant, doctor and patient

b) Where he stands in a fiduciary relator, freiation of trust and cofidenc) to the other. it is supposed to exist, for example, between father and son. Solicitor and client, trustee and beneficlary and prooter and company

c) Where he makes a contract with a person whose mental capacity its temporarity or permanently affected by reason of age, illness or mental or bodily distress. Such a relation exists, for example, between a medical attendant and his patient

Effect of undueinfluence

When consent to an agreement is obtained by undue influence, the agreement is a contract avoidable at the option of the party whose consent was so obtained. Any such contract may be set aside either absolutely or if the party who is entitled to avoid it has received any benefit there under, upon such terms and conditions as to the court may seem just and equitable

MISREPRESENTATION AND FRAUD

A statement of fact which one party makes in the course of negotiations with a view to inducing the other party to enter into a contract is known as a representation. It must relate to some fact which is material to the contract. It may be expressed by words spoken or written or implied from the acts and conduct of the parties.

A representation, when wrongly made, either incocently or intentionally, is a misrepresentation. Misrepresentation may be

a) an innocent or unittentional misrepresentation or

b) an intentional deliberate or willful misrepresentation with an intent to deceive or defraud the other party.

c) The former is called misrepresentation and the latter fraud.

MISREPRESENTATION

Misrepresentation is a false statement which the person making it honestly believes to be true or which he does not know to be false. It also include non disclosure of material fact or facts without any intent to deceive the other party.

When a person positively asserts that a fact is true when his information does not warrant it to be so, though the believes it to be true.

When there is any breach of duty by a person, which brings an advantage to the person committing it by misleading another to his prejudice

When a party causes, however innocently, the other party to the agreement to make a mistake as to the substance of the thing, which is the subject of the agreement.

FRAUD

Fraud exists when it is shown that

(1) A false representation has been made 9a) knowingly, or (b) without belief in its truth, or (c) recklessly, not caring whether it is true or false, and the maker intended the other party to act upon it, or

(2) There is a concealment of a material fact or that there is a partial statement of a fact in such a manner that the withholding of what is not stated makes that which is stated false

The intention of the party making fraudulent misrepresentation must be to deceive the other party to the contract or to induce him to enter into a contract.

According to Sec. 17. “Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance (intentional

active or passive acquiescence), or by his agent with intent to deceive or to induce a person to enter into a contract:

1. The suggestion that a fact is true when it is not true and the person making the suggestion does not believe it to be true;
2. The active concealment of a fact by a person having knowledge or belief of the fact;
3. A promise made without any intention of performing it;
4. Any other act fitted to deceive;
5. Any such act or omission as the law specially declares to be fraudulent.

MISTAKE

Mistake ma be defined as an erroneous belief about something. It may be a mistake of law or a mistake of fact.

Mistake of law

Mistake of law may be-(1) mistake of law of the country, or (2) mistake of law of a foreign country.

(1) Mistake of law of the country. Ignorantia juris non excusat, i.e., ignornace of law is no excuse, is a well settled rule of law. A party cannot be allowed to get any relief on the ground that it had done a particular act in ignorance of law. A mistake of law is, therefore, no excuse, and the contract cannot be avoided (Solle V. Butcher, (1950) 1 K.B. 671).

But if a person enters into a contract by making a mistake of law through the inducement of another, whether innocent or otherwise, the contract may be avoided.

(2) Mistake of law of a foreign country. Such as mistake is treated as mistake of fact and the agreement in such a case is void (Sec. 21).

WAGERING AGREEMENTS (SEC.30)

Meaning of Wagering Agreements

An agreement between two persons under which money or money's worth is payable, by one person to another on the happening or non-happening of a future uncertain event is called a wagering event. Such agreements are chance oriented and therefore, completely uncertain.

Essentials of a Wagering Agreement

The aforesaid definition highlights the following essentials of a wagering agreement:

(b) Promise to Pay Money or Money's Worth The Wagering agreement must contain a promise to pay money or money's worth.

(c) Uncertain Event The performance of the promise must depend upon the determination of an uncertain event. An even is said to be uncertain when it is yet to take place or it might have already happened but the parties are not aware of its result.

(d) Mutual Chances of Gain or Loss Each party must stand to win or lose upon the determination of an uncertain event. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering agreement.

(e) Neither Party to have control over the Event Neither party should have control over the happening of the event one way or the other.

(f) No other Interest in the Event Neither party should have interest in the happening or non-happening of the event other than the sum or stake he will win or lose.

SELF EVALUATION QUESTIONS

True or False Questions

State whether the following statements are True or False.

25. The performance of a contingent contract depends upon the happening of some future event.
26. The performance of a contingent contract depends upon the non-happening of some future event.
27. The event in a contingent contract must be essential to the contract.

Effects of Wagering Agreements (Section 30)

The effects of wagering agreements are given as under:

(a) Agreements by way of wager are void in India.

(b) Agreements by way of wager have been declared illegal in the states of Maharashtra and Gujarat.

(c) No suit can be filed to recover the amount won on any wager.

(d) Transaction which are collateral to wagering agreements are not void in India except in the states of Maharashtra and Gujarat.

Transactions which are collateral to wagering agreements are illegal in the states of Maharashtra and Gujarat.

SELF EVALUATION QUESTIONNAIRE

True or False Questions

State whether the following statements are True or False.

28. The event in a contingent contract may be certain or uncertain.
29. The performance of a contingent contract must not depend upon mere will of the promisor.
30. Contracts contingent upon the happening of an uncertain future event becomes voidable at the option of promisee if that becomes impossible.

Very Short Answer Type Questions

1. Define Agreement.
2. Define Contract.
3. What is enforceability of an agreement?
4. What is an 'Express Contract'?
5. What is an 'Implied Contract'?
6. Define 'Executed Contract'?
7. Define 'Executory Contract'.
8. What is meant by 'Partly Executed and Partly Executory Contract'?
9. What is meant by a Valid Contract?
10. Define 'Void Contract'.
11. Define 'Void Agreements'.
12. What is illegal agreement?
13. What is 'Unforceable contract'?

Short Answer Type Questions

1. Enumerate the Essentials of a valid Contract.
2. Distinguish between the followngs:
   (a) Implied Contract and Express Contract
   (b) Executory Contract and Executed Contract
   (c) Void Contract and Voidable Contract
   (d) Void Contract and Void Agreement
   (e) Void Agreement and Illegal Agreement.
3. State the options available to a promisee in case of an anticipatory breach of contract.
4. State the consequences of not rescinding a contract at the time of anticipatory breach of contract.
5. State the consequences of actual breach of a contract.
6. State the importance of time in case of actual breach of a contract.

Essay Type Questions

1. (a) Define contract.
   (b) Explain the essentials of a valid contract.
2. (a) What is an offer?
   (b) When does it complete?
   (c) Discuss the legal rules of a valid offer.
3. (a)What is an acceptance?
   (b) How can an offer be accepted?
   (c) Discuss the legal rules of a valid acceptance.
4. Explain briefly the legal provisions relating to the communication of offer.
5. Explain briefly the legal provisions relating to the communication of acceptance.
6. (a) What is a breach of contract ?
   (b) What do you understand by an anticipatory breach of contract?
   (c) State the rights of the promisee in case of anticipatory breach.
7. State the principles on which damages are assessed for breach of contract?
8. What remedies are available to an aggrieved party on the breach of contract?

9. State the circumstances under which a party is not entitled to specific performance.
10. State briefly whether all stipulations for payment of interest are in the nature of a penalty. Give examples also.

Answer

[1. True	2. True	3. False]
[4. True	5. False	6. False]
[7.False	8. False	9. False]
[10. False	11. False	12. True]
[11. False	12. False	13. False]
[14. False	15. True	16. False]
[17. False	18. True	19. False]
[20. True	21. False	22. True]
[23.False	24. False	25. False]
[26. False	27. True	28. False]

NOTES

UNIT – II

CONTENTS

INDEMNITY AND GUARANTEE

UNIT- II

INDEMNITY AND GUARANTEE

INTRODUCTION

Definition of Contract of Indemnity : Sections 124,125 and 127 of the Indian Contract Act deal with contract of indemnity. A *contract by which one party promises to save the other from any loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called "Contract of Indemnity.* The promisor in such a contract is called *indemnifier* while the promisee who is to be protected is called the indemnity holder or *Indemnified.*

Illustration : A contracts to indemnify B against the consequences of any proceedings which the other person may take against B in respect of a certain sum of 2,000 rupees. This is a. Contract of Indemnity. A is the indemnifier and B is the indemnified.

Essentials of a contract of indemnity : 1. There must be *two parties* in a contract of Indemnity viz., Indemnifier and Indemnified. 2. A contract of Indemnity may be *express or implied.* 3. This contract being a *specie of contract,* is subject to all the rules of contract, such as free consent, legality of object, etc. 4. A contract of indemnity is enforceable only when the promisee suffers a loss the happening of which is unknown and against which the indemnity holder was promised to be protected. 5. *Consideration* in the case of contract of indemnity is essential to enable the indemnity holder to make claim to be compensated.

Illustration : A agrees to indemnify B if the latter published a defamatory article in his newspaper against C. If C sues B and is fined, he cannot recover fine from A inspite of his promise to indemnify B.

Examples of Implied Indemnity

If, for instance, A, on the instructions of B, sold certain goods belonging to C. C made A liable for it and recovered damages from A, for selling the goods. In this case, A could recover the loss from B, as the promise ofB to save A from any loss would be implied from his conduct in asking A to sell the goods ofC. *(Adamson Vs. Jarvis).* Under Section 222 of the Indian Contract Act, there is and implied promise to indemnify the agent by the principal in a contract of agency. A duty to indemnify may also arise by the operation of law. For instance, under the Indian Companies Act, a transferee of shares is bound to indemnify the transferor against future calls on shares. Under Section 69 of the Indian Contract Act, a person who is interested in the payment of money which another is bound by law to pay, and who therefore, pays it, is entitled to be indemnified by the other.

Commencement of indemnifier's liability: The indemnity holder can compel the indemnifier to make good his loss even before he had suffered actual loss by paying off the claim. If the payment is a condition, precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance.

Limitation : Any suit filed before the actual loss incurred will be dismissed as premature as the cause of action arises when the damage is suffered.

Rights of indemnified : An indemnity holder acting within the scope of his authority is entitled to recover from the promisor: (a) *all damages* which he might be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies; (b) *all costs*, which he may be compelled to pay in any suit, if he acted as a prudent person; and (c) *all sums* which he may have paid under the terms of any compromise, as such that a prudent promisee would make in the absence of a contract to the contrary.

Rights of indemnifier: If a person has some liability, he must have certain rights also. In the case of contract of indemnity, the promisor has liabilities to the indemnity holder, but it is curious that the Contract Act does not specifically lay down the rights of the promisor or the indemnifier. By reading See. 141 which deals with the surety's rights, one may conclude that the rights of an indemnifier are the same as those of the surety.

CONTRACT OF GUARANTEE

Definition of Contract of Guarantee: It is a contract to perform the promise or discharge the liability of a third person in case of his default (S. 126). Surety is a person who gives the guarantee. The person in respect of whose default the guarantee is given is called 'Principal Debtor'. The person to whom the guarantee is given is called the 'Creditor'.

Essentials of a Contract of Guarantee

1. *Form :* A contract of guarantee is just like any other contract which may be *either oral or in writing.*

2. *Tripartite agreement:* Every contract of Guarantee involves three agreements between (i) the Creditor and the Principal Debtor, (ii) the Surety and the Creditor, and (iii) the Surety and the Principal Debtor.

3. *Secondary liability :* The test which applied to determine whether the contract is one of guarantee or indemnity is whether the obligation has been undertaken at the debtor's request in which case the contract is one of guarantee. If the obligation is undertaken without any request of the debtor, the contract is one of indemnity. The intention of the parties is also important

whether making himself primarily or *collaterally liable.* Hence, the promise to be primarily and independently liable is not a guarantee, though it may be an indemnity. Hence in a contract of guarantee, the primary liability is with the principal debtor.

4. *Existing liability* *:* It is not necessary that the principal contract must be in existence at the time the contract of guarantee is made; the original contract by which the principal debtor undertakes to repay the money to the creditor may be about to come into existence.

5. *The promise to pay must be conditional:* In other words, the liability of the surety should arise only when the principal debtor makes a default.

6. *Consideration**:*** Something done for the benefit of the principal debtor is considered as *consideration* for the guarantee to make the contract valid. The legal detriment incurred by the promisee at the promisor's request is sufficient to constitute the element of consideration.

7. *Competency :* The principal debtor, surety and creditor must be a *person competent to contract.* However, under certain circumstances, a surety is liable though the principal debtor is not i.e., the original contract is void as is the case of a contract with a minor in which the surety is liable not only as surety but also as a principal debtor *Kashiba Vs. Shripat, (*1894). A person of unsound mind or an undischarged insolvent cannot give a valid guarantee.

8. *Consent:* There must be free consent, otherwise the contract of guarantee may become void or voidable. Generally a contract of guarantee is not a contract of the utmost goodfaith-i.e., *uberninae fidei,* but it is sometimes a first cousin to it. Mere non-disclosure will not effect the contract of suretyship unless there is an intentional concealment.

Kinds of Guarantee

A contract of guarantee may be either *'Retrospective'* i.e., for an existing debt or *'Prospective'* i.e., for a future debt. Guarantees are further divided into *'Specific'* also known as simple or single guarantee and *'Continuing'*. When the guarantee is given for a single or particular debt, it is called a specific guarantee and it comes to an end when the debt guaranteed has been paid. A guarantee which extends to a series of transactions is called a *continuing guarantee* (Sec. 129 of the Indian Contract Act).

Again guarantee may be for a part of a whole debt or for the whole debt subject to a limit. When the intention of the parties is not explicit it will be presumed that where a portion of a floating balance is guaranteed it is for a part of it only. When a portion of a fixed and ascertained debt is guaranteed, the guarantee applied to the whole debt subject to the limit.

Continuing Guarantee

Definition of continuing guarantee: A guarantee which extends to a series of transactions is called *Continuing Guarantee* (Sec. 129). A guarantee may be an ordinary or specific guarantee or a continuing guarantee. In the former, the guarantee is in respect of one single transaction while in the case of continuing guarantee, the guarantee extends to a series of transactions.

Illustrations : A in consideration that B will employ C inCollecting the rents of B's shopping complex promises B to be responsible, to the amount of 3,000 rupees, for the due collection of payments by C of those rents. This is a continuing guarantee.

Revocation of Continuing Guarantee

1. *Notice :* A continuing guarantee is revoked when the surety gives a notice to the creditor for the revocation of guarantee. Notice will be applicable only for future transactions and not those transactions which had already taken place.

2. *Death :* The continuing guarantee is revoked by the death of the surety provided such a notice had been received by the creditor.

3. *Variation in Contract :* 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.

4. *Creditor's act of Omission :* Any act or omission by the creditor which impairs the eventual remedy of the surety against the debtor amounts to revocation of the contract of guarantee (See 139).

5. *Novation :* 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.

Difference Between Specific and Continuing Guarantee

Specific Guarantee	Continuing Guarantee
1. A single transaction is guaranteed.	A series of transactions are guaranteed.
2. Comes to an end when the complete, transaction is 'continuing'.	Extends over the whole series of transactions, therefore called
3. Can not be revoked by the surety.	Can be revoked as a future transaction.

RIGHT OF SURETY

A. Against the Creditor

1. ***Ask the creditor to sue the debtor :*** On the guaranteed debt having fallen due for payment, **the** surety may ask the creditor to sue the debtor to collect the due amount, but he cannot compel him to do so. But he must then indemnity the creditor against any risk or delay arising as a consequence.

2. ***Require the creditor to terminate the debtor's*** *services :* In the case of a fidelity guarantee, if the principal debtor's dishonesty comes to light, the surety can require the creditor to terminate the principal debtor's services so as to save him from further loss.

3. ***Claim to any set off*** *:* The surety on being called upon to pay, can claim any set-off to which the principal debtor is entitled from the creditor.

4. ***Access to the securities of the debtor with the creditor :*** The surety can, after paying the guaranteed debt, compel the creditor to assign to him all the securities taken by the creditor either before or at the time of the contract of guarantee, whether the surety was aware of them or not.

5. ***Right to Share Reduction*** *:* On debtor's insolvency the surety is entitled to claim the proportionate reduction of his liability by the amount of dividend claimed by the creditor (from the Official Receiver of the Principal debtor). Similarly, debtor's debt obligation is scaled down by subsequent legislation, the creditor is entitled to claim proportionate reduction in his liability.

B. Against the Principal Debtor

6. ***Right ofsuborgation*** *:* After paying the guaranteed debt, the surety steps into the shoes of the creditor and acquires all the rights which the latter had against the principal debtor (i.e., he gets subrogated to all the rights and remedies available to the creditor) (Sec. 140). If the creditor has the right to stop goods in transit or has a lien, the surety, on payment of all he is liable for, will be entitled to exercise these rights.

7. *Right as to Securities with the creditor:* The surety has the right to proceed against such securities of the principal debtor, as the creditor could himself proceed.

8. ***Right of indemnity :*** The surety is entitled to be indemnified by the principal debtor for all payments rightfully made by him (Sec. 145).

9. ***Compel the principal debtor to perform the promise :*** The surety has also the right to insist the principal debtor to perform the promise. The surety can, before making payment, compel the debtor to relieve him from liability by paying of the debt, provided that liability is an ascertained and subsisting one.

10. ***Prove the Debt in Bankruptcy of the Debtor:*** In case of the bankruptcy of the principal debtor, the surety may prove the debt in respect of contingent liability even if he has not been called upon to pay any definite amount.

C. Against Co-sureties

When two or more persons guarantee the same *debt jointly or severally,* whether under the same or different contracts, they are known as *co-sureties. As* the co-sureties share the liabilities, they have in equity also the right to share the means of recovery.

11. ***Right to share the Securities Rateably (Proportionately) :*** If they are liable in equal amounts, they will be entitled to share equally the securities belonging to the principal debtor in possession of the creditor. In case their liabilities are unequal, they will share the securities rateably i.e., in equal proportions.

12. ***Right to contributions :*** If any one of the sureties has to pay more than his share, he has a right to call upon his co-sureties for such contribution as will enable him to recoup himself to the extent of excess amount paid by him over and above his proportionate liability.

13. ***Right to counter-security :*** Co-surety has also the right to benefit of a counter-security given to another surety by the principal debtor.

14. ***Right to plead the co-sureties and debtor in one suit:*** It is open to a surety to implead the co-sureties as well as the principal debtor in one suit. Where one surety has paid more than his proportionate share the proper procedure is to file a suit for contribution against his co-surety making the principle debtor also a party thereto.

Rights of the Creditor against Surety

1. ***Demand payment when due :*** *As* the liability of the surety arises, the creditor is entitled to demand payment from the surety although the debt is time-barred against the principal debtor *[Bombay Dyeing and Manufacturing Co. Ltd. Vs. State of Bombay,* 1958] or principal debtor has been adjudged as bankrupt or the principal debtor's contract is void or voidable. He can file a suit against the surety without suing the principal debtor, even if the principal debtor is solvent. The liability of the surety is immediate and not be deferred until the creditor has exhausted his remedies against the principal debtor.

2. ***Proceed against Surety before resorting to debtor/securities*** *: A* creditor can directly proceed against the surety before resorting to the securities deposited by the principal debtor. This is feasible although the liability of the surety becomes the primary one along with the principal debtor. Of course, a

contract may specifically provide that the creditor must exhaust his remedies against the principal debtor or give notice of default or proceed against the securities.

3. *Claim for Legal Expenses :* *A* creditor can claim the cost of baseless legal suits against the principal debtor, sued at the request of the surety i.e., the right of indemnity.

4. *Prove against the official receiver in case of surety's* *insolvency:* If the surety becomes insolvent, the creditor has the right to recover the dues from the estate of the insolvent party.

5. Proceed against any One Surety in the case of co-sureties : In case of co-sureties, the creditor will be at liberty to proceed against any one of the sureties for the whole debt.

6. *Concurrent remedy :* *A* creditor may also pursue his remedy concurrently against both the principal debtor and the surety, and obtain a degree against both in the same suit.

Rights of Co-sureties Among Themselves

1. *Co-sureties have rights and liabilities among themselves under Sec. 132:* Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third party not being a party to such a contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

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

3. *Contribution :* Co-sureties are liable to contribute equally if there is more than one surety in respect of one debt, though contracted on different dates unless contracted otherwise (See 146).

4. *Equality :* Where the sureties are bound in different sums, they are bound to pay equally as far as the limits of their respective obligations permit (S. 147).

Liabilities of Co-sureties

Co-sureties are jointly and severally liable in India. The discharge of one co-surety from his liability does not release the other co-sureties from their liability. *They are liable to bear the loss equally, subject to the limit of the debt guaranteed by him. As* mentioned earlier, if one of them has paid more than his share, he can claim contributipn from others. Where the co-sureties have

limited their liabilities to different sums, they should contribute equally and not exceeding their respective limits.

Illustrations : A, B and C are sureties for D guaranteeing different sums namely, A Rs. 10,000, B Rs. 20,000 and C Rs. 40,000. In case of default by D the liabilities of the co-sureties would be as under :

(i) D makes default in payment to the extent to of Rs. 30,000. Liabilities of A, B and C is Rs. 10,000 each.

(ii) D makes default to the extent to Rs. 40,000. Liability shall be as of A's 10,000 (maximum obligation), as ofB and C, Rs. 15,000 each being equal contribution.

(iii) D makes default of Rs. 70,000. A, B and C will pay the full amount ofguarantee.

DISCHARGE OF SURETY

Discharge of surety means he is freed from his obligations. This can happen in various ways, either by the action of the surety himself or by the creditor or by the principal debtor or by both or by operation of law.

A. From the side of the Principal Debtor/Surety

1. *Payment by debtor :* Surety is also discharged from his liability when the principal debtor has paid the debt himself.

2. *Revocation :* A surety may revoke his liability by giving a notice fo the creditor (Sec. 130). This section refers to continuing guarantee but by implication is equally applicable to a specific guarantee too.

3. *Death:* By the death of the surety, the contract of guarantee comes to an end unless there is different intention in the contract (Sec. 131). This section refers to continuing guarantee but by implication is equally applicable to a specific guarantee too.

SELF –EVALUATION QUESTIONS

1. The promiser in the contract of indemnity it called _____
2. A quadratic which extends to a series of transaction is called_____
3. Discharge of surety means the is freed for his obligalles (True √ / False)

Answer :

Indemnified

Continuing guarantee

True √

4. ***General Rules of Contract****:* A contract of guarantee is discharged by all the different ways as the case of a contract in general and the surety is discharged as a party to the contract.

B. From the side by the Creditor

5. ***Variation in the term of the Contract:*** When a variation is made in the terms of the contract of guarantee between the principal debtor and the creditor without the consent of the surety, the latter is discharged from his liability. Variation must be such which materially affects the interest of the surety. If a person stood surety for different distinct debts and consequently there were different contracts and if a variation was made in one of those contracts, he (surety) is not discharged from his liability in the case of other contracts (Sec. 133). Where several persons agreed to become co-sureties for different sums, and the creditor allowed one of them to alter his liabilities without the consent of the others. Held that none of the sureties is liable on the bond.

6. ***Release or Discharge of Debtor by Creditor :*** The surety is discharged by any contract between the creditor and the debtor by which the principal debtor is released. When the creditor is guilty of any act of omission or commission, the legal consequence of which is the discharge of the principal debtor, the surety is discharged from his liability (See 134). Thus, under this clause, the surety is discharged in the following two circumstances : (a) If the creditor makes a fresh contract with the principal debtor by which the latter is released from his liability; (b) If the creditor does any act or omission which has the effect of discharging the principal debtor from his liability.

7. ***Compounding with the principal debtor by creditor or extending time for payment:***

Where a creditor compounds with, or gives time to or agrees not to sue the principal debtor, the surety *is discharged unless the surety* assents to such a contract (See 135). However, it must be remembered that if the contract to extend time is not given to the principal debtor but is given to a third person, the surety is not discharged (See 136).

8. ***Agreement not to sue debtor*** *:* An agreement by the creditor not to sue the principal debtor without the consent of the surety, discharges the surety from his liability (S. 137). It may be pointed out here that if the creditor did not sue the principal debtor or did not enforce any other remedy against the debtor, the surety is not discharged unless provided otherwise in the contract of guarantee.

9. ***Creditor's act or omission impairing surety's remedy:*** If the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual

remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged (S. 139). The term "impairing the surety's remedy" means damaging or diminishing the rights of the surety.

10. ***Loss of security (Section 141):*** If the creditor loses or without the consent of the surety, parts with any security given to him at the time of the contract of guarantee, the surety is discharged from liability to the extent of the value of security.

The following acts committed by the creditor will however not discharge the surety:

(i) When the creditor contracts with a third party to give time to the principal debtor for the payment of the debt or the performance of the promise, surety is not discharged, (ii) When the creditor does not sue i.e., mere forbearance or enforce any other remedy against the principal debtor for the payment of the money or the performance of the terms, the surety is not discharged from his liability to the creditor (S. 137). (iii) Release by the creditor of one co-surety does not discharge the other co-sureties from their liability to the creditor (Sec. 138). (iv) Release of any security/securities by the creditor which he had received from the debtor subsequent to the contract of guarantee.

From the side of the Contract itself

The surety is liable under the guarantee only if the contract of guarantee is valid. If the contract of guarantee is invalid, then the surety will not be liable i.e., he will be discharged from his liabilities. Thus, where a guarantee is obtained by coercion, undue influence, fraud etc., then it will not be valid and the surety is not liable under such a guarantee. The following are the ways in which a contract of guarantee becomes invalid:

11. ***Guarantee obtained by misrepresentation*** *:* When a guarantee has been obtained by the creditor by misrepresenting the facts or such a misrepresentation had been made with his knowledge and assent, concerning a material part of the transaction (See 142).

12. ***Guarantee obtained by concealment:*** Any guarantee obtained by means of keeping silent by the creditor with regard to a material fact which had the surety known about such a material fact would not have entered into the contract of guarantee (S. 143).

13. ***Failure of the co-surety to join*** *:* 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 (S. 144).

14. ***Failure of consideration :*** Failure of consideration is a good ground for the discharge of a surety. But there must be substantial failure of consideration in order to make or operate the discharge as invalid. Since there is a common consideration between the creditor, the principal debtor and the surety, any failure of consideration between the creditor and the principal debtor makes the contract void and the surety is discharged. (Sec. 127)

Distinction Between Indemnity and Guarantee

Indemnity	**Guarantee**
1. Number of Parties : There are two parties principal : Indemnifier and Indemnified,	There are three parties to it viz., the principal : Indemnifier and Indemnified,
2. Number of Contracts : There is only one contract between the indemnified and indemnifier.	**There contracts** : (i) Between the Principal Debtor and the Creditor, (ii) Between the surety and the Creditor, and (iii) Between the surety and the Principal Dr (implied).
3. May be written or oral in both Indian and English Law.	According to Section 4, of the Statute of Frauds (in England) it should be in writing; in Indian law it may be written or oral.
4. Interest in the transaction : Theindemnifier has one interest in the transaction apart from the indemnity i.e., apart from his promise to pay to the loss.	The guarantee is totally unconnected with the contract but the only interest in the contract is his promise to the loss.
5. Nature of risk : It is possibility of risk of any loss happening in future against which the indemnifier undertakes to indemnify i.e., contingent risk.	There is an existing debt the discharge or performance of which is guaranteed by the surety i.e., it is the absolute and subsisting risk.
6. Nature of liability : The indemnifier is primarily and independently liable.	In a guarantee the liability of the surety is co-extensive with that of the principal debtor (ancillary liability). The guarantor is secondarily liable except where the principal debtor is incapable of contracting.

7. Subrogation : An indemnifier cannot have subrogation unless there is an assignment. Otherwise he must bring the suit in the name of the indemnified.	**If** a surety pays the debt or performs the obligation he can file a suit in his own name against the principal debtor to reimburse the amount so paid.
8. Request : It is not necessary for the indemnifier to act at the request of the indemnified.	It is necessary for the surety to give his guarantee at the request of the debtor.

BAILMENT AND PLEDGE

Definition of Bailment: Section 148 of the Act defines a Bailment thus, A *Bailment is the delivery of goods, by one person to another, for some specified purpose, and upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them.* The person delivering the goods is called the *Bailor.* The person to whom they are delivered is called the *Bailee.*

Characteristics of Bailment : 1. A bailment is normally based upon a *contract* either *express* or *implied* between the bailor and the bailee. However, the finder of goods is an exception to this rule i.e., a finder of goods becomes a bailee though there is no contract between the finder and the true owner. A person already in possession of goods may become a bailee by a *subsequent agreement,* express or implied. 2. A bailment necessarily involves *delivery of goods* by one person (called the *bailor)* to another person (called the *bailee)* for some purpose upon a contract. Delivery, however, may be actual or constructive. 3. In bailment, the *possession of goods* must change, though temporarily. 4. In bailment, ownership of the goods is retained by the bailor. It is not transferred. 5. The delivery of goods in bailment is for some *purpose.* The purpose may be the lending, giving or depositing the goods for (i) safe custody, or (ii) as a security for a debt, or (iii) for repair, or (iv)for conversion of form etc. 6. When the purpose for which the bailment is created, is accomplished, the goods are to be *returned or disposed according to the instructions of the bailor.* The goods returned should be the same ones which were bailed. 7. Bailment is possible only *of goods* i.e., of movable property and chattels and not of immovable property.

This money paid into a bank to the credit of a current (or any type of) account does not constitute bailment, money and actionable claims are not goods. However, the deposit of government promissory notes, promissory notes, with the bank for safe custody is treated as bailment. But if they are sent for collection, it is not bailment.

Bailment With reward and without reward

Gratuitous and Non-gratuitous bailment: A *gratuitous bailment* is that in which neither the bailor nor the bailee is entitled to any remuneration e.g., lending of a book to a friend. On the other hand, a *non-gratuitous bailment* is that in which either the bailor or the bailee gets remuneration e.g., giving of a watch or scooter for repair or clothes for stitching. It is also called as bailment for reward. Cases of bailments for reward are divided into two classes, viz., (i) those in which a reward is received by the bailor, and (ii) those in respect of which the reward is to be received by the bailee.

Rights of Bailor

1. *Restoration of goods lent gratuitously (Section 159)*: The lender of a thing for use may at any time even before the expiry of the time or accomplishment of the purpose require its return if the loan was *gratuitous* (i.e., without reward), even though he lent it for a specified time or purpose.

2. *Entitled to increase or profits to goods bailed (Section 163) :* In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profits which may have accrued from the goods bailed.

Illustration: A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

3. *Enforcement a/rights :* The bailor can enforce by suit all the liabilities or duties of the Bailee.

4. *Claim damages* *:* The bailor can claim compensation (damages) for the loss of the goods occasioned due to bailee's negligence like unauthorised use, unauthorised mixture, destruction or refuses to return or even deterioration of the goods bailed.

5. *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.

6. *Right to share* *:* Right to have his share in the compensation received in any such suit.

Duties of Bailor

1. *To Disclose faults in goods bailed (Section 150):* The bailor in gratuitous bailment, is bound to disclose to the bailee, faults in goods bailed, of which he (the bailor) is aware and which are likely to interfere with the use of them or expose the bailee to extraordinary risks. If the bailor does not make such

disclosure, he is responsible for damages arising to the bailee directly from such faults.

Illustration : A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damages sustained.

On the other hand, if goods are bailed for reward, the bailor is responsible to the bailee for such damages arising to the bailee directly from the faults in goods bailed, even though he was aware or not of the existence of such faults in the goods bailed.

Illustration : A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

2. *Repayment of expenses (Section 158):* In a gratuitous bailment, where the goods are to be kept or are to be carried, or to have work done upon them by the bailee for the bailor, the bailor shall repay to the bailee all the *necessary expenses* incurred by him for the purpose of the bailment. But in case of non-gratuitous bailment, it is the duty of the bailor only to bear *extraordinary-expenses,* if any, incurred by the bailee in relation to the things bailed. In such a bailment, the bailor is not to bear ordinary or usual expenses.

Illustration: **A** lends a horse to B for safe custody. The horse falls ill and B has to incur medical expenses on it. If the bailment is gratuitous (without reward) A must reimburse B for usual feeding expenses as well as medical expenses. But if the bailment is non-gratuitous, (with reward), A must repay B the medical expenses only, these being extraordinary expenses.

3. *Responsibility of lack of title* *(Section 164):* The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions regarding them.

4. *To receive back the goods* *:* It is a right as well as a duty of the bailor to receive hack the goods after the expiry of the term or the accomplishment of the purpose of bailment or when the bailee returns them. If the bailor refuses to receive them back, the bailee becomes entitled to receive compensation from him (bailor) for necessary expenses incurred by him (bailee).

Rights of Bailee

1. *Rightto Compensation (Sections 164 & 166):* If the bailor has no right to hail the goods or to receive them back or to give directions regarding them and consequently the bailee is exposed to some loss, the bailor is responsible for the same. If the bailor has no title to the goods, and the bailee, in good

faith delivers them back to or according to the directions of the bailor, the bailee shall not be responsible to the owner in respect of such delivery.

2. *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 expenses* incurred by him. It may be noted that this right can be claimed by the gratuitous bailee only. In non-gratutions bailment the bailee can also claim *extraordinary expenses incurred by* him.

3. *Right of Particular Lien (Section 170):* Where the bailee has, in accordance with the purpose of the bailment, rendered any services involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a *right to retain* such goods until he receives due remuneration for the services he has rendered in respect of them.

4. *Right* *of general lien (Section 171) :* Bankers, factors, wharfingers, attorneys of a High Court and policy brokers are entitled to retain, as a security for a general balance of amount, any goods bailed to them in the absence of a contract to the contrary. Even the other types of bailees may be given this right of general lien to retain the goods as a security for such balance of account, by entering into an agreement to this effect.

5. *Right to claim compensation in case of faulty goods (Section 150):* The bailee has a right to know 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.

6. *Right to Inter-plead* *(Section 167) :* If a person, other than the bailor, claims goods bailed, the bailee may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

7. *Right to bailment by* *several joint owners :* If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of one joint owner without the consent of all, in the absence of any agreement to the contrary. In such a case delivery of goods to any one of the several joint bailors of goods will amount to delivery of goods to all of them, in the absence of any agreement to the contrary.

8. *Right to sue (Section* *180):* 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.

Duties of Bailee

1. ***Duty of reasonable care of goods bailed*** *(Sections* ***151 &*** *152):* In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. If the bailee has taken reasonable amount of care which a man of ordinary prudence would take, then in the absence of any special contract, he will not be responsible for the loss, destruction or deterioration of the goods bailed.

2. ***Not to make unauthorised use of goods bailed*** *(Sections 153 of 154):* Bailee must use the goods according to the conditions of the contract of bailment or the directions of the Bailor. He must not use the goods in a manner inconsistent with the terms of bailment. If he docs so, the bailor can terminate the bailment and recover any loss that might have been caused due to such unauthorised use.

3. ***Duty not to mix goods bailed with other goods(Section 155 to*** *157):* The Bailee should not mix the goods bailed with other goods of his own, without the consent of the bailor. He must maintain separate identity of bailor's goods.

(a) ***Mixture with bailor's*** *consent:* If the bailee, with the consent of the bailor, mixes the goods of the bailor, mixes with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

(b) ***Mixture without bailor's consent when goods can be separated :*** If the bailee, without the consent of the bailor mixes the goods with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively, but the bailee is bound to bear the expenses of separation or division, and any damages arising from the mixture.

(c) ***Mixture without bailor's consent when goods cannot be separated :*** If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

4. ***Duty to return goods without demand (Sections 160 & 161) :*** As soon as the purpose of bailment is accomplished, the bailee should return the goods bailed to the bailor, otherwise he will be liable in damages for loss destruction or deterioration occasioned by the delay, and will also be liable during such period as an insurer.

5. *Duty not to set up adverse title :* Bailee cannot set up as against the bailor, a title over goods bailed in favour of any one (including himself) other than the bailor. He is also estopped from denying the right of the bailor to bail the goods and to receive them back. It is the duty of the bailee to return the goods only to the ba'kir even though any third person is claiming the title over them.

Termination of Bailment

Under the following circumstances, a contract of bailment is terminated:

1. *Lapse of time :* When the contract of bailment is for a specified period, it terminates after the expiry of such period.

2. *Accomplishment of the purpose :* A bailment is terminated on the accomplishment of the purpose for which it was made.

3. *Inconsistent use of goods (Section 153):* A contract of bailment may be terminated by the bailor if the bailee does any act with regard to the goods bailed, inconsistent v (11 the conditions of bailment.

4. *Death (Section 162) :* A gratuitous bailment is terminated by the death of either the bailor or the bailee.

5. *Gratuitous bailment (Section 159) :* The lender of a thing for use may at any time terminate the bailment, even if it was lent gratuitously for a specified time or purpose. But if any loss is caused to the bailee because of such premature termination, it must be made good by the bailor.

FINDER OF LOST GOODS

Section 71 lays down that "A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a *bailee".* He is bound to take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods found. The rules relating to the rights of the Finder of Goods are given below :

1. *Right of possession :* The finder is entitled to retain possession of the goods against every one except the true owner.

2. *Right of lien :* When the true owner is found,/the finder can exercise *possessory lien* over the goods against the owner until he receives compensation for expenses, etc., incurred in connection with preservation of the goods found. But he cannot sue the owner for the compensation, or trouble and expenses voluntarily incurred by him to preserve the goods and to find out the owner.

3. *Right to reward :* Where the owner has offered a specific reward for the return of the goods lost, the finder may sue for such a reward, and may retain the goods until he receives it (Section 168).

4. *Right of sale :* When a thing which is commonly the subject of sale is lost, the finder may sell it when (i) the owner cannot with reasonable diligence be found, or (ii) if found, the owner refuses to compensate the finder for his lawful charges, or (iii) the thing found is in danger of perishing or of losing the greater part of its value, or (iv) the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

Illustration*:* F picks up a diamond on the floor of S's shop. He hands it over to S to keep it till the true owner is found. No one appears to claim it for quite some weeks inspite of the wide advertisements in the newspapers. F claims the diamonds from S who refuses to return. S is bound to return the diamond to F who is entitled to retain the diamond against the whole world except the true owner.

Obligations of finder of lost goods : Thus in respect of duties and liabilities a finder is treated at par with the bailee. The finder's position, therefore, has been considered along with bailment. The main obligation (duties and liabilities) are : 1. He must take reasonable care of the goods and if, inspite of this, the goods are destroyed, he is not responsible for any loss. 2. He must not use the goods for his own purpose. 3. He must not mix the goods with his own goods. 4. He must try to find out the owner of the goods. If he does not do that, he will be liable as a trespasser.

Possessory Lien/ Particular Lien and General Lien

Lien is the right to retain property until the charges due in respect of the property are paid. A lien is a right of person in possession of goods belonging to another, to retain or detain the goods, until certain demands are satisfied. Possession is essential to create a right to lien. This right is sometimes called as *Possessory Lien.* Lien is of two kinds : Particular Lien and General Lien. *' Particular Lien',* (also called as *'Special Lien').* It is a right to retain goods belonging to any for the discharge of a debt or liability incurred in their connection. Persons entitled to a particular lien are carriers, mechanics, repairers, unpaid seller of lost goods, finder of lost goods, pawnee and agent, etc. A bailee is also entitled to particular lien only i.e., he has a right to retain that a particular property in respect of which he has extended some skill or service and his charges are due. *General Lien* is the right to hold goods bailed belonging to another, not only for the discharge of a debt or liability incurred in respect of those goods, but also as a security for the general balance of account.

Section 171 provides for General Lien only in case of Bankers, Factors, Wharfingers, Attorneys of High Courts, Policy Brokers etc.

Differences between Particular lien and General lien : 1. Particular Lien can be *exercised only against those goods* in respect of which the bailee has rendered some skill and labour, whereas General Lien can be exercised against any goods or property of another in possession of the person exercising the right. 2. Particular Lien is the right to retain the goods only for recovering the amount due on account of labour or skill employed or expenses incurred upon the goods, whereas General Lien is a right to retain any property belonging to the other for recovering a *general balance* of account. 3. Particular Lien can be *exercised by all* bailees whereas General Lien can be exercised only by the bankers, factors, wharfingers, attorneys and policy brokers. (Sections 170 & 171).

Termination of Lien : In the following circumstances, the right of lien can be terminated : 1. The right of lien is a personal right, which continues so long as the bailee is in possession of the goods. It is lost as soon as the possession of the goods is surrendered by the bailee. 2. The right of lien is terminated as soon as the amount due to the bailee is paid to him. The tender (offer) of the amount also terminates the lien. 3. The bailee may give up his right of lien by entering into an agreement. In such cases, the lien is also terminated.

PLEDGE

According to Section 172 for the Indian Contract Act, 1872 a pledge is a bailment of goods . as security for payment of debt or performance of a promise. The person who offers the security (i.e., the bailor) is called the *'Pawnor'* or *'Pledger'* and the person who receives the good as security (i.e., bailee) is called the *'Pawnee'* or *'Pledgee'*. From this it is clear that in the case of pawn or pledge (i) there should be bailment of goods, and (ii) the object of such bailment should be to hold the goods as a security for the payment of a debt or performance of promise and not for safe custody or any other purpose.

Since pledge is a branch of bailment, it must satisfy the essential requirements of a bailment viz., (i) there must be delivery of goods, (ii) the delivery must be made for some specific purpose, (iii) the delivery must be made on condition that the goods shall be returned in specific time when the purpose is over, or disposed of according to the directions of the bailor, and (iv) only possession, but not the ownership of the good's, is transferred.

Rights of Pledgee

1. *Rights of retainer:* The pledgee has a right to retain the possession of the goods pledged till, be recovers the debt, interest and other necessary expenses incidental to possession or preservation of the goods.

2. *Security for subsequent Advances/debts* *:* He cannot retain the goods for debts other than those for which a pledge is made. Unless the parties contract that they shall be security also for any other subsequent debts.

3. *To Recover any extraordinary expenses* *:* The pledge is also entitled to receive any extraordinary expenses incurred for the preservation of goods pledged. He is entitled to this right even if he has violated some provisions of the law in respect of the goods pledrc '\

4. *To bring civil suit for amount due :* In the case of a default by the pledger to make payment of the debt, the pledgee has the right either (a) to bring a civil suit against the pledger for the amount due, and retain the goods pledged as collateral security; or (b) to sell the goods pledged by himself after giving the pledger reasonable notice of sale; or (c) to ask the court to put the pledged articles on sale.

5. *Sale after notice:* The notice of sale should be clear and specific in language indicating the intention of the pledgee to sell the security. It should be noted that this duty of the pledgee to give notice of sale cannot be dispensed with even if the agreement of pledge authorises the pledgee to sell the security without notice to the pledger. Further, it is not obligatory for pledgee to sell the goods within reasonable time after the notice of sale is served. If the proceeds of such sale are insufficient to meet claim of the pledgee, the pledger is still liable to pay the balance. If the sale proceeds are greater than the amount so due, the pledgee has to return the excess or surplus to the pledger.

Note : The pawnee may sell the goods before filing the suit in a Court of Law. If the suit is filed for the recovery of the amount then the goods can be sold through court orders only.

6. *Right to damages :* The pledgee has a right to be compensated for any damage which he suffers as a result of non-disclosure of any defects or faults in the goods pledged which are within the knowledge of the pledger.

7. *Right to indemnity :* The pledgee has a right to claim any damages suffered because of the defective title of the pledger.

8. *Remedy against deprivation :* In case of injury to the goods or their deprivation by a third party the pledgee would have all such- remedies that the owner of the goods would have against them.

Duties of a Pledgee/Pawnee

1. *To take reasonable care :* The pledgee must take that much care which an ordinary prudent man would take of his own goods under similar circumstances.

2. *Not to make any unauthorised use :* The pledgee must make use of goods pledged according to the agreement between the two parties. If he makes any unauthorised use, the pledger is entitled to terminate the contract and claim damages, if any.

3. *Return on repayment:* The pledgee must return the goods pledged on payment of the debt. If the goods are not returned by the pledgee at the proper time, he is responsible to the pledger for any loss, destruction or deterioration of the goods pledged.

4. *To return any increase or profit:* The pledgee must return to the pledger any increase or profit which have accrued from the goods pledged, e.g., dividends, bonus shares, etc., in respect of pledged shares.

5. *Not* ***to set-up adverse title ;*** The pledgee should not deny the pledger's title. He should not set up his own title or that of a third party.

Rights of a Pledger/Pawnor

1. *Right of redemption :* Even after the expiry of a stipulated period, or if there has been a default by the pawnor, he may redeem the goods pledged at any subsequent time before the actual sale of the goods pledged. But he must pay expenses which may have arisen from his default. The *period of limitation* in the case of a loan on a pledge is three years to run from the date of the loan.

2. *To receive notice of sale :* The pledger has a right to receive a reasonable notice of sale, under Sec. 176 of the Indian Contract Act, from the pledgee.

3. *To receive the surplus :* The pledger has right to receive the surplus sale proceeds after meeting the claims of the pledgee.

4. *To take action for conversion :* If the sale is effected by the pledgee without giving a reasonable notice to the pledger, the latter has got a right to ask for damages on the ground of conversion. But he cannot sue for a declaration that the sale is contrary to law.

5. *Right to increase or profit:* The pledger has a right to receive any increase or profit which may have accrued from the goods pledged.

Duties of a Pledger/Pawnor

1. *Disclose the faults :* The pledger should disclose to the pledgee, the faults in the goods pledged, of which he is aware. If he does not disclose, he will be liable for the loss resulting therefrom.

2. *To meet extraordinary expenses :* The pledger should bear the extraordinary expenses incurred by the pledgee in respect of the goods pledged.

3. *To indemnify the pledgee :* If the title of the pledger to the goods pledged is defective and the pledgee suffers any loss due to this fact, the pledger should indemnify the pledgee.

Pledge by Non-owner: Generally, no person can pledge the goods except when he is the legal owner of the goods. But under certain circumstances a pledge by a non-owner is also valid, (1) Pledge by a mercantile agent (Section 178): (2) Pledge by person in possession under voidable contract (Sec. 178 .A): (3) Pledge by pawnor who has only a limited interest (Sec. 179): (4) Pledge of co-owner : A joint owner who is in sole possession of the goods, with the consent of others, can make a valid pledge. (5) Seller or buyer in possession after sale : A seller, left in possession of goods sold, is no more owner of the goods but a pledge created by him is valid, provided the pawnee acts in goodfaith and has no notice of the sale of goods to the buyer. (6) Where a buyer or a person who has agreed to buy, obtains possession of goods with the seller's consent, before the payment of price, pledges these goods to a pawnee who takes them in goodfaith and without notice of the seller's right of lien or any other right of the seller the pledge is valid.

SELF –EVALUATION QUESTIONS

4. Bailment is the delivery of goods by one person to another is called ____
5. A person who finds goods belongings to another is called _____
6. No person can pledge the goods except when he is the legal owner of the goods. (True √ / False)

Answer

Bailment

Finder of lost goods

True

LAW OF AGENCY

Agency is a relation between two parties created by agreement express or implied.* The relationship of agency arises wherever one person called the *agent* has authority to act on behalf of another called the *principal.*

Essentials of contract of agency: The relationship of an agency is based upon a contract. The contract may be either express or implied. The essentials of agency are as follows : 1. There should be the appointment by the principal of an agent, 2. The principal should confer authority on the agent to act for him. 3. The authority conferred should be such as will make the principal answerable to third panics. 4. The object of the appointment must be to establish relationship between principal and third parties. 5. The relationship of the agency is based on confidence between the principal and the agent.

Anyone may be an Agent: Section 184 of the Contract Act provides that any person may become an agent. In other words, even a minor can be employed as agent and the principal shall be bound by the acts of such an agent. But no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal. Thus, if an agent is to be held liable to the principal, he must be a major and of sound mind.

A person who is *major* and who is of *sound mind* can employ another person as an agent.' Section 183 states that a person who is of the age of majority and is of sound mind can become a principal. Thus, a minor cannot act as a principal. It may be noted that *consideration is* an essential element for the validity of every contract, but, section 185 lays down (hat *"No consideration is necessary to create an agency". A* contract of agency is one *of good faith;* the agent must disclose to the principal every information coming to his knowledge, which may also influence the principal in the making of the contract with the third parties.

Classification of Agents : 1. Express or Implied agents; 2. General, Special or Universal agents; 3. Agent or Sub-agent. Another broad classification of agents is *mercantile* (or commercial) agents and *non-mercantile* (or non- commercial) agents. The following are some of the important mercantile agents. Banker, Factor, Broker, Auctioner, Commission Agent and Del Credere Agent. A *del credere* agent is an agent who in consideration of an extra remuneration guarantees to his principal the performance of the contract by the other party. The *del credere commission* is a higher reward than is usually given in the form of a commission. He occupies the position of a guarantor as well as of an agent. But his liability is secondary and arises only on the insolvency or failure of the other party. A *del credere* agent is appointed generally when the principal deals with a person about

whom he knows nothing. Non-mercantile agents include counsel, solicitor, guardian, promoter, wife, receiver, clearing and forwarding agent, insurance agent, estate agent etc. Though these cannot be classed among mercantile agents, they are always engaged by merchants to conduct their suits in connection with mercantile disputes.

Creation of Agency

An agency may arise in different ways. It need not be created expressly by any writing and may be inferred from the circumstances and conduct of the parties. An agency may be constituted in three following ways : (1) by express agreement; (2) by implication or law, i.e., from the conduct of the parties or from the necessity of the case and (3) by ratification.

* Express agreement and Implied agreement have been explained earlier.

Implied Agency

Implied agency includes : (a) Agency by estoppel, (b) Agency by holding out, (c) Agency by operation of law, and (d) Agency by necessity.

Agency by Estoppel (Sec. 237): In many cases, an agency may be implied from the conduct of the parties, though no express authority has been given. Thus, where the principal knowingly permits a person to act in a certain business in his name or on his behalf, such a principal is estopped from denying the authority of the supposed agent to bind him.

Illustration: If a railway company holds out that its parcel clerk can accept consignments for despatch, it cannot afterwards say, that he had no such legal authority. There are three possible cases of agency by estoppel: (a) A person can be held out as an agent although he is actually not so, (b) A person acting as agent may be held out as having more authority than he actually has, (c) A person may be held out as agent after he has ceased to be so.

Agency by holding out: Where a person permits another by a long course of conduct to pledge his credit for certain purposes, he is bound by the act of such person in pledging his credit for similar purposes, though in some cases without the previous permission of his master. This is a case of agency by 'holding out'. Similarly where a husband holds out his wife as having his authority by words or conduct and a third party advances money to the wife on the faith of such conduct, the husband is liable for such debts.

Agency by operation of law' : Sometimes, an agency arises by operation of law. When a company is first formed, its promoters and its agents are recruited and implied by operation of law. A partner is the agent of the firm for the purposes of the business of the firm, and the act of a partner, which is done to carry on, in the usual way, business of the kind carried on by the firm, binds

the firm (Sees. 18 and 19 of the Indian Partnership Act, 1932). In all these cases the agency is implied by operation of law.

Agency by necessity : Sometimes extraordinary circumstances require that a person who is not really an agent should act as an agent of another. In such a case, though there might not have been an express or implied authority to do an act, the law implies such an authority in favour of that person on account of the necessity that had arisen. Before an agency of necessity can be inferred, the following conditions should be fulfilled ; (a) There should be a real and definite *necessity for* the creation of the agency, *(b) It should* be impossibfe to *obtain the principal's* instructions, (c) The person acting as an agent should act *bonafide and in the interest* of parties concerned.

Agency of husband and wife : The wife has authority to pledge her husband's credit for as they are living together. The authority of the wife to bind her husband is to be exercised in a proper manner.

3. Agency by precedent and subsequent authority: A contract of agency may be formed either by precedent authority or by subsequent authority. Agency by subsequent authority is known as agency by ratification.

Ratification is a kind of affirmation or approval of a previous unauthorised act or acts relating to a contract. It implies the adoption by the principal of an act made by an agent in his behalf, but without his authority. Section 196 of the Contract Act provides that *"where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority"*.

Illustration : *A* without having any authority of B, acts as B's agent and enters into a contract with C. The contract will be binding on B, if he ratifies or approves of the same.

Effect of ratification : Ratification *relates back* to the date when the act was done by the agent. It is but the adoption of the old contract. It only endorses the unauthorised act of the agent as authorised. It is authorisation retrospectively. In other words, it is equivalent to previous authority. It is a cure of the lack of authorisation or a substitute for authorisation. This is known as *'Doctrine of Relation Back'*.

Essentials of a valid ratification : To make a ratification valid, the following conditions must be fulfilled.

1. Act must have been done *on behalf of the* person ratifying;
2. The principal must be *in existence* at the time of the act that is to be ratified;

3. Ratifier should be *competent* to ratify the act;
4. The transaction must have been *subsisting* at the time when it is ratified;
5. The principal must have signified his *unconditional acceptance* of the act;
6. Ratification may be *express or implied',*
7. Ratification must have been made *with full knowledge* of all the material facts;
8. *Whole transaction* must be ratified;
9. Ratification may be of *one act or of a series of acts;*
10. Ratification must be made within a *reasonable time;*
11. Act to be ratified should *not be void or illegal;*
12. Ratification must be *communicated;*
13. Ratification must *not injure a third person;*
14. Ratification *relates back* to the date of the act of the agent.

Nature of Authority of an Agent

An agent is appointed with some authority by which he can bind the principal with third persons. In general, acts of an agent done within his authority, bind the principal (Sec. 225). The authority, however, is not unlimited.

A. *Express and implied authority* *:* The authority of an agent may be express or implied (Sec. 186). An authority is said to be expressed when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken and written or the ordinary course of dealing, may be accounted as circumstances of the case (Sec. 187).

B. *Ostensible or apparent authority :* Ostensible or Apparent Authority is the authority of an agent as it appears to others. When an agent is employed for a particular business, the persons dealing with him can presume that he has authority to do all such acts as are necessary or incidental to such a business.

C. *Emergency authority* *:* An agent has authority, in emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances (Sec. 189).

Sub-Agent and Substituted Agent

Definition of Sub-Agent: Section 191 defines a sub-agent as *"a person employed by and acting under the control of the original agent in the business of the agency".*

Appointment of Sub-agent: The ordinary rule of the law is that an agent cannot delegate his powers or duties to another without the express authority of the principal. To this rule, there are certain *exception*^ where an agent can appoint a sub-agent: (a) where the ordinary *custom or usage* of trade permits employment of sub-agent; (b) where it is necessary because of the *nature of the agency;* (c)where the act to be done *is purely ministerial* and does not involve any confidence or require any skill; (d) where the agent has *express authority* to appoint sub-agent; (e) where in the course of the agent's employment unforeseen *emergencies* arise which render it necessary to delegate his authority; (f) where *the principal knows* that the agent intends to appoint a sub-agent; (g) where the authority of the agent to appoint a sub-agent can be *inferred from the conduct of the parties.*

Substituted agent : A substituted agent is a person appointed by the agent to act for principal in the business of the agency with the knowledge and consent of the latter.

Illustration : A directs B, his solicitor to sell his estate by auction and to employ an auctioneer, for the purpose. B names C as an auctioneer to conduct the sale. C is not a sub-agent but is A's agent for the conduct of the sale.

A substituted agent is deemed to be an agent to the principal and not his sub-agent. A privity of contract is established between the principal and the substituted agent. The agent is not concerned about the work of the substitute. A duty, however, is implied on the original agent to choose a proper substituted agent with reasonable care. The agent selecting such an agent must use discretion and prudence. But he is not to guarantee solvency, skill or integrity of the person selected. If he fails to exercise such care, he becomes liable for damages to the principal for his negligence.

Difference Between Sub-Agent and Substituted Agent

Both a sub-agent and substituted agent are appointed by the agent. But, however, the following are the points of the distinction between the two. (1) The agent not only *appoints* a sub-agent but also *delegates* to him a pan of his own duties. The agent does not delegate any part of his task to the substituted agent. (2) A sub-agent does his work under the *control* of the agent but a substituted agent works under the instructions of the principal. (3) *Privity of contract* is established between a principal and a substituted agent. But there is no privity of contract between the principal and the sub-agent. (4) *The sub-*

agent is responsible to the agent alone and is not generally responsible to the principal. But a substituted agent is responsible to the principal and not to the original agent who appointed him. (5)The *agent is responsible* to the principal for the acts of the sub-agent, but he is not liable for those of the substituted agent, provided he has taken due care in selecting him. (6) In the case of a substituted agent, the *agent's duty* ends once he has named him, but in the case of a sub-agent, the agent remains answerable for the acts of the sub-agent as long as sub-agency continues.

Rights of an agent: 1. An agent is entitled to receive agreed *remuneration.* In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act (Sec. 219). 2. An agent may *retain* out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business and also such remuneration as may be payable to him for acting as agent (Sec. 217). 3. In the absence of any contract to the contrary, the agent is entitled to *particular lien* i.e. right to retain goods, papers (documents) and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him (Sec. 221). 4. Under the following circumstances, an agent can *stop the goods in transit: 5.* The employer of an agent is bound to *indemnify* him a.cainst the consequences of all lawful acts done by such agent in exercise of authority conferred upon him.

Duties of an agent : 1. To follow the *instructions* of the principal; 2. To work with *reasonable skill* and *diligence;* 3. To render *proper accounts* ; 4. To *communicate* with the principal in difficult situations; 5. *Not to deal on his own account;* 6. *To pay all sums* to his principal; 7. *Not to set up adverse title ;* 8. *Not to delegate* his authority ; 9. Not to use *agency informations* against principal ; 10.Termination of agency on principals *death or insanity ; 1*1 .Not to put himself in a position where *interest* and *duty conflict.*

Principal and Third Parties : The rights and liabilities of a principal in relation to third parties under contracts made by his agent depend upon whether (a) an agent contracts as agent for a named principal: (b) an agent contracts for a principal whose name he does not disclose : (c) an agent contracts in his own name but in reality for a principal whose existence he does not disclose.

Agent Acting for a Named Principal

1. *When the agent acts within the scope of his authority (Section* *216}:* Where an act is done by an agent within the scope of his authority, his acts are

binding on the principal. The principal will also be bound by the acts of the agent provided (a) the act is lawful and (b) it is within the scope of agent's authority. Thus, where an agent is authorised to receive payment on behalf of the principal, a payment to the agent discharges the debtor from liability to the principal and the fact that the agent embezzled the money is immaterial.

2. *When the agent exceeds his authority* *(Sections 227 and 228):* Ordinarily, the principal is liable for those acts of the agent which are within the scope of his authority. According to Section 227, where an agent has done more than what he is authorised to do and it is separable, the principal is bound by that part which is within his authority.

3. *Principal bound by notice given to agent* *(Section 229) :* A notice given to the agent is as effectual as notice given to the principal as otherwise notice might be avoided in every case by employing agents. Thus, the knowledge of a manager of a bank is knowledge of the bank. Similarly, knowledge of one partner in a firm is a knowledge of all the partners. The principal is bound by notice given to the agent in the course of the business. Knowledge of the agent is the knowledge of the principal. But where knowledge is not acquired by the agent in course of his employment, it cannot be imputed to the principal. However, the rule contained in this section will not apply if the agent had committed a fraud on the principal.

4. *Liability of principal by estoppel* *(Section 237):* A principal is liable where he has, by words or conduct, induced a belief in the contracting party that the act of the agent was within the scope of his authority. The liability of the principal under Section 237 is not based on any real authority, but is by estoppel.

5. *Liability for misrepresentation or fraud by an agent* *(Section 238) :* The principal is liable for the fraud of his agent acting within the scope of his authority, and whether the fraud is committed for the benefit of the principal or that of the agent.

Agent acting for an unnamed principal: Where an agent disclosed the fact, that he is an agent, hut at the same time does not disclose his principal's name, the contract made by the agent is binding on the principal. But the unnamed principal should be in existence at the time of the contract. Where an agent signed the contract as a broker, "to my principal's", but did not disclose the name of the principal, it was held that the broker was not personally liable.

Agent acting for an undisclosed principal : The doctrine of the undisclosed principal comes into operation when an agent enters into a contract with a person without disclosing the name and the existence of his principal. Where the agent does not disclose the existence of his principal he is *personally*

liable for the contract. On such contracts he can sue and be sued in his own name because he is then in the eyes of law the real contracting party. But the agent's right to action comes to an c-sd with the intervention of the undisclosed principal. Once the third party knows of the existence of the principal as well as of the agent, he has a right to sue both or either of them. Once he elects to sue one and not the other, it would appear that he exhausts his cause of action.

Misrepresentation and fraud by agents : Misrepresentation made or frauds committed, by agents acting in the course of their business for their principals have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals. But misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principal (Sec. 238).

Cases of personal liability of an agent:

1. Where the agent acts for *a foreign principal;*
2. Where the agent acts for an *undisclosed principal;*
3. When the agent acts for a *disclosed principal who cannot be sued;*
4. Where agent's authority is *coupled with interest;*
5. Where an agent received or pays money by *mistake or fraud;*
6. Where the agent *signs the negotiable instrument in his own name;*
7. Where the agent *exceeds his authority;*
8. Where the *contract expressly provides;*
9. *Where an agent acts for a non-existing principal;*
10. Where according to *trade usage*, an agent is personally liable.

Termination of Agency

Agency may be terminated in the same manner as any other contract, viz., by the operation of law or by the acts of the parties. In certain cases, the agency is irrevocable, i.e., it cannot be terminated.

Termination of agency by acts of the parties : (1) By *agreement* between principal and agent; (2) By *revocation* of the agent's authority by the principal; (3) By *renunciation* of business by the agent.

Termination of agency by operation of law :

1. By *performance of* the contract of agency;
2. By *efflux of time;*
3. By *death or insanity of* the agent or principal;
4. By the *insolvency* of the principal and in some cases that of the agent;
5. *By the destruction of the subject matter of agency;*

6. Where the principal or agent is an incorporated company, by its *dissolution;*
7. By the principal becoming an *alien enemy;*
8. *By termination of sub-agent'5 authority.*

***Effect* of termination (Section** 208): As between the principal and the agent, termination of agency is effective only when it becomes known to the agent, but so far as third parties are concerned, termination of agency takes effect when it is known to them.

Irrevocable Agency

When an agency H.e., the relationships between the principal and agent) cannot be terminated it is said to be an irrevocable agency.

1. *Where the* *agency is* ***coupled with interest:*** An agency is said to be coupled with an interest when the agency is created for the purpose of securing some benefit over and above his remuneration as an agent. Thus, an agency is coupled with interest when the agent has an interest in the authority granted to him or when the agent has an interest in the subject-matter with which he is authorised to deal. Such an agency cannot, in the absence of any contract to the contrary, be terminated to the prejudice of such interest.

2. *Where the agent has incurred a personal liability**:*** When an agent has incurred personal liability, the agency becomes irrevocable, for the principal cannot be permitted to withdraw, leaving the agent exposed to risk or liability he has incurred.

3. *Where the agent has partly exercised the authority :* Section 204 of the Act lays down that the principal cannot revoke the authority given to his agent after the authority has partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Illustration: A authorises B to buy 1,000 bags of paddy on account of A and to pay for it out of A's money remaining in B's hands. B buys 1,000 bags of paddy in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the paddy.

REVIEW QUESTIONS

1. Define the **term** 'agency'. What are the essentials and legal rules for a valid agency?
2. Briefly explain the various modes by which an agency may be created.
3. What is agency by estoppel? In what way does it differ from an agency by holding out?
4. Mention some important mercantile agents and their functions.

5. 'Ratification is tantamount to prior authority'. Comment and explain the requisites of a valid ratification.
6. What are the different kinds of agents? How they can be classified?
7. State briefly the duties and rights of an agent. What is the degree of skill required of an agent?
8. Discuss the duties of an agent under the Indian Control Act.
9. Define the term 'substituted agent'. State the comparison between sub-agent and substituted agent.
10. State the rules relating to the personal liability of an agent for a contract entered into by him on behalf of his principal.
11. Discuss briefly the different modes in which the agency can be terminated. When does the termination take effect ?
12. Explain (a) Irrevocable Agency (b) Agency coupled with interest.
13. Define a contract of indemnity. What are the essentials and legal rules for a valid contract of indemnity?
14. When does the liability of indemnifier commence?
15. State the rights of the indemnity holder when sued.
16. Define a contract of guarantee. What are the essentials and legal rules for a valid contract of guarantee?
17. Define a continuing guarantee and state how it can be revoked?
18. State the nature and extent of surety's liability. How and in what circumstances the surety is discharged from his liability?
19. "The liability of surety is secondary; it is co-extensive with that of the principal debtor unless it is otherwise provided by the contract". Discuss.
20. "A surety is a favoured debtor". Comment.
21. Explain the difference between a contract of indemnity and contract of guarantee.
22. Define bailment and state its characteristic features. Discuss the various kinds of Bailment.
23. Discuss the rights and duties of bailor and bailee.
24. What are the circumstances in which the contract of bailment stands terminated?
25. What are the rights and duties of the finder of lost goods?
26. Define a pledge. Discuss the rights of the pledgee and pledger.
27. When will a pledge made by a non-owner of the goods be valid?

NOTES

UNIT - III

CONTENTS

LAW OF SALE OF GOODS ACT, 1930

UNIT - III

LAW OF SALE OF GOODS ACT, 1930

INTRODUCTION

Till 1930, transactions relating to sale and purchase of goods were regulated by the Indian Contract Act, 1872. In 1930, Sections 76 to 123 of the Indian Contract Act, 1872 were repealed and a separate Act called 'The Indian Sale of Goods Act, 1930 was passed. It came into force on 1st July, 1930. With effect from 22nd September, 1963, the word 'Indian' was also removed. Now, the present Act is called 'The Sale of Good Act, 1930'. This Act extends to the whole of India except the State of Jammu and Kashmir.

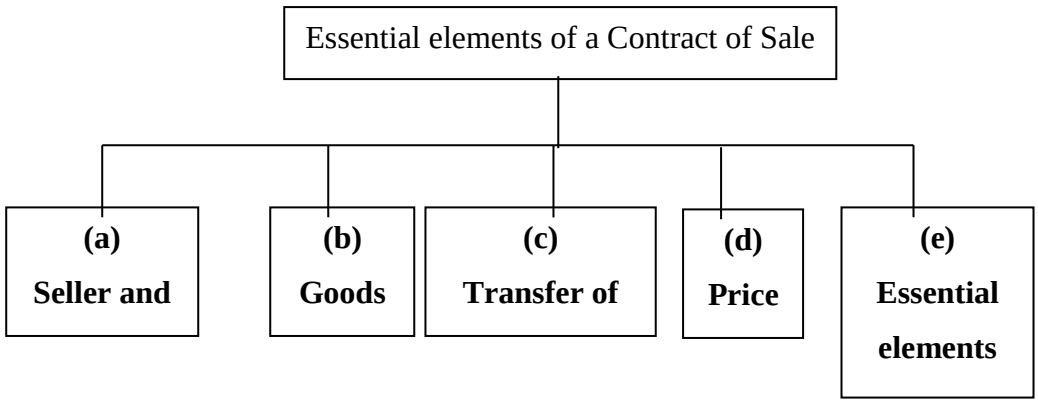
According to Section 3, the provisions of the Indian Contract Act, 1872, still continue to apply to contracts for the sale of goods except where 'The Sale of Goods Act', 1930 provides for the contrary.

Meaning of contract of Sale

According to Section 4(1) of the Sale of Goods Act, 1930, "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 price". 'Contract of Sale' is a generic term which includes both a sale as well as an agreement to sell.

Essential Elements of Contract of Sale

The aforesaid definition clearly indicates the essential elements shown below .



There must be a seller as well as a buyer. 'Buyer' means a person who buys or agrees to buy goods [Section 2(1)]. 'Seller' means a person who sells or agrees to sell goods [Section 2(13)].

'Good' means every kind of movable property other than actionable claims and money.

Property means the General property in goods, and not [Section 2(11)]. General property in goods means ownership of the goods.

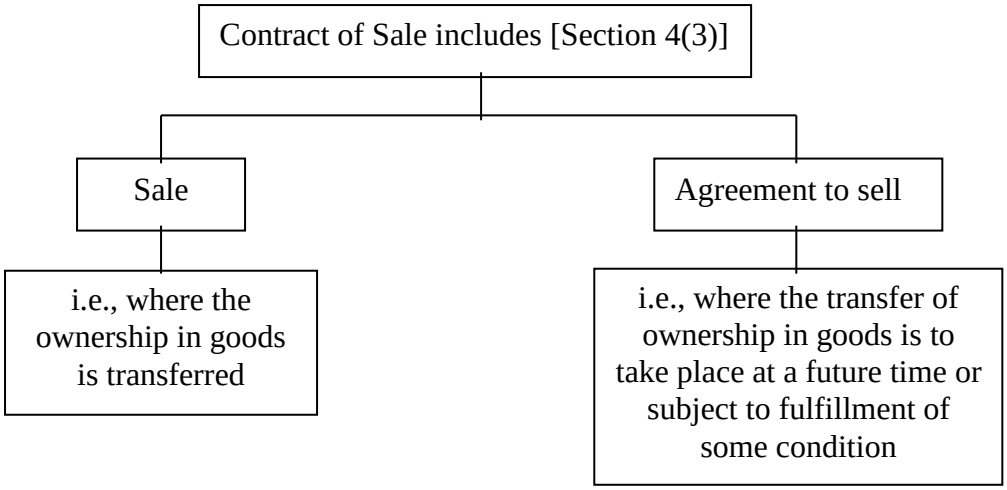
There must be a price. Price here means the money consideration for a sale of goods [Section 2(10)]. When the consideration is only goods, it amount to a 'barter' and not sale.

In addition to the aforesaid specific essential elements, all the essential elements of a valid contract as specified under Section 10 of Indian Contract Act, 1872 must also be present.

DISTINCTION BETWEEN SALE AND AGREEMENT TO SELL

What does 'Contract of Sale' Include

The term 'Contract of Sale' includes both a 'sale' and 'agreement to sell' as shown below.



When does Agreement to Sell become Sale [Section 4(4)].

An Agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the ownership in the goods, is to be transferred.

Distinction between Sale and Agreement to Sell

A 'Sale' and an 'Agreement to Sell' can be distinguished as under:

Basis of distinction	Sale	Agreement to sell
1. Transfer of ownership	Transfer of ownership of goods takes place immediately	Transfer of ownership of goods is to take place at a future time or subject to fulfillment of some

		condition.
2. Executed contract or Executory contract	It is an executed contract because nothing remains to be done.	It is an executory contract because something remains to be done.
3. Conveyance of property	Buyer gets a right to enjoy the goods against the whole world including seller. There fore, a sale creates jus in rem (Right against property).	Buyer does not get such right to enjoy the goods. It only creates jus in personam (Right against the person).
4. Transfer of risk	Transfer of risk of loss of goods takes place immediately because ownership is transferred. As a result, in case of destruction of goods, the loss shall be borne by the buyer even though the goods are in the possession of the seller.	Transfer of risk of loss of goods does not take place because ownership is not transferred. As a result, in case of destruction of goods, the loss shall be borne by the seller even though the goods are in the possession of the buyer.
5. Rights of seller against the buyer's breach	Seller can sue the buyer for the price even though the goods are in his possession.	Seller can sue the buyer for damages even though the goods are in the possession of the buyer.
6. Rights of buyer against the seller's breach	Buyer can sue the seller for damaged and can sue the third party who bought those goods, for goods.	Buyer can sue the seller for damages only.

7. Effect of insolvency of seller having possession of goods	Buyer can claim the goods from the official receiver or assignee because the ownership of goods has transferred to the buyer.	Buyer cannot claim the goods even when he has paid the price because the ownership has not transferred to the buyer. The buyer who has paid the price can only claim rateable dividend.
8. Effect of insolvency of the buyer before paying the price	Seller must deliver the goods to the official receiver or assignee because the ownership of goods has transferred to the buyer. He can only claim rateable dividend for the unpaid price.	Seller can refuse to deliver the goods unless he is paid full price of the goods because the ownership has not transferred to the buyer.

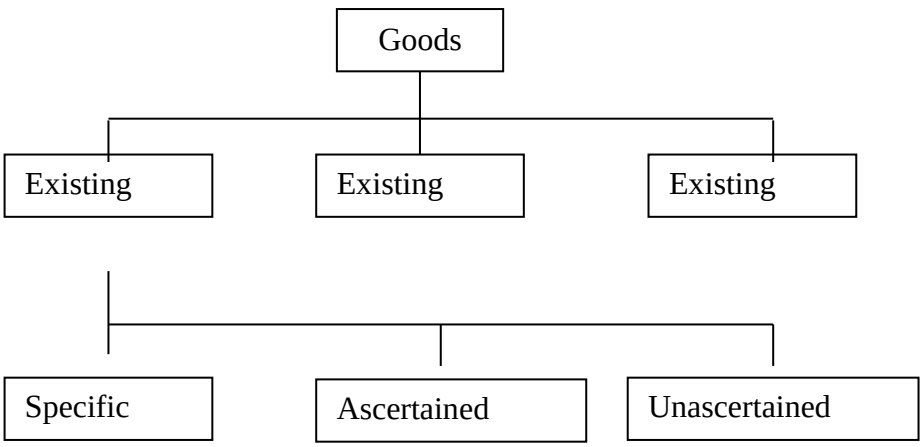
Meaning of Goods [Section 2(7)]

Goods means every kind of movable property other than actionable claims and money, and includes the following:

(a) Stock and shares

(b) Growing crops, grass and thing attached to or forming part of the land which are agreed to be served before sale or under the Contract of Sale.

Type of Goods



Types of Goods

Existing goods mean the goods which are either owned or possessed by the seller at the time of contract of sale.

Future goods [Section 2(6)] Future goods mean goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.

These are the goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

CONDITIONS AND WARRANTIES

It is usual for both seller and buyer to make representations to each other at the time of entering into a contract of sale. Some of these representations are mere opinions which do not form a part of contract of sale. Whereas some of them may become a part of contract of sale. Representations which become a part of contract of sale are termed as stipulations which may rank as condition and warranty e.g. a mere commendation of his goods by the seller doesn't become a stipulation and gives no right of action of the buyer against the seller as such representations are mere opinion on the part of the seller. But where the seller assumes to assert a fact of which the buyer is ignorant, it will amount to a stipulation forming an essential part of the contract of sale.

Meaning of Stipulation [Section 12(1)]

A stipulation in a contract of sale of goods may be a condition or warranty [Section 12(1)].

Meaning of Condition [Section 12(2)]

A condition is a stipulation

(a) Which is essential to the main purpose of the contract, and

(b) The breach of which gives the aggrieved party a right to terminate the contract.

Meaning of Warranty [Section 12(3)]

A warranty is a stipulation

(a) Which is collateral to the main purpose of the contract, and

(b) The breach of which gives the aggrieved party a right to claim damages but not right to reject goods and to terminate the contract.

When condition to be treated as warranty [Section 13]

In the following three case, a breach of a condition is treated as a breach of a warranty:

(a) Where the buyer waives a condition: once the buyer waives a condition, he cannot insist one its fulfillment e.g. accepting defective goods or beyond the stipulated time amounts to waiving a condition.

(b) Where the buyer elects to treat breach of the condition as a breach of warranty; e.g. where he claims damages instead of repudiating the contract.

(c) Where the contract is not severable and the buyer has accepted the goods or part thereof, the breach of any condition by the seller can only be treated as a breach of warranty. It can not be treated as a ground for rejecting the goods unless otherwise specified in the contract. Thus, where the buyer after purchasing the goods finds that some condition is not fulfilled, he cannot reject the goods. He has to retain the goods entitling him to claim damages.

SELF EVALUATION QUESTIONS

True or False Questions

State giving reasons whether each of the following statements is 'True' or 'False'

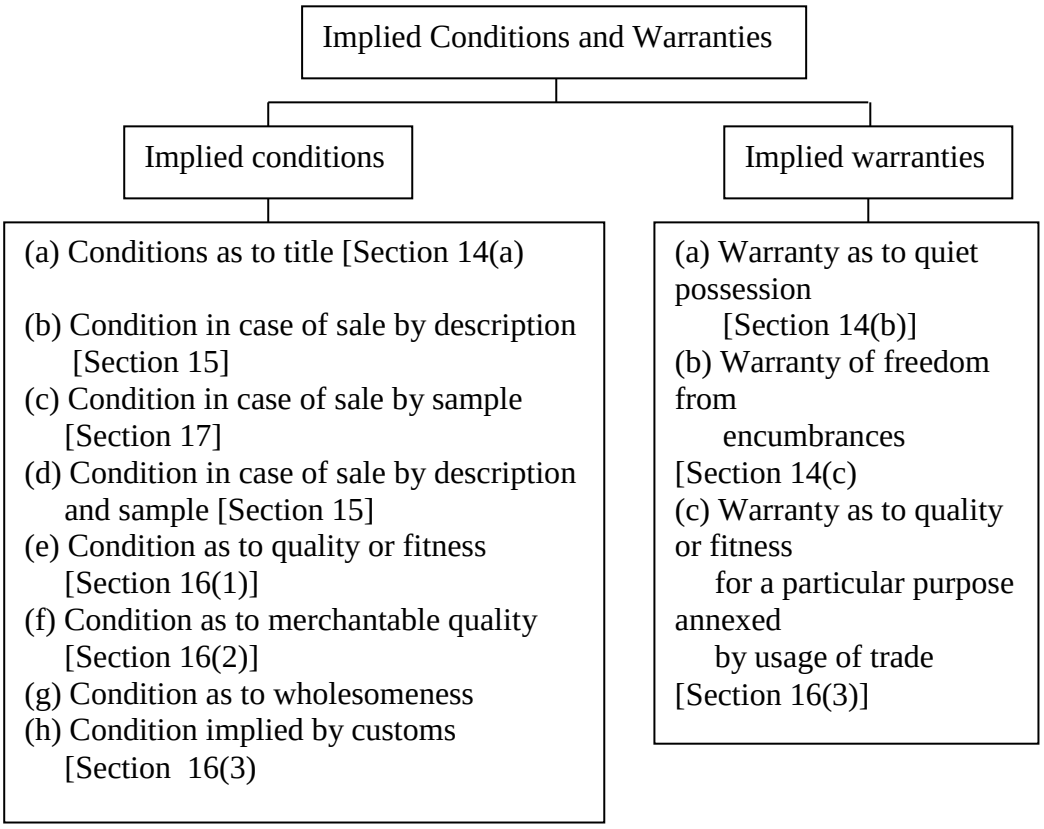
1. A contract of sale of goods includes the sale of goods and not an agreement to sell goods.
2. The consideration for the contract of sale can be partly in money and partly in goods.
3. The subject matter of the contract of sale can be all movable goods.

Express and implied conditions and warranties

In a contract of sale of goods, conditions and warranties may be express or implied.

(a) Express Conditions and Warranties These are expressly provided in the contract. For example, a buyer desires to buy a SONY TV Model No. 2062. Here, model no. is an express condition. In an advertisement for Khaitan fans, guarantee for 5 years is an express warranty.

(b) Implied Conditions and Warranties These are implied by law in every contract of sale of goods unless a contrary intention appears from the terms of the contract. The various implied conditions and warranties have been shown below.



Implied conditions [Sections 14(A), 15(1), 16(1), 16(2), 16(3), 17]

(a) Condition as to Title [Section 14(a)] There is an implied condition on the part of the seller that (i) in the case of a sale, he has a right to sell the goods, and (ii) 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.

(b) Sale by Description [Section 15] Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with description. The main idea is that the goods supplied must be same as were described by the seller. Sale of goods by description include many situations as under:

(c) Sale by Sample [Section 17] A contract of sale is contract for sale by sample when there is a term in the contract, express or implied, to that effect. Such sale by sample is subject to the following three conditions.

(i) The goods must correspond with the sample in quality.

(ii) The buyer must have a reasonable opportunity of comparing the bulk with the sample.

(iii) The goods must be free from any defect which renders them unmerchantable and which would not be apparent on reasonable examination of the sample. Such defects are called latent defects and

are discovered when the goods are put to use. It may be noted that the seller cannot be held liable for apparent or visible defects which could be easily discovered by an ordinary prudent person.

(d) Sale by sample as well as by Description [Section 15] If the sale is by sample as well as by description, the goods must correspond with the sample as well as the description.

(e) Condition as to Quality or Fitness [Section 16(1)] There is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. In other words, the buyer must satisfy himself about the quality as well as the suitability of the goods. This is expressed by the maxim caveat emptor (let the buyer beware).

(f) Condition as a Merchantable Quality [Section 16(2)] Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. The expression 'merchantable quality' means that the quality and condition of the goods must be such that a man of ordinary prudence would accept them as the goods of that description. Goods must be free any latent or hidden defects.

(g) Conditions as to Wholesomeness In case of eatables or provisions or foodstuffs, there is an implied condition as to wholesomeness. Condition as to wholesomeness means that the goods shall be fit for human consumption.

Implied Warranties [Section 14(b), 14(c), and 16(3)]

(a) Warranty as to Quiet Possession [Section 14(b)] There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The reach of this warranty gives buyer a right to claim damages from the seller.

(b) Warranty of Freedom from Encumbrances [Section 14(c)] There is an implied warranty that the goods are free from any charge or encumbrance in favour of any third person if the buyer is not aware of such charge or encumbrance. The breach of this warranty gives buyer a right to claim damages from the seller.

(c) Warranty as to Quality or Fitness for Particular Purpose which may be Annexed by the Usage of Trade [Section 16(3)]

(d) Warranty to Disclose Dangerous Nature of Goods In case of goods of dangerous nature the seller must disclose or warn the buyer of the

probably danger. If the seller fails to do so, the buyer may make him liable for breach of implied warranty.

Meaning of the Doctrine of Caveat Emptor [Section 16]

The expression 'Caveat Emptor' means 'let the buyer beware'. The doctrine of caveat emptor has been given in the first para of Section 16 which reads as under:

"Subject to the provisions of this Act and any other la for the time being in force, there is no implied warranty or condition as to the quality or fitness for ny particular purpose of good supplied under a contract of sale".

In other words, it is not part of the seller's duty to point out defects of the goods which he offers for sale, rather it is the duty of the buyer to satisfy himself about the quality as well as the suitability of the goods.

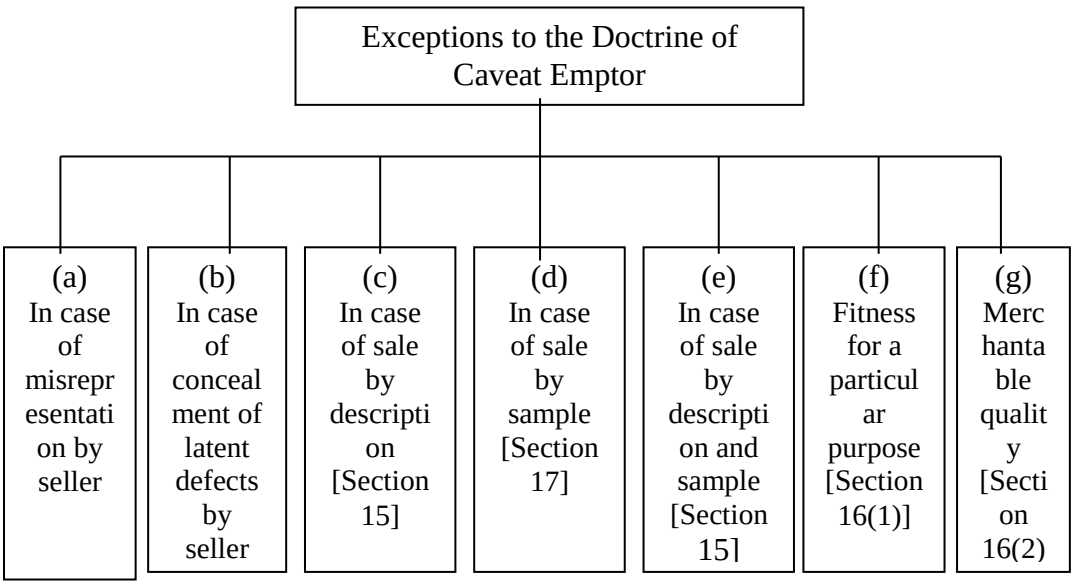
Exceptions to the Doctrine of Caveat Emptor

The doctrine of caveat emptor is subject to the following exceptions shown.

(a) In Case of Misrepresentation by the Seller Where the seller makes a misrepresentation and the buyer relies on that representation.

(b) In Case of Concealment of Latent Defect Where the seller knowingly conceals a defect which would not be discovered on a reasonable examination.

(c) In Case of Sale by Description [Section 15] Where the goods are sold by description and the goods supplied by the seller do not correspond to the description.



Exceptions to the Doctrine of Caveat Emptor

(d) In Case of Sale by Sample [Section 17] Where the goods are sold by sample and the goods supplied by the seller do not correspond with the sample.

(e) In Case of Sale by Sample as well as Description [Section 15] Where the goods are sold by sample as well as description and the goods supplied do not correspond with sample as well as description.

(f) Fitness for a Particular Purpose [Section 16(1)] Where the seller or a manufacturer is a dealer of the type of goods sole by him and the buyer has disclosed the purpose for which goods are required and relied upon the seller's skill or judgement.

(g) Merchantable Quality [Section 16(2)] Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that goods shall be of merchantable quality.

SALE BY NON-OWNERS

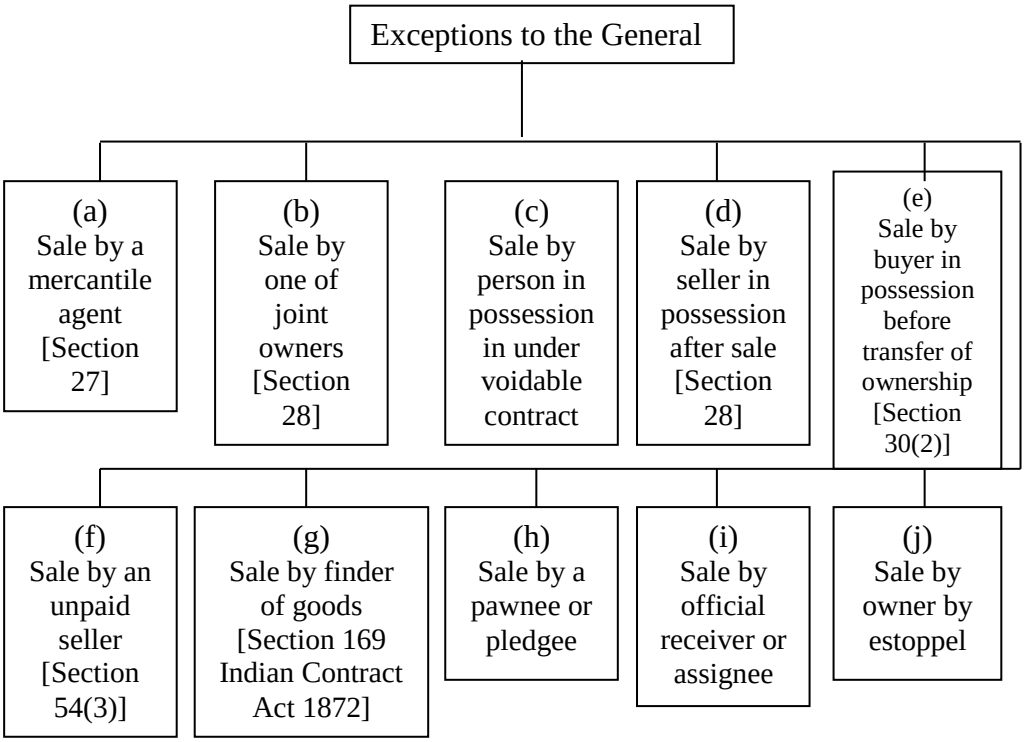
Meaning of General Rule

The general rule is expressed by the latin maxim "Namo dat quod non habet", which means that "no one can give what he does not himself possess". If the seller's title to the goods is defective, the buyer's title will also be defective because the buyer acquires his title to the goods from the seller. Hence, the seller cannot give a better title to the buyer than he himself has.

Exceptions to the General Rule

The circumstances under which a seller can give a better title than what he himself has, have been shown.

Lest us discuss these exceptions one by one.



Exceptions to the General Rule

The various exceptions of the general rule and the conditions for their application are summarised below:

Exception to the general rule	**Conditions to be fulfilled before a buyer gets a good title to the goods**
(a) Sale by a mercantile agent [Section 27]	(i) The agent must be in possession of goods of a document title (e.g., Railway receipt, Bill of Lading) to the goods with the consent of the owner. (ii) The agent must have sold the goods in the ordinary course of business as a mercantile agent. (iii) The buyer must have acted in good faith. (iv) The buyer must have no knowledge that the seller had no authority to sell.
(b) Sale by one of the joint owners [Section 280]	(i) The joint owner must be in the sole possession (ii) The buyer must have bought the goods in good faith.

	(iii) The buyer must have no knowledge that the seller had no authority to sell.
(c) Sale by a person in possession under voidable contract	(i) The seller must be in possession of goods under a contract voidable u/s 19 or 19A of Indian Contract. Act, 1872 on ground of coercion, undue influence, misrepresentation of fraud. (ii) The goods must have been sold before the contract is rescinded. (iii) The buyer must have bought the goods in goods faith. (iv) The buyer must have no knowledge that the seller's title is defective.
(d) Sale by seller in possession after sale [Section 30(1)]	(i) The seller must be in possession of goods or of a document of title to the goods, in the capacity of a seller and not in any other capacity such as bailee. (ii) The buyer must have bought the goods in good faith. (iii) The buyer must have no knowledge about the previous sale.
(e) Sale by a buyer in possession before the transfer of ownership [Section 30(2)]	(i) The buyer must be in possession of the goods or a document of title to the goods, with the consent of the original seller and must have bought or agreed to buy the goods. (ii) The new buyer must have bought the goods in good faith. (iii) The new buyer must have no knowledge about any lien or other right of the original seller in respect of good.
(f) An unpaid seller [Section 54(3)]	An unpaid seller must have exercised his right of lien or stoppage in transit.
(g) Sale by a Finder of Goods [Section 169 of Indian Contract Act 1872]	(i) The owner cannot be found with reasonable diligence; or (ii) The owner, if found refuse to pay the

	lawful charges of finder; or (iii) If the goods are in danger of perishing or of losing the greater part of its value; or (iv) If the lawful charges of the finder in respect of the thing found amounts to two third of its value.
(h) Sale by a pawnee or pledgee	(i) The pawnor or pledger must have made a default in the payment of the debt or the performance of the promise at the stipulated time. (ii) The pawnee or pledgee must have given a reasonable notice to the pawnor or pledger.
(i) Sale by Official Receiver or Assignee or Liquidator	The involvement person must be the owner of goods.
(j) Sale by owner by estoppel	The owner of the goods b his statement or conduct must have lead the buyer to believe that the seller has the autority to sell.

SELF EVALUATION QUESTIONNAIRE

True or False Questions

State giving reasons whether each of the following statements is 'True' or 'False'

4. In a sale the property I goods in transferred when the buyer pays the price.
5. A sale by a partner of a firm to his firm is void.
6. Future goods cannot be the subject matter of sale.

PROPERTY, POSSESSION AND RISK

There are three stages in the performance of a contract of sale of goods by a seller, viz,

(1) The transfer of property in the goods:

(2) The transfer of possession of the goods (i.e., delivery) and

(3) The passing of the risk.

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.

2. Action against third parties. 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 either 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 have become the property of the buyer.

PASSING OF PROPERTY

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 unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained

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.

1. Specific goods (Secs. 20 to 22)

The rules relating to transfer of property in specific goods are as follows:

Passing of property at the time of contract. 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.

2. Unascertained goods (Sec. 23)

Where there is a contract for the sale of unascertained goods, the property in the goods does not pass to the buyer until the good are ascertained (Sec. 23 (1) further provides that where is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, the property in the goods thereupon passes to the buyer.

3. Goods sent on approval or on sale or return

When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer:

(1) when he signifies his approval or acceptance to the seller;

(2) when he does any other act adopting the transaction;

Rules as to delivery of goods

1. Mode of delivery (Sec. 33). Delivery should have the effect of putting the goods in the possession of the buyer or his duly authorised agent. Delivery of goods may be (1) actual, (2) constructive, or (3) symbolic.

2. Delivery and payment - concurrent conditions. 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, that is to say, 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 (Sec. 32).

3. Effect of part delivery. A delivery of 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 as delivery of the remainder (Sec. 34).

4. Buyer to apply for delivery. Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery (Sec. 35). Where the goods are subsequently acquired by the seller, he should intimate this the buyer and the buyer should then apply for delivery. Unless otherwise agreed, the buyer has not cause of action against the seller if he does not apply for delivery.

5. Place of delivery. Where the place at which delivery of the goods is to take place is specified in the contract, the goods must be delivered at that place during business hours on a working day. Where there is no specific agreement as to place, the goods sold are to be delivered at the place at which

they are at the time of sale. As regards the goods agreed to be sold, they are to be delivered at the place at which they are at the time of agreement to sell, or if not then in existence, at the place at which they are manufactured or produced (Sec. 36(1).

6. Time of delivery. Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time (Sec. 36 (2). But where the contract uses words like "directly", "without loss of time", or "forthwith", quick and immediate delivery is contemplated. 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).

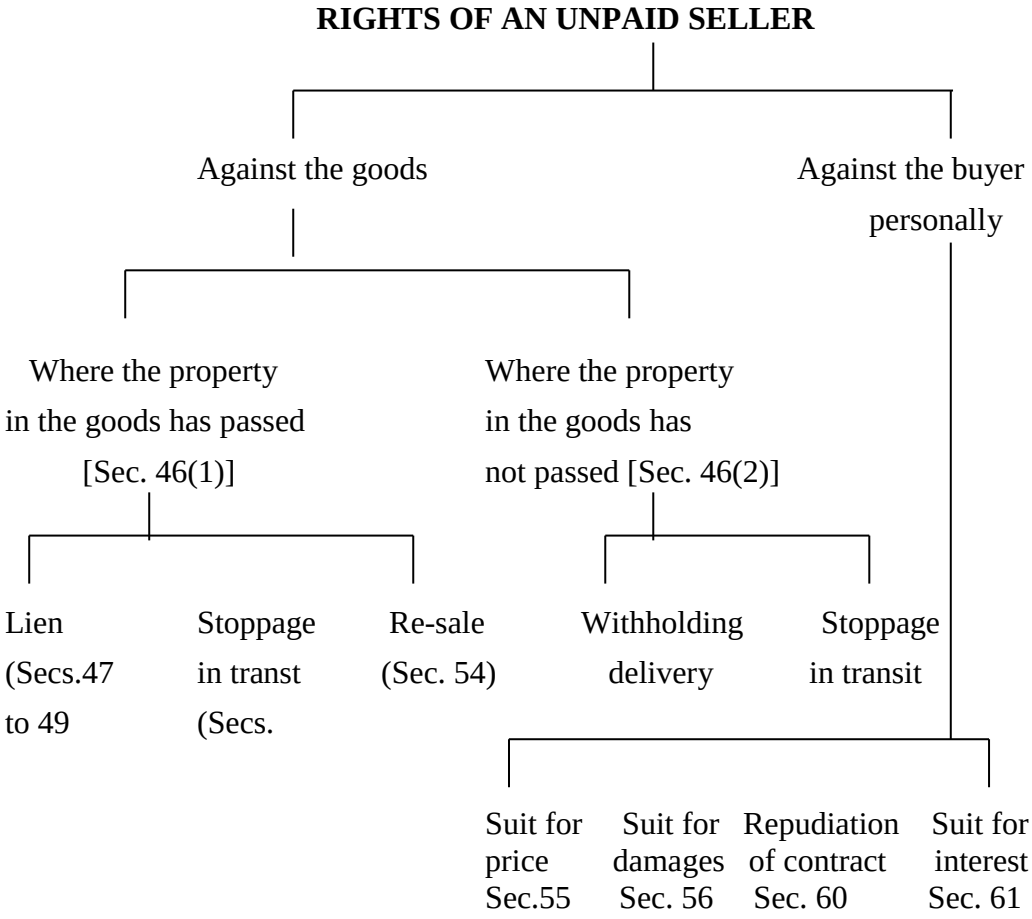
7. Goods in possession of a third party. When at the time of the sale the goods re with a third party, there is no delivery by the seller to the buyer until such third party acknowledges to the buyer that he holds them on his behalf. But where the goods have been sold by the issue or transfer of any document of title to goods. E.g.. a receipt or a bill of lading, such third party's consent is not required (Sec. 36 (3).

8. Cost of delivery. Unless otherwise agreed. All expenses of and incidental to making of delivery are borne by the seller, but all expenses of and incidental to obtaining of delivery are borne by the buyer (Sec. 36 (5).

9. Delivery of wrong quantity (Sec. 37). The delivery of the quantity of goods contracted for should be strictly according to the terms of the contract. A defective delivery entitles the buyer to reject the goods. The three different contingencies which may arise in case of a defective delivery. I.e., delivery of a wrong quantity.

RIGHTS OF AN UNPAID SELLER

'Seller' here 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)].



I. Rights of an unpaid seller against the goods

Where the property in the goods has passed to the buyer, an unpaid seller has the following rights against the goods [Sec. 46(1)]:

1. Right of lien 9Secs. 46(1) (a) and 47 to 49]

A lien is a right to retain possession of goods until payment of the price [Sec. 46(1) (a)]. It is available to the unpaid seller of the goods who is in possession of them where.

(a) The goods have been sold without any stipulation as to credit:

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

(c) The buyer becomes insolvent [Sec. 47(1)].

Rules regarding lien. (1) The seller may exercise his right of lien not with standing that he is in possession of the goods as agent or bailee for the buyer [Sec. 47(2)]. If he loses the possession of he goods, he losses the right of lien also.

2. Right of stoppage in trnsit [Secs. 46(1) (b) and 50 to 52]

The right of stoppage in transit is a right of stopping the goods in transit after the unpaid seller has parted with the possession of the goods. He has the further right of resuming possession of the goods as long as they are in the course of transit, and retaining possession until payment or tender of the price. It is available to the unpaid seller-.

i. When the buyer becomes insolvent; and

ii. When the goods are in transit (Sec. 50).

Distinction between right of lien and right of stoppage in transit

i. The unpaid seller's right to stop the goods in transit arises only when the buyer is insolvent but the right of lien can be exercised even when the buyer is able to pay but does not pay.

ii. The right of lien can be exercised on goods which are in actual or constructive possession of the seller.

iii. The right of lien comes to an end when the possession of the goods is surrendered by the seller, but the right of stoppage in transit commences when the goods have left the possession of the seller and continues until the buyer or his agent has acquired their possession.

iv. The right of lien is to retain possession, while the right of stoppage in transit is to regain or resume possession.

3.Right of resale [Secs. 46(1) (c) and 54]

The unpaid seller can re-sell the goods –

(1) Where the goods are of a perishable nature: or

(2) Where he 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.

AUCTION SALES

A sale by auction is a public sale where different intending buyer try to outbid each other. The goods are ultimately sold to the highest bidder. The auctionneer who sells the goods by auction is an agent of the seller, i.e., the owner. His relationship with the owner of the goods is governed by the general principles of the law relating to agency.

Procedure in auction sales. The usual procedure in case of auction sales is as follows: The proposed auction is duly advertised and a printed catalogue of the goods together with the terms of sale is circulated. On the appointed day and time, the intending buyers assemble and the auctioneer puts the different lots to auction and invites bids from the intending buyers.

Rules of auction sales. The law on auction sales is contained in Sec. 64 of the Sale of Goods Act. According to it, in the case of a sale by auction the following rules apply:

1. **Goods put up for sale in lots.** Where goods are put up for sale in lots, each lot is prima facie deemed to be subject of a separate contract of sale [Sec. 64(1)].
2. **Completion of sale.** The sale is complete when the auctioneer announces its completion by the fall of the hammer or in some other customary manner.
3. **Right of seller to bid.** A right to bid may be reserved expressly by or on behalf of the seller. Where such right is expressly reserved (but not otherwise), the seller or any one person on his behalf may bid at the auction 'Section 64 (3)].
4. **Sale not notified subject to a right to bid.** Where a sale is not notified to be subject to a right to bid no behalf of the seller, it is not lawful.
5. **Reserve price.** The sale may be notified to be subject to a reserve or upset price [Sec. 64(5)]. It is a price below which the auctioneer will not sell.
6. **Use of pretended bidding.** If the seller make use of pretended bidding to raise the price, the sale is voidable at the option of the buyer [Sec. 64(6)].
7. **Knock out or agreement not to bid against each other.** Where a group of persons form a combination to prevent competition between themselves at an auction and arrange that only one of them will bid.

Very Short Answer Type Questions

1. Define a 'contract of sale'.
2. Does the term 'contract of sale' include an agreement to sell?
3. When does an agreement to sell become sale?
4. Can a contract of sale be implied from the conduct of parties?
5. Can a contract of sale be partly in writing and partly by words of mouth?
6. Can an offer to sell by words of month be accepted in writing?
7. Can an offer in writing be accepted by words of mouth?
8. What is the true test of hire-purchase agreement?
9. What is a contract for work and labour?
10. Is a contract for work and labour covered under the Sale of Goods Act, 1930?

11. Define the term ‘goods’.
12. Do old rare coins constitute goods?
13. Do actionable claims constitute goods?

Short Answer Type Questions

1. Enumerate the implied conditions and implied warranties.
2. What is meant by ‘sale by decription’?
3. What is meant by ‘sale by sample’?
4. What is meant by ‘sale by sample as well as by description?
5. What is meant by ‘condition as to quality or fitness’?
6. State the conditions to be satisfied to avail of the condition as to fitness.
7. State tow cases where the condition as to fitness may not be applicable.
8. What is meant by ‘condition as to merchantable quality’?
9. When can a breach of condition be treated as a breach of warranty?
10. What is doctrine of ‘caveat emptor’?
11. Enumerate the exceptions to the doctrine of caveat emptor.
12. State the reason of knowing the exact moment when property in goods passes to the buyer.
13. State the rules relating to transfer of property of specific goods from seller to buyer.
14. State the rules relating to transfer of property of unascertained goods from seller to buyer.

Essay Type Questions

1. (a) Define a contract of sale.

   (b) Explain the essentials of a valid contract of sale.

   (c) How is a contract of sale different from an agreement to sell?

2. (a) How is a contract of sale made? State briefly with illustrations the necessary formation formalities of such a contract.

3. (a) Explain the term ‘goods as defined in, the Sale of Goods Act 1930.

   (b) What are the various types of goods?

4. What is the effect of destruction of specific goods?

5. (a) Distinguish between condition and warranty.

   (b) Briefly discuss the implied conditions and warranties in a contract of sale.

   (c) Under that circumstances does a condition descend to the level of a warranty?

6. (a) What is the doctrine ‘caveat emptor’?

   (b) What are the exceptions to this rule?

Answer

[1. False 2. True 3. False]

[4. False 5. False 6. True]

NOTES

UNIT - IV

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COMPANY – LAW

- **DEFINITION**
- **OBJECTIVES OF COMPANY LAW**
- **CHARACTERISTICS OF A COMPANY**
- **KINDS OF COMPANIES**
- **PRIVILEGES AND EXEMPTIONS AVAILABLE TO ALL PRIVATE COMPANIES**
- **FORMATION OF A COMPANY**
- **STAGES IN FORMATION OF COMPANIES**
- **MEMORANDUM OF ASSOCIATION**
- **CLAUSES (CONTENTS) OF MEMORANDUM OF ASSOCIATION**
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UNIT – IV

COMPANY - LAW

DEFINITION

The expression company law may be defined as a branch of law governing the companies. It deals with all aspects relating to companies, such as incorporation of companies, allotment of shares and share capital, membership in companies, borrowings by companies, management and administration of companies, winding up of companies. Thus, the company law is that branch of law which exclusively deals with all matters relating to companies. The company law, in India, is codified, and contained in the companies act 1956. This act extends to the whole of India, and came into force on 1st April, 1956.

OBJECTIVES OF COMPANY LAW

We have already discussed that the company law in India is codified and contained in the companies. Act, 1956 as amended from time to time. The objects of company law are those with which the company Act, 1956 was passed, and may be summaries as under

1. To ensure that the activities of the companies are carried on not only in the interest of those directly concerned with them but also in furtherance of the ultimate ends of our economic and social policy which the country has accepted.
2. To fix up minimum standards of business integrity and conduct in the promotion and management of companies affair.
3. To protect the legitimate interest of the shareholders by ensuring effective participation and control by them
4. To prevent misconduct and malpractices, on the part of company management and abuse of power vested in them by the general body of shareholders
5. To enforce proper performance of duties by persons responsible for the management of companies.
6. To require full and fair disclosure of all reasonable information relating to the affairs of the companies
7. To adjust the rights of the management Viz a Viz the shareholders and other concerned persons
8. To empower the government to intervene and investigate into the affairs of the company where the business of the company is being carried on in a manner prejudicial to the interest of the shareholders, the company or the general public.

DEFINITION OF A COMPANY

The term company may be defined as a group of persons associated together to achieve some common objective. This, however, is not the legal definition. In legal sense, a company means an association of persons incorporated under the existing law of country. The legal definition of company is given in section 3(1)(i) of the companies Act, which reads as under

"Company means a company formed and registered under this Act or an existing company".

A company is voluntary association of persons formed to achieve some common objectives, having a separate legal entity, independent and separate from its members, with a perpetual succession and a common seal, and with capital divisible into transferable shares.

CHARACTERISTICS OF A COMPANY

1. It has a separate legal entity. It is a important characteristics of a company that it have a separate legal entity. It means that the existence of a company is independent and separate from its members. In law, the company is regarded as artificial legal person, which deals in its own name.

2. It has a perpetual succesStion. The term perpetual succession may be defined as the continuous existence. A company has a perpetual succession. Ie., company never dies. The membership of a company may change from time to time. But it does not affect the company's continuity. In other words the members may come and go, but the company can go no forever.

3. It has a separate property: we know that company is a legal person in the eyes of law. It can, therefore, hold the property in its own mane. All the property in the name of the company is its separate property, which is controlled, managed and disposed of by the company in its own name.

4. It has capacity to sue and being sued. We know that a company is a legal person and has independent existence. Being a legal person, the company can file suits against others in its own name. Similarly, the suits against the company can also be filed in company's name.

5. It has a common seal. We know that a company is a legal person, but it is not, physically, in existence. Thus it cannot sign its name. It has a common seal which is used as a substitute for its signature. The common seal is the official signature of a company.

6. Its members have limited liability. As a matter of fact, it is the principal advantages of carrying the business under limited companies. A company may be limited by shares or by guarantee. In a company limited by shares, the liability of a member is limited to the extent of nominal value of the

shares held by him, If the shares are partly paid. The liability of a member is limited to the extent of unpaid value of shares held by him. And if the shares are fully paid, the liability of the member is nil.

7. Its shares are freely transferable: The capital of a company is divided into parts, and each part is called the share. The shares of a company are freely transfereable and can be purchased and sold in share market.

8. It has Several other advantages: A part form the above advantages available to a company, it enjoys several other advantages also, such as

a) A company has an autonomy and independence to form its own policies and implement them in accordance with the provisions contained in its memorandum, articles of association and the companies Act
b) A company attracts professional management and thus helps in promotion of professional management and efficiency.
c) A company has the privilege of collecting interest free money form the public, for its business, by making a public issue or through private placement of shares and other securities.
d) The restrictions, with certain exception, on the purchase of its own shares by the company, provide permanence of capital collected and stability to the company and protection to some extent to the creditor5s of the company.

DISADVANTAGES OF INCORPORATION

We have discussed in the last article, the chief advantages (characteristics) of the company from of organisation. However, there are also certain disadvantages of incorporation (i.e,, formation) of a company, which may be summed up as under

1. Company's formation requires many formalities and is expensive: The formation of a company requires a number of formalities to be complied with, and is also an expensive affair.

2. Company is not a citizen, and cannot have the benefit of fundamental rights. We know that a company is a legal person and has the rights and obligations like a natural person. However, a company is not a citizen either under the constitution of India or the citizenship Act. Thus, a company cannot have the fundamental rights, which have been expressly given to the citizen only under the constitution of India. The supreme court has also emphasized that only the natural persons can be recognizes as citizens. Moreover, the right of citizenship can be conferred on the natural persons alone. Even if all the members of a company are the citizens of India, the company does not become a citizen of India. The company, being an

independent and different identity from its members, has nothing to do with the status of its members.

3. Company's social responsibility is greater. We know that the companies have enormous powers and enjoy various advantages. Moreover, they also have their own impact on the society.

4. Company's members cannot have effective control: The membership of companies is generally large and the members are scattered at distant places. Consequently, the members of a company cannot have effective control over its working and day to day affairs.

5. Company's tax burden is heavy. The structure of tax legislation is such that in certain circumstances the tax burden on a company is more as compared to other forms of organisations. E.g., the company has to pay income tax on the whole of its income at a flat rate, whereas others are taxed on a slab system

6. Company's separate entity can be ignored under the doctrine of lifting of corporate veil. We know that the chief advantage of a company is its separate legal entity, and various other advantages, which are available to a company are linked with this chief advantage.

7. Company's winding up procedure is expensive and time consuming. The company can be wound up (i.e., put to an end) only by following the procedure prescribed in the companies act.

KINDS OF COMPANIES

Though there are many kinds of companies. Yet the following are important form the subject point of view

1 Chartered companies.2 statutory companies 3 registered companies 4 private companies 5 public companies 6 holding and subsidiary companies 7 government companies 8 foreign companies

CHARTERED COMPANIES

A chartered company is one which is incorporated (formed) under a special charter granted by the king or queen of England in the exercise of prerogative powers e.g, east India company, bank of England, Standard Chartered Bank. The chartered companies are governed by the provisions of the special charter, under which they are formed. The charter defines the nature and power of such companies.

STATUTORY COMPANIES OR CORPORATIONS

A statutory company is one which is incorporated by a special Act of the legislature (i.e., by the Act of parliament or State legislature). It may be noted that an act is specially passed to create a statutory company e.g. the life

insurance corporation of India was created by the Life Insurance Corporation Act. The Food Corporation of India was created by the Food Corporation of India. Act. The statutory companies are also known as 'Corporations'. Such companies are, generally, created for the public utility services, and their main object is not to earn profits, but to serve the general public.

REGISTERED COMPANIES

A registered company is one which is formed and registered under the companies Act, 1956, it also includes an existing company, which was formed and registered under the earlier companies Acts.

LIMITED COMPANIES

A limited company is one in which the liability of the members is limited i.,e the members are liable upto a limited amount, a d beyond that limit they cannot be asked to contribute anything towards the payment of company's liabilities.

1. Companies limited by share. A company limited by shares is one in which the liability of the members is limited to the extent of nominal value of shares held by them. If the shares are fully paid i.e, all the amount of share has already been paid, then the liability of the members is nil. And if the shares are partly paid, then the liability of the members is limited to the extent the amount which remains unpaid.

2. Companies limited by guarantee. A company limited by Guarantee is one in which the liability of the members is limited to such amount as he undertakes to contribute to the assets of the company in the event, of its being wound up. The amount of guar5antee is fixed in the memorandum of association. Of the company. The guaranteed amount may differ from member to member. It may be noted that the liability of the member can be enforced only at the time of winding up of the company.

UNLIMITED COMPANIES

An unlimited company is one in which the liability of the members is unlimited the members are also personally liable for the payment of companies liabilities. Thus if in the event of winding up of a company, the assets of the company are not sufficient to pay its liabilities, then the private property of the members can also be utilised for the payment of company's liabilities.

PRIVATE COMPANIES

A private company is one which has a minimum paid up capital of rupees one lakhs or such higher paid up capital as may be prescribed. And by its articles of association, puts the following restrictions on itself (section 3(1)(iii)

1. Restricts the right to transfer its shares, if any
2. Limits the maximum number of its members to fifty (excluding the present or past employees of the company) prohibits any invitation to the public to subscribe for any shares or debentures of the company
3. Prohibits any invitation or acceptance of deposits form person other than its members, directors or their relatives

PUBLIC COMPANIES

A public company may, therefore, be defined as an association of persons consisting of not less than sever members, which is registered under the companies. Act with a minimum paid up capital of rupees five lakhs and which is not a private company within the meaning of this act.

HOLDING AND SUBSIDIARY COMPANIES

We know that a holding company is one, which has control over another company. And the company, over which the control is exercised, is called the subsidiary company. It may be noted that the holding and subsidiary companies are relative terms. A company is a holding company of another if the other is its subsidiary.

GOVERNMENT COMPANIES

A Government company is one in which 51% or more of the paid up share capital is held by the central Government, or by any one or more state Governments, or partly by central Government r partly by one or more state governments.

FOREIGN COMPANIES

A foreign company is one which is incorporated (i.e,, formed) outside India. However, of the purpose of the companies Act, 1956. it means a company incorporated outside India and having a place of business in India

PRIVILEGES AND EXEMPTIONS AVAILABLE TO ALL PRIVATE COMPANIES

Following are the special privileges and exemption which are available to all private companies, including a private company which is the subsidiary of a public company.

1. Its formation is easy. A private company can be easily formed as it requires only two minimum members. This also helps in smooth functioning of the company Section 12(1).

2. It can immediately start its business. A private company can start its business immediately after its incorporation (formation). It is not required to obtain a certificate for commencement of business as is required in case of a public company (Section 149(7)

3. It is exempted from the issue of prospectors. We know that a private company is prohibited from inviting offers from general public for the purchase of its shares or debentures. Thus, it is not required to issue a prospectus, which is meant for this very purpose. A private company is, therefore, 3exempted from all the legal requirements relating to the preparation and issue of prospectus. Moreover, it is also not required to file with the registrar of companies, a statement in lieu of prospectus (Section 70 (3))

4. It is exempted from the requirement of minimum subscription for allotment of share. The minimum subscription is the amount, which must have been collected by a company before any allotment of shares is made. But a private company can proceed to allot shares without waiting for the minimum subscription. The reason for the same is that a private company is not required to offer shares to the public, and thus no question of minimum subscription for the public arises (section 69)

5. It can issue further shares to outsiders. In certain cases of new allotment, the shares must be offered to the existing equity shareholders. Bu a private company is free to allot shares to any persons i.e., to outsiders also Section 81(3). The cases in which the shares should be offered to the existing shareholders will be discussed in Act. 8.5

6. It is exempted from holding statutory meeting. A private company is not required to hold a statutory meeting. Moreover, it is also not required to file a statutory report with the registrar of companies (Section 165)10)).

7. It is exempted from keeping an index of members. A private company is not required to keep an index of members. As a matter of fact, a company is required to keep an index of its members if the number of members exceeds 50. in case of a private company, the maximum number of members is fifty. Thus, there is not question of keeping an index of members [Section-151(1)]

8. It need not have more than two directors. A private company is not required to have more than two directors. However, this is also the minimum requirement for a private company. This is to say, a private company must have at least two directors [section 252(2)]. Whereas, a public company must have at last three directors.

SELF EVALUATION QUESTIONS

1. *Which of the following statements is not true?*

   (a) A company is an artificial person created by law.

   (b) A company can do every act like a natural person except the acts which are purely of personal nature.

   (c) A company can be held liable for violation of the statutory provisions of the Companies Act.

   (d) A company can be imprisoned for violation of such provisions which attract penalty by way of imprisonment only.

2. *What of the following is not the characteristic of a public company?*

   (a) It has a separate legal entity *(b) It has a perpetual succession.*

   (c) It has a common seal and separate *(d) Its shares are non-transferable.*

3. *A company being a legal person is also a citizen under the Constitution of India.*

   (a) True, as there is a clear provision in the Companies Act.

   (b) False, as there is neither any provision nor any judicial authority on this point.

Comparison between Private Company & Public Company

S. No	Private Company	Public company
1	It is formed and registered under the companies act, and is a separated legal entity	It is also formed and registered under the companies Act, and is also a separate legal entity
2	In this case, the minimum number of persons required to form a company is two	In this case, the minimum number of persons required to form a company is sever.
3	In this case, the maximum member of members must not exceed fifty	It this case, there is no such restriction on the maximum number of members.
4	It this case, the right of members to transfer their shares is	In this case, the right of members to transfer their shares is not

	restricted. i.e., the shares are not freely transferable	restricted i.e, the shares are freely transferable.
5	It is prohibited from issuing a prospectus i.e., it cannot invite offers from the general public to subscribe for it shares or debentures.	It is not prohibited from issuing a prospectus i.e., it can invite offers from the general public to subscribe for its shares or debentures.
6	It must have minimum of two directors.	It must have minimum of three directors.
7	It can start its business as soon as it is incorporated. It is not required to obtain a certificate to commence business.	It cannot start its business as soon as it is incorporated. It is required to obtain a certificate to commence business from the Registrar of Companies.
8	It is not required to hold a statutory meeting, and need not to file statutory report with the Registrar of Companies.	It must hold a statutory meeting, and file a statutory report with the Registrar of Companies.
9	In this case, the director is not required to file, with the Registrar of Companies, a written consent to act a director. Moreover, he is also not required to sign the memorandum and enter into a contract for is qualification shares.	In this case, the director must file, with the Registrar of Companies, a written consent to act as a director. Moreover, he must also sign the memorandum and enter into a contract for his qualification shares.
10	In this case, the directors may be appointed by a single resolution.	In this case, the directors cannot be appointed by a single resolution.
11	In this case, the directors are not required to retire by rotation. They may be appointed as permanent life directors.	In this case, two-third of the directors of the company must retire by rotation.

12	In this case, the number of directors may be increased to any extent without the permission of the Central Government.	In this case, the number of directors cannot be increased without the permission of the Central Government.
13	In this case, a director may participate in the company meeting and cast his vote even if he is interested in the subject-matter.	In this case, a director cannot participate in the company meeting and cast his vote if he is interested in the subject-matter.
14	In this case, the quorum required for holding a meeting is of two members i.e., there must be at least two members personally present for holding the company meetings.	In this case, the quorum required for holding a meeting is of five members i.e., there must be at least five members personally present for holding the company meetings.
15	In this case, one member having the voting right can demand poll if the total number of members present is not more than seven. But if the number of members exceeds seven, the poll can be demanded by two members.	In this case, the poll can be demanded by any members or members having 10% of voting powers, or having shares worth Rs.50,000.
16	In this case, there are no restrictions on managerial remunerations (i.e., remuneration payable to directors, or managers).	In this case, there are certain restrictions on managerial remunerations e.g., the total managerial remuneration payable in one financial year should not exceed 11% of he net profits of that year, and in case of inadequacy of profits, the company shall not pay any managerial remuneration except with the previous approval of Central Government.

17	In case a private company proposes to increase its capital by issue of shares, it may issue the shares either to the existing members or to outsiders.	In case a public company proposes to increase its capital by issue of shares, it must in certain circumstances, first offer the shares to existing members.

ONE MAN COMPANY OR FAMILY COMPANY

The term one man company may be defined as a company in which one person holds the substantial number of shares, and has the controlling power over the company. It may be noted that this does not mean that there is only one member in the company, because there must be at least two members for a private company, and seven for a public company.

SELF EVALUATION QUESTIONS

4. *A statutory company or corporation is one which is incorporated.*

   (a) by an Act of Parliament *(b) by an Act of State Legislature*

   (c) under the Companies Act, 1956 *(d) by either (a) or (b)*

5. *In case of a company limited by guarantee, the liability of the members can be enforced.*

   (a) at any time when the company so decides.

   (b) only at the time of winding up of the company.

   (c) only by an order of court *(d) only by an order of Registrar of Companies.*

6. *The minimum number of members required for the formation of a company is 2 for a private company and 7 for a public company, but the maximum number of members is 50 in both the cases.*

   (a) True, as the Companies (Amendment) Act, 1999 amended the provisions in this regard.

   (b) False, as there is not prescribed maximum limit for members in case of a public company.

FORMATION OF A COMPANY

Stages in formation of companies

Following are the three stages in the formation of a company.

1. Promotion of a company
2. Registration and incorporation of a company.
3. Commencement of business

Promotion of a company

The promotion of a company refers to all those steps which are taken from the time of having an idea of starting a company to the time of the actual starting of the company business. Thus, formation of a company , means originating the idea of forming a company, and taking necessary steps in this regard. The persons who thing of forming a company and take necessary steps in its formation are known as promoters or company promoters.

Registration and incorporation of a company

It is the second stage in the formation of a company. We know that a company comes into existence when it is registered under the companies Act. If the company is to be formed as a public company, any sever or more persons associated for any lawful purpose may form the same by getting it registered with the registrar of companies. And if the company is to be formed as a private company, any two or more but not more than 50 persons may get the same registered. The company so formed, whether public or private, may be of the following two types, namely (section (12)

1. limited company (Limited by shares or limited by guarantee)
2. Unlimited company

A company is got registered by filing an application with the registrar of companies of the area in which registered office of the company is to be situated.

After getting the approval of name, the application for registration of the company should be filed with the registrar along with the following documents and particulars (section 33).

1. The memorandum of association It is the document which describes the scope of company activities. It must be signed by the required number of persons, which are necessary for the formation of company. And who come forward to form it (it seven in case of public, and two in case of private company)

2. The articles of association: It is the document which contains the rules and regulations of the company. It must also be signed by the persons who sign the memorandum of association. It may be noted that the filling of the articles of association. Is compulsory for three types of companies, namely, a unlimited companies, b. private companies, c companies limited by guarantee.

3. The agreement which the company proposes to enter into with any individual for appointment as company's managing director, or whole time directors or manger. In case the company has entered into any such agreement, the same must also be filed with the registrar at the time of registration of the company. This clause has been added by the companies (amendment Act 1988)

4. The declaration that all the requirements of the companies Act relating to the registration of the company have been complied with. Such a declaration must be signed by any one of the following person (section 33(2))

a. An advocate of the supreme court or of a high court
b. An attorney or pleader entitled to appear before high court
c. A secretary in whole time practice in India, who is engaged in the formation of a company.
d. A person named in the articles of association as a director, a manger or secretary of the company.

5. A written consent of such director to act as director of the company: It should be signed by the director himself or by his agent authorized in writing.

6. A written undertaking by such directors to take and pay for their qualification shares, if any: It should be signed by each such director.

7. A list of persons who have agreed to become the first director of the company: Such a list becomes necessary in view of the aforesaid written consent and undertaking to be given by such persons.

The registrar of companies may himself ask for the above three documents in case of a public company having a share capital.

CERTIFICATE OF INCORPORATION

A certificate of incorporation is one which certifies that the company is incorporated. The registrar of companies issues it and it contains the name of the company, the date of its issue, and the signature of the registrar with his seal. This certificate brings the company into existence. The legal effects of the certificate of incorporation may be stated as under (section 34)

1. Company comes into existence and it becomes a legal entity independent from its members.
2. The company's life starts from the date of the certificate of incorporation
3. The company acquires a perpetual succession i.e it remains in existence for ever unless wound up according to the provisions of the companies Act. In toehr words, the death, retirement, admission etc., of the members of the company does not affect its existence.
4. The memorandum and articles of association become binding upon the company and all its members.
5. The liability of the members of the limited company becomes limited.

Thus, on the issue of certificate of incorporation, the company comes into existence with all the characteristics.

CONCLUSIVENESS OF CERTIFICATE OF INCORPORATION

The certificate of incorporation is the conclusive evidence of registration of the company. In other words. It is considered to be decisive and final as regards the registration of the company. The validity of this certificate cannot be disputed on any ground whatever (section 35)

SELF EVALUATION QUESTIONS

7. A company comes into existence, when –

(a) The 'memorandum of association' is signed by the required number of members.

(b) The 'memorandum of association' is submitted for registration to the Registrar of Companies.

(c) It is registered under the Companies Act, 1956.

(d) It establishes its registered office and starts functioning there from.

8. At the time of registration, the filling of articles of association with the Registrar of Companies is compulsory for.

(a) Private companies, unlimited companies and companies limited by guarantee.

(b) Unlimited companies only.

(c) Companies limited by shares only.

(d)) All types of companies.

9. If at the time of registration, a company limited by shares does not file articles of association with the Registrar, then

(a) The company cannot be registered without this document.

(b) The company is deemed to have adopted 'Table A'

(c) The company is deemed to have become a company with unlimited liability.

(d) The directors become liable to be punished with fine at the rate of Rs. 50 for each day during which the default continues.

10. A company comes into existence from the date of certificate of incorporation

(a) True (b) False

COMMENCEMENT OF BUSINESS

A private company can start its business immediately after obtaining the certificate of incorporation. But a public company will have to obtain a further certificate known as the certificate to commence business. Before it can start its business.

Roles of promoters

Following are the main functions of promoters

1. To originate an idea of starting a business and forming a company.

2. To investigate the idea and known whether the formation of the company is possible and profitable
3. To collect the requisite number of persons necessary for the formation of the company, and to find out the first directors
4. To settle the name of the company
5. To settle the details of the memorandum and articles of association of the company. and to get these documents drafted and printed, and to arrange for the registration of the company.
6. To arrange for the preparation of the prospectors and its issue
7. To enter into preliminary contracts
8. To pay preliminary expenses
9. To arrange for the load etc., from various financial institutions
10. To perform such other functions as are necessary for the formation of the company.
11. To conduct the negotiations for the purchase of business where it is intended to purchase an existing business.

Duties and obligations of promoters

1. The promoters must not make, directly or indirectly, any secret profits at the expense of the company which they are promoting. If they do so, the company may recover the same.
2. The promoters must disclose fully all the material facts regarding the formation of the company
3. The promoters must faithfully disclose all the facts relating to the property which they want to sell to the company.
4. The promoters must not make an unfair use of their position, and they must disclose to the company their rue position.

SELF EVALUATION QUESTIONS

11. A public company having a share capital can start its business on obtaining -.

(a) Certificate of incorporation and approval of Company Law Board.

(b) 'Certificate to commence business', and approval of Company Law Board.

(c) 'Certificate to commence business'. *(d) Approval of High Court.*

12. Which of the following statements is correct?

(a) A public company having share capital can start its business after obtaining a

certificate to commence business.

(b) A public company having no share capital can start its business without obtaining certificate to commence business.

(c) Both (a) and (b)

(d) None of these.

13. A company must commence business within one year of its incorporation.

(a) True, as it is the law on this point.

(b) False, as there is no such provision in the Companies Act.

14. Which of the following statements is cored?

(a) Only an individual can be the promoter of a company.

(b) Besides individual, a firm, an association, or a company may also act as a promoter of a company.

MEMORANDUM OF ASSOCIATION

INTRODUCTION

The first important document to be filed with the registrar is the memorandum of association, briefly called the memorandum. It may rightly be called a charter or the construction of the company as it regulates the relationship of the company with the outside world

The memorandum is as it were the area beyond which the actions of the company cannot go inside that area the shareholders may make such regulations for their own governance as they think fit

Clauses (Contents) of Memorandum of Association

The memorandum of association of every company must have the following clauses: 1. Name Clause. 2. Registered Office Clause. 3. Objects Clause. 4. Liability Clause. 5. Capital Clause. 6. Association or Subscription Clause.

NAME CLAUSE

This clauses of memorandum of association contains the name of the proposed company. The company being a legal person, must have a name to establish its identity. As a matter of fact, the name is the symbol of personal existence of the company. a company may choose any suitable name it likes, however, the following rules must be observed while selecting a name of the company.

1. The name should not be undesirable: The name of the company should not be undesirable in the opinion of the central government. If it is so, the company cannot be registered with such a name (Section 20 (1)). This provision enables the central government to reject a name without giving any reason.

2. The name should not be identical with another company's name: The name of the company should not be identical with the name of an already existing company. it should also not too closely resemble the name of another existing company.

3. The name should not be a prohibited one: The name of the company should not be prohibited by the emblems and names (Prevention of improper use(Act, 1950.

4. The name should end with words limited or private limited: The public company with limited liability must add the word limited at the end of its name, and the private company the word private limited.

REGISTERED OFFICE CLAUSE

This clause of memorandum of association contains the name of the state in which the registered office of the company is to be situated

OBJECTS CLAUSE

This clause of memorandum of association contains the objects for which the proposed company is to be formed. It is the most important clause of the memorandum, and should be drafted very carefully. The objects of the company must be stated in clear and definite terms. The objects clause must be divided into two sub clause namely (section 13 (d)).

1. Main objectives clause. This clause will state the main objects of the company which are to be pursued by it on its incorporation. The objects which are incidental or ancillary to the attainment of main objects will also be stated in this clause.

2. Other objects clause: This clause will state those objects of the company which have not been mentioned in the above clause.

LIABILITY CLAUSE

This clause of memorandum of association contains the nature of liability of the members of the mcomapny. This clause is necessary for those companies in which the liability of the member is limited. The memorandum of such companies must state that the liability of the members is limited. It may be noted that the proposed company may be limited by shares, or by gurantee. In these cases, the liablility clause should state as under

1. In case of companies limited by shares, the liability clause must state that the liability of the members shall be limited by shares (section 13 (2). This means that the liability of member is limited to the nominal value of shares held by him.
2. In case of companies limited by guarantee, the liability clause must state that the liability of the members shall be limited by guarantee section 13 (2).

CAPITAL CLAUSE

This clause of memorandum of association contains the amount of share capital with which the company is to be registered. This clause should also state the number and value of shares into which the capital of the company id divided. Section 13 –4, a. the capital with which the company is registered is called the registered nominal or authorized capital.

ASSOCIATION OR SUBSCRIPTION CLAUSE

This clause of memorandum of association contains the names of the persons who sign the memorandum and states that they are willing to form themselves into a company. These persons are called subscribers.

ALTERATION OF MEMORANDUM OF ASSOCIATION

The memorandum of association is a very important document of a company. it cannot be altered by the sweet will of the members of the company. it can be altered only by following the procedure as prescribed in the companies.\ Act. It may be noted that the right of the company to alter its memorandum is strictly limited to the provisions of the companies Act. The procedure of alteration of various clauses of the memorandum may be discussed under the following heads.

ALTERATION OF NAME CLAUSE

A company may alter (i.e., changing) its name at any time. The only requirement is that the change must be made by following the prescribed procedure. The procedure for the change of name of the company is contained in sections 21 to 23 of the companies Act and may be summed up as under.

A company can change its name at any time by adopting the following procedure Section 21.

By passing a speci8al resolution and

By obtaining the approval of central Government in writing.

However, the approval of central Government is not required when the change involves the addition or deletion of the word private on the conversion of a public company in a private company or vice versa.

Some times, a company has been registered with a name which is identical with the name of an existing company or which, in the opinion of central government, is undesirable, in such cases, the company, may change its name by adopting the following procedure (Section, 22 (1) (a)]

ALTERATION OF REGISTERED OFFICE CLAUSE

The procedure for the alteration (i.e., change) of registered office of the company is contained in section 17, 18 and 146 of the companies Act., and may be summed up as under

1. Change of registered office from one place to another within the same city: Such a change in the registered office of the company may be made by a board resolution to the effect.

2. Change of registered office from one city to another within the same state: Such a change in the registered office of the company may be made by passing a special resolution to that effect. When the registered office is shifted to the new loction, then the notice of the same must be given to the registrar of companies within 30 dyas of the shifting of the office section 146 (2).

3. Change of registered office from one state to another: Such a change in the registered office of the company involves the alteration of memorandum of association and may be made by adopting the following procedure (section 17)

By passing a special resolution, and

By obtaining the confirmation of the company law board.

Thus, the first step for such a change is to pass a special resolution and the second step is to apply to the company law board for its sanction.

SELF EVALUATION QUESTIONS

15. A company formed for the promotion of commerce, art, science, charity etc. may not use the word 'Limited' at the end of its name, even if it is a limited company.

(a) True, as it may do so by getting a licence from the Central Government to that effect.

(b) False, as the use of word 'Limited' at the end of all limited companies' name is obligatory under the amended Companies Act.

16. The Registered office Clause of memorandum of association contains -

(a) The name of the Sate in which the registered office of the company is to situate.

(b) The name of the city/town only and not that of the state.

(c) The name of Registrar of Companies.

(d) The complete postal address.

17. The Registered office of the company must be in existence from the day when the.

(a) Company starts its business or from 30th day of incorporation of the company whichever is earlier.

(b) Documents are filed with the Registrar for registration or from 30th day of registration thereof whichever is earlier.

(c) Company gets the notice of its registration.

(d) Company proposes to hold its first annual general meeting.

18. Which of the following statements is correct?

(a) In limited companies, the liability of members holding fully paid-up shares is nil.

(b) In companies limited by guarantee, the liability of members is limited to the amount which they have agreed to pay.

(c) Both (a) and (b) are correct.

(d) None of these is correct.

19. The capital with which the company is registered is called the.

(a) Subscribed capital *(b) Nominal or authorized capital*

(c) Working Capital *(d) None of these*

20. The procedure for changing the name of a company is by passing.

(a) Special resolution and obtaining the approval of Central Government in writing.

(b) Special resolution and obtaining the approval of Company Law Board in writing.

21. The procedure for changing the name of a company when it is identical with the name of an existing company is by passing.

(a) Ordinary resolution and obtaining approval of Central Government.

(b) Special resolution and obtaining approval of Company Law Board.

ALTERATION OF OBJECTIVES CLAUSE

We know that objects clause of memorandum is the most important clause. Certain limits are imposed on company's powers of alteration. The procedure for the change of objects of the company is contained is sections 17 and 18 of the companies act. The company may change its objects by adopting the following procedure.

1. By passing a special resolution (Section 17 (1).
2. By filing the special resolution with the registrar of companies within one month from the date of such resolution (section 18(1)(a)].

REGISTRATION OF ALTERATION

The alteration of memorandum involving the shifting or registered office from one state to another and the alteration of the objects clause must be registered with the registrar of companies. If these alterations are not so registered, then these will have no effect at all [Section 19(1)].

ALTERATION OF LIABILITY CLAUSE

Generally, the company cannot alter the liability clause of its memorandum
so as to increase the liability of the members. The liability of members can be increased only if the concerned member agrees in writing. Thus, an alteration which imposes additional liability on a member or with compels the members to buy additional shares of the company can be made only if the concerned member gives his consent in writing (Section 38)

ALTERATION OF CAPITAL CLAUSE

The company may alter the capital clause of its memorandum by adopting the procedure prescribed in the companies Act. It may, however, be noted that the company can alter (Change) its capital only if it is so authorized by its articles of association. Certain alterations in the capital clause may be made by passing an ordinary resolution, and certain by a special resolution, following types of alterations can be made simply by passing an ordinary resolution

1. Increase of share capital by issue of new shares
2. Consolidation or sub division of existing shares of larger or smaller amount.
3. Conversation of fully paid shares into stock, and conversion of stock into fully paid shares.
4. Cancellation of unissued shares.

DOCTRINE OF ULTRA-VIRES

The term ultra means beyond, and the term vires means powers. Thus term ultra vires means doing an ac beyond the powers. The ultra vires acts may be categorized as under:

1. An act ultra-vires the directors. It is an act which is beyond the powers of the directors.

2. An act ultra-vires the articles of association: It is an act which is beyond the powers given by the articles of association.

3. An act ultra-vires the memorandum of association: It is an act which is beyond the powers given by the memorandum of association. As a matter of fact, such act is beyond the legal powers of the company, and is also known as ‘ultra-vires the company’.

If the company does any act which is ultra-vires the directors, the act is not altogether void and inoperative. It can be ratified by the general body of shareholders. When the act is so ratified, the company becomes bound by the same. Similarly, an act which is ultra-vires the articles of association, is also not altogether void and inoperative.

EFFECTS OF ULTRA-VIRES ACT

The effects of ultra-vires acts may be discussed under the following heads

1. Injunction against the company: In case any ultra Vs act has been done or is about to be done, any member of the company can obtain an injunction from the court. It., he may obtain a court order restraining the company from proceeding with the ultra Vs Act.

2. Personal liability of directors to the company: The directors of the company are personally liable to the company for the ultra Vs Acts. It is the duty of the directors to see that company's capital is used for the legitimate objects of the company.

3. Persons liability of directors to third party: The directors of the company are also personally liable to the third part as they exceed their authority by doing ultra Vs acts. It is the duty of an agent to act within the scope of his authority. If he exceeds his authority he will be personally liable to the third party.

4. Ultra Vs contracts are void: A contract which is ultra Vs the company i.e., beyond company's powers, is void and without any legal effect.

SELF EVALUATION QUESTIONS

22. The procedure for change of registered office from one city to another within the same state is by passing.

(a) Ordinary resolution and approval of Company Law Board.

(b) Special resolution and approval of Central Government.

(c) Ordinary resolution only. *(d) Special resolution only.*

23. Fill in the blanks.

The change of registered office of a company from one state to another requires (i)……., and (ii)…….

24. The procedure for alteration of the object clause of memorandum is by passing.

(a) Special resolution and confirmation of the Company Law Board.

(b) Special resolution and confirmation of the Court.

(c) Special resolution only. *(d) Ordinary resolution only.*

25. The procedure for alteration of the capital clause of memorandum which has the effect of reduction of share capital is by passing a

(a) Special resolution and confirmation of the Company Law Board.

(b) Special resolution and confirmation of the court.

26. Which of the following statements is correct?

(a) An act ultra-vires the company is wholly void an cannot e ratified in any case.

(b) An act ultra-vires the company is not wholly void as it can be ratified by the

whole body of shareholders.

27. Can an act ultra-vires the directors, and ultra-vires the articles of association be ratified?

(a) No, as all ultra-vires acts are void ab initio

(b) Yes, if it is intra-vires the company.

ARTICLES OF ASSOCIATION

INTRODUCTION

The articles of association briefly called articles is the second important document which has to be filed with the registrar at the time of registration of the company this document contains t(e rules, regulations an$ bye laws for the internal management of the company.

The articles of association lays down the modes in which the objects of the company are to be carried out by the members.

The articles define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and the form in which the business of the company is to be carr)ed on, and the mode and form in which changes in the internal regulations of the company may, from time to time, be made.

Thus, the articles of association contain the rules and regulations which are framed for the internal management of the company.

Contents of articles of association

1. Definition of important terms and phrases 2. Adoption or execution of pre incorporation contracts. 3. Share capital and the rights of the shareholders. 4. Allotment of shares. 5. Procedure as to making of calls on shares. 6. Procedure as to forfeiture of shares. 7. Transfer of shares. 8. Lien on sháres. 9. Share certificate and share warrants. 10. Alteration of share capital. 11. Conversion of shares into stocks. 12. dividend, reserves and capitalization of profits.13. appointment of managerial personnel e.g, directors etc., 14. meetings. 15 borrowing powers 16. accounts and audit. 17. common seal of the company. 18 voting rights and proxies. 19 winding up of the company 20. the exclusion, total or partial of table A of schedule I of the companies Act

ALTERATION OF ARTICLES OF ASSOCIATION

The procedure for alteration of articles is contained in Section 31 of the Companaes Act which states that a company may alter its articles of association by passing a special resolution. However, the following alterations shall not have any effect unless the same have been approved by the central Government:

1. The alteration which has the effect of converting a public company into a private company (Secti/n 31 (1)[2].
2. The alteration which has the effect of increasing the remuneration of any director, including a managing or whole time director [Section 310][3].

It may be noted that a company can alter its articles of association as a matter or right. Section 31 gives a clear and statutory power to the company to alter its articles of association.

SELF EVALUATION QUESTIONS

28. Which of the following statements is correct?

(a) The articles of association is subordinate to memorandum of association as the 'memorandum' is considered to be the charter of the company, where as the 'articles' is merely regulatory.

(b) The memorandum of association is subordinate to articles of association as the 'articles' formulates the rules and regulations where as the 'memorandum' states objects only.

29. For which of the following companies it is not obligatory to have articles of association?

(a) Public companies limited by shares.

(b) Public companies limited by guarantee.

(c) Private limited companies. *(d) Unlimited companies.*

30. The general procedure for alteration of articles of association is by passing.

(a) Special resolution. *(b) Ordinary resolution.*

(c) Special resolution and approval of CLB

(d) Ordinary resolution approval of court.

31. The procedure for alteration of articles of association which has the effect of converting a public company into a private company is by passing.

(a) Special resolution and approval of CLB

(b) Special resolution and approval of Central Government

(c) Ordinary resolution and approval of CLB

(d) Ordinary resolution and approval of Central Government

COMPARISON BETWEEN MEMORANDUM AND ARTICLES OF ASSOCIATION

Following table gives the comparison between the memorandum and articles of association:

S. No.	Memorandum of Association	Articles of Association
1.	It defines the objects and powers of the company.	It contains the rules and regulations of the company which are formed for the purpose of carrying out the objects as laid down in the memorandum of association.
2.	It is the supreme document as it defines the constitution of the company. As a mater of fact, it is the charter of the company.	It is subordinate to the memorandum of association. In case of any conflict between the two, the memorandum shall prevail.
3.	It regulates the relationship of the company with the outsiders, as the objects and powers of the company are made known to the outsiders through this document.	It regulates the internal management of the company, as the rules and regulations contained in it describe the internal procedure to be followed by the company.
4.	It cannot be easily altered. The company has to follow strict procedure for the alteration of its registered office clause for shifting the registered office from one state to another.	It can be easily altered as compared to memorandum of association.

5.	It is an important document, and every company must have its own memorandum of association'.	It is not necessary for every company. Because a public company limited by shares may not have any articles of association of its own, it may adopt 'Table A' of Schedule I of the Companies Act.
6.	Any act which is ultra vires (i.e., beyond powers) the memorandum, is wholly void and cannot be ratified even by the whole body of shareholders. As a matter of fact, the company cannot go beyond the scope of its memorandum of association.	Any act which is ultra vires the articles of association may be ratified by the shareholders. Acts ultra vires the articles of association are merely irregular and not void. However, such act can be ratified only if it is within the scope of memorandum of association.

SELF EVALUATION QUESTIONS

32. Can company's power to alter its articles be taken away from the company so as to make the articles final once for all?

(a) Yes, by incorporating a clause to that effect in the articles itself, and approval of court.

(b) No, as the power of alteration of articles is the statutory power given to the company.

33. Which of the following statements is correct?

(a) The 'memorandum' and 'articles' are binding on the members in their relation to the company.

(b) The 'memorandum' and 'articles' are binding on the company in their relation to the members.

(c) None of these is true.

(d) Both of these are true.

34. Company's 'memorandum' and 'articles' are public documents.

(a) True.

(b) False, as these are private documents only governing a particular company and not public in general.

35. Which of the following statements is corrects?

(a) Articles of association regulates the relation of the company with the outsides, as objects of the company are made known to them by this document.

(b) Memorandum of association regulates the internal management of the company as it states the rules and regulations for carrying out the objects of the company.

(c) None of these is true.

(d) Both of these are true.

PROSPECTUS OF A COMPANY

INTRODUCTION

After formation, the company needs the necessary amount of money to finance is business activities. The necessary money for this purpose may either be raised (or collected) from the general public, or be obtained through private contracts. However, the required money is generally raised from the public, as the private money may not be sufficient for the needs of the company. As a matter of fact, it is the great advantage of forming a public [1] company. The money from the general public is raised by inviting deposits from the public, or by inviting offers to purchase the shares or debentures of the company. such deposits or offers may be invited from the public by issuing a document known as 'prospects'. In this chapter we shall discuss the definition of prospectus and other legal provisions relating to prospectus.

DEFINITION OF PROSPECTUS

The term prospectus is defined in section 2 (36) of the Companies Act, which reads as under:

"A prospectus means any document described or issued as prospectus and includes any notice circular, advertisement or other document inviting deposits from the public or inviting offers from the public of the subscription or purchase of any shres in, or debentures of, a body corporate".

In other words, a prospectus means any invitation issued to the public inviting it to deposit money with the company or to take shares or debentures of the company. such invitation my be in the form of a document or a notice, circular, advertisement etc. The only requirement is that the invitation must be made (or issued) to the public.

MATTERS CONTAINED IN PART I OF SCHEDULE - II

The following matters are contained in Part I of Schedule II of the Companies Act which are to be specified in the prospectus.

1. General information: This clause should specify the following matters:

(a) The name and address of registered office of the company.

(b) The consent of the Central Government for the present issue.

(c) The names of regional stock exchange and other stock exchanges where an application has been made for the listing of present issue.

(d) The provisions of section 68A (a) of the Companies Act. As per this section any person who makes a fictitious application for the purchase of company's shares shall be punishable with imprisonment for a term which may extend to 5 years.

(e) The declaration that if minimum subsciption[3] of 90% is not received within 90 days from the closure of the issue, the money received from the applicants shall be refunded.

(f) The declaration about the issue of allotment letters or refunds within a period of ten weeks. In case of delay of any refund, the declaration about the payment of interest at the prescribed rate.

LIABILITY FOR MIS-STATEMENTS AND OMISSION OF FACTS IN THE PROSPECTUS

Prospectus should disclose the whole picture of the company. It should neither contain any mis-statement, i.e. untrue or misleading statement) nor omit to disclose any material fact. If there is any mis-statement or omission of material facts, then the directors, promoters, the persons responsible for the issue of the prospectus, and the company incur a liability for the same, which may be discussed under the following heads:

1. Civil liability of the persons who have authorized the issue of the prospectus.
2. Criminal liability of the persons who have authorised the issue of the prospectus.
3. Liability of the company.

CIVIL LIABILITY OF THE PERSONS WHO HAVE AUTHORIZED THE ISSUE OF THE PROSPECTUS

The civil liability means the liability to pay damages or compensation. When a false prospectus is issued by the company, then the following persons are liable to pay damages to any person who suffers any loss by subscribing for the shares or debentures in the company relaying upon the faith of the prospectus (Sec. 62).

(a) Every person who is a director at the time of the issue of the prospectus. (b)Every promoter who was a party to the preparation of the prospectus. (c) Every person who has authorized himself to be named as a director in the prospectus (d) Every person who has authorized the issue of the prospectus e.g., the experts.

The liability of these persons may be discussed under the following heads:

1. Liability for damages for mis-statement.
2. Liability for damages for omission of facts.
3. Liability for damages under the general law.

However, in the following circumstances on person (i.e, director, promoter etc.) shall be liable for any mis-statement in the prospectus:

1. When he proves the before the issue of the prospectus, he had withdrawn his consent to act as a director.
2. When he proves that the prospectus was issued without his knowledge or consent, and on becoming aware of the issue of prospectus, he immediately gave a public notice to the effect that the prospectus was issued without his knowledge or consent.
3. When he proves that he was ignorant to the untrue statement in the prospectus, and on becoming aware of the same, he withdrew his consent and gave a public notice that he had withdrawn his consent. However, all this must be done before the allotment of shares.
4. When he proves that he had reasonable ground to believe that the statement was true, and he believed it to be true upto the time of allotment.
5. When he proves that the statement was based on an expert's report who was competent to make it, and that the expert had also given his consent to the issue of the prospectus. The espert may escape his liability by proving that he had withdrawn his consent before the registration of the prospectus, or that he was competent to msake the statement and believed the statement to be true.
6. When he proves that the statement was correct and fair representation of a public official document, or a true and fair extract or copy of such document, and he believed the same to be true.

LIABILITY FOR DAMAGES FOR OMISSION OF FACTS

It may, however, be noted that in the following circumstances, a person (i.e., director etc.) responsible for the issue of prospectus shall not be liable for any omission of facts in the prospectus:

1. When he proves that he had no knowledge of the particulars not disclosed in the prospectus.
2. When he proves that the omission to disclose the particulars arose from an honest mistake of fact on his part.
3. When the court considers that the particulars no disclosed were immaterial, or that the omission should otherwise be excused.

Thus, the directors, promoters etc. can put up the above mentioned three defenced to escape liability for omission of facts in the prospectus.

SELF EVALUATION QUESTIONS

36. Which of the following statement is correct?

(a) A public company cannot issue shares or debentures at all unless it issues a prospectus to the public.

(b) A public company can issue shares or debentures without issuing the prospectus if it files with the Registrar a statement in lieu of prospectus within the prescribed time.

37. It is obligatory to file with the Registrar, a copy of prospectus before it is being issued to the public.

(a) True (b) False.

38. A prospectus is required to be issued to the public, within

(a) 30 days after the copy of prospectus is filed with the Registrar.

(b) 60 days after the copy of prospectus is filed with the Registrar.

(c) 90 days after the copy of prospectus is filed with the Registrar.

(d) 90 days the copy of prospectus is filed with the CLB.

39. Can a director escape his liability for mis-statement in a prospectus?

(a) Yest, by proving that before the issue of prospectus he had withdraw his consent to act as director

(b) No, as directors' liability for mis-statement in a prospectus is absolute as provided in section 62.

LIABILITY FOR DAMAGES UNDER THE GENERAL LAW

The persons responsible for the issue of false prospectus may also be held liable for the payment of damages under the general law. Thus, a person who has been induced to invest money in a company by fraudulent statement in a prospectus can recover damages for fraud (or deceit) under the 'Indian Contract Act', or the 'Law of Torts'.

CRIMINAL LIABILITY OF PERSONS WHO HAVE AUTHORIZED THE ISSUE OF THE PROSPECTUS

The criminal liability means the liability which impose punishment of imprisonment of fine or both. These persons are also criminally liable, under the Companies Act, for the issue of false prospectus. According to Section 63 of the Companies Act, if a prospectus is issued containing an untrue statement then every person who authorised the issue of the prospectus, is punishable with imprisonment which may extend to two years, or with fine which may extend to two years, or with fine which may extend to five thousand rupees, or with both. However, such person will not be liable if he proves that:

1. The untrue statement was immaterial; or
2. He had reasonable grounds to believe that the statement was true, and upto the issue of the prospectus he actually believed the statement to be true.

Liability of the company

We have already discussed in Arts 6.11 to 6.14 that the persons who have authorized the issue of false prospectus are liable to the persons who invest money in the company on the belief of such prospects. It will be interesting to know that the company is also liable to pay damages for misstatement in the prospectus. Thus, any person who has been induced to invest money in the company by fraudulent statement in the prospectus, may recover damages for fraud either from the directors etc. or from the company. However, the company by fraudulent statement in the prospectus, may recover can be made fraud either from the directors etc. or from the company. However, the company can be made liable if it is proved that the false prospectus was issued by the directors within the scope of their authority. It may, however, be noted that the liability of the company is only for those mis-statements which amount to 'fraud'. Thus, the damages can be recovered from the company only if following conditions are satisfied and proved by the investor:

1. The mis-statement in the prospectus must be fraudulent i.e., it must be made with the intention to deceive.

2. The fraudulent misstatement must relate to some existing materials facts.
3. The fraudulent misstatement must have induced the investor to purchase the shares or debentures in the company, and he actually acted upon the misstatement and suffered damages.

STATEMENT IN LIEU OF PROSPECTUS

We know that, a public company having a share capital must issue a prospectus if it wants to raise public money by issue (i.e., allotment) of shares or debentures. The company can also allot shares or debentures without issuing the prospectus. However, in such a case, a statement known as 'statement in lieu of prospectus' is required to be prepared and filed with the Registrar of Companies.

The legal provisions relating to the 'statement in lieu of prospectus' are contained in section 70 of the companies Act, which may be summed up as under:

1. It must be singed by every person who is named as director or proposed director of the company, or by his authorised agent.
2. It must be filed with the Registrar at least three days before the first allotment of shares or debentures is made.
3. If it is not filed with the Register as stated above, then company and the guilty directors are punishable with fine which may extend Rs. 10,000*.
4. If it contains any misstatement then the civil and criminal liability is the same as in case of prospectus.

Minimum Subscription

The minimum subscription is the minimum amount states in the prospectus which is required for certain specified purposes, namely:

1. For the payment of purchase price of the property.
2. For the payment of preliminary expenses including any commission payable for the sale of company's share (e.g., underwriting commission).
3. For the repayment of any money borrowed by the company for the above, two purposes.
4. For working capital.
5. For any other necessary expenditure.

Underwriting Commission

The expression underwriting literally means the giving literally means the giving of a guarantee. It is a well-known business term and is commonly used in company matters. In this connection, it may be defined as the entering into a contract with a company by which a person (known as 'underwriters*) agrees that if the shares f debentures offered by the company to the public for subscription are not taken up by the public, he will himself take up the shares and pay for them. As a matter of fact, an underwriter guarantees the purchase of company's shares or debentures by the public. The amount payable to the underwriters for giving such undertaking (i.e., guarantee) is known as the 'underwriting commission'.

SELF EVALUATION QUESTIONS

40. The prospectus should disclose the matters contained in Part I, and Part Ii of Schedule II.

(a) True, as this schedule is applicable to a prospectus.

(b) False, as Schedule III is applicable to a prospectus.

41. Is there any criminal liability for untrue statement in a prospectus?

(a) Yes, punishment upto who years or fine up Rs. 5,000 or both

(b) No, as such an untrue statement does not amount to an offence under any law

42. Is there any liability of company for false prospectus?

(a) Yes, if the false statement in a prospectus amounts to fraud.

(b) No, the company being an artificial person cannot be held liable for any such fraud. Only the human beings (i.e., directors, promoters etc.) are liable for such things.

43. What is the remedy available to a person who has been induced to purchase the shares or debentures of a company by misrepresentation of material facts in prospectus?

(a) He can recover damages from the company.

(b) He can rescind the contract to purchase the shares or debentures.

(c) Both of these

(d) None of these

44. Fill in the blanks

(a) If a public company having share capital wishes to issue shares without issuing a prospectus to the public then a statement in lieu prospectus must be filed with the –at least –days before the – allotment of shares.

SHARES OF A COMPANY

INTRODUCTION

We know that the money required by the company for its business activities is raised (collected) by it fro the public. The money so raised is called the capital of the company which is usually divided into different units of a fixed amount. These units are called the 'shares'. The persons who hold the shares of a company are called the members or shareholders of the company.

"A share is the interest of a shareholder in the company, measured by a sum of money for the purpose of liability and dividends in the just place, and of interest in the second, and also consisting of a contracts as contained in the articles of association".

Types of shares

The shares which can be issued by a company, are of two types, namely:

1. Preference shares.
2. Equity of ordinary shares.

It may be noted that company can issue only the above two types of shares (Section 86). However, a private company which is not a subsidiary of a public company may issue shares of such other kind as it may think fir e.g., deferred or founder shares [Section 90 (2)].

The Companies (Amendment) Act, 1999 has inserted a new Section 79A which provides that a company may also issue *sweat equity shares.* The expression 'sweat equity shares' means the equity shares issued by the company to employees or directiors at a discount. This point will be discussed in detail in Art. 7.44.

PREFERENCE SHARES

The preference shares are those which have some preferential rights over the other types of shares *i.e.,* which enjoy some priority over the equity shares. A share to be preference share, must have *both* the following preferential rights [Section 85]:

1. A *preferential right as to the payment of dividend:* During the continuance of the company, the preference shareholders must get some dividend. The preference dividend may consist of fixed amount to be distributed among the preference shareholders, or it may be paid at a fixed rate *e.g.,* 5% of nominal value of shares.
2. A *preferential right as to the repayment of capital:* In the event of winding up of the company, the amount paid on preference shares must be paid back before anything is paid to the equity shareholders. The

sum-total of the preference shares is the 'preference share capital' of the company.

KINDS OF PREFERENCE SHARES

The preference shares may be of the following kinds:

1. Cumulative and non-cumulative preference shares.
2. Participating and non-participating preference shares.
3. Convertible and non-convertible preference shares.
4. Redeemable preference shares.

CUMULATIVE AND NON-CUMULATIVE PREFERENCE SHARES

The ‘cumulative preference shares’ are those which are assured of the dividends every year even if there are no profits in a particular year. If in a particular year there are no profits to pay the dividends, the unpaid dividend of such preference shares is treated as arrear and is carried forward to the subsequent years. Thus, the unpaid dividend goes on accumulating and is paid when there are sufficient profits in the subsequent years. It may be noted that when there are profits in a year then the arrears of dividend are paid to the preference shareholders before paying anything to the other *(i.e.,* equity) shareholders. It will be interesting to know that the *preference shares are always presumed to be 'cumulative'.* They become non-cumulative only if there is a clear provision stating that they are ‘non-cumulative’.

The ‘non-cumulative preference shares’ are those which do not get any dividend if in a particular year there are no profits to pay their preferential dividends. Their dividends do not accumulate and they cannot claim the unpaid dividends in the subsequent years when there are sufficient profits *i.e.,* the unpaid dividend of 'non-cumulative preference shares' is not carried forward. Thus, when there are no profits, in a particular year these shares go without any dividend. It may be noted that there must be clear provision to make the preference shares as non-cumulative.

PARTICIPATING AND NON-PARTICIPATING PREFERENCE SHARES

The 'participating preference shares' are those whi^h, in addition to their preferential dividend, are also entitled to participate in the surplus profita or surplus assets. The term *'surplus profits'* means the balance of profits which is left after paying the fixed amount of dividend to the preference shareholders and some dividend to the equity shareholders. And the term *'surplus assets'* means the balance of assets which is left after paying back both the preference and equity shareholders. The 'participating preference shareholders' participate in such surplus alongwith the equity shareholders. It will be interesting to know

that the *preference shares are always presumed to be 'non-participating'*. They become participating only if there is a clear provision in the 'memorandum' or 'articles of associat'un' or the 'terms of issue'.

Sometimes, the 'articles of association' provides that the preference shares are entitled to participate in the 'surplus profits'. In such cases, they do not become entitled to participate in the 'surplus assets'. There must be clear provision to that effect.

The 'non-participating preference shares' are those which are not entitled to participate in the 'surplus profits' or 'surplus assets'. They are entitled only to a fixed rate of dividend. Generally, the preference shares are presumed to be 'non-participating'.

CONVERTIBLE AND NON-CONVERTIBLE PREFERENCE SHARES

The 'convertible preference shares' .are those which can be converted into equity shares within a certain period *i.e.,* the holders of such shares have right to convert these shares into equity shares. The 'non-convertible preference shares' are those which cannot be converted into equity shares.

REDEEMABLE PREFERENCE SHARES

The 'redeemable preference shares' are those the amount of which can be paid back to the holders of such shares. In other words, the capital raised through the issue of redeemable preference shares can be paid back by the company to such shareholders. The paying back of capital is called the redemption.

EQUITY OR ORDINARY SHARES

The equity shares are those which are not preference shares i.e., these shares do not enjoy any preferential rights [Section 85(2)]. Thus, for the purpose of dividend and repayment of capital, the equity shares rank after the preference shares.

ALLOTMENT OF SHARES

We know that the prospectus issued by a company is the invitation to the public to apply for the shares of the company. One the basic of this invitation, the persons apply to the company for its shares. An application for shares is an offer from the applicant to purchase the shares. And when an application is accepted by the company, it is called an allotment. Thus, an ‘allotment’ is the acceptance by the company of the offer to purchase shares.

ESSENTIALS AND LEGAL RULES FOR A VALID ALLOTMENT

We have discussed, in the last article, that a valid allotment creates a binding contract between the company and shareholders. It must, therefore, satisfy the requirements of the Law of Contract relating to offer and acceptance.

In addition to this, a valid allotment must also comply with the legal provisions as contained in the Companies Act. Thus, the essentials and legal rules for a valid allotment may be discussed under the two heads, namely:

1. Legal rules relating to offer and acceptance.
2. Legal rules under the companies act.

LEGAL RULES RELATING TO OFFER AND ACCEPTANCE

We know that an allotment is the acceptance of an offer to purchase the shares. Therefore, the general principles relating to valid acceptance of an offer must be followed. These may briefly be summed up as under:

The allotment must be made by proper authority: The proper authority for allotment is the 'Board of Directors'. Thus, the allotment must be made by a resolution passed by the Board of Directors. However, this authority of allotment may be delegated by the Board of Directors as per the provisions contained in the articles of association. The allotment made by the person properly authorized by the Board of Directors shall also be valid. However, if the person signing the allotment letter is not authorized by the company, the allotment will be invalid and without any legal effect.

1. **The allotment must be communicated:** The allotment must be communicated to the applicant. It may be noted that no binding contract arises until the allotment is properly communicated. Generally, the allotment is communicated through post. It may be noted that in case of postal communication, the allotment is complete (i.e., considered to be communicated) as soon as the properly addressed and stamped letter of acceptance is posted by the company. It will be interesting to know that even if the letter of acceptance is lost or delayed in postal transit, the applicant would be bound by the contract to purchase shares. The reason for the some is that, the applicant becomes bound by the allotment as soon as the letter of acceptance is properly posed by the company.
2. **The allotment must be made within a reasonable time:** The allotment of shares must be made within the reasonable time of the application for shares. if the application for shares is not accepted within reasonable time, then the applicant may refuse to take shares. The expression 'reasonable time' is a question of fact in each particular case.
3. **The allotment must be absolute and unconditional:** The allotment of shares must be absolute, and in accordance with the terms and

conditions of the application. Where the allotment is not according to the terms and conditions, the applicant may reject the allotment.

SHARE WARRANT

A 'share warrant' is a document specifying certain shares, and stating that the bearer of the document is entitled to the shares specified in it. It is issued by the company under its common seal. It may be noted that a share warrant is the substitute for a share certificate. It is a bearer document and is transferable by mere delivery i.e., the share mentioned in it may be transferred by simply delivering the share warrant to the transferee. Thus, the holder of the share warrant is entitled to the shares specified therein. It will be interesting to know that a share warrant is a negotiable instrument. Following are the legal provisions as to the validity of a share warrant [Section 114]:

1. It must have the common seal of the company affixed on it.
2. It must be issued only in respect of fully paid shares.
3. It must specify the number of shares.
4. It must state that its bearer is entitled to the shares specified in it.
5. It can be issued only by a public company limited by shares.
6. The articles of association of the company must have authorised the issue of share warrant.
7. The prior approval of the Central Government must have been obtained for the issue of share warrant.

COMPARISON BETWEEN A SHARE CERTIFICATE AND A SHARE WARRANT

The following table gives the comparison between a share certificate and a share warrant:

S. No.	Share Certificate	Share Warrant
1.	It can be issued whether the shares are fully or partly paid.	It can be issued only when the shares are fully paid.
2.	It can be transferred by executing a proper transfer deep.	It can be transferred by mere delivery.
3.	It entitles the person named in it to the shares specified in the share certificate.	It entitles its bearer to the shares specified in the share warrant.
4.	It can be issued by both a public and private company.	It can be issued only by a public company limited by shares.

5.	It is not a negotiable instrument.	It is considered to be a negotiable instrument.
6.	Its holder is a member of the company.	Its holder is not a member of the company. He can be considered a member for specific purpose only if company's articles so provide.
7.	Its holder is qualified as a director of the company where the qualification shares are prescribed.	
8.	Its holders is entitled to present a petition for winding up of the company.	Its holder is not entitled to present a petition for winding up of the company.
9.	It is issued without any approval of Central Government. Moreover, there need not be any authority in company's articles for its issue.	It can be issued only with the prior approval of the Central Government. Moreover, the company's articles must authorise the company for its issue.
10.	Its transfer attracts stamp duty i.e., the stamp duty is payable on the transfer of share certificate.	Its transfer does not attract any stamp duty i.e., no stamp duty is payable no the transfer of share warrant.
11.		a heavy stamp duty is payable on the issue of a share warrant.
12.	A nominal stamp duty is payable on the issue of a share certificate.	A heavy stamp duty is payable on the issue of a share warrant.
	The dividend to its holder is paid, usually by cheque.	The dividend to its holder is paid on the production of a coupon attached with it.

TRANSFER OF SHARES

We have already discussed that the shares of a company are movable property and can be transferred in a manner prescribed by the 'articles of association' of a company. The transferability of shares is one of the main advantages of the company form of organisations.

PROCEDURE OF TRANSFER OF SHARES

A member can transfer his shares by executing an instrument of transfer of shares (i.e., a transfer deed). This instrument of transfer must be in the prescribed form i.e., as per form No. 7 B of the Companies Central Government (General Rules & Forms), 1956. Before the instrument of transfer (i.e.,

prescribed form) is signed by the transferor and before any entry is made in it, must be presented to the prescribed authority [10] for stamping.

The requirements of a valid transfer of shares may be summed up as under:

1. The instrument of transfer must be in the prescribed form and must be presented to the prescribed authority for stamping (dating) before it is signed by the transferor and before any entry is made therein.
2. The instrument of transfer must be in writing and executed (i.e. signed) by both the transferor and the transferee.
3. the instrument of transfer must specify the name, address and occupation, if any, of the transferee.
4. the instrument of transfer must be duly stamped.
5. the instrument of transfer must be delivered to the company, for registration within the time along with the share certificate relating to the shares transferred by the instrument. If no share certificate is in existence, then the letter of allotment should be sent.
6. The instrument of transfer must be registered. Without registration, the transferee does not become a member of the company though the transfer of shares is complete as between the transferor and the transferee.

CERTIFICATION OF TRANSFER

The term 'certification' may be defined as an act of endorsement on the 'instrument of transfer', by an authorized officer of the company, that the share certificate relating to the shares under transfer has been lodged with the company.

FORGED TRANSFER

The term 'forged transfer' may be defined as the transfer of shares made on the basis of a 'forged instrument of transfer' (i.e., a forged transfer deed). The instrument of transfer is said to be forged when transferor's signatures on it are forged. Following are the consequences of 'forged transfer'.

BLANK TRANSFER

The term 'blank transfer' may be defined as the transfer of shares by blank instrument of transfer (i.e., a blank transfer deed). A blank instrument of transfer is one in which only the name and signature of the transferor are filled in.

SELF EVALUATION QUESTIONS

45. The shares in a company are the movable property of the shareholder.

(a) True, as the Companies Act so provides.

(b) False, as only goods can be the movable property and shares are not goods.

46. A share certificate is a negotiable instrument as the shares of companies are freely transferable.

(a) True *(b) False*

TRANSMISSION OF SHARES

The term 'transmission of shares' may be defined as transfer of shares by the operation of law. The transmission of shares takes place on the death or insolvency of the shareholder. The 'articles of association' of the company usually contains provision relating to transmission of shares.

COMPARISON BETWEEN TRANSFER OF SHARES AND TRANSMISSION OF SHARES

The following table gives the comparison between the transfer of shares and transmission of shares:

S. No.	Transfer of Shares	Transmission of Shares
1	It is a voluntary act of the parties.	It is not a voluntary act of the parties. It takes place by operation of law i.e. on the death or insolvency of the shareholder.
2	In this case, the shares are transferred to another for some consideration.	In this case, the shares pass to another person without any consideration.
3	In this case, the 'transfer deed' is necessary for the purpose of transferring the shares to another person.	In this case, the 'transfer deed' is not required only a letter of request to the company is sufficient.

STOCK

The term 'stock' may be defined as the aggregate of fully paid up shares legally consolidated. In other words, it is a set of shares put together in a bundle. The 'stock' is expressed in terms of money and not as so many shares.

COMPARISON BETWEEN SHARES AND STOCK

The following table gives the comparison between share and stock:

S. No.	Share	Stock
1.	It has a nominal value.	It has no nominal vale.
2.	It may not be fully paid up i.e. It may also be partly paid up.	It is always fully paid up.
3.	It cannot be transferred in small fraction. It is always transferred as a whole.	It can be transferred in any fraction.
4.	It can be issued directly to the public.	It cannot be issued directly to the public. Only the fully paid shares (already issued) may be converted into stock.
5.		
6.	All the shares are of equal denomination (i.e., amounts).	The stock may be of unequal amount.
	All the shares bear distinct numbers.	The stock discloses the consolidated value of the share capital. Thus, the fractions of stock do not bear any number.

ISSUE OF SHARES AT PREMIUM

The issue of shares at premium mean the issue of shares at a price higher than the face value of the share. Thee is no restriction on the issue of shares at premium. The company is free to issue the shares at premium.

ISSUE OF SHARES AT DISCOUNT

The issue of shares at a discount means the issue of shares at a price less than the face value of the share. Generally speaking, the Company Law has always discouraged the issue of shares at a discount. And the law does not tolerate the issue of shares at a discount even in an indirect way. The Companies Act has imposed strict restrictions on the issue of shares at discount [Section 79]. A company can issue the shares at discount subject to the following conditions:

1. The discount can be allowed only on that class of shares which the company has already once issued earlier at full value. Thus, the shares

to be issued at discount must be of a class already issued by the company.

2. One year must have passed since the date at which the company became entitled to commence the business. In other words, the company must have been working for at least one year from the date it became entitled to commence the business.
3. The issue of shares at discount must be authorized by a resolution passed by the company in its general meeting.
4. The resolution must specify the rate of discount which must not exceed 10%. However, a higher rate of discount may be allowed if the Company Law Board is of the opinion that the higher rate may be allowed in special circumstances.
5. The sanction of the Company Law Board must be obtained, and the shares must be issued within two months of the sanction. However, the Board may extend time for the issue of shares at discount.

BONUS SHARES

Sometimes, the larges amount of reserves are accumulated with the company which are undistributed past profits, and the company likes to distribute these accumulated profits. In such cases, the company may issue the shares for this amount to its existing shareholders who are entitled to receive the bonus. The shares so issued are called the 'bonus shares'.

FORFEITURE OF SHARES

The term 'forfeit' may be defined as taking into possession and depriving a shareholder of his right to the shares. Sometimes, the shareholder is called upon to pay the amount of calls due on his shares, but he fails to pay the amount of calls.

CALLS ON SHARES

The term 'call' may be defined as a demand by a company on its shareholders to pay the whole or part of the balance remaining unpaid on each share. When the shares are issued to the public, generally the full amount of each share is not payable at once. Only a part is payable on application, and another part on allotment. And the balance is payable by instalments as and when called by the company. The amount paid on application and allotment are not calls unless the articles of association expressly recognize them as calls. But the subsequent instalments are calls as and when demanded by the company. The liability of a shareholder to pay the full value of shares held by him is enforced by the company by making 'calls'.

SELF EVALUATION QUESTIONS

47. Which of the following statements is correct?

(a) Only fully paid preference shares can be redeemed.

(b) Only fully paid shares can be issued as irredeemable preference shares.

(c) All the preference shares (fully paid or partly paid) can be redeemed. The only requirement is that the company must have been authorized by its articles to redeem the shares.

(d) The preference shares cannot be redeemed as the Companies (Amendment) Act, 1988 prohibits their redemption.

48. Where the prospectus has not been issued, and the allotment of shares is made without filing with the Registrar a 'statement in lieu of prospectus', the allotment is

(a) Irregular and void ab initio i.e., without any legal effect.

(b) Irregular and voidable at the option of applicant.

(c) Regular and valid. Only the directors are liable to punishment upto 3 months.

(d) Effective after 3 months from the date of allotment.

49. Which of the following statements is not correct?

(a) A share warrant is a negotiable instrument.

(b) A share warrant is not a negotiable instrument

(c) A share warrant can be issued only in respect of fully paid shares.

(d) A share warrant can be issued only by a public company limited by shares.

SHARE CAPITAL

TYPES OF SHARE CAPITAL

The term 'capital' in connection with a company is used in different senses. Keeping this aspect in view, the capital of the company may be categorized as under:

1. **Authorised capital:** It is the capital which is stated in company's memorandum of association with which the company intends to be registered. It is also called the 'nominal' or 'registered' capital. In fact, it is the maximum amount of share capital which a company is authorized to raise by issuing the shares. The authorized capital is divided into shares of fixed amount. The maximum limit of the authorized capital depends upon the business requirements of each company, and there is no legal restriction upon its maximum limit. The authorized capital may be increased or reduced by the company by passing an ordinary resolution.
2. **Issued capital:** It is that part of the authorized (nominal) capital which is actually offered (issued) of the public for subscription. It indicates the amount which is open for public subscription. It is not obligatory for the company to issue whole of its authorized capital. The company may issue whole or any part of it, and keep the balance for future requirements. However, the issued capital cannot exceed the authorized capital. The part of the authorized capital which is not issued to the public, is known as the 'unissued capital'.
3. **Subscribed capital:** It is that part of the issued capital which is actually subscribed (i.e., taken up) by the public. In other words, it is the capital for which the applications are received from the public and the shares have been allotted to the public. The subscribed capital depends upon the response from the investing public which is received on the basic of issued capital.
4. **Called-up capital:** It is that part of the subscribed capital which is actually demanded by the company to be paid. The company may not be in need of the entire amount of the capital subscribed by the public. The company may call such amount from the subscribers as is required by it. The part of the subscribed capital which is not called by the company is known as the 'uncalled capital'. It may be called according to requirements subject to the terms of issue of shares, and the provisions of 'articles of association'.
5. **Paid-up capital:** It is that part of called-up capital which has been actually paid by the members (subscribers). In other words, the total money received on shares is known as the paid-up capital.

6. **Reserve capital:** It is that part of the uncalled capital which cannot be called by the company except in the event of its winding up. The company may, by a special resolution, declare that a portion or whole of the uncalled capital shall not be called except in the event of its winding up [Section 99]. It may be noted that the 'reserve capital' cannot be converted into ordinary uncalled capital without the leave (permission) of the court.

SELF EVALUATION QUESTIONS

50. Which of following statement is not correct?

(a) The authorized capital of company may be increased or reduced by passing an ordinary resolution.

(b) The issued capital of a company cannot exceed its authorized capital.

(c)The reduction of share capital, without the sanction of the court, is unlawful.

(d) All are correct

51. The procedure for reduction of share capital is by passing a special resolution and obtaining confirmation of

(a) Company Law Board. *(b) Court*

(c) Central Government *(d) SEBI*

DEBENTURES OF A COMPANY

"Debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture".

CHARACTERISTICS OF DEBENTURES

We have discussed, in the last article, the legal definition of the term 'debenture'. It reveals the following usual characteristics of debentures:

1. It is an acknowledgement of indebtedness of the company to its holder for the amount stated in the certificate. It is the main feature of a debenture.
2. It is usually in the form of a certificate issued under the seal of the company. However, it may also be signed by the directors without any seal of the company.
3. It usually provides for the payment of a specified principal sum at a specified date. But it is, however, not necessary, because the company may also issue perpetual or irredeemable debentures which are made payable only on the happening of some contingency or in the event of winding up [Section 120].
4. It Usually provides for the payment of interest until the principal sum is paid back. This again is also not necessary, because the interest may also be made payable on the happening of some contingency *i.e.*, uncertain event.

   [Lemon v. A.F. Investment Trust, (1926) Ch. 1].
5. It is usually issued out of a series of debentures. However, a single debenture may also be issued to one person.
6. It is usually secured by a charge, fixed or floating, on some property of the company. However, a debenture may also be issued without any charge on company's property.
7. A debenture-holder does not have any right to vote at any meeting of a company Section 117].

KINDS OF DEBENTURES

The debentures may be of the following kinds:

1. *Registered debentures:* These are the debentures which are registered in the name of a particular person and are payable to him. The name of registered holder is placed on the debenture certificate and the company's register of debentures. The payment of interest and the repayment of the principal is made to the persons whose names are registered with the company. A registered

debenture-holder can transfer his debentures in the same way as shares are transferred [Section 108]. And such transfer must be registered with the company.

Note. The registered debentures are not negotiable instruments.

2. *Bearer debentures:* These are the debentures which are payable to the bearer *(i.e.,* the holder of the debenture). The company keeps no register of such debenture-holders. However, if the debentures are secured they are entered in the register of charges. The bearer debentures are like cheques etc. and are transferable by mere delivery. The person to whom the bearer debentures are transferred becomes its holder and is entitled to receive and recover the principal with interest on due date. The transfer is not required to be registered with the company. Generally, the coupons are attached to such debentures for the payment of interest.

Note. The bearer debentures are regarded as negotiable instruments.

3. *Secured debentures:* These are the debentures which are secured by a charge on the property of the company. In other words, the repayment of the interest and the principal is secured by way of security. The charge may be fixed or floating. The fixed and floating charges have already been discussed in the last chapter.

4. *Unsecured debentures or naked debentures:* These are the debentures which are not secured by any charge on company's property. The debenture-holders of such debentures are the unsecured creditors of the company.

5. *Redeemable debentures:* These are the debentures which are paid off after the expiry of the fixed term. Thus, in case of redeemable debentures, the company has the right to pay back the loan to the debenture-holders after the expiry of the fixed term, and have its properties released from the charge created in favour of the debenture holders. It will be interesting to know that the redeemed debentures can be re-issued until they are cancelled. And on re-issue, the new debenture-holders will get the same rights and priorities as if the debentures have never been redeemed [Section 121]

Note. The debentures may be redeemable at par, or at premium. But their redemption at discount is not permitted.

6. *Irredeemable or perpetual debentures:* These are the debentures which contain no clause as to repayment, or which contain a clause that it shall not be paid back. Such debentures are payable in the event of winding up of the company, or on some serious default by the company *{e.g.,* when interest is not paid regularly), or on the happening of some uncertain event. However, this

does not mean that the company can never pay them off even if it wishes to do so. *It only means that the debenture-holders cannot compel the company to redeem them unless some event happens.* As a matter 'of fact, these are retained as a part of the permanent capital structure of the company.

Note, All debentures whether redeemable or irredeemable become payable when the company goes into liquidation.

7. *Convertible debentures:* These are the debentures which give an option to the debenture-holders to convert their debentures into equity or preference shares at a stated rate of exchange, after a certain period [Section 81 (3)]. On conversion, the debenture-holders become the members of the company.

COMPARISON BETWEEN A SHARE-HOLDER AND A DEBENTURE-HOLDER

The following table gives the comparison between a share-holder and a debenture-holder:

S.No.	Share – holder	Debenture – holder
1.	He is the member and joint owner of the company.	He is simply a creditor of the company who has given some loan to the company.
2.	He has a right to vote at the meetings of the company.	He has no right to vote at any meeting of the company.
3.	He is entitled to get dividends only out of profits. The rate of dividends is not fixed. It varies from year to year depending upon the profits of the company.	He is entitled to fixed rate of interest whether there are profits or not.
4.	He has full right to control company's affairs. In fact, the ultimate destiny of the company is in the hands of share-holders.	He has not right to interfere with the business of the company. however, in case of company's default in paying their debt, he may enforce their security.
5.	He cannot be paid back so long as the company is a going concern.	He can be paid back unless he is a perpetual debenture-holder. He generally has a charge over

6.	He does not have any charge over the assets of the company.	the assets of the company.
7.	In case of winding up of the company, he is paid after satisfying all other claims.	In case of winding up, a secured debenture holder is paid prior to the share-holder.

SELF EVALUATION QUESTIONS

52. A bearer debenture is regarded as a negotiable instrument.

(a) True *(b) False*

53. The debentures can also be redeemed at discount.

(a) True *(b) False*

54. Which of the following statement s is correct?

(a) A debenture – holder does not have any right to vote at any meetings.

(b) The company cannot issue irredeemable debentures.

(c) The debentures can also be redeemed at discount.

(d) The redeemed debentures cannot be issued again by the company

55. Which of the following statement is correct?

(a) The debentures can also be issued giving voting right to debenture-holders.

(b) The convertible debentures give right to debenture-holders to convert their debentures into shares (equity or preference).

MEETINGS AND RESOLUTIONS

INTRODUCTION

The business of the company is carried on by the selected representatives of the members, called the directors. The directors take decisions by calling their meetings.

KINDS OF MEETINGS

The meetings of a company may broadly be classified into the following two categories:

1. Meeting of members (shareholders) and 2. Other meetings.

MEETINGS OF MEMBERS (SHAREHOLDERS)

The meetings of the shareholders can be of four kinds, namely:

1. Statutory meeting. 2. Annual general meeting.
3. Extra-ordinary general meeting. 4. Class meeting.

STATUTORY MEETING

It is the first meeting of the members of the company after its incorporation. It must be held within 6 months from the date at which the company is entitled to start business. [Section 165]. It may be noted that the statutory meeting is held only once in the life time of the company.

The following companies are required to hold the statutory meeting:

(a) Every public company limited by shares.

(b) Every public company limited by guarantee and having a share capital.

The legal provisions relating to the statutory meeting are contained in Section 165 and may be summed up as under:

1. The statutory meeting must be held within a period of not less than one month and not more than six months from the date on which the company is entitled to commence business [Section 165 (1)]. In other words, it must be held within 6 months from the date on which the company is entitled to start the business but it cannot be held within the first one month from the date, *e.g.*, a company entitled to commence business on 1st July 1999, must held its statutory meeting within the period commencing from 1st August, 1999 to 31st December, 1999.

2. The Board of Directors is required to prepare a report, called the *'statutory report'*. This report must be sent to every member of the company at least 21 days before the day on which the meeting is to be held. However, the delay in sending the report may be condoned by all the members who are entitled to attend and vote at the meeting [Section 165 (2)].

3. The statutory report is sent to the members to enable them to know the full information on all the important matters relating to the company. It must contain the following particulars [Section 165 (3)]:

(a) The total number of shares allotted giving their all details.

(b) The total amount of cash received by the company in respect of all the shares allotted.

(c) An abstract of receipts and payments of the company, and the particulars of balance in hand.

(d) An estimate of company's preliminary expenses.

(e) The particulars of directors, managers, secretary and auditors.

(f) The particulars of a contract requiring company's approval.

(g) The arrears of calls due from directors, managers.

(h) The particulars of commission or brokerage paid or payable to the directors or manager.

4. The statutory report must be certified as correct by at least two directors, one of whom must be a managing director if there is any. After the report is certified as above, it should also be certified as correct by the auditors of the company [Section 1-65 (4)].

5. After the copies of the statutory report have been sent to the company, a certified copy of the report should also be sent to the Registrar of Companies for registration [Section 165 (5)].

6. At the commencement of the meeting, the Board of Directors shall produce a list of members showing their names, addresses and occupation along with the number of shares held. by them. Such list shall remain open and accessible to any member of the company during the continuance of the meeting [Section 165 (6)].

7. The members present at the meeting shall be at liberty to discuss any matter relating to the formation of the company. They may also discuss any matter arising out of the statutory report. [Section 165 (7)].

8. The meeting may adjourn from time to time. A resolution may be passed at any such adjourned meeting if due notice has been given in the meantime [Section 165(8)].

ANNUAL GENERAL MEETING

It is the regular meeting of the members of the company. It must be held in each year in addition to any other meeting [Section 166 (1)]. The purpose of. this meeting is to provide an opportunity to the members of the company to express their views on the management of company's affairs.

SELF EVALUATION QUESTIONS

56. Statutory meeting is the first meeting of the company after it incorporation, and must be held within.

(a) 90 days from the date at which the company is entitled to start its business.

(b) 6 months from the date at which the company is entitled to start its business.

(c) 6 months from the date of incorporation.

(d) 18 months from the date of incorporation.

57. Which of the following statements is not correct?

(a) A statutory meeting is held only once in the life time of a company.

(b) It is obligatory for every company (public or private) to hold a statutory meeting.

(c) It is obligatory for public companies (limited by shares, and limited by guarantee and having share capital) to hold a statutory meeting.

(d) A statutory meeting must be held within 6 months from the date on which the company is entitled to commence business, but is cannot be held within one month from that date.

58. The first annual general meeting of the company must be held within

(a) 6 months of incorporation.

(b) 6 months from the date at which the company is entitled to start its business.

(c) 18 months of incorporation

(d) 18 months from the date at which the company is entitled to start its business.

The legal provisions relating to the annual general meeting are contained in Sections 166 to 168, which may be summed up as under:

1. The annual general meeting must be held once in each year in addition to any other meetings. And the gap between one meeting and the next should not be more than 15 months. However, for special reason, the Registrar of Companies may extend the time within which the annual general meeting shall be held, but the extension cannot exceed 3 months [Section 166 (1)].

2. The first annual general meeting must be held within 18 months of the incorporation of the company, and this time cannot be extended even by the

Registrar. The subsequent annual general meetings should be held in each year within 15 months from the last meeting [Section 166 (1)].

3. At least 21 days notice of the meeting in writing, must be given to every member of the company. A shorter notice may also be given if agreed to by all the members who are entitled to vote at the meeting. The place, day and hours should be specified in the notice [Sections 171, 172].

4. The meeting must be held during the business hours and on a day which is not a public holiday' [Section 166 (2)]. It is important to note here that, if *after* the issue of notice convening the meeting, any day is declared by the Central Government to be a public holiday, it shall not be considered to be a public holiday in relation to the meeting and the meeting can be held on that day even if that has been declared as a public holiday. However, if a day has already been declared as a public holiday by the Central Government and the notice convening the meeting has been issued by the company after such declaration, then the meeting cannot be held on that day [Section 2(38)].

5. The meeting must be held either at the registered office of the company, or at some place within the city, town or village in which the registered office is situated.

6. If the company fails to hold the annual meeting, the consequences will be as under:

(a) Any member of the company can apply to he Company Law Board[2] for calling the meeting. On such application, the Company Law Board[2] may order calling of the meeting, or it may issue directions for calling the meeting. A meeting called by the order of the Company Law Board shall be deemed to be an annual general meeting of the company [Section 167].

(b) The company and every officer in default shall be punishable with fine up to Rs. 50,000*, and if the default continues, with a further fine upto Rs. 2,500* for every day after the first day of default during which the default continues.

EXTRA-ORDINARY GENERAL MEETING

It is the meeting other than the statutory and the annual general meeting of the company [Clause 47 of Table A, Schedule IJ. This meeting is called for dealing with some urgent special business which cannot be postponed till the next annual general meeting.

The legal provisions relating to the extra-ordinary general meeting have been provided in Clause 48 of Table A, Schedule I, and Sections 169 and 186 of the Companies Act which may be studied as under:

1. Calling of extra-ordinary general meeting by the board of directors [Clause 48, Table A]: The extra-ordinary general meeting may be called by the Board of Directors on its own motion whenever it thinks fit to call the meeting.

2. Calling of extra-ordinary general meeting on the requisition of members [Section 169]: The extra-ordinary general meeting becomes necessary on the requisition of members. The legal provisions relating to the calling of the extra-ordinary general meeting on the requisition of members, may be stated as under:

(a) The requisition for calling this meeting must be signed by such number of members who hold at least 1/10 of the paid up capital of the company, and have the right to vote at the meeting on the matter. And if the company has no share capital it must be signed by such number of members who have at least 1/10 of the total voting power [Section 169 (4)].

(b) The requisition must set out the matters for the consideration of which the meeting is to be called, and it must be signed by the requisitionsts. And it should be deposited at the registered office of the company [Section 169 (2)].

(c) Only such matter can be taken up at the meeting which is specified in the requisition and in respect of which the requisitionists have the voting strength as stated in clause (a) above.

(d) **On** deposit of a valid requisition at company's registered office, the directors must move to call a meeting within 21 days, and the meeting must actually be held within 45 days from the date of deposit of requisition [Section 169 (6)].

(e) If the Board does not proceed to call the meeting, the requisitionists may themselves proceed to call the meeting. However, the requisitionists must hold the meeting within 3 months from the deposit of the requisition.

3. Calling of extra –ordinary general meeting by the Company Law Board [Section 186]5: Sometimes, it is impracticable to call, hold or conduct the meeting of a company, other than an annual general meeting.

CLASS MEETING

It is the meeting of a particular class of shareholders. Generally, the companies have two classes of shareholders, namely (a) equity shareholders and *(b)* preference shareholders. In order to discuss the matters affecting one class, only a meeting of the particular class of shareholders is held.

OTHER MEETINGS

In addition to these meetings, there are other company meetings also which may be discussed under the following heads:

1. *Meetings of directors:* We know that the directors are responsible for the overall control and supervision of the affairs of the company. The directors generally act collectively *i.e.,* as Board of Directors unless the powers have been delegated to individual directors. It will be interesting to know that their meetings are more frequent than the meetings of shareholders. A company must hold meeting of its Board of Directors at least once in every three calendar months. And there must be at least four meetings of the Board of Directors in every year [Section 285].

2. *Meetings of creditors'*. The meetings of creditors are held by an order of the court. Sometimes, a compromise or arrangement is proposed between a company and its creditors or any class of creditors. In such cases, the court may order a meeting of creditors or a class of creditors to be called, held and conducted in such manner as the court directs. The court orders such a meeting on the application of the company, or of any creditor or member of the company. In case the company is in liquidation, the application may be filed by the liquidator [Section 391].

3. *Meetings of debenture-holders'*. The meetings of the debenture-holders may be held from time to time in accordance with the provisions contained in the debenture trust deed. Their meetings are usually held when the conditions of the issue of debentures are to be altered. Where a scheme of compromise or arrangement is proposed, the meetings of the debenture-holders may also be held through an order of the court.

ESSENTIALS AND LEGAL RULES FOR A VALID MEETING

The company meetings are called to take decisions on the matters discussed in the meeting. And such decisions are binding on the persons in respect of whom the matters are decided. However, the decisions will have binding effects only if the meeting is valid and is conducted in accordance with the procedure. The following are the essentials and legal rules *(i.e.,* procedure) for a valid meeting:

1. *Proper authority:* It is an important requirement of a valid meeting that it should be called proper authority. The proper authority to call a general meeting of the members is the Board of Directors. The Board of Directors should pass a resolution at Board meeting to call the general meeting.

2. Proper notice: It is another important requirement of a valid meeting that a proper notice to call the meeting should be given to every member of the company. It may be noted that deliberate omission to give notice to a single member may invalidate the meeting.

3. Contents of notice: The notice of meeting must specify the following particulars:

(a) The place, day and hour of the meeting.

(b) The nature of the business to be transacted at the meeting [Section 172(1)]. The business to be transacted at the meeting may be of the following two kinds [Section 173].

(i) Special business, and (ii) General business.

4. Quorum for meeting: The term 'quorum' may be defined as the minimum number of members that must be present at the valid meeting so that the business can be validly transacted at the meeting. If the quorum is not present, the meeting shall not be valid and the proceedings of such meeting shall be invalid.

5. Chairman of the meeting [Section 175]: A chairman is necessary for conducting a meeting properly. He presides over the meeting, and his main function is to keep order and see that the business is properly conducted. Legally speaking, the chairman is the proper person to put resolution to the meeting, count the votes, declare the result and authenticate the minutes by signature.

The appointment of the chairman is usually regulated by the articles of association of the company. But if there is nothing in the articles, the members personally present at the meeting shall elect one of themselves to be the chairman of the meeting. Sometimes, there are difference among the members, and a peaceful meeting is impossible under the chairmanship of a person appointed by one group. In such cases, the chairman may be appointed by the court. It may, however, be noted that apart from such extraordinary circumstances, the courts do not interfere in the conduct of meetings by appointing a chairman.

The important duties of a chairman may briefly be stated as under:

(a) He must act honestly and in the interest of the company as a whole.

(b) He must ensure that the meeting is properly called and constituted, and also ensure that the proceedings at the meeting are properly and regularly conducted.

(c) He must give a reasonable chance to members who are present to discuss any proposed resolution.

(d) He must exercise correctly and honestly his powers of adjournment of the meeting and of demanding a poll.

(e) He must preserve order in the meeting.

ONE-MEMBER MEETING

We know that the quorum must be present for a valid meeting, which is five members in case of a public company, and two members in case of private company. Thus, a single member cannot constitute a valid meeting. As a matter of fact, the word 'meeting' means the coming together of more than one person. Moreover, Section 174 also states that the members actually present shall be the quorum. Thus, where only one member attends the meeting,' the meeting cannot be validly held.

However, there are certain exceptional circumstances in which a single member present may constitute a quorum, and meeting can be validly held. These are as under:

1. Where one person holds all the shares of a particular class, he alone can constitute a meeting of that class and can pass a resolution by signing it.
2. Where the general meeting is called by an order of the Company Law Board, this Board may give the direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting [Section 167 Explanation].
3. Where the meeting (other than the annual general meeting) is called by an order of the Company Law Board, this Board may give the direction that one member of the, company present in person or by proxy shall be deemed to constitute a meeting

VOTING AT MEETINGS

The business of the meeting is conducted in the form of resolution passed at the meeting. And the resolutions proposed in the meeting are decided on the votes of the members of the company. The members also have the right to discuss the proposed resolution.

'The voting may take place in either of the following two ways:

1.Voting by show of hands: In the first instance, the voting at the general meeting takes place by show of hands, and the resolutions are decided by counting the hands held up in favour of the resolution.

2. Voting by poll: Sometimes, there is dissatisfaction about the result of voting by show of hands. In such cases, a poll can be demanded. The poll may also be demanded even before the declaration of the result on a show of hands [Section 179].

PROXIES

The term 'proxy' may be defined as the representative of a member appointed by him to attend and vote at the meeting on his (member's) behalf. Thus, he is a person authorized to attend and vote for another at the meeting. It will be interesting to know that the instrument (i.e., document) appointing a person as proxy is also known as 'proxy'.

RESOLUTIONS

The term 'resolution' may be defined as the proposal which is voted at the meeting and accepted by the members. In other words, it is the decision taken at the meeting. The business of a meeting is conducted in the form of resolutions.

The validity of a resolution passed at a meeting depends on the constitution and conduct of the meeting, which means that

(a) The notice convening the meeting had been given according to law.

(b) The quorum was present.

(c) The proper person was in chair.

(d) The meeting was competent to pass the resolution.

(e) The reasonable discussion was allowed on the resolution.

(f) The resolution was correctly voted upon.

SPECIAL RESOLUTION

It is the resolution which is passed, at a validly called general meeting, by special majority of the members i.e., by the support of $3/4^{th}$ majority of the members present and entitled to vote at the meeting. The voting may be either by show of hands or by polls. In determining the $3/4^{th}$ majority, all the votes cast by the members, whether personally or by proxy, are considered [Section 189(2)].

MINUTES OF PROCEEDINGS OF MEETINGS

The term 'minute' may be defined as the written record of the proceedings of a meeting. Every company must keep a fair and correct record of all proceedings of every general meeting, and of every meeting of its Board of Directors or of every committee of the Board.

SELF EVALUATION QUESTIONS

59. Every company (whether public or private) is required to hold an annual general meeting.

(a) True (b) False

60. Which of the following statements is not correct?

(a) In case the company fails to hold annual general meeting, it can be held at the instance of Company Law Board.

(b) An extra-ordinary meeting can be called only at the instance of Company Law Board.

(c) The proper authority for calling a general meeting is the Board Directors.

(d) There must be one annual general meeting per year and as many meetings as there are years.

61. Which of the following statements is not correct?

(a) Only a member and no other person can be appointed as a proxy at the meeting.

(b) A proxy is appointed by a member only to vote at the meeting on his behalf. The proxy has no right to speak at the meeting.

(c) In case the member, appointing proxy, personally attends and votes at the meeting, then the proxy stands revoked.

(d) A member of a public company may also appoint two proxies i.e., one in respect of certain shares and another in respect of other shares.

62. An ordinary resolution is which is passed by

(a) Simple majority of votes cast either personally or by proxy.

(b) Simple majority of votes cast personally.

(c)1/3 of the total votes.

(d) 2/3 of the total votes.

TEST QUESTIONS

1. Define the term company. Explain and illustrate the characteristics of a company.
2. "A company is an artificial person created by law with a perpetual succession and common seal" -Explain.
3. Define a private company. What are the privileges and exemptions enjoyed by a private company? Under what circumstances would a private company be deemed to have become a public company?
4. State the comparison between the following:

   (a) Private company and public company. (b) Private company and partnership.
5. What do you understand by formation of a company? Discuss in brief, the procedure (i.e., different stages) for the formation of a company.
6. How a company is incorporated? What documents are required to be filed with the Registrar of Companies for this purpose?
7. "A certificate of incorporation is conclusive evidence that all the requirements of the Companies Act have been complied with" – explain and state from what date the company is incorporated.
8. What can a company, which has issued a prospectus inviting the public to subscribe for its shares, commence business?
9. Define the term 'promoters'. State the functions, duties and obligations of the promoters.
10. What is the legal position of a promoter? State the liabilities of a promoter with special reference to his liability for pre-incorporation contracts. How a promoter is remunerated?
11. What is memorandum of association? What are its important clauses?
12. Explain briefly how can the memorandum of association of a company be altered?
13. What is the procedure for alteration of the 'objects clause' in memorandum of association? When does the alteration take effect? What is the effect of failure to register the alteration with the Registrar of Companies? Discuss citing relevant provisions of the Companies Act 1956?
14. Enumerate the steps to be taken by a company desiring to alter its memorandum of association (including change of its name), and also articles of association.
15. What is articles of association. What are its contents?

16. How can articles of association be altered?
17. What is prospectus? What are its contents? State the legal rules relating to the issue of prospectus.
18. (a) What is a prospectus? Explain the term 'invitation to public'.

    (b) What do you understand by the 'rule of golden legacy?
19. Who are liable for mis-statement in a prospectus? Discuss their civil and criminal liability. Is there any liability for omission of facts in the prospectus? If yes, state.
20. What is a prospectus? Who are liable for mis-statement in a prospectus? Explain remedies available to shareholder, who had applied for shares on the faith of a false prospectus.
21. Discuss the extent of company's liability to shareholders for mis-statement in the prospectus.
22. Write notes on (a) Public issue of prospectus. (b) Statement in lieu of prospectus. (c) Golden rule as to framing of prospectus. (d) Prospectus by implication (e) Cases in which a prospectus in not required to be issued by a public company.
23. Define the term 'share'. What is its nature? What are the different types of shares which a company can issue under the companies Act, 1956?
24. What is preference share capital? When can a company issue redeemable preference shares? What are the restrictions on the power of a company to redeem such shares?
25. Explain what do you understand by allotment of shares. State in brief the provisions of the companies Act, 1956 on prohibition of a allotment of shares, and what is the effect of irregular allotment?
26. What are the different categories of share capital? State the legal provisions relating to the alteration of share capital of a company.
27. What are the different kinds of share capital which a company can issue under the Companies Act., 1956? What are the provisions regarding further issue of share capital?
28. (a) What is a debenture? State the characteristics of a debenture.

    (b) What are the various kinds of debentures?
29. Define the term 'debentures'. Explain the legal provisions relating to debentures.
30. Discuss the different kinds of meetings of a company. What are the essentials and legal rules for a valid meetings?

31. When is a statutory meeting to be held? Which companies, if any, are exempted from holding statutory meetings? What should be the contents of the statutory report?
32. (a) What are the requisites of a valid general meeting?

    (b) When can the general meeting of a company be called at a shorter notice?
33. (a) What is the meaning of quorum? What are the quorum requirements of board meeting and general meeting? Must quorum be present throughout a meeting? State the consequence if quorum is not present.
34. a) What are the different kinds of resolutions which may be passed by a company? Give three instances of the business for which each kind of resolution is required.
35. Discuss special resolutions and ordinary resolutions of a company registered under the Companies Act.
36. Write notes on the following:

    (a) Statutory report (b) Extra-ordinary general meeting

    (c) Class meeting (d) Proxy

    (e) Special resolution (f) Special notice

    (g) Resolution by circulation
37. hat is winding up? State the various modes of winding up. What is the duty of liquidator regarding unpaid dividend and undistributed assets lying in his hands during winding up?
38. What is meant by compulsory winding up? Who can order such winding up and in what circumstances? What is the nature and extent of contributory's liability?
39. What is meant by winding up of a company? State the circumstances under which a company may be wound up (a) voluntarily, and (b) by the court.
40. Discuss the statutory provisions relating to the winding up under the supervision of the court.
41. Who is a liquidator? What are his duties and powers in connection with the winding up?

ANSWERS

1. (d)	2. (d)	3. (b)	4. (d)	5. (b)	6. (b)
7. (c)	8. (a)	9. (b)	10. (a)	11. (c)	12. (c)
13. (a)	14. (b)	15. (a)	16. (a)	17. (a)	18. (c)
19. (b)	20. (a)	21. (a)	22. (d)		

23. (i) Special Resolution (ii) Confirmation of CLB

24. (c)	25. (b)	26. (a)	27. (b)	28. (a)	29. (a)
30. (a)	31. (b)	32. (b)	33. (d)	34. (a)	35. (c)
36. (b)	37. (a)	38. (c)	39. (a)	40. (a)	41. (a)
42. (a)	43. (c)	44. Registrars tree, first		45. (a)	46. (b)
47. (a)	48. (b)	49. (b)	50. (d)	51. (b)	52. (a)
53 (b)	54. (a)	55. (b)	56. (b)	57. (b)	58. (c)
59. (a)	60. (b)	61. (b)	62. (a)		

NOTES

UNIT – V

CONTENTS

INDIAN STAMP ACT

UNIT- V

INDIAN STAMP ACT

The Indian Stamp Act, 1899

The Indian Stamp Act. 1899 is a fiscal enactment. It levies tax in the shape of stamp duties on instruments recording the transactions. It should be clearly understood that the stamp duty is leviable on an instrument and not on the transaction.

The primary object of the Act is to raise revenue for the State.

The Act is a consolidating and amending Act. It has a long history behind it. The Regulation VI of 1797 which provided for the first time regarding stamping of certain documents extended in its application only to Bengal, Bihar, Orlssa and Benaras. The provinces of Bombay and Madras followed suit. The first all India measure was the Stamp Act 1860 which consolidated the law relating to stamps in India. Then there was a chain of Repealing Acts which were also amended quite often. The present Stamp Act of 1899 has also been quite often amended both by the Central Government and the State Governments, the latter in some cases having enacted separate State Acts. The provisions of these State Acts are mostly identical with the Indian Stamp Act, 1899.

The Act came into force on 1st July. 1899. It extends to the whole of India except the State of Jammu and Kashmir.

References to Sections

Unless otherwise indicated, references to Sections in this Chapter are to the Indian Stamp Act, 1899.

Constitutional position

Schedule VII to the Constitution contains **three** Lists as regards **the** power to legislate regarding stamp duties.

1. List I or the Union List contains matters on which only the Union Parliament can legislate. Entry 91 in this List runs thus : "91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts." The Union Parliament has the exclusive power to fix the rates of duty in respect of the documents enumerated in Entry 91 of List I, Article 268 of the Constitution however provides that such stamp duties as are mentioned in the Union List, although levied by the Government of India, shall be collected

(a) In the case where such duties are leviable within any Union Territory, by the Government of India, and

(b) in other cases, by the States within which such duties are respectively leviable.

Further, proceeds in any financial year of any such duty leviable in any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

2. List II or the State List (Entry 63) contains matters on which the State legislatures have the exclusive power to legislate.

Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.'

So the rates of stamp duty in respect of documents other than those included in Entry 91 are prescribed by the State Legislatures.

3. List III or the Concurrent List (Entry 44) includes matters on which both the Union Parliament and the State Legislatures can legislate.

Stamp duties other than duties or fees collected by means of Judicial stamps, but not including rates of stamp duty.

REASONS FOR VARIATIONS IN STAMP DUTY

1. Fixing of stamp duty is differ from state to state because on the basic of condition of the state or status of the state it will differ.
2. Some state due to social welfare of the society they make stamp duty at reduced manner.

   Ex : Pondicherry state.

   It reduced the stamp duty for women. There who registered the land under the name of women the for will be 50% of the actual tax levied.

Some state to improve the backward area they make difference with in the state it self.

EFFECT OF DOCUMENT NOT BEING DULY STAMPED

Sec. 33 casts a duty upon Courts, arbitrators (except officers of police) and public officers to examine every instrument which is chargeable with duty, and is produced or comes before them in the performance of their functions, in order to ascertain whether it is duly stamped. If they are satisfied that the instrument is not duly stamped, they shall impound it.

Who may impound ? The duty to examine and the power to Impound intruments are conferred on—

1. every person having by law authority to receive evidence, e.g. judges of Courts
2. every person having by consent of parties authority to receive evidence, e.g. arbitrators ; and

3. every person In charge of a public office except an officer of police, efore whom any Instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions.

Any of these persons shall, if it appears to him that such instrument is not duly stamped, impound the same.

Such person or officer before whom the instrument comes or is produced must at the time of examining or Impounding it be exercising his official functions, i.e., he can act under Sec. 33 only when he is performing the duties of his office and not otherwise. Further, the instrument must in the opinion of such person or officer be chargeable with duty before it can be Impounded. If he is in doubt as to its chargeability, be cannot impound it but he may make a reference.

Public offices and persons in charge of public offices. For the purposes of Sec. 33 in cases of doubt, the State Government may determine

(a) what offices shall be deemed to be public offices ; and

(b) who shall be deemed to be persons in charge of public offices. **When may an instrument be impounded** ? Sec. 33 lays down 3 conditions for the exercise of the power to Impound an Instrument by a Court or public officer, ie.. such power may be exercised if an instrument

1. is produced, or
2. comes, before the Court of an arbitrator or a public officer,
3. in the performance of its or his functions. Any instrument. The expression 'any instrument* as used in Sec. 33 means an instrument as defined in Sec. 2 (14) and not each and every instrument or writing [Ramashankar Pathak v. Collector, Central Excise, A.I.R (1971) AH. 287).

Produced. The expression 'produced' means produced in the ordinary course of law and not produced under compulsion. It has a technical meaning and means either (a) produced in response to a summons, or (b) produced voluntarily for some judicial purpose such as evidence.

Examples, (a) A witness was summoned to produce a certain document which was in his possession. He produced the document in question, bound up in a bahi, along with other document.; which had nothing to do with the case. The Court, on glancing through the bahi, noticed that the other documents which were wholly irrelevant to the case before it, and which the witness had not been asked to produce, were insufficiently stamped. The Court impounded the documents and ordered them to be sent to the Collector for recovery of stamp duty and penalty. Held, the Court was not justified in Impounding the

documents which the witness had not been called upon to produce [Narayan DOS Nathwam, In re, A.I.R, (1943) Nag. 97).

(b) In a mortgage suit, the defendant's council told the Court that one of the documents 'to be produced' by the plaintiff was not sufficiently stamped and therefore liable to penalty. The Court Immediately compelled the plaintiff to produce the original document, impounded it and forwarded the same to the Collector. Held, the word "produced" meant produced in the ordinary course of law and not under compulsion and it was open to the party to refuse to obey the order of the Court in this regard [C/ttam Chand v. Prema Nand, A.I.R. (1942) Lah. 265).

Comes. The expression "comes" Is sufficiently wide to include production of documents under a search warrant Issued by a Magistrate.

Example. A Magistrate issued a warrant with a view to discovering registers kept by the accused containing documents not stamped in accordance with the provisions of the Stamp Act. In course of the Search, the registers were seized and produced before the Magistrate. Held. the documents so produced could be impounded as the word 'comes' Is sufficiently wide to Include documents produced by the search under a search warrant [King Emperor v. Balu Kuppayyan, 25 Mad. 525).

In the performance of functions. Sec. 33 applies only when a document is produced for purposes of evidence or it comes before the Court or authority in some other way when the Court or authority is performing its normal functions. Thus where a Court summons a witness to produce document A, but by mistake or otherwise he produces document B , which has no relevance to the case, it cannot be said that document B came before the Judge 'in the performance of his functions' [ATarayan Das Nathu Ram. In re, A-I.R. (1943) Nag. 97). The Section does not empower the authorities to direct a party to produce a document for the purposes of ascertaining whether it is properly stamped or not [R.A. Remtngtonv. Deputy Comnv., (1966) A.L.J. 514].

Duty to impound. The persons referred to in Sec. 33 shall examine every instrument chargeable to duty and produced or coming before them in order to ascertain whether it is stamped with a proper stamp.

Sec. 33 does not require any Magistrate or Judge of a Criminal Court to examine or Impound, if he does not think fit so to do, any Instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or XXXVI of the Code of Criminal Procedure;. Further in the case of a Judge of a High Court, the duty of impounding an Instrument may be delegated.

Instruments impounded how dealt with (Sec. 38). Sec. 38 prescribes the procedure to be followed in dealing with impounded instruments.

Where a Judge, or an arbitrator or other officer impounds an Instrument under Sec. 33, he must, unless he has by law or consent of parties authority to receive evidence and admit the instrument on payment of a penalty under Sec. 35 or of duty under Sec. 37, send to the Collector an authenticated copy of the instrument. The copy should be accompanied with a certificate in writing, stating the amount of duty and penalty levied in respect thereof. The Judge, etc., shall also send the amount of the penalty or duty to the Collector , or to such person as he may appoint in this behalf. In every other case, the person so impounding an instrument shall send it in original to the Collector.

Sec. 46 protects the person who has impounded an instrument from any liability arising from the loss or destruction of or damage to the instrument while being sent to the Collector. It authorises the making of a copy at the demand of the person from whose possession such an instrument came into the hands of the Court or public officer. Such a copy serves as a safeguard against the risk of loss, and is made at the expense, and for the benefit, of such person.

Instruments not duly stamped inadmissible in evidence, etc. (Sec. 35)

An insufficiently stamped and unstamped document shall not be—

(1) received in evidence ;

(2) acted upon :

(3) registered or authenticated.

Sec. 35 does not affect the validity of the document but only makes it inadmissible in evidence. An objection as to an instrument not being duly stamped must be taken at the trial when the instrument is first tendered in evidence. It is the duty of Court to refuse to admit in evidence an instrument not duly stamped whether or not the parties object to its admission.

Under Sec. 36, the admisslbility **of an** instrument cannot be challenged on the ground that it is not duly stamped once it has been admitted in evidence. An unstamped and unregistered partition deed having no valuation about property partitioned cannot be admitted in evidence [Bhagwant Prasad v. MukatLal. (1986) Simla L.C. 195].

The Court is said to have acted upon an instrument if it is admitted in evidence.

Exceptions to the **general rule.** The exceptions to the general rule discussed above are as follows :

(a) Admission of instrument not duly stamped, on payment of deficit duty and penalty. An Instrument not being an Instrument chargeable with a

duty up to 10 paise, or a bill of exchange or promissory note shall, subject to all just exceptions, be admitted in evidence on payment of duty or deficit duty or penalty. The penalty is Rs. 5, or, when 10 times the amount of the proper duty or deficient portion thereof exceeds Rs. 5 it is equal to 10 times such duty or deficient portion.

(b) Receipts. Where any person has given an unstamped receipt, such receipt shall be admitted in evidence against the person who ought to have stamped it on payment of a penalty of Re. 1 by the person tendering it. For example, it may be admitted in evidence in favour of the debtor against the creditor.

(c) Contracts or agreements by correspondence. Where a contract or agreement of any kind is effected by correspondence consisting of 2 or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped.

(d) Instruments produced in Criminal Proceedings. Sec. 35 does not prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding of the Code of Criminal Procedure.

(e) Instruments executed by or on behalf of the Government, or bearing Collector's certificate. Sec. 35 does not prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Sec. 32 or any other provision of this Act.

RATIONABLE BEHIND PRESCRIBING PERIOD OF LIMITATION

Period of limitation' means the period of limitation prescribed for any suit, a ppeal or application by the Schedule to the Act, and 'prescribed period' means the period of limitation computed in accordance with the provisions of the Limitation Act, 1963.

Exclusion of time

The Act makes specific provisions for exclusion of certain time In some cases for computation of the prescribed period *(i.e.,* period of limitation). These provisions are as follows :

1. Exclusion *of time in legal proceedings* (Sec. 12). The rules relating to exclusion of time in legal proceeding are as follows :

(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

Example. A promissory note is executed on 10th July, 1991. The last date for filing the suit will be 1 Oth July, 1994. the period of limitation in case of

promissory notes being 3 years. The first day, i.e., 10th July, 1991 will not be taken into account in computing the period of limitation.

In computing a calender month or year, it is sufficient to go from one month or year to the'corresponding day in the next, and to exclude from computation the day from which the month or the year is calculated, so that two days of the same number are not included (Debt *Narain v. Ishan,* 13 C.L.R. 153).

(2) In computing the period of limitation for *(a)* an appeal, or *(b)* an application for leave to appeal, or *(c)* revision, or review of a judgment, the following periods shall be excluded—

i. the day on which the period begins to run,

ii. the day on which the judgment complained of was pronounced,

iii. the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed, and

iv. the time requisite for obtaining a copy of the judgment.

v. Time *requisite/or obtaining a copy.* The word 'requisite' means "properly required', and it throws upon the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default [J.N. Surty v. ChettiarA.l.R. (1928) P.C. 103]. The words 'requisite' and 'obtaining' means that some definite step should be taken by the appellant or the applicant himself towards the attainment of the copy *[Keshav* Sugar Works v. *R.C Sharma,* A.I.R. (1951) All. 122].

vi. The delay caused by the carelessness or negligence of the party iri applying for a copy or in paying the money required for making the copy cannot be excluded from computation [Paruati v. *Bhola,* 12 All. 79].

(3) Where a decree or order is appealed from or sought to be revised o reviewed, or where an application is made for leave to appeal from a decree o order, the time requisite for obtaining a copy of the judgement on which the decree or order is founded shall also be excluded.

In computing the period of limitation for an application to set aside an award, the following periods shall be excluded

(i) the day on which the period begins to run,

(ii) the time requisite for obtaining a copy of the award.

But in computing under Sec. 12 the time requisite for obtaining a copy of a decree or an order, any time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall not be exclucded.

2. *Exclusion of time* in coses *where leave to sue or appeal as a pauper is applied for (Sec.* 13). In computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded.

The essential requisites of Sec. 13 are as follows :

(a) The applicant has made an application for leave to sue or appeal as a pauper.

(b) The application for leave has been rejected.

(c) The applicant has been prosecuting his application for leave in good faith.

If the above conditions are satisfied, the time lost in the prosecution of the application shall be excluded in computing the period of limitation.

Further the Court may, on payment of the Court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the Court fees had been paid in the first instance.

3. *Exclusion of time of proceeding bonafide in Court without Jurisdiction* (Sec. 14). In computing the period of limitation for any suit or application the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a Court of first instance or of appeal or revision, against the defendant, shall be excluded. Such proceeding must, however, relate to the same matter in issue and must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

The essential requisites for excluding the time spent in taking civil proceedings in a wrong Court are as follows :

1. The proceeding which the plaintiff was prosecuting must be a civil proceeding.
2. All the defendants in the earlier civil proceeding must be now parties to the present suit.
3. The suit in which the plaintiff claims the benefit of the rule in Sec. 14 must relate to the same matter in issue as the former civil proceeding.
4. The previous civil proceeding must have been prosecuted with due diligence and in good faith. According to Sec. 2 *(h),* nothing shall be deemed to be done in good faith which is not done with due care and attention. It may be noted that the mistaken advice of a lawyer may be a sufficient cause for holding that the plaintiff was misdirected if he has acted with due diligence and good faith *[Madhavrao* v. *Ram Kishan,* A.I.R. (1958) S.C. 767]. When a lawyer in exercise of his professional

functions prophesies that a particular Court is likely to entertain a particular suit, he or his client cannot be said to be acting in bad faith *[R.K. Janakiah Lehetty* v. *A.K. Mohan.* (1980) A.P. 41].

5. The incapacity of the previous Court must have been due to *(a]* want of jurisdiction, or *(b)* other cause of a like nature *ISatyanarayananmurthy.v. Maharaja ofPithapur, A.I.R.* (1939) Mad. 724).

6. In the absence of any of the above requisites, the plaintiff cannot take advantage of exclusion of time permitted by Sec. 14 *[Maqsoodv. Harkishore* A.I.R. (1945) All. 377). The Section must however be construed liberally *[Maneklalv. Shivalal.* A.I.R. (1939) Bom. 26]. Indulgence should be granted under this Section only in case where an error was an error that might be committed by a reasonable and prudent man exercising due diligence and caution (Mayav. *Udham.* A.I.R. (1938) Lah. 708).

The period which the rule under Sec. 14 permits to be excluded Is :

a) the time during which the earlier suit or application was pending or being made ;

b) the day on which the suit or application was instituted ;

c) *the* day on which the proceeding terminated ; and

d) the period between the decision of the first Court and the disposal of an appeal therefrom, provided the latter was executed in good faith.

The principle underlying Sec. 14 is the protection against the bar of limitation to a person honestly doing his best to get his case tried on merits, but falling through the Court being unable to give him such trial *[Mathura Singhv. Bhawani Singh.* (1900) I.L.R. 22 All. 248(F_B.).

It may be noted that Sec. 14 has no application in the case of appeals. For the purposes of Sec. 14

a) *in* excluding the time during which a former civil proceeding was pending, they day on which that proceeding was instituted and the day on which it ended shall both be counted;

b) a plaintiff or an an applicant resisting an appeal shall be deemed to be prosecuting a proceeding ;

c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

4. *Exclusion of time in certain other cases* (Sec. 15). The Act makes the following provisions for exclusion of time in certain cases other than those contained in Sees. 12 to 14.

(1) In computing the period of limitation for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the following periods shall be excluded —

(a) the time of continuance of the injunction or order,

(b) the day on which it was issued or made, and

(c) the day on which it was withdrawn.

A party seeking to take advantage of Sec. 15 must show that he was earlier restrained by an order from making the prayer, which he is now making. If he could have done earlier what he is trying to do now, he cannot invoke the application of Sec. 15 ITriueni Prasad Dhandhania v. Sita Ram Poddar & Others, A.I.R. (1980) Pat. 234].

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded. However in excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on the which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.

(3) In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceedings and ending with the expiry of 3 months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

(4) In computing the period of limitation for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, shall be excluded.

This provision is attracted only when the cause of action has arisen in India [Subramaniam v. Marutnamuthu, A. I. R. (1944) Mad. 437].

The word 'absent' used includes a person who had never been present in India (Maharcyav. Prouincial bank, 72 P.R. 1891). Even where the defendant

pays occasional visits to India, Sec. 15 will apply (Jankiv. Manohar Lal, 26 P.R. 1897). Where the plaintiff is ignorant of the return of the defendant to India, it does not affect the running of limitation (Mahamud v. Claragene, 2 N.W.P. 173).

The rule contained in Para (5) applies only to defendants, and in favour of plaintiffs so as to prevent limitation from running against the latter. It is, however, not applicable in favour of the defendant who has been absent from India and wants to set aside proceedings in execution taken against him in his absence. Further, it applies to suits only and not to appeals or applications.

Effect of death on or before the accrual of the right to sue (Sec. 16)

A person who has a right to institute a suit or make an application may die before the right accrues, or a right to institute a suit or make an application may accrue only on the death of a person. In such a case the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application. The same rule applies to the person against whom. if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, or where a right to on the application of the judgment-creditor made after the expiry of the said period, extend the period for execution of the decree or order. Such application must however be made within 1 year from the date of the discovery of the fraud or the cessation offeree, as the case may be.

SELF –EVALUATION QUESTIONS

1. The first Indian stamp act _____ 1899.
2. Varieties is stamp duty from state to state (True √ / False)
3. Instruments not duty stamped is in admissible (True √ /False)

Answers :

1. 1899
2. True
3. True

ACKNOWLEDGEMENT OF DEBT

Effect of acknowledgement in writing (Sec. 18)

Sometimes a liability may *be* acknowledged by the party against whom the liability is alleged within the period of limitation. If this acknowledgement is made in writing, it would give rise to a fresh period of limitation (as prescribed by the Limitation Act) and it would run from the date of acknowledgement. The acknowledgement in no way extinguishes the original cause of action nor does it create a new one. It only shows that the original cause of action still subsists and the claim remains unsatisfied.

Sec. 18 contains the rule of law to the above effect. Sometimes before the expiration of the prescribed period for a suit or application in respect any property or right, an acknowledgement of liability in respect of such property or right may be made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability. In such a case, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

Example. A borrows money from B on 1st January, 1991. The debt will become time-barred after the expiry of 3 years. On 1st July, 1993 A. writes a letter to B. saying that he is sorry that he has not been able to pay and now promises to pay the full amount within 3 months. A fresh period of limitation (3 years) shall start from 1st. July, 1993.

The underlying priniciple as laid down by Sec. 18 is that the statutory bar to a claim would fail when the existence of the claim or right is acknowledged from time to time by the person against whom it is made.

Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed ; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

The word 'signed' as used in Sec, 18 means signed either personally or by an agent duly authorised in this behalf.

The essential requisites of a valid acknowledgement under Sec. 18 are as follows :

1. The acknowledgement must have made before the expiration of the prescribed period of limitation. Where a claim becomes time-barred, a mere acknowledgement or payment without a new promise to pay will not revive the claim so as to provide a fresh starting point. This, in other words, means that the acknowledgement concerned must contain an

admission of a subsisting liability *[V. C. Pillaiv. Siranthanu Pillai,* A.I.R. (1979) S.C. 1937].

2. The acknowledgement must have been made by the party against whom the right is claimed or by person through whom he derives his title or liability.
3. The acknowledgement must be in writing. However if t'pe acknowledgement is undated, oral evidence may be given of the time when it was signed.

The acknowledgement must have been signed by the party against whom the right is claimed or by any person through whom b° derives his title or liability. A telegram acknowledging a debt does not constitute a sufficient acknowledgement under Sec. 18. The reason is that telegrams are not signed by the persons sending them.

(5) The acknowledgement must be in respect of some liability or a particular property or right claimed in the suit or application *[Hu.ku.matv. Nenumal,* A.i.R (1928) Sindh 45].

(6) The acknowledgement is not required to be made to the creditor or the person entitled to the property ; it may be made to any person, even to a stranger.

It is not necessary that an acknowledgement within Sec. 18 must contain an express or implied promise to pay or should amount to a promise to pay [Subbarsadya v. *Narsimha,* A.I.R. (1936) Mad 939]. What is necessary is that there should be an admission of the subsisting liability. If an admission is accompanied by a refusal to pay, its character as acknowledgement will not be affected. However an acknowledgement may be sufficient even though- CO It omits to specify the exact nature of the property or right, or

(ii) avers (to allege in pleading) that the time for payment, delivery, performance or enjoyment has not yet come, or

(ii) is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or

(iv) is coupled with a claim to set-off, or

(v) is addressed to a third person *(i.e.,* a person other than a person entitled to the property or right).

As regards payment of time-barred debts under Sec. 25 (3) of the Indian Contract. Act 1872, a promise to pay in writing may be made even after the limitation period ; but under Sec. 18 of the Limitation Act, 1963 an acknowledgement must be made before the expiration of the limitation period.

Effect of payment on account of debt or of interest on legacy (Sec. 19)

Sec. 19 deals with the effect of payment on account of a debt or interest on a legacy. It provides thus : Where payment *(a)* on account of a debt or *(b)* of interest on a legacy is made before the expiration of the prescribed period *(i)* by the person liable to pay the bebt or legacy, or *(ii)* by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. It further provides that. snve in the case of payment of interest made before the 1st day of Jaunai-y, 1928. an acknowledgement of the payment must appear in the handwriting of, or in a writing signed by the person making the payment. for the purposes of Sec. 19,—

(a) where a mortgaged land is in the possession of the morlagee. the receipt of the rent or produce of such land shall be deemed to be a payment ;

(b) 'debt' does not include money payable under a decree or order of n Court.

The principle underlying Sec. 19 is that the payment (whose acknow-ledgement must be signed by the person making the payment or must be in his handwriting and which excludes oral testimony) implies an admission of a right and acknowledgement of a corresponding liability. Payment need not necessarily be in terms of money. It may be in any medium that the creditor may agree to accept.

Payment under Sec. 19 impliedly means part-payment. When a debt is partly paid, it amounts to an admission that the other part of the debt is still outstanding. This implies an acknowledgement of the liability to pay the outstanding balance. The part payment, therefore, gives a fresh start to limitation.

Difference between Sees. 18 and 19. Sec. 19 does not prevent the operation of Sec. 18 and the two Sections are not mutually exclusive. An acknowledgement under Sec.. 18 need not be addressed to the person entitled but a part-payment under Sec. 19 must be made only to the person entitled to payment (Venfcatafcrishnaihv.Subbarayyudu, 40 Mad. 98). Under Sec. 19, an acknowledgement of payment should appear in the handwriting of or be signed by the person making it whereas under Sec. 18, the person acknowledging must sign the acknowledgement *[Gazadharv. Udiachand,* A.I.R. (1940) Nag. 354]. A subsisting liability is essential under Sec. 18 and that has to be in writing. Under Sec. 19 payment as well as a writing recording the same is necessary. Under Sec. 18, an acknowledgement of liability by a person liable to pay the debt operates only against the person acknowledging the debt and not against

others who are also liable to pay the debt, whereas part-payment under Sec. 19 operates even against the others.

Effect of acknowledgement or payment by another person (Sec. 20)

The provisions in Sec. 20 are in the nature of an explanation to Sees. 18 and 19 *[Ram Kumar Pandey* v. *Hiralal. I.LR.* (1939) All. 258). Sec. 20 merely supplements Sees. 18 and 19 as to the persons who can make acknowledgements. It does not by any means constitute an exception in the case of either Sec. 18 or Sec. 19 [JVozimddin v. *Ramanand.* A.I.R. (1948) Oudh 193].

Agent authorised in this behalf. The expression 'agent duly authorised in this behalf in Sees. 18 and 19 shall, in the case of a person under disability, include his lawful guardian, committee (a person to whom the custody of the person or estate of a person under legal disability is committed or granted by the Court) or manager or an agent duly authorised by such guardian, committee or manager to sign the acknowledgement or make the payment. Thus an acknowledgement made by a lawful guardian of a minor or an idiot is valid and binds the minor or the idiot, as the case may be.

Acknowledgement by one of several persons. An acknowledgement signed by, or of a payment made by, or by the agent of one of several person (Joini. contractors, partners, executors or mortgagees) interested in the same property or debt is not binding on others. To put it differently, this means that a mere signing of an acknowledgement by one of several persons interested in the same property or debt does not necessarily of itself bind others, unless it is shown that he had authority, express or implied, to make the acknowledgement on behalf of himself and others. If, however, it is shown that he had authority, express or implied, then of course the acknowledgement will be binding on them all.

The reason behind the above rule Is that an acknowledgement and payment are the acts which make the period of limitation run afresh. It would, therefore, be unjust if the debtor is debarred from the right of pleading the statute of limitation due to the acts of a co-debtor or an agent unless due authority among co-debtors is established in which case alone an acknowledgement by one of several joint debtors will bind him and the others.

Exceptions. (1) An acknowledgement signed or a payment made in respect of any liability by or by, the duly authorised agent of, any limited owner of property who is governed by Hindu Law, shall be a valid acknowledgement or payment, as the case may be, against a reversioner succeeding to such liability.

(2) Where a liability has been incurred by or on behalf of a Hindu undivided family as such, an acknowledgement or payment made by, or by the

duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.

Subsifrution or addition of new plaintiff or defendant (Sec. 21)

Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. But where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been institute a on any earlier date.

Exceptions. The above rule shall not, however, apply to a case —

(a) where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit, or

(b) where a plaintiff is made a defendant or a defendant is made a plaintiff.

The reason beind these exceptions is that in such cases the newly added person steps into the shoes of the deceased or the assignor, as the case may be, and cause of action remains the original cause of action. No new considera-tions. therefore, arise in matters of limitation.

Continuing breaches and torts (Sec. 22)

In the case of a continuing breach of a contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. In sue'.', cases, a right to sue arises at every moment of the time during which the breach or tort continues.

Tort', according to Sec. 2 *(m)*, means a civil wrong which is not excusively the breach of a contract or the breach of a trust.

Examples, *(a) A* lets out a bus to a school under a lease on the condition that during the continuance of the lease, the school shall maintain the bus in a perfect running condition. The school neglects to repair the bus. There is a continuing breach of contract. Every moment during which the breach continues, a (resh period of limitation begins to run.

(b) In a suit for the restitution of conjuagal rights, the wife (the defendant) contended that the suit was time-ban-ed **as** she had been continuously refusing to return to her husband (the plaintiff) for over 20 years; The plaintiff contended that her refusal constituted a continuous wrong giving rise to a continuously recurring cause of action and that under the Limitation Act such suits were altogether exempt from the bar of limitation. *Held.* the refusal of the wife to live with her husband was a continuing wrong which gave

rise to a fresh period of limitation at every moment of time during which the wrong continued. The present suit, therefore, was not barred by limitation *[Mst. Sahibzadiv. Abdul Gajur,* A.I.R. (1939) Lah. 454].

(c) The plaintiffs (Digambar Jains) had been worshipping certain charans (footprints) on the Parasnath hill. The defendants (siwetamber Jains) removed those charans and replaced them by charans of a different type obnoxious to the plaintiffs. *Held,* the action of the defendants was a continuing wrong (tort) in respect of which a fresh period of limitation began to run every moment of the day on which the wrong continued *[Hukam* Chand v. *BahadwSingh,* A.I.R. (1933) P.C. 193).

A distinction may be noted between a continuing tort and the continuance of the injurious effects of a tort. The latter contemplates that there has been a legal injury once and its after-effects continue while the former contemplates that the act or omission causing infringement to some legal right is being repeated from day to day. Continuance of injurious effects of a tort does not give rise to a fresh cause of action whereas a continuing tort gives rise to a fresh cause of action at every moment during which the wrong continues.

***Suits for* compensation for acts not actionable without special damages (Sec. 23)**

In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Example. A owns the surface of a field, *B* owns the subsoil. *B* digs coal thereout without causing any immediate apparent injury to the surface but at last the surface subsides. The period of limitation in this case shall be computed not from the day when the digging starts but from the time when the injury results.

The word 'act' used in Sec. 23. includes both acts of commission and omission *[Dwarkan.ath* v. *Corpn. of Calcutta, 18* Cal. 91). The word 'injury includes a legal injury [Gouindv. *Rangnath,* A.I.R. (1930) Bom. 572).

Each separate specific injury caused by an act constitutes a fresh cause of action and separate period of limitation will run for each *(Mitchell v. DM. Colliery Co..* 14 Q.B.D. 125).

Computation of time mentioned in instruments (Sec. 24)

All instruments shall, for the purposes of the Limitation Act, be deemed to be made with reference to the Gregorian calendar (i.e., the year beginning on 1st January and ending on 31st December),

Example. A makes a promissory note bearing 14th day of Baisakhi. Samvat 2047 (23rd April, 199C) as date, payable four months after date. The period of limitation applicable to a suit on tlie note runs from the expiration of four months (plus three days of grace in case of negotiable instruments) after date computed according to the Gregorian calender, i.e., from 26th August, 1990.

Sec. 24 postulates of uniform adoption of Gregorian calendar so as to bring about uniformity as the various calenders in India divide the year in different manner *[Venkta. Subramanyav'. Yalla Bhairava.* A.I.R. (1927) Mad. 917].

QUESTIONS

1. List out the reasons for varieties of stamp duty from state to state.
2. What an the effect of document not being duty stamped.
3. Explain the ratimable behind presiding period of limitations.
4. How the dept may acknowledged.
5. Explain the balance of confirmation destes available?

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NOTES